An Unreliable Reporter

JON J. LEE*

As part of the legal profession's tradition of self-regulation, attorneys have an ethical obligation to ensure that those within it are fit to practice. Given the gravity associated with accusing another lawyer of misconduct, it is not surprising that many are reticent to speak up. But what would happen if attorneys were pressured to vigorously pursue sanctions against their opponents, even if those sanctions may be unwarranted? President Trump's recently-issued memorandum arguably does just that, mandating the Attorney General to seek court and disciplinary sanctions for lawyers and law firms that appear to violate ethics rules. This Essay explains how this directive may put some federal government attorneys in a conundrum where they will have to choose between placating the Administration or standing firm, and it explores the ethical and other professional consequences that may follow from their choice.

* Professor of Law, University of Oklahoma College of Law. The author would like to thank Bruce Green, Garry W. Jenkins, and Melissa Mortazavi for their sharing their ideas on these issues, as well as Hannah Goff for her stellar research assistance.

Table of Contents

INTRODUCTION

Through the looking-glass.[1] That was my immediate reaction as I read "Preventing Abuses of the Legal System and the Federal Courts," ("*Preventing Abuses*") issued by President Donald J. Trump on March 21, 2025.[2] In the presidential memorandum, directed to the Attorney General and Secretary of Homeland Security, Trump demanded accountability for lawyers "who engage in frivolous, unreasonable, and vexatious litigation . . . particularly in cases that implicate national security, homeland security, public safety, or election integrity."[3] Meanwhile, the most prominent cases of attorneys arguably engaging in such professional misconduct were Trump's own lawyers, who were involved in attempting to overturn the 2020 presidential election.[4] This included Rudy Guiliani, who has been disbarred in New York and the District of Columbia, and John Eastman, who is on the brink of disbarment in California.[5]

Beyond the irony of issuing such a memorandum lies two deeper and more troubling concerns. The first concern is that this memorandum is "intended to intimidate and deter law firms that could potentially be hired to engage in litigation that challenges the actions taken and regulations issued by the Trump administration."[6] This concern is not unique to this memorandum, however, as Trump has issued a plethora of executive actions directly targeting such lawyers or law firms.[7] This Essay instead focuses on a second concern: the mechanism that will be used to carry out these threats. In no uncertain terms, the memorandum directs the Attorney General "to seek [court] sanctions against [these] attorneys and law firms" and "to refer [such attorneys] for disciplinary

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[1] *See generally* LEWIS CARROLL, THROUGH THE LOOKING GLASS (AND WHAT ALICE FOUND THERE) (1871).

[2] *See* Memorandum on Preventing Abuses of the Legal System and the Federal Courts, 2025 DAILY COMP. PRES. DOC. 387 (Mar. 21, 2025) [hereinafter Preventing Abuses].

[3] Preventing Abuses, *supra* note 2.

[4] Katelyn Polantz & Tierney Sneed, *Lawyers for Trump After 2020 Election Face Professional Reckonings*, CNN (Mar. 27, 2024, at 12:08 ET), https://www.cnn.com/2024/03/27/politics/jeffrey-clark-john-eastman-trump-lawyers/index.html [https://perma.cc/7DXJ-92LK] (describing the "[f]allout for lawyers who assisted Donald Trump in his efforts to overturn the 2020 election").

[5] *See* Josh Gerstein & Kyle Cheney, *Rudy Giuliani Permanently Disbarred in Washington, DC*, POLITICO (Sep. 26, 2024, at 11:26 ET), https://www.politico.com/news/2024/09/26/rudy-giuliani-disbarred-washington-00181183 (discussing New York and D.C. disbarments "over Giuliani's role in former President Donald Trump's attempt to undermine the results of the 2020 presidential election"); Kyle Cheney, *California Court Upholds John Eastman's Disbarment for Role in Trump 2020 Plot*, POLITICO (June 17, 2025, at 18:39 ET), https://www.politico.com/news/2025/06/17/california-court-john-eastman-disbarment-00411266 (explaining the California State Bar Court upheld a judge's recommendation for disbarment, yet noting "the ruling is still under review and has not yet been implemented").

[6] *Presidential Memorandum on Preventing Abuses of the Legal System and the Federal Court*, ECON. POL'Y INST. (Apr. 9, 2025), https://www.epi.org/policywatch/presidential-memorandum-on-preventing-abuses-of-the-legal-system-and-the-federal-court/ (discussing the impact of Memorandum); *see also ACLU Reacts to President Trump's Latest Directive Threatening Lawyers and Law Firms*, ACLU (Mar. 22, 2025, at 12:30 ET), https://www.aclu.org/press-releases/aclu-reacts-to-president-trumps-latest-directive-threatening-lawyers-and-law-firms [https://perma.cc/7RW5-MSVK] (recounting statement by Cecillia Wang, National Legal Director of the American Civil Liberties Union, that "President Trump is attempting to silence those who embody the mission and ideals of the legal profession — representing the people in the orderly resolution of disputes in the court system and, critically, holding government officials to account when they violate the people's rights").

[7] *See, e.g.*, Exec. Order No. 14237, 90 Fed. Reg. 13039 (Mar. 20, 2025) ("Addressing Risks From Paul Weiss"); Exec. Order No. 14263, 90 Fed. Reg. 15615 (Apr. 15, 2025) ("Addressing Risks From Susman Godfrey"). *See generally* Adam Liptak, *Trump's Strategy in Law Firm Cases: Lose, Don't Appeal, Yet Prevail*, N.Y. TIMES (June 16, 2025), https://www.nytimes.com/2025/06/16/us/politics/trump-strategy-law-firms-appeals.html (discussing litigation over executive orders aimed at "punish[ing] prominent law firms for . . . representing clients and causes not to [Trump's] liking").

action."[8] It also suggests that attorneys or firms could be subject to additional penalties, including "reassessment of security clearances" or "termination of any contract."[9]

On its face, *Preventing Abuses* appears to institute a type of mandatory lawyer reporting obligation.[10] Forty-eight states already include a mandatory reporting rule in their lawyer ethics codes, [11] so one might assume that *Preventing Abuses* merely reminds government attorneys of their existing professional obligations. Indeed, legal advocacy organizations such as The 65 Project filed several complaints against attorneys connected with the attempt to overturn the results of the 2020 presidential election—perhaps turnabout is fair play.[12]

Yet as this Essay will describe, the directives contained in *Preventing Abuses*, when considered in conjunction with others requiring fealty to the President's "authoritative interpretations of [the] law,"[13] have the potential to put federal government attorneys in the middle of litigation in an untenable position: do nothing and risk retaliation from the Administration, or report lawyers and risk disciplinary sanctions of their own. This Essay will identify possible courses of action for an attorney who faces such suboptimal choices, in light of an attorney's responsibilities under the ABA Model Rules of Professional Conduct ("Model Rules") that have been largely adopted in all jurisdictions.[14] Violations of a jurisdiction's ethics code may result in professional discipline, with sanctions ranging from private admonitions all the way up to the temporary or permanent exclusion from practice.[15]

Part I describes Model Rule 8.3, the mandatory reporting obligation, and discusses its use and efficacy as a disciplinary tool. The language of Rule 8.3 is then contrasted with the new obligations set forth in *Preventing Abuses*, revealing how the latter is considerably farther reaching. Part II explores how carrying out these new obligations has the potential to violate other ethical duties, including provisions proscribing the making of frivolous assertions, actions that are prejudicial to the administration of justice (including harassment and discrimination based on national origin), and conduct that disrespects the rights of third persons. Part III addresses the possible courses of action an attorney might take and the ethical and practical consequences that could follow. Ultimately, this Essay concludes that the best resolution—as some other federal government attorneys have reached—is to extricate oneself from the situation even if it means facing an immediate uncertain future.

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[8] Preventing Abuses, *supra* note 2.
[9] *Id.* (identifying these additional actions both for ongoing litigation and for litigation "against the Federal Government over the last 8 years").
[10] *Id.*
[11] Jon J. Lee, *A New Approach to Attorney Regulation*, 65 B.C. L. REV. 1625, 1638–39 (2024) (discussing jurisdictional adoption of Model Rule 8.3, the ABA's version of the mandatory reporting rule).
[12] *About Us*, THE 65 PROJECT, https://the65project.com/about/ [https://perma.cc/YA6G-4K4W] (last visited Apr. 4, 2025) (stating mission as "holding accountable Big Lie Lawyers who bring fraudulent and malicious lawsuits to overturn legitimate election results, and working with bar associations to revitalize the disciplinary process so that lawyers, including public officials, who subvert democracy will be punished").
[13] Exec. Order No. 14215, 90 Fed. Reg. 10447 (Feb. 24, 2025) [hereinafter Ensuring Accountability].
[14] *See* Lonnie T. Brown, Jr., *Criticizing Judges: A Lawyer's Professional Responsibility*, 56 GA. L. REV. 161, 169 n.25 (2021) (noting that all states have adopted the Model Rules, even if there are variations in particular provisions).
[15] *See* Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. Rev. 1, 20–28 (1998) (describing the different types of sanctions and their purposes).

I. REPORTING OBLIGATIONS UNDER ABA MODEL RULES AND *PREVENTING ABUSES*

The concept of an attorney's obligation to report misconduct has been inherently linked to the legal profession's system of self-regulation, deemed by some to be "essential to the survival of the profession."[16] Yet there has also been extensive criticism of the so-called "snitch rule" among professional responsibility scholars on account of its futility and its potential to put the most vulnerable attorneys in a position of being required to report misconduct at the risk of personal and professional repercussions.[17] As this Part will show, the ABA mandatory reporting rule covers a relatively small number of ethical lapses and has been significantly overhauled since its inception to counteract the unwieldiness of imposing a broad reporting obligation. By contrast, the reporting obligation in *Preventing Abuses* is simultaneously vast and targeted.

A. MODEL RULE 8.3

Under Model Rule 8.3, which has been adopted with minor variation in forty-eight states, an attorney ordinarily must "inform the appropriate [professional] authority" if they know "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."[18] An attorney who fails to make such a report is subject to disciplinary action.[19]

Those outside of the profession might assume that Rule 8.3 imposes a significant burden on attorneys to "rat out" their peers who are committing misconduct. Yet the rule contains three features that circumscribe its applicability. First, reporting is not required for every ethical violation but only those that "raise[] a substantial question" about the lawyer's fitness to practice, i.e. for sufficiently "serious" offenses.[20] The "substantial question" language was added as part of the transition from the earlier ABA Model Code of Professional Responsibility ("Model Code"), which had required the reporting of every ethics code violation.[21] The change was needed because having such a "general reporting rule would be subject to massive civil disobedience that would in turn make it difficult to prosecute even clearcut and egregious cases."[22]

Second, the reporting obligation is triggered only when an attorney *knows* that the other lawyer committed an ethical violation.[23] Although there is disagreement among jurisdictions regarding

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[16] *See* Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259, 265 (2003) (quoting Wieder v. Skala, 609 N.E.2d 105, 108–09 (N.Y. 1992)).

[17] *See, e.g.*, R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice,"* 82 NOTRE DAME L. REV. 635, 682 (2006) (discussing failures of the "snitch rule"); Gerard E. Lynch, *The Lawyer as Informer*, 1986 DUKE L.J. 491, 523–32 (1986) (discussing inequity in requiring certain persons to report misconduct); Lee, *supra* note 11, at 1644–59 (exploring several ways in which Rule 8.3 has been ineffective).

[18] MODEL RULES OF PRO. CONDUCT r. 8.3 (A.B.A. 1983).

[19] *See* Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation*, 12 GEO. J. LEGAL ETHICS 175, 179 (1999) ("Courts have freely enforced the mandatory reporting requirements of . . . Model Rule 8.3(a) . . . .").

[20] Lynch, *supra* note 17, at 513.

[21] *See* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 943–45 (Supp. 1998) (describing transition).

[22] *Id.* at 943; Edmund B. Spaeth, Jr., *To What Extent Can a Disciplinary Code Assure the Competence of Lawyers?*, 61 TEMP. L. REV. 1211, 1223 (1988) (discussing changes).

[23] MODEL RULES OF PRO. CONDUCT r. 8.3 (A.B.A. 1983); Richmond, *supra* note 19, at 185–88 (exploring knowledge requirement).

how much information an attorney must possess, it is clearly higher than "mere suspicion."[24] Under a common formulation, an attorney must have "a substantial basis for believing that a violation has occurred," which in turn requires that "a reasonable lawyer under the circumstances would have formed a firm opinion that the conduct in question had more likely than not occurred."[25]

Third, an attorney's reporting obligation is limited by their duty of confidentiality under Rule 1.6.[26] In fact, even if an attorney is acting in good faith in reporting misconduct, they can be sanctioned if they reveal confidential information without authorization.[27] The inclusion of the confidentiality limitation also was put in place in the transition from the Model Code, which had only exempted information that was subject to the attorney-client privilege.[28]

B. PREVENTING ABUSES

To fully comprehend and contextualize the obligations contained in *Preventing Abuses*, one must read its prefatory language carefully.[29] It begins with a discussion of lawyer and law firm accountability—but it identifies four types of matters that animate its issuance: matters involving "national security, homeland security, public safety, or election integrity."[30] It then identifies two examples of "grossly unethical conduct." The first involves Marc Elias, formerly of Perkins Coie (itself the subject of an executive order),[31] who participated in the creation of a dossier on Trump's financial ties with Russia during the runup to the 2016 presidential election.[32] The second is "the immigration bar, and powerful Big Law pro bono practices," which assert "fraudulent claims" by "frequently coach[ing] clients to conceal their past or lie about their circumstances" to be granted asylum.[33] The memorandum cites to no data or specific matters in support of this second contention

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[24] Lee, *supra* 11, at 1639–41 (identifying disagreement among jurisdictions, many of which adopt an objective standard rather than a purely subjective one).
[25] Richmond, *supra* note 19, at 186 (quoting Attorney U v. Miss. Bar, 678 So. 2d 963, 972 (Miss. 1996)).
[26] *See* MODEL RULES OF PRO. CONDUCT r. 8.3(c) (A.B.A. 1983) (explaining that Rule 8.3 "does not require disclosure of information otherwise protected by Rule 1.6 or information gained . . . while participating in an approved lawyers assistance program"). Rule 1.6 provides that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by [an exception listed in the rule]." MODEL RULES OF PRO. CONDUCT r. 1.6(a) (A.B.A. 1983).
[27] *See* A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 433 (2004) [hereafter A.B.A. Reporting Opinion] ("Stated more bluntly, Rule 1.6 trumps Rule 8.3.").
[28] Ronald D. Rotunda, *The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of* Himmel, 1988 U. ILL. L. REV. 977, 989 (1988) (discussing versions of mandatory reporting obligation that predated the Model Rules).
[29] *See generally* Preventing Abuses, *supra* note 2.
[30] *Id*.
[31] *See* Exec. Order No. 14230, 90 Fed. Reg. 11781 (Mar. 11, 2025) ("Addressing Risks From Perkins Coie LLP").
[32] Preventing Abuses, *supra* note 2; *see also* Megan Messerly, *Trump Targets Prominent Democratic-Linked Law Firm*, POLITICO (Mar. 6, 2025, at 18:44 ET), https://www.politico.com/news/2025/03/06/trump-security-clearance-steele-dossier-025203 (describing executive order against Perkins Coie and its connection to Marc Elias).
[33] Preventing Abuses, *supra* note 2; *see also Fact Sheet: President Donald J. Trump Prevents Abuses of the Legal System and the Federal Courts*, THE WHITE HOUSE (Mar. 21, 2025), https://www.whitehouse.gov/fact-sheets/2025/03/fact-sheet-president-donald-j-trump-prevents-abuses-of-the-legal-system-and-the-federal-courts/ [https://perma.cc/7JSG-QT4H] ("President Trump is delivering on his promise to end the weaponization of government and protect the nation from partisan and bad faith actors who exploit their influence.").

beyond allusions to the proposition that noncitizens have committed "heinous crimes against innocent victims."[34]

Notwithstanding this context, the directives contained in *Preventing Abuses* are not strictly limited to those four categories of cases. In relation to Rule 11 sanctions, the memorandum directs pursuing court sanctions "against attorneys and law firms who engage in frivolous, unreasonable, and vexatious litigation against the United States or in matters before executive departments and agencies of the United States."[35] But the memorandum goes further in relation to reporting to state disciplinary agencies. It directs the Attorney General

> to refer for disciplinary action any attorney whose conduct in Federal court or before any component of the Federal Government appears to violate professional conduct rules, including rules governing meritorious claims and contentions, and particularly in cases that implicate national security, homeland security, public safety, or election integrity.[36]

The reporting obligation to disciplinary agencies is broader than Rule 8.3—and the memorandum's own framing of the concerns—in several respects. First, it articulates a general reporting obligation—the likes of which had been eschewed in the transition from the Model Code to the Model Rules. It does not distinguish between the severity of the misconduct involved, such as being limited to violations that raise a substantial question about the lawyer's fitness to practice;[37] it simply mandates the reporting of *all* violations of ethical rules. At the same time, the memorandum highlights four categories of cases for which the Attorney General should be especially vigilant to refer to disciplinary authorities—an arguably not-so-subtle warning to lawyers opposing the United States in such cases that their conduct is under scrutiny.[38]

Second, the memorandum seemingly adopts a lower and ambiguous standard of the certainty required before an attorney is obligated to report. In contrast to the knowledge standard of Rule 8.3, *Preventing Abuses* requires reporting to disciplinary agencies whenever a lawyer's conduct "appears to violate professional conduct rules."[39] The word "appears" is not one used in connection with lawyer ethics codes. Although the word had been included in an earlier version of Rule 11 of the Federal Rules of Civil Procedure, it was not being used as a standard triggering one's obligations.[40] At best one might analogize it to the "appearance of impropriety" standard that is used in connection with judicial ethics, which could suggest that an attorney have a reasonable

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[34] Preventing Abuses, *supra* note 2.
[35] *Id*.
[36] *Id.*
[37] *See generally id.*
[38] *See, e.g.*, *AILA Rejects Administration's Dangerous Threats on Immigration Attorneys*, AM. IMMIGR. LAWS. ASS'N (Mar. 22, 2025), https://www.aila.org/library/aila-rejects-administration-s-dangerous-restrictions-on-immigration-attorneys [https://perma.cc/KW8E-WJ5Y] (condemning the "chilling directive" and contending that "[t]he broad assertion that immigration attorneys are acting improperly in their efforts to represent individuals against an increasingly complex and restrictive immigration system is both unfounded and dangerous").
[39] Preventing Abuses, *supra* note 2.
[40] *See* FED. R. CIV. P. 11(c)(1)(b) (amended 2007) ("On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto."). The current version states: "On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b)." FED. R. CIV. P. 11(c)(3).

belief that a violation had occurred.[41] On the other hand, the word "appears" is often used in a much looser and subjective sense, as in to "seem" or "give the impression of being" a certain way.[42] The memorandum does not provide explicit guidance on which of these interpretations is intended or controlling. But the two sets of examples of alleged misconduct highlighted in the memorandum, that of Marc Elias and immigration lawyers writ large, suggests that the latter vibe-based definition is envisioned.[43] This interpretation is further supported by the fact that the memorandum provides no empirical support for its contention that attorneys involved in these cases are more "frequently" engaging in "fraud" than are attorneys involved in other types of matters.[44]

Third, the memorandum does not contain any limitations on reporting to disciplinary agencies, such as the necessity to comply with the duty of confidentiality or to fulfill the attorney's other ethical obligations. Perhaps the memorandum itself could be seen as giving consent to disclose information that would otherwise be considered confidential.[45] Nevertheless, the unqualified nature of the reporting directive raises the possibility that a government attorney could be put in a position where they must choose between carrying out the directive and fulfilling their own ethical obligations. It is to that issue that this Essay turns.

II. POTENTIAL LANDMINES IMPOSED BY ADDITIONAL OBLIGATIONS

One might assume that there would be no ethical concerns in reporting the suspected misconduct of another lawyer to a disciplinary agency for investigation or in pursuing court sanctions. Even though Rule 8.3 may subject an attorney to professional discipline for failing to report serious wrongdoing, there is nothing in the rule that subjects an attorney to discipline if they incorrectly report a lawyer whose conduct did not meet the reporting threshold.[46] In light of the fact that "Rule 8.3 is perhaps the most widely violated and the most underenforced of the disciplinary rules,"[47] enhancing the reporting obligation could be viewed as a positive development.[48]

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[41] *See* Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 MINN. L. REV. 1914, 1935–36 (2010) (discussing "appearance of impropriety" standard and its interpretation).

[42] *Thesaurus: Appear*, MERRIAM-WEBSTER, https://www.merriam-webster.com/thesaurus/appear [https://perma.cc/9A3L-X92J] (last visited Oct. 27, 2025).

[43] *Cf.* Don Moynihan, *Under Trump, Laws Are Just Vibes*, THE BULWARK (Feb. 10, 2025), https://www.thebulwark.com/p/trump-laws-vibes-nih-overhead-cap-illegal [https://perma.cc/EP5M-GQM7] (contending that "the Trump administration is creating a sense that the law is just vibes now"); LEAH LITMAN, LAWLESS: HOW THE SUPREME COURT RUNS ON CONSERVATIVE GRIEVANCE, FRINGE THEORIES, AND BAD VIBES (2025) (employing the term "vibes" in connection with decisions of the contemporary U.S. Supreme Court, including rulings on the legality of Trump Administration policies).

[44] *See* Preventing Abuses, *supra* note 2 (employing such language).

[45] *See* A.B.A. Reporting Opinion, *supra* note 27 (explaining that a lawyer will be able to report confidential information if the client gives informed consent to make the disclosure).

[46] MODEL RULES OF PRO. CONDUCT r. 8.3 (A.B.A. 1983); *see also* A.B.A. Reporting Opinion, *supra* note 27 ("If the lawyer, after assessing all of the circumstances, remains uncertain whether she has a duty to report, she nevertheless may opt to do so. Voluntary reporting made in good faith always is permissible . . . .").

[47] Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205, 278 (1999).

[48] *Cf.* David A. Grenardo, *Long Live Bohatch: Why a Law Firm Partner Can Be Expelled for Following the Rules of Professional Conduct*, 34 MISS. C. L. REV. 15, 46–47 (2015) (suggesting that attorneys should be required to report the misconduct of other lawyers in their firms, even if they will face negative consequences by virtue of doing so).

Yet as this Part will argue, the obligations set forth in *Preventing Abuses* have the real potential to put federal government attorneys in a position where their actions could put their own license at risk. This is because these new obligations must be considered in light of President Trump's other executive actions and the Administration's track record of demanding its attorneys to align their actions with political ends.[49] Possible violations include the making of frivolous assertions (Rule 3.1), actions that are prejudicial to the administration of justice, including harassment and discrimination on the basis of national origin (Rules 8.4(d) and 8.4(g)), and conduct that disrespects the rights of third persons (Rule 4.4(a)).

A. RULE 3.1

Rule 3.1 provides that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law."[50] As described below, although *Preventing Abuses* is ostensibly directed towards curbing Rule 3.1 violations committed by attorneys who oppose the federal government, a government lawyer seeking to comply with its directives might themselves run afoul of the provision.

Preventing Abuses posits that some lawyers litigating against the federal government routinely press frivolous arguments.[51] Given that there is no data to support such a contention, it is conceivable that the Office of the Attorney General might believe that certain legal arguments—arguments with which it disagrees—are frivolous. These could include, for example, claims that officials "violat[ed] federal records laws by using Signal . . . to chat about the highly sensitive attack on Houthi rebels in Yemen."[52] These also could include states that contend that their public safety programs are not, as alleged by Attorney General Pam Bondi, "a frontal assault on the federal immigration laws, and the federal authorities that administer them."[53]

But this perspective on what arguments may be "frivolous" is not limited to President Trump or Attorney General Bondi; it likely will filter down to all executive branch attorneys. Executive Order 14215, entitled "*Ensuring Accountability for All Agencies*," ("*Ensuring Accountability*") provides that "[t]he President and Attorney General's opinions on questions of law are controlling

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[49] *See* Eric Tucker & Alanna Durkin Richer, *Justice Department's Independence is Threatened as Trump's Team Asserts Power Over Cases and Staff*, ASSOCIATED PRESS (Feb. 16, 2025, at 17:30 ET), https://apnews.com/article/fbi-justice-department-trump-bondi-bove-adams-a003af9d9aebe89cd289361a65c9401b [https://perma.cc/PES2-RHU9] (suggesting that the Department of Justice, under Attorney General Pam Bondi, is "play[ing] politics").

[50] MODEL RULES OF PRO. CONDUCT r. 3.1 (A.B.A. 1983); *see also* Judith A. McMorrow, *Rule 11 and Federalizing Lawyer Ethics*, 1991 B.Y.U. L. REV. 959, 971–76 (1991) (exploring relationship between Rule 11 and Model Rule 3.1).

[51] Preventing Abuses, *supra* note 2.

[52] Alan Feuer, *Judge Moves to Prevent Hegseth, Waltz and Others from Deleting Houthi Texts*, N.Y. TIMES (Mar. 27, 2025), https://www.nytimes.com/2025/03/27/us/politics/signal-chat-houthis-court-decision.html (discussing the lawsuit and the negative reaction by Attorney General Bondi).

[53] Alanna Durkin Richer & Anthony Izaguirre, *Attorney General Pam Bondi Rails Against New York Leaders as She Announces Immigration Lawsuit*, ASSOCIATED PRESS (Feb. 12, 2025, at 22:22 ET), https://apnews.com/article/justice-department-immigration-pam-bondi-trump-4829db2b93afcfa35194014f160d7edb [https://perma.cc/2EYD-DSX3] (quoting allegation from lawsuit).

on all employees in the conduct of their official duties."[54] This means, among other things, that an executive branch attorney cannot "advance an interpretation of the law as the position of the United States that contravenes the President or Attorney General's opinion on a matter of law."[55] In this new normal, where executive branch attorneys are required to mimic the views of the President and Attorney General, it follows that they could be pressured to cast arguments of opposing counsel as frivolous even if meritorious.

What happens if a federal government attorney were to file a baseless motion for Rule 11 sanctions? The attorney themselves would be subject to Rule 11 sanctions and professional discipline for a Rule 3.1 violation.[56] Indeed, this type of misconduct is not unheard of. When confronted with an attorney who crossed over from "zealous advocacy" to baseless "allegations of professional misconduct," a federal district court judge in an unrelated case remarked:

> Rule 11 is not a toy. A lawyer who transgresses the rule abuses the special role our legal system has entrusted to him. He can suffer severe financial sanctions and . . . find himself before a disciplinary commission. In short, a Rule 11 violation is a serious thing, and an accusation of such wrongdoing is equally serious.[57]

B. ACTIONS PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE

As described earlier, the memorandum also directs the Attorney General to make a report to disciplinary agencies when a lawyer's conduct "appears to violate professional conduct rules."[58] Notwithstanding the fact that such reports are often styled as "complaints,"[59] it is unlikely that attorneys filing such reports would be subject to Rules 3.1–3.9, which apply to conduct when acting as an advocate before a tribunal.[60] Nevertheless, attorneys are subject to Rule 8.4, which contains the so-called "catchall" provisions, at all times.[61] One of these broad provisions is Rule 8.4(d), which proscribes "engag[ing] in conduct that is prejudicial to the administration of

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[54] Ensuring Accountability, *supra* note 13; *see also* Alden Abbott, *Accountability Comes to the Independent Agencies*, FORBES (Feb. 19, 2025, at 17:59 ET), https://www.forbes.com/sites/aldenabbott/2025/02/19/accountability-comes-to-the-independent-agencies/ [https://perma.cc/CL3C-YFZE] (explaining significance of *Ensuring Accountability*, which was called "a significant step forward in consolidating [the Trump] Administration's control over executive branch policy").

[55] *See* Ensuring Accountability, *supra* note 13 (containing a limited exception for taking contradictory positions when they are "authorized . . . by the President or in writing by the Attorney General").

[56] *See* Marc P. Goodman, *A Uniform Methodology for Assessing Rule 11 Sanctions: A Means to Serve the End of Conserving Public and Private Legal Resources*, 63 S. CAL. L. REV. 1855, 1858 (1990) ("[C]ourts have entertained motions for Rule 11 sanctions based on the filing of a frivolous motion for Rule 11 sanctions."); Draper & Kramer, Inc. v. Baskin-Robbins, Inc., 690 F. Supp. 728, 732 (N.D. Ill. 1988) (discussing the possibility of court and disciplinary sanctions for such transgressions).

[57] *Draper & Kramer, Inc.*, 690 F. Supp. at 732 (citations omitted).

[58] Preventing Abuses, *supra* note 2.

[59] *See, e.g.*, *Filing a Complaint Against an Attorney*, OKLA. BAR ASS'N (last visited Oct. 27, 2025), https://www.okbar.org/gc/complaint/ [https://perma.cc/8BLE-Z32T] (containing information on how to file a grievance against an Oklahoma attorney, styling it as a "complaint," and including a link to download the form).

[60] *See* Brian Sheppard, *The Ethics Resistance*, 32 GEO. J. LEGAL ETHICS 235, 280 (2019) ("Ethics complaints against lawyers are a different species from the civil complaints that typically violate Rule 3.1.").

[61] Jon J. Lee, *Catching Unfitness*, 34 GEO. J. LEGAL ETHICS 355, 381–82 (2021); *see also* Samuel J. Levine, *Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in a Comparative Hermeneutic Framework*, 77 TUL. L. REV. 527, 558–61 (2003) (describing Rule 8.4(d) and its earlier Model Code counterpart, both of which may be "appli[ed] to unenumerated areas of obligation").

justice."[62] The ABA has not attempted to define what conduct qualifies as being prejudicial to the administration of justice, but the provision has been used at times to "discipline lawyers for conduct that is in some way an affront to the high professional standards lawyers should be held to in performing their public calling, for conduct unbecoming officers of the court, or for conduct that flagrantly violates professional norms and is plainly serious."[63] Indeed, before the adoption of Model Rule 8.4(g), an anti-bias provision, Rule 8.4(d) had been used to discipline attorneys who had engaged in discriminatory conduct while in their professional capacity.[64]

There are several ways in which a government attorney acting at the behest of the Attorney General might be at risk of violating Rule 8.4(d) in connection with reporting to a disciplinary agency. The first could occur if the attorney were to make baseless accusations against opposing counsel, their supervisor, or the law firm itself—all of which were specifically identified in *Preventing Abuses* as possible targets of ethics complaints.[65] Even though an attorney does not need knowledge of an ethical violation to make a report, presumably one must at least have a good faith belief of a violation.[66] Given the memorandum's use of the ambiguous term "appears" in relation to the reporting standard, one can imagine a scenario in which an attorney feels obligated—or is pressured—to report an adversary whose conduct does not merit investigation. Although there have not been widely publicized cases directly on point, disciplinary agencies have sanctioned attorneys who have attempted to use the filing of a grievance for an improper purpose, citing Rule 8.4(d).[67] Analogously, attorneys who thwart the disciplinary process may be sanctioned for violating Rule 8.4(d), along with Rule 8.1, which concerns disciplinary matters.[68]

A second way a federal government attorney might be at risk of violating Rule 8.4(d) is if they threaten opposing counsel that they will file an ethics complaint unless the other lawyer submits to their demands. As noted earlier, one might view the memorandum itself as an ominous warning to those who might oppose the United States that they or their law firms might become reporting targets. But if a government attorney were to go further by, for example, threatening to make a report unless the other lawyer terminates the representation of a disfavored client or agrees to an

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[62] MODEL RULES OF PRO. CONDUCT r. 8.4(d) (A.B.A. 2016); *see* Alex B. Long, *Of Prosecutors and Prejudice (or "Do Prosecutors Have an Ethical Obligation Not to Say Racist Stuff on Social Media?")*, 55 U.C. DAVIS L. REV. 1717, 1730–34 (2022) (exploring the majority (narrow) and minority (broad) interpretations of Rule 8.4(d)).

[63] Douglas R. Richmond, *Saber-Rattling and the Sound of Professional Responsibility*, 34 AM. J. TRIAL ADVOC. 27, 38 (2010).

[64] *See* Alex B. Long, *Discrimination, Model Rule 8.4(g), and the ABA's Quixotic Quest for Uniformity*, 81 WASH. & LEE L. REV. 1551, 1575–78 (2024) (discussing the use of Rule 8.4(d) in relation to discriminatory conduct, which ultimately led to the adoption of Rule 8.4(g)).

[65] Preventing Abuses, *supra* note 2 ("In complying with this directive, the Attorney General shall consider the ethical duties that law partners have when supervising junior attorneys, including imputing the ethical misconduct of junior attorneys to partners or the law firm when appropriate.").

[66] *See* A.B.A. Reporting Opinion, *supra* note 27 (linking ability to report to acting in "good faith").

[67] *See* Richmond, *supra* note 19, at 200. *But cf.* Sheppard, *supra* note 60, at 280–81 (contemplating that attorneys could violate ethics rules when they file frivolous ethics complaints, yet noting that such a scenario would be rare given the mandatory reporting rule).

[68] *See, e.g.*, *In re* Doman, 314 A.3d 1219, 1231 (D.C. 2024) (per curiam) (failure to respond to disciplinary counsel violates D.C. R. Pro. Rule 8.4(d)); Bradney Griffin, No. 2007.071, (Vt. Prof. Resp. Bd. 2007) https://www.vermontjudiciary.org/sites/default/files/documents/98prb.pdf (suspending attorney for "failure to cooperate with disciplinary counsel in violation of Rule 8.4(d)").

unattractive settlement, such a threat would violate Rule 8.4(d).[69] This arguably would be true even if the underlying ethics complaint had a basis in law and fact.[70]

As noted above, Rule 8.4(d) historically had been used as a disciplinary tool to combat harassment and discrimination in the profession.[71] Its application in that manner was limited, however, by the fact that the reference to "bias or prejudice" was relegated to a comment rather than the text of the rule itself and was limited to circumstances when the misconduct occurred while "representing a client."[72] In 2016, the ABA House of Delegates voted to amend the rules to explicitly add an anti-bias provision, Model Rule 8.4(g).[73] The provision proscribes "conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of" a number of protected categories, including race, national origin, and ethnicity, in relation to "the practice of law."[74] Although the provision "does not preclude *legitimate* advice or advocacy," a comment to Rule 8.4 contemplates that some discriminatory actions taken in connection with litigation could violate the anti-bias provision.[75]

There may be First Amendment concerns about a disciplinary agency using Rule 8.4(g) to sanction attorneys who merely espouse views on politically-charged issues such as "terrorism, immigration, and refugee assistance."[76] The directives in *Preventing Abuses* go beyond rhetoric, however, because they call out the "rampant fraud and meritless claims" that are brought in connection with immigration matters and direct the Attorney General to "particularly" examine "cases that implicate national security [and] homeland security."[77] In light of these directives, one could imagine a scenario in which a government attorney draws unsupported inferences

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[69] A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 383 (1994) (noting that "[t]hreatening to file a complaint against opposing counsel to extract settlement concessions may violate" Rule 8.4(d), among other rules); *see* J. Nick Badgerow, *The Beam and the Mote: A Review of the Lawyer's Duty to Report*, 82 J. KAN. B. ASS'N, 20, 27–28 (2013) (admonishing lawyers not to use reporting as "as a lever in litigation" or to "[t]hreaten an [e]thics [c]omplaint").

[70] *See generally* N.Y.C. Bar Ass'n Prof. Ethics Comm., Formal Op. 2017-3 (2017) (discussing circumstances when a threat to report to a regulatory agency would violate New York's version of Rule 8.4(d), which mirrors the ABA's version).

[71] *See* Long, *supra* note 64 & accompanying text.

[72] MODEL RULES OF PRO. CONDUCT r. 8.4 cmts. 3–4 (A.B.A. 1998); *see* Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195, 207 (2017) (discussing the limitations in Comment [3] to the earlier version of Rule 8.4).

[73] *See* Gillers, *supra* note 72, at 202–14 (detailing history of Rule 8.4(g), which went through several iterations).

[74] MODEL RULES OF PRO. CONDUCT r. 8.4(g) (A.B.A. 2016); *see* Gillers, *supra* note 72, at 214–24 (discussing interpretation issues connected with Rule 8.4(g)); *see also* Lee, *supra* note 61, at 372–76 (identifying the opposition to the adoption of Rule 8.4(g), which is partly based on ambiguity in its interpretation and potential application).

[75] *See* MODEL RULES OF PRO. CONDUCT r. 8.4(g) (A.B.A. 2016) (emphasis added); MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 5 (A.B.A. 2016) ("A trial judge's finding that peremptory challenges were exercised on a discriminatory basis *does not alone* establish a violation of paragraph (g)."") (emphasis added); *cf*. Michael Ariens, *Anti-Discrimination Ethics Rules and the Legal Profession*, 50 HOFSTRA L. REV. 501, 515 (2022) (suggesting that a trial judge's finding that a peremptory challenge was exercised on discriminatory grounds should be sufficient to make out a rule violation).

[76] Margaret Tarkington, *Reckless Abandon: The Shadow of Model Rule 8.4(g) and a Path Forward*, 95 ST. JOHN'S L. REV. 121, 145–46 (2021). *See generally* Bruce A. Green & Rebecca Roiphe, *ABA Model Rule 8.4(g), Discriminatory Speech, and the First Amendment*, 50 HOFSTRA L. REV. 543, 544 (exploring "the constitutionality of Rule 8.4(g)'s restriction on objectionable speech").

[77] Preventing Abuses, *supra* note 2.

about the veracity of claims of noncitizens from a particular country[78]—or noncitizens in general—and concludes that lawyers representing such clients necessarily are engaged in fraudulent conduct. If a report were made based on that faulty and dangerous logic, it arguably would violate Rule 8.4(g) in that it would be harassment or discrimination based on the client's national origin.[79] Such conduct also would arguably violate Rule 8.4(d) insofar that it reflects bias or prejudice that flatly contravenes the profession's norms.

C. DISRESPECT FOR THE RIGHTS OF THIRD PERSONS

Another category of unethical conduct is that which does not respect the rights of persons other than an attorney's client, which may include misconduct towards opposing parties or their counsel.[80] Of particular significance to this Essay is Rule 4.4(a), which provides in relevant part that a lawyer representing a client cannot "use means that have no substantial purpose other than to embarrass, delay or burden a third person."[81] This provision focuses on the *means* rather than the *ends*; "[m]ost charges of violating Rule 4.4(a) . . . involve conduct that has both a 'legitimate purpose and an illegitimate purpose.'"[82] The key question in instances where there are dual purposes is the extent to which the chosen means further the legitimate purpose rather than the illegitimate one.[83] In evaluating this question, courts need not rely solely on a lawyer's subjective view about their own conduct; courts can also consider how it would be viewed by a reasonable person.[84] Accordingly, this provision "tempers the zeal with which a lawyer is permitted to represent a client."[85]

Rule 4.4(a) is a relatively undertheorized provision, so its precise contours are less clear.[86] Nevertheless, it has been regularly cited alongside Rule 8.4(d) as being violated when an attorney "threaten[s] to file a disciplinary complaint . . . against opposing counsel to obtain an advantage in a civil case."[87] Likewise, if an attorney were to file a motion for sanctions that were "based on

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[78] *Cf.* Josh Dawsey, *Trump Derides Protections for Immigrants from 'Shithole' Countries*, WASH. POST (Jan. 12, 2018), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html (using the phrase "shithole" countries in relation to immigrants from Haiti and other African countries).

[79] *Cf. In re* Barker, 993 N.E.2d 1138, 1139 (Ind. 2013) (finding violation of similar anti-bias provision where an attorney accused opposing party of "being in the country illegally," which was not supported by the facts).

[80] *See* Richmond, *supra* note 63, at 35 (noting that the ethics "rule's reference to third persons makes clear that it applies to lawyers' conduct directed at anyone other than the lawyer's client, including court personnel, jurors, lawyers, parties, witnesses, and others").

[81] MODEL RULES OF PRO. CONDUCT r. 4.4(a) (A.B.A. 1983); *see also* Richmond, *supra* note 63, at 34–36 (exploring the components of the provision and their meanings).

[82] A.B.A. CTR. FOR PRO. RESP., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 531 (Ellen J. Bennett, Helen W. Gunnarson & Nancy G. Kisicki eds., 10th ed. 2023) [hereinafter ANNOTATED RULES] (quoting *In re* Royer, 78 P.3d 449 (Kan. 2003)).

[83] Richmond, *supra* note 63, at 35.

[84] *See In re* Comfort, 159 P.3d 1011, 1020 (Kan. 2007) ("A lawyer cannot escape responsibility for a violation based on his or her naked assertion that, in fact, the 'substantial purpose' of conduct was not to 'embarrass, delay, or burden' when an objective evaluation of the conduct would lead a reasonable person to conclude otherwise."); *see also* David P. Weber, *(Unfair) Advantage: Damocles' Sword and the Coercive Use of Immigration Status in a Civil Society*, 94 MARQ. L. REV. 613, 647–48 (2010) (discussing the *Comfort* decision with approval).

[85] ANNOTATED RULES, *supra* note 82, at 530.

[86] *See* Weber, *supra* note 84, at 646–51 (identifying key issues and disagreements among jurisdictions).

[87] ANNOTATED RULES, *supra* note 82, at 535 (citing A.B.A Comm. On Ethics & Pro. Resp., Formal Op. 383 (1994) in support of the proposition); *e.g.*, Weber, *supra* note 84, at 641 (drawing link between the ethics provisions in the context of attorneys seeking to discover or introduce immigration status during litigation).

unfounded assertions" or motivated by bad faith, the attorney could be sanctioned for a Rule 4.4(a) violation.[88]

But the reach of Rule 4.4(a) extends beyond that of the provisions discussed earlier in that it could apply when the attorney were to threaten or recommend "additional steps" be taken against adversaries, such as "reassessment of security clearances held by the attorney" or "termination of any contract for which the relevant attorney or law firm has been hired to perform services."[89] Since such additional steps are not tied to litigation before a tribunal, they likely do not violate the prohibition on frivolous assertions.[90] Nor is it clear that the steps would be deemed prejudicial to the administration of justice, since some jurisdictions require that the relevant conduct have a connection to some type of proceeding.[91] Nevertheless, a disciplinary agency could conclude that such means have "no substantial purpose other than to . . . burden a third person"—in this case, those lawyers and law firms that have been thorns in the Administration's proverbial side.[92]

III. WHAT'S AN ETHICAL GOVERNMENT ATTORNEY TO DO?

As explained in Part II, there are a variety of scenarios in which an attorney for the federal government could be in a position where they are pressured by Administration officials to take actions in furtherance of the directives articulated in *Preventing Abuses* that would contravene their ethical obligations. Since the memorandum's issuance, the Department of Justice ("DOJ") already has sought monetary sanctions against an immigration lawyer who had attempted to block his client's deportation.[93] While it is not clear whether that particular sanctions motion was meritorious, one need only look at the actions of Trump's former lawyers[94] and the events that

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[88] *See, e.g.*, *In re* O'Dwyer, 221 So. 3d 1, 4 (La. 2017) (per curiam) (disciplining attorney for filing multiple retaliatory motions for sanctions).

[89] Preventing Abuses, *supra* note 2 (discussing these steps "when the Attorney General determines that conduct by an attorney or law firm in litigation against the Federal Government warrants seeking sanctions or other disciplinary action").

[90] *See* Sheppard*, supra* note 60 & accompanying text.

[91] *See* Richmond, *supra* note 63, at 38 (noting that "some courts deem a lawyer's misconduct prejudicial to the administration of justice only if it relates to a judicial or similar proceeding").

[92] MODEL RULES OF PRO. CONDUCT r. 4.4 (A.B.A. 2002); *cf.* Exec. Order No. 14230, 90 Fed. Reg. 11781 (Mar. 11, 2025) ("Addressing Risks From Perkins Coie LLP"); Exec. Order No. 14246, 90 Fed. Reg. 13997 (Mar. 28, 2025) ("Addressing Risks From Jenner & Block"); Exec. Order. No. 14237, 90 Fed. Reg. 13039 (Mar. 20, 2025) ("Addressing Risks From Paul Weiss").

[93] Josh Gerstein, *"This is Sending a Message": DOJ Moves to Sanction Lawyer Who Took Pro Bono Deportation Case*, POLITICO (Aug 6, 2025, at 20:38 ET), https://www.politico.com/news/2025/08/06/justice-department-sanctions-immigration-lawyer-00496886 (describing the sanctions motion and noting that "[t]he Trump administration is escalating its efforts to punish lawyers whom it sees as obstacles to the president's agenda.").

[94] *See, e.g.*, People v. Ellis, 24PDJ002 (Colo. 2024) (ordering three-year suspension of Jenna Ellis's license based on her felony conviction related to her conduct in the aftermath of the 2020 presidential election, based on stipulation); Larry Neumeister, *Michael Cohen Completes Prison Term After Trump-Related Crimes,* L.A. TIMES (Nov. 22, 2021, at 10:53 ET), https://www.latimes.com/world-nation/story/2021-11-22/michael-cohen-completes-prison-term-after-trump-related-crimes [https://perma.cc/86M4-TXMZ] (describing the release from prison of Michael Cohen, Trump's former lawyer); *see also* W. BRADLEY WENDEL, CANCELING LAWYERS: CASE STUDIES OF ACCOUNTABILITY, TOLERATION, AND REGRET 199–220 (2024) (distinguishing between "[s]ome of what lawyers did in the course of representing the Trump campaign or working within the administration," which was "unobjectionable," and "[o]ther conduct," which was "outright unlawful or a serious violation of standards of professional ethics").

unfolded in connection with the DOJ's decision to drop the corruption charges against New York City Mayor Eric Adams[95] to appreciate the real likelihood that such a scenario could come to pass.

This Part will chart out three possible paths an attorney could take if they were put in such an intractable position: (1) fall in line with their supervisor's views, despite the risk of disciplinary consequences; (2) counsel their client (the United States) through its constituents that such an action would be unlawful and/or unwise, but not resign; or (3) counsel their client but resign from their position if attempts to persuade are unsuccessful. It will show that all three paths come with serious professional risk in the short term, but the final path arguably minimizes the long-term negative consequences.

A. FALL IN LINE

As is the case all too often, an attorney might choose to conform to their supervisor's view even if they personally believe that the conduct may violate an ethical provision.[96] They might do so based on either of two rationales. The first is that they might be able to escape disciplinary sanctions by relying on the qualified "following orders" defense included in the Model Rules.[97] Under Rule 5.2(b), a subordinate lawyer who "acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty" will not violate the rules even if the supervisor's resolution turns out to be incorrect.[98] While this might seem contradictory to the idea that all lawyers should be expected to have their own independent professional judgment,[99] this defense is justified on the ground that when lawyers working together on a matter disagree, "someone has to decide upon the course of action."[100] That person ostensibly should be the supervisor, which means that the supervisor also should "assume responsibility for making the judgment."[101]

Nevertheless, the reality is that a subordinate government attorney—or any subordinate attorney—would be foolish to rely on the prospect of a "following orders" defense to avoid discipline. The rules themselves do not provide tangible guidance on the meanings of the phrases "reasonable resolution" or "arguable question," but a comment warns: "If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally

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[95] *See infra* notes 120–123 & accompanying text (describing the events that unfolded).

[96] *See* Sabrina C. Narain, *A Failure to Instill Realistic Ethical Values in New Lawyers: The ABA and Law School's Duty to Better Prepare Lawyers for Real Life Practice*, 41 W. ST. U. L. REV. 411, 420 (2014) (discussing the lawyer's "duty of obedience" and how it creates pressures to conform); *see also* Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451, 462–71 (2007) (identifying the circumstances that "[p]roduce [o]bedience in [l]aw [p]ractice," drawing upon social psychology principles).

[97] Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties*, 70 NOTRE DAME L. REV. 259, 294–304 (1994) (using the phrase "following orders" in connection with Model Rule 5.2(b) and explaining its operation).

[98] MODEL RULES OF PRO. CONDUCT r. 5.2(b) (A.B.A. 1983); *see* Carol M. Rice, *The Superior Orders Defense in Legal Ethics: Sending the Wrong Message to Young Lawyers*, 32 WAKE FOREST L. REV. 887, 893–95 (1997) (clarifying that Rule 5.2(b) operates as a defense and is not merely a mitigating circumstance).

[99] *See* Rice, *supra* note 98, at 904–14 (arguing that Rule 5.2(b) undercuts the profession's general insistence on "individual accountability").

[100] MODEL RULES OF PRO. CONDUCT r. 5.2 cmt. 2 (A.B.A. 1983).

[101] *Id.*; *see* Miller, *supra* note 97, at 297 ("Providing this form of limited disciplinary immunity does, however, help resolve a subordinate's dilemma by explicitly permitting subordinate lawyers to defer to a superior's reasonable resolution of an arguable question of professional duty.").

responsible for fulfilling it."[102] When it comes to the types of ethical violations that would realistically result in ethical sanctions, those invariably will not be among the "razor thin set of cases" when the Rule 5.2(b) safe harbor is implicated.[103] As Andrew Perlman has quipped: "[I]t is difficult to create a hypothetical where Rule 5.2(b)'s 'just following orders' defense would help a subordinate lawyer, let alone cite to an actual disciplinary proceeding where this defense has been asserted successfully."[104] Indeed, in my own research, I have read well over five thousand ethics opinions and have not encountered an opinion finding its applicability. If a subordinate lawyer believes proposed conduct may be unethical, it almost undoubtedly is.

The second rationale is that even if their actions are unethical, they are unlikely to be investigated and virtually certain to escape public discipline. Unfortunately, this rationale is buttressed by available disciplinary statistics; lawyers infrequently are disciplined and, when they are, the sanctions are often private.[105] Yet there is reason to believe that these attorneys are more likely to be under the microscope. Watchdog organizations filed disciplinary complaints against Emil Bove when he was Acting Deputy Attorney General and Edward Martin when he was Interim U.S. Attorney for the District of Columbia, both of which were publicized.[106] Moreover, much of the possible misconduct at issue (filing motions for sanctions and reporting) are ones that could more readily come to the attention of disciplinary agencies because they will involve tribunals or the agencies themselves.[107] As several lawyers affiliated with Trump can attest, disciplinary agencies have been examining their actions with interest[108]—making the decision to simply fall in line a risky proposition.

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[102] MODEL RULES OF PRO. CONDUCT r. 5.2 cmt. 2 (A.B.A. 1983); *see also* Rice, *supra* note 98, at 895–96 (discussing lack of clear guidance on boundaries).

[103] Andrew M. Perlman, *The Silliest Rule of Professional Conduct: Model Rule 5.2(b)*, 19 PROF. LAW. 14, 14 (2009).

[104] *Id*.

[105] *See* Levin, *supra* note 15, at 8–9 (noting that "[o]nly about five percent of all complaints result in any sanctions against lawyers"); Melissa Mortazavi, *Code of Silence*, 40 CARDOZO L. REV. 2171, 2173 (2019) (highlighting that there are places "where widespread violations of the law of lawyering are clear and known, and the bar does not discipline the attorneys involved"); Jon J. Lee, *Private Sanctions, Public Harm?*, 48 BYU L. REV. 1255, 1294, 1297 (2023) (presenting the results of an empirical study showing that jurisdictions with private sanctions regularly impose them in cases in which discipline is warranted).

[106] *See American Oversight Files Bar Complaint Against Deputy AG Bove for Corrupt Actions in Dismissal of Eric Adams Charges*, AMERICAN OVERSIGHT (Feb. 20, 2025), https://americanoversight.org/american-oversight-files-bar-complaint-against-deputy-ag-bove-for-corrupt-actions-in-dismissal-of-eric-adams-charges/ [https://perma.cc/E636-8Z4T] (stating that "[t]he organization calls for a full investigation of reported misconduct by Bove, who pushed for the dismissal of criminal charges in return for Adams' political cooperation with the Trump administration"); *Bar Complaint Against Edward Martin*, THE 65 PROJECT (Feb. 6, 2025), https://the65project.com/bar-complaint-against-edward-martin/ (embedding the complaint against Edward Martin that was sent to the Office of Chief Disciplinary Counsel, District of Columbia Court of Appeals).

[107] *But see* Bruce A. Green, *Selectively Disciplining Advocates*, 54 CONN. L. REV. 151, 170–79 (2022) (positing that lawyers infrequently receive court or disciplinary sanctions for "overzealous advocacy").

[108] *See, e.g.*, Gerstein & Cheney, *supra* note 5 & accompanying text (identifying the disciplinary actions taken against Giuliani); Cheney, *supra* note 5 & accompanying text (identifying the disciplinary actions taken against Eastman); Jesse Paul, *Jenna Ellis, Trump Lawyer Who Pleaded Guilty in Georgia Case, Is Barred from Practicing Law in Colorado for Three Years*, THE COLO. SUN (May 28, 2024, at 18:31 MDT), https://coloradosun.com/2024/05/28/jenna-ellis-suspended-colorado-law-license/ [https://perma.cc/X7YM-L4WU] (discussing three-year disciplinary suspension of Jenna Ellis on account of her "public-facing role in Trump's efforts to overturn his loss to Joe Biden in 2020").

B. COUNSEL BUT NOT INTERFERE

In lieu of impulsively deferring to the Administration's position, an attorney who faces pressure to take improper actions towards their adversaries could first try to explain to their supervisor why such actions would be unethical and/or unwise. In fact, Rule 2.1 mandates that lawyers "exercise independent professional judgement and render candid advice."[109] Because Rule 2.1 is one of the most underenforced provisions, it is difficult to know precisely what it entails, but it "would seem to require that attorneys, at minimum, refer to something other than client interests to determine whether certain actions are legally permissible."[110] Furthermore, to the extent that senior administration officials higher up the ranks are unaware of improper actions, the attorney has an ethical obligation to inform them as well.[111]

Assuming that such counsel is not well-received, the attorney might decide that they will not themselves file a motion for sanctions to report conduct to disciplinary agencies, yet they will not interfere with a colleague doing so. There are two potential problems with this course of action. The first is an ethical one: if one of their colleagues attempts to file a frivolous motion for sanctions or a baseless disciplinary complaint, the attorney could be obligated pursuant to Rule 8.3 to report that colleague.[112] The attorney's failure to make a report—or to do anything in the face of misconduct—could itself be viewed as complicity, or at least acquiescence, in the unethical behavior.[113]

The second concern is a practical one: an attorney who raises concerns about improper behavior or declines to take requested actions puts themselves at risk for retaliation.[114] A whistleblowing attorney faces a very uncertain prospect of getting redress if they are wrongfully discharged, and many decline to bring such claims out of concern for their own reputations.[115] In

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[109] MODEL RULES OF PRO. CONDUCT r. 2.1 (A.B.A. 1983). Model Rule 1.4(a)(5) also requires that a lawyer "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law."). MODEL RULES OF PRO. CONDUCT r. 1.4(a)(5) (A.B.A. 1983).

[110] Milan Markovic, *Advising Clients After Critical Legal Studies and the Torture Memos*, 114 W. VA. L. REV. 109, 119–21 (2011) (discussing the lack of disciplinary actions, ethics opinions, and scholarly commentary on the subject).

[111] *See* MODEL RULES OF PRO. CONDUCT r. 1.13(b) (A.B.A. 2003) (requiring that when lawyers for organizations know of certain violations of legal obligations or violations of law likely to result in substantial injury that they "refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law"); *see also* Bruce A. Green & Rebecca Roiphe, *Impeaching Legal Ethics*, 49 FLA. ST. U. L. REV. 447, 459–65 (2022) (discussing the obligations of government attorneys to report to higher authorities on account of Rule 1.13(b)).

[112] *See* Alex B. Long, *Whistleblowing Attorneys and Ethical Infrastructures*, 68 MD. L. REV. 786, 826–27 (2009) (discussing that even when a reporting obligation applies to attorneys within an organization, it "often goes unfulfilled").

[113] *See, e.g.*, Maia Spoto, *Girardi Convicted, Focus Turns to Failed Firm's Other Attorneys*, BLOOMBERG LAW (Aug. 29, 2024, at 6:00 ET), https://news.bloomberglaw.com/litigation/girardi-convicted-focus-turns-to-failed-firms-other-attorneys (describing the actions of Girardi Keese attorneys who knew of rainmaker Tom Girardi's egregious criminal misconduct, spanning decades, yet did nothing).

[114] Greenbaum, *supra* note 16, at 322; Long, *supra* note 112, at 804–05 (explaining that those who make internal or external reports of misconduct may be subject to retaliation, yet there is no ethical rule explicitly prohibiting retaliation).

[115] Lee, *supra* note 11, at 1653–59 (describing the nebulous prospect of recovery for breach of contract or retaliatory discharge, along with the risk of reputational harm associated with reporting misconduct); *see* Long, *supra* note 112, at 825 (noting that "the external whistleblower, in particular, has long been viewed in some quarters as inherently disloyal").

light of the White House's firings without explanation of career prosecutors who were "seen as insufficiently loyal," it appears certain that an attorney who speaks up, even internally, would be unlikely to remain employed for long.[116] If the Administration were pressed to defend their actions, they could rely on the *Ensuring Accountability* Executive Order, which demands that the President's legal interpretations are authoritative; thus, attorneys who question them may face employment consequences.[117]

C. COUNSEL AND RESIGN

The third course of action begins like the second but then sharply diverges. Assuming the attorney is unsuccessful in persuading their supervisor or other involved constituents not to pursue unwarranted court or disciplinary sanctions against opposing counsel, the attorney could resign. Depending on the circumstances, the attorney's decision could be compelled by ethical obligations. Under Rule 1.16(a)(1), an attorney is required to withdraw if continued representation of the client "will result in violation of the Rules of Professional Conduct or other law."[118] If the attorney is being pressured to act in a way they *know* is unethical, the only permissible option would be to withdraw. But even if a lawyer is unsure, they are permitted to withdraw under a variety of circumstances, including when "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."[119]

What can or should such a resignation entail? An apt model was on display in connection with DOJ's decision to drop the corruption charges against Eric Adams. After receiving a directive from Deputy Attorney General Emil Bove to dismiss the indictment against Adams without prejudice, Danielle Sassoon, Acting Attorney General for the Southern District of New York, wrote a letter to Attorney General Bondi.[120] In that letter, Sasson explained why she could not, in good faith, file a "motion to dismiss a case that is well supported by the evidence and the law" because to do so would not be "consistent with [her] duty of candor" to the tribunal.[121] She closed with the following: "In the event you are unwilling to meet or to reconsider the directive in light of the

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[116] Alanna Durkin Richer, *White House Abruptly Fires Career Justice Department Prosecutors in Latest Norm-Shattering Move*, CHI. TRIB. (Mar. 31, 2025, at 16:46 CT), https://www.chicagotribune.com/2025/03/31/justice-department-prosecutors-fired/ [https://perma.cc/4KVR-MD4U]; Ryan J. Reilly, *White House Firing of a Career Prosecutor Pulls Justice Department Under Ever-Closer Control*, NBC NEWS (Apr. 1, 2025), https://www.nbcnews.com/politics/justice-department/white-house-firing-career-prosecutor-pulls-justice-department-ever-clo-rcna198864 [https://perma.cc/NK4X-QRC7] (describing the abrupt firing of "Assistant U.S. Attorney Adam Schleifer . . . by a White House official in an email . . .").

[117] *See* Ensuring Accountability, *supra* note 13.

[118] MODEL RULES OF PRO. CONDUCT r. 1.16(a)(1) (A.B.A. 2023); *see also* Paul R. Tremblay, *At Your Service: Lawyer Discretion to Assist Clients in Unlawful Conduct*, 70 FLA. L. REV. 251, 275–80 (2018) (discussing the contours of Rule 1.16(a)(1)).

[119] MODEL RULES OF PRO. CONDUCT r. 1.16(b)(4) (A.B.A. 2023); *see* Vanessa A. Kubota, *Subjective Feeling or Objective Standard? The Misuse of the Word "Repugnant" in the Model Rules of Professional Conduct*, 35 GEO. J. LEGAL ETHICS 259, 277 (2022) ("Rule 1.16(b)(4) was intended to cover situations in which the insistence by the client that improper or unethical methods or tactics be used by the attorney will justify, and in some cases compel, the attorney's decision to terminate the relationship." (internal quotation marks omitted)).

[120] Erica Orden, *Before Resigning, Top Prosecutor Drafted Letter to Bondi in Last-Ditch Bid to Salvage Eric Adams Case*, POLITICO (Mar. 25, 2025, at 13:45 ET), https://www.politico.com/news/2025/03/25/eric-adams-sassoon-letter-bondi-00247698 (noting that the letter was disclosed in court filings).

[121] Letter from Danielle R. Sassoon to Pamela Jo Bondi (Feb. 13, 2025), *available at* https://www.nytimes.com/interactive/2025/02/13/us/letter-to-bondi.html.

problems raised by Mr. Bove's memo, I am prepared to offer my resignation."[122] But Sassoon was just the first of several lawyers who would not capitulate to the Administration's demands. Hagan Scotten, an assistant United States Attorney working on the case, included in his resignation letter a scathing rebuke: "If no lawyer within earshot of the President is willing to give him [the] advice [not to file the motion], then I expect you will eventually find someone who is enough of a fool, or enough of a coward, to file your motion. But it was never going to be me."[123]

An attorney who makes a "noisy" withdrawal or resignation must be mindful not to improperly share confidential information, though in most of these cases the underlying facts will already be a matter of public record and known to the public.[124] Sometimes the attorney also will be obligated to report a colleague's misconduct, though they can do so following resignation without fear of retaliatory discharge. Perhaps their biggest concern will be for their professional future, however. Lawyers overwhelmingly adhere to a collective "code of silence," despite the profession's avowals to the contrary.[125] Those who violate that norm, even rightfully, risk being ostracized.[126]

Yet there is reason to believe that attorneys who choose this courageous path might fare better than colleagues who yield to the Administration's directives. In the wake of Sassoon's resignation, seven former federal prosecutors issued a joint statement "praising [her] decision to resign rather than obey [the] order" and "sharply criticized the Justice Department's intention to investigate [her]."[127] Her actions were lauded by multiple Democratic lawmakers, who used words like "integrity" and "hero."[128] Sassoon and Scotten were even profiled in the *Vanity Fair*.[129] Although it is too soon to tell how these events ultimately will affect the career trajectory of these formal federal prosecutors, their professional reputations appear to have been bolstered by their actions.[130]

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[122] *Id.*

[123] E-mail from Hagan Scotten to Emil J. Bove III, (Feb. 14, 2025), *available at* https://www.nytimes.com/interactive/2025/02/14/nyregion/scotten-letter.html.

[124] *See* Greenbaum, *supra* note 16, at 309–10 (explaining that although Model Rule 1.6 does not have an exception for information that is "generally known," such an exception appears in the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS).

[125] *See* Lynch, *supra* note 17, at 491 (noting that "the heroes of the legal profession tend to be those who keep secrets faithfully rather than those who blow the whistle on wrongdoers").

[126] *Id.* at 493; *see* Lee, *supra* note 11, at 1653–59 (discussing the negative consequences that may befall those who dutifully report).

[127] Benjamin Weiser, *Seven Former Manhattan U.S. Attorneys Voice Support for Sassoon*, N.Y. TIMES (Feb. 14, 2025), https://www.nytimes.com/2025/02/14/nyregion/manhattan-us-attorneys-sassoon.html.

[128] Filip Timotija, *Democrats Cheer Conservative US Attorney Who Resigned Over Adams Case*, THE HILL (Feb. 14, 2025, at 18:04 ET), https://thehill.com/regulation/court-battles/5146714-democrats-sasssoon-adams-doj-charges/ [https://perma.cc/9MA4-RT56].

[129] *See* Noah Shachtman, *"This Is Some New and Very Dangerous Development." Inside the Bloody Battle Over the DOJ's Crown Jewel*, VANITY FAIR (Feb. 18, 2025), https://www.vanityfair.com/news/story/trump-adams-emil-bove-sdny-justice-dept [https://perma.cc/R4X5-JG65].

[130] Sassoon joined the Manhattan Institute, a "right leaning urban policy think tank," in July 2025 as a senior fellow. Devyn Novikoff, *Former SDNY U.S. Attorney Danielle Sassoon Joins the Manhattan Institute*, CITY & STATE N.Y. (July 22, 2025), https://www.cityandstateny.com/politics/2025/07/former-sdny-atty-danielle-sassoon-joins-manhattan-institute/406911/ [https://perma.cc/ZVP9-YFB6]. Scotten joined the law firm Hueston Hennigan as a partner in its New York office. David Thomas, *DOJ Lawyer Who Quit Over Adams Case Joins Law Firm Hueston Hennigan*, REUTERS (June 2, 2025, 12:54 ET), https://www.reuters.com/legal/government/doj-lawyer-who-quit-over-adams-case-joins-law-firm-hueston-hennigan-2025-06-02/ [https://perma.cc/265L-Z6E6].

By contrast, those who demurred to President Trump's demands in the past have not fared so well in the long term, even if it enabled them to remain in his good graces.[131]

To be sure, not all attorneys who resign under similar circumstances will receive the same public attention as Danielle Sassoon—and those who do not might have a difficult time explaining their reasons for departure or finding employment in the private sector. There is also a real concern that if too many attorneys take this course of action, it will leave their departments in dire straits.[132] One who is faced with this predicament might reasonably choose to stay in their positions for as long as possible, despite their qualms about the Administration's tactics, in a belief that their presence might have a positive effect on their colleagues and supervisors. Yet the time could come when they are forced to choose between allegiance to the Administration and upholding their responsibilities as a member of the legal profession. In such a circumstance, the only ethical option is to resign, despite the immediate uncertainty that might lie ahead.

CONCLUSION

For law students who aspire to a career in public service, landing a position as an attorney for the federal government is a dream. It is wrong that these attorneys may be asked—or pressured—to lodge complaints against their adversaries on account of the Administration's unfounded complaints of "rampant fraud and meritless claims."[133] And it is abhorrent that this directive is justified by the need for lawyers to "respect the rule of law and uphold our Nation's legal system with integrity," in light of the Administration's failures on both fronts.[134] Yet when one is faced with the prospect of continuing a destructive game, often "the only winning move is not to play."[135]

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[131] *See, e.g.*, Neumeister, *supra* note 93 (discussing Michael Cohen's release from prison after serving over thirteen months on "campaign finance charges and lying to Congress, among other crimes," with Cohen stating that his actions were "at the direction of and for the benefit of Donald J. Trump").

[132] *Cf.* Andrew Goudsward, *Two-Thirds of the DOJ Unit Defending Trump Policies in Court Have Quit*, REUTERS (July 14, 2025, at 9:29 ET), https://www.reuters.com/legal/litigation/two-thirds-doj-unit-defending-trump-policies-court-have-quit-2025-07-14/ [https://perma.cc/88MY-DLHV] (noting that "[s]ixty-nine of the roughly 110 lawyers in the [DOJ's] Federal Programs Branch have voluntarily left the unit since President Donald Trump's election in November or have announced plans to leave . . . ").

[133] Preventing Abuses, *supra* note 2.

[134] *Id.*

[135] WARGAMES, Amazon Prime Video, at 1:48:54–1:48:58 (MGM 1983).