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# Imposing Lawyer Sanctions in a Post-January 6 World

Alex B. Long

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ABSTRACT

*As was the case with the Watergate scandal fifty years ago, the number of lawyers involved in the efforts to overturn the 2020 election results has raised questions about the state of ethics within the legal profession. So far, the profession's response to the crisis has been to rely on the professional disciplinary system to address the alleged misconduct of the lawyers involved. This decision raises a question as to whether the collection of state professional disciplinary systems are up to the task. The conduct of Jeffrey Clark, the DOJ lawyer who sought to convince state officials to convene special legislative sessions to investigate supposed widespread voter fraud, raises particular concerns related to the disciplinary process as applied to government lawyers. The events surrounding the 2020 election and the January 6 attack on the Capitol provide the legal profession with an opportunity to take a fresh look at the Standards for Imposing Lawyer Sanctions and address existing shortcomings. This Article identifies some of those shortcomings and uses the case of Jeffrey Clark to highlight some of the Standards' particular pitfalls as they apply to government lawyers' misconduct.*

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*"How in God's name could so many lawyers get involved in something like this?"*[1]

## INTRODUCTION

Fifty years ago, the Watergate scandal helped spur the creation not only of new law school courses devoted to the study of legal ethics, but also of a new set of ethics rules for the legal profession.[2] One of the features of the scandal that was most disturbing to members of the profession, and the public at large, was the number of lawyers—and, in particular, lawyers in government—who were willing to go along with the illegal activities.[3] Thus, the first legal ethics crisis of the modern age led to major reforms in the professional disciplinary system governing lawyers, which were designed, in part, to address the public's image of the legal profession.[4]

The efforts to overturn the 2020 election results represent a new shock to the legal profession. As with Watergate, the number of lawyers involved in the efforts to overturn the 2020 election results is remarkable. The most prominent (Sydney Powell, Rudy Giuliani, Lin Wood, and John Eastman) are either well-connected lawyers in private practice or, in Eastman's case, a well-connected academic. Each of these private lawyers has faced, or is facing, ethics investigations into their conduct.[5]

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1. Victor Li, *Watergate's Whistleblower: Legal Ethics May Be the Only Surviving Reform, John Dean Tells Techshow Audience*, 100(6) ABA J. 31, 32 (June 2014) (quoting John Dean).

2. *See* Robert H. Aronson, *Professional Responsibility: Education and Enforcement*, 51 WASH. L. REV. 273, 273 (1976) (stating that the fallout from the Watergate scandals caused "the American Bar Association, state and local bar committees, and law schools to seek new ways of educating prospective lawyers with respect to their ethical duties"); Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 688 (1989) (discussing how the *Model Rules of Professional Conduct* developed from "a felt need to shore up the profession's public image in the wake of the Watergate scandal").

3. *See* Donald T. Weckstein, *Watergate and the Law Schools*, 12 SAN DIEGO L. REV. 261, 261 (1975) ("It is unfortunately true that approximately half of the individuals indicted or convicted for Watergate-related crimes are lawyers."); Schneyer, *supra* note 2, at 688 (linking the decline in the public's image of lawyers following the scandal to the number of lawyers involved in the scandal).

4. *See* Schneyer, *supra* note 2, at 688.

5. *See generally* Debra Cassens Weiss, *Sidney Powell Faces Ethics Charges Over Election Litigation; Group Seeks Discipline Against Other Lawyers*, ABA J. (Mar. 9, 2022), https://www.abajournal.com/news/article/sidney-powell-faces-ethics-charges-over-election-litigation-group-seeks-discipline-against-other-lawyers [https://perma.cc/M3WT-8JA8] (discussing the ethics complaint against Powell for allegedly filing frivolous lawsuits); *In re* Giuliani, 146 N.Y. S.3d 266 (N.Y. App. Div. 2021) (suspending Giuliani from the practice of law); *State Bar Announces John Eastman Ethics Investigation*, STATE BAR OF CAL. (Mar. 1, 2022), https://www.calbar.ca.gov/About-Us/News/News-Releases/state-bar-announces-john-eastman-ethics-investigation [https://perma.cc/B9ZB-K8VN] (noting ethics investigation into Eastman's conduct in connection with 2020 election); Randall Chase, *Judge Boots Trump Attorney from Carter Page Defamation Suit*, AP NEWS (Jan. 13, 2021), https://apnews.com/article/election-2020-donald-trump-georgia-wisconsin-lawsuits-840308687a5e8de21c7f50d59f394892 [https://perma.cc/AZP4-KWMZ] (reporting that a Georgia judge ordered Wood to show cause as to why he should not be removed from representing a client given his attempts to overturn the 2020 election).

But the ethics of lawyers in government have also been called into question. A group of lawyers filed an ethics complaint with the Office of Disciplinary Counsel of the State Bar of Texas against Senator Ted Cruz, alleging a host of ethics violations stemming from allegedly false public statements Cruz made in connection with the 2020 election and from Cruz's involvement in a Pennsylvania lawsuit seeking to have absentee ballots thrown out.[6] Former Judge Advocate General's Corps lawyer Senator Lindsey Graham battled a grand jury subpoena seeking to investigate Graham's possible attempts to influence Georgia election officials following the November election.[7]

So far, the profession's response to the alleged misconduct surrounding the 2020 election has been to rely on the professional disciplinary system.[8] Groups of lawyers organized to bring individual ethics complaints against many of the lawyers involved. One group in particular, the 65 Project, which bills itself as part of a "bipartisan effort to protect democracy from [abuse of the legal system] by holding accountable . . . [l]awyers who bring fraudulent and malicious lawsuits to overturn legitimate election results,"[9] has been particularly active in this regard.[10] While there has been discussion in various circles about the need for potential changes to legal ethics rules to address ethical issues raised by the efforts to undo the 2020 presidential election results, none has been considered by the American Bar Association ("ABA") or at the state-level.[11] Instead, it appears for now that the legal profession has chosen to rely on the existing professional disciplinary system in response to the events surrounding the election.

This raises a question as to whether the current state professional disciplinary systems are up to the task.[12] There are longstanding concerns about whether state

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6. Letter from The 65 Project to the Office of Disciplinary Counsel of the State Bar of Texas (May 18, 2022), https://aboutblaw.com/25Y [https://perma.cc/KF96-YUGW].

7. *See* Meg Kinnard, *Graham, Trying to Quash Subpoena, Denies Election Meddling*, AP NEWS (July 13, 2022), https://apnews.com/article/2022-midterm-elections-biden-georgia-presidential-donald-trump-b07884241 96eb70d423516b83ed62e58 [https://perma.cc/MHV5-XUM6].

8. *See* Bruce A. Green, *Selectively Disciplining Advocates*, 54 CONN. L. REV. 151, 154–55 (2022) (summarizing requests by lawyers for disciplinary authorities to pursue action against lawyers charged with filing frivolous claims in connection with 2020 election).

9. THE 65 PROJECT, https://the65project.com [https://perma.cc/J3KH-H55L] (last visited Nov. 12, 2022).

10. *See The 65 Project's Ethics Complaint Against Trump Attorney Jenna Ellis*, THE 65 PROJECT (Mar. 7, 2022), https://the65project.com/ethics-complaint-against-trump-attorney-jenna-ellis/ [https://perma.cc/FQK4-C6QB].

11. *See* Margaret Tarkington, *The Role of Attorney Speech and Advocacy in the Subversion and Protection of Constitutional Governance*, 69 WASH. U. J.L. & POL'Y 287, 290 (2022) (stating that the incident "highlights the need for greater clarification and even amended rules of professional conduct to address the obligations of government lawyers and private lawyers who advise or assist government officials in the use of government power"). In 2022, the Southeastern Association of Law Schools ("SEALS") conference featured a discussion entitled "Amending the Model Rules of Professional Conduct to Clarify the Duties of Government Lawyers," which focused on possible changes to the rules stemming from the events surrounding the 2020 election. *SEALS 2022 Conference Schedule*, SEALS, https://sealslawschools.org/submissions/schedule.php?year=2022 [https://perma.cc/85XR-PU7G] (last visited Nov. 25, 2022).

12. *See* Melissa Heelan, *Election Fraud Cases Sow Doubts About Legal Profession's Future*, BLOOMBERG L. (Sept. 14, 2021), https://news.bloomberglaw.com/us-law-week/election-fraud-cases-sow-doubts-about-legal-professions-future [https://perma.cc/7HTA-Y2KV] (citing legal experts who opine that "[p]enalties and

disciplinary agencies have the resources to aggressively pursue professional misconduct to the point that professional discipline serves as a deterrent.[13] But aside from those concerns, there is a more basic question: assuming the lawyers in question have actually committed the ethics violations they are charged with, are they likely to receive a meaningful sanction?

When I first started thinking about these ethics complaints and the potential sanctions that might result, I was quickly drawn to one case in particular: that of Jeffrey Clark. During the events leading up to January 6, Clark was Assistant Attorney General for the Environment and Natural Resources Division of the United States Department of Justice ("DOJ") and Acting Chief of the Department's Civil Division.[14] Clark's role in the efforts to overturn the 2020 election results have captured not only the public's attention but also the attention of law enforcement.[15] Clark is perhaps most notorious for his attempt to oust Jeffrey Rosen as acting Attorney General and assume the position himself so that he and the DOJ could bring pressure to bear on Georgia lawmakers to undo the election results in the state.[16] But it is some of Clark's other actions that led the District of Columbia's Office of Disciplinary Counsel for the Board of Professional Responsibility to bring ethics charges against Clark in July 2022.[17]

According to the complaint, Clark drafted and presented a letter to Acting Attorney General Rosen and Acting Deputy Attorney General Richard Donoghue that he hoped would be sent on behalf of the DOJ to Georgia Governor Brian Kemp and other Georgia public officials.[18] The letter falsely claimed that the DOJ had "identified significant concerns that may have impacted the outcome of the election in multiple States, including the State of Georgia."[19] According to the complaint, this was untrue.[20] The letter falsely asserted that the DOJ was concerned about the slow pace of a legal proceeding in Fulton County, Georgia

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discipline against a dozen attorneys over Trump-fueled election challenges probably won't discourage similar fraud suits in the future").

13. *See* Veronica Root Martinez, *Combating Silence in the Profession*, 105 VA. L. REV. 805, 858 (2019) (noting that disciplinary authorities are constrained by limited resources).

14. *See* Michael Kranish & Rosalind S. Helderman, *Echoes of Watergate: Trump's Appointees Reveal His Push to Topple Justice Dept.*, WASH. POST (June 23, 2022), https://www.washingtonpost.com/national-security/2022/06/23/jan6-doj-clark-rosen-donoghue-testimony/ [https://perma.cc/LQB6-SKKT].

15. *See generally* Spencer S. Hsu, Devlin Barrett & Josh Dawsey, *Home of Jeffrey Clark, Trump DOJ Official, Searched by Federal Agents*, WASH. POST (June 23, 2022), https://www.washingtonpost.com/national-security/2022/06/23/jeffrey-clark-house-search/ [https://perma.cc/4VHN-JX8G].

16. *See* Kranish & Helderman, *supra* note 14.

17. A group of lawyers first filed a complaint against Clark in October 2021. *See* Letter from Donald Ayer et al. to Office of Disciplinary Counsel, Board of Professional Responsibility, District of Columbia (Oct. 5, 2021), https://ldad.org/wp-content/uploads/2021/10/DC-Ethics-Complaint-Against-Jeffrey-Clark.pdf [https://perma.cc/2X33-GJ2R] [hereinafter Clark Complaint Letter].

18. *In re* Clark, Disciplinary Docket No. 2021-D193 (July 19, 2022), https://s3.documentcloud.org/documents/22111864/ethics-charges-against-jeffrey-clark.pdf [https://perma.cc/729L-CZEC].

19. *Id.* ¶ 15.

20. *Id.*

regarding the election.[21] The proposed letter also stated that the DOJ recommended that the Georgia General Assembly convene a special session to investigate allegations of voter fraud and that "[t]ime is of the essence" given the January 6 deadline for Senate to certify the election results.[22] The Office of Disciplinary Counsel filed formal charges against Clark alleging that Clark had violated Model Rule 8.4(c), which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; Model Rule 8.4(d), which prohibits a lawyer from engaging in conduct prejudicial to the administration of justice; and Model Rule 8.4(a), which prohibits a lawyer from attempting to violate a rule of professional conduct.[23]

What makes Clark's alleged misconduct arguably worse than that of Powell, Giuliani, and other private attorneys is not that he was more successful in furthering false election claims than they were. He was not. Powell, Giuliani, and others were able to instigate or participate in judicial and legislative hearings concerning supposed election fraud while spreading misinformation concerning the election to the public at large.[24] Clark simply wrote a letter that his bosses refused to sign.[25] What arguably makes the actions of Clark more serious is the fact that he attempted to use the power and prestige of the Attorney General's office in furtherance of his misrepresentations and attempts to influence the legal processes surrounding the presidential election.

As I thought more about Clark's case and the potential professional discipline he might face, I turned my attention to the ABA Standards for Imposing Lawyer Sanctions ("Standards"), the resource relied upon by the majority of states to help determine the appropriate sanction in a professional discipline case.[26] I was familiar with the Standards, but, truthfully, had never paid that much attention to them. Surely, I thought, they would provide a clear explanation as to why Clark deserved to be disbarred or, at a minimum, suspended. What I found instead was somewhat disturbing.

The Standards fail, as a general matter, to provide courts and disciplinary authorities with the guidance needed to arrive at consistent conclusions regarding the appropriate level of discipline in lawyer misconduct cases. The full extent of these shortcomings becomes apparent when one looks to the Standards for guidance in the case of Clark and other lawyers charged with misconduct related to the 2020 election. This includes lawyers (including prosecutors) who are

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21. *Id.* ¶ 16.

22. *Id.* ¶ 18. According to the initial complaint filed with the DC Bar, Clark also proposed to Rosen and Donoghue that this same letter be sent to other states where voter fraud had supposedly occurred in an attempt to have these other state legislatures convene their own special sessions. *See* Clark Complaint Letter, *supra* note 17.

23. *Clark*, Disciplinary Docket No. 2021-D193 ¶ 31; MODEL RULES OF PROF'L CONDUCT R. 8.4(a), (c), (d) (2018) [hereinafter MODEL RULES].

24. *See* Weiss, *supra* note 5.

25. *Clark*, Disciplinary Docket No. 2021-D193 ¶ 12, 15–16.

26. *See infra* notes 80–85.

employed by the government to practice law, other public officials who happen to be lawyers, and private lawyers acting on behalf of the Trump campaign.

In 1999, Professor Leslie Levin observed that "relatively little attention has been given in recent years to the manner in which state lawyer discipline sanctions are determined or to the consistency or efficacy of the sanctions imposed."[27] Little has changed in the ensuing years. The Standards were published in 1986 and amended in 1992.[28] There have been no changes to the Standards since then. In contrast, the ABA's *Model Rules of Professional Conduct* ("*Model Rules*") were amended fourteen times between 1983 and 2002 alone before a substantial overhaul in 2002.[29] The *Model Rules* have been amended eight times since 2002.[30] Nearly forty years of history with the Standards establishes that the Standards are flawed on a general level. And the events surrounding the 2020 election help illustrate that they are underinclusive when it comes to misconduct on the part of government lawyers who occupy positions of public trust.

As was the case with the Watergate scandal over fifty years ago, the events surrounding the 2020 election and the January 6 attack on the Capitol provide the legal profession with an opportunity to take a fresh look at the system for promoting professional responsibility and to address any existing shortcomings. This Article identifies some of those shortcomings as they apply to the process for imposing lawyer sanctions and, in particular, to lawyers working in government. Part I of the Article discusses the purposes of the *Model Rules* and the professional disciplinary process more generally. Part II discusses the history and organization of the Standards, paying particular attention to the methodology it recommends states employ. Part III identifies the various shortcomings of the Standards and describes how those shortcomings have sometimes resulted in inconsistent and lesser sanctions, both of which undermine the goals of the disciplinary system. Part IV discusses how the Standards might apply in the case of Clark or other government lawyers and how Clark's case illustrates some of the shortcomings of the Standards.

## I. THE MODEL RULES, THE STANDARDS FOR IMPOSING LAWYER SANCTIONS, AND THE PURPOSES OF THE LAWYER DISCIPLINARY SYSTEM

Most discussions of the purposes behind the system for regulating lawyer misconduct focus almost exclusively on the *Model Rules* themselves.[31] These rules

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27. Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 5 (1999).

28. STANDARDS FOR IMPOSING LAWYER SANCTIONS (Am. Bar Ass'n 1992) [hereinafter ABA STANDARDS].

29. MODEL RULES preface.

30. *Model Rules of Professional Conduct*, AM. BAR ASS'N (2022), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ [https://perma.cc/7RCP-PWGL].

31. *See, e.g.*, Jon J. Lee, *Catching Unfitness*, 34 GEO. J. LEGAL ETHICS 355, 383 (2021) (evaluating disciplinary rules in light of the goals of professional disciplinary system).

articulate the values of the legal profession while defining the standards of professional conduct. But no matter how thoughtful and nuanced a set of conduct rules might be, the rules will do little to advance the profession's values without an effective system for imposing sanctions when they are violated. The following Part discusses the goals of the lawyer disciplinary system, both as expressed by the *Model Rules* themselves as well as by the standards that authorities can use to impose sanctions for violations of the *Model Rules*.

### A. THE GOALS OF THE LAWYER DISCIPLINARY SYSTEM AND THE *MODEL RULES*

Courts and commentators have articulated numerous goals of the lawyer disciplinary system. The number of reasons and the language used varies from source to source.[32] But the system of lawyer self-regulation has at least four widely recognized goals that the rules of professional conduct seek to advance.

The first recognized goal of the lawyer disciplinary system—and what virtually all sources describe as the most important—is protection of the public.[33] As a representative of clients, a lawyer can cause a variety of readily identifiable harms to clients through misconduct. And in the course of representing a client, a lawyer may also cause harm to third persons.[34] Numerous rules speak to this goal.[35]

The second recognized goal is the protection of the fair operation of the legal system.[36] As Professor Levin describes it, some rules of professional conduct specifically regulate "conduct that unfairly interferes with the truth-seeking activities of the courts or the smooth functioning of the legal system," such as suborning perjury, bringing frivolous claims, and a lack of candor toward a tribunal.[37] It is in these types of contexts that a lawyer's role as an officer of the court is most often implicated. The third goal is conceptually related to the second: preserving public confidence in the legal system.[38] As public citizens having special responsibility for the quality of justice,[39] lawyers can cause the public to lose trust in the integrity and impartiality of courts and the legal profession through their

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32. *Compare* Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 698 (2003) (listing nine possible purposes), *with* Levin, *supra* note 27, at 17–18 (listing three).

33. *See* Levin, *supra* note 27, at 17.

34. *See* Lee, *supra* note 31, at 380 (noting that the goal of protection of the public can be conceived to include not only clients but others as well).

35. *See, e.g.*, MODEL RULES R. 1.1 (requiring a lawyer act competently while representing a client); MODEL RULES R. 4.4 (prohibiting a lawyer from using means "that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person" while representing a client).

36. *See* Levin, *supra* note 27, at 17 n.78. Professor Levin groups this goal under the broader heading of "the administration of justice" while recognizing that this phrase encompasses the need for the proper functioning of the judicial process as well as the need to preserve public trust in the judicial process. *Id.*

37. *Id.*

38. *See id.* at 17–18 n.79.

39. *See* MODEL RULES pmbl. ¶ 1 ("A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.").

misconduct. Public confidence that justice is being distributed fairly and impartially is arguably as important as the actual fair and impartial distribution of justice.[40]

The fourth goal is somewhat more self-serving for the legal profession. As the Preamble notes, a lawyer is a member of the legal profession, and the legal profession is largely self-governing.[41] Some rules of professional conduct, such as the rule regarding bar admission and disciplinary matters,[42] are designed, in part, with the goal of preserving the ability of the profession to carry out its self-governing responsibilities without interference from the government.[43]

Finally, it is worth noting that the *Model Rules* may serve an expressive function that relates back to each of the goals identified above. As numerous authors have noted, "[t]he lawyer disciplinary process serves multiple functions, including the dissemination of the profession's values both within the profession and to the public."[44] Clear standards of professional conduct may, in the words of Professor Deborah Rhode, "help persuade the general public that [lawyers] are especially deserving of confidence [and] respect."[45]

### B. THE ROLE OF LAWYER SANCTIONS IN ADVANCING THE GOALS

While one typically thinks of the rules of professional conduct themselves as advancing the goals of the lawyer disciplinary system, the mechanisms that are in place to aid authorities in imposing sanctions for the violation of the rules also play an essential role. In order to maintain its legitimacy, the professional disciplinary system that enforces these rules must do so in a way that furthers these goals. The disciplinary process needs to educate lawyers about the extent of their duties under the rules and articulate and enforce the rules in a way that deters lawyers from engaging in violations. And while the process needs to cleanse the profession of lawyers who pose a grave threat to the goals embodied by the rules, it more generally needs to impose consistent and uniform sanctions in a fair and just manner in order to maintain legitimacy.[46]

Poorly defined standards for imposing lawyer sanctions may lead to inconsistent sanctions. And inconsistent sanctions may, in the words of the ABA, "cast

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40. *See* Levin, *supra* note 27, at 17–18 n.79.

41. MODEL RULES pmbl. ¶¶ 1, 10.

42. MODEL RULES R. 8.1.

43. *See* MODEL RULES pmbl. ¶ 11 (noting that the self-regulation helps maintain the legal profession's independence from government domination).

44. Martinez, *supra* note 13, at 855; *see* Stephen Gillers, *Lowering the Bar: How Lawyer Discipline in New York Fails to Protect the Public*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 485, 495 (2014) (explaining that censure "announces to the public that same conduct is inconsistent with our standards for fitness").

45. Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 693 (1981).

46. *See* ABA STANDARDS, *supra* note 28, at Standard 1.3 (noting the need to promote "consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions").

doubt on the efficiency and the basic fairness of all disciplinary systems."[47] As Professor Levin has noted, "[t]he imposition of any sanction expresses a message to the errant lawyer, other attorneys, and the general public about the level of blame and social condemnation attached to the misconduct."[48] Thus, lawyer sanctions, like rules of professional conduct, may serve an expressive function.[49] "[S]anctions that are too lenient fail to adequately deter misconduct and thus lower public confidence in the profession."[50] Conversely, sanctions that are too onerous may deter lawyers from reporting misconduct and undermine public confidence in the system.[51]

The ABA's publication of the Standards for Imposing Lawyer Sanctions was part of a larger effort to improve the professional discipline systems that existed in the states.[52] As Professor Levin noted in the most in-depth exploration of the Standards to date, until the adoption of the Standards in 1986, "there were no developed standards for imposing sanctions on lawyers."[53] One of the chief criticisms of the lawyer disciplinary systems as they existed at the state level until that time was the lack of consistency in the discipline imposed upon lawyers for misconduct.[54] Sanctions for the same misconduct sometimes varied wildly depending on the jurisdiction in question.[55] The lack of clear, consistent standards may result in a host of problems, including the potential for bias to seep into the sanctioning process and the failure to put attorneys on notice as to the likely consequences of their actions.[56] The Standards were published, in large part, to address this concern over the lack of consistency.[57]

The ABA's Joint Committee on Professional Sanctions ("Committee") developed the Standards,[58] after reviewing all reported lawyer disciplinary decisions over a roughly four-year period where public discipline was imposed.[59] The Committee collected data "concerning the type of offense, the sanction imposed, the policy considerations identified, and aggravating or mitigating" offenses

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47. *Id.* at preface.

48. Levin, *supra* note 27, at 21.

49. *See id.* at 17–18 n.78–79 (discussing the expressive function of rules of professional conduct), 22 (discussing the idea of "expressive sanctions").

50. ABA STANDARDS, *supra* note 28, at Part IA.

51. *Id.*

52. *See* Levin, *supra* note 27, at 2–3 (describing the origins of the Standards).

53. *Id.* at 31.

54. *See id.* at 2 (noting the criticism that disciplinary authorities applied discipline "secretly and inconsistently").

55. *See* ABA STANDARDS, *supra* note 28, at Part IA (citing the examples of failure to file federal income tax and conversion of client funds).

56. Levin, *supra* note 27, at 29.

57. *See id.* at 3 (stating the Standards "attempted to provide a framework for the consistent imposition of sanctions").

58. ABA STANDARDS, *supra* note 28, at Part IA.

59. The Committee also reviewed all published disciplinary decisions from eight jurisdictions over a ten-year period. *Id.* at Part IB.

identified by a court for each case in an effort to identify the patterns that existed.[60] The Committee then used this information to develop a framework that state disciplinary authorities could use in imposing lawyer sanctions.

## II. THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS AND OTHER STANDARDS AT THE STATE LEVEL

The Committee designed the Standards, in large part, to help establish uniformity and predictability among the states in terms of a system for imposing lawyer sanctions.[61] The Committee developed an organizational structure for analyzing lawyer misconduct and imposing sanctions that jurisdictions could apply. As a practical matter, the Standards have had only limited success in this regard.

### A. THE ORGANIZATIONAL STRUCTURE OF THE STANDARDS

The most lasting contribution of the Standards is the model the Committee developed for state courts and disciplinary authorities to follow when imposing sanctions. The Committee organized the analytical process around four inquiries. First, a court should consider the duty violated: was it a violation of a duty owed "to a client, the public, the legal system, or the legal profession?"[62] The authors explained that the most important ethical duties are those owed to clients.[63] These duties include the duties of loyalty, diligence, competence, and candor.[64]

Second, a court should consider the lawyer's mental state: "[d]id the lawyer act intentionally, knowingly, or negligently?"[65] Intentional misconduct, which the Standards define in terms of acting with "the conscious objective or purpose to accomplish a particular result," is classified as the most culpable mental state.[66] Knowledge is defined in terms of the lawyer's "conscious awareness of the nature or attendant consequences" of the lawyer's act.[67] Negligence is defined in terms of the failure to meet the standard of care of a reasonable lawyer, either in terms of the failure to be aware of the "substantial risk that circumstances exist or that a result will follow."[68]

Next, a court should inquire into "the extent of the actual or potential injury caused by the lawyer's misconduct."[69] The extent of injury may range from

60. *Id.*
61. *Id.* at Standard 1.3 (noting the need to promote "consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions").
62. *Id.* at Part II.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*

"serious injury" to "little or no injury."[70] After this stage of analysis, a court should adopt a presumptive sanction, ranging from disbarment to private admonition.[71]

Finally, a court should consider the existence of any aggravating or mitigating circumstances that might impact the severity of the presumptive sanction.[72] The Standards list eleven aggravating factors, such as a lawyer's prior history of disciplinary offenses, a dishonest or selfish motive, and the vulnerability of the victim.[73] The Standards also list thirteen mitigating factors, including personal or emotional problems, inexperience in the practice of law, and remorse.[74]

After explaining this framework, the Standards provide specific standards that describe the appropriate sanction based on the nature of the rule violated, the lawyer's mental state, and the resulting injury or potential injury.[75] For example, the failure to safeguard a client's property is a violation of a duty to a client, the most serious type of rule violation.[76] Where "a lawyer knowingly converts a client's property and causes injury or potential injury to a client," disbarment is presumptively the appropriate sanction.[77] Where, instead, the lawyer's conduct was merely negligent and little or no injury resulted, private admonition is presumptively the appropriate sanction.[78] A different mental state or a different level of injury should yield some type of intermediate sanction.[79]

### B. APPLICATION OF THE STANDARDS AT THE STATE LEVEL

Today, a clear majority of states rely upon the Standards in some capacity as part of the professional disciplinary process.[80] In some instances, courts and

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70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at Standard 9.22.
74. *Id.* at Standard 9.32.
75. *Id.* at Standard 4.0.
76. *Id.* at Part II.
77. *Id.* at Standard 4.11.
78. *Id.* at Standard 4.14.
79. *Id.* at Standard 4.12–13.
80. Jurisdictions that expressly use the Standards, either by court rule or practice include Alabama, ALA. STANDARDS FOR IMPOSING LAW. DISCIPLINE preface (Ala. Sup. Ct. 1990), https://judicial.alabama.gov/docs/library/rules/stdpref.pdf [https://perma.cc/6Y4A-R4SY] ("These standards are based, in large measure, upon similar standards adopted by the American Bar Association in February 1986."); Alaska, *In re* Buckalew, 731 P.2d 48, 51 (Alaska 1986) (adopting Standards); Arizona, *In re* Peasley, 90 P.3d 764, 769 (Ariz. 2004) (stating that the court looks to the Standards for guidance); Colorado, People v. Romero, 503 P.3d 951, 962 (Colo. O.P. D.J. 2021) ("The American Bar Association Standards for Imposing Lawyer Sanctions ('ABA Standards') and Colorado Supreme Court case law guide the imposition of sanctions for lawyer misconduct.") (citing *In re* Roose, 69 P.3d 43, 46–47 (Colo. 2003)); Connecticut, Off. of Chief Disciplinary Couns. v. Miller, 239 A.3d 288, 309–10 (Conn. 2020) ("Reviews of misconduct are often guided by the use of the American Bar Association's Standards for Imposing Lawyer Sanctions (Standards), which have been approved by the Connecticut Supreme Court."); Delaware, *In re* Doughty, 832 A.2d 724, 736 (Del. 2003) (explaining that the court looks to the Standards to promote consistency and predictability); District of Columbia, *In re* White, 11 A.3d 1226, 1250 (D.C. 2011) (relying upon Standards as persuasive authority); Florida, FLA. STANDARDS FOR IMPOSING LAW. SANCTIONS

disciplinary authorities rely upon the Standards as persuasive authority.[81] In other

§ 1.1 (Fla. Bar 2021), https://www.floridabar.org/rules/sanctions/ [https://perma.cc/YLC7-55HQ] ("The Board of Governors of The Florida Bar (the board) adopted an amended version of the ABA Standards for Imposing Lawyer Sanctions."); Georgia, *In re* Von Mehren, 862 S.E.2d 547, 549 (Ga. 2021) ("Georgia looks to the ABA's Standards for Imposing Lawyer Sanctions for guidance in determining punishment in disciplinary cases."); Hawaii, Off. of Disciplinary Couns. v. Dubin, SCAD-19-0000561, 2020 WL 5412896, at *4 (Haw. Sept. 9, 2020) (noting that the court takes the Standards into consideration); Idaho, Idaho State Bar v. Malmin, 78 P.3d 371, 379 (Idaho 2003) (noting the hearing committee's reliance on the Standards and adopting recommended sanction); Indiana, *In re* Blickman, 164 N.E.3d 708, 719 (Ind. 2021) (noting that the court frequently turns to the Standards for guidance); Iowa, Iowa Sup. Ct. Att'y Disciplinary Bd. v. Den Beste, 933 N.W.2d 251, 257 (Iowa 2019) (citing Standards); Kansas, *In re* Kline, 311 P.3d 321, 390 (Kan. 2013) (explaining that use of standards is not mandated by court's rules but historically it looks to the standards in imposing discipline); Kentucky, Pepper v. Ky. Bar Ass'n, 632 S.W.3d 312, 319 n.13 (Ky. 2021) ("When determining appropriate discipline, we may consider the American Bar Association Standards for Imposing Lawyer Sanctions Rule 9 compilation of aggravating and mitigating circumstances."); Louisiana, *In re* Hawkins 341 So. 3d 519, 522 (La. 2022) (noting Office of Disciplinary Counsel's use of Standards); Maine, ME. BAR RULES R. 21 Reporter's Notes (ME. BD. OF OVERSEERS OF THE BAR 2018) (noting that rule regarding factors to be considered in imposing sanctions incorporates language from Standards); Maryland, Att'y Grievance Comm'n of Md. v. Woolery, 198 A.3d 835, 859 (Md. 2018) (noting court's frequent use of Standards' mitigating and aggravating factors); Michigan, Grievance Adm'r v. Lawrence, 960 N.W.2d 123, 123 (Mich. 2021) (noting court's direction to the Attorney Disciplinary Board to follow Standards); Minnesota, *In re* Disciplinary Action against Fairbairn, 802 N.W.2d 734, 747 (Minn. 2011) (citing *In re* Rooney, 709 N.W.2d 263, 272 (Minn. 2006)); Missouri, *In re* Kayira, 614 S.W.3d 530, 533 (Mo. 2021) ("This Court determines appropriate discipline by considering its prior cases and the American Bar Association's Standards for Imposing Lawyer Sanctions."); Nevada, *In re* Lerner, 197 P.3d 1067, 1077 (Nev. 2008) (relying upon Standards); New Hampshire, Mesmer's Case, 237 A.3d 238, 250 (N.H. 2020) ("Although we have not adopted the American Bar Association's Standards for Imposing Lawyer Sanctions, we look to them for guidance.") (citing Saloman's Case, 202 A.3d 587, 597 (N.H. 2019)); New Mexico, *In re* Behles, 450 P.3d 920, 931 (N.M. 2019) ("In dispensing discipline, we are guided by our prior decisions regarding similar misconduct and the American Bar Association's Standards for Imposing Lawyer Sanctions."); New York, *In re* Molinsek, 157 N.Y.S.3d 399, 400 (N.Y. App. Div. 2022) (relying upon Standards); North Dakota, N.D. STANDARDS FOR IMPOSING LAW. SANCTIONS (N.D. Cts. 2004) (utilizing same format as ABA Standards); Oregon, *In re* Lackey, 37 P.3d 172, 179 (Or. 2002) ("This court refers to the American Bar Association's Standards for Imposing Lawyer Sanctions (1991) (amended 1992) (ABA Standards) for guidance in determining the appropriate sanction for lawyer misconduct."); Tennessee, TENN. SUP. CT. R. 9 § 15.4(a) (TENN. SUP. CT. 2005) ("In determining the appropriate type of discipline, the hearing panel shall consider the applicable provisions of the ABA Standards for Imposing Lawyer Sanctions."); Vermont, *In re* Wysolmerski, 237 A.3d 706, 714 (Vt. 2020) ("Where a violation of the Rules of Professional Conduct has occurred, the American Bar Association's Standards for Imposing Lawyer Sanctions guide our sanctions determinations."); Washington, *In re* Disciplinary Proceeding Against Abele, 358 P.3d 371, 382 (Wash. 2015) ("The American Bar Association's Standards for Imposing Lawyer Sanctions (1991 ed. & Supp. 1992) govern lawyer sanctions in Washington.") (internal quotations omitted); West Virginia, Law. Disciplinary Bd. v. Curnutte, 849 S.E.2d 617, 624 (W. Va. 2020) (citing Standards); Wisconsin, Off. of Law. Regul. v. Zenor, 964 N.W.2d 775, 778 (Wis. 2021) ("Sources of guidance in determining appropriate sanctions include prior case law, aggravating and mitigating factors, and the American Bar Association (ABA) Standards for Imposing Lawyer Sanctions."); Wyoming, Bd. of Pro. Resp. v. Woodhouse, 512 P.3d 960, 967 (Wyo. 2022) (noting court rule requires consideration of Standards).

81. *See, e.g.*, *White*, 11 A.3d at 1250 (D.C. Court of Appeals relying upon Standards as persuasive authority).

jurisdictions, the Standards have been formally incorporated into court rules or are routinely relied upon as a matter of precedent.[82]

While the majority of jurisdictions make some use of the Standards, the extent to which courts actually apply the approach outlined in the Standards varies substantially. Some decisions methodically and rigorously apply the framework from the Standards as the Committee intended.[83] But others give little more than a passing nod to the framework or use only parts of it.[84] Still others referenced the Standards in the past but now largely ignore them when considering the appropriate sanction.[85] Thus, even in jurisdictions that theoretically utilize the Standards, the adoption of the Standards has not resulted in the uniformity that the Committee envisioned.

The remaining states take differing approaches. Some have identified relevant factors to consider in assessing the appropriate sanction but have not adopted any sort of formal framework like that employed in the Standards.[86] Some fail to identify the presumptive sanctions that should apply for particular forms of misconduct.[87] Others have adopted formal frameworks, but sometimes these frameworks speak only in broad generalities that provide courts with limited practical guidance.[88] For example, in determining the appropriate sanction, disciplinary authorities in the District of Columbia should consider "the need to protect the public, the courts, and the legal profession, and the moral fitness of the attorney" in question.[89] While these are all important considerations, they provide only limited guidance at best for disciplinary authorities.

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82. *See, e.g.*, *Woodhouse*, 512 P.3d at 967 (Wyoming Supreme Court noting that consideration of Standards is mandatory under court's rules); FLA. STANDARDS FOR IMPOSING LAW. SANCTIONS preface § 1.1 ("The Board of Governors of The Florida Bar (the board) adopted an amended version of the ABA Standards for Imposing Lawyer Sanctions.").

83. *See* Lee, *supra* note 31, at 382 n.185 (citing Ohio as an example).

84. *See generally* Bd. of Overseers of Bar v. White, 210 A.3d 168 (Me. 2019) (noting that the court did not explicitly articulate its consideration of the Standards in determining the appropriate sanction). As another example, Maryland regularly draws upon the aggravating and mitigating factors described in the Standards but only infrequently draws upon the other aspects of the Standards. *See Woolery*, 198 A.3d at 859 (Maryland Court of Appeals noting court's frequent use of Standards' mitigating and aggravating factors); *see also* ARK. S. CT. PROCS. REGULATING PRO. CONDUCT § 13 (ARK. SUP. CT. 1990) (requiring, in disbarment proceedings, consideration of aggravating and mitigating factors contained in the Standards).

85. For example, the Mississippi Supreme Court last cited the Standards in 1999. *See* Attorney AAA v. Miss. Bar, 735 So. 2d 294, 306 (Miss. 1999). Since then, the court has regularly employed a different framework that considers "(1) the nature of the misconduct involved; (2) the need to deter similar misconduct; (3) the preservation of the dignity and reputation of the profession; (4) the protection of the public; (5) the sanctions imposed in similar cases; (6) the duty violated; (7) the lawyer's mental state; (8) the actual or potential injury resulting from the misconduct; and (9) the existence of aggravating or mitigating factors." Miss. Bar v. Turnage, 919 So. 2d 36, 40 (Miss. 2005).

86. *See* Levin, *supra* note 27, at 35.

87. *Id.*

88. *See In re* Gorecki, 802 N.E.2d 1194, 1200 (Ill. 2003) (stating the court will consider the nature of the misconduct and any aggravating or mitigating factors).

89. Other considerations include "the nature of the violation" and "the mitigating and aggravating circumstances." *In re* Schwartz, 221 A.3d 925, 928 (D.C. 2019) (citing *In re* Austin, 858 A.2d 969, 975 (D.C. 2004)).

Others take a case-by-case approach in which disciplinary authorities and courts either look to the discipline imposed in similar cases or consider each case on its own merits with little or no attempt at comparison with past disciplinary cases.[90] As Professor Levin has explained, these attempts often fail "because the courts disregard seemingly similar cases, or cannot agree upon the factors that should be considered when assessing similarity, or do not consider the same factors important from case to case."[91] In short, to the extent that the Standards were designed to provide uniformity and consistency to the process of determining sanctions, the experiment has not been as successful as the Committee might have hoped.[92]

As a result, the modern disciplinary systems across the country involve an interesting dichotomy. Because most jurisdictions have adopted the *Model Rules* almost *in toto*, there is considerable uniformity in terms of the rules of conduct themselves. But there is little uniformity in terms of the standards that disciplinary authorities apply in the case of a violation of these rules. Because the states have adopted a hodgepodge of standards for determining the appropriate sanction for a given rule violation, similar misconduct may result in substantially different sanctions depending upon the jurisdiction in question.

## III. THE SHORTCOMINGS OF THE STANDARDS IN GENERAL AND THEIR IMPACT ON THE PROFESSIONAL DISCIPLINARY SYSTEM

Given the lack of scholarly attention paid to the courts' application of the Standards and the courts' imposition of lawyer sanctions more generally, criticisms of the sanction phase of the disciplinary process are fairly limited.[93] There is, of course, criticism of the lack of professional discipline meted out by the disciplinary system.[94] And there have been some suggestions for additions that might be made to the Standards, such as treating the fact that a lawyer has expressed remorse or apologized as a mitigating factor and requiring disciplinary authorities to treat the existence of a disability as a mitigating factor.[95] But

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90. Levin, *supra* note 27, at 36–37.

91. *Id.* at 36.

92. *See id.* at 37 (noting that despite the publication of the Standards, "attorneys continue to be sanctioned inconsistently").

93. *See generally* Levin, *supra* note 27; Gillers, *supra* note 44; David Luty, *In the Matter of Mitigation: The Necessity of a Less Discretionary Standard for Sanctioning Lawyers Found Guilty of Intentionally Misappropriating Client Property*, 32 HOFSTRA L. REV. 999 (2004); Sarah A. Hirsch, *The Illusive Consistency: The Case for Adopting the ABA Standards for Imposing Lawyer Sanctions in* In re Martin, 40 S.D. L. REV. 300 (1995); James Duke Cameron, *Standards for Imposing Lawyer Sanctions—A Long Overdue Document*, 19 ARIZ. ST. L.J. 91 (1987), for scholarship discussing the Standards or the process for imposing lawyer sanctions at length.

94. *See, e.g.*, Alicia LeVezu, *Alone and Ignored: Children Without Advocacy in Child Abuse and Neglect Courts*, 14 STAN. J. C.R. & C.L. 125, 163 (2018) (citing statistics and stating that "public sanctions and harsh punishments of lawyers by state bar associations are extremely rare").

95. *See* Leslie C. Levin & Jennifer K. Robbennolt, *To Err Is Human, To Apologize Is Hard: The Role of Apologies in Lawyer Discipline*, 34 GEO. J. LEGAL ETHICS 513, 547–62 (2021) (discussing ways apologies

criticism of the actual framework for imposing lawyer sanctions has been somewhat muted. There is nothing inherently flawed about the methodology described in the Standards. But the fact that so many states have chosen not to follow the approach of the Standards—and in some cases actually tried them out before jettisoning them—suggests disciplinary authorities at the state level see significant shortcomings in the Standards. This Part of the Article details several obvious shortcomings regarding some of the specific standards articulated as well as more general shortcomings, including the outdated nature of the Standards and the overall lack of theorization.

### A. THE STANDARDS ARE OUTDATED

The Standards were first published in 1986.[96] The reported disciplinary decisions that the Committee reviewed to help develop the Standards were decided between 1980 and June 1984.[97] This fact is noteworthy for two reasons. First, it illustrates just how old the Standards are. The Committee attempted to discern trends from decisions that are now approximately forty years old. Not only has the practice of law changed dramatically during this time, but the demographics of the legal profession have also changed. While still underrepresented, there are substantially more women, members of the LGBTQ community, and lawyers of color in the profession than during the timeframe the Committee studied.[98] Technology has advanced, conceptions of confidentiality and privacy have evolved, and the public's attitude toward lawyers has changed (mostly for the negative).[99] These changes have undoubtedly shaped how modern disciplinary authorities and courts should and do view various forms of misconduct. Yet, those changes are not reflected in the specific standards adopted by the Committee.

The second reason why the timeframe in which the Standards were developed is relevant is because it illustrates just how different the rules the Committee was relying upon are today. The *Model Rules* were approved by the ABA in August 1983.[100] It was not until sometime later that states began to fully incorporate these rules into their own professional discipline systems. The Committee only looked at disciplinary cases decided up until June 1984.[101] This means that during the

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might be incorporated into the lawyer discipline process); Kelly Cahill Timmons, *Disability-Related Misconduct and the Legal Profession: The Role of the Americans with Disabilities Act*, 69 U. PITT. L. REV. 609, 620 (2008) (noting the failure of the Standards to treat disability as a mandatory mitigating factor).

96. ABA STANDARDS, *supra* note 28, at Standard 1.

97. *See* Levin, *supra* note 27, at 32 n.142.

98. *See* J. Clay Smith, *Career Patterns of Black Lawyers in the 1980's*, 7 BLACK L.J. 75, 75 n.4 (1981) (citing Department of Labor statistics reporting that only 2.5% of U.S. lawyers in 1979 were non-white).

99. *See* Eric T. Kasper & Troy A. Kozma, *Did Five Supreme Court Justices Go "Completely Bonkers"?: Saul Goodman, Legal Advertising, and the First Amendment Since* Bates v. State Bar of Arizona, 37 CARDOZO ARTS & ENT. L.J. 337, 364 (2019) (citing polling showing declining public respect for lawyers).

100. Alexander v. Super. Ct., 685 P.2d 1309, 1316 (Ariz. 1984) (en banc).

101. *See* Levin, *supra* note 27, at 32 n.142.

period in which the disciplinary decisions the Committee looked at were published, few actually applied the standards contained in the *Model Rules*.[102] Instead, most states were still relying upon their own versions of the older *Model Code of Professional Responsibility* ("*Model Code*").[103] While the *Model Rules* and *Model Code* articulate many of the same basic principles and standards, there are significant differences in terms of content.[104] In short, the Committee was largely discerning trends in disciplinary decisions that were applying a different set of ethical rules.

Moreover, as noted, the *Model Rules* have been amended twenty-two times since their initial publication; some of the changes have been substantial.[105] For example, the corporate fraud scandals of the early 21st century caused the ABA to amend the *Model Rules* to recognize additional exceptions to a lawyer's duty of confidentiality where a client used the lawyer's services to commit a crime or fraud that is reasonably certain to result in financial harm to another.[106] Brand new rules and comments have been added to reflect important societal changes, such as the comment to Model Rule 1.1 explaining that a lawyer's duty of competence requires that a lawyer have at least some familiarity with the benefits and risks associated with technology relevant to the practice of law.[107] In contrast, the Standards have not been amended since 1992, a time when use of e-mail (let alone the internet) was uncommon.[108]

### B. THE STANDARDS ARE UNDER-THEORIZED, INCOMPLETE, AND LACKING IN EXPLANATION

The Standards articulate what, at first glance, appears to be a fairly straightforward methodology. When one delves deeper into the Standards, however, flaws quickly emerge. These flaws include a lack of theorization, the failure to consider

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102. Some courts would cite the *Model Rules* as persuasive authority during this period, even though a different set of rules actually applied. *See, e.g.*, *Alexander*, 685 P.2d at 1316 ("Although not adopted by this court at this time, we feel it important to discuss two of the rules found in the American Bar Association Model Rules of Professional Conduct adopted by the House of Delegates on 2 August 1983.").

103. *See* Paul R. Tremblay, *At Your Service: Lawyer Discretion to Assist Clients in Unlawful Conduct*, 70 FLA. L. REV. 251, 268 (2018) (noting that all states relied upon the *Model Code* prior to the adoption of the *Model Rules*).

104. To cite but one example, the *Model Rules* impose a more stringent confidentiality obligation on the part of lawyers than did the *Model Code*—prohibiting the disclosure of any information related to the representation of a client as opposed to prohibiting only the disclosure of "confidences and secrets"—while also recognizing more exceptions to this duty. *Compare* MODEL RULES R. 1.6, *with* MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (1980) [hereinafter MODEL CODE].

105. *See supra* notes 27–30 and accompanying text.

106. *See* E. Norman Veasey, *Corporate Governance and Ethics in a Post Enron/Worldcom Environment*, 72 U. CIN. L. REV. 731, 737 (2003) (noting ABA's amendments to Model Rule 1.6 in the wake of corporate fraud scandals).

107. MODEL RULES R. 1.1 cmt. 8.

108. ABA STANDARDS, *supra* note 28, at Standard 1.

some concepts altogether, and a failure to offer clear explanations as to some of the key concepts involved in the methodology.

### 1. THE STANDARDS ARE UNDER-THEORIZED

In all but a few instances, the Committee classified each *Model Rule* as articulating only one of the four different kinds of duties a lawyer may owe.[109] For example, the Committee classified Model Rule 1.1, the rule regarding competence, as articulating a duty owed only to the client.[110] Figure 1 summarizes how the Standards classify each *Model Rule* and the duty to which it relates.

**FIGURE 1**[111]

| ***Model Rule*** | **Duty Owed** | | | |
|---|---|---|---|---|
| | Duty to Clients | Duty to General Public | Duty to Legal System | Duty to Profession |
| 1.1 (Competence) | X | | | |
| 1.2 (Scope of Representation) | X | | | X |
| 1.3 (Diligence) | X | | | |
| 1.4 (Communication) | X | | | |
| 1.5 (Fees) | | | | X |
| 1.6 (Confidentiality) | X | | | |
| 1.7 (Conflicts – Current Clients) | X | | | |
| 1.8 (Conflicts – Specific Rules) | X | | | |
| 1.9 (Duties to Former Clients) | X | | | |
| 1.10 (Imputation of Conflicts) | X | | | |
| 1.11 (Government | X | | | |

109. *See supra* note 62 and accompanying text.
110. ABA STANDARDS, *supra* note 28, at Part II.
111. *Id.*

| ***Model Rule*** | **Duty Owed** | | | |
|---|---|---|---|---|
| | Duty to Clients | Duty to General Public | Duty to Legal System | Duty to Profession |
| Employee Conflicts) | | | | |
| 1.12 (Former Judge Conflict) | X | | | |
| 1.13 (Organization as client) | X | | | |
| 1.14 (Client with Diminished Capacity) | | | | X |
| 1.15 (Safekeeping Property) | X | | | |
| 1.16 (Terminating Representation) | | | | X |
| 1.17 (Sale of Law Practice) | | | | |
| 1.18* (Prospective Clients) | | | | |
| 2.1 (Advice) | | | | |
| 2.2**(Lawyer as Intermediary) | X | | | |
| 2.3 (Evaluation for Use by Third Persons) | | | | |
| 2.4* (Third-Party Neutral) | | | | |
| 3.1 (Frivolous Claims) | | | X | |
| 3.2 (Expediting Litigation) | | | X | |
| 3.3 (Candor Toward the Tribunal) | | | X | |
| 3.4 (Fairness to Others) | | | X | |
| 3.5 (Decorum of the Tribunal) | | | X | |
| 3.6 (Trial Publicity) | | | X | |

| *Model Rule* | **Duty Owed** | | | |
|---|---|---|---|---|
| | Duty to Clients | Duty to General Public | Duty to Legal System | Duty to Professio |
| 3.7 (Lawyer as Witness) | X | | | |
| 3.8 (Prosecutors) | | | | |
| 3.9 (Nonadjudicative Proceedings) | | | X | |
| 4.1 (Truthfulness to Others) | | | X | |
| 4.2 (Communication with Represented Person) | | | X | |
| 4.3 (Unrepresented Persons) | | | X | |
| 4.4 (Rights of Third Persons) | | | X | |
| 5.1 (Partners and Supervisory Lawyers) | | | | |
| 5.2 (Subordinate Lawyers) | | | | |
| 5.3 (Non-Lawyer Assistance) | | | | |
| 5.4 (Independence of Lawyer) | X (conflicts) | | | X (fees) |
| 5.5 (Unauthorized Practice of Law/Multijurisdictional Practice) | | | | X (assisting unauthorized practice of law) |
| 5.6 (Restrictions on Right to Practice) | | | | X |
| 5.7 (Law-Related Services) | | | | |
| 6.1 (Pro Bono) | | | | |
| 6.2 (Accepting Appointments) | | | | |
| 6.3 (Legal Services Organization) | X | | | |

| *Model Rule* | **Duty Owed** | | | |
|---|---|---|---|---|
| | Duty to Clients | Duty to General Public | Duty to Legal System | Duty to Profession |
| 6.4 (Law Reform Activities) | | | | |
| 6.5* (Limited Legal Services Program) | | | | |
| 7.1 (Advertising) | | | | X |
| 7.2 (Advertising – Specific Rules) | | | | X |
| 7.3 (Solicitation) | | | | X |
| 7.4** (Advertising –Specialization) | | | | X |
| 7.5** (Firm Names) | | | | X |
| 7.6* (Political Contributions) | | | | |
| 8.1 (Bar Admission) | | | | X |
| 8.2 (Judicial Officials) | | X | | |
| 8.3 (Reporting Misconduct) | | | | X |
| 8.4 (Misconduct) | X (candor) | X (criminal acts & candor) | X (administration of justice, influence, judges) | |
| 8.5 (Choice of law) | | | | |

*Rule not in existence at the time of the 1992 amendments.
**Rule no longer in existence.

In some cases, such as the duty of competence, the decision to categorize a rule as articulating a duty owed to only one actor makes sense. But in others, the authors' classification system is puzzling at best.[112] For example, Model Rule 1.5 describes a lawyer's duties regarding fee agreements, with the most obvious duty being the duty to charge only a reasonable fee.[113] One common justification for the rule against unreasonable fees is that charging an unreasonable fee amounts to a violation of a lawyer's duty of loyalty to a client as a fiduciary.[114] Thus,

112. *See* Levin, *supra* note 27, at 39 ("One reason why the ABA Standards do not effectively promote consistent treatment of similar misconduct is that not all lawyer misconduct fits neatly into one of the categories set forth in the Standards.").

113. MODEL RULES R. 1.5(a).

114. *See* Cripe v. Leiter, 703 N.E.2d 100, 107 (Ill. 1998) (stating "the attorney's fiduciary position prohibits the attorney from charging an excessive fee"); Eli Wald, *In-House Pay: Are Salaries, Stock Options, and Health Benefits a "Fee" Subject to a Reasonableness Requirement and Why the Answer Constitutes the*

charging an unreasonable fee would clearly seem to be a violation of a duty to the client. Another possible justification for the rule is that charging unreasonable fees makes access to the legal system unaffordable.[115] Thus, charging an unreasonable fee is also arguably a violation of a duty owed to the legal system or to the public in general. But the authors chose not to classify a violation of Model Rule 1.5 as a violation of any of these duties. Instead, with no explanation, the authors treat charging an unreasonable fee as a breach of a duty owed to the legal profession.[116]

Even when the authors break course and describe a rule as articulating a duty owed to more than one actor, the curious choices continue. For example, Model Rule 1.2(a) requires that a lawyer abide by a client's decisions concerning the objectives of representation and allows a lawyer to limit the scope of a client's representation if the limitation is reasonable and the client provides informed consent.[117] The Committee correctly classifies the rule as articulating duties owed to a

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Opening Shot in a Class War Between Lawyer-Employees and Lawyer-Professionals, 20 NEV. L.J. 243, 260 (2019) ("Arguably, the duty of loyalty encompasses the reasonableness requirement such that charging clients unreasonable fees constitutes an act of disloyalty in violation of lawyers' fiduciary obligations.").

115. *See* Baruch v. Giblin, 164 So. 831, 833 (Fla. 1935) ("Justice should be administered economically, efficiently, and expeditiously. The attorney's fee is, therefore, a very important factor in the administration of justice."); Stephen L. Rispoli, *Courting Access to Justice: The Rule of Law, the Rule of the Elite, and Non-Elite Non-Engagement with the Legal System*, 29 S. CAL. REV. L. & SOC. JUST. 333, 349 (2020) (discussing the World Justice Project's system for judging a country's access to justice, which includes the absence of excessive or unreasonable fees).

116. ABA STANDARDS, *supra* note 28, at Part II. There are other examples. For example, Model Rule 1.14 recognizes a lawyer's special obligations when representing a client with diminished capacity. MODEL RULES R. 1.14. These include the lawyer's obligations to maintain a "normal" lawyer-client relationship, protect the client's interests, and protect information relating to the representation of the client. MODEL RULES R. 1.14. Logically, this rule seems to articulate duties owed to a client. Yet, the Standards classify the rule as articulating a duty owed to the legal profession. MODEL RULES R. 1.14. Why did the authors make this choice? A reader is simply left to guess.

As another example, Model Rule 4.4 is entitled "Respect for Rights of Third Persons" and imposes upon a lawyer a duty not to refrain from using means that have no substantial purpose other than to burden a third person or that violate the legal rights of such a person. MODEL RULES R. 4.4(a). Other rules likewise impose obligations vis-à-vis third persons. For example, Model Rule 4.1(a) prohibits a lawyer from making a false statement of material fact or law to a third person. MODEL RULES R. 4.1(a). Model Rule 4.3 describes the duties a lawyer owes when dealing with an unrepresented person. MODEL RULES R. 4.3. Logically then, one might expect the Standards to recognize a fifth category of duties to add to the mix of factors: duties owed to third persons. Yet the Standards classify these rules as articulating duties owed to the legal system. Why is the obligation not to burden a third person or not to violate that person's rights a duty owed to the legal system? Again, the reader is simply left to guess.

Other curious choices that result from the tendency to treat rules as articulating only one duty include the decision to classify the rule that restricts a lawyer's ability to withdraw from client representation and that requires that the withdrawing lawyer take care to limit the adverse impact on the client as a breach of a duty owed to the legal profession (instead of a client), MODEL RULES R. 1.16; and the classification of a violation of the rules regarding the bar application and professional discipline process solely as a violation of a duty owed to the profession rather than a recognition that the rule is designed to protect the public in general from incompetent and unethical attorneys, MODEL RULES R. 8.1.

117. MODEL RULES R. 1.2(a).

client.[118] Model Rule 1.2(b) briefly addresses the idea that a lawyer's representation of a client does not constitute an endorsement of the client's views or activities.[119] So, the Committee also describes the rule as articulating a duty about accepting representation and thus classifies the rule as describing a duty owed to the legal profession.[120] Oddly, the Committee appears to have completely overlooked the portion of the rule that prohibits a lawyer from assisting a client or counseling them to engage in conduct that the lawyer knows is criminal or fraudulent.[121] This portion of the rule seems to articulate duties owed to the public (which might otherwise be harmed by the client's conduct) and the legal system more generally (which would be harmed if lawyers could assist their clients in illegal acts). But there is no mention of these ideas in the Standards' discussion of the rule.

### 2. THE STANDARDS ARE INCOMPLETE

Another shortcoming of the Standards is that they are incomplete. While the Standards require an analysis of what ethical duty a lawyer violated, the Committee completely failed to address the duties articulated in several rules altogether. As Figure 1 illustrates, these include some fairly important rules, such as Model Rule 2.1 (the rule requiring a lawyer to render candid advice) and Model Rules 5.1, 5.2, and 5.3 (the rules regarding the special obligations of law firm partners and supervising lawyers).[122] Some of the failure can perhaps be explained by the timing of the Committee's review of prior discipline decisions, which occurred when the ABA was transitioning from the older *Model Code of Professional Responsibility* to the *Model Rules of Professional Conduct*, and some of the new *Model Rules* had no predecessor in the *Model Code*.[123] Thus, there may not have been many decisions for the Committee to review. But this only highlights once again how outdated the Standards are.

### 3. THE STANDARDS LACK EXPLANATION

Finally, the Standards frequently fail to provide explanations or examples concerning the relevant factors in the sanctions analysis. The clearest example of this shortcoming involves the failure to explain the concept of an injury. The Standards direct courts to consider the extent of the injury or potential injury the lawyer's misconduct caused and identifies three levels of injury: "serious injury," "injury," or "little or no injury."[124] But the Standards provide little in the way of guidance concerning what qualifies as an "injury" or "potential injury."[125]

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118. ABA STANDARDS, *supra* note 28, at Part II.
119. MODEL RULES R. 1.2(b).
120. ABA STANDARDS, *supra* note 28, at Part II.
121. MODEL RULES R. 1.2.
122. *See supra* Fig. 1.
123. *See* MODEL RULES R. 5.1.
124. ABA STANDARDS, *supra* note 28, at Part II.
125. The definition of the term "injury" simply refers to the duties owed by a lawyer and directs courts to

Instead, the Standards simply provide that "[t]he extent of the injury is defined by the type of duty violated and the extent of actual or potential harm."[126] The Committee included two straightforward examples to help illustrate this principle—one involving conversion of client funds (where the injury or potential injury is obviously financial) and the other involving witness tampering (where the injury is measured "by evaluating the level of interference or potential interference with the legal proceeding").[127]

But in most instances, the Standards use the generic term "injury" when discussing possible sanctions for various forms of misconduct. What is the injury when, for example, a lawyer discloses confidential client information and no financial injury results? Is a client's embarrassment or sense of betrayal an injury, or is the concept confined to more tangible harms? The Standards are silent.[128] What injury, if any, does a client suffer when a lawyer violates the rules by failing to communicate with a client or return documents to which the client is entitled? Is damage to the public's confidence in the legal profession an injury? The Standards are silent.[129]

In some instances, the Standards do not speak of an injury at all. When discussing the potential sanctions that might apply when a lawyer engages in a criminal act that reflects adversely on the lawyer's fitness to practice, the Standards do not identify any injury or potential injury caused by such conduct.[130] The fact that the Standards group this rule violation under the heading of a violation of a duty owed to the general public might lead one to speculate that the violation causes an injury to the public in the sense of damaging the public's trust in the legal system. But this idea does not appear in this particular context.[131]

This same problem appears in the Standards' list of aggravating and mitigating factors. The Committee included nothing in the way of explanation of how the factors might be relevant, what weight they might be given in a particular case, or even why they are relevant in the first place.[132] In addition, the Standards fail to indicate whether these lists of factors are intended to be exhaustive, although the failure to include any sort of catchall phrase in either suggests perhaps that the

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consider the harm to the actor owed the duty. ABA STANDARDS, *supra* note 28, at Part III, Definitions. The definition of "potential injury" refers to "the harm . . . that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct." *Id.*

126. *Id.* at Part II.

127. *Id.*

128. *See* Levin, *supra* note 27, at 44 (noting the Standards' failure to address whether emotional harm qualifies as an injury).

129. *See id.* at 43.

130. *See* ABA STANDARDS, *supra* note 28, at Standards 5.21–5.24.

131. *See id.* at Part II.

132. *See* Levin, *supra* note 27, at 49.

list was intended to be exhaustive.[133] This, then, may potentially short-circuit a court's consideration of other potentially relevant factors.

### C. THE EFFECT OF THESE SHORTCOMINGS ON THE PROFESSIONAL DISCIPLINARY SYSTEM

The Standards observe that "[f]or lawyer discipline to truly be effective, sanctions must be based on clearly developed standards."[134] The Committee noted that the lack of clear standards leads to inconsistent results, and the lack of consistent results—including sanctions that are too lenient—may fail to deter lawyer misconduct and cause the public to lose confidence in the legal profession.[135] However, as discussed below, the shortcomings of the Standards have themselves contributed to these same sorts of problems.

#### 1. THE FAILURE TO ENCOURAGE CONSISTENT TREATMENT

The failure to elaborate upon the concept of an injury, and the specific failure to explain what might qualify as an "injury," has led to conflicting results among courts.[136] For example, Professor Levin has noted that courts have reached different conclusions as to whether the loss of a financial opportunity resulting from a lawyer's misconduct qualifies as an injury.[137] Some courts treat emotional distress resulting from misconduct as an injury, while others do not.[138] This leads to inconsistent sanctions in factually similar cases, which is exactly what the Standards were designed to avoid.[139]

As an example, some courts tend to impose the lightest form of sanction—admonition or private reprimand—in cases where a lawyer's misconduct results only in emotional distress.[140] Admonition or private reprimand is a form of non-public discipline, which the Standards provide is appropriate in cases of "minor misconduct, when there is little or no injury" to the actor or interest in question.[141] Thus, by failing to identify emotional distress and related forms of harm as an "injury," the Standards signal to judges and disciplinary authorities that misconduct that results in purely harms is merely "minor misconduct." To the extent this

133. Some courts have nonetheless concluded that the lists are non-exhaustive. *See, e.g.*, Att'y Grievance Comm'n of Md. v. Sheridan, 741 A.2d 1143, 1159 (Md. 1999).

134. ABA STANDARDS, *supra* note 28, at Part IA.

135. *Id.*

136. *See* Levin, *supra* note 27, at 44 (noting the disparity in results).

137. *See id.* at 43 (noting the disparity in results).

138. *See id.* (noting the disparity in results).

139. *See supra* note 134 and accompanying text.

140. *See* Levin, *supra* note 27, at 44.

141. ABA STANDARDS, *supra* note 28, at Standard 2.6.

message is communicated to the members of the legal profession, the deterrence function of the disciplinary process is not served.[142]

### 2. THE FAILURE TO FULFILL THE EXPRESSIVE FUNCTIONS OF THE PROFESSIONAL DISCIPLINE SYSTEM

In addition to their limitations in promoting consistent sanctions, the shortcomings identified above also limit the ability of the discipline system to carry out its expressive function. The sanctions that the legal system imposes on lawyers for misconduct sends a message to the public and the profession about how seriously (or not) the profession takes such misconduct. The imposition of lesser sanctions that do not capture the seriousness of the offense may mistakenly express the sentiment that the legal profession does not view the offense as being particularly serious.

Take, for example, Model Rule 1.6, which generally prohibits a lawyer from disclosing information relating to the representation of the client.[143] Instead of simply observing that this rule articulates a duty owed to a client, the Committee could have drawn upon the wealth of judicial decisions and ethics opinions explaining why the duty of confidentiality is a fundamental principle of the lawyer-client relationship.[144] The Committee could have further used judicial decisions to help illustrate the various types of injuries or potential injuries that might arise as a result of a violation, whether it be embarrassment, loss of a job, or criminal prosecution. At the same time, the Committee could have identified some of the exceptions to the general rule that illustrate some of the countervailing concerns that reflect the legal profession's decision to sometimes place a higher value on the interests of third parties than client confidentiality.[145] The result would have not only been clear guidance to courts and disciplinary authorities but a clearer expression of the values of the profession to lawyers and the public. The failure of the Standards to do any of these things represents a missed opportunity to fulfill the potential expressive function of the disciplinary process.

### 3. HOW THESE SHORTCOMINGS HAVE FILTERED DOWN TO THE STATE LEVEL

Finally, it is worth noting how these shortcomings have resulted in similar problems at the state level. As noted, many states do not utilize the Standards as

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142. *See* Levin, *supra* note 27, at 44 (stating that admonition "is a sanction that does not effectively promote the goals of lawyer discipline").

143. MODEL RULES R. 1.6.

144. *See, e.g.*, Cleveland Metro. Bar Ass'n v. Heben, 81 N.E.3d 469, 473 (Ohio 2017) (explaining that a "fundamental principle in the attorney-client relationship is that the attorney shall maintain the confidentiality of any information learned"); State *ex rel.* Great Am. Ins. Co. v. Smith, 574 S.W.2d 379, 383 (Mo. banc 1978) ("[C]onfidentiality of the communications between client and attorney is essential for such relationships to be fostered and effective.").

145. *See* MODEL RULES R. 1.6(b) (listing exceptions).

the Committee intended.[146] As a practical matter, this means that state courts have had to shoulder the burden of developing standards that promote consistent treatment of lawyer misconduct, reduce the risk of bias in the process, and advance the expressive function of lawyer sanctions. Many courts have failed to develop any sort of formal analytic framework, articulate factors relevant to the sanction decision at a high level of generality, or adopt anything beyond ad hoc, case-by-case approaches to the question of appropriate sanction.[147]

## IV. THE PARTICULAR SHORTCOMINGS OF THE STANDARDS AND THE SANCTIONS PROCESS AS APPLIED TO THE 2020 ELECTION: THE ILLUSTRATIVE CASE OF JEFFREY CLARK

The case of Jeffrey Clark, the DOJ lawyer who sought to convince state officials to investigate supposed widespread voter fraud, illustrates the shortcomings of the Standards and the sanctions process at the state level more generally, as well as their shortcomings in his particular case.

### A. THE LACK OF UNIFORM ADOPTION OF THE STANDARDS

As noted, some jurisdictions do not apply the Standards as the Committee intended, or have adopted different approaches altogether.[148] The District of Columbia, where Clark's disciplinary complaint was filed, is one of those jurisdictions.[149] At the time of this Article, the District of Columbia Court of Appeals had not referenced the Standards since 2012.[150] In *In re Schwartz*, the D.C. Court of Appeals identified four primary considerations when determining an appropriate sanction: "the nature of the violation, the mitigating and aggravating circumstances, the need to protect the public, the courts, and the legal profession, and the moral fitness of the attorney."[151] The District of Columbia's list of considerations is something of a jumble. The third consideration (the need to protect the public) offers little guidance and would seem to be subsumed within the first consideration (the nature of the violation), which would presumably consider whether the public was put at risk by the attorney's misconduct. The fourth consideration (the moral fitness of the attorney) articulates a nebulous standard, which, in practice, the court only infrequently references as a separate consideration.[152]

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146. *See supra* notes 80–91 and accompanying text.

147. *See supra* Part II.B.

148. *See supra* note 89 and accompanying text.

149. *Id.*

150. *See In re* Howes, 52 A.3d 1, 16 n.20 (D.C. 2012) (the most recent case referencing the Standards).

151. *In re* Schwartz, 221 A.3d 925, 928 (D.C. 2019) (citing *In re* Austin, 848 A.2d 969, 975 (D.C. 2004)).

152. *See In re* Weiss, 839 A.2d 670, 676 (D.C. 2003) (Ruiz, J., dissenting) (citing lawyer's decision to self-report as an example of lawyer's moral fitness); *In re* Hutchinson, 534 A.2d 919, 924 (D.C. 1987) (noting attorney's contrition and attempts to understand the root causes of his behavior as examples of his moral fitness).

The court has also listed "[s]ome additional factors," which may include "(1) the seriousness of the conduct, (2) prejudice to the client, (3) whether the conduct involved dishonesty, (4) violation of other disciplinary rules, (5) the attorney's disciplinary history, (6) whether the attorney has acknowledged his or her wrongful conduct, and (7) mitigating circumstances."[153] Some of these factors, such as "the seriousness of the conduct" and "mitigating circumstances," are already addressed in the previously articulated considerations.[154] In short, like the Standards, the District of Columbia's approach to the sanctions process would benefit from reconsideration and greater theorization. But in the meantime, the District of Columbia's failure to rely upon the Standards or to utilize a well-thought-out framework seems likely to lead to inconsistent results.

This same problem is likely to occur as different jurisdictions wade through the disciplinary cases involving other lawyers charged with misconduct in connection with the 2020 election. There are dozens of ethics complaints pending in numerous jurisdictions against lawyers for their actions following the election, most of which pertain to dishonesty and frivolous claims.[155] The absence of a uniform approach at the state level to the issue of sanctions makes it more likely that there will be substantial differences in terms of the sanctions ultimately imposed in these cases.

### B. THE CURIOUS CASE OF STANDARDS 5.2 AND 5.21

The complaint against Clark alleges that Clark attempted to use his position as a DOJ lawyer to interfere with the certification process for the 2020 presidential election.[156] Clark attempted to use the DOJ to pressure Georgia officials into calling a special session of the legislature to investigate supposed election fraud.[157] He allegedly did so by preparing a letter containing false and misleading statements.[158]

Despite the various shortcomings of the Standards, they do contain a specific standard that speaks directly to the alleged misconduct in Clark's case. Standard 5.2 discusses the sanctions that are appropriate where a public official, or a lawyer in an official or governmental position, engages in conduct prejudicial to the administration of justice.[159] The more specific standard that follows, Standard 5.21, explains that "disbarment is generally appropriate when a lawyer in an official or governmental position knowingly misuses the position with the intent to obtain a significant benefit for [the official] or another, or with the intent to cause serious injury or potentially serious injury to a part or to the integrity of the legal

153. *In re Schwartz*, 221 A.3d at 928.
154. *See supra* note 150 and accompanying text.
155. *See supra* notes 9–10 and accompanying text.
156. *See supra* notes 13–21 and accompanying text.
157. *Id.*
158. *Id.*
159. ABA STANDARDS, *supra* note 28, at Standard 5.2.

process."[160] This would seem to describe Clark's situation as alleged in the ethics complaint.[161] Clark, a lawyer in a governmental position, knowingly sought to use the inherent power of his governmental position for the benefit of Donald Trump in connection to a legal matter or legislative proceeding.[162] The Standard captures the essence of what is so objectionable concerning Clark's alleged conduct and identifies the appropriate sanction.

Thus, Clark's case arguably highlights the flaws in the sanctions process at the state level. The failure of the District of Columbia to utilize the Standards means that disciplinary authorities cannot simply apply a standard that seems tailor made to be applied to Clark's alleged misconduct. Instead, assuming Clark is found to have engaged in misconduct, disciplinary authorities will likely rely on the District's nebulous constellation of considerations, with the likely sanction being difficult to predict. Indeed, it is entirely possible that a lesser sanction than that suggested by the Standards may ultimately be imposed, thus sending a message to the public that Clark's actions did not rise to the level of serious misconduct.

But as is often the case with the Standards, the matter is somewhat more complicated than it might first appear. Presumably, one reason why many state courts have chosen not to follow the Standards' framework is that they view the Standards as being flawed. As discussed, these courts would be correct in that conclusion.[163] Specific standards 5.2 and 5.21 further illustrate some of the overall shortcomings of the Standards.

For starters, Standard 5.21 articulates the appropriate sanction for violation of a rule that no longer exists. Standard 5.21 appears to be based on DR 8-101 from the older *Model Code*.[164] The rule was not carried over into the *Model Rules*. DR 8-101, entitled "Action as a Public Official," had as its clear purpose the prevention of public officials from using their positions of trust and power for their own benefit or the benefit of clients.[165] The rule speaks of a public official using their position to obtain a special advantage for themselves or their clients in legislative or adjudicative matters, and accepting anything of value when they know that the offer is for the purpose of influencing their actions.[166] In short, DR 8-101 was designed to prevent lawyers who were public officials from perverting government processes by trading on their status. This is how courts and disciplinary authorities understood and applied the rule leading up to the time that the

160. *Id.* at Standard 5.21.

161. *See supra* notes 13–21 and accompanying text.

162. This specific standard might also apply to the actions of Sen. Lindsey Graham, who allegedly used his status as a senator to bring pressure to bear on Georgia state election officials. *See supra* note 7 and accompanying text.

163. *See supra* notes 108–132 and accompanying text.

164. *See* MODEL CODE DR 8–101.

165. MODEL CODE DR 8–101.

166. MODEL CODE DR 8–101.

Committee published the Standards: the cases decided under this rule at the time included a congressman who accepted a bribe;[167] a judge who used his position to interfere with the zoning process in order to obtain a benefit for his car business;[168] a municipal judge who interceded in another proceeding on behalf of a client the judge was representing in another court;[169] and a prosecutor accused of accepting money from a bail bondsman pursuant to an agreement to use the prosecutor's position to secure a favorable disposition for criminal defendants.[170]

Some commentators at the time criticized DR 8-101 for being too lenient on government lawyers, and the rule was not carried forward into the *Model Rules*.[171] It might make sense to include an updated version of DR 8-101 in the *Model Rules*. And, in light of the events surrounding the 2020 election, others will undoubtedly suggest amending the *Model Rules* to do something similar. But regardless of the wisdom of having such a rule, the Standards for Imposing Lawyer Sanctions—a nearly forty-year-old set of standards that have not been amended in over thirty years—continue to recommend a sanction for violation of a rule that no longer exists. This reality highlights the need to revisit and update the Standards.[172]

There are other odd features of Standard 5.21 that reflect a lack of theorization on the part of the Committee. For example, Standard 5.21 is inconsistent with the methodology that the Committee laid out insofar as it does not inquire as to whether the lawyer's efforts resulted in any injury or potential injury.[173] Apparently, the mere fact that the lawyer knowingly attempted to use the public office for improper ends by itself warrants disbarment. The specific standards that follow, Standards 5.22–5.24, also do not analyze what the appropriate sanction is where the lawyer's actions amounted to mere negligence. Instead, they discuss an entirely different scenario involving a government lawyer's simple failure to "follow proper procedures or rules," an act of misconduct that has little to do with trading on one's status as a public official.[174] This turns the Standard into a

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167. *See generally* Office of Disciplinary Counsel v. Eilberg, 441 A.2d 1193 (Pa. 1982).

168. *See generally In re* DelSordo, 474 A.2d 594 (N.J. 1984).

169. *See generally In re* Vasser, 382 A.2d 1114 (N.J. 1978).

170. *See generally In re* McMahon, 513 P.2d 796 (Or .1973).

171. *See* Dennis Mitchell Henry, *Lawyer-Legislator Conflicts of Interest*, 17 J. LEGAL PROF. 261, 272 (1992) (discussing the history of the rule); George F. Carpinello, *Should Practicing Lawyers Be Legislators?*, 41 HASTINGS L.J. 87, 103–08 (1989) (criticizing rule for being too permissive in terms of allowing a legislator who was also a practicing lawyer to represent clients whose interests might be affected by proposed legislation).

172. Moreover, the Committee extended the reach of the rule beyond its terms. The language of DR 8-101 was limited to situations in which the public official sought to benefit personally or sought to benefit *a client*. Yet, Standard 5.21 more generally discusses a lawyer in a government position seeking to benefit the lawyer or "another," not necessarily "a client." *See supra* note 115 and accompanying text (discussing DR 8-101); ABA STANDARDS, *supra* note 28, at Standard 5.2. Thus, Standard 5.21 articulates a disciplinary standard for a rule that (a) no longer exists and (b) did not specifically proscribe the conduct at issue in the standard.

173. *See* ABA STANDARDS, *supra* note 28, at Standard 5.2.

174. ABA STANDARDS, *supra* note 28, at Standard 5.22–5.24.

strange hodgepodge and creates a potentially sweeping standard that applies to any failure to follow proper "procedures or rules."[175]

Ultimately, Standards 5.2 and 5.21 illustrate one of the central dilemmas associated with the Standards as a whole. Given the flawed nature of the Standards, courts could choose to adopt a deeply flawed approach to the issue of lawyer sanctions or chart their own course. The District of Columbia chose the latter route, with the same sort of disappointing results that plague many states.

### C. THE FAILURE TO ADDRESS PROSECUTORIAL MISCONDUCT

Clark's situation also highlights the incomplete nature of the Standards in terms of its treatment of prosecutorial misconduct. Admittedly, Clark was not a prosecutor. Clark was serving as Acting Chief of DOJ's Civil Division at the time of the relevant events.[176] But he lobbied to become Attorney General where he

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175. Courts have struggled to make sense of Standard 5.2, sometimes seemingly converting it into a catch-all standard covering all forms of bad behavior on the part of government lawyers. *See* People v. Steinman, 452 P.3d 240, 249 (Colo. 2019) (stating that Standard 5.22 "is less well-suited to this case than to cases in which legal proceedings themselves are affected by the misconduct" but applying it anyway). For example, in one case, the Delaware Supreme Court applied Standard 5.2 where a deputy attorney was part of a practical joke that resulted in a court employee pulling his gun and pointing it another individual. *In re* Gelof, 142 A.3d 506, 508 2016 WL 3419111, *7 (Del. 2016). That amounts to bad behavior to be sure, but it seems to have little to do with a failure to follow proper procedure or rules or with an abuse of one's role as a lawyer for the government. In another case, an Assistant U.S. Attorney posted online comments about public cases in violation of the special rule regarding prosecutor and pre-trial publicity. *In re* Perricone, 263 So.3d 309, 310 (La. 2018). In sanctioning the lawyer, the Louisiana Supreme Court relied upon Standard 5.22, presumably because the lawyer knowingly failed to follow proper procedures or rules through his online posts. *Id.* at 318. Courts do sometimes rely upon Standard 5.21 in cases involving the sort of influence peddling and abuse of office that seems to have been the intent of DR 8-101. *See, e.g.*, Attorney Grievance Comm'n of Maryland v. McDonald, 85 A.3d 117, 144 (Md. 2014) (involving a prosecutor who used their position to fix tickets and interfered with the prosecution of an individual with whom the prosecutor had a relationship). But courts have also referenced the standards language of "procedures or rules" in these cases when Standard 5.21 is more appropriate. For example, in one case, a prosecutor threatened to bring felony charges against the opposing party of a client the prosecutor was representing in a civil matter in order to coerce a settlement. *In re* Holste, 358 P.3d 850, 853 (N.M. 2015). This seems like the factual scenario for which Standard 5.21 was designed. But instead, the disciplinary hearing panel cited Standard 5.22 and its reference to a violation of "procedures or rules." *Id.* at 886.

Finally, it is also debatable whether the decision to apply Standard 5.2 to *any* government lawyer is consistent with DR 8-101 and decisions on which the standard was based. An ethical consideration accompanying the disciplinary rule discussed the rule in terms of lawyers who serve "as legislators or as holders of other public offices," thus arguably implying a more limited conception of "public office." MODEL CODE EC 8-8. Nearly all of these decisions involved legislators, judges, or prosecutors, i.e., individuals who clearly held "public office." *See In re* Todd, 359 N.W.2d 24 (Minn. 1984) (judge); *In re* DelSordo, 474 A.2d 594 (N.J. 1984) (judge); People v. Tucker, 676 P.2d 680 (Colo. 1983) (district attorney); Georgia Dept. of Human Resources v. Sistrunk, 291 S.E.2d 524 (Ga. 1982) (state legislator); Office of Disciplinary Counsel v. Eilberg, 441 A.2d 1193 (Pa. 1982) (member of Congress); *In re* Vasser, 382 A.2d 1114 (N.J. 1978) (judge); State *ex rel.* Nebraska State Bar Ass'n v. Holscher, 230 N.W.2d 75 (Neb. 1975) (prosecutor); *In re* D'Auria, 334 A.2d 332 (N.J. 1975) (judge); *In re* McMahon, 513 P.2d 796 (Or. 1973) (prosecutor). Other lawyers who faced professional discipline under this rule included a "borough attorney," who had responsibility for advising members of local government, *In re* Dolan, 384 A.2d 1076 (N.J. 1978), a city attorney with authority to prosecute "quasi-criminal" matters, *In re* LaPinska, 381 N.E.2d 700 (Ill. 1978), and a deputy clerk of court, *In re* Diamond, 368 A.2d 353 (N.J. 1976). MODEL CODE EC 8-8.

176. *See* Kranish & Helderman, *supra* note 14.

would have had the authority oversee not only the prosecution of criminal cases generally, but also, more specifically, potential criminal investigations into supposed election fraud.[177] Given the well-publicized efforts on the part of former-President Trump and his staff to pressure DOJ officials into investigating alleged voter fraud and their filing legal challenges to the election results in court,[178] it is entirely possible that DOJ prosecutors would have taken such actions had Clark been appointed.

Election fraud has increasingly become an issue of public discussion as a result of the 2020 election, and state and local prosecutors have generated publicity for their efforts to investigate and prosecute voter fraud.[179] Some of these actions have raised concerns about possible abuse of prosecutorial discretion.[180] Finally, the DOJ, under Merrick Garland, has faced criticism for some of prosecutorial decisions regarding participants in the January 6 attack on the Capitol, both for being overly aggressive and for being too lenient.[181]

These events raise questions about prosecutorial misconduct and the potential sanctions that may apply. So, what do the Standards have to say about prosecutorial misconduct? Nothing.

Model Rule 3.8 imposes special obligations upon prosecutors.[182] The rule is detailed, with eight sections all listing separate obligations.[183] Given the vital role that prosecutors play in the justice system, one would think that the rule recognizing these special obligations would merit at least a mention in the Standards. But the Standards not only fail to reference Model Rule 3.8, they do not even mention the word "prosecutor."

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177. *Id.*

178. *See* Matt Zapotosky, Rosalind S. Helderman, Amy Gardner & Karoun Demirjian, *"Pure Insanity": How Trump and His Allies Pressured the Justice Department to Help Overturn the Election*, WASH. POST (June 26, 2021) https://www.washingtonpost.com/politics/interactive/2021/trump-justice-department-2020-election/ [https://perma.cc/8BNC-BJVV].

179. *See* Monique Beals, *Abbott, Other Texas Republicans Urge Court to Reverse Ruling on Voter Fraud Prosecutions*, THE HILL (Jan. 26, 2022), https://thehill.com/homenews/state-watch/591400-abbott-other-texas-republicans-urge-court-to-reverse-ruling-on-voter/ [https://perma.cc/8VH5-CZDM] (discussing criticism by the Texas attorney general and others of a court decision limiting attorneys' general ability to prosecute election fraud cases); Matt Mencarini, *"A Hammer in Search of a Nail": Wisconsin AG Candidate Eric Toney Prosecutes Eligible Voters for Address Snafus*, PBS WIS. (July 11, 2022), https://pbswisconsin.org/news-item/wisconsin-attorney-general-candidate-eric-toney-voters-over-errors/ [https://perma.cc/JMT5-LFWQ] (discussing a local prosecutor's pursuit of voter fraud cases against individuals who listed incorrect addresses when registering).

180. *See* Mencarini, *supra* note 178 and accompanying text (noting criticism of a prosecutor's decision).

181. The DOJ has actually faced criticism for being too lenient and being too aggressive with regard to its prosecutions. *See* Marsha Cohen and Hannah Rabinowitz, *After 50 Rioters Sentenced for January 6 Insurrection, a Debate Rages Over What Justice Looks Like*, CNN (Dec. 11, 2021), https://www.cnn.com/2021/12/11/politics/january-6-capitol-riot-punishments-jail/index.html [https://perma.cc/P9X2-44RC] (discussing criticism).

182. MODEL RULES R. 3.8.

183. *Id.*

The Committee's failure to so much as mention Model Rule 3.8 or the special issues raised by one's status as a prosecutor is somewhat baffling. It is not as if these were new issues confronting the Committee. The older *Model Code* contained several disciplinary rules and ethical considerations that addressed the special role of prosecutors.[184] And there were certainly discipline decisions involving prosecutorial misconduct for the Committee to draw upon.[185] Yet, the Standards are silent on the appropriate sanction when a lawyer who perhaps best embodies the concept of a government lawyer engages in misconduct.

The failure to develop specific standards pertaining to prosecutorial misconduct means that, in this respect, the Standards fail to fulfill one of the Committee's stated goals: establishing clearly developed standards so that lawyer discipline can truly be effective.[186] As it stands, judges and disciplinary authorities are left to sort out for themselves the appropriate sanction in the case of prosecutorial misconduct or rely upon other standards that do not capture the special issues involved. This failure undoubtedly leads to bias in the sanctions process in an area in which the public has a particular interest in the application of appropriate sanctions. The failure to deal with prosecutorial misconduct is also a missed opportunity for the Standards to convey to the public the special role that prosecutors play in the justice system and why such misconduct poses a special threat to the administration of justice.

### D. THE INCOMPLETE LIST OF AGGRAVATING FACTORS

Finally, Clark's case illustrates the incomplete nature of the list of aggravating factors contained in the Standards. Under the methodology identified in the Standards, after arriving at a presumptive sanction based on the duty violated, the lawyer's mental state, and the injury or potential injury caused, the next step is to consider whether there are any aggravating or mitigating factors that should result in a different sanction.[187]

Numerous decisions treat the fact that a lawyer holds public office, is a prosecutor or public defender, or is a government lawyer more generally as an aggravating factor (or at least a special circumstance) in professional discipline cases.[188] For example, courts routinely express the view that prosecutors "have

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184. MODEL CODE DR 7-103, 7-05, EC 7-13.

185. *See, e.g.*, *In re* Lantz, 442 N.E.2d 989, 990 (Ind. 1982) (publicly reprimanding prosecutor for conflict of interest).

186. ABA STANDARDS, *supra* note 28, at Part IA.

187. *See supra* note 71 and accompanying text.

188. *See In re* Howes, 39 A.3d 1, 21 (D.C. 2012) (finding respondent's misconduct was aggravated by his status as a prosecutor); *In re* Melvin, 807 A.2d 550, 554 (Del. 2002) (noting that as a public defender, a lawyer held a "unique position of public trust"); People v. Pautler, 35 P.3d 571, 579 (Colo. 2001) (stating that prosecutors are held to a higher ethical standard); Comm. on Legal Ethics of W. Va. State Bar v. Roark, 382 S.E.2d 313, 318 (W. Va. 1989) (holding that a lawyer's status as mayor added to his penalty); *In re* Bankston, 01-B-2780, p. 12 (La. 03/08/02); 810 So.2d 1113 (holding a lawyer's actions were "particularly egregious because they occurred while he was a state senator"); Disciplinary Couns. v. Dann, 979 N.E.2d 1263, 1268 (Ohio 2012)

higher ethical duties than other lawyers because they are ministers of justice, not just advocates."[189] In some instances, courts explicitly treat the fact that the respondent is a prosecutor as an aggravating factor in the imposition of sanctions on the grounds that prosecutorial misconduct "calls into question the fairness of the criminal justice system" in its entirety.[190] Not only do prosecutors occupy a special position in the law as ministers of justice, their positions afford them broad discretion and the use of public funds.[191] One court has explained that it is appropriate to treat one's status as a prosecutor as an aggravating factor given prosecutors' "pivotal role in the justice system, the great discretion they are given, and the few tools available to oversee their compliance with the legal standards that govern their conduct."[192]

While these considerations apply with particular force in the case of prosecutors, they may apply more generally to other government lawyers and lawyers who hold public office. Indeed, one theme that emerges from the disciplinary decisions involving misconduct on the part of public officials who are lawyers and government lawyers is that misconduct by these actors is particularly offensive because it amounts to a violation of the public trust.[193] As the Arizona Supreme Court has explained

> [T]he authority of the Government lawyer does not arise from any *right* of the Government, but from *power* entrusted to the Government. When a Government lawyer, with enormous resources at his or her disposal, abuses this power and ignores ethical standards, he or she not only undermines the public trust, but inflicts damage beyond calculation to our system of justice.[194]

Thus, government lawyers may be held "to even a higher standard of conduct than an ordinary attorney."[195] Reviewing courts sometimes note that misconduct

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(treating the fact that a lawyer was a state attorney general as justifying imposition of heightened sanction); State *ex rel.* Nebraska State Bar Ass'n v. Douglas, 416 N.W.2d 515, 550 (Neb. 1987) ("The conduct of a government attorney is required to be more circumspect than that of a private lawyer."). Courts have cited a lawyer's connection to the government as an aggravating factor both in cases involving misconduct in the practice of law as well as misconduct occurring in the lawyer's private life. *See* Att'y Grievance Comm. v. Markey, 230 A.3d 942, 960 (Md. 2020) (stating that the misconduct of government lawyers "cannot be tolerated from any members of the Bar of Maryland—especially ones who occupy positions of public trust").

189. *Pautler*, 35 P.3d at 579.

190. *Howes*, 39 A.3d at 21; *see In re* Kurtzrock, 138 N.Y.S.3d 649, 665 (N.Y. App. Div. 2020) (treating a lawyer's status as a prosecutor a "substantial factor in aggravation").

191. *Howes*, 39 A.3d at 21.

192. *Id.* at 23.

193. *See Markey*, 230 A.3d at 960 (noting that the government attorneys in question occupied "positions of public trust"); *Roark*, 382 S.E.2d at 318 (stating that courts have uniformly found that the ethical violations by a lawyer holding public office are "more egregious because of the betrayal of the public trust attached to the office"); *Douglas*, 416 N.W.2d at 550 ("Improper conduct on the part of a government attorney is more likely to harm the entire system of government in terms of public trust.").

194. *In re* Peasley, 90 P.3d 764, 772–73 (Ariz. 2004).

195. *In re* Bankston, 01-B-2780, p. 12 (La. 03/08/02); 810 So.2d 1113.

by government lawyers tends to more egregious because it damages the public's perception of the legal system.[196]

These considerations apply with particular force in the case of a lawyer employed by the Department of Justice. An attorney general—"the chief law officer" at the federal or state level—has sweeping responsibilities, including the duty to furnish advice on legal matters to heads of other departments and agencies within the government.[197] As the Ohio Supreme Court noted in a disciplinary case involving that state's attorney general, "the work of the attorney general touches upon virtually all areas" of state government.[198] Thus, an attorney general's ethics violations not only call into question the attorney's fitness to practice law, they "cause incalculable harm to the public perception of the attorney general's office and those government agencies, departments, and institutions that the attorney general advises and represents."[199] Clark may not have been attorney general when he engaged in his alleged misconduct, but he was only a few steps removed, and he allegedly attempted to use the name and status of the Department of Justice to accomplish his goals.[200] This would seem to aggravate the nature of his offense.

But the Standards do not include the fact that one is employed by the government as an aggravating factor.[201] Thus, Clark's alleged betrayal of the public trust would not expressly be taken into account in a jurisdiction that follows the approach of the Standards. Nor would the expressive function of the disciplinary process be fulfilled to its potential in a jurisdiction that does not expressly treat misconduct on the part of a government attorney as an aggravating factor.

## CONCLUSION

The lawyer disciplinary system has lived with the Standards for Imposing Lawyer Sanctions since 1986.[202] Since that time, the problems associated with the Standards have been made more apparent. While the legal profession owes a debt of gratitude to the Committee for its efforts to develop a workable methodology for imposing lawyer sanctions, the Standards for Imposing Lawyer Sanctions amount to a deeply flawed approach.

Even if the Standards were not as problematic as they are, it is long past time for the legal profession to revisit them. More than thirty years have passed since

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196. *See id.* at p. 12–13; *In re* Kline, 311 P.3d 321, 393 (Kan. 2013).

197. *See* Disciplinary Counsel v. Dann, 979 N.E.2d 1263, 1269 (Ohio 2012) (describing duties of Ohio attorney general).

198. *Id.*

199. *Id.*

200. *In re* Clark, Disciplinary Docket No. 2021-D193 ¶ 15 (July 19, 2022), https://s3.documentcloud.org/documents/22111864/ethics-charges-against-jeffrey-clark.pdf [https://perma.cc/729L-CZEC].

201. *See generally* ABA STANDARDS, *supra* note 28.

202. ABA STANDARDS, *supra* note 28.

the last time the Standards were amended.[203] The patterns in prior disciplinary cases that the Committee relied upon began to emerge more than forty years ago. Much has changed in the legal profession in the ensuing years. New rules have been adopted. But none of these changes are reflected in the Standards.[204]

There have also been dramatic societal events that have influenced how the legal profession views its obligations viz a viz clients and the public. The corporate fraud scandals of the early 21st century, which led the ABA to amend the *Model Rules* to recognize additional exceptions to a lawyer's duty of confidentiality, are one obvious example.[205] But many of these dramatic events have particular application for lawyers who work for the government. Since 1992, the last year the Standards were amended,[206] the country has seen two presidents impeached, increased governmental surveillance following the September 11 attack, the Bush-era "torture memos," numerous incidents of prosecutorial misconduct, the murder of George Floyd, and the active involvement of lawyers in the events of the 2020 election and the January 6 attack on the Capitol. Each of these events forced lawyers to reconsider what the role of a lawyer who works on behalf of the government is and how to resolve tensions between a lawyer's obligations to the agency the lawyer serves and to the public at large and the legal system more generally.

Updating the Standards would be a means of addressing the shortcomings identified in this Article. This would hopefully lead to a more consistent application of the Standards by courts that currently rely upon them. And an improved version of the Standards might also cause courts and disciplinary authorities in states that do not currently rely upon them to take a second look.

None of the lessons learned from these sorts of events are reflected in the current Standards. Fifty years ago, Watergate helped spawn a re-evaluation of the ethical obligations of lawyers. A similar opportunity presents itself today.

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203. ABA STANDARDS, *supra* note 28.

204. *See* Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. LEGAL PROF. 201, 246 (2017) (noting that Rule 8.4(g), adopted in 2016, is not discussed in the Standards).

205. *See supra* note 106 and accompanying text (discussing effect of corporate fraud scandals on the rules).

206. ABA STANDARDS, *supra* note 28.