

IMPEACHING LEGAL ETHICS

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ABSTRACT

In the investigations, hearings, and aftermath of President Trump's first impeachment, lawyer-commentators invoked the rules of professional conduct to criticize the government lawyers involved. To a large extent, these commentators mischaracterized or misapplied the rules. Although these commentators often presented themselves to the public as neutral experts, they were engaged in political advocacy, using the rules, as private litigators often do, as a strategic weapon against an adversary in the court of public opinion. For example, commentators on the left wrongly conveyed that, under the rules, government lawyers had a responsibility to the public to voluntarily assist in the impeachment, rather than recognizing that the rules rightly called on the government lawyers in question to serve the public good by preserving the president's confidences while promoting lawful conduct. In misinforming the public about the nature of the law governing lawyers, these commentators made it more difficult to hold lawyers accountable in the future and undermined public confidence in the credibility of the profession.

The law regulating lawyers' professional conduct, popularly known as "legal ethics," is a critical aspect of the rule of law. To hold lawyers accountable to the public, however, legal ethics needs to be treated as a serious branch of law, not misconceived as an infinitely malleable set of soft principles. After examining how the rules were manipulated, the illegitimacy of doing so, and the resulting harms, this Article considers what role lawyers, and the legal profession more generally, should play, especially in politically charged moments. It draws on theoretical debates about the role of the profession to argue that the legal profession can play an important role in preserving democracy. To ensure that it continues to do so, however, lawyer-commentators, who represent the profession as a whole, have a responsibility to explain the law and professional conduct rules to the public in a fair and neutral way.

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INTRODUCTION

Litigators sometimes accuse their opposing counsel of professional improprieties to gain a strategic advantage.¹ But it is not only in courts of law where lawyers wield rules of professional conduct strategically. In the first Trump impeachment hearings, the investigations preceding them, and the aftermath, lawyer-commentators impugned the professional conduct of Special Counsel Robert Mueller and his team, a succession of Attorneys General, two White House Counsel, President Trump's private lawyers, and other lawyers, employing professional conduct rules as rhetorical weapons in the court of public opinion.² Through an examination of these recent events, this Article explores three related subjects: the nature of lawyers' public discourse, the significance of rules of professional conduct in shaping this discourse, and the legal profession's role in a democracy particularly in times of intense political conflict.

We acknowledge that the first impeachment proceedings are increasingly receding in national memory, eclipsed by the 2020 presidential election and ensuing challenges to its results and by President Trump's second impeachment as his presidency drew to a close. These

1. See *infra* note 118 and accompanying text.

2. See *infra* Part I.

later events were also significant moments for the legal profession and the nation, placing lawyers again in the national spotlight and calling attention to their conduct and to professional norms.³ But we think the first impeachment proceedings are worth revisiting and analyzing both because of lawyers' varied and controversial roles and because of the high degree of scrutiny accorded lawyers' conduct.

First, informed by our own occasional experience commenting in the media,⁴ this Article considers lawyers' role during the first Trump impeachment proceedings as public commentators on issues of law and, particularly, on the legal profession. Its detailed analysis of lawyers' commentary suggests that in the public media, lawyers were serving as advocates for favored political positions, not as objective spokespeople for the legal profession, and that, consequently, claims of professional misconduct functioned as indirect criticisms of other lawyers for taking the wrong side. It argues that lawyers have a social responsibility, when commenting publicly about other lawyers' professional conduct, to speak with some degree of care, even if doing so may blunt the professional conduct rules' rhetorical impact. If lawyers want to question other lawyers' decision to serve a disfavored client or cause, they are free to do so, but they should not mask that criticism as unfounded claims of professional misconduct.

Second, this Article addresses how the legal profession's rules define lawyers' public role and responsibilities. It shows that commentators' instrumental use of the rules to make a political point often led them to distort or mischaracterize the rules, an approach that unfortunately played into the misconception that the legal profession's norms are subjective and that professional conduct rules are malleable. In general, the body of law governing lawyers, popularly known as "legal ethics," did not support commentators' claims that lawyers in the impeachment proceedings were transgressing. By distorting the

3. Lawyers who brought election challenges have been subject to sanction motions and referred to disciplinary authorities for allegedly filing frivolous pleadings and lying. One prominent lawyer, Rudolph Giuliani, was suspended from law practice on an interim basis for knowingly making false statements regarding the legitimacy of the election. *See generally* Matter of Rudolph W. Giuliani, 146 N.Y.S.3d 266 (2021).

4. We have authored and co-authored articles on legal matters in the popular press, including some related to the impeachment proceedings, and have occasionally been interviewed by print and television news media; additionally, Professor Roiphe comments on Twitter and is a legal news contributor at CBS News. For an example of the op-eds, see Rebecca Roiphe, *Will the Real Bill Barr Please Stand Up*, POLITICO (Jan. 16, 2019), <https://www.politico.com/magazine/story/2019/01/16/william-barr-trump-attorney-general-confirmation-hearings> [https://perma.cc/9SMG-C2GF] -224022/; Rebecca Roiphe & Bruce A. Green, *Pardoning Paul Manafort Might Not Be Such a Bad Idea if Donald Trump Wants to Take a Risk*, USA TODAY (Aug. 27, 2018), <https://www.usatoday.com/story/opinion/2018/08/27/paul-manafort-convicted-trump-pardon-obstruction-justice-column/1083646002/> [https://perma.cc/3CXQ-7DDW].

professional standards, commentators threaten to undermine the utility of the rules in defining acceptable lawyer conduct and fail to fulfill the profession's role in promoting public values.

Third, the Article seeks to explain what that role is, especially in moments of intense political conflict. Commentary by lawyers, who drew on their presumed expertise and objectivity, invoked professional conduct rules to accuse some lawyers involved of misconduct. In particular, a significant strand of criticism, coming from the left, implied that government lawyers failed in their obligations to serve the public. We argue that this critique misperceived the governing professional norms, and that in our democracy, government lawyers best serve the public by promoting legality and by abiding by their fiduciary duties, not by substituting their own idea of the public's best interest for that of elected officials who are authorized to decide on the government's behalf. As spokespeople for the profession, lawyer-commentators should embody this ideal by explaining the legal standards and the professional conduct rules as objectively as possible—pointing out where lawyers and public actors have departed from them.

Along the way, the Article explicates tensions between different moral systems and rhetorical approaches and discusses what this clash can show us about the role of lawyers in American politics and public discourse. On one hand, lawyers are ordinarily subject to the special morality of the legal profession which presupposes a particular custom, approach, and style of rhetoric that, although typically partisan and subjective, values accuracy and clarity. On the other hand, politicians and pundits are governed by a less well-defined code that accommodates a less rigorous rhetorical style. For example, political messaging (also known as “spin”) contemplates exaggeration if not outright lying.⁵ When lawyers appear in court, rules of procedure structure and restrict their discourse and a judge enforces the rules, but there are virtually no restraints (other than libel law) on social media, cable news shows and other media.⁶ As a consequence, legal narratives differ from political narratives in degree if not kind. This raises the question of which set of normative expectations should govern lawyers commenting on political events: As legal professionals, should

5. See Devlin Barrett, *Giuliani Told Agents It Was Okay to 'Throw a Fake,' During Political Campaign*, WASH. POST (Aug. 11, 2021, 4:36 PM), https://www.washingtonpost.com/national-security/giuliani-fbi-surprise-fake/2021/08/11/754e9b4c-fabc-11eb-9e0e-97e29906a970_story.html; David Greenberg, *Five Myths About Political Spin*, WASH. POST (Mar. 18 2016), https://www.washingtonpost.com/opinions/five-myths-about-spin/2016/03/18/eb8153d2-ecac-11e5-a6f3-21ccdbc5f74e_story.html [<https://perma.cc/WWE4-FPMT>].

6. Libel law is extremely deferential to defendants in cases where the plaintiff is a public figure, even a limited-purpose public figure. See, e.g., *Gertz v. Robert Welch*, 418 U.S. 323, 345 (1974).

these lawyer-commentators adhere to norms governing professional rhetoric or to the looser standards that apply to advocates in the political arena?

There is an important distinction between professional conduct rules that dictate lawyer behavior and professional norms that provide looser guides to conduct. Norms derive in part from the rules of professional conduct but cannot be neatly reduced to the enforceable provisions. Norms refer to the practice and expectation of the professional community, while rules set the minimum of acceptable lawyer conduct. Of course, the two are related, but there are norms of behavior that are not captured by a specific rule.⁷ We highlight this distinction as we argue that some lawyer-commentators themselves betrayed the norms of the profession by accusing others of professional rule violations. In critiquing these commentators, we do not suggest that the commentators themselves deserve to be disciplined, but rather that they fell short of the expectations of the professional community in a damaging way.

This exploration begins in Part I with a discussion of how commentators and others invoked professional conduct rules in public discourse relating to the 2019-20 presidential impeachment proceedings. The bottom line is that there was a lot of loose talk. Commentators often made assertions about the purported professional misconduct of lawyers based on factual conjecture and misunderstandings about what the rules mean. Discussions of professional conduct rules were more likely to obfuscate than to illuminate.

In Part II, we distinguish between professional rhetoric and political rhetoric and argue that when lawyers serving as political commentators discussed professional conduct rules, they were often employing a political rather than professional style of rhetoric while capitalizing on public expectations that they would be more measured. This led them to employ the rules instrumentally to achieve political objectives, but unreliably and misleadingly so. This, we argue, betrayed professional norms of behavior that ought to govern lawyers in these circumstances. As we discuss, this blending of different professional standards erodes the legitimacy of the professional conduct rules and the legal profession as a whole. We conclude that using professional conduct rules to serve political goals weakens what ought to be neutral principles. The risk is that when it becomes appropriate to discipline high-profile lawyers, including political actors, it will seem as if these rules are being used as a tool in a political vendetta. This, in turn, undermines the legitimacy of the system of lawyer regulation.

7. W. Bradley Wendel, *Lawyers' Constrained Fiduciary Duties: A Comment on Paul R. Tremblay*, *At Your Service: Lawyer Discretion to Assist Clients in Unlawful Conduct*, 70 *FLA. L. REV.* 7, 8-9 (2018).

In Part III, we examine what the impeachment proceedings and the accompanying commentary can tell us about the role of lawyers in American society, particularly during times of intense political strife. Impeachment proceedings themselves are a hybrid event, blending politics and law in an unusual way. This can put a strain on both the lawyers involved and those trying to define and explain their role and the rules governing their behavior. We use this discussion to contribute to a debate about professional regulation and the extent to which it permits lawyers to rely on their individual sense of conscience. More broadly, this analysis helps us better understand the actual and imagined role of lawyers in the American polity, enabling us to weigh in on the debate about what role lawyers play in government and more generally in society. We conclude that at these politically charged moments, the legal profession should be particularly careful to adhere to its area of expertise and professional authority and serve to educate rather than obfuscate about the law and the obligations of the legal profession.

I. THE ROLE OF ETHICS RULES IN COMMENTARY ON THE IMPEACHMENT PROCEEDINGS

For almost three years, the nation debated a legal and political question: Had President Trump committed crimes or abuses of power warranting his removal from office? Beginning in May 2017, Special Counsel Robert Mueller investigated whether the Trump campaign was complicit in Russia's efforts to influence the 2016 presidential election and whether, following the election, Trump or others had tried to obstruct federal investigators.⁸ In September 2019, after Mueller released his report, a congressional committee began examining whether Mueller's evidence and findings called for impeaching the President, and it launched its own inquiry into whether President Trump used his office to solicit Ukraine's help to influence the next presidential election.⁹ The official proceedings eventually swept in federal grand jurors and the federal judiciary, the Special Prosecutor's office and the Department of Justice, the White House and other executive agencies, the House of Representatives, which impeached President Trump in

8. See 1 ROBERT S. MUELLER, III, REPORT OF THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION, 12-15 (2019) (summarizing investigation); see also KEVIN SULLIVAN & MARY JORDAN, TRUMP ON TRIAL: THE INVESTIGATION, IMPEACHMENT, ACQUITTAL AND AFTERMATH (2020) (chronicling the impeachment investigation and the impeachment proceedings); JEFFREY TOOBIN, TRUE CRIMES AND MISDEMEANORS: THE INVESTIGATION OF DONALD TRUMP (2020) (recounting the Mueller investigation); ANDREW WEISSMAN, WHERE LAW ENDS: INSIDE THE MUELLER INVESTIGATION (2020) (recounting Mueller investigation from the perspective of a member of the prosecution team).

9. See IMPEACHMENT OF DONALD J. TRUMP PRESIDENT OF THE UNITED STATES: H. R. 755 BEFORE THE H. COMM. ON THE JUDICIARY, 116TH CONG. H.R. REP. NO. 116-346, at 5-27 (2019) (summarizing House investigation).

December 2019, and the Senate, which acquitted him in February 2020 following a trial where Chief Justice Roberts presided but no witness testified.¹⁰ Mueller's staff scrutinized the conduct of other associates of President Trump, some of whom were prosecuted, but it was President Trump's conduct that was central to this succession of proceedings, which, for brevity's sake and, with the benefit of hindsight, we call "the impeachment proceedings." Throughout these proceedings, President Trump played multiple roles, including as a subject of the criminal investigation and congressional inquiry, a public defender of his own past conduct, and a critic of investigators and witnesses who questioned his narrative.¹¹

Although President Trump was not a lawyer, many others with roles in the impeachment proceedings were. Mueller and the lawyers on his staff served as public prosecutors. As Attorneys General, first Jeff Sessions, Michael Whitaker, and then Bill Barr functioned both as government lawyers and as the public officials overseeing the Department of Justice.¹² After Attorney General Sessions recused himself, Deputy Attorney General Rod Rosenstein appointed Robert Mueller to serve as the Special Counsel and oversaw Mueller's investigation.¹³ As White House counsel, first Don McGahn and then Pat Cipollone represented the President, presumably in his official capacity, while Trump's private lawyers, including Ty Cobb, Alan Dershowitz, Rudolph Giuliani, Marc Kasowitz, Jay Sekulow, and Ken Starr, advised him or advocated for him personally.¹⁴ Some, such as

10. See SULLIVAN & JORDAN, *supra* note 8.

11. See, e.g., Complaint, *Vindman v. Trump, Jr. et al*, Civ. Action No. 1:22-cv-00257 (D.D.C. Feb. 2, 2022), https://storage.courtlistener.com/recap/gov.uscourts.dcd.239743/gov.uscourts.dcd.239743.1.0_1.pdf [<https://perma.cc/DVK6-TBF6>] at para. 100 (displaying tweet in which President Trump characterized his call with Ukraine's leader as "a perfect conversation with a foreign leader"); *id.* at para. 129, 172 & 199 (quoting President Trump's verbal attacks on Lt. Col. Vindman following Vindman's congressional testimony).

12. Noah Weiland, Emily Cochrane, & Troy Griggs, *Robert Mueller and His Prosecutors: Who They Are and What They've Done*, N.Y. TIMES (Jan. 25, 2019), <https://www.nytimes.com/interactive/2018/11/30/us/mueller-investigation-team-prosecutors.html>. For a description of the role of the Attorney General, see *Organization, Mission & Functions Manual: Attorney General, Deputy and Associate*, U.S. DEP'T JUST., <https://www.justice.gov/jmd/organization-mission-and-functions-manual-attorney-general#:~:text=The%20principal%20duties%20of%20the,United%20States%20in%20legal%20matters.&text=Furnish%20advice%20and%20opinions%2C%20formal,government%2C%20as%20provided%20by%20law> (last visited Dec. 29, 2021).

13. Fred Wertheimer & Donald Simon, *Sessions' Recusal and Rosenstein's Appointment—Both Were Legally Required*, JUST SECURITY (Sept. 17, 2018), <https://www.justsecurity.org/60757/sessions-recusal-rosensteins-appointment-special-counsel-both-legally-required> [<https://perma.cc/FC5B-FWSX>].

14. Franco Ordoñez & Tamara Keith, *Starr, Dershowitz, Ray: Trump Leans on High-Wattage Lawyers for Impeachment*, NPR (Jan. 14, 2020, 5:00 AM), <https://www.npr.org/2020/01/14/795929276/here-are-the-lawyers-who-will-defend-president-trump-against-impeachment> [<https://perma.cc/7MB7-YQ49>]; Zachary B. Wolf, *Trump's Ukraine Scandal: Who's Who?*, CNN POLITICS (Nov. 26, 2019, 2:07 PM), <https://www.cnn.com/2019/09/28/politics/trump-ukraine-scandal-people/index.html>.

Giuliani, seemed to combine the conventional behind-the-scenes role as one of Trump's personal legal advisors with the role of public spokesperson. Many members of Congress with key roles in the proceedings were also lawyers, including Adam Schiff, who spearheaded the impeachment investigation in the House and the prosecution in the Senate.¹⁵ The lawyer-legislators presumably drew on their legal experience and abilities although they were not representing a client.

The impeachment hearings in Congress also included lawyers who served as chief investigators for the two parties in the House Intelligence Committee: Daniel S. Goldman for the majority and Steven R. Castor for the minority.¹⁶ There were also law professors called as legal experts. The Democrats picked Professors Michael Gerhardt, Pamela Karlan, and Noah Feldman,¹⁷ who wrote a column in Bloomberg on legal issues.¹⁸ The Republicans chose Professor Jonathan Turley, who had worked as a legal analyst for CBS and NBC News.¹⁹

A trial commenced in the court of public opinion long before the Senate trial. While events unfolded, the media scrutinized Mueller's investigation of Trump, prosecutions of others, and eventual report, as well as the subsequent congressional hearings. The President defended himself on social media and in press conferences,²⁰ and many of his supporters, including some of his lawyers, took to both Twitter and the airwaves in the President's defense.²¹

15. See Wolf, *supra* note 14.

16. Eileen Sullivan, *Partisan Lawyers Seize Leading Roles in Impeachment Hearings*, N.Y. TIMES (Nov. 19, 2019), <https://www.nytimes.com/2019/11/19/us/politics/house-impeachment-lawyers-goldman-castor.html> [<https://perma.cc/473R-MU4U>].

17. Jacqueline Thomsen, *Meet the Constitutional Law Scholars Who Will Help the House Figure Out Impeachment*, NAT'L L. J. (Dec. 2, 2019, 7:08 PM), <https://www.law.com/nationaljournal/2019/12/02/meet-the-constitutional-law-scholars-who-will-help-the-house-figure-out-impeachment/> [<https://perma.cc/7T55-UH34>].

18. Jonathan Bernstein, *Four Legal Experts Weighed in on Impeachment. Did it Matter?*, BLOOMBERG (Dec. 5, 2019, 6:32 AM), <https://www.bloomberg.com/opinion/newsletters/2019-12-05/four-legal-experts-weighed-in-on-impeachment-did-it-matter-k3sn5ezr> [<https://perma.cc/Z557-RFGD>].

19. Devan Cole, *Anti-Impeachment Witness Says He's Received Threats Since Judiciary Committee Hearing*, CNN (Dec. 5, 2019, 6:19 PM), <https://www.cnn.com/2019/12/05/politics/jonathan-turley-impeachment-expert-congress/index.html> [<https://perma.cc/ZMB3-WCEL>].

20. See Daniel Dale, *Fact-checking Trump's Barrage of Anti-impeachment Tweets*, CNN POL. (Nov. 12, 2019), <https://edition.cnn.com/2019/11/12/politics/trump-impeachment-defense-tweets/index.html>; Maggie Miller & Chris Mills Rodrigo, *Trump Makes Social Media a Player in Impeachment*, THE HILL (Nov. 17, 2019, 7:00 AM), <https://thehill.com/policy/technology/470751-trump-makes-social-media-player-in-impeachment> [<https://perma.cc/DE6A-5HB7>]; Shannon Pettypiece, *Trump's Senate Defense So Far Echoes His Twitter Feed*, NBC NEWS (Jan. 25, 2020, 4:09 PM), <https://www.nbcnews.com/politics/trump-impeachment-inquiry/trump-s-senate-defense-so-far-echoes-his-twitter-feed-n1123101> [<https://perma.cc/LN9N-3L9V>].

21. See Conrad Duncan, *Russian State TV Airs Rudy Giuliani Interview After Trump Lawyer Spreads Ukrainian Conspiracy Theories*, THE INDEPENDENT (Dec. 16, 2019), <https://www.independent.co.uk/news/world/americas/us-politics/giuliani-trump-impeachment-interview-russia-state-tv-one-america-conspiracy-a9248796.html>

The public discussion covered more than the conduct of participants in, and witnesses to, the events addressed in Mueller's Report and the two articles of impeachment. Commentators also critiqued the lawyers and legislators who conducted the investigation or defended against it. Before Mueller and his team finished working, the President and his sympathizers denounced them, hoping to discredit their eventual findings.²² In turn, the President's detractors and others scrutinized both Trump's private lawyers and lawyers in the Trump Administration.²³ Their subjects included Attorney General Bill Barr, whose allegedly misleading characterizations of the Mueller Report before it was released to the public later became part of a well-documented disciplinary complaint signed by leaders of the District of Columbia bar.²⁴

Because the impeachment proceedings raised innumerable questions about the law and legal processes, yet another group of lawyers had a pivotal role as public commentators. They are the subject of this Article. Besides explicating the impeachment proceedings and analyzing evidence as it came to light, lawyer-commentators critiqued the conduct of lawyers involved in the proceedings, including Mueller and his staff,²⁵ successive Attorneys General and their staff,²⁶ two White

[<https://perma.cc/T5AU-3HR2>]; Brian Fung & Donie O'Sullivan, *How Social Media Set The Agenda In The First Impeachment Hearing*, CNN BUSINESS (Nov. 14, 2019, 6:04 PM), <https://www.cnn.com/2019/11/14/tech/social-media-impeachment-hearing/index.html> [<https://perma.cc/U7MX-Q6M6>].

22. See *infra* note 25 (citing op-eds criticizing Mueller investigation).

23. See *infra* notes 26-28 (citing op-eds criticizing government lawyers and Trump's personal lawyers).

24. See Letter from 27 Members of the Washington, D.C. Bar to Hamilton P. Fox III, Office of Disciplinary Counsel Re: Professional Responsibility Investigation of William P. Barr 14-16 (July 22, 2020), <https://www.justsecurity.org/wp-content/uploads/2020/07/Professional-Responsibility-Investigation-of-William-P.-Barr-Complaint-DC-Bar-Association-July-22-2020.pdf> [<https://perma.cc/M5YB-6XQM>] (asserting that Barr made multiple misleading statements regarding the Mueller report).

25. See, e.g., Alan Dershowitz, *Dershowitz: Shame on Robert Mueller for Exceeding His Role*, THE HILL (May 29, 2019, 1:45 PM), <https://thehill.com/opinion/judiciary/445983-dershowitz-shame-on-robert-mueller-for-exceeding-his-role#XO7RNRd2GnU.twitter> [<https://perma.cc/Y62W-V4HX>]; Larry Klayman, *Fire Mueller Now, Mr. President!*, RENEW AM. (July 24, 2017), <http://www.renewamerica.com/columns/klayman/170724> [<https://perma.cc/3L6G-7XYL>]; Jack Marshall, *Robert Mueller's Bizarre and Unethical Public Statement*, ETHICS ALARMS (May 29, 2019), <https://ethicsalarms.com/2019/05/29/robert-muellers-bizarre-and-unethical-public-statement/> [<https://perma.cc/UPG9-E9A2>]; J. Marsolo, *Mueller Should Have Refused the Special Counsel Appointment*, AM. THINKER (July 30, 2019), https://www.americanthinker.com/blog/2019/07/mueller_should_have_refused_the_special_counsel_appointment.html [<https://perma.cc/YF6Q-HHE7>].

26. See, e.g., Norman Eisen & Virginia Canter, *Rod Rosenstein Has No Conflict*, THE HILL, (Oct. 22, 2018, 12:00 PM), <https://thehill.com/opinion/judiciary/412517-rod-rosenstein-has-no-conflict> (maintaining that Deputy Attorney General Rod Rosenstein was not required by Rule 1.7 or Rule 3.7 to recuse himself from overseeing the Mueller investigation); Stephen Gillers & Ryan Goodman, *Top Legal Ethics Expert (Stephen Gillers) Writes: Whitaker Should Be Recused*, JUST SECURITY (Nov. 8, 2018), <https://www.justsecurity.org/61395/top-legal-ethics-professional-responsibility-expert-writes-whitaker-recuse/> [<https://perma.cc/QS7P-8TCW>] (arguing that acting Attorney General, Michael Whitaker,

House counsel and their staff,²⁷ the President's private lawyers,²⁸ the lawyer-legislators,²⁹ and the legal experts.³⁰ These commentators were not necessarily disinterested or objective—indeed, they were often partisan, and some may have regarded their commentary as a form of public advocacy.³¹ Among them were law professors,³² former prosecutors,³³ former government ethics lawyers,³⁴ lawyer-journalists,³⁵ and lawyer-bloggers.³⁶ They also included a disbarred lawyer: John Dean, who had been President Nixon's White House Counsel. He drew on his

should recuse himself from overseeing the Mueller investigation because of his repeated expressions of hostility to the investigation).

27. See, e.g., Michael J. Gerhardt, *Introduction: Legal Ethics in the Age of Trump*, 98 N.C. L. REV. 1029, 1036-37 (2020) (identifying “troublesome conduct” of White House Counsel Cipollone and Deputy White House Counsel Patrick Philbin and Michael Purpura); Colin Kalmbacher, *Calls for Pat Cipollone's Disbarment Swell After 'Brazen Lack of Candor' During Impeachment Trial*, LAW & CRIME (Jan. 22, 2020, 5:31 PM), <https://lawandcrime.com/impeachment/calls-for-pat-cipollones-disbarment-swell-after-brazen-lack-of-candor-during-impeachment-trial/> [https://perma.cc/B6ZR-GKS8]; Kimberly Wehle, *Trump's Government Lawyers Don't Know Who Their Real Client Is*, THE ATLANTIC (Oct. 19, 2019), <https://www.theatlantic.com/ideas/archive/2019/10/government-lawyers-don-t-work-trump/600346/>.

28. See, e.g., Gerhardt, *supra* note 27, at 1036-37 (identifying “troublesome conduct” of Jay Sekulow and Alan Dershowitz); Andrew Kent, *Legal Ethics Questions for Trump's Personal Lawyer*, LAWFARE (June 12, 2017, 2:32 PM), <https://www.lawfareblog.com/legal-ethics-questions-trumps-personal-lawyer> [https://perma.cc/AU7A-TY4U] (discussing “[c]oncerns about the role and conduct of President Trump's personal defense lawyer for the Russia investigations, Marc Kasowitz”).

29. See, e.g., Elad Hakim, *Why Adam Schiff Is Too Biased to Manage Trump's Impeachment Trial*, THE FEDERALIST (Jan. 17, 2020), <https://thefederalist.com/2020/01/17/why-adam-schiff-is-too-biased-to-manage-trumps-impeachment-trial/> [https://perma.cc/BP9L-FYX5].

30. See, e.g., Matt Margolis, *Democrats' 'Legal Expert' Called for Trump's Impeachment Over a Tweet in March 2017*, PJ MEDIA (Dec. 3, 2019, 9:49 AM), <https://pjmedia.com/news-and-politics/matt-margolis/2019/12/03/democrats-legal-expert-called-for-trumps-impeachment-over-a-tweet-in-march-2017-n70830> [https://perma.cc/NLT9-748D]; Elie Mystal, *The Republicans' Star Impeachment Scholar is a Shameless Hack*, THE NATION (Dec. 5, 2019), <https://www.thenation.com/article/archive/turley-impeachment-hypocrisy/> [https://perma.cc/ZZZ9-HBAB].

31. By engaging in advocacy while presenting themselves as experts, these commentators betrayed norms of transparency reflected in various professional conduct rules, see, e.g., MODEL RULES OF PRO. CONDUCT r. 3.9, though none of the rules specifically covered this particular situation.

32. See, e.g., Gerhardt, *supra* note 27; Stephen Gillers, *Impeachment Trial and Legal Ethics: Cipollone Should Be a Witness, Not a Trump Lawyer*, JUST SECURITY (Jan. 27, 2020), <https://www.justsecurity.org/68264/impeachment-trial-and-legal-ethics-pat-cipollone-should-be-a-witness-not-a-trump-lawyer/> [https://perma.cc/A8L6-JYNB] [hereinafter Gillers, *Impeachment*]; Kent, *supra* note 28.

33. See Wehle, *supra* note 27.

34. See, e.g., Eisen & Canter, *supra* note 26.

35. See, e.g., Aaron Keller, *Ex-Trump Attorney John Dowd May Have Committed Professional Misconduct (If This Is True)*, LAW & CRIME (Mar. 23, 2018, 2:12 PM), <https://lawandcrime.com/trump/ex-trump-attorney-john-dowd-may-have-committed-professional-misconduct-if-this-is-true/> [https://perma.cc/4RAT-KSXS].

36. See, e.g., Klayman, *supra* note 25; Marshall, *supra* note 25.

experience as a participant in the 1972-74 Watergate scandal that culminated in Nixon's resignation from the presidency as well the criminal conviction of Dean himself, Attorney General John Mitchell, and other lawyers with roles in the Watergate break-in or cover-up.³⁷

This Part examines the public critique of and by lawyers during the impeachment proceedings. Its focus is on commentary referring to rules of professional conduct. Although critics often invoked more broadly applicable standards such as government ethics rules or common morality,³⁸ they sometimes invoked rules that govern only lawyers.³⁹ In general, the references were to provisions of the Model Rules of Professional Conduct ("Model Rules"),⁴⁰ which were drafted by the American Bar Association as a model for the rules that state judiciaries adopt to govern lawyers licensed in their states.⁴¹

In discussing the lawyers involved in the impeachment proceedings, commentators referred to more than a dozen different rules. Although some writings defended lawyers from attack,⁴² most asserted or

37. See *Lessons from the Mueller Report: Presidential Obstruction and Other Crimes: Hearing Before the H. Comm. on the Judiciary Hearings*, 116th Cong. (2019) (statement of John W. Dean) <https://docs.house.gov/meetings/JU/JU00/20190610/109602/HHRG-116-JU00-Wstate-DeanJ-20190610.pdf> [<https://perma.cc/EXE9-JVH5>].

38. See, e.g., Letter from Tom Fitton, President, Jud. Watch, to David Skaggs, Chairman, Off. of Cong. Ethics, Re: Complaint Against Rep. Adam Schiff Concerning Contacts with Congressional Witnesses (Mar. 11, 2019), <https://www.judicialwatch.org/documents/complaint-against-rep-adam-schiff-03-11-19/> [<https://perma.cc/95DK-4WK5>]; Letter from Rep. Matt Gaetz, U.S. Cong., to Rep. Theodore Deutch, Chairman, and Rep. Kenny Marchant, Ranking Member, H. Comm. on Ethics, (Oct. 30, 2019), https://gaetz.house.gov/sites/gaetz.house.gov/files/wysiwyg_uploaded/Gaetz%20Ethics%20Complaint%201030_0.pdf [<https://perma.cc/PT4U-FVE2>] (requesting ethics investigation of Rep. Adam Schiff for conduct of House investigation).

39. We acknowledge that there was often not a clear line between the use of the rules in formal proceedings and their use in public discourse, since, on occasion, participants in the proceedings themselves made reference to the rules, arguably with an eye less toward influencing the proceedings than making a public point. Likewise, some critics complained to the disciplinary authorities about lawyer-participants and publicized the complaints, perhaps with greater hope of evoking a reaction from the public than from a disciplinary authority that is overseen by the judiciary.

40. MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 1983) (as amended). For a critical review of the Model Rules drafting process, see generally Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 L. & SOC. INQUIRY 677 (1989).

41. For an example of how the Model Rules are adapted by different state jurisdictions, see Kent, *supra* note 28 (reviewing rules potentially applicable to statements by President Trump's personal lawyer, Marc Kasowitz).

42. See, e.g., Alison Frankel, *Bob Mueller and the Kushner Client Conflict Question*, REUTERS (May 31, 2017, 2:33 PM), <https://www.reuters.com/article/us-otc-kushner-idUSKBN18R2SU> [<https://perma.cc/DZ5S-9A7W>]; William J. Hughes Jr., *A Better Alternative to Holding McGahn in Contempt*, REALCLEAR POL. (May 21, 2019), https://www.realclearpolitics.com/articles/2019/05/21/a_better_alternative_to_holding_mcgahn_in_contempt_140381.html# [<https://perma.cc/Q3XD-NVMM>]; Aaron Keller, *Trump's List of Mueller's Supposed 'Conflicts of Interest' is Laughable*, LAW & CRIME (Jan. 25, 2018, 10:26 PM), <https://lawandcrime.com/opinion/trumps-list-of-muellers-supposed-conflicts-of-interest-is-laughable/> [<https://perma.cc/2PP6-33NW>]; Elura Nanos, *The Problem with Democrats' Demands of White House Counsel Pat Cipollone*, LAW & CRIME (Jan. 21,

implied that the lawyer in question violated a rule. Some lawyer-observers, going a step further, filed and published grievances against a lawyer participating in the proceedings based on public accounts.⁴³ Among the rules invoked were several governing the lawyer-client relationship, such as those on the duties of competence (Rule 1.1)⁴⁴ and confidentiality (Rule 1.6),⁴⁵ and on conflicts of interest (Rule 1.7).⁴⁶ Commentators also referred to rules governing lawyers' work as advocates, including those on litigator's extrajudicial statements (Rule 3.6)⁴⁷ and prosecutors' extrajudicial statements in particular (Rule 3.8(f)).⁴⁸ The array of rules invoked in commentary also included those

2020, 1:36 PM), <https://lawandcrime.com/opinion/the-problem-with-democrats-demands-of-white-house-counsel-pat-cipollone/> [<https://perma.cc/E93C-43BV>]; Jonathan Turley, *Pelosi Questions Why The President's Lawyers Are Not Disbarred*, JONATHAN TURLEY (Jan. 31, 2020), <https://jonathanturley.org/2020/01/31/pelosi-questions-why-the-presidents-lawyers-are-not-disbarred/>; Jonathan Turley, *Gerhardt: The Entire White House Defense Team Will Face Bar Charges*, JONATHAN TURLEY (Feb. 2, 2020), <https://jonathanturley.org/2020/02/02/gerhardt-the-entire-white-house-defense-team-will-face-bar-charges/comment-page-4/> [<https://perma.cc/78NU-KAC9>].

43. See, e.g., Alex Costello, *LI Rep. Kathleen Rice Calls For Rudy Giuliani To Be Disbarred*, PATCH (Oct. 21, 2019, 4:37 PM), <https://patch.com/new-york/gardencity/rep-kathleen-rice-calls-rudy-giuliani-be-disbarred/>; Jerry Iannelli, *Miami-Dade Dems File Bar Complaint Against Matt Gaetz for Obstructing Impeachment*, MIA. NEW TIMES (Feb. 6, 2020, 5:53 PM), <https://www.miaminewtimes.com/news/matt-gaetz-hit-with-bar-complaint-over-trump-impeachment-inquiry-11492069> (reporting filing of grievance against Rep. Gaetz for conduct in impeachment proceedings). For a discussion of the filing of disciplinary complaints against lawyers in the Trump administration, see Brian Sheppard, *The Ethics Resistance*, 32 GEO. J. LEGAL ETHICS 235, 305 (2019) (arguing "that the growing number of ethics complaints filed against high-ranking lawyers in the Trump Administration not only form a novel and important movement, but are also a legitimate and sensible use of the toolset provided by the law to deter or punish lawyer misconduct.").

44. See Marsolo, *supra* note 25 (asserting that Mueller had a duty under Rule 1.1 to decline to serve as Special Counsel because of his poor health).

45. See Frank Bowman, *Giuliani Backtracks . . . Too Late*, IMPEACHABLE OFFENSES? (Jan. 21, 2019), <https://impeachableoffenses.net/tag/rudolph-giuliani/> (raising the possibility that Giuliani violated Trump's confidences in an interview with the New York Times); Bernie Burk, *Adventures in Ethics with All the President's Lawyers (or WTF at the BLT)*, FAC. LOUNGE (Sept. 21, 2017, 12:34 AM), <https://www.thefacultylounge.org/2017/09/adventures-in-ethics-with-all-the-presidents-lawyers-or-wtf-at-the-bl.html> [<https://perma.cc/FEU3-HDJR>] (discussing whether Trump's private lawyers, Ty Cobb and John Dowd, breached their duty of confidentiality by discussing the Russia investigation loudly enough to be overheard by a reporter); Todd Presnell, *Two Trump Lawyers and a NYT Reporter Walk into a Bar...*, PRESNEL ON PRIVILEGES (Sept. 21, 2017), <https://presnellonprivileges.com/2017/09/21/two-trump-lawyers-and-a-nyt-reporter-walk-into-a-bar/> [<https://perma.cc/Q5DK-NBE5>] (same).

46. See, e.g., Eisen & Canter, *supra* note 25; Norman Eisen et al., *Spare the Rod*, POLITICO, (June 7, 2018), <https://www.politico.com/magazine/story/2018/06/07/spare-the-rod-218660> [<https://perma.cc/PM2G-VY5G>]; Klayman, *supra* note 25.

47. See Marshall, *supra* note 25 (arguing that Mueller's statement after releasing his report violated Rule 3.6).

48. See Sean Davis, *Mueller Just Proved His Entire Operation Was A Political Hit Job That Trampled The Rule Of Law*, THE FEDERALIST (May 29, 2019), <https://thefederalist.com/2019/05/29/mueller-just-proved-his-entire-operation-was-a-political-hit-job-that-trampled-the-rule-of-law/> [<https://perma.cc/BZ9L-9TC6>] (asserting that Mueller's statement after releasing his report violated Rule 3.8(f)); see also World Tribune Staff, *Former Prosecutors Say Mueller Statement Violated American Bar Association Rule*, WORLD TRIB.

on assisting and exploiting clients' and others' false statements (Rules 3.3(a)(3), 3.4(b), and 8.4(a)),⁴⁹ on exercising independent professional judgment (Rule 2.1),⁵⁰ on relations with unrepresented third parties (Rule 4.3),⁵¹ on improperly influencing public officials (Rule 8.4(e)),⁵² and on conduct prejudicial to the administration of justice (Rule 8.4(d)).⁵³

This Part focuses on yet other professional conduct rules that commentators cited. Section A examines claims that lawyers in the Trump Administration violated Rule 1.13, the rule governing the representation of entity clients.⁵⁴ Section B discusses accusations that Deputy Attorney General Rod Rosenstein, Representative Adam Schiff, and White House Counsel Pat Cipollone violated Rule 3.7, which forbids lawyers from serving simultaneously as trial advocates and witnesses.⁵⁵ Section C addresses allegations that lawyers in the impeachment proceedings made false statements and engaged in misleading conduct in violation of Rules 3.3(a)(1), 4.1(a), and 8.4(c).⁵⁶ In each case, the commentary, shedding more heat than light, did little to illuminate either the lawyers' conduct or the professional standards governing their conduct.

(May 30, 2019), <https://www.worldtribune.com/prosecutors-say-mueller-statement-violated-american-bar-association-rule/> [<https://perma.cc/X63R-BLYE>].

49. See, e.g., Kent, *supra* note 28.

50. See Wehle, *supra* note 27.

51. See, e.g., Kent, *supra* note 28 (suggesting that Marc Kasowitz, one of Trump's personal attorneys, violated Rule 4.3 by advising Trump's aides to talk as little as possible about the matter and that it is unnecessary for them to hire their own lawyers).

52. See Keller, *supra* note 35; Aaron Keller, *In Boasting About Trump Role, Rudy Giuliani Came Close to Breaking Ethics Rules*, LAW & CRIME (Apr. 20, 2018, 9:32 AM), <https://lawandcrime.com/legal-analysis/in-boasting-about-trump-role-rudy-giuliani-came-close-to-breaking-ethics-rules/> [<https://perma.cc/4RAT-KSXS>].

53. Stephen Gillers, *Mueller Report and the President's Personal Lawyers: Did They Violate Criminal Law and Ethical Rules?*, JUST SECURITY (Apr. 24, 2019), <https://www.justsecurity.org/63740/mueller-report-and-the-presidents-personal-lawyers-did-they-violate-criminal-law-and-ethical-rules/> [<https://perma.cc/F6PD-MDM7>] (discussing whether Giuliani engaged in conduct prejudicial to the administration of justice, when Paul Manafort may have considered cooperating with prosecutors, by floating the possibility that the President would pardon Manafort) [hereinafter Gillers, Mueller Report].

54. See *infra* Part I.A.

55. See *infra* Part I.B; see also Eisen et al., *supra* note 46; Gillers, *Impeachment*, *supra* note 32; Hakim, *supra* note 29; Cameron Tousi, *INSIGHT: Are There Attorney Ethics Implications for Trump's Lawyer*, BLOOMBERG L. (Feb. 21, 2020, 4:00 AM), <https://news.bloomberglaw.com/us-law-week/insight-are-there-attorney-ethics-implications-for-trumps-lawyer> [<https://perma.cc/45BE-FRVK>] (discussing, after the Senate trial, whether White House Counsel Pat Cipollone, who served as Trump's lead counsel in the trial, is subject to discipline under Rule 3.7, which forbids serving as both a witness and an advocate at trial).

56. See *infra* Part I.C; see also Bowman, *supra* note 45 (raising the possibility that Giuliani lied to the New York Times); Gerhardt, *supra* note 27; Kalmbacher, *supra* note 27; Dean Obeidallah, *If Trump's Legal Team Continues to Lie in the Senate Trial, They Should Be Disbarred*, MEDIAITE (Jan. 28, 2020, 11:04 AM), <https://www.mediaite.com/opinion/if-trumps-legal-team-continues-to-lie-in-the-senate-trial-they-should-be-disbarred/> [<https://perma.cc/RR2E-HCJ7>].

A. *Government Lawyers' Duty to Report Up or Out*

At least two commentators with backgrounds in the law, John Dean and Kim Wehle, invoked the professional conduct rule relating to the work of lawyers who represent organizations. In part, they used the rule to make the point that lawyers serving in official positions in the Trump Administration were obligated to serve the public, not Trump personally. This point might easily have been made without reference to the particular norms governing lawyers, since all public officials have fiduciary duties to the public and must avoid using their position to serve anyone's private interests. But, more significantly, Dean and Wehle used the rule to argue that White House Counsel should cooperate voluntarily with congressional investigations. As discussed below, this use of the ethics rule was unjustified.⁵⁷

Dean appeared before the House Judiciary Committee in June 2019 purportedly to give historical context to the Mueller Report, drawing on his 1972 experience in the Nixon White House.⁵⁸ In his concluding remarks, however, drawing on his subsequent experience co-teaching Continuing Legal Education programs on legal ethics, Dean challenged White House Counsel Don McGahn's refusal to testify voluntarily before the committee, asserting that McGahn's "silence is perpetuating an ongoing coverup."⁵⁹ Referring to the Model Rules, Dean inveighed that, insofar as McGahn was putting Donald Trump's personal interests ahead of the public interest, McGahn misconceived his duty as a government lawyer.⁶⁰ Dean stated:

Model Rule 1.13 provides that a lawyer representing an organization represents the entity and not the individuals running the entity. Hence, it is now clear that White House Counsel represents the Office of the

57. There may have been other ethics rules that could conceivably instruct Administration lawyers to testify voluntarily. For example, Michael Gerhardt suggested that Rule 3.3(a), which forbids a lawyer from knowingly making "a false statement of fact or law to a tribunal," may have served as justification. Gerhardt, *supra* note 27, at 1035. As Gerhardt noted, a Comment to the rule recognizes that "[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation." *Id.* at 1035 n.32. It seems unlikely, however, that any Administration lawyer made the equivalent of a false statement that needed to be corrected. In the case law, silence rarely equates to a false statement, and only when the lawyer has made statements or engaged in conduct that fostered a misunderstanding on the part of the tribunal, and the lawyer's silence would reinforce the tribunal's misunderstanding. A lawyer's silence, in itself, is not equivalent to an affirmative false statement because it does not convey anything one way or the other. Moreover, a lawyer's obligation to remedy a false statement, or the equivalent, would not open the door to the lawyer's testimony. If withdrawing the false statement was not a sufficient remedy, simply correcting the false statement would almost certainly suffice.

58. Politico Staff, *Watergate's John Dean Gives Statement on Potential Trump Obstruction*, POLITICO (June 10, 2019, 2:21 PM), <https://www.politico.com/story/2019/06/10/full-text-watergate-john-dean-trump-obstruction-1358916> [<https://perma.cc/LKG4-73ZG>].

59. *Id.*

60. Keller, *supra* note 35.

Presidency and not the current occupant of that office. . . [H]is duty is to protect the Office of the Presidency, sometimes against the very person in charge of it.⁶¹

Dean claimed that McGahn was obligated to testify voluntarily to fulfill his duty under Rule 1.13 to go “up the ladder” to report wrongdoing.⁶²

In an October 2019 article, a lawyer who previously had worked on Ken Starr’s investigation of President Clinton invoked Rule 1.13 in similar fashion to criticize government lawyers, including McGahn’s successor.⁶³ Kim Wehle maintained that by “advanc[ing] a host of frivolous arguments” to justify the Administration’s unwillingness to cooperate with the congressional investigation, White House Counsel Pat Cipollone served Trump personally at the public’s expense.⁶⁴ Likewise, she asserted that Attorney General Barr had previously betrayed the public by mischaracterizing the Mueller Report’s findings before they were released, and that, along with others in the DOJ, Barr had recently done so again by “issu[ing] an irresponsible legal opinion to justify keeping the whistle-blower complaint from Congress.”⁶⁵ And, like John Dean, Wehle cited the provision of Model Rule 1.13 requiring an organization’s lawyers to go “up the ladder” when they know of wrongdoing by the organization’s representatives.⁶⁶

Wehle also asserted that the lawyers acted unethically by “[o]bstructing a congressional investigation—and fostering an office of the presidency that defies the checks and balances inherent in the Constitution.”⁶⁷ Wehle cited two other rules in support: Rule 2.1, which requires lawyers to “exercise independent professional judgment and render candid advice,” and Rule 8.4, which forbids “conduct that is prejudicial to the administration of justice.”⁶⁸ She concluded that “lawyers inside the White House and Justice Department have an ethical

61. Politico Staff, *supra* note 58.

62. *Id.* (Dean stating: “Rule 1.13 further provides that when an attorney representing an organization encounters ongoing crime or fraud, he or she must first try to solve the problem within the organization, by ‘going up the ladder’ to the highest authority that can address the problem. In a corporation, for example, the attorney would report up to the board of directors or a special committee of the board. If the problem cannot be solved internally, Model Rule 1.13 provides that an attorney may report out, . . . despite his duty of confidentiality or the attorney-client privilege. This ‘reporting out’ provision provides lawyers with leverage to stop wrongdoing if the client fails to take appropriate advice.”).

63. Wehle, *supra* note 27.

64. *Id.*

65. *Id.*

66. *Id.*; Politico Staff, *supra* note 58.

67. Wehle, *supra* note 27.

68. *Id.*

obligation to their clients to administer justice under the rule of law. But they must recognize that their client is the American public – not Donald Trump.”⁶⁹

Dean and Wehle were correct conceptually that federal government lawyers do not owe loyalty to the President personally. But the public might have grasped that general concept without reference to professional conduct rules because all public officials owe a fiduciary duty of loyalty to the public.⁷⁰ The harder question is what loyalty to the public entails. One might assume that, for White House Counsel, loyalty to the public is generally expressed by following the instructions of, and acting in the interest of, the current President.⁷¹ From a lay perspective, it might be assumed that even if the President’s legal staff do not serve Donald Trump personally, these lawyers do not have a free-floating commission to do whatever they think is in the public’s best interest.⁷² That is not the conventional understanding with regard to government officials generally. Dean and Wehle both emphasized an obvious point about loyalty to the public and, by invoking professional conduct rules, attempted to promote a counter-intuitive understanding about government lawyers. Their argument was that, as lawyers, White House Counsel had duties that compelled them to come forward about confidential matters in circumstances in which other subordinate public officials might not.

69. *Id.*; see also Richard Lindgren, *Impeachment and the Death of Professional Ethics*, WHEN GOD PLAYS DICE (Feb. 7, 2020), <http://godplaysdice.com/2020/02/07/impeachment-and-the-death-of-professional-ethics/> (stating that Cipollone “is *White House counsel*, and not the President’s personal attorney, and yet he has appeared to cross that important ethical line often.”).

70. See generally Vincent R. Johnson, *The Fiduciary Obligations of Public Officials*, 9 ST. MARY’S J. LEGAL MAL. & ETHICS 298 (2019). Like that of lawyers, public officials’ fiduciary duties are complicated, and a growing number of scholars have sought to define the parameters of this obligation. See Ethan J. Leib, David L. Ponet & Michael Serota, *Translating Fiduciary Principles into Public Law*, 126 HARV. L. REV. F. 91, 94 (2013); Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 556-65 (2015); D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 671 (2013).

71. See, e.g., *In re Lindsey*, 158 F.3d 1263, 1277 (D.C. Cir. 1998) (recognizing that White House Counsel may represent the President in the impeachment process).

72. The same may be equally true from a legal perspective. See, e.g., Geoffrey P. Miller, *Government Lawyers’ Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1295 (1987):

If attorneys could freely sabotage the actions of their agencies out of a subjective sense of the public interest, the result would be a disorganized, inefficient bureaucracy, and a public distrustful of its own government. More fundamentally, the idea that government attorneys serve some higher purpose fails to place the attorney within a structure of democratic government. Although the public interest as a reified concept may not be ascertainable, the Constitution establishes procedures for approximating that ideal through election, appointment, confirmation, and legislation. Nothing systemic empowers government lawyers to substitute their individual conceptions of the good for the priorities and objectives established through these governmental processes.

These commentators did not develop their claim about White House Counsel's professional obligations at length, as one might do in a legal brief or judicial opinion. But their audience could not be expected to be conversant with Rule 1.13, since even most lawyers lack a working knowledge of this rule.⁷³ Therefore, their audience would have to credit their representations about the rule and its significance, based on the commentators' professed expertise regarding government lawyers' professional conduct. This allowed the commentators to get away with dubious claims about Rule 1.13 and its reach.

Rule 1.13 deals with lawyers' representation of entities as clients. This typically involves representing a corporation, but not invariably. The rule might apply to lawyers who represent public entities and agencies as well. In arguing that White House Counsel should testify publicly, Dean and Wehle principally invoked Rule 1.13(b), the up-the-ladder provision, which says:

If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.⁷⁴

This lengthy provision is not easy to parse,⁷⁵ but the bottom line is that it sets a high bar before lawyers are required to do anything to try to avert wrongdoing by an organization's representatives.

The subsequent provision, concerning when the organization's lawyer may (not must) try to avert misconduct by disclosing information to someone outside the organization, sets an even higher bar. Rule 1.13(c) provides, subject to exception, that the lawyer "may reveal information relating to the representation" if "despite the lawyer's efforts in accordance with" the prior provision, "the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law."⁷⁶ And even then, the lawyer may disclose confidential information to someone outside the organization

73. Roger C. Cramton, et al., *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725, 738-39 (2004).

74. MODEL RULES, r. 1.13(b).

75. See William H. Simon, *Duties to Organizational Clients*, 29 GEO. J. LEGAL ETHICS 489, 500 (2016) (characterizing the rule as "ambiguous and circuitous").

76. MODEL RULES, r. 1.13(c).

“only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.”⁷⁷

The limited significance of these provisions cannot be overstated. First, Rule 1.13(b), which may require a lawyer to go over the head of representatives engaged in wrongdoing, is not triggered when an organization’s representatives previously engaged in wrongdoing, but only when they are currently engaged in wrongdoing or are plotting future wrongdoing.⁷⁸ Second, the provision does not address any and all wrongdoing but only a legal wrong that puts the organization at serious risk—that is, in the language of Rule 1.13(b), “a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization.”⁷⁹ Third, this provision does not require the organization’s lawyers to act when they merely suspect, or even strongly suspect, that representatives are engaged in or intending misconduct; it applies only when the lawyers have knowledge of ongoing or intended wrongdoing, and that means “actual knowledge of the fact in question.”⁸⁰ Fourth, even when the organization’s lawyers have actual knowledge of a representative’s current, or intended, serious misconduct, the lawyers’ charge is simply to “proceed as is reasonably necessary in the best interest of the organization,” which will not invariably require going over the malefactor’s head to someone higher up in the organization.⁸¹

Even more important, Rule 1.13(b) does not authorize the organization’s lawyers to make disclosures to anyone outside the organization. It preserves lawyers’ ordinary obligation under Rule 1.6 (which Dean and Wehle failed to acknowledge) to preserve the confidentiality of the organization’s information.⁸² This is a sweeping obligation, applicable not only to attorney-client privileged information but to all

77. *Id.*

78. *Id.* r. 1.13(b).

79. *Id.*

80. *Id.* r. 1.0(f). The definition goes on to state, somewhat cryptically, that “[a] person’s knowledge may be inferred from circumstances.” *Id.* It is unclear whether that means that disciplinary authorities may “infer[] from circumstances” that a lawyer possessed actual knowledge of the fact in question, or that a lawyer’s “infer[ences] from circumstances” may be so compelling that the lawyer will have acquired actual knowledge. *Id.* For a discussion of this provision’s ambiguity, see Rebecca Roiphe, *The Ethics of Willful Ignorance*, 24 GEO. J. LEGAL ETHICS 187, 196 (2011) (asserting that the provision “serves as an admonition to lawyers that a finder-of-fact could ignore a lawyer’s subjective protestations of ignorance if circumstances belie that claim.”).

81. *Id.* r. 1.13(b).

82. *Id.* r. 1.6.

“information relating to the representation” of the organizational client—including whatever information the lawyers learned from the organization’s officers and other representatives.⁸³

In turn, Rule 1.13(c) permits lawyers to reveal confidential information outside the organization only in exceptional circumstances. Taken together, these provisions require lawyers who know of wrongdoing to “report[] up” within the organization only in limited circumstances, and they permit the lawyer to “report out” only in truly exceptional circumstances. In Professor William Simon’s view, these provisions are worse than “merely trivial,” because they might be read to establish the full extent of organizational lawyers’ duties when encountering corporate misconduct.⁸⁴ In the case of corporate lawyers, to whom Rule 1.13 is principally directed, there are few publicly-known examples in which lawyers have “reported out” to regulatory agencies or others pursuant to Rule 1.13(c). Legal scholarship addressing government lawyers’ disclosure obligations tends to slight Rule 1.13, precisely because it sets such a high bar; instead, legal scholars have looked to whistleblower statutes or other law that may permit government lawyers to report government misconduct despite their ordinary confidentiality obligations.⁸⁵

Against this background, it is hard to conceive that Rule 1.13 could have permitted, much less required, White House Counsel to testify voluntarily in the impeachment proceedings. Commentators ignored various questions of interpretation that would have had to be resolved

83. *Id.* r. 1.6(a) (protecting “information relating to the representation of a client”); see Irma S. Russell, *Cries and Whispers: Environmental Hazards, Model Rule 1.6, and the Attorney’s Conflicting Duties to Clients and Others*, 72 WASH. L. REV. 409, 423 (1997) (observing that Rule 1.6 “embraces virtually all data relating to a client regardless of whether it is protected by the attorney-client privilege or whether it was gained during the attorney-client relationship or at some other time.”).

84. Simon, *supra* note 75, at 500, 502.

85. See generally Kathleen Clark, *Government Lawyers and the Confidentiality Norms*, 85 WASH. U.L. REV. 1033 (2007); James E. Moliterno, *The Federal Government Lawyer’s Duty to Breach Confidentiality*, 14 TEMP. POL. & CIV. RTS. L. REV. 633 (2005); Jesselyn Radack, *The Government Attorney-Whistleblower and the Rule of Confidentiality: Compatible at Last*, 17 GEO. J. LEGAL ETHICS 125 (2003); W. Bradley Wendel, *Government Lawyers in the Trump Administration*, 69 HASTINGS L. J. 275 (2017). See also Kathryn Marshall, Note, *Advancing the Public Interest: Why the Model Rules Should Be Amended to Facilitate Federal Government Attorney Whistleblowing*, 31 GEO. J. LEGAL ETHICS 747 (2018) (proposing the amendment of Model Rules 1.6 and 1.13 to facilitate whistleblowing by government lawyers). Events following the impeachment proceedings failed to vindicate commentators’ assertion that White House Counsel should have testified voluntarily. After the proceedings, the House Judiciary Committee sought McGahn’s testimony and, after Biden took office, it negotiated with the Biden Administration to secure McGahn’s testimony under circumscribed conditions and on limited topics. There was no suggestion that, given his dealings with President Trump, McGahn should or could have disclosed confidential communications on his own initiative. See Alex Rogers et al., *House Democrats Release Former White House Counsel Don McGahn’s Testimony*, CNN POL. (June 9, 2021, 8:46 PM), <https://www.cnn.com/2021/06/09/politics/don-mcgnah-transcript-released/index.html> [<https://perma.cc/V5WA-3U2T>].

before reaching that conclusion. Most fundamentally, it is not even clear which provision of Rule 1.13 would apply to government lawyers' legislative testimony—that is, it is unclear whether testifying without the President's authorization constitutes “reporting up” under Rule 1.13(b) or “reporting out” under Rule 1.13(c). Testifying would constitute “reporting up” only if Congress's role in the federal government, or at least in the impeachment context, in relationship to the Executive Branch, is analogous to the role of a corporation's top management or board of directors. Conceivably, one might argue that Congress's oversight authority makes it analogous to a corporate board.⁸⁶ But the analogy seems weak, because Congress's relationship to the Executive Branch, under our constitutional system of checks and balances, makes the President co-equal with, not subordinate to, the legislative branch.⁸⁷ The analogy is further flawed in that the corporate board itself has confidentiality duties with regard to the outside world, while a report to Congress would likely become public.⁸⁸

Even assuming that, for executive-branch lawyers, testifying in Congress constitutes reporting up under Rule 1.13(b), as opposed to reporting out under Rule 1.13(c), it seems implausible that Rule 1.13(b) authorized White House Counsel to go to Congress. McGahn or Cipollone would have an “up the ladder” obligation only if they knew that Trump was engaging, or would engage, in serious wrongdoing “that is likely to result in substantial injury to the organization” which they could not avert without Congress's help.⁸⁹ But there was no reason for commentators to assume this to be the state of affairs (or the affairs of state). There's a question what the relevant “organization” is: the White House; the executive branch; the presidency (in some abstract sense); or more broadly, the nation or the public. Regardless of how one views White House Counsel's organizational client, however, it seems unlikely that reporting to Congress was necessary to avert substantial injury. What was publicly known suggested that just the opposite was true—that, for example, insofar as Trump contemplated obstructing the impeachment proceedings, his White House Counsel or other aides either interceded or simply declined to follow Trump's lead.⁹⁰ To be sure, Trump may have been guilty of obstructing justice,

86. See Simon, *supra* note 75, at 514-18.

87. See Miller, *supra* note 72, at 1296 (“The notion . . . that an agency attorney serves the government as a whole is misplaced. It fails to situate the attorney within a system of separation of powers and checks and balances.”).

88. Cyril Moscow, *Director Confidentiality*, 74 LAW & CONTEMP. PROBLEMS 197, 197-202 (2011).

89. MODEL RULES r. 1.13(b).

90. See, e.g., Tom McCarthy, *All The President's Men and Women: How Disobedient Aides Saved Trump*, THE GUARDIAN (Apr. 20, 2019), <https://www.theguardian.com/us-news/2019/apr/20/donald-trump-robert-mueller-presidents-men> [https://perma.cc/AHW5-74VY]. Indeed, McGahn was lauded for interceding. See Joe D. Whitley et al., *INSIGHT: What Lawyers Can Learn About Lawyers From the Mueller Report*, BLOOMBERG L.

but that is because obstruction of justice is an inchoate crime like attempt or conspiracy: Trump could be guilty of trying to impede the Mueller investigation or a congressional inquiry whether or not he succeeded. Viewing the publicly known facts from an objective perspective, the likelihood was that, under Rules 1.6 and 1.13, White House Counsel's duty was to keep what they knew confidential, because there was no need for congressional intervention to prevent significant harm to the nation.

Commentators might have argued that, notwithstanding the professional conduct rules, public-spirited government lawyers had a civic duty to tell Congress what they knew. But that would presuppose that government lawyers are different from lawyers for corporations and other organizations. Leaving aside the professional literature on criminal prosecutors, which acknowledges their exceptionalism, legal scholars generally try to bring government lawyers' conduct within the ambit of generally applicable rules and norms.⁹¹ To argue that government lawyers have special disclosure obligations is difficult both because the obligations must be rooted in a source other than the ethics rules and because the other obligations must supersede the ethical duty of confidentiality. Rather than pursuing an alternate theory, Dean and Wehle leaned on a professional conduct rule that could not bear the weight of their argument. If their argument persuaded their audience, that was because their audience was not qualified to interrogate it.

Ultimately, the question of how government lawyers should respond to government misconduct is a complex one. Not all government lawyers are the same; indeed, even within a single agency, such as the Department of Justice, lawyers serve significantly different roles.⁹² The professional role and responsibilities of White House Counsel, in particular, are uncertain and contested.⁹³ While it is true that White House Counsel could not consciously serve Donald Trump's private interests, the line is thin between the public interest, the interests of the White House or Administration or presidency, and the particular president's private interests. The lawyers' general obligation was to take

(May 20, 2019, 4:00 AM), <https://news.bloomberglaw.com/business-and-practice/insight-what-lawyers-can-learn-about-lawyers-from-the-mueller-report> [<https://perma.cc/F6PD-MDM7>].

91. Miller, *supra* note 72, at 1294-95.

92. See generally Rebecca Roiphe, *A Typology of Justice Department Lawyers' Roles and Responsibilities*, 98 N.C. L. REV. 1077 (2020) (discussing the differing roles and responsibilities of the Attorney General, civil litigators, prosecutors, and others in the U.S. Department of Justice).

93. See Jacob I. Davis, *Current Developments, Nixon, Trump, and the Doom of Repeating History*, 33 GEO. J. LEGAL ETHICS 443, 460 (2020) (noting the blurriness of "the line between [the office's] mandate and the president's personal affairs"); Nelson Lund, *Lawyers and the Defense of the Presidency*, 1995 BYU L. REV. 17, 17-18 (1995) (identifying the differing conceptions of White House Counsel in different administrations).

direction from the President. Lawyers representing entities—public or private—cannot function effectively without generally assuming that the officers from whom they take direction are acting on the entity's behalf. Therefore, as a practical matter, lawyers who answer to the President start out by presuming that the President is acting on the public's behalf, at least when the President's direction is not lawless on its face. The question of what to expect of White House Counsel who serve a seemingly lawless President is a hard one. Most professional conduct rules are not drafted with government lawyers in mind and they do not necessarily provide adequate guidance.⁹⁴ That is true of Rule 1.13.

The question of whether White House Counsel should cooperate with a congressional investigation is less likely to be resolved by professional conduct rules than by the law establishing the office of White House Counsel, the traditions of that office, understandings regarding the fiduciary duties of executive-branch lawyers generally, sound public policy, relevant background law regarding confidentiality, and more—including office holders' own judgment about what it means to do their job well. The norms associated with a particular government lawyer's role go well beyond the professional conduct rules. It may be that a White House Counsel who acted in an abjectly indefensible fashion could be disciplined for incompetence under Rule 1.1. But to draw the line between competent and incompetent representation, the competence rule ordinarily looks to the standard of care of lawyers practicing in the field. Here, the uniqueness of White House Counsel's position and the novelty of the dilemma suggests that a lawyer would have a wide range of discretion before a response could be said to fall below a standard of care, assuming one can be identified that sets any limits. Further, given that the underlying question involves the conduct of executive branch officials, courts would be reluctant to restrict White House Counsel's range of options in a difficult and uncertain situation out of a respect for separation-of-powers principles. To the extent that White House Counsel's obligations should be clarified or their discretion narrowed, that is more properly a task for Congress than for the judiciary. One might well argue that a good White House Counsel who knows first-hand of the president's impeachable offenses should exercise discretion afforded by the uncertain law to disclose the facts to Congress rather than invoke a privilege to refrain from testifying, and that one would deserve public or professional opprobrium

94. See generally Bruce A. Green & Rebecca Roiphe, *May Federal Prosecutors Take Direction from the President?*, 87 *FORDHAM L. REV.* 1817, 1835 (2019) ("How the professional conduct rules play out, in the situation where a federal prosecutor concludes that the president is breaching his fiduciary duty, is far from settled given the novelty of a presidential intrusion into criminal prosecutions."); Nelson Lund, *The President as Client and the Ethics of the President's Lawyers*, 61 *LAW & CONTEMP. PROBS.* 65, 80 (1998) ("For some government lawyers, . . . especially the political appointees in the Department of Justice and the White House, the ordinary rules of professional ethics are not so useful.")

for failing to act. But, given the absence of precedent or definitive interpretive authority, it is far more difficult to argue that a lawyer who maintains confidentiality has acted incompetently under Rule 1.1 or otherwise engaged in sanctionable misconduct. If one is concerned about setting norms for future White House Counsel, perhaps the better route is to draw from legislation and history to suggest how individuals ought to approach the job.

B. Lawyers as Advocates or Witnesses – But Not Both

Commentators also addressed whether several lawyers were barred from serving as advocates in the impeachment proceedings because of their involvement in some of the events that were the subject of the proceedings. The commentary drew on Rule 3.7(a), which is titled “Lawyer as Witness,” and provides as a general rule that “[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness”⁹⁵ The rule generally proscribes being an advocate and a witness in the same trial because “[i]t may not be clear [to the trier of fact] whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.”⁹⁶ None of the lawyers in question was persuaded to end his role as advocate on the grounds that it was “necessary” for him to be a witness, and none ever in fact testified as a witness.

Early on, Senator Lindsay Graham released a letter asking Rod Rosenstein, the Deputy Attorney General, whether he was obligated to recuse himself from overseeing the Mueller investigation because of his potential role as a witness, having drafted the memorandum on which President Trump ostensibly relied in firing FBI director James Comey in May 2017.⁹⁷ But Rosenstein was evidently unpersuaded that the possibility of being a witness required him to step aside. Norman Eisen, a commentator who had served as ethics counsel in the prior administration, co-authored two articles explaining why “[a]ny suggestion of a disabling conflict at this stage is contrary to ethics rules.”⁹⁸ As for Rule 3.7, Eisen pointed out that it applied only “at a trial,” and that there was no trial on the horizon.⁹⁹ Rosenstein was unlikely to be a witness or an advocate if a trial were ever conducted, and for now, Rosenstein was neither a trial advocate nor a trial witness, much less

95. MODEL RULES r. 3.7(a). For scholarship on the rule, see Judith A. McMorrow, *The Advocate as Witness: Understanding Context, Culture and Client*, 70 FORDHAM L. REV. 945 (2001).

96. MODEL RULES r. 3.7 cmt. 1.

97. Letter of Sen. Lindsay O. Graham to Dep’y A.G. Rod Rosenstein (May 31, 2018), <https://www.scribd.com/document/380757336/Sen-Graham-s-letter-to-Rosenstein> [<https://perma.cc/FHY8-YTNS>].

98. Eisen & Canter, *supra* note 26.

99. Eisen et al., *supra* note 46; *see also* Eisen & Canter, *supra* note 26.

both. Eisen also explained why Rule 1.7, which, to the extent relevant, governed conflicts of interest arising out of a lawyer's self-interest, did not require Rosenstein's recusal.¹⁰⁰

More than a year later, a Republican Congressman asserted that Adam Schiff should withdraw from his role in the House investigation because he was a potential witness, and a lawyer who writes conservative political commentary revived the argument as the Senate trial approached.¹⁰¹ This commentator asserted that Rule 3.7 required Schiff's recusal because the Republicans were likely to call him as a witness in Trump's defense to testify about his interactions with "the original whistleblower in the Ukraine matter."¹⁰² But Schiff ignored the assertion, and the Republicans in the Senate never pressed the point, presumably because they never intended to call any witnesses.

Turnabout being fair play, Democratic members of Congress advanced a similar theory a few days later in a letter objecting to White House Counsel Pat Cipollone's role as one of Trump's trial advocates in the Senate. Led by Congressman Schiff, the House Managers advised Cipollone that he was likely to be a witness with respect to both articles of impeachment.¹⁰³ They asserted, among other things, that Cipollone had "detailed knowledge of the facts" underlying the charge that Trump pressured Ukraine to open sham investigations to aid his reelection campaign, because "witnesses . . . testified that they raised concerns about the President's scheme with" a lawyer who answered to Cipollone.¹⁰⁴ Further, they asserted that Cipollone had an instrumental role in the alleged conduct underlying the obstruction-of-justice charge, because Cipollone participated in various ways, including by directing witnesses not to testify.¹⁰⁵ Under Rule 3.7, Cipollone could not properly serve as an advocate in the Senate trial, the House Managers maintained, because he "may be a material witness to the charges against President Trump,"¹⁰⁶ and even if not, he might be "an unsworn witness" who presented his first-hand knowledge without swearing an oath or being cross-examined.¹⁰⁷

100. Eisen & Canter, *supra* note 26.

101. Hakim, *supra* note 29 (citing to Sean Davis, *Rep. John Ratcliffe: Adam Schiff's Problem Isn't That He's Biased, It's That He's Running A Corrupt Process*, THE FEDERALIST (Nov. 1, 2019), <https://thefederalist.com/2019/11/01/rep-john-ratcliffe-adam-schiffs-problem-isnt-that-hes-biased-its-that-hes-running-a-corrupt-process/> [<https://perma.cc/6NVU-DVS5>]).

102. *Id.*

103. Letter from Adam Schiff, et al., House Impeachment Managers, to Pat A. Cipollone, Counsel to the President (Jan. 21, 2020), https://intelligence.house.gov/uploadedfiles/2020-01-21_house_managers_ltr_to_cipollone.pdf [<https://perma.cc/HXJ3-4LCV>].

104. *Id.* at 1-2.

105. *Id.* at 4.

106. *Id.*

107. *Id.* at 2.

Lawyer-commentators then picked up the ball. Harvard Law professor Noah Feldman, who was himself an expert witness at the impeachment proceedings, endorsed the House Managers' analysis.¹⁰⁸ He observed that Cipollone had written a "legally preposterous and constitutionally wrong" letter on President Trump's behalf the previous October, declining to cooperate with the House's impeachment investigation, and that because the letter was the basis of the impeachment article on obstruction of justice, "Cipollone's conduct is . . . directly at issue in the trial."¹⁰⁹ Stephen Gillers, a prominent legal ethics scholar and frequent public commentator, followed suit.¹¹⁰ He argued that, under Rule 3.7, as "a percipient witness to the relevant facts," possessing "personal and significant experience with the events that form the basis for the articles of impeachment," Cipollone would have to recuse himself from being an advocate in a trial, whether it was conducted in a courtroom or in the Senate.¹¹¹ And the rule remained relevant, Gillers maintained, even if Cipollone would not testify as a witness—indeed, even if (as became true) no witnesses were actually called to testify—because, if Cipollone made assertions as an advocate about events in which he participated, he might "appear particularly credible."¹¹² Other commentators piled on.¹¹³

In truth, House Democrats' call for Cippollone's recusal under Rule 3.7 was no more legitimate than Republicans' earlier calls for the recusal of Rosenstein and Schiff under the same rule. Rule 3.7 is not obscure. There is ample case law interpreting it, because litigators like to invoke it as a weapon in an effort to convince the trial court to disqualify an opposing counsel who allegedly, in the language of the rule, "is likely to be a necessary witness."¹¹⁴ Contrary to the commentators' presupposition, a lawyer is not barred from serving as an advocate at a trial simply because the lawyer was personally involved in events in issue in the trial and has personal knowledge of some of those events. Being a potential witness is a far cry from being a necessary witness.

108. Noah Feldman, *Commentary: White House Counsel Shouldn't Be Impeachment Lawyer*, MINN. LAW. (Jan. 22, 2020), [https://minnlawyer.com/2020/01/22/commentary-white-house-counsel-shouldn't-be-impeachment-lawyer/](https://minnlawyer.com/2020/01/22/commentary-white-house-counsel-shouldn-t-be-impeachment-lawyer/)[<https://perma.cc/GM22-W5KU>].

109. *Id.*

110. Gillers, *Impeachment*, *supra* note 32.

111. *Id.*

112. *Id.*

113. *See, e.g.*, Bob Bauer, *The White House Counsel Succumbs to Partisanship*, THE ATLANTIC (Feb. 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/white-house-counsels-betrayal-his-office/605980/> [<https://perma.cc/68RP-NP3J>] (quoting Gillers); Lindgren, *supra* note 69 (linking to House Managers' letter); Tousi, *supra* note 55 (referencing Rule 3.7 and stating that "Cipollone's decision to try a case where he, himself, is likely a witness may raise concerns.").

114. MODEL RULES r. 3.7.

Under Rule 3.7, a “witness” is someone who testifies under oath, not someone who happens to possess relevant information, and a lawyer is a “necessary witness” only if the lawyer has unique knowledge of disputed evidentiary facts, so that the lawyer’s client or the opposing party needs the lawyer’s testimony. If there were other witnesses to the events who can give similar testimony, then the lawyer ordinarily is not “necessary” as a witness.¹¹⁵ If the events in which the lawyer was involved are not important to the litigation, or if the lawyer’s account of the events is not contested, then again, the lawyer is unlikely to be a necessary witness.¹¹⁶ Courts often deny pretrial disqualification motions based on the advocate-witness rule on the ground that the motions are premature: Until the lawyer is deposed and it becomes clear that the lawyer’s account will be significant at trial, the prediction that a lawyer is a necessary witness is ordinarily too speculative to deprive clients of their chosen advocates.¹¹⁷ Courts are wary of disqualification motions based on ethics rules generally, and the advocate-witness rule in particular, because they are often used strategically.¹¹⁸ And even if a lawyer is precluded from serving as a trial advocate because of the need to testify, the lawyer may still serve as an advocate in pretrial activities and behind the scenes.¹¹⁹

History disproved any pundit’s prediction that Rosenstein, Schiff, or Cipollone was “likely” to be a witness at Trump’s Senate trial. None of the three testified in the Senate under oath; indeed, no one testified in the country’s most expeditious presidential impeachment trial in history. The Republican Senator’s worry about Rosenstein was considerably premature, since even the possibility of a trial was speculative. In the case of Schiff and Cipollone, the Senate trial was near enough that it was predictable that they would not in fact be testifying. To be sure, one can imagine cases where a lawyer is a necessary witness at

115. See, e.g., *Metro. P’ship, Ltd. V. Harris*, No. 3:06CV522-W, 2007 WL 2733707, at *2 (W.D.N.C. Sept. 17, 2007) (Rule 3.7 applies only when the lawyer’s testimony “cannot be obtained elsewhere”) (citation omitted); *In re Chantilly Constr. Corp.*, 39 B.R. 466, 473 (Bankr. E.D. Va. 1984) (lawyers were not necessary witnesses where their testimony would be “cumulative and in some instances redundant” to others’ testimony).

116. See, e.g., MODEL RULES r. 3.7(a)(1) (rule inapplicable if “the testimony relates to an uncontested issue”); *People v. Paperno*, 429 N.E.2d 797, 801 (N.Y. 1981) (“A mere assertion by the defendant that he intends to question some aspect of the prosecutor’s conduct is insufficient. Rather, the defendant must demonstrate that there is a significant possibility that the prosecutor’s pretrial activity will be a material issue in the case.”).

117. See, e.g., *Saetrum v. Raney*, No. 1:13-425 WBS, 2014 WL 2155210, *5 (D. Idaho 2014) (denying disqualification motion as “premature because Rule 3.7 is expressly limited to a lawyer’s advocacy ‘at trial.’”) (citation omitted).

118. See, e.g., *Cont’l Motors, Inc. v. Jewell Aircraft, Inc.*, 2013 U.S. Dist. LEXIS 149236, at *17 (S.D. Ala. 2013) (criticizing party’s invocation of Rule 3.7 “in furtherance of securing a strategic advantage at trial.”).

119. See *Culebras Enters. Corp. v. Rivera-Rios*, 846 F.2d 94, 101 (1st Cir. 1988) (disqualified lawyers did not violate Rule 3.7 by conducting pretrial activities because the rule prohibits “a lawyer-witness only from acting as [an] ‘advocate at a trial’”).

the outset of a trial but does not ultimately testify. But that was certainly not true of Rosenstein or Schiff, and commentators did not try to make the case that it was true of Cipollone. Since Cipollone had not been deposed by Mueller or compelled to testify in the House, commentators could not know how he would testify, and so could only have speculated that his testimony would have been important and non-cumulative.

Gillers credited the House Managers' fallback argument that Cipollone would be a so-called "unsworn witness." The premise was that, although Cipollone would not in fact be a testifying trial witness, in the course of his advocacy he might refer to events in which he was personally involved. If so, the trier of fact might be confused into believing that Cipollone was speaking based on his personal knowledge, and not simply making arguments based on trial evidence. But, as one of the nation's foremost legal ethics scholars, Gillers must have known that lawyers are rarely disqualified on this court-made theory, which departs from Rule 3.7. As noted, Rule 3.7 gives priority to a client's choice of a particular lawyer as trial advocate. If the lawyer is not needed as a testifying witness, the lawyer may be an advocate, taking care (as all lawyers must) to avoid making arguments sound like they are matters of personal knowledge or belief.¹²⁰

Notwithstanding the line-drawing in Rule 3.7, in unusual cases courts have disqualified trial lawyers who participated in the events in issue at trial and whose arguments about those events would give their clients an unfair advantage by "subtly impart[ing] to the jury . . . first-hand knowledge of the events without having to swear an oath or be subject to cross examination."¹²¹ Perhaps the best known application of this principle was the disqualification of alleged mobster John Gotti's lawyer, Bruce Cutler, who "had allegedly entangled himself to an extraordinary degree in the activities of the Gambino Crime Family."¹²² But courts do not necessarily endorse the principle that lawyers may be disqualified as "unsworn witnesses" when they are not necessary "witnesses", and even if a court might be willing to apply this principle in an extreme case, "an attorney's personal participation in pretrial events can often be resolved through monitoring by the district court to ensure that counsel does not . . . provide impermissible unsworn testimony."¹²³ Trump was represented by multiple lawyers in

120. See MODEL RULES r. 3.4(e) (forbidding trial lawyers from "assert[ing] personal knowledge of facts in issue except when testifying as a witness, or stat[ing] a personal opinion as to . . . the culpability of a civil litigant or the guilt or innocence of an accused").

121. *United States v. Locascio*, 6 F.3d 924, 933 (2d Cir. 1993). See generally Roxanne Malaspina, *Resolving the Conflict of the Unsworn Witness: A Framework for Disqualifying House Counsel Under the Advocate-Witness Rule*, 67 N.Y.U. L. REV. 1073, 1091 (1992).

122. *Locascio*, 6 F.3d at 934.

123. *United States v. Evanston*, 584 F.3d 904, 916 (10th Cir. 2009) (McKay, J., concurring) (citing *Fonten Corp. v. Ocean Spray Cranberries, Inc.*, 469 F.3d 18, 23 (1st Cir. 2006)).

the Senate, and there never came a point in Cipollone's representation when the House Managers objected that he was implicitly testifying about events in which he was involved. In retrospect, commentators citing Rule 3.7 failed as prognosticators as well as lawyers: the harms against which the rule protects never materialized.¹²⁴

C. *Lawyers' Representations vs. Advocacy vs. Performance*

It seems obvious that lawyers should not lie, given the understanding that lying is morally wrong and is sometimes a crime, particularly in investigative and adjudicative proceedings. Much of the commentary during the impeachment proceedings fact-checked participants and called out those who allegedly made misstatements.¹²⁵ Of course, Trump topped the list. But many others joined him, lawyers among them. Much of the commentary singling out lawyers as liars did not allude to their professional obligations.¹²⁶ But commentators some-

124. Further, commentators ignored, or assumed away, the question of whether the advocate-witness rule is even applicable to a trial in the Senate. In general, regardless of where advocates are licensed, they are governed by the professional conduct rules of the court or other tribunal, including a legislative body, before which they are advocating. See MODEL RULES r. 8.5(b)(1) ("for conduct in connection with a matter pending before a tribunal," the applicable professional conduct rules are those "in which the tribunal sits, unless the rules of the tribunal provide otherwise") & r. 1.0(m) (defining "tribunal" to include a legislative body acting in an adjudicative capacity). It is not a foregone conclusion that the Senate was employing the Washington D.C. Rules of Professional Conduct rather than its own looser but noncodified expectations to govern the conduct of lawyers and witnesses in the impeachment proceedings.

125. See, e.g., Susan Simpson, *Seven Outright Falsehoods in GOP Staff Report on Impeachment*, JUST SECURITY (Dec. 8, 2019), <https://www.justsecurity.org/67658/seven-outright-falsehoods-in-gop-staff-report-on-impeachment/> [<https://perma.cc/LZ45-Y67S>].

126. As to Mueller, see, for example, Matt Vespa, *Another Liar? Despite Denials Under Oath, Mueller Wanted FBI Director Job During 2017 Meeting With Trump*, TOWNHALL (Oct. 8, 2019, 6:28 PM), <https://townhall.com/tipsheet/mattvespa/2019/10/08/another-liar-despite-denials-under-oath-mueller-wanted-fbi-director-job-during-n2554392> [<https://perma.cc/2QSV-KYU3>]. As to Barr, see, for example, Jonathan Chait, *William Barr Keeps Lying About Mueller, and People Keep Trusting Him Anyway*, NEW YORK MAG. (May 1, 2019), <https://nymag.com/article/2019/05/barr-lying-mueller-report-trump-russia.html> [<https://perma.cc/T68Z-GYM5>]. As to Schiff, see, for example, Matt Margolis, *The Top Seven Lies Adam Schiff Has Told to Boost Impeachment*, PJ MEDIA (Jan. 22, 2020, 3:19 PM), <https://pjmedia.com/news-and-politics/matt-margolis/2020/01/22/the-top-six-lies-adam-schiff-has-told-to-boost-impeachment-n72423> [<https://perma.cc/PUX9-9BHY>]; Claire Russel, *Schiff Mischaracterized, Lied About Impeachment 'Evidence' Again*, LIBERTY HEADLINES USA (Jan. 22, 2020), <https://www.libertyheadlines.com/schiff-mischaracterized-lied-impeachment-evidence/> [<https://perma.cc/3QT9-TN5A>]. As to Cipollone, see, e.g., Emily Singer, *Trump's Defense Team Opens Impeachment Trial with 'Demonstrable Lie,'* AM. INDEP. (Jan. 21, 2020, 4:04 PM), <https://americanindependent.com/donald-trump-impeachment-trial-defense-team-pat-cipollone-demonstrable-lie-white-house/> [<https://perma.cc/36AV-SAFW>].

times threw in a citation to professional conduct rules, including when discrediting Barr,¹²⁷ Giuliani,¹²⁸ and members of Trump's Senate trial defense team.¹²⁹

What these commentators overlooked is that, when it comes to lawyers' candor, everyday morality may be stricter than professional morality. One's intuition may be that no one should ever mislead, least of all lawyers, who must adhere to a higher standard of integrity than members of the general public. But the professional conduct rules demand varying levels of candor and honesty, depending on the role and context in which a lawyer is speaking,¹³⁰ and lawyers may escape discipline for misleading statements in a variety of contexts.

The expectations for lawyers' candor are highest when a lawyer is making representations or assertions based on personal knowledge of the facts.¹³¹ For example, lawyers may not lie when they testify or submit written representations under oath. Besides being disciplined,¹³² they may be prosecuted for perjury.¹³³ And lawyers' obligation does not depend on having vowed to tell the truth. Lawyers violate Rule 3.3(a)(1) when they knowingly make factual representations to judges,¹³⁴ and they violate Rule 4.1(a) when they knowingly make false

127. See Michael Greiner, *Bill Barr Needs to Be Disciplined by the Bar*, DIALOGUE & DISCOURSE (May 4, 2019), <https://medium.com/discourse/bill-barr-needs-to-be-disciplined-by-the-bar-917d810a3522> [<https://perma.cc/7PSE-B6TF>] (maintaining that Barr's letter to Congress mischaracterized the Mueller Report in violation of Rule 4.1, which forbids false statements to a tribunal; that his initial refusal to convey the report to Congress violated Rule 3.4(c), which forbids knowingly disobeying an obligation under a court rule; and that if he was acting out of loyalty to Trump, Barr had a conflict of interest requiring his recusal under Rule 1.7).

128. See Ellen C. Brotman, *Advice for the President's New Lawyer: There's a Rule for That*, LEGAL INTELLIGENCER (June 15, 2018), <https://www.law.com/thelegalintelligencer/2018/06/15/advice-for-the-presidents-new-lawYER-theres-a-rule-for-that/> [<https://perma.cc/PLD6-VZMG>] (asserting that Giuliani made a false statement about the Mueller investigation, implicating Rule 4.1(a) and 8.4(d)).

129. See Lindgren, *supra* note 69 ("Cipollone appears to have openly lied in his defense presentation to the Senate") (quoting Rule 4.1); Obeidallah, *supra* note 56 (quoting Rules 3.3(a)(1) and 4.1).

130. See, e.g., *Kupferman v. Consol. Research & Mfg. Corp.*, 459 F.2d 1072, 1080-81 (2d Cir. 1972) ("The vague requirement of 'candor and fairness' in the Canons of Professional Ethics . . . could hardly be read as requiring [an advocate] to make certain that his opponent was fully aware of every possible defense that could be advanced.").

131. See, e.g., MODEL RULES r. 4.1, cmt. 1 ("A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts."); see Bruce A. Green, *Candor in Criminal Advocacy*, 45 HOFSTRA L. REV. 429, 433 (2016) ("While truthfulness is the rule for lawyers, candor is the exception.").

132. See MODEL RULES, r. 8.4(b).

133. See, e.g., Craig R. McCoy et al., *Jury: A.G. Kane Guilty of Perjury, Obstruction, All Other Charges*, PHIL. INQUIRER (Aug. 15, 2016) (reporting Pennsylvania Attorney General's conviction of perjury and other charges).

134. See MODEL RULES r. 3.3(a)(1) ("A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal . . ."); see generally Elizabeth Slater, Note, *A Legal and*

statements to third parties while representing clients.¹³⁵ Moreover, whether or not they are practicing law, lawyers violate Rule 8.4(c) when they “engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.”¹³⁶ A lawyer must ordinarily be honest even in purely personal dealings because dishonesty may raise doubts about the particular lawyer’s integrity and about the bar’s integrity generally, and because the public may put stock in lawyers’ truthfulness even when lawyers are not representing clients.¹³⁷ In other words, there is a norm that the profession as a whole ought to defend the truth, but how this plays out in any given context is governed by the application of different rules, which demand varying degrees of candor.

Both during the impeachment proceedings and in their wake, there was much public discussion of whether Attorney General Barr lied about the Mueller report. The discussion illustrates that even when lawyers are speaking based on personal knowledge, their ethical duty of truthfulness has limitations. Barr wrote to Congress summarizing the report’s principal conclusions before it was released,¹³⁸ and afterwards some observers—including distinguished signatories to a highly publicized complaint to Washington, D.C. disciplinary authorities—asserted that Barr had engaged in dishonesty and deceit amounting to a disciplinary violation.¹³⁹ But others characterized Barr’s letter differently. Mueller himself responded tepidly that Barr’s summary “did not fully capture the [report’s] context, nature, and substance.”¹⁴⁰ Jack Goldsmith defended Barr’s letter, although acknowledging that it

Ethical Puzzle: Defense Counsel as Quasi Witness, 85 FORDHAM L. REV. 1427 (2016) (exploring tension between defense counsel’s candor duty to the court and confidentiality and loyalty duties to the client).

135. See MODEL RULES r. 4.1(a) (“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”).

136. See *id.* r. 8.4(c) (“It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation”).

137. For a detailed analysis of the rules on lawyers’ truthfulness and the exceptions, the rationales for those rules, and the First Amendment problems they raise, see Bruce A. Green & Rebecca Roiphe, *Lawyers and the Lies They Tell*, WASH. U. J. L. & POL’Y (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3982663 [<https://perma.cc/BDV5-X4YB>] [hereinafter Green & Roiphe, *Lawyers and the Lies*].

138. Letter from Attorney General William P. Barr to Chairman Lindsey Graham et al. (Mar. 24, 2019), <https://www.lawfareblog.com/document-attorney-general-barr-letter-mueller-report> [<https://perma.cc/RR2M-P8QJ>].

139. See *supra* note 24.

140. Letter from Special Counsel Robert S. Mueller, III to Attorney General William P. Barr, Re: Report of the Special Counsel on the Investigation Into Russian Interference in the 2016 Presidential Election and Obstruction of Justice (Mar. 27, 2019) https://www.washingtonpost.com/context/special-counsel-mueller-s-letter-to-attorney-general-barr/e32695eb-c379-4696-845a-1b45ad32fff1/?itid=lk_inline_manual_2 [<https://perma.cc/WLU5-AJT8>].

could have been more carefully worded.¹⁴¹ Benjamin Wittes thought it was merely misleading—an exercise in “spin”—but not outright false.¹⁴² Judge Walton, in an opinion on a Freedom of Information request, observed that Barr’s

fail[ure] to provide a thorough representation of the findings set forth in the Mueller Report, causes the Court to question whether Attorney General Barr’s intent was to create a one-sided narrative about the Mueller Report—a narrative that is clearly in some respects substantively at odds with the redacted version of the Mueller Report.¹⁴³

The discussion illustrates that there is a gap between statements that are “false,” “dishonest,” or “deceitful,” and therefore potentially covered by the ethics rules, and those that are incomplete, unforthcoming, or misleading but not false.¹⁴⁴ There was room to argue whether Barr’s summary fell on one side of the line or the other.

Further, the rules’ reference to false statements of “fact” excludes statements of opinion.¹⁴⁵ Barr’s letter declared that the evidence amassed by Mueller’s team was insufficient to establish that Trump obstructed justice.¹⁴⁶ Many with considerable experience as prosecutors disagreed. But unlike Barr’s statements allegedly misdescribing Mueller’s findings before the report came out, Barr’s statements about the strength of the evidence could not subject him to discipline. Even if they were implausible, they were statements of opinion, not fact.

The “knowledge” requirement serves as another substantial limitation on the rules governing lawyers’ honesty. If a lawyer makes a statement of fact that turns out to be false, the lawyer is not subject to discipline under Rule 3.3(a) or Rule 4.1(a) unless the lawyer knew the

141. Jack Goldsmith, *Thoughts on Barr and the Mueller Report*, LAWFARE (May 4, 2019, 2:50 PM), <https://www.lawfareblog.com/thoughts-barr-and-mueller-report> [<https://perma.cc/TAG7-FXVQ>].

142. See, e.g., Benjamin Wittes, *The Catastrophic Performance of Bill Barr*, THE ATLANTIC (May 2, 2019), <https://www.theatlantic.com/ideas/archive/2019/05/bill-barrs-performance-was-catastrophic/588574/> [<https://perma.cc/U59T-4JHG>].

143. Elec. Priv. Info. Ctr. v. U.S. Dep’t of Justice, 442 F. Supp. 3d 37, 49 (D.D.C. 2020).

144. MODEL RULES r. 8.4(c).

145. See, e.g., *Off. of Disciplinary Counsel v. Barrish*, 2005 Pa. LEXIS 3303, *16 (Pa. 2005)

Respondent did not violate RPC 4.1(a), which states that 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. Respondent published accusations on the Internet based on his personal impressions and opinions that his case was fixed. These were not material facts concerning the representation of his client.

There is a body of tort law drawing the distinction between fact and opinion. See, e.g., *Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984) (en banc) (setting out factors for distinguishing statements of fact from opinion).

146. Letter from Attorney General William P. Barr to Chairman Lindsey Graham et al. (Mar. 24, 2019), <https://s3.documentcloud.org/documents/5779688/AG-March-24-2019-Letter-to-House-and-Senate.pdf> [<https://perma.cc/Z8UL-C2KV>].

assertion to be false.¹⁴⁷ In this respect, the rules run parallel to perjury law, which does not subject individuals to prosecution for false testimony that is merely negligent or even reckless.¹⁴⁸ Like other lawyers in the Trump Administration, Barr was criticized for misdirected loyalty. But ironically, this might provide an innocent explanation for any falsehoods: Barr's overweening devotion to Trump may have so distorted his judgment and perception that he believed what he was saying.

And while the professional conduct rules may have held Barr to a relatively high standard of honesty, because he was speaking about the unreleased Mueller report from personal knowledge, the rules demanded less of other lawyers, who were advocates in the impeachment proceedings. Although advocates may not knowingly present or rely on a client's or witness's false testimony at trial, they are free to make factual arguments that they personally disbelieve or know to be probably false as long as there "is a basis in . . . fact for doing so that is not frivolous."¹⁴⁹ Even if Trump's defense lawyers believed based on their confidential conversations with him that he had obstructed justice or colluded with Russia to influence the election, they were free to argue the opposite based on the evidence, or absence of evidence, presented to the Senate. In advocating, they were not presenting their personal belief or knowledge—nor could they, because they were not trial witnesses.¹⁵⁰ Therefore, commentators were off-base in arguing that Cipollone and Sekulow should be sanctioned for making false factual arguments to the Senate.¹⁵¹

Additionally, there is a category of performative speech that takes lawyers outside the rules' reach altogether. This includes hyperbole and puffery – speech that, as lawyers expect, no one will take seriously or literally. So, for example, in settlement negotiations a lawyer's false assertion to opposing counsel that the client will not accept less or pay more than a particular amount is not regarded as a false statement of material fact because, as the ABA has explained, "a certain amount of posturing or puffery . . . may be an acceptable convention" in that context.¹⁵² Much of Giuliani's defense of Trump in the media likely falls in that category. Ellen Brotman, a legal ethicist, may have been right

147. A lawyer may conceivably be subject to discipline under some other rule, however, for failing to take adequate care to ensure the accuracy of the lawyer's assertions. For example, in *Matter of Palmer*, 2016 Calif. Op. LEXIS 2 (Jan. 6, 2016), the lawyer was subject to discipline for moral turpitude based on the lawyer's gross negligence in making false statements in sworn affidavits.

148. See e.g., *State v. Purnell*, 735 A.2d 513, 517 (N.J. 1999) (listing the elements of a perjury charge).

149. MODEL RULES r. 3.1.

150. See *id.* r. 3.4(d).

151. See *supra* note 129; see also *supra* notes 27 & 28.

152. ABA Comm. On Ethics & Pro. Resp., Formal Op. 370 (1993) (citing MODEL RULES 4.1 cmt. 2).

that Giuliani was speaking falsely when, for example, he accused Mueller of trying to frame the President,¹⁵³ but given the context, this was not just opinion and advocacy but conceivably hyperbole on which no one could reasonably rely. Insofar as Giuliani was performing in the public arena, not advocating in court, his words might not subject him to discipline for speaking falsely.¹⁵⁴

Finally, because all of the lawyers' communications in question involved political speech, courts would be reluctant to restrain or punish the communications through the judicial enforcement of court-adopted rules of professional conduct.¹⁵⁵ Courts would generally be deferential to professional conduct undertaken by federal public officials or by private agents of the president, out of concern for principles of separation of powers (in the case of federal courts) or federalism (in the case of state courts).¹⁵⁶ This is particularly true when, as in this case, the professional conduct in question involves public speech on political questions, implicating core First Amendment free speech values.¹⁵⁷ To be

153. Brotman, *supra* note 128.

154. A New York appellate court took a different view regarding Giuliani's later false statements in the media concerning the 2020 presidential election, finding that he was subject to discipline for those falsehoods as well as for those made in formal proceedings. The court suspended him from law practice on an interim basis while disciplinary proceedings were still pending. *Matter of Giuliani*, 146 N.Y.S.3d 266, 283-84 (2021).

155. Bruce A. Green & Rebecca Roiphe, *As the Giuliani Case Goes Forward, Courts Should Think Deeply About the First Amendment*, WASH. POST. (June 25, 2021, 1:29 PM), <https://www.washingtonpost.com/opinions/2021/06/25/suspend-giulianis-law-licendon't-ouch-free-speech/> [<https://perma.cc/WLU5-AJT8>].

156. See generally Kevin Hopkins, *The Politics of Misconduct: Rethinking How We Regulate Lawyer-Politicians*, 57 RUTGERS L. REV. 839 (2005) (discussing constitutional restraints on applying professional conduct rules to lawyers in politics). *But see* Brian Shepard, *The Ethics Resistance*, 32 GEO. J. LEGAL ETHICS 235, 284-85 (2019) (arguing that the Supremacy Clause has limited relevance to disciplinary complaints against lawyers in the Trump administration).

157. See, e.g., *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1030, 1034 (1991) (plurality opinion of Kennedy, J.) (observing that the case, in which a criminal defense lawyer was sanctioned for criticizing the police and prosecution during a press conference about a pending criminal case, "involves classic political speech"); Green & Roiphe, *Lawyers and the Lies*, *supra* note 137 (analyzing whether the First Amendment forbids courts' imposition of professional discipline when lawyers lie on about political issues in public fora). Commentators have been dissatisfied with how courts interpret the First Amendment with regard to lawyers' speech and have offered various alternative approaches. See generally Renee Newman Knake, *Attorney Advice and the First Amendment*, 68 WASH. & LEE L. REV. 639 (2011) (maintaining that lawyers' advice to clients deserves strong First Amendment protection); Peter Margulies, *Advocacy as a Race to the Bottom: Rethinking Limits on Lawyers' Free Speech*, 43 U. MEM. L. REV. 319 (2012) (maintaining that lawyers' speech deserves less protection when it endangers courts' role in democratic governance); Kathryn A. Sabbeth, *Towards an Understanding of Litigation as Expression: Lessons from Guantanamo*, 44 U.C. DAVIS L. REV. 1487 (2011) (arguing that the First Amendment should protect trial lawyers' speech when litigation is employed as political expression); Margaret Tarkington, *A Free Speech Right to Impugn Judicial Integrity in Court Proceedings*, 51 B.C. L. REV. 363 (2010) (arguing that lawyers have a constitutional right to impugn judges' integrity); Margaret Tarkington, *A First Amendment Theory for Protecting Attorney Speech*, 45 U.C. DAVIS L. REV. 27 (2011) (arguing that the First Amendment should be interpreted to give special attention to lawyers' speech in aid of securing clients' access to justice).

sure, the First Amendment ordinarily leaves courts latitude to regulate lawyers' false and misleading statements in the context of professional representations, in order to protect clients and others from being misled and to protect the integrity of the judicial process. But courts would hesitate to extend their regulatory authority to the public and political arenas, where free speech interests are heightened and courts have the least control and weakest claim of authority to establish expectations for candor.¹⁵⁸

II. THE PROBLEM WHEN LAWYERS COMMENT PUBLICLY ON OTHER LAWYERS' ETHICS

It is a truism that, when it comes to lawyers' professional norms, "[c]ontext count[s]."¹⁵⁹ As Part I illustrates, although lawyers in a given U.S. jurisdiction are all subject to the same set of professional conduct rules,¹⁶⁰ the requirements vary depending on the role in which the lawyer is acting or speaking. For example, greater candor is expected when lawyers testify as witnesses or otherwise speak from personal knowledge and belief than when they are advocating on behalf of clients;¹⁶¹ likewise, expectations may differ for public lawyers as compared with lawyers for private clients.¹⁶² Consequently, parties interacting with a lawyer may be confused or misled if they do not understand the lawyer's role at the time. To avoid false expectations or con-

158. See Standing Comm. on Discipline of the U.S. Dist. Court for the Cent. Dist. of California v. Yagman, 55 F.3d 1430, 1443 (9th Cir. 1995) (extending First Amendment protection to a lawyer's criticism of a judge, and recognizing that justifications for restricting trial lawyers' speech were inapplicable to a lawyer's assertions outside the context of a proceeding); W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305, 440 (2001) ("At a minimum, the First Amendment ought to be interpreted to protect lawyers who engage in speech or expressive conduct that is 'reasonably designed or intended to contribute to reasoned debate on issues of public concern.'") (citation omitted). But see Ellen Yaroshefsky, *Regulation of Lawyers in Government Beyond the Client Representational Role*, 33 NOTRE DAME L. ETHICS & PUB. POL'Y 151 (2019) (arguing that government lawyers should be disciplined for false public statements).

159. See, e.g., Bruce A. Green, *Less is More: Teaching Legal Ethics in Context*, 39 WM. & MARY L. REV. 357 (1998) (discussing the value of contextual legal ethics courses rather than survey courses); David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1145, 1149-53 (1993) (discussing the importance of context for the professional obligations of lawyers representing a bank before an administrative agency).

160. See Eli Wald, *Resizing the Rules of Professional Conduct*, 27 GEO. J. LEGAL ETHICS 227, 228 (2014) ("Not surprisingly, critics have long argued that the universal nature of the *Rules* renders them conceptually anachronistic and practically useless, and have called for the promulgation of rules of conduct more in tune with and sensitive to the increasingly diverse realities practicing lawyers face.") (footnotes omitted).

161. See *supra* Part I.C.

162. See *supra* Part I.A.

fusion, lawyers must sometimes disclose the role in which they are speaking,¹⁶³ and must sometimes avoid serving in two different roles – for example, as advocate and witness – in the same proceeding.¹⁶⁴

The occasional ambiguity regarding a lawyer's role and the attendant professional expectations is compounded for lawyers who comment publicly on legal questions. It is generally clear that these lawyers are not representing clients; they would be expected to disclose if they were doing so. But that does not mean that no expectations flow from the lawyer's role as pundit. For those who are law professors, there may be expectations and norms of academic integrity and objectivity.¹⁶⁵ But even for those who are practitioners only, readers or viewers may expect that, because they are lawyers, they will speak truthfully, if not objectively – in the very least, avoiding “dishonesty, fraud, deceit or misrepresentation,” since the norms of the profession demand that level of integrity even when lawyers have no client.¹⁶⁶

Confusion may arise, however, if the lawyers think of themselves solely as public commentators, a role whose expectations are different from those of lawyers, though may be equally context-dependent. A high degree of accuracy and objectivity are expected of news-writers; less objectivity but comparable factual accuracy are expected of editorialists; it is likely that less accuracy and greater advocacy are tolerated of those who comment in blogs or other unmediated fora on social media than of those who write op-eds in traditional media; and very little is expected of those who are transparently political actors, such as candidates for public office or their spokespersons, when they exploit a particular medium to pursue partisan ends. It may be unclear in any given situation whether a lawyer or law professor's writings should be taken as objective scholarship or news, as editorials, or as partisan political rhetoric. As a result, readers or viewers may give lawyers' commentary undue weight or, when it becomes clear that the

163. See MODEL RULES r. 1.13(f) (corporate lawyers may not mislead corporate constituents about their role); *id.* at r. 2.4(b) (third-party neutrals may not mislead parties about their role); *id.* at r. 3.9 (lawyers appearing before legislatures or administrative agencies must disclose when they are appearing in a representative capacity); *id.* at r. 4.3 (clients' lawyers may not mislead unrepresented persons about their role).

164. See MODEL RULES r. 3.7; *supra* Part I.B.

165. For views on legal scholars' ethics in the internet era, see, for example, *Draft Principles of Scholarly Ethics*, 101 MARQ. L. REV. 897 (2018); Carissa Byrne Hessick, *Towards a Series of Academic Norms for #LawProf Twitter*, 101 MARQ. L. REV. 903 (2018). For earlier views, see, for example, Rebecca S. Eisenberg, *The Scholar as Advocate*, 43 J. LEGAL EDUC. 391 (1993); Bruce A. Green, *Reflections on the Ethics of Legal Academics: Law Schools as MDPS; or, Should Law Professors Practice What They Teach?*, 42 S. TEX. L. REV. 301, 329-44 (2001). For trenchant critiques (of which there are many) of legal scholarship in general, see, for example, Deborah Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327 (2002); Robin West, *The Contested Value of Normative Legal Scholarship*, 66 J. LEGAL EDUC. 6 (2016).

166. MODEL RULES r. 8.4(c).

commentary is unreliable, lose confidence in lawyers' commentary as a whole.

This Part explores the ambiguities of the lawyer-commentator role and some dangers created when, in this ambiguous role, lawyers publicly criticize other lawyers for violating ethics rules. Part A elaborates on the different roles and expectations, while Part B focuses on two particular dangers: first, that the public will be miseducated about the practice of law and its professional norms and therefore harbor unrealistic expectations of lawyers in the public sphere; and, second, that public confidence in the reliability of lawyer-commentary in general will diminish, thereby undermining the credibility of future commentary that is relatively objective and accurate.

A. Lawyer-Commentary and the Confusion of Professional, Journalistic, and Political Norms

Lawyers engaged in public commentary may regard themselves in any of several ways. They may think of themselves as political actors who simply happen to be lawyers, comparable to lawyers who campaign for public office (other than perhaps, offices such as attorney general or district attorney that call for a law license). Alternatively, they may regard their role as being like that of others who comment on public events in a given medium such as in traditional newspapers, in the editorial spaces of an on-line magazine or in one's own blog. Alternatively, they may regard themselves as lawyers serving in a non-representational capacity while contributing to public discourse from their unique perspective as a lawyer. Some lawyer-commentators may publicize the fact that they are lawyers, seeking to capitalize on the additional credibility that comes with the role, while others may just happen to have a bar card. Depending on the role, the lawyer's approach to commentary—in particular, the lawyer's fidelity to accuracy and objectivity—may differ in ways that may not be obvious to the audience, just as lawyers' approach may differ when speaking in their personal capacity or as advocates on a client's behalf.

Suppose that lawyers decide to use their knowledge of the law and persuasive ability to promote a favored candidate's election or to promote some other political end, such as the removal of an impeached president or defense of a president who has been impeached. If the lawyers were to think of themselves simply as political actors, producing writings for public consumption to achieve a political objective, they would perceive few legal restraints beyond libel or copyright law, and few social restraints. In politics, gloves come off. Politicians have long told their own truths, engaging in what is commonly known as "spin." It is not that elected officials are free to lie. They do, after all,

take an oath to uphold the laws and Constitution.¹⁶⁷ As fiduciaries, they have a responsibility to the public.¹⁶⁸ But few would be naïve enough to believe that politicians are fully committed to the truth, especially on the campaign trail. And those who are simply candidates, or public supporters of candidates, may be even less restrained. Some of the lawyer-commentators who discussed lawyers and legal ethics in the impeachment proceedings may have been engaged in politics, pursuing purely political objectives via their commentary. Nothing would have required them to disclose that conception of their role, however. Further, they may have perceived that their writings would be more persuasive if packaged as relatively objective expert analysis.

To the extent that lawyer-commentators are not politically engaged but have taken a step back to comment as editorialists, a different set of expectations would follow. Journalists have traditionally been governed by norms of objectivity, accuracy, independence, and accountability, although, unlike for lawyers, these norms are not codified and enforceable.¹⁶⁹ Perhaps they derive from a mutual understanding developed over time between the public and journalists themselves. The expectations for opinion writers are somewhat different. However, even if objectivity is not required, factual accuracy and independence are. The public has historically relied on the media to enforce these various expectations and to promote accurate public understandings by helping to filter fact from fiction in public debate.¹⁷⁰ Perhaps this is what led many to adopt the term the “Fourth Estate” to describe the press.¹⁷¹ However, today, individual journalists’ and editorialists’ fidelity to independence and factual accuracy, and the media’s gatekeeping role, are increasingly in tension with the reality of online journalism and social media.¹⁷² With the growth of social media, commentary is no longer the province of the elite few. Many citizens watch MSNBC, CNN, or Fox News because of their take on a political debate, hearing,

167. 5 U.S.C. § 3331 (1966). The President is constitutionally required to take a similar oath. See U.S. CONST. art. II, § 1, cl. 8.

168. FIDUCIARY GOVERNMENT (Evan J. Criddle et al. eds., 2018) (analyzing the theoretical basis and implications of public officials as fiduciaries).

169. *SPJ Code of Ethics*, SOC’Y OF PRO. JOURNALISTS (Sept. 6, 2014, 4:49 PM), <https://www.spj.org/ethicscode.asp>.

170. See generally Derek Wilding & Peter Fray, *The Impact of Digital Platforms on News and Journalistic Content*, U. TECH. SYDNEY, NSW, <https://www.uts.edu.au/sites/default/files/2018-12/CMT%20News%20Report.pdf> [<https://perma.cc/AV82-4W43>].

171. Potter Stewart, “*Or of the Press*”, 26 HASTINGS L. REV. 631, 633-34 (1975). The origin of the term is not entirely clear, but Thomas Carlyle attributed it to a speech by Edmund Burke before the Parliament in 1787. THOMAS CARLYLE, ON HEROES, HERO WORSHIP, AND THE HEROIC IN HISTORY 139 (2013).

172. STEPHEN J.A. WARD, ETHICS AND THE MEDIA: AN INTRODUCTION 1-3 (2011). For a discussion of how professions can evolve to develop a new branch with a separate set of norms and expectations, see THE AMERICAN MEDICAL ETHICS REVOLUTION: HOW THE AMA’S CODE OF ETHICS HAS TRANSFORMED PHYSICIANS’ RELATIONSHIPS TO PATIENTS, PROFESSIONALS, AND SOCIETY 144, 145-47 (Robert B. Baker, Ph.D. et al. eds., 1999).

or important news conference. And now commentators can weigh in

directly on Twitter or on their own blogs; they may be influential even if they do not possess traditional credentials or adhere to traditional journalistic norms.¹⁷³

When there were fewer media outlets, and those available played a mediating role, it would have been harder to find an outlet for partisan argument in disguise. But with the advent of social media and the polarization of news sources, the media's credibility as gatekeeper has diminished. Not everyone listens when a respected journalist from a credible news outlet seeks to explain the facts behind a political posture. Instead, many people curate their news by following only certain individuals and reporters on social media and listening or reading news reports that conform to their political beliefs.¹⁷⁴ While this has always been true to some extent, it has become more prevalent in recent years.¹⁷⁵

The expectations for lawyers engaged in public discourse, whether as educators or as advocates in the court of public opinion, differ from those of journalists and opinion writers and even more so from those of purely political actors. Lawyers, of course, are governed by the ethics rules of the state in which they practice and other law governing lawyers. As discussed, lawyers are subject to honesty requirements both in¹⁷⁶ and outside court,¹⁷⁷ all of which are enforceable. Fiduciary obligations of loyalty and care are enforced through other rules.¹⁷⁸ And, these normative expectations are often unclear and vary depending on context.

The discussion in Part I illustrates a broader problem of lawyers' public commentary on legal ethics. As we described, lawyers widely commented about the conduct of other lawyers who were involved in the impeachment hearings. Among other things, the commentary addressed whether those lawyers, such as the Attorney General or White

173. Ben Smith, *The Rules of Debate Spin are Changing, and the Media is Losing Control*, BUZZ FEED NEWS (June 26, 2019, 3:56 PM), <https://www.buzzfeednews.com/article/ben-smith/democratic-debate-twitter> [<https://perma.cc/C3TY-CX54>].

174. Studies show that exposing individuals to contrary views on social media actually contributes to rather than alleviates political polarization. Christopher A. Bail et al., *Exposure to Opposing Views on Social Media Can Increase Political Polarization*, PNAS (Sept. 11, 2018), https://www.pnas.org/content/115/37/9216?mod=article_inline [<https://perma.cc/CZQ6-ULXT>].

175. There is a debate about how much media exacerbates political polarization. See e.g., Gregory J. Martin & Ali Yurukoglu, *Bias in Cable News: Persuasion and Polarization*, 107 AM. ECON. REV. 2565 (2017) (reviewing the literature and arguing that polarization has worsened in the recent past).

176. MODEL RULES r. 3.3.

177. *Id.* r. 4.1, 8.4(a)-(c).

178. See e.g., *id.* r. 1.1 (competence), 1.4 (communication), 1.3 (diligence).

House Counsel, should be faulted for violating the rules of professional conduct or broader professional norms. The nature of the lawyers' role was of public importance and interest, and lawyers would seem to be uniquely qualified to address it because the subject called for specialized knowledge of an area of law that may have been unfamiliar and inaccessible to non-lawyers. But, in general, the lawyers' commentary did not express the levels of care and accuracy that one would ordinarily look for in a judicial opinion, an academic or professional-educational article, or even a legal brief where, notwithstanding the lack of objectivity, accuracy is expected. The lawyer-commentators often appeared to use professional conduct rules instrumentally and unreliably, as weapons in partisan attacks on other members of the bar in the court of public opinion.¹⁷⁹ We infer that some were politically motivated and that even those who regarded themselves as removed from politics did not feel restrained by their role as lawyers. Perhaps others got caught up by the expectations of the medium in which they wrote or spoke. To the extent that their audience had expectations regarding the credibility, care, and expertise of lawyers, they were misled.

In the court of public opinion, unlike in a court of law, it is not easy to redress lawyers' unfair use of professional conduct rules as weapons. In private litigation, in contrast, when parties challenge opposing counsel's professional conduct to gain a strategic advantage, there is an objective arbiter to correct unreliable claims. Motions to disqualify opposing counsel for conflicts of interest, or dramatic objections before juries to an opposing counsel's misconduct, can serve a client's interest, and lawyers can engage in excess. But in litigation, the judge will decide whether the recusal motions have merit and issue a jury instruction to stem the damage of strategic objections regarding the conduct of opposing counsel. In some situations, judges might admonish or even sanction lawyers who are too free with their misconduct allegations. In the public debate over lawyers in the impeachment proceedings, however, there was no such mediating force.

One can understand both the allure of the lawyer-commentators' role and the temptation to play by the relatively loose standards of the media to which they contributed. Although most lawyer-commentators are not financially compensated for occasional opinion pieces or appearances on network and cable television, the job has other rewards. Having labored in relative obscurity, lawyers, such as those who are academics or former prosecutors, might find the spotlight alluring and perhaps even professionally useful. And their success may depend on conforming to the expectations of the particular medium. It is not obvious which set of norms the lawyer-commentators should adopt or

179. See generally John Leubsdorf, *Using Legal Ethics to Screw Your Enemies and Clients*, 11 GEO. J. LEGAL ETHICS 831, 831-32 (1998) (arguing that certain uses of the professional conduct rules are themselves unethical).

whether there should be a single set of norms for lawyers serving in this role. Problems arise, however, when lawyers create false expectations.

Ultimately, for the lawyer-commentators in the impeachment proceedings, as for most lawyers who comment in public about legal affairs, any restraints directed at addressing these problems are likely to be self-imposed. Disciplinary authorities have no history of proceeding against lawyers who publish misleading commentary. Likewise, there are no meaningful social restraints. In the impeachment proceedings, for example, there was no forum for lawyers' claims to be tested and disproved. For example, neither the Senate nor the Chief Justice, who presided over the Senate hearings, was asked to rule on the propriety of lawyers who prosecuted or defended Trump or other lawyers whose conduct was implicated.¹⁸⁰ So, lawyers could comment publicly in the media about lawyer-participants' ethics without fear of later being proven wrong. Perhaps at some point, the organized bar will coalesce around a set of normative expectations for lawyers serving as public commentators, but written standards ought not to be necessary to develop a professional norm in this context.¹⁸¹ Professional conscience, reputation, and mutual understanding should themselves suffice to establish basic expectations.

One approach would be for some or all lawyers to refrain from public commentary altogether. One might take the view, for example, that to avoid conveying expertise that they do not possess, lawyers should not comment on topics they have not studied extensively.¹⁸² This seems too extreme, however, since lawyers can bring knowledge, expertise, and context to public debate even when they are not experts in all relevant areas of the law.¹⁸³

180. See IMPEACHMENT OF DONALD J. TRUMP PRESIDENT OF THE UNITED STATES, *supra* note 9.

181. The ABA has offered some guidance to lawyers who serve as commentators on pending criminal cases in particular. See ABA STANDARDS FOR CRIMINAL JUSTICE: FAIR TRIAL AND PUBLIC DISCOURSE 8-2.4 (4th ed. 2013). The relevant Standard provides:

A lawyer who is serving as a legal commentator should strive to ensure that the lawyer's commentary enhances the public's understanding of the criminal matter and of the criminal justice system generally, promotes respect for the judicial system, and does not materially prejudice the fair administration of justice, in the particular case or in general. *Id.* at 8-2.4(b).

182. Ward Farnsworth, *Talking Out of School: Notes on the Transmission of Intellectual Capital from the Legal Academy to Public Tribunals*, 81 B.U. L. REV. 13, 14, 30-41 (2001) (arguing that it is problematic that academics without expertise in the area signed the letter urging against Clinton's impeachment); RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 241-42 (1999) (criticizing lawyers and academics who lacked expertise for signing on to a legal letter opposing the impeachment of President Clinton).

183. See Hessick, *supra* note 165, at 916-18 (suggesting a set of norms for academics who comment on Twitter).

One might also argue that, as commentators on legal questions, lawyers should strive for objectivity and accuracy, not use public media as advocates who “spin” or distort the law for political or other ends. In an era when lines between truth and “truthiness” are sometimes blurred, and when even conventional news media are sometimes condemned as purveyors of “fake news,” the public would benefit from being able to rely on lawyers as a corps of social and political commentators who, by virtue of their legal training and commitment to integrity as a professional value and trait of character, are straight shooters.¹⁸⁴ But this, too, may demand too much. Lawyers have an interest in advocating not only for clients but, outside the context of lawyer-client relationships, for causes that are important to them. And advocacy presupposes subjectivity and argumentation, not objective disquisitions.

But at the very least, if the lawyers are not endeavoring to offer objective, reliable views of the law, but are intending to engage in partisan advocacy, they should disclose that, so that their audience is not misled to overvalue lawyers’ claims. Otherwise, when lawyers appear as experts on television or use their credentials to write in print media, their audience may not trust them to transcend ideological warfare by employing legal expertise and knowledge relatively objectively.

Further, even when using public media as an outlet for advocacy, lawyers should exercise some restraint in how they talk about the law and facts. We derive this norm not directly from the rules of professional conduct but from the role that we believe lawyers ought to play in society, which we outline below. Even when lawyers are transparently advocating a cause, they will be expected to advocate within limits, as lawyers do for clients in the courtroom. While they will not be objective, they have some obligation of candor. Lawyer-commentators should aim to clarify, not obfuscate, the legal standards about which they write and speak. When discussing legal ethics, for example, they should explain where the rules fail to give a clear answer rather than make it seem as if the rules dictate the outcome that these commentators (or their media outlet) would like. Further, lawyer-commentators should be sparing in their accusations of professional misconduct, reserving such public criticism for situations in which other lawyers have crossed a clearly established ethical line.

184. For a satirical look at this problem, see Joseph Bernstein, *Bad News*, HARPER’S MAG. (Sept. 2021), <https://harpers.org/archive/2021/09/bad-news-selling-the-story-of-disinformation/> [<https://perma.cc/LU5A-WZH4>].

B. The Dangers of Employing Legal Ethics Instrumentally in Public Commentary

This section highlights some dangers when lawyer-commentators employ professional conduct rules instrumentally and, as a result, misleadingly, to criticize lawyers in public life, as some commentators did in the impeachment proceedings. First, these commentators may give the public a distorted understanding of the professional norms and focus the public on the wrong questions. Second, these commentators may undermine confidence in lawyers' future public commentary generally, and particularly in commentary on the professional conduct rules and norms, even when legitimate critiques are later offered. They may also undermine the efficacy of lawyer regulation more generally if the rules are seen as malleable and subject to political bias.

1. Diminished Public Understanding of the Legal Profession

It is important that, as an aspect of civics education, the public understand what lawyers do and what is expected of them. After all, the rule of law is, in part, upheld by lawyers who act as referees inside and outside the courtroom. When lawyers write or speak about other lawyers' work in the national public spotlight, as in the first Trump impeachment proceedings, lawyer-commentators have the chance to educate the public about the legal profession's rules and norms. But when lawyer-commentators mischaracterize the professional expectations, the dangers include not just public misunderstanding but public disappointment that institutions are not enforcing the norms, as explicated by lawyer-commentators. This disappointment can translate into disaffection or distrust of law and legal institutions, which is destabilizing. Further, the public may be unable to judge genuine questions regarding lawyers' work and the legal profession, if the public is misled to believe that professional conduct rules provide a way to judge the ultimate justness of a client's cause. Lawyers' commentary regarding the impeachment proceedings offers several illustrations of this problem.

The first problem was that much of the criticism masked valid moral critiques as objective professional ones. It would have been fine to criticize lawyers—for example, those defending President Trump—for their choice of client. Although a central principle of the rule of law is that even unpopular clients deserve a lawyer,¹⁸⁵ lawyers generally

185. Daniel H. Pollitt, *The Hazard of Being Undone*, 43 N.C. L. REV. 9, 10 (1964) (recounting how state bar authorities pursued charges of unethical conduct against a lawyer when in fact members of the bar were punishing the lawyer for representing unpopular clients); see also MODEL RULES r. 1.2(b) (stating that representation does not constitute "endorsement of the client's political, economic, social, or moral views or activities."); see generally HOW CAN YOU REPRESENT THOSE PEOPLE? (Abbe Smith & Monroe H. Freedman, eds. 2013) (compiling essays addressing the question of how lawyers represent unpopular clients).

may choose whom to represent and may therefore be held accountable for their choices. Professors Monroe Freedman and Michael Tigar famously debated this issue,¹⁸⁶ with Freedman concluding that lawyers are morally obligated to justify their clientele.¹⁸⁷ A lawyer-commentator on the left who agreed with Freedman might have raised moral questions about the decision to serve as White House Counsel or to serve President Trump personally. But it would be misleading to convey that it violates professional conduct rules to represent discredited clients, assuming the lawyer pursues their lawful objectives by lawful means.¹⁸⁸

Lawyer-commentators who unfairly accused the President's lawyers of ethical improprieties purveyed a misunderstanding about professional conduct rules while distracting the public from potentially legitimate moral concerns about particular clients and their causes. This sort of unfair critique may deter future lawyers from representing unpopular clients out of concern that they will be subject to baseless public accusations of professional impropriety by lawyers who exploit their own presumed expertise and objectivity. No lawyer is immune from reputational damage. In fact, part of the way self-regulation works is by trading off a lawyer's interest in preserving his reputation among potential clients, courts, and colleagues.¹⁸⁹

Criticizing a lawyer for his choice of client, rather than for supposed ethics violations, may also deter that lawyer from representing unpopular clients in the future, but at least the lawyer can defend his conduct directly. He can offer a public justification for his choice of client, as Freedman urged,¹⁹⁰ or he can justify the decision on other grounds, such as by referring back to the basic principle that even the most despised person deserves a lawyer.¹⁹¹ But if the lawyer is criticized by

186. Monroe H. Freedman, *Must You Be the Devil's Advocate?*, LEGAL TIMES (Aug. 23, 1993); Michael E. Tigar, *Setting the Record Straight on the Defense of John Demjanjuk*, LEGAL TIMES (Sept. 6, 1993). Others have weighed in on this debate. David Luban has argued that lawyers must choose clients whose goals are most consistent with ordinary moral norms. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 129-133 (1988). See also W. Bradley Wendel, *Institutional and Individual Justification in Legal Ethics: The Problem of Client Selection*, 34 HOFSTRA L. REV. 987, 991-92 (2006) (arguing that there ought to be some limits on client selection).

187. Monroe H. Freedman, *The Lawyer's Moral Obligation of Justification*, 74 TEX. L. REV. 111, 111-12 (1995) [hereinafter, Freedman, *Lawyer's Moral Obligation*].

188. This controversy was well reported when senior Pentagon official Charles Stimson attacked law firms for representing terrorism suspects detained in Guantanamo Bay. Neil A. Lewis, *Official Attacks Top Law Firms Over Detainees*, N.Y. TIMES (Jan. 13, 2007), <https://www.nytimes.com/2007/01/13/washington/13gitmo.html> [<https://perma.cc/N5XV-246S>].

189. W. Bradley Wendel, *Informal Methods of Enhancing the Accountability of Lawyers*, 54 S.C. L. REV. 967, 969-70 (2003).

190. Michael Tigar responded in this way by defending his choice to represent John Demjanjuk, a Nazi war criminal. See Tigar, *supra* note 186.

191. David Luban provides a good example of this direct form of criticism. Instead of accusing government lawyers of misconduct in their representation, he directly argued that

those who appear to have expertise and authority on the grounds that he is not adhering to professional duties in representing that client, it becomes much more difficult to address the underlying concern.

By criticizing the client's goals indirectly instead of asking lawyers to justify their decision to dedicate their expertise and talent to defending Trump, his administration or allies, these commentators may chill lawyers from representing controversial clients in the future. It's one thing to attack a lawyer's choice of client but quite another to accuse the lawyer of failing to act with integrity in the representation. In public debate, where there is no judge to cast aside such arguments, the impugned lawyer is at the mercy of these expert commentators. A lawyer is in the unenviable position of having to defend his conduct as a lawyer to a public that itself is not equipped to evaluate his conduct, when what is really at issue is his representation of an unpopular client.

A second related problem is that unfair ethics critiques mislead the public about the nature of lawyers' professional obligations. In building his argument, Freedman noted that lawyers play a critical role in our constitutional order and that the public is entitled to know what lawyers do and why they do it.¹⁹² Lawyer-commentators who obfuscate by masking criticism of client goals or values as a critique of the conduct of the lawyer fail to live up to this expectation and do a disservice by confusing the public about the profession's role.

For example, by casting Attorney General Bill Barr's summary of the Mueller Report as an unethical lie, rather than an act of advocacy on the part of a government lawyer serving the government as a client, lawyer-commentators made it seem as if Barr had betrayed professional values when their genuine concern was that Barr was wrong to undermine the legitimacy of the Mueller investigation, or wrong not to defer to the properly appointed special counsel. The latter critiques may have been valid, and one might have drawn on legal expertise in advancing them. But by invoking professional conduct rules, lawyer-commentators muddled rather than elucidated the issues.

Similarly, when lawyer-commentators complained about Cipollone's possible role as a witness in the impeachment hearings or suggested that he had a duty to report to Congress that arose out of his obligations as a lawyer to an entity, they cast what was, in essence, a critique of the President and his activities in Ukraine as a complaint about the White House counsel's ethics breach. In doing so, they confused the public about the lawyer's role, leading people to believe that

lawyers should not join the Trump administration because of the nature of the client. David Luban, *The Case Against Serving in the Trump Administration*, SLATE (Nov. 15, 2016, 2:29 PM), <https://slate.com/news-and-politics/2016/11/career-civil-servants-should-not-serve-in-the-trump-administration.html> [<https://perma.cc/7HPW-T7JN>].

192. See generally Freedman, *Lawyer's Moral Obligation*, *supra* note 187.

a lawyer may not represent a client in a proceeding in which he had personal knowledge, which is an inaccurate explanation of the scope of the advocate-witness rule.

Finally, some lawyer-commentators implied that government lawyers have a special obligation to ensure the public good. This is not entirely wrong. The Attorney General at least arguably represents the American public.¹⁹³ But the public speaks through its elected officials. Therefore, it is an oversimplification to suggest that the Attorney General has a direct obligation to pursue some abstract notion of the public good.¹⁹⁴ The same is true of other government lawyers such as White House counsel.¹⁹⁵ By suggesting otherwise, these commentators misled the public to believe that government lawyers pursue some objective public good that the lawyer or the public can ascertain.

2. *Diminished Credibility of Lawyers and Legitimacy of Lawyer Regulation*

While one danger is that the public will accept a lawyer-commentator's misleading critique, the corresponding danger is that, eventually, the public will catch on to these commentators' partisanship and unreliability. The public may perceive that lawyers with particular political leanings consistently defend the lawyers on their own side or attack the lawyers on the opposing side. For example, the public may have noticed that Democratic party-leaning lawyers accused Cipollone of violating the advocate-witness rule, while Republican-leaning lawyers launched the same critique against Adam Schiff.¹⁹⁶

One danger is that the public will stop believing lawyers who comment publicly about legal ethics and other aspects of the law, with the result that lawyers who genuinely seek to educate the public will be discounted. Another danger is that professional conduct rules themselves lose credibility. Rather than helping to elucidate the role of lawyers in public life, the rules may be swallowed up by the politicized

193. William R. Dailey, *Who is the Attorney General's Client?*, 87 NOTRE DAME L. REV. 1113, 1113-20 (2012); Roiphe, *supra* note 92, at 1091-99.

194. Roiphe, *supra* note 92, at 1091-99.

195. See generally Bob Bauer, *Thoughts on the Proper Role of the White House Counsel*, LAWFARE (Feb. 21, 2017, 9:02 AM), <https://www.lawfareblog.com/thoughts-proper-role-white-house-counsel> [<https://perma.cc/9BY5-UYGQ>]; Jennifer Wang, *Raising the Stakes at the White House: Legal and Ethical Duties of the White House Counsel*, 8 GEO. J. OF LEGAL ETHICS 115, 118 (1994) (discussing the ethical obligations of White House Counsel).

196. Olivia Beavers, *Democrats Call White House Lawyer a 'Fact Witness' in Impeachment Case, Demand He Disclose 'All Facts' to Senate*, THE HILL (Jan. 21, 2020, 10:00 AM), <https://thehill.com/homenews/house/479112-democrats-call-white-house-lawyer-a-fact-witness-in-impeachment-case-demand-he> [<https://perma.cc/LC5W-275W>]; Mike Debonis & Colby Itkuwitz, *Trump's Legal Team Targets Schiff in Effort to Undercut Impeachment Case*, WASH. POST (Jan. 25, 2020), https://www.washingtonpost.com/politics/trumps-legal-team-targets-schiff-in-effort-to-undercut-impeachment-case/2020/01/25/9dc38708-3fa2-11ea-baca-eb7ace0a3455_story.html [<https://perma.cc/7ZPC-GX7B>].

rhetoric used to advance a particular ideological agenda. It is not hard to imagine that questions may arise in the future regarding the ethical behavior of government lawyers and other lawyers involved in public controversies, but that lawyers' explanations and critiques may no longer be credible. The rules may no longer be useful in publicly assessing the conduct of lawyers because they may seem to be yet another tool in an ideologically driven debate. Regulators may themselves become wary of pursuing disciplinary claims against lawyers who were publicly critiqued in a climate in which the regulators might then be accused of playing partisan politics.¹⁹⁷

III. THE MORAL OF THE STORY: WHAT WE CAN LEARN ABOUT LAWYERS, DEMOCRACY, AND PUBLIC DEBATE

In many ways, impeachment is an imperfect lens through which to judge lawyer conduct. Impeachment trials are not normal court proceedings and are more appropriately viewed as political proceedings than legal proceedings. Imposing too much formal law on an impeachment may undermine its constitutional purpose.¹⁹⁸ Lawyers do, however, play a pivotal part in impeachment proceedings as politicians and advocates. Impeachment proceedings therefore provide a good context in which to examine the profession's role, particularly at times of intense political conflict. The politically charged nature of impeachment proceedings does not necessarily bring out the best in the profession, but examining lawyers' conduct in the proceedings offers insight not only into the bar's deficiencies, but also into the potentially positive, mediating role lawyers can play in divisive, politically charged moments in history.

Congressional impeachment proceedings over the past half-century have held a spotlight on the legal profession and its role in American democracy. The congressional investigation of the Watergate break-in and cover-up led to introspection about government lawyers' misconduct. This ultimately led to reforms, including a revision of professional conduct rules¹⁹⁹ and the requirement that law students study

197. There is relatively little public discussion of how disciplinary authorities exercise discretion in deciding whether to initiate and pursue charges against lawyers in politically charged cases or in general. For a discussion of this subject in the context of lawyers' pursuit of frivolous civil challenges to the results of the 2020 presidential election, see Bruce A. Green, *Selectively Disciplining Advocates*, 54 CONN. L. REV. 151 (2022).

198. Mark Graber & Sanford Levinson, *Overlegalizing Impeachment and the Twenty-Fifth Amendment*, JURIST (Jan. 13, 2021, 9:04 AM), <https://www.jurist.org/commentary/2021/01/graber-levinson-impeachment-amendment/> [https://perma.cc/96XP-ZD6U].

199. See Michael Ariens, *The Agony of Modern Legal Ethics, 1970-1985*, 5 ST. MARY'S J. LEGAL MAL. & ETHICS 134, 139 (2014) (maintaining that the ABA replaced the Code of Professional Responsibility with the Model Rules of Professional Conduct in response to the loss in public confidence in the legal profession caused by the Watergate scandal).

legal ethics.²⁰⁰ The Clinton impeachment proceedings, though less momentous, also shined a light on lawyers – particularly the lawyer-President, the Independent Counsel who investigated him, and the lawyers who defended him.²⁰¹ As discussed, the first Trump impeachment proceedings raised questions about the ethics of government lawyers, as well the dangers of using ethics to judge those defending political adversaries.

As Part I showed, professional conduct rules were wielded in dubious ways as weapons against lawyers with supporting roles in the Trump impeachment proceedings. To be sure, some lawyers did engage in problematic conduct; however, the lawyers throwing stones were not themselves without sin. Their accusations were often predicated on questionable, and occasionally implausible, claims about the meaning and application of professional rules and norms. While lay readers may have inferred that professionally credentialed commentators were offering objective expert viewpoints, much of the commentary does not stand up well to analysis. If many commentators were not consciously using the ethics rules instrumentally, they were almost certainly politically biased. There is an impulse in moments like these to cast one's political adversaries as not merely wrong but also disreputable, or outside the scope of permissible conduct. Lawyer-commentators frequently fell victim to this tendency. The culture of the media did not help. First, media outlets themselves increasingly lean to one side of the political spectrum,²⁰² and space and time limitations make it hard to explore complexities and nuance if commentators are inclined to do so. This is compounded by the fact that some popular outlets seem to reward incendiary or extreme statements rather than thoughtful and balanced ones.

As we discussed in Part II, masking political or moral critique as professional critique misleads the public about lawyers' professional

200. See Kathleen Clark, *The Legacy of Watergate for Legal Ethics Instruction*, 51 HASTINGS L.J. 673, 673 (2000) (observing that in response to the Watergate scandal, the ABA adopted the accreditation requirement that all law students be instructed in legal ethics). The requirement that all law students take and pass an exam on professional conduct rules before being admitted to the bar was also due, in part, to the Watergate scandal. Paul T. Hayden, *Putting Ethics to the (National Standardized) Test: Tracing the Origins of the MPRE*, 71 FORDHAM L. REV. 1299, 1301-02 (2003).

201. See, e.g., Robert W. Gordon, *Imprudence and Partisanship: Starr's OIC and the Clinton-Lewinsky Affair*, 68 FORDHAM L. REV. 639 (1999); Charles J. Ogletree, Jr., *Personal and Professional Integrity in the Legal Profession: Lessons from President Clinton and Kenneth Starr*, 56 WASH. & LEE L. REV. 851, 852 (1999); Deborah L. Rhode, *Conflicts of Commitment: Legal Ethics in the Impeachment Context*, 52 STAN. L. REV. 269, 269 (2000).

202. See Tim Groseclose & Jeffrey Milyo, *A Measure of Media Bias*, 120 Q. J. OF ECON. 1191, 1192 (2005) (concluding that United States media outlets have a strong liberal bias). At least this is the popular perception of media. Ken Paulson, *Knight-Gallup Poll Sheds Light on Media-Bias Perceptions*, FREE SPEECH CTR. (Sept. 9, 2020), <https://www.mtsu.edu/first-amendment/post/953/knight-gallup-poll-sheds-light-on-media-bias-perceptions> [<https://perma.cc/3ZP2-JHGK>].

role and responsibilities. It undermines the power of the rules of professional conduct to serve as a real limit on government lawyer conduct, because if these rules can be construed to have *any* meaning, then they have no meaning at all. In this part, we argue that politically charged moments like the impeachment hearings pose a challenge to the profession. To maintain its integrity and serve a vital purpose, the profession as a whole should strive to focus its contribution on areas of professional expertise, promote rule of law values, and educate the public about democratic institutions and processes. This Part draws on theoretical debates about the legal profession's role to analyze the profession's conduct during the impeachment proceedings. We conclude that the profession can play a critical part in upholding the institutions of democracy but that this role may, at times, counterintuitively include defending lawyers who seemingly pose a threat to it.

Part of what makes it hard for the profession to live up to expectations in politically charged moments like the impeachment is a misperception that professional norms are more aspirational than regular law. Section A argues that, insofar as the commentary manipulated professional conduct rules for political advantage, it reinforced the misconception that professional conduct rules are contingent, subjective, and, ultimately, malleable. But on a more positive note, the commentary also reaffirmed the resilience of professional codes of conduct. It showed how despite the various ways in which the profession fails to live up to its ideal, the public still looks to lawyers as a moderating force.

Drawing on theoretical debates about the role of the legal profession in American democracy, Section B analyzes what this moderating force might be. As the impeachment hearings and commentary show, the legal profession cannot and should not serve as an arbiter of the public interest. It is not tasked with helping achieve the best or even the right result. Nor are lawyers merely hired guns who seek any advantage for their clients. The profession serves a central and traditional role; it protects the law and institutions of American democracy. While we give clients, in government and private practice, a great deal of leeway in defining the objectives of a representation, lawyers must play by the rules, protect legal processes, and ensure that their clients abide by the law.²⁰³ The analysis of impeachment lawyers and their critics shows that this role is a substantial and important one. Lawyer-commentators in the future can and should hold all lawyers, including those in government, to this standard. In order to do so, however, they must model this conduct themselves by intervening only when they have the expertise to do so and by providing accurate commentary that

203. MODEL RULES r. 1.2(a) (providing that clients determine the objectives of the representation); r. 2.1 (defining the lawyer's role as counselor); r. 1.2(d) (forbidding lawyers from knowingly assisting in a client's crime or fraud); r. 8.4(d) (forbidding lawyers from interfering with the administration of justice).

educates the public about law and democratic institutions and processes. Or, at the very least, they should be transparent about their motives if they are doing otherwise.

A. *The Role of the Rules of Professional Conduct*

There is a longstanding debate about the regulation of lawyers, particularly about the influence and significance of professional conduct rules. For the past half century, state courts have promulgated these rules pursuant to their lawmaking authority and enforced them through disciplinary decisions and by other means.²⁰⁴ But the view still lingers among lawyers that these rules lack the legitimacy or dignity of other law, and that lawyers and law firms are entitled, or should be entitled, to a greater latitude than other regulated individuals and entities to decide for themselves how to behave.²⁰⁵ The notion is that, while rules offer guidance, lawyers may ultimately resolve professional dilemmas based on their own personal or professional conscience.²⁰⁶

204. See generally Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L. J. 73, 78-79, 86-87 (2009) (discussing judicial regulation of lawyers via rule making and disciplinary enforcement) [hereinafter Zacharias & Green, *Rationalizing Judicial Regulation*].

205. See *id.* at 92 (discussing the illegitimacy of the idea that professional conduct rules are “[w]eak law”).

206. The idea that lawyers should be guided by personal conscience has been traced back to the nineteenth-century writings of David Hoffman, whose resolutions for lawyers’ deportment included a resolution “to make my own, and not the conscience of others, my sole guide. What is morally wrong cannot be professionally right.” David Hoffman, *Fifty Resolutions in Regard to Professional Deportment*, in A COURSE OF LEGAL STUDY 720, 765 (2d ed. 1936). Subsequent nineteenth-century writings referred variously to lawyers’ personal conscience and professional conscience, with possibly different meanings. See Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 22-24 (2005). The extent to which lawyers could or should act on their own sense of justice was debated by the drafters of the 1908 Canons, who ultimately provided in Canon 15 that the lawyer “must obey his own conscience and not that of his client.” See James A. Altman, *Considering the A.B.A.’s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2401, 2424 (2003) (“The Canons prescribed a vision of conscientious lawyering. According to that vision, lawyers should zealously represent their clients, but only insofar as they could do so in conformity with their personal duties and views as gentlemen and their republican duties as ‘officers of the court’ Lawyers were to measure those duties by their own consciences, not those of their clients.”); see also Susan D. Carle, *Lawyers’ Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 LAW & SOC. INQUIRY 1 (1999) (discussing the drafting of the Canons).

Since then, the debate over the significance of a lawyer’s conscience in resolving questions of professional conduct has continued principally with regard to questions about lawyers’ advocacy. See, e.g., Lori D. Johnson & Melissa Love Koenig, *Walk the Line: Aristotle and the Ethics of Narrative*, 20 NEV. L.J. 1037, 1075 (2020) (proposing the addition of a Comment to the Model Rules to provide, in part: “A lawyer should strive to be a person of good character and maintain good habits in the practice of law. In light of such virtuous character, and employing personal conscience, a lawyer should make good choices when faced with difficult moral decisions in the course of advocating for a client”); Julie A. Oseid & Stephen D. Easton, *The Trump Card: A Lawyer’s Personal Conscience or Professional Duty*, 10 WYO. L. REV. 415, 416 (2010) (discussing whether lawyers must act contrary to their conscience and whether, to avoid having to do so, they may influence their clients); Russell G. Pearce et

The commentary about lawyers in the impeachment proceedings supports both sides of this debate. In critiquing lawyers who were involved in the impeachment proceedings, lawyer-commentators personally rejected the idea that professional conduct rules have little importance. When commentators criticized other lawyers and suggested that they be punished for violating professional conduct rules, they recognized that lawyers are bound by rules, not just personal conscience, and that the rules have some objective meaning beyond what the lawyer in question thinks they mean, and that transgressions have consequences. But, at the same time, commentators' aggressive readings of professional conduct rules for partisan purposes, and their indifference to contrary authority and modes of interpretation, reinforced the idea that these rules are malleable, perhaps more so than other law.

To be sure, the law of lawyering was not the only, or most important, area of law that was contested in the first impeachment proceedings. Questions of constitutional law—such as whether a president could be impeached for particular offenses, whether a sitting president could be prosecuted, and whether Congress could compel executive branch officials' testimony—were more germane. Constitutional law experts lined up on opposite sides to debate questions such as these, giving the impression, perhaps, that law—and certainly constitutional law—is subject to manipulation for partisan ends.²⁰⁷ At least since the dawn of legal realism, this has been a strong current of understanding about the law generally within both the profession and society at large.²⁰⁸ Contests over judicial appointments, especially to

al., *A Challenge to Bleached Out Professional Identity: How Jewish was Justice Louis D. Brandeis?*, 33 *TOURO L. REV.* 335, 368 (2017) (“As a general matter . . . the lawyers’ personal conscience must give way to professional rules.”).

207. See Graber & Levinson, *supra* note 198 (arguing ordinary meaning and common sense ought to have more bearing on the legal questions raised by impeachment proceedings than formal court-made law).

208. See Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 *FLA. ST. U. L. REV.* 195, 197 (1987) (“Now the Legal Realists are mostly remembered for having been skeptical about the determining force of precedent, for believing that judges could always reach any result they wanted and would therefore decide cases out of class bias or passing whimsy. The [Critical Legal Studies] writers have tried to resurrect some of the Legal Realists’ more substantial scholarship, to appropriate it to their own purposes, and to generalize it into a critique of mainstream modes of liberal-legal thought more far-reaching than anything the Legal Realists themselves had in mind.”); Robert Justin Lipkin, *Indeterminacy, Justification and Truth in Constitutional Theory*, 60 *FORDHAM L. REV.* 595, 610-11 (1992) (distinguishing “a stronger version of the indeterminacy thesis”—namely, “that constitutional provisions are now and perpetually indeterminate”—from “the weaker version [which] contends that constitutional provisions are either indeterminate or, if not, can always become indeterminate in the appropriate circumstances”).

the Supreme Court, often reinforce perceptions about the law's indeterminacy by underscoring the significance of the nominee's approach to constitutional interpretation.²⁰⁹

The law of lawyering has a special problem of legitimacy, however, and, in the impeachment proceedings, lawyer-commentators' loose use and exploitation of professional conduct rules both revealed and magnified the problem. While the Constitution's meaning is, in many respects, contestable, and there is disagreement about which tools to employ to ascertain its meaning, few doubt that this is an intellectually rigorous pursuit. Even after legal realism, no jurists purport to pull the Constitution's meaning out of thin air, to rely on their gut or intuition, or to find its meaning in sound public policy alone.²¹⁰ This is a pursuit for experts—not for all lawyers, but particularly for judges and scholars, with the Supreme Court often getting the last word, based, variously, on precedent, constitutional history and text, and other indicia of meaning. Other bodies of law have other priesthoods, modes of exegesis, and sources of authority. In general, ascertaining the law's meaning is a job for specialists.²¹¹

Not so for the law of lawyering, however. Justice Scalia belittled the subject of legal ethics as the “least analytically rigorous.”²¹² Because it is the one area of law that applies equally to all lawyers and that all lawyers are required to know and to obey, some assume that the meaning and application of the relevant rules and law are relatively accessible.²¹³ Some even assume that one need not look to exter-

209. See, e.g., Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, 115 YALE L.J. POCKET PART 38, 51 (2006) (defending the idea of “vigorous Senate confirmation hearings that directly address and debate contested issues of substantive constitutional law”).

210. See, e.g., Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1224 (1995) (maintaining that, “[a]lthough some provisions might be more pliable than others,” constitutional interpretation is bound by the text and interpretive convention).

211. See, e.g., Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 80 (2012) (referring to “statutory interpretation specialists”). But see LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (arguing that in interpreting the constitution, judges should channel the popular will).

212. *Holland v. Florida*, 560 U.S. 631, 670 (2010) (Scalia, J., dissenting) (referring to “that least analytically rigorous and hence most subjective of law-school subjects, legal ethics.”). For a refutation of Justice Scalia's characterization, see Bruce A. Green, *Foreword - The Legal Ethics Scholarship of Ted Schneyer: The Importance of Being Rigorous*, 53 ARIZ. L. REV. 365, 369 (2011).

213. See, e.g., *Howell v. State Bar of Tex.*, 843 F.2d 205, 206, 208 (5th Cir. 1988) (citation omitted) (finding that disciplinary rule forbidding “conduct that is prejudicial to the administration of justice” is not unconstitutionally vague, because lawyers are professionals who benefit from guidance from case law and the “lore of the profession”).

nal authority for meaning because one may rely on intuition—for example, on one’s gut or on one’s sense of smell (as in, does it pass “‘the smell test’ ”?).²¹⁴

Aspects of the law governing lawyers reinforce these ideas. The very term “legal ethics” might imply that the subject is subjective—that it is a body of expectations, more “ethics” than “legal,” that either accords with or defers to a lawyer’s own sense of personal or professional conscience. The history of the field suggests the same. The current rules derive from the Canons of Professional Ethics published by the ABA in 1908.²¹⁵ The Canons drew on common law, such as agency law establishing lawyers’ duties to clients, and on judicial pronouncements in the context of advocacy. However, the Canons themselves initially purported merely to offer guidance to lawyers, not to establish legally enforceable obligation.²¹⁶ The Canons invited lawyers to rely on their professional conscience.²¹⁷

The Preamble to the Model Rules of Professional Conduct preserves vestiges of this understanding. For example, it says that “a lawyer is also guided by personal conscience and the approbation of professional peers.”²¹⁸ But the point is not that lawyers may rely on conscience and professional consensus to the exclusion of the rules, but that these considerations supplement the rules’ legally enforceable prescriptions, helping to fill in gaps where the rules give lawyers discretion.²¹⁹ There are, in other words, broader norms that govern professional conduct

214. See, e.g., *Smith, Smith & Kring v. Superior Court*, 60 Cal. App. 4th 573, 580 (1997) (overturning disqualification of trial counsel where, rather than applying the applicable rule, the trial court determined that the representation “failed ‘the smell test.’”). Judith L. Maute, *Foreword: Symposium Issue on the Evolving Restatement of the Law Governing Lawyers*, 46 OKLA. L. REV. 1, 12 (1993) (“Wide variance exists among instructors, but at least the recent generations of lawyers are aware that ‘legal ethics’ involves more than a gut reaction. Those who graduated since adoption of the Model Rules have an even stronger orientation to analyze ‘ethical’ problems as also raising questions of law susceptible to traditional research and analysis.”).

215. See Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 434-39 (2005) (describing evolution from the 1908 Canons to the Code of Professional Responsibility to the Model Rules).

216. See *id.* at 430-35 (explaining that, although the Canons did not have the force of law, state courts gradually used the Canons as the basis of discipline).

217. See *supra* note 206.

218. MODEL RULES, Preamble, ¶ [7].

219. See *id.* (“Many of a lawyer’s professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law.”). With respect to how lawyers should exercise discretion under professional conduct rules, see generally Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265 (2006). The misunderstanding that professional conduct rules lack the status of enforceable law is compounded by the fact that, although applicants for admission to the bar are tested on their knowledge of the Model Rules, the Model Rules are not in fact legally enforceable but are simply a proposal on which, for the most part, state courts premise their own rules. What those emphasizing the nonauthoritative role of the Model Rules overlook, however, is that state rules of professional conduct, adopted by state courts, are legally enforceable.

that elude precise regulation. Further, the Preamble states that “[t]he legal profession’s relative autonomy carries with it special responsibilities of self-government.”²²⁰ This observation might be misunderstood to mean that individual lawyers have autonomy to govern themselves, when it actually refers to lawyers’ collective influence through the organized bar on the content of the professional conduct rules.²²¹

Bar associations have contributed to the idea that ascertaining lawyers’ professional obligations is different from ascertaining other legal obligations. Beginning soon after the Canons were adopted, bar associations established ethics committees that advised lawyers about how to handle professional dilemmas.²²² Because the Canons were vaguely worded and, in any event, did not have the force of law, the committees did not feel constrained by the text of the Canons.²²³ They did not engage in an analysis like that of courts interpreting a constitutional provision or statute, or like that of a common law court applying and extending prior judicial precedent. Rather, the committees offered guidance on professional practice based largely on their members’ professional experience and intuition.

Today, the professional conduct rules have a different role. Courts’ rules of professional conduct are law – part of the “law of lawyering.”²²⁴ Although some would prefer for lawyers to have more room to engage in independent moral deliberation on questions of professional conduct,²²⁵ lawyers’ conscience plays only an interstitial role.²²⁶ But many

220. MODEL RULES, Preamble, ¶ [12].

221. See *id.* (“The profession has a responsibility to assure that its regulations are conceived in the public interest . . .”). For critiques of the idea of law as a “self-regulating” profession, see Bruce A. Green, *Lawyers’ Professional Independence: Overrated or Undervalued?*, 46 AKRON L. REV. 599, 602-08 (2013); see generally Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147 (2009).

222. See Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers’ Conduct*, 15 GEO. J. LEGAL ETHICS 313, 325-27 (2002) (describing the origin of bar associations’ ethics committees).

223. In 1915, the earliest bar association ethics committee, which was established by the New York County Lawyers’ Association, explained that in advising lawyers about proper professional conduct, “it is guided by the tried and accepted traditions of an honorable and useful profession, and by widely acknowledged principles of ethics, and by what it conceives to be tenets held by the most upright members of the Bar for sound reasons.” JULIUS HENRY COHEN, *THE LAW: BUSINESS OR PROFESSION?* 168 (1916).

224. See, e.g., John M. A. DiPippa, *Lon Fuller, the Model Code, and the Model Rules*, 37 S. TEX. L. REV. 303, 346 (1996) (“The Model Rules represent the triumph of a new jurisprudential orthodoxy which combined realism and positivism. This can be seen in the Model Rules’ conception as the law of lawyering, the rejection of the Code’s three-part structure, and the Rules’ disconnection of law and ethics.”).

225. See, e.g., Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885, 887 (1996); Michael S. McGinniss, *The Character of Codes: Preserving Spaces for Personal Integrity in Lawyer Regulation*, 29 GEO. J. LEGAL ETHICS 559, 560 (2016); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

226. See Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 19-21 (1997); Serena Stier, *Legal Ethics: The Integrity Thesis*,

bar associations' professional ethics committees continue to issue opinions with minimal analysis, reinforcing the idea that professional obligations are more a matter of individual conscience or professional consensus than of rules and legal analysis.²²⁷ And, of course, the low burden of justification expands the opportunity to bring professional self-interest and other biases to bear.²²⁸

Out of the notion that the dictates of legal ethics are accessible and intuitive, not rooted in authority or ascertainable by conventional modes of legal analysis, grows the mistaken idea that (to paraphrase Lewis Carroll) the rules mean just what a lawyer chooses them to mean, neither more nor less.²²⁹ At least from the courts' perspective, this idea is not far off. Courts are not as restricted in interpreting professional conduct rules as they are in interpreting statutes, because courts themselves adopt these rules.²³⁰ State supreme courts have latitude to apply the rules to reach results that make sense to them as a matter of sound policy, or, if they think the rules lead to undesirable results, to rewrite them.²³¹ But it does not follow that lawyers have comparable latitude. Because courts have the last word on the meaning of the professional conduct rules, well-regulated lawyers should look to judicial precedent and, where it is unavailable, should employ

52 OHIO ST. L.J. 551, 554 (1991) (“[L]awyers have a special obligation to obey the law of lawyering when the rules are mandatory. The law of lawyering also encourages lawyers to exercise discretion and to choose actions consistent with their own moral values.”). Lawyers may also rely on personal values when the meaning of the rules is unascertainable. See Geoffrey C. Hazard, Jr., *Personal Values and Professional Ethics*, 40 CLEV. ST. L. REV. 133 (1992). But that is surely not the usual situation.

227. Joy, *supra* note 222, at 350 (“Many opinions are simple summaries of questions and answers with very little citation or reasoning.”). For a criticism of the ABA’s ethics opinions in the first decade after the Code of Professional Responsibility was adopted, see Ted Finman & Theodore Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 UCLA L. REV. 67 (1981). For a more positive account, see Richard H. Underwood, *Confessions of an Ethics Chairman*, 16 J. LEGAL PROF. 125 (1991).

228. See Joy, *supra* note 222, at 354-59 (discussing the risk that ethics opinions are influenced by committee members’ self-interest). There is an extensive literature on the influence in general of lawyers’ self-interest on the bar’s role in professional self-regulation. See, e.g., Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation--Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1169 (2003) (“There is growing scholarly accord that regulating lawyers is designed as much, or more, to benefit lawyers than to protect the public.”) (citing examples); Sung Hui Kim, *Naked Self-Interest? Why The Legal Profession Resists Gatekeeping*, 63 FLA. L. REV. 129 (2011).

229. See, e.g., ABA Standing Comm. on Ethics & Prof’l Resp., Formal Op. 93-374 (1993) (dissenting opinion) (“Only under the world view of Mr. H. Dumpty, where words mean only what he chooses them to mean, can the Committee’s conclusion be reached.”).

230. Bruce A. Green, *Doe v. Grievance Committee: On the Interpretation of Ethical Rules*, 55 BROOK. L. REV. 485, 536 (1989) (“Because the court is not constrained to implement the will of the legislature, but is operating in an area of law in which it has a special expertise and authority, it should have far greater latitude in interpreting ethical rules than it would have in interpreting legislation.”).

231. See Zacharias & Green, *Rationalizing Judicial Regulation*, *supra* note 204, at 117.

the interpretive tools that courts employ, not exploit vagueness and ambiguity by ascribing their preferred meaning to the rules.

The commentary about lawyers' conduct during the Trump impeachment proceedings played into the assumption that norms and rules of professional conduct are manipulable if not meaningless. Constitutional questions were addressed by constitutional law experts who spoke with authority because they were particularly knowledgeable about, and capable of applying, the relevant judicial decisions, constitutional history, and secondary authority. In contrast, any lawyer or, in John Dean's case, disbarred lawyer, could opine on legal ethics.²³² While some commentators, such as NYU's Professor Gillers, could fairly claim expertise as a teacher and scholar in the field, no special knowledge was required. In the hands of lawyer-commentators, professional conduct rules were protean, bendable at will toward politically agreeable results. Perhaps that was true of much of the law discussed in the context of the impeachment proceedings, but this is particularly concerning with respect to the law of lawyering because of the popular view that the field lacks analytic rigor.

Of course, however popular, it is still a misconception to assume that lawyers' regulation is as manipulable as it was in the hands of commentators. Every year, courts' disciplinary authorities punish lawyers for violating professional conduct rules. Trial courts, in turn, provide remedies, impose sanctions for lawyers' misbehavior in court proceedings, and impose civil liability or forfeit lawyers' legal fees based on professional violations. In all these contexts, the meaning and application of professional conduct rules and standards are litigated and found to have determinate meanings that do not necessarily accommodate the lawyers' conduct, and there are adverse consequences when lawyers run afoul of them.²³³ While lawyers' professional obligations are sometimes uncertain or in flux, there are also bodies of precedent and accepted modes for interpreting professional conduct rules, no less than for other bodies of law.²³⁴ It is precisely those precedents and modes of interpretation by which one can judge the impeachment commentary and find much of it wanting.

232. It may be that impeachment is so unique that lawyer expertise is not particularly helpful. See Graber & Levinson, *supra* note 198. If the law is uniquely determined by Congress in an impeachment proceeding, then perhaps Congress can also shape the role of lawyers. Even if this is so, the departure ought to be set against the backdrop of established principles of the law governing lawyers.

233. See, e.g., *Persichette v. Owners Ins. Co.*, 462 P.3d 581, 583-84 (Colo. 2020) (disqualifying lawyer for violating Rule 1.9(a)); *Cohen v. Statewide Griev. Comm.*, 208 A.3d 676, 688-90 (Conn. App. Ct. 2019) (interpreting Rule 3.3 to apply to false statements made by a lawyer in a fiduciary capacity, not only in a lawyer-client relationship, and affirming sanctions); *Bennett v. GlaxoSmithKline LLC*, 151 N.E.3d 1184, 1201-02 (Ill. App. Ct. 2020) (ordering forfeiture of legal fees for lawyers' violation of Rule 1.5(e), which regulates fee sharing by lawyers of different firms).

234. See Green, *supra* note 230, at 534-52.

On a more positive note, while one might wish that legal commentary on the professional conduct rules had been more objective and analytically rigorous, one might still appreciate that commentary called attention to the rules in the first place. Further, commentators treated professional conduct rules seriously, as standards against which lawyers should be judged. While some obvious concepts, such as that lawyers should not lie, went unelaborated (and consequently, oversimplified), others, such as the advocate-witness rule, were not intuitive and garnered some explanation. In these respects, the commentary conveyed that lawyers are subject to different, and more exacting, standards of conduct than the public generally. While it is regrettable that many commentators misrepresented the meaning or scope of the rules, it is heartening that they conveyed that lawyers in and out of government are subject to a set of professional rules and norms and that members of the legal profession are keeping track of whether their professional brethren are conforming to these expectations. This sort of exercise gives expression to the aspirations of a self-regulating profession. In addition, the interest in lawyers' commentary, especially that on lawyers' professional conduct, is a sign of a healthy democracy, one in which the public welcomes professional gatekeepers, experts who will transcend the partisan clamor. Lawyers still command respect (which may not be fully deserved) not only as experts but as guardians of democratic institutions.

B. Lawyers' Role in a Divided Society

How can lawyers act collectively during a politically charged moment like impeachment? How can the bar and lawyer-commentators manage to sustain an influential and constructive role without taking political sides? The answer is that they can promote values associated with legalism.²³⁵ Acting collectively to point out departures from legal rules and norms as well as areas in which the governing law is unclear is the best way to ensure relevance and positive influence that transcends an individual lawyer's role as advocate. In this section, we argue that the rules of professional conduct ought to be used and interpreted in this spirit. It may be hard for the profession in these intense moments to abandon what lawyers see as the ends of justice. Individual lawyers, of course, need not do so in their professional or political advocacy. However, when acting collectively through bar associations or

235. In taking this position, we are disagreeing with the eminent historian of the legal profession, Jerold Auerbach, who argued that throughout the twentieth century, the bar's adherence to legalism and process ensured that it favored the status quo over equal justice; that the bar abandoned the fight for equality and fairness in favor of elite professional values; and these values have become an excuse for inaction on social justice; and that the effort to preserve or protect neutral institutions is itself just an excuse for conservative inaction. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 232, 259 (1976).

offering public commentary that seems objective, lawyers should promote their role as guardians of democratic process and the law itself.

There is a longstanding professional debate about lawyers' role in society. To oversimplify, the debate is over the extent to which lawyers should serve the public interest at the expense of individual clients' interests or their own self-interest. With respect to the primacy of clients' interests, the debate is captured by two different conceptions of the lawyer's role—that of “statesman” versus a hired gun.²³⁶ The latter has been characterized as the “standard conception.”²³⁷ The tension between the public interest and lawyers' self-interest is captured by the question of whether law is a profession or a business.²³⁸ Academics and practitioners (among others) have debated these questions for over a century.²³⁹

The impeachment commentary straddled both sides of this debate. On the one hand, commentators seemed to convey that lawyers, at least those who work for the government, have a special obligation to pursue the public good. This assumption is at the heart of the criticism of White House Counsel for not voluntarily cooperating with Congress. While it was cast as a question of Rule 1.13, the commentary essentially argued that White House Counsel should have promoted the public interest directly, rather than catering to the President's view of what was best.²⁴⁰ On the other hand, by using the professional conduct rules to make what, in the end, seemed like a partisan argument about what constituted the public interest, these commentators seem to have unwittingly embodied and therefore confirmed the standard view that all lawyers are partisans, or hired guns.

In the context of legal representations, where lawyers owe professional duties to clients, there is room to debate whether lawyers should

236. Anthony Kronman coined the term “lawyer-statesman,” claiming that the profession was suffering from the decline from this ideal, which was based on the assumption that lawyers have unique practical wisdom that enables them to ascertain the public good and pursue civic virtue. ANTHONY KRONMAN, *THE LOST LAWYER* 12, 354 (1993).

237. MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 74-79, 377 (5th ed. 2016) (explaining in § 4.04 that lawyers can choose clients and offer moral counseling but are not morally responsible for their clients' conduct); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *YALE L. J.* 1060, 1060-61 (1976) (arguing that lawyers must be loyal to clients regardless of the justness of the client's cause); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 *AM. B. FOUND. RES. J.* 613, 617-18 (1986) (arguing that lawyers ought to be amoral advocates for their clients).

238. Robert W. Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 *WM. & MARY L. REV.* 1169, 1178 (2009); 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, 1230-31 (1995).

239. Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 *GEO. WASH. L. REV.* 1, 2 (2005) (noting that “[c]ontemporary regulation of the legal profession is rooted in a nineteenth-century debate about the proper conduct of advocates.”).

240. See *supra* Part I.A.

be “amoral” advocates for clients’ lawful preferences or whether lawyers should temper their advocacy out of regard for the public interest.²⁴¹ Those taking an extremely client-centered approach argue that once lawyers take on a representation, they should advocate unwaveringly for the client’s interest, within the bounds of the law. Others argue that lawyers may and should take account of the public interest in counseling clients,²⁴² and perhaps even in advocacy on clients’ behalf.²⁴³ But even those advocating for more extreme partisanship in the context of representing clients might acknowledge that, outside legal representations, lawyers who purport to speak for the profession should serve the public good, though how they ought to do that might still be in dispute.²⁴⁴ The Model Rules preamble gives some support for this latter view, by proclaiming that “lawyers play a vital role in the preservation of society.”²⁴⁵ The Rules somewhat cryptically add that “[t]he fulfillment of this role requires an understanding by lawyers of their relationship to our legal system,”²⁴⁶ and refers them to the rules as a roadmap.

Although the debate about the proper role for lawyers has spanned a century, its tone changed after the “intellectual revolution” of the latter part of the twentieth century.²⁴⁷ Earlier, few questioned that there was one set of public values or interests—that there was, in short, a public good to pursue.²⁴⁸ By the end of the twentieth century, however, critics successfully challenged this notion, arguing that there is no one objective public good; there are only vying interests.²⁴⁹ But if there is no such thing as the public good, it is hard to maintain that lawyers have a special obligation to uphold or pursue it.²⁵⁰ In other words, if politics is merely special interests competing for power, and law is merely politics and power by other means, there is little role left for lawyers other than as advocates in a power game.

241. W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 367-72 (2004) (describing the two sides of the debate as those who believe that lawyers should act based on moral beliefs and those who believe that lawyers ought to be constrained due to their role in representing parties in the system).

242. DAVID LUBAN, *LAWYERS AND JUSTICE* 171-74 (1988).

243. See generally William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

244. See Bruce A. Green & Russell G. Pearce, *Public Service Must Begin at Home: The Lawyer as Civics Teacher in Everyday Practice*, 50 WM. & MARY L. REV. 1207, 1210, 1233-34 (2009) (arguing that the predominant contemporary view is that lawyers express their commitment to the public good only outside private law practice).

245. MODEL RULES, Preamble ¶ [13].

246. *Id.*

247. Rebecca Roiphe, *The Decline of Professionalism*, 29 GEO. J. L. ETHICS 649, 663-72 (2016).

248. *Id.*

249. *Id.*

250. *Id.*

While political scientists and economists were demystifying the notion of a public interest in their respective studies, critical legal theorists were doing the same in law.²⁵¹ Taking legal realism to its extreme, some argued that the law is not a body of discernable principles, but rather an indeterminate and infinitely manipulable set of rules that are used by those in power to consolidate control.²⁵² This too posed a problem for lawyers because if the law, including the rules of professional conduct, sets the limits of what a lawyer can do on behalf of the client, and the law is infinitely malleable, it follows that there are no limits on what lawyers can do for their clients.²⁵³

Although this is certainly one possible moral of the intellectual developments of the 1970s and 80s, we do not think it is either correct or widely embraced. Law is not merely politics or the pursuit of power. It imposes real constraints on people, even those with power. Lawyers in general, and government lawyers in particular, have a unique role in policing that line. This, one might argue, is a tamed version of Legal Realism. Law is not just politics. It is of course affected by ideology and personal interests of judges and others who have the power to determine its meaning. But it is its own discipline, involving its own form of reasoning and institutions that restrict the realm of possible outcomes, and the law governing lawyers is no exception.²⁵⁴

Lawyers have duties of competence, diligence, and independence.²⁵⁵ And, as noted, they have obligations to help clients achieve only lawful ends. This amounts to a collective professional responsibility to uphold the mechanisms for resolving disputes, or as Brad Wendel puts it, the craft of lawyering.²⁵⁶ There are only certain forms of reasoning that qualify as law, and lawyers are required to respect the boundaries they establish. In other words, ours is not a system in which might makes right. Ours is a system of evolving laws and processes by which we all agree to play. In agreeing to play by these rules, we compete for the right to define the public good in any given context and we agree to abide by the result even when the outcome seems wrong, misguided, or even dangerous. Lawyers as members of a profession have a special

251. *Id.*

252. *See generally*, EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* (1973) (discussing the challenge that relativism posed to traditional democratic theory).

253. David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 474-78 (1990).

254. W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* 1-17 (2010); Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 44 (2008); Wilkins, *supra* note 253, at 484-96; Benjamin C. Zipursky, *Legal Positivism and the Good Lawyer: A Commentary on Brad Wendel's Lawyers and Fidelity to the Law*, 24 GEO. J. LEGAL ETHICS 1165, 1173-75 (2011).

255. MODEL RULES r. 1.1 (competence), r. 1.3 (diligence), r. 2.1 (independent advisor).

256. WENDEL, *supra* note 254, at 176-208; *see also* SCOTT J. SHAPIRO, *LEGALITY* 1-34 (2011) (arguing for a meaning of law and legal practice that denotes a structure of legal reasoning and argument).

role to play in upholding the public good in the following way: they do not pursue a substantive conception of justice or morality; instead, they preserve a set of stable institutions for resolving disputes about justice and insist upon a certain kind of approach, involving only certain types of reasons, within those institutions. Even when representing clients, lawyers have a role in maintaining the integrity and legitimacy of the law, understood in this way.

Where does this leave our lawyer-commentators? In the court of public opinion, where lawyer-commentators had no clients, they were free to offer objective explanations of the professional norms and their relevance in order to further the public's understanding. And their audience might have understood that they were doing so, appearing not as mouthpieces (or hired guns) for one side or the other but as objective expert commentators. But instead, as analyses of their opinions suggest, some lawyer-commentators took highly partisan views and, one might argue, misleadingly so. Thus, lawyer-commentators' instrumental use of professional conduct rules during the impeachment proceedings might be viewed as an expression of extreme advocacy.

The impression this creates is that lawyers cannot remove the mantle of partisanship even in contexts when they are permitted and expected to do so. This is a problem that has been noted in other contexts as well, such as when lawyers participate in bar associations and law reform organizations: They may be expected to "leave their clients at the door," and to put aside personal self-interest to pursue the public interest, defined in legalistic terms, exclusively. However, rather than pursuing public-interested reforms, many lawyers use these fora to pursue clients' or their own interests.²⁵⁷ We could throw up our hands when we witness this and concede that everything is consumed by power and preference. But there is enough evidence to hold out hope that this cynical view is both unwarranted and undesirable.

One might ask what the impeachment proceedings and its commentary teach us about the lawyer-statesman ideal after legal realism. The impeachment hearings displayed our post-realist reality by highlighting the malleability of law and the partisan nature of lawyers' work even for those who serve in government positions. The hearings were political theater masquerading as a legal proceeding and the lawyers who took part often came off as partisan themselves.²⁵⁸ They illustrated that the law is suffused with the political and ideological leanings of its creators.

257. See generally Elizabeth Chambliss & Bruce A. Green, *Some Realism About Bar Associations*, 57 DEPAUL L. REV. 425, 426-47 (2008) (discussing why lawyers engaged in law reform might advance client interests or self-interest rather than the public interest).

258. See Doni Gewirtzman, *Was Impeachment Designed to Fail?*, PUBLIC BOOKS (Aug. 5, 2020), <https://www.publicbooks.org/was-impeachment-designed-to-fail/> [<https://perma.cc/AM7M-RKXY>] ("partisan polarization and institutional dysfunction have made it

Where does that leave lawyers and the rules that govern them? Are we doomed to President Trump's vision of law as an obstacle to push aside? Are all lawyers some version of Roy Cohn, who sought to manipulate law into yet another tool for the powerful? Our answer, in short, is no. The law is certainly more malleable than those in the 19th century thought. It is suffused with politics and bias. At times, it helps the powerful accumulate more power. But that does not leave us in a world where might makes right. It is not as nihilistic as all that. Law is also a real constraint. And lawyers are tasked with ensuring that it remains so. They serve clients but only up to a point. They can help clients pursue only lawful ends and they are constrained by duties of competence, diligence, loyalty, and honesty when they do so. Not all ends are lawful and not all means of pursuing those ends are permissible. Lawyers play an important public role when they refuse to help clients to disobey the law or are unwilling to manipulate the law beyond rational meaning, and the profession fulfills its "vital role in the preservation of society" when it accurately explains the law to the public.²⁵⁹ Lawyers are statesmen in fulfilling this role, even though it is a less robust or ambitious project than some scholars have maintained.

To adhere to this more modest post-Realist view of the law and of lawyers' role and professional responsibilities in upholding it, we must hold lawyers to a professional standard without exaggerating their role in defining or promoting the public good. To this end, lawyers who comment in the public and are at least arguably representing the profession as a whole when they do so, have an obligation not to over-promise.

Government lawyers are not there to fulfill any one individual's or group's view of the public good, no matter how compelling. Government lawyers may serve the American people or, in the case of White House Counsel, the presidency. This gives the illusion that they are responsible for upholding public values. But in most instances, these lawyers are professionally obligated to accept the public policy goals of elected officials rather than substitute their own sense of what might

almost impossible for Congress to use its legislative and oversight powers to effectively check the president's actions").

259. MODEL RULES, Preamble ¶ [13]; see also Green & Pearce, *supra* note 244, at 1208-19 (arguing that lawyers have a special role in educating the public about the nature of the law and democratic institutions). The call for better civic education has grown louder in recent years. Natalie Wexler, *To Educate Good Citizens, We Need More Than the 'New' Civics*, FORBES (Jan. 5, 2020), <https://www.forbes.com/sites/nataliewexler/2020/01/05/to-educate-good-citizens-we-need-more-than-the-new-civics/?sh=6905dbfb5c8f> [https://perma.cc/M7XH-84DF]. The legal profession can, and should, play a central role, especially at moments like impeachment when the public is listening. *Id.* (referring to impeachment as a "teachable moment").

be best for all.²⁶⁰ If the public or the commentator disagrees with that conviction, he or she has a political or moral complaint, not a legal one.

This was a particularly hard standard to meet during the impeachment proceedings. The hearings differed from a public policy debate over immigration or health care. The question was whether the president was unfit for office. This had the potential to be, and historically has been, profoundly divisive.²⁶¹ So there is reason for extra caution. A lawyer-commentator may be predisposed to assume unfairly that lawyers who take opposing views are departing from their appropriate role. But the standards for impeachment are vague and the question is usually more a political than a legal one. Commentators should be cautious in assuming that a lawyer has pushed the bounds of acceptable behavior.

Moreover, because our system of government allows for bad actors in government and other positions and may even accommodate to some extent those who wish ill on democracy, the public should expect lawyers to represent some distasteful and anti-social clients and causes.²⁶² Rather than convey that it is a violation of the ethical rules for lawyers to represent unfavorable clients, the legal profession should seek to explain this behavior.

That said, lawyers may fairly be condemned for promoting unlawful objectives. If the objectives are arguably unlawful, commentary can highlight the uncertainty. If a lawyer promotes lawful objectives by unlawful or unethical means, this can also be criticized. The problem, however, arises when commentary mischaracterizes the professional standards, as recurred during the impeachment proceedings. Lawyer-commentators should strive to get it right, which may require more of an effort when their own biases are running high. Had they done so during the impeachment proceedings, they would not have painted nearly such a gloomy picture of lawyers in the public spotlight.

For all the scrutiny accorded lawyers, the Trump impeachment process was one where, with some notable exceptions, lawyers acquitted themselves comparatively well. This time, the principal antagonist

260. Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 238 (2000) (stating that there is no consensus on whether government lawyers have a special obligation to pursue the public good); *see generally* Roiphe, *supra* note 92 (arguing that that government lawyers' obligations vary depending on the role of the lawyer); W. Bradley Wendel, *Government Lawyers in the Trump Administration*, 69 HASTINGS L.J. 275, 293-98 (2017) (arguing that government lawyers serve agency heads when providing legal advice). We have discussed elsewhere how prosecutors are different in that they do serve a more abstract public interest in justice. *See generally* Roiphe, *supra* note 92, at 1117-22; Green & Roiphe, *supra* note 94.

261. Gewirtzman, *supra* note 258.

262. For a brilliant account of a lawyer who made a career of representing unpopular and vilified clients, see LONNIE T. BROWN, JR., *DEFENDING THE PUBLIC'S ENEMY: THE LIFE AND LEGACY OF RAMSEY CLARK* (2019).

was not a lawyer but a former real estate developer. Unlike the lawyers surrounding President Nixon, most of those surrounding President Trump could justify themselves based on a reasonable conception of their role. While White House Counsel did not cooperate with Congress as some thought these lawyers should, they at least appear to have refrained from aiding the president's efforts to obstruct justice. On the contrary, while preserving confidentiality, they seem to have served as restraining influences. Lawyers in Congress mostly contributed to at least a semblance of procedural regularity, however much Democrats regretted the outcome. To the extent that lawyers were accused of misconduct, the alleged misconduct was mostly technical in nature—the major exception being allegations that some lawyers, including the Attorney General, lied or misled—and the allegations were largely unpersuasive or at least debatable. Lawyers may not have been heroic (although Democrats lionized Adam Schiff and conservatives at times did the same with Bill Barr), and some may have come across as villainous or buffoonish, but this was a far cry from lawyers' lawbreaking in the Nixon administration.²⁶³

Although it is unclear how much to credit the legal profession's rules and norms, it seems reasonable to assume that they were, at least to some extent, a moderating influence. Lawyers on both sides were under tremendous pressure—whether from President Trump and his supporters or from the Democratic opposition. The aftermath of the 2020 presidential election shows the extremes to which some may go for political ends. The impeachment proceedings, by comparison, were relatively moderate. The participation of lawyers, who were scrutinized by reference to professional conduct rules, and who in most cases presumably were professionally committed to those rules, may have served as a restraint. Regardless of whether the professional conduct rules worked as a moderating force in the impeachment proceedings, it is critical for them to maintain that function for the future.

Because lawyer-commentators do not represent a client and can be relatively objective, they can play an important role in promoting public understanding. Ideally, as representatives of the legal profession, they would educate the public about the professional conduct rules and other relevant law, processes, and institutions, in a way that avoids distortion by their own partisan political commitments. They should call other lawyers to account, but only when it is clear that these lawyers have run afoul of applicable law or rules; they should not mischaracterize the rules, using them misleadingly to advance a political cause. To serve this role effectively, lawyers commenting on other lawyers' professional conduct must acquire an expert understanding of the

263. There are numerous accounts of the Watergate scandal, which resulted in lawyers' criminal conviction, disbarment, and disgrace. For a summary of the lawyers' role, see Kathleen Clark, *The Legacy of Watergate for Legal Ethics Instruction*, 51 U.C. HASTINGS L. REV. 673, 678-79 (2000).

rules and how courts interpret and apply them, not just wing it based on intuitive or wishful understandings. If, instead, lawyer-commentators intend to engage in pure politics, or to offer casual and uninformed opinion, they should be candid about their role, because it is not necessarily what the public expects or what a commentator credentialed as a lawyer ordinarily conveys.

Others have previously expressed concern about lawyers' role as public commentators on legal matters. Following the O.J. Simpson trial, for example, Professors Chemerinsky and Levenson floated an idea for a voluntary ethics code for lawyer-commentators²⁶⁴ that was briefly debated²⁶⁵ and has occasionally been revived.²⁶⁶ The impeachment proceedings offer a different case study in lawyers' public commentary, but one that focuses on a particular class of commentary that looks self-referentially at lawyers and the legal profession itself. The impeachment proceedings afford a different occasion for reflection on how lawyers should serve in this role and, in turn, lead to a different set of insights and prescriptions. We advocate a different and more limited role than the ones adopted by many lawyer commentators during the impeachment proceedings. It is a role, as relatively objective expert, that conforms to public expectations and that fulfills the function sometimes ascribed to lawyers as "civics teachers" who promote the public understanding of the law and legal values.²⁶⁷

This role will lead not only a better public understanding of the legal profession's norms, but also a better professional understanding. As discussed, loose commentary reinforces lawyers' misconception of professional rules as subject to manipulation. Commentary that shows respect for professional conduct rules, legal authority, and conventional modes of interpretation will reinforce the status of the rules as a code of conduct that governs and unites the legal profession's members, regardless of their political persuasion or that of their clients.

Legal realism, even in its tamer form, requires acknowledging that the profession cannot play a legitimate role in promoting a particular

264. See generally Erwin Chemerinsky & Laurie Levenson, *The Ethics of Being A Commentator*, 69 S. CAL. L. REV. 1303 (1996); Erwin Chemerinsky & Laurie Levenson, *The Ethics of Being a Commentator II*, 37 SANTA CLARA L. REV. 913 (1997); Erwin Chemerinsky & Laurie Levenson, *The Ethics of Being a Commentator III*, 50 MERCER L. REV. 737 (1999).

265. See generally *A Panel Discussion on a Proposed Code of Ethics for Legal Commentators*, 50 MERCER L. REV. 681 (1999); Raymond M. Brown, *A Ransom Note from the Opposition to the Proposed Rules of Ethics for Legal Commentators*, 50 MERCER L. REV. 767 (1999); Jacquenette M. Helmes, *An Ethical Code for Legal Commentators: What Is Its Value?*, 12 GEO. J. LEGAL ETHICS 767 (1999).

266. See generally Sarah K. Fleisch, *The Ethics of Legal Commentary: A Reconsideration of the Need for an Ethical Code in Light of the Duke Lacrosse Matter*, 20 GEO. J. LEGAL ETHICS 599 (2007); A. Augustus LaSala, *Sensationalism Falling Through the Cracks: Why the Legal Profession Must Broaden Ethical Standards for Legal Commentators*, 26 FORDHAM INTEL. PROP. & MEDIA L.J. 189 (2015).

267. See Green & Pearce, *supra* note 244.

substantive view of justice, without engaging in intellectual dishonesty. The profession cannot credibly pursue lofty ideals about its role in shepherding in a more perfect world. But that does not mean that the legal profession is doomed to serve the powerful. In this less idealistic vision, it can educate the public about the law and critique lawyers who act outside of law or professional norms. But lawyers who have a platform through the public media must be careful in what they teach.

CONCLUSION

The impeachment proceedings were a significant event for the legal profession, as well as for the country generally. The key questions concerned whether a president, who was not a lawyer, betrayed his office. But lawyers, and especially government lawyers and lawyers in public office, played important roles throughout. The proceedings dominated U.S. news and social media for well over a year, and the media shined a light on the participating lawyers, among others. Because the proceedings were about law and legal process in addition to politics, lawyers were among those commenting, and, for better or worse, they were uniquely positioned to influence how the public understood lawyers' role and responsibilities.

Much of participating lawyers' work was behind the scenes, private and confidential. But some work, especially in congressional hearings, was visible and open to critique. Lawyers could be judged based on various measures, including their skill in investigating or in advocating for or against impeachment, or the social utility or morality of their choice to employ their skills for one side or the other. But, unsurprisingly, a significant amount of commentary measured lawyers against the legal profession's rules of professional conduct. From commentators' perspective, many lawyers measured up poorly.

Lawyer-commentators may have appeared to be disinterested experts, but they often functioned as political actors. Claims that lawyers in the impeachment proceedings were engaged in professional misconduct were often unsubstantiated and, one can infer, politically motivated. The Trump impeachment proceedings were not like the Watergate proceedings, which exposed government lawyers' lawlessness. Judged by the professional conduct rules, most lawyers performed reasonably well. Commentators, however, mischaracterized these rules to support false criticism, wrongly calling into question the integrity not only of other members of the bar but also of the legal profession's regulatory regime: they impeached legal ethics by reinforcing the mistaken narrative that professional conduct rules are subjective, not subject to rigorous analysis like other bodies of law.

The biggest misconception, coming from pro-impeachment commentators, was about government lawyers. Their argument, based on

various professional conduct rules, was that White House Counsel should eschew their role as advocates to become witnesses against President Trump, disclosing confidences in the bargain. These commentators' broader premise was that, like federal prosecutors,²⁶⁸ other federal government lawyers should be independent of elected federal officials and should pursue their own idea of the public good. We challenge that this is the preferable conception of White House Counsel's role and responsibilities. But in any event, it is not a role ascribed by professional conduct rules. Nor should it be. State courts should not promulgate professional conduct rules for lawyers that resolve specific contested questions about the loyalties of federal executive-branch lawyers in distinctive contexts such as this one. If commentators believe that government lawyers behaved badly, they should debate how federal law could better define federal government lawyers' role and responsibilities rather than giving the misimpression that professional conduct rules provide the answers.

If any group of lawyers deserve criticism for their conduct in connection with the impeachment proceedings, it is therefore lawyer-commentators themselves, not for breaking the rules but for abandoning the norms of the profession. Representatives of the legal profession played a prominent role by explaining and commenting on the proceedings in the media. The commentary on the professional conduct of the lawyers involved was often inaccurate, however, either because the lawyer-commentators lacked expertise or because they were biased. This ran the risk of miseducating the public about the role of the legal profession and undermining the credibility of lawyers' future commentary in general. This Article offers some prescriptions for lawyers serving as commentators in the future, including urging them to adopt a more objective approach and to stay away from subjects where they lack expertise; and if lawyers reject this prescription, opting instead to use the media as a forum for advocacy rather than public education, they should be open in doing so.

The proceedings and the commentary raise questions about the role of the profession as a whole. It may seem, in politically charged moments like impeachment, that the other side is not only wrong but completely illegitimate. That impulse may lead many lawyers to want to impugn the ethics of lawyers who represent those with opposing views and loyalties. This Article urges caution. Falling back on a clear, expert exposition of the law of lawyering and the values of legalism itself is a way to both preserve our institutions and protect against this impulse.

Like other significant public events involving lawyers, including prior impeachment proceedings, the Trump impeachment proceedings

268. On criminal prosecutors' independence, see generally Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1 (2018).

should inspire professional reflection, but of a different sort than in the past. Here is an occasion to reflect on the conduct of government lawyers and others, including lawyer-commentators, whose efforts influenced the public understanding of lawyers' role. The legal profession should consider whether it is wholly satisfied with how lawyers behaved and, if not, how to improve relevant lawyers' practice, whether through professional regulation or by other means.

