Maintaining Your Ethical Compass in the Midst of Chaos[1]

"... For the times they are a-changin' ..."
Bob Dylan

Change may be the constant, but some changes are more chaotic than others. Whether because of market disruption caused by the explosion of AI-containing tools, rapid swings in the legal landscape swept in by a new administration, or lawyers finding themselves in the "crosshairs," lawyers may be called on to navigate not just changing times but chaos itself. This two-hour ethics CLE focuses on the professional rules that provide lawyers the ethical compass to navigate chaos connected to the following specific topics:

- **The use of artificial intelligence tools in the legal profession**: This segment will highlight types of AI tools commonly used by lawyers, some AI mishaps still making the news, and address the duties implicated when lawyers use AI (including the duties of confidentiality, competence, diligence, supervision, communication, and candor as well as the duty to charge reasonably and represent clients within the bounds of the law).

- **Advising clients on laws for which the executive branch has stated a position of "non-enforcement" of laws that remain "on the books."** This segment will highlight some of the examples of government-declared "non-enforcement" positions and will then discuss ABA Model Rule 1.2 and state variations on the same rule aimed at setting parameters for lawyers to represent clients within the bounds of the law.

- **Lawyers in the crosshairs.** This segment will highlight various scenarios when lawyers find themselves in the "crosshairs," whether because of government action aimed at lawyers, claims against lawyers, motions against lawyers, or intense public pressure on lawyers, and it will then discuss the professional rules implicated in those scenarios.

- **Judges in the crosshairs.** This segment will examine what is in or out of bounds under the professional rules when lawyers take aim at judges' decisions and actions.

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I. THE USE OF GENERATIVE AI TOOLS IN THE LEGAL PROFESSION

A. ARTIFICIAL INTELLIGENCE

"Artificial intelligence" is a very broad term. According to Merriam-Webster's Dictionary, "artificial intelligence" (AI) refers to the "capability of computer systems or algorithms to imitate intelligent human behavior." www.merriam-webster.com/dictionary/artificial%20intelligence (last visited October 21, 2025). This includes tasks such as logical deduction, creativity, decision-making, and understanding spoken language.

Matching the breadth of the term "AI" is the myriad of tools used in a law practice that employ some level of AI. Consider, for example, the AI built into:

- the spelling and grammar checks in your document processing or e-mail software programs;
- time-keeping tools with predictive capabilities about an applicable client/matter number, billing code, or description of time;
- e-billing tools to search for certain types of anomalies to flag for closer review;
- document review platforms that can be trained to identify potentially relevant or privileged documents;
- contract review programming to flag critical terms; and
- research platforms like Westlaw or LEXIS, including the "natural language" search intelligence.

This list above would not be complete without mentioning the **generative AI platforms ("GAI")**, such as OpenAI's ChatGPT or Microsoft's Copilot. Microsoft explains that generative AI "is a type of AI that is trained on data and can generate novel content, such as text, images, music, and code . . . [G]enerative AI . . . continuously learns and refines its outputs based on user interactions." See www.microsoft.com/en-us/microsoft-copilot/for-individuals/do-more-with-ai/general-ai/what-is-generative-ai?msockid=34468f2d2a746877031499062b6669e6&form=MY02PF What Is Generative AI? Example Generative AI Prompts and Outputs | Microsoft Copilot (last visited October 21, 2025). This is contrasted with more traditional AI that makes "decisions by operating on explicit instructions and predefined rules. Traditional AI is not designed to create original content from existing data like generative AI does." *Id.*

The list of tools relying on AI, including GAI, is long, and the use cases are compelling. But as near daily headlines make clear, there are serious risks associated with AI tools that need to be identified and managed. Not all AI introduces the same level and nature of risk. The focus of the risks and related ethical issues in the materials that follow will be the **GAI platforms,** although the ethical issues may be shared across other AI tools.

B. GENERATIVE AI MISHAPS MAKING THE NEWS

The introduction and quick explosion of GAI platforms has triggered a continuing tsunami of well-publicized mistakes within the legal community. Pick a day and the odds are that you will find a headline reporting on a court filing containing errors that originated with GAI and were not identified and corrected prior to filing. For example, in *N.Z. et al. v. Fenix International Ltd. et al.* (Case No. 8:24-cv-01655) (C.D. Cal.), plaintiffs' counsel allegedly used ChatGPT to generate four legal briefs that contained nearly a dozen AI-generated hallucinations, including made-up cases and hallucinated quotations, according to the defendants' motion opposing the plaintiffs' motion for leave to file corrected briefs. *See* September 3, 2025 Opposition to Plaintiffs' Motion for Leave to File Corrected Briefs (ECF No. 185), http://assets.law360news.com/2384000/2384063/https-ecf-cacd-uscourts-gov-doc1-031145769373.pdf. None of the ten attorneys working on the plaintiffs'side prevented, caught, or corrected the errors.

Attorneys are not the only ones outed for GAI-related mistakes. In *Christopher Kohls et al. v. Keith Ellison et al*. (Case No. 0:24-cv-03754) (D. Minn.), U.S. District Judge Laura M. Provinzino excluded an **expert declaration** due to fake, AI-generated sources cited in the expert's declaration – two non-existent academic articles and incorrect citations to the authors of a third article. *See* January 10, 2025, Order Granting in Part and Denying in Part Plaintiffs' Motion to Exclude Expert Testimony and Denying Defendant's Motion for Leave to File and Amended Expert Declaration (ECF No. 46), http://assets.law360news.com/2283000/2283639/https-ecf-mnd-uscourts-gov-doc1-101110744465.pdf. Judge Provinzino noted the irony of the AI-generated mistakes in the expert's declaration, noting that he is "a credentialed expert on the dangers of AI and misinformation" who "has fallen victim to the siren call of relying too heavily on AI—in a case that revolves around the dangers of AI, no less." *Id.* at 8. She further made clear that she did not fault the expert merely for using AI for research purposes, recognizing that "AI, in many ways, has the potential to revolutionize legal practice for the better. . . . But when attorneys and experts abdicate their independent judgment and critical thinking skills in favor of ready-made, AI-generated answers, the quality of our legal profession and the Court's decisional process suffer." *Id.* at 8-9.

Add judges to the pool of those outed for GAI-related errors. For example, counsel for defendants in *In Re CorMedix* (No. 21-cv-14020) (D.N.J.) alerted the presiding judge to "a series of errors" in the Court's June 30, 3035 Opinion (ECF No. 114), which denied defendants' motion to dismiss. *See* July 22, 2025, Correspondence from Defendants' Counsel to the Court in the *In Re CorMedix* case (ECF No. 123), gov.uscourts.njd.477937.123.0.pdf. Those errors were identified as including "three instances in which the outcomes of cases cited in the Opinion were misstated (i.e., the motions to dismiss were granted, not denied) and numerous instances in which quotes were mistakenly attributed to decisions that do not contain such quotes." *Id.* at 1. The Court subsequently withdrew its opinion and order, noting that they were entered in error.

One database tracking legal decisions in cases in which GAI produced "hallucinated content" (whether fake citations or otherwise) reports 301 such cases between June 2023 and late October 2025. The judicial response has ranged from "warnings," "rebukes," and ordered CLE to sanctions, fee disgorgement, motion denial and case dismissal, and even some instances of pro

hac vice revocation or suspension from practice before the affected court. *See* database of cases compiled by Damien Charlotin, a Senior Research Fellow and Lecturer at HEC Paris and lawyer with Pelekan Data Consulting in Paris, France, www.damiencharlotin.com/hallucinations/?sort_by=-date&states=USA&period_idx=0&page=2&page=3&page=4&page=5&page=4&page=5 (last visited October 21, 2025). As of September 10, 2025, the database breaks down the party responsible for introducing the errors as follows:

- Pro Se litigants (174)
- Lawyers (118)
- Expert (4)
- Judge (3)
- Paralegal (3)

Id. The database further categorizes the nature of the errors as follows:

- Fabricated cases (215)
- False quotes (86)
- Misrepresented (90)
- Outdated advice (8)

Id. The database emphasizes that it is tracking legal decisions and not the "(necessarily wider) universe of all fake citations or use of AI in court filings." *Id.*

According to U.S. District Judge Anna M. Manasco in a July 23, 2025 Sanctions Order entered in *Johnson v. Dunn,* Case No.: 2:21-cv-1701-AMM (N.D. Ala.) (ECF No. 204), http://cases.justia.com/federal/district-courts/alabama/alndce/2:2021cv01701/179677/204/0.pdf?ts=1753423722, the fact that the tsunami of GAI-related errors does not appear to be abating suggests the need for more serious sanctions to function as deterrents:

> . . . Fabricating legal authority is serious misconduct that demands a serious sanction. In the court's view, it demands substantially greater accountability than the reprimands and modest fines that have become common as courts confront this form of AI misuse. As a practical matter, time is telling us – quickly and loudly – that those sanctions are insufficient deterrents. In principle, they do not account for the danger that fake citations pose for the fair administration of justice and the integrity of the judicial system.
> . . .
> An appropriate and reasonable sanction must (1) have sufficient deterrent force to make this misuse of AI unprofitable for lawyers and litigants, (2) correspond to the extreme dereliction of professional responsibility that sham citations reflect (whether generated by artificial or human intelligence), and (3) effectively

> communicate that made-up authorities have no place in a court of law. *Id*. at 1-2

Lawyers are not strangers to the phenomenon of new technologies introducing potential for errors as they struggle to master both the risks and benefits. For example, lawyers may remember and still grapple with:

- Accidental "reply all" or other inadvertently sent communications;
- Removable PDF redactions; and
- Inadvertently shared metadata.

In addition, mobile technology and cloud storage provide essential tools but challenge the profession's duty to keep information confidential. Recognizing that "[t]echnology and globalization have transform the practice of law in ways the profession could not anticipate," the ABA created the Commission on Ethics 20/20 in August 2009 to tackle the ethical and regulatory challenges and opportunities arising from the technology transformations and increasing globalization of law practice. ABA Commission on Ethics 20/20 Report to the House of Delegates (2012) ("Ethics 20/20 Report"), at p. 1, https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introdution_and_overview_report.authcheckdam.pdf, and www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.pdf. The Ethics 20/20 Commission observed that "[t]echnology affects nearly every aspect of legal work, including how we store confidential information, communicate with clients, conduct discovery, engage in research, and market legal services." *Id.* at p. 4.

In light of these types of technological developments, the Ethics 20/20 Commission recommended, and the ABA adopted, amendments to the Model Rules of Professional Conduct ("ABA Model Rules") in 2012 to provide guidance regarding lawyers' use of technology, particularly regarding the duties of competence and confidentiality, but also with respect to "fairness" to others. Specifically, the 2012 amendments to the ABA Model Rules:

- Specified in comment [6] to ABA Model Rule 1.1 ("Competence") that a lawyer "should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology" in order to "maintain the requisite knowledge and skill."

- Added ABA Model Rule 1.6(c), requiring a lawyer to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

- Clarified that ABA Model Rule 4.4(b)'s "inadvertent production" rule applies to electronically stored information as well as documents, requiring a "lawyer who receives a document *or electronically stored information* relating to the representation of the lawyer's client" to "promptly notify the sender" if the lawyer "knows or

reasonably should know that the document *or electronically stored information* was inadvertently sent."

The 2012 ABA Model Rule amendments were limited compared to the burgeoning risk associated with the explosion of technology. Nevertheless, the message remains the same: lawyers must attain a level of competence in using available technology in order to understand the risks and adequately fulfill the duties under applicable rules.

While lawyers may not be strangers to the phenomenon of new technologies, the debut of GAI platforms provoked an unprecedented wave of corporate client proclamations about use of GAI. The messaging ranged from "steer clear" instructions to admonitions to "eke out all possible efficiencies." It would be an understatement to say that the GAI platforms have ushered in chaotic times in the legal world as lawyers and clients struggle to incorporate the efficiencies while minimizing the risks.

C. ETHICAL COMPASS POINTS

Many of the rules of professional conduct are implicated in using GAI. *See* ABA Formal Opinion 512 (July 29, 2024) ("Generative Artificial Intelligence Tools") (discussing duties to provide competent legal representation, to protect client information, to communicate with clients, to supervise employees and agents, to advance only meritorious claims and contentions, to ensure candor toward the tribunal, and to charge reasonable fees). Many will be addressed below around three overarching themes:

- Be transparent,
- Take responsibility, and
- Protect client confidentiality.

1. Be Transparent (No Dishonesty; Duty to Communicate)

In response to the growing number of court filings with errors introduced by use of GAI tools, a number of judges issued standing orders requiring counsel to affirmatively disclose or file certifications regarding their use of GAI. *See, e.g.,*

- Judge Brantley Starr of the U.S. District Court for the Northern District of Texas posted on May 30, 2023, a standing order requiring counsel file a certificate "attesting either that no portion of any filing will be drafted by generative artificial intelligence —including quotations, citations, paraphrased assertions, and legal analysis—will be checked for accuracy, using print reporters or traditional legal databases, by a human being before it is submitted to the Court," and further stating, "I understand that any attorney who signs any filing in this case will be held responsible for the contents thereof according to applicable rules of attorney discipline, regardless of whether generative artificial intelligence drafted any portion of that filing." *See,* Eugene Volokh, *Federal Judge Requires All Lawyers to File Certificates Related to Use of Generative AI,"* reason.com (May 30, 2023), https://reason.com/volokh/2023/05/30/federal-judge-requires-all-

lawyers-to-file-certificates-related-to-use-of-generative-ai/, citing Judge Starr's Certificate at https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.txnd.uscourts.gov%2Fsites%2Fdefault%2Ffiles%2Fdocuments%2FCertReStarrJSR.doc&wdOrigin=BROWSELINK. Judge Starr's Standing Order is no longer published on the web page for the Northern District of Texas for Judge Starr's judge-specific requirements. *See* https://www.txnd.uscourts.gov/judge/judge-brantley-starr. While the certification requirement may not stand, undoubtedly attorneys should still understand the expectation that they will be held responsible for the integrity of the court filings they sign.

- Magistrate Judge Gabriel A. Fuentes of the U.S. District Court for the Northern District of Illinois issued a standing order on May 31, 2023, to address "the fast-growing and fast-changing area of generative artificial intelligence (AI) and its use in the practice of law" and requiring "[a]ny party using any generative AI tool to conduct legal research or to draft documents for filing with the Court must disclose in the filing that AI was used, with the disclosure including the specific AI tool and the manner in which it was used." *See* www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/Fuentes/Standing%20Order%20For%20Civil%20Cases%20Before%20Judge%20Fuentes%20rev%27d%205-31-23%20(002).pdf. This order was ultimately superseded by the "Standing Order for Civil Cases Before Magistrate Judge Fuentes" as revised effective January 1, 2025, in light of the adoption by the Northern District of Illinois of the Illinois Supreme Court Policy on Artificial Intelligence. *See* www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/Fuentes/Standing%20Order%20For%20Civil%20Cases%20Before%20Judge%20Fuentes%20revision%2012-20-24%20GAF.pdf. Judge Fuentes' January 1, 2025 Standing Order for Civil Cases acknowledged that the "Court has gravitated toward a more collaborative approach in which attorneys have been requested, and not required, to disclose their use of generative AI in their legal research and brief drafting." *Id.* at p. 13.

- On June 6, 2023, Judge Michael Baylson of the U.S. District Court for the Eastern District of Pennsylvania issued a Standing order re: Artificial Intelligence ("AI") in Cases Assigned to Judge Baylson, which stated: "If any attorney for a party, or a pro se party, has used Artificial Intelligence ("AI") in the preparation of any complaint, answer, motion, brief, or other paper, filed with the Court, and assigned to Judge Michael M. Baylson, MUST, in a clear and plain factual statement, disclose that AI has been used in any way in the preparation of the filing, and CERTIFY, that each and every citation to the law or the record in the paper, has been verified as accurate." *See* www.paed.uscourts.gov/sites/paed/files/documents/procedures/Standing%20Order%20Re%20Artificial%20Intelligence%206.6.pdf This standing order remains published on Judge Baylson's page of the Eastern District of Pennsylvania. *See* www.paed.uscourts.gov/judges-info/senior-judges/michael-m-baylson

Lawyers making court filings will need to continue to check on court or judge-specific orders to determine whether disclosures are required. But litigation is not the only context in which lawyers may need to be transparent about use of GAI. Lawyers must consider the implications

of ABA Model Rule 8.4(c)[2], defining professional misconduct as "conduct involving dishonesty, fraud, deceit or misrepresentation." Is it deceitful or dishonest to pass off work product as your own if it was prepared with the assistance of GAI? Undoubtedly, it depends. A client who hires a lawyer reasonably expects the lawyer to use his or her skill and judgment. If that is not what the client is getting, it may arguably be viewed as misleading or deceitful. On the other hand, clients typically want the lawyer to be efficient and may very well expect the lawyer to use appropriate tools to gain that efficiency. Almost as soon as GAI platforms became available, many corporate clients immediately began communicating expectations about use of GAI. In this context, it could be viewed as deceitful to use GAI contrary to such expectations without further discussing it with the impacted client. It would also cross the dishonesty line of ABA Model Rule 8.4(c) for a lawyer to lie about use of GAI in response to an inquiry calling for disclosure.

Vis-à-vis clients, lawyers must also consider ABA Model Rule 1.4(a)(2), which requires a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished." In addition, ABA Model Rule 1.4(b) requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Moreover, Rule 1.5 admonishes a lawyer not to collect an "unreasonable fee" considering a variety of factors, including the "time and labor required." Taking these rules together with ABA Model Rule 8.4(c) makes a strong case for disclosure to and discussion with clients regarding use of a GAI tool to avoid misleading a client and to allow the client to judge the reasonableness of the fee. Moreover, there is a typically a "risk-benefit" analysis that accompanies use of a GAI platform, and a lawyer needs to involve the client in a discussion of those risks and benefits.

Outside the context of a client representation, a lawyer may generate presentations or other work product for publication. Must the lawyer affirmatively disclose if the work product was created in whole or in part using GAI tools? As a point of "honesty" relative to ABA Model Rule 8.4(c), it again likely "depends" on the context. For example, the amount of the content that is wholly attributable to GAI and the manner in which the lawyer presents the work product could impact an assessment of whether the lawyer is being deceitful in failing to disclose use of a GAI tool.

Although lawyers are generally expected to use precedent and quotes from authoritative resources, they are expected to provide citations or attributions. Plagiarizing another's work has been found to violate Rule 8.4(c). *See* ABA Model Rule 8.4 annotation in Ellen J. Bennett, Helen W. Gunnarsson, and Nancy G. Kisicki. Annotated Model Rules of Professional Conduct, Tenth Edition (American Bar Association) (Kindle Edition), citing *Venesevich v. Leonard*, No. 1: 07-CV-2118, 2008 WL 5340162 n. 2, 2008 BL 280879 n. 2 (M.D. Pa. Dec. 19, 2008) ("[p]lagiarism constitutes misrepresentation and is therefore a violation of Rule 8.4(c)"; significant portion of lawyer's brief plagiarized from court opinions without attribution); *In re Burghoff*, 374 B.R. 681 (Bankr. N.D. Iowa 2007) (lawyer plagiarized material in two briefs; in

[2] While there is some variation in the states' respective adoption of their version of ABA Rule 8.4(c), that variation doesn't impact the fundamental definition of "misconduct" as including dishonest, deceitful, or fraudulent conduct or misrepresentation. The variation tends to address an "intent" element or an exceptions for some amount of pretexting associated with law enforcement undercover investigative activities.

one brief, plagiarized material consisted of string cites); *In re Ayeni*, 822 A. 2d 420 (D.C. 2003) (appointed counsel filed brief in criminal appeal that was virtually identical to brief filed earlier by co-defendant; he then submitted voucher for payment claiming he spent more than nineteen hours researching and writing it); *Iowa Supreme Court Att'y Disciplinary Bd. v. Cannon*, 789 N.W. 2d 756 (Iowa 2010) (lawyer's brief included seventeen pages of material copied from published article without attribution); *Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Lane*, 642 N.W. 2d 296 (Iowa 2002) (lawyer submitted brief plagiarized from legal treatise, then applied to court for $16,000 in fees for eighty hours spent working on it); *In re Steinberg*, 620 N.Y.S. 2d 345 (App. Div. 1994) (in application for appointment to criminal defense panel, lawyer submitted writing samples of other lawyers claiming they were his own) (additional citations omitted).

Output of a GAI platform, however, does not lend itself to a citation in the same way as citing case precent, articles, or other authority. Most GAI platforms state that the user of the platform is the content owner, meaning users will not face a copyright claim from the AI platform provider. *See* Sergei Tokmakov, Esq., *Navigating AI Platform Policies: Who Owns AI-Generated Content?*, Term.Law (April 23, 2025), https://terms.law/2025/04/09/navigating-ai-platform-policies-who-owns-ai-generated-content/ (It is a separate issue not addressed here whether the AI platform violated any copyright in training its GAI tool.) Having legitimate ownership of the work product, however, is not the same thing as representing yourself as the "author" of the work. As a point of honesty, the standard is likely both fact-specific and evolving. As a point of compliance, the GAI platform may – or may not – include "terms and conditions" dictating attribution to the GAI platform. Failure to comply with such terms could be a factor in considering whether the lawyer's conduct in claiming authorship amounts to a misrepresentation.

Fees are another topic on which a lawyer should be transparent and communicate with a client when a lawyer is using a GAI platform to generate client work product. Pursuant to ABA Model Rule 1.5, fees must be "reasonable," and a lawyer must communicate to a client the basis for the lawyer's fees and expenses.

ABA Formal Opinion 512 points to earlier ethics opinions as relevant to charging hourly fees in connection with incorporating GAI tools:

> ABA Formal Ethics Opinion 93-379 explained, "the lawyer who has agreed to bill on the basis of hours expended does not fulfill her ethical duty if she bills the client for more time than she has actually expended on the client's behalf." If a lawyer uses a GAI tool to draft a pleading and expends 15 minutes to input the relevant information into the GAI program, the lawyer may charge for the 15 minutes as well as for the time the lawyer expends to review the resulting draft for accuracy and completeness. As further explained in Opinion 93-379, "If a lawyer has agreed to charge the client on [an hourly] basis and it turns out that the lawyer is particularly efficient in accomplishing a given result, it nonetheless will not be permissible to charge the client for more hours than were actually expended on the matter," because "[t]he client should only be charged a reasonable fee for the legal services performed." The "goal should be solely to compensate the lawyer

> fully for time reasonably expended, an approach that if followed will not take advantage of the client.

ABA Formal Opinion 512 (citations omitted). A lawyer and client may, however, agree to a flat or contingent fee. Those fees still must be "reasonable" with reference to the factors articulated in ABA Model Rule 1.5. Provided that such fees are "reasonable," the lawyer then is not strictly tied to a time-based metric. Nevertheless, ABA Formal Opinion 512 quotes *Att'y Grievance Comm'n v. Monfried,* 794 A.2d 92, 103 (Md. 2002) for the proposition that even a flat fee charged for "little or no work" was still an "unreasonable fee."

ABA Formal Opinion 512 also discusses the potential for charging GAI work as an expense, relying on past opinions to point out that such expense-related charges must also be "reasonable." The general guidance distinguishes legitimate "out-of-pocket" expenses from "overhead," which a lawyer should not include as an expense. According to ABA Formal Opinion 512, to "the extent a particular tool or service functions similarly to equipping and maintaining a legal practice, a lawyer should consider its cost to be overhead and not charge the client for its cost absent a contrary disclosure to the client in advance. . . . In contrast, when a lawyer uses a third-party provider's GAI service to review thousands of voluminous contracts for a particular client and the provider charges the lawyer for using the tool on a per-use basis, it would ordinarily be reasonable for the lawyer to bill the client as an expense for the actual out-of-pocket expense incurred for using that tool." *Id*. at 13

2. Take Responsibility (Competence and Supervision)

Taking responsibility starts with attaining and employing the requisite competence as required in ABA Model Rule 1.1: "A lawyer shall provide competent representation to a client." Not only does competent representation require "legal knowledge, skill, thoroughness and preparation," it requires lawyers to "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." ABA Model Rule 1.1 and comment [8] to ABA Model Rule 1.1. *See also,* ABA Formal Ethics Op. 477R (2017) (addressing a lawyer's duty of confidentiality when using email); ABA Formal Ethics Op. 498 (2021) (technological competence required when practicing virtually); ABA Formal Ethics Op. 483 (2018) (duty to monitor for and respond to data breach); ABA Formal Ethics Op. 11-459 (2011) (protecting confidentiality of client's electronic communications).

The Ethics 20/20 Commission explained its proposed amendments in 2012 in ABA Model Rule 1.1, comment [8], noting that lawyers need to "keep abreast of changes in the law and its practice," concluding that "in order to keep abreast of changes in law practice in a digital age, lawyers necessarily need to understand basic features of relevant technology," and observing that "a lawyer would have difficulty providing competent legal services in today's environment without knowing how to use email or create an electronic document." ABA Commission on Ethics 20/20 Report to the House of Delegates (2012), at p. 3, https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introdution_and_overview_report.authcheckdam.pdf and www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.pdf. A lawyer can competently practice *without* using GAI, but a lawyer

may soon face concerns about being able to *efficiently* practice without using GAI. And that will require competence.

The Ethics 20/20 Commission acknowledged that "[i]n some situations, a matter may require the use of technology that is beyond the ordinary lawyer's expertise." *Id.* at p. 5. The wave of litigation sanctions associated with GAI-produced content suggests that the technology continues to be beyond the expertise of many. In ABA Formal Opinion 512 (citations omitted, and emphasis added), the ABA Standing Committee on Ethics and Professional Responsibility, observed that to "competently use a GAI tool in a client representation, lawyers need not become GAI experts. Rather, lawyers must have a reasonable understanding of the capabilities and limitations of the specific GAI technology that the lawyer might use. This means that lawyers should either acquire a reasonable understanding of the benefits and risks of the GAI tools that they employ in their practices or ***draw on the expertise of others who can provide guidance about the relevant GAI tool's capabilities and limitations***. This is not a static undertaking. Given the fast-paced evolution of GAI tools, technological competence presupposes that lawyers remain vigilant about the tools' benefits and risks. Although there is no single right way to keep up with GAI developments, lawyers should consider reading about GAI tools targeted at the legal profession, attending relevant continuing legal education programs, and, as noted above, consulting others who are proficient in GAI technology." While lawyers retain the ultimate responsibility for competence, ABA Formal Opinion 512 recognizes that a lawyer can – and should – draw on the expertise of technology advisors with appropriate expertise.

The Illinois Supreme Court likewise elaborated on the capabilities and limitations of GAI in its Policy on Artificial Intelligence, ultimately underscoring accountability for its use and the need for competency. The policy, with which counsel are advised to comply, provides as follows:

> Embracing the advancements of artificial intelligence (AI), the Illinois Supreme Court remains steadfast in its commitment to upholding the highest ethical standards in the administration of justice. We acknowledge the rapid development of generative AI technologies capable of producing human-like text, images, video, audio, and other content. The integration of AI with the courts is increasingly pervasive, offering potential efficiencies and improved access to justice. However, it also raises critical concerns about authenticity, accuracy, bias, and the integrity of court filings, proceedings, evidence, and decisions. Understanding the capabilities and limitations of AI technology is essential for the Illinois Judicial Branch. The Illinois Courts will be vigilant against AI technologies that jeopardize due process, equal protection, or access to justice. Unsubstantiated or deliberately misleading AI-generated content that perpetuates bias, prejudices litigants, or obscures truth-finding and decision-making will not be tolerated. The use of AI by litigants, attorneys, judges, judicial clerks, research attorneys, and court staff providing similar support may be expected, should not be discouraged, and is authorized provided it complies with legal and ethical standards. Disclosure of AI use should not be required in a pleading. The Rules of Professional Conduct and the Code of Judicial Conduct apply fully to the use of AI technologies. Attorneys, judges, and self-represented litigants are accountable

> for their final work product. All users must thoroughly review AI-generated content before submitting it in any court proceeding to ensure accuracy and compliance with legal and ethical obligations. Prior to employing any technology, including generative AI applications, users must understand both general AI capabilities and the specific tools being utilized. The Court acknowledges the necessity of safe AI use, adhering to laws and regulations concerning privacy and confidentiality. AI applications must not compromise sensitive information, such as confidential communications, personal identifying information (PII), protected health information (PHI), justice and public safety data, security-related information, or information conflicting with judicial conduct standards or eroding public trust. This policy reflects the Illinois Supreme Court's commitment to upholding foundational principles while exploring the potential benefits of new AI technologies in a dynamic landscape. The Court will regularly reassess policies as these technologies evolve, prioritizing public trust and confidence in the judiciary and the administration of justice. Judges remain ultimately responsible for their decisions, irrespective of technological advancements. The Court encourages the development of technologies that enhance service to all court users and promote equitable access to justice. To facilitate this, the judicial branch will support ongoing education on emerging technologies, including AI.

Illinois Supreme Court Policy on Artificial Intelligence, effective on January 1, 2025 (http://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/e43964ab-8874-4b7a-be4e-63af019cb6f7/Illinois%20Supreme%20Court%20AI%20Policy.pdf).

In addition to knowing the capabilities and limitations of the GAI platform, a lawyer should have the requisite knowledge of the law to recognize and spot problems with the output of a GAI tool and understand and utilize appropriate tools or processes to independently verify the output. For GAI, this means recognizing that the output could include citations to cases that do not exist notwithstanding the legitimate-looking format. It also means recognizing that output could cite existing cases but either mis-state a proposition from the case or generate a false quotation and attribute it to the real case.

GAI is often described as a "research" tool, and depending on the tool and the materials on which it draws for output, that may be a mostly fair description. However, even if the tool was "trained" on a universe of source material that is appropriately legal research materials, it may not contain the most up-to-date information, and it is still providing results based on an algorithm that mimics the language on which it was trained. It is not applying legal principles. False cases and made up quotations that appear in GAI-produced work product are frequently described as "hallucinations." This seems to reflect an expectation that tools was meant to conduct legal research through legal analysis as opposed to application of an algorithm. In this way, even using the term "hallucination" seems to reinforce what may be a misperception about how the tool operates and what to expect as output.

In order to understand the basis for work product generated by a AI tool, the lawyer should understand the pool of materials on which the GAI was trained and what "feeds" the output. Does it have an adequate and appropriate base of information? Is it limited to cases, statutes,

pleadings, or agreements, or does it include articles, treatises, or other types of content? Is it kept updated with new information, and if so, how? The more targeted the pool of information training the GAI, the better the chances that the algorithm will generate content that can be confirmed as accurate, up-to-date, and appropriate. Even so, the work product can contain citation and quotation errors. Taking responsibility for GAI-produced work product means finding and reading the cases and utilizing cite-checking tools and processes to confirm the legitimacy and accuracy of the authority and its use. It means editing the content consistent with appropriate legal principles and uses of the cited authority. It means ensuring that the content is edited to reflect legitimate legal principles and authority consistent with a competent and up-to-date knowledge of the law. Failing to properly take responsibility for GAI-generated work product could implicate ABA Model Rules 3.1 (a "lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous"), 3.3 (a lawyer shall not knowingly "make a false statement of fact or law to a tribunal" or fail to correct the same, fail to disclose directly adverse and controlling legal authority, or offer evidence known to be false), or 8.4 (a lawyer shall not engage in "conduct involving dishonesty, fraud, deceit or misrepresentation").

Taking responsibility also means engaging in appropriate supervision of those other lawyers and non-lawyers with whom a lawyer works and relies. Pursuant to ABA Model Rules 5.1 and 5.2, lawyers with supervisory authority over other lawyers and non-lawyers must "make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." ABA Formal Opinion 512, p. 10 (citations omitted) explains this supervisory duty with respect to GAI:

> Managerial lawyers must establish clear policies regarding the law firm's permissible use of GAI, and supervisory lawyers must make reasonable efforts to ensure that the firm's lawyers and nonlawyers comply with their professional obligations when using GAI tools. Supervisory obligations also include ensuring that subordinate lawyers and nonlawyers are trained, including in the ethical and practical use of the GAI tools relevant to their work as well as on risks associated with relevant GAI use. Training could include the basics of GAI technology, the capabilities and limitations of the tools, ethical issues in use of GAI and best practices for secure data handling, privacy, and confidentiality.

ABA Formal Opinion 512, p. 10 (citations omitted), also references earlier opinions on outsourcing in noting the additional responsibilities for supervising outside consultants, including the "importance of: reference checks and vendor credentials; understanding vendor's security policies and protocols; familiarity with vendor's hiring practices; using confidentiality agreements; understanding the vendor's conflicts check system to screen for adversity among firm clients; and the availability and accessibility of a legal forum for legal relief for violations of the vendor agreement. These concepts also apply to GAI providers and tools." In short, lawyers should not forget to affirmatively discuss and investigate whether any consultants, experts, or other vendors retained on behalf of a client are using GAI, and if so, to ensure proper verification of output and protection for confidentiality.

3. Protect Client Confidentiality

ABA Model Rule 1.6 charges lawyers with the duty to protect client confidential information and to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client. In using GAI platforms, lawyers must consider the pool of information on which the GAI platform is "trained," any specific information uploaded into the GAI platform in connection with a specific request, and the potential for the disclosure of confidential information in the output of the GAI platform.

In terms of inputs to the GAI platform, the first question is whether the information contains client confidential information. The scope of "confidential information" is broadly defined in ABA Model Rule 1.6 as "information relating to the representation of a client." This is not just what the client tells the lawyer. ABA Model Rule 1.6, comment [3], emphasizes that the "confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Client identity is also subject to a lawyer's duty of confidentiality, qualifying as "confidential information" for which disclosure requires an exception. *See* ABA Model Rule 1.6 annotation in Ellen J. Bennett, Helen W. Gunnarsson, and Nancy G. Kisicki. Annotated Model Rules of Professional Conduct, Tenth Edition (American Bar Association) (Kindle Edition), citing Conn. Ethics Op. 17-01 (2017) (lawyer for real estate seller is impliedly authorized to complete state tax form requiring disclosure of seller's Social Security Number); Ill. Ethics Op. 12-03 (2012) (may not provide business networking group members with client names without clients' consent); N.Y. State Ethics Op. 1088 (2016) (lawyer may not disclose client name in advertising if client has requested representation remain confidential or disclosure would be detrimental or embarrassing to client, but may do so under New York rule's exception if fact of representation is generally known); Phila. Ethics Op. 2014-6 (2014) (law firm representing union members through union legal services plan contract may not disclose names of members with pending cases to union after contract terminated); Utah Ethics Op. 21-01 (2021) (disclosure of client's identity prohibited absent informed consent, except under certain circumstances); Wash. Ethics Op. 201802 (2018) (informed consent required before disclosing client's name to outside entity such as insurer, risk or human resources manager, or third-party litigation administrator); Wis. Ethics Op. EF-17-02 (2017) (informed consent required before including client names in advertising materials); see also Model Rule 7.2 [cmt. 1] (lawyers' marketing materials may include "names of clients regularly represented" but only with clients' consent).

The duty of confidentiality also "applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person." ABA Model Rule 1.6, cmt. [4]. As ABA Model Rule 1.6(c) makes clear, a lawyer does not fulfill the duty merely by abstaining from revealing confidential information. A lawyer must "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." ABA Model Rule 1.6(c) was added in 2012, but it articulates what the ABA expressed in Formal Opinion 99-413 (1999) about a lawyer's duty to take reasonable steps to protect information against unauthorized use or disclosure. Considering whether use of e-mail was consistent with a duty of confidentiality, ABA Formal Opinion 99-413 analogizes the "reasonable expectation of privacy" test for whether a communication is "in confidence" for purposes of the attorney-client privilege

to a lawyer's duty to protect client information under ABA Model Rule 1.6. In Formal Opinion 99-413, the ABA observed that it "uniformly is agreed" that lawyers have a reasonable expectation of privacy in communications made by U.S. and commercially carried mail notwithstanding risk of theft or other loss, including even the carrier's reservation of rights to inspect the letter or package contents. The same was true with respect to landline and cordless or cellular telephones, notwithstanding the risk of interception or disclosure, as well as for facsimiles, notwithstanding "significant risks of interception and disclosure," misdirection, and dependence on intermediaries before reaching the intended recipient. Likewise, ABA Formal Opinion 99-413 ultimately concluded that lawyers "have a reasonable expectation of privacy in communications made by all forms of e-mail, including unencrypted e-mail sent on the Internet, despite some risk of interception and disclosure. It therefore follows that its use is consistent with the duty under Rule 1.6 to use reasonable means to maintain the confidentiality of information relating to a client's representation."

ABA Formal Opinion 99-413 identifies the test of "reasonable expectation of privacy" as to the means or method of communication in satisfying a lawyer's duty of confidentiality. Comment [4] to ABA Model Rule 1.6 identifies the test as to the content of information shared, specifically noting that a "lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there ***is no reasonable likelihood that the listener will be able to ascertain the identity of the client*** or the situation involved" (emphasis added). Taken together, whether information shared into a GAI platform meets a lawyer's duty of confidentiality should consider whether the lawyer:

- Has a "reasonable expectation of privacy" as to the uploaded or shared content into the GAI platform; and

- Has shared content for which there is no reasonable likelihood that someone who sees the input to our output from the GAI platform would be able to ascertain the identity to the client.

If information shared into the platform cannot be located or reviewed in its original format – or at least not by those outside the attorney-client relationship – there should be a "reasonable expectation of privacy." If information shared into the platform or output of the platform would not involve a reasonable likelihood of identifying the client, this also should not be the kind of "disclosure" of client confidential information at which ABA Model Rule 1.6 is aimed, consistent with comment [4]. In sum, with the right protections for input and output, lawyers should be able to use GAI platforms consistent with their duties of confidentiality.

Formal Opinion 99-413 established the "reasonable expectation of privacy" test for meeting the duty of confidentiality under ABA Model Rule 1.6. Later, in ABA Formal Opinion 477R, the ABA acknowledged that those providing legal services were regularly using a variety of devices to create, transmit and store confidential communications, "including desktop, laptop and notebook computers, tablet devices, smartphones, and cloud resource and storage locations." The risks of inadvertent or unauthorized disclosure of information relating to the representation only increased. While conceding that lawyers are not "guarantors" of data security, in an "environment" of increasing technology and cyberthreats, what amounts to "reasonable efforts" to protect client confidential information, and what would meet the "reasonable expectation of

privacy" becomes very fact-specific. ABA Formal Opinion 477R points to comment [18] to ABA Model Rule 1.6, which articulates the factors to consider when assessing what efforts are "reasonable:"

- the sensitivity of the information,
- the likelihood of disclosure if additional safeguards are not employed,
- the cost of employing additional safeguards,
- the difficulty of implementing the safeguards, and
- the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

ABA Formal Opinion 477R at 4-5.

In Formal Opinion 512, the ABA addressed the duty of confidentiality specifically as to use of GAI, pointing out both the duty to keep information confidential – for prospective, current, and past clients – and to make "reasonable efforts" to prevent the inadvertent or unauthorized disclosure of the same. As with ABA Formal Opinion 477R, ABA Formal Opinion 512 reiterates the fact-based nature of the associated risk, citing the factors articulated in comment [18] to ABA Model Rule 1.6 above and observing that "the nature and extent of the risk that information relating to a representation may be revealed depends on the facts." ABA Formal Opinion 512 at 6.

Lawyers utilizing GAI platforms must ascertain whether the platform is an "open" or a "closed" system. In a closed system, the training data is controlled by and kept confidential to the user or the user organization. This is contrasted with "open" AI models where the architecture and training data are shared publicly. In addition, lawyers should understand who has access to data uploaded into a GAI platform. This may vary, but generally a service provider will have the right to store and process the data. A lawyer looking to establish a "reasonable expectation of privacy" should ensure that the provider is under terms restricting its right to use or share uploaded content. As ABA Formal Opinion 512 makes clear, however, lawyers must not only be concerned with access by "outsiders" to the firm but also must be aware of the possibility of access by others inside the firm who may not be aware of the source or sensitivity of the information:

> Self-learning GAI tools into which lawyers input information relating to the representation, by their very nature, raise the risk that information relating to one client's representation may be disclosed improperly, even if the tool is used exclusively by lawyers at the same firm. This can occur when information relating to one client's representation is input into the tool, then later revealed in response to prompts by lawyers working on other matters, who then share that output with other clients, file it with the court, or otherwise disclose it. In other words, the self-learning GAI tool may disclose information relating to the representation to

> persons outside the firm who are using the same GAI tool. Similarly, it may disclose information relating to the representation to persons in the firm (1) who either are prohibited from access to said information because of an ethical wall or (2) who could inadvertently use the information from one client to help another client, not understanding that the lawyer is revealing client confidences.

ABA Formal Opinion 512 at 6-7 (citations omitted). ABA Formal Opinion 512 concludes that "because many of today's self-learning GAI tools are designed so that their output could lead directly or indirectly to the disclosure of information relating to the representation of a client, a client's informed consent is required prior to inputting information relating to the representation into such a GAI tool." As a result, a lawyer cannot without client permission share confidential information into an open or closed system without client consent. *Id.* at 7

There are uses of GAI that do not involve disclosure of client confidential information. ABA Formal Opinion 512 notes: "Today, there are uses of self-learning GAI tools in connection with a legal representation when client informed consent is not required because the lawyer will not be inputting information relating to the representation. As an example, if a lawyer is using the tool for idea generation in a manner that does not require inputting information relating to the representation, client informed consent would not be necessary." *Id.* There may even be room for a lawyer to alter input to prevent the possibility that the information could be linked to a client, taking the information outside the realm of "confidential information." Consider the guidance about formulating "hypotheticals" in a manner that does not reveal a client confidence. *See* ABA Model Rule 1.6, comment [4] ("A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved."). However, that could involve more than just stripping out a client name prior to uploading content. Lawyers will have to consider the nature of the information uploaded and whether its potential use in output of a GAI tool would amount to a disclosure of client confidential information.

Although a lawyer's duty of confidentiality is much broader than the concept of evidentiary privilege, a lawyer must also consider whether or when use of a GAI platform could generate discoverable documents and whether or when such documents are protected by the attorney-client or work product privilege. At least conceptually, a lawyer's use of GAI platforms as a tool in rendering legal advice could result in inputs/outputs that do qualify for attorney-client privilege (assuming it is a lawyer or someone operating at the direction of lawyer for purposes of facilitating legal advice) ***if*** the requisite confidentiality is achieved. There is much more room to claim "attorney work product" protection if the context for the use is "anticipation of litigation." Again, there would need to be some connection back to working at a lawyer's direction. A non-lawyer using the tools apart from, or instead of, consulting with an attorney would be hard pressed to identify a legal privilege that would apply.

II. ETHICS IN A NON-ENFORCEMENT CLIMATE

Lawyers regularly deal with ambiguity in the law or the variations in policy that accompany changes in political leadership. On the heels of a political election, lawyers begin projecting shifts in policy positions or approaches to enforcement of laws. Similarly, lawyers are also accustomed to the concept of prosecutorial discretion, which allows prosecutors to choose

whether to prosecute a case, and if so, the nature of the charges, the nature of potential resolutions, and recommended sentencing. Essentially, the concept of prosecutorial discretion allows prosecutors to prioritize cases based on various factors, such as the severity of the offense, the evidence available, and the interests of justice. It is far less common, however, for lawyers to be required to navigate declared non-enforcement policies without repeal of the applicable regulations or statutes.

Clients hire lawyers not just to help explain the law but also to navigate compliance and enforcement issues. This presents unique challenges when government agencies or officials declare "non-enforcement" positions without repealing or changing the law, particularly in light of ABA Model Rule 1.2's admonition not to "counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal." Even if the laws have civil rather than criminal penalties, lawyers must carefully navigate "non-enforcement" scenarios.

A. NON-ENFORCEMENT EXAMPLES

1. Foreign Corrupt Practices Act

Adopted in 1977, the Foreign Corrupt Practices Act's ("FCPA"), 15 U.S.C. 78dd-1 *et seq.*, purpose is to prohibit U.S. citizens and entities from bribing foreign government officials to benefit their business interests. There are civil and criminal penalties for violations of the FCPA. Only the Department of Justice (DOJ) has the authority to pursue criminal actions, while both DOJ and the Securities and Exchange Commission (SEC) have civil enforcement authority in different circumstances. The DOJ outlined the principles for how and when it will commence, decline, or otherwise resolve an FCPA matter in its *Principles of Federal Prosecution* at Chapter 9-27.000 of the U.S. Attorney's Manual (USAM) and its *Principles of Federal Prosecution of Business Organizations* at Chapter 9-28.000 of the USAM. *See* USAM, http://www.justice.gov/usao/eousa/foia_reading_room/usam/. (last visited October 23, 2025). The SEC's *Enforcement Manual*, http://www.sec.gov/divisions/enforce/enforcementmanual.pdf, sets out the SEC's principles for conducting investigations and the guiding principles for SEC staff in determining whether to open or close an investigation and whether civil charges are merited.

On February 10, 2025, Pres. Trump signed an executive order pausing enforcement of the FCPA by the DOJ, citing to concerns of global economic competitiveness and national security. The pause was only for 180 days and new enforcement guidance was published on June 9, 2025. That didn't mean that bribery became legal – it just meant that people would not be prosecuted criminally.

2. Foreign Agents Registration Act

The Foreign Agents Registration Act (FARA), 22 USC § 611 *et seq*., requires "foreign agents" (individuals and entities engaged in domestic lobbying or advocacy for foreign governments or entities) to register with the DOJ and disclose information on their relationship, activities, and compensation. There are four types of activities that trigger a reporting requirement for an "agent of a foreign principal" ***absent an exemption***. Each involves specifically defined terms and acts "within the United States" at the "order, request, or under the

direction or control of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal[.]" 22 U.S.C. § 611(c). Those four types are:

- Political activities;
- Acts as public relations counsel, publicity agent, information-service employee or political consultant;
- Solicits, disburses, or dispenses contributions, loans, money, or other things of value for or in the interest of the foreign principals; or
- Represents the interests of the foreign principal before any agency or official of the Government of the United States.

Id.

Section 613 of FARA sets eight exemptions to registration:

(a) Diplomatic or consular officers;

(b) Officials of foreign government;

(c) Staff members of diplomatic or consular officers;

(d) Private and nonpolitical activities and solicitation of funds;

(e) Religious, scholastic, or scientific pursuits;

(f) Defense of foreign government vital to the United States defense;

(g) Persons qualified to practice law; and

(h) Agents of foreign principals (registration under the Lobbying Disclosure Act).

22 U.S.C. § 613.

FARA violations can lead to civil or criminal penalties.

On February 5, 2025, the DOJ announced it was limiting enforcement under FARA to activities that resembled "traditional espionage." However, FARA's more robust reporting requirements still remained "on the books." As with the FCPA, that did not make it legal to fail to register as a foreign agent, it just meant that it just meant that people would not be prosecuted criminally (or perhaps even civilly) for failure to register.

In what might be an about face, on September 25, 2025, President Trump issued National Security Presidential Memorandum 7 (NSPM-7), a memorandum entitled "Countering Domestic Terrorism and Organized Political Violence." The memorandum broadly addresses domestic

political violence and explicitly orders investigations into potential violations of FARA. "[W]hile the DOJ historically favored civil enforcement in less serious cases, NSPM-7 signals a willingness to consider criminal prosecution where activities intersect with foreign influence or funding tied to political violence. Even if the threshold for prosecution remains high, the Justice Department may initiate investigations that could lead to subpoenas, production of records, and increased scrutiny." Kellen Dwyer, Joseph T. Burns, *FARA Enforcement Gets a Major Shake-Up Under New Presidential Directive*, National Law Review (September 29, 2025), https://natlawreview.com/article/fara-enforcement-gets-major-shake-under-new-presidential-directive.

3. Federal Drug Laws - Marijuana

Since 1970, the Controlled Substances Act (CSA), 21 U.S.C. §801 *et seq.*, has made it illegal to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense" a Schedule I controlled substance. Marijuana is still listed as a Schedule I controlled substance under the CSA. Prohibited acts A, 21 U.S.C. § 841. In addition, federal law criminalizes aiding and abetting the same conduct, and there are a host of companion federal crimes to federal drug crimes that can be prosecuted without a conviction for the underlying CSA violation, including conspiracy and money laundering.

Enforcement of the CSA with respect to marijuana was deprioritized under the Obama administration. The Memorandum for All United States Attorneys: Guidance Regarding Federal Marijuana Enforcement, Office of the Deputy Attorney General (August 29, 2013) (the "Cole Memorandum"), www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf, stated that the DOJ would not enforce federal marijuana prohibition in states that "enacted laws legalizing marijuana in some form and ... implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana," except where a lack of federal enforcement would undermine federal priorities (such as preventing violence in marijuana cultivation and distribution, preventing cannabis impaired driving, and preventing marijuana revenues from going to gangs and cartels). *Id.* at 3

The first Trump administration rescinded the Cole Memorandum in 2018, noting the "return to the rule of law." *See* Press Release, Department of Justice, Justice Department Issues Memo on Marijuana Enforcement (January 4, 2018), www.justice.gov/archives/opa/pr/justice-department-issues-memo-marijuana-enforcement. In the 2018 memo, Attorney General Jeff Sessions "directs all U.S. Attorneys to enforce the laws enacted by Congress and to follow well-established principles when pursuing prosecutions related to marijuana activities. This return to the rule of law is also a return of trust and local control to federal prosecutors who know where and how to deploy Justice Department resources most effectively to reduce violent crime, stem the tide of the drug crisis, and dismantle criminal gangs." *Id.*

Notwithstanding the withdrawal of the Cole Memorandum and the language of the 2018 memo, federal enforcement of the CSA related to marijuana remains rare. In fact, the Agricultural Improvement Act of 2018, also known as the Farm Bill, legalized hemp, which comes from the same species of plant as marijuana, at the federal level. In addition, in April 2024, the Drug Enforcement Administration (DEA) announced that it would look at reclassifying

marijuana as a less dangerous drug after the Department of Health and Human Services recommended a move from Schedule I to Schedule III. That review is ongoing.

Many states have legalized or decriminalized possession of marijuana. According to the ABA, "forty-one states plus the District of Columbia, Guam, Puerto Rico and the U.S. Virgin Islands have laws legalizing marijuana for medical use, and twenty-four of those states, plus D.C. and Guam have legalized marijuana for recreational use, as well. According to one source, 54% of the US population lives in states with legal recreational adult use marijuana and 74% of the US population lives in states where marijuana is legal for either medical or recreational use." *See* Stanley Samuel Jutkowitz, Cannabis Law: An Update on Recent Developments Related to the Cannabis Industry, 2025, American Bar Association (August 11, 2025), www.americanbar.org/groups/business_law/resources/business-law-today/2025-august/recent-developments-cannabis-law/.

The bottom line remains that possession and sale of marijuana remains illegal under the federal laws, but people are generally not being prosecuted criminally at the federal level for marijuana possession or sale.

B. ETHICAL COMPASS POINTS

ABA Model Rule 1.2(d) and state variations on the same rule set the ultimate parameter for lawyers' representations of clients within the bounds of the law:

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

Although ABA Model Rule 1.2(d) indicates that a lawyer "may discuss" the legal consequences of a proposed course of conduct, ABA Model Rule 1.4 sets the bar for communications higher. Specifically, under ABA Model Rule 1.4(a)(5) and (b), a lawyer "shall:"

- "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law" (ABA Model Rule 1.4(a)(5)), and

- "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation" (ABA Model Rule 1.4(b)).

It is noteworthy that the admonition of ABA Model Rule 1.4(a)(5) was formerly contained in ABA Model Rule 1.2(e), placing it alongside the prohibition in ABA Model Rule 1.2(d) against assisting a client with criminal or fraudulent conduct. Whether tied to ABA Model Rule 1.2 or 1.4, the net effect is that lawyers conferring with clients about conduct that may be criminal or fraudulent must both explain the limitation on the lawyers' conduct and, ultimately, abstain from such conduct. *See e.g.,* Cal. Ethics Op. 2020-202 (n.d.) (lawyer advising marijuana business who knows client expects forbidden assistance must advise client of limitations on lawyer's conduct);

Conn. Informal Op. 2013-02 (2013) (when providing advice on marijuana business activities permissible under state law, lawyer should advise client of restrictions on lawyer's ability to assist client in conduct that violates federal law).

Beyond advising a client about the lawyer's limitations (ABA Model Rule 1.4(a)(5)) or abstaining from assisting a client "in conduct that the lawyer knows is criminal or fraudulent" (ABA Model Rule 1.2), a lawyer may be required to withdraw from the representation pursuant to ABA Model Rule 1.16 or even make disclosures to avoid assisting a criminal or fraudulent act under ABA Model Rule 4.1(b). *See* ABA Model Rule 1.2, comment [10]. The withdrawal provisions are set out in ABA Model Rule 1.16, which was recently amended by the ABA in 2023. The current version of ABA Model Rule 1.16 directly ties together the admonitions of ABA Model Rules 1.2 and 1.4 as follows (amended language is underlined):

> (a) A lawyer shall inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation. Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
>
> (1) the representation will result in violation of the Rules of Professional Conduct or other law;
>
> . . .
>
> (4) the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud, despite the lawyer's discussion pursuant to **Rules 1.2(d) and 1.4(a)(5)** regarding the limitations on the lawyer assisting with the proposed conduct.

The 2023 amended version of ABA Model Rule 1.16 makes clear that a lawyer must make efforts to ensure that the lawyer's services will not be used to commit or further a crime or fraud both ***before*** the representation is undertaken and when it is ***ongoing***.

With respect to the need for a potential disclosure, ABA Model Rule 4.1(b) states:

> In the course of representing a client a lawyer shall not knowingly: . . . (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is ***prohibited*** by Rule 1.6.

ABA Model Rule 4.1(b) (emphasis added). ABA Model Rule 1.6(b) would not prohibit, and in fact, allows a lawyer to reveal confidential information to the extent that the lawyer reasonably believes necessary:

> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of

another and in furtherance of which the client has used or is using the lawyer's services; [and]

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

There is a fair amount of variability in states' respective versions of ABA Model Rule 1.6 exceptions to the general rule of non-disclosure. Accordingly, any lawyer who believes that a disclosure triggered under the applicable jurisdiction's version of ABA Model Rule 4.1(b) should be sure to consult that jurisdiction's version of both ABA Model Rule 4.1(b) and Rule 1.6(b).

The challenge of non-enforcement scenarios is not unique to the federal vs. state differences in criminalizing marijuana sale, possession, or use. However, this evolving marijuana federal-state divergence and the non-enforcement position (whether announced or de facto) of the federal government with respect to marijuana caused states to issue guidance in the form of rule changes, comment changes, or legal ethics opinions to help lawyers navigate the Rule 1.2(d) admonition against assisting a client commit a crime. There appears to be 18 states that have specifically addressed the issue in either rule text or a rule comment, though they are of two typical varieties: (i) half of those are limited to the federal/state divergence in marijuana laws specifically and (ii) the other half of those are limited to a circumstance involving an express state law that permits conduct contrary to federal law.

STATE	Variation on ABA Model Rule 1.2(d):	
Alaska	1.2(f) A lawyer may counsel a client regarding Alaska's ***marijuana laws and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws***. If Alaska law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and policy.	Limited to marijuana scenario; does not provide other non-enforcement relief.
California	Comment [6] to Rule 1.2.1: Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law. In the event of such a conflict, the ***lawyer may assist a client in drafting or administering, or interpreting or complying with, California laws, including statutes, regulations, orders, and other state or local provisions, even if the client's actions might violate the conflicting federal or tribal law***. If California law conflicts with federal or tribal law, the lawyer must inform the client about related federal or tribal law and policy and under certain circumstances may also be required to provide legal advice to the client regarding the conflict (see rules 1.1 and 1.4).	Note that this is comment text and not specifically rule text. Limited to state/federal law express divergence (but not only as to marijuana); does not provide other non-enforcement relief.

Colorado	Comment [14] to Rule 1.2: A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, and the Colorado Natural Medicine Act of 2022, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and statutes, and the statutes, regulations, orders, and other state or local provisions implementing them, as they may be amended from time to time. ln these circumstances, the lawyer shall also advise the client regarding related federal law and policy.	Note that this is comment text and not specifically rule text. Limited to marijuana scenario; does not provide other non-enforcement relief.
Connecticut	1.2(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may (1) discuss the legal consequences of any proposed course of conduct with a client; (2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law; or (3) counsel or assist a client regarding conduct ***expressly permitted by Connecticut law***, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct.	Limited to state/federal law express divergence (but not only as to marijuana); does not provide other non-enforcement relief.
Hawaii	1.2(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law, and may counsel or assist a client regarding ***conduct expressly permitted by Hawai'i law***, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct	Limited to state/federal law express divergence (but not only as to marijuana); does not provide other non-enforcement relief.
Illinois	1.2(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may (1) discuss the legal As of March 25, 2024 7 consequences of any proposed course of conduct with a client, (2) counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning or application of the law, and (3) counsel ***or assist a client in conduct expressly permitted by Illinois law that may violate or conflict with federal or other law***, as long as the lawyer advises	Limited to state/federal (and "other") law express divergence (but not only as to marijuana); does not provide other non-enforcement relief.

	the client about that federal or other law and its potential consequences.	
Maryland	Comment [12] to Rule 1.2: Maryland enacted a medical marijuana law in 2013. See Md. Code, Article-HealthGen., § 13-3301 *et seq.* As a matter of State law, some medical marijuana activities are permissible, and are subject to regulation. Notwithstanding Maryland law, the Federal Controlled Substances Act, Subchapter I—Control and Enforecement,21 U.S.C. §§ 801-904, continues to criminalize the production, use, and distribution of marijuana, even in the context of medical use. As of 2014, the federal government has taken the position, however, that it generally does not wish to interfere with retail sales of medical marijuana permitted under State law. ***In this narrow context, an attorney may counsel a client about compliance with the State's medical marijuana law without violating Rule 19-301.2 (d) and provide legal services in connection with business activities permitted by the State statute***, provided that the attorney also advises the client about the legal consequences, under other applicable law, of the client's proposed course of conduct.	Note that this is comment text and not specifically rule text. Limited to marijuana scenario; does not provide other non-enforcement relief.
Nevada	Comment [1] to Rule 1.2: A lawyer may counsel a client regarding the validity, scope, and meaning of Nevada Constitution Article 4, Section 38, and NRS Chapter 453A, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and statutes, including regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy.	Note that this is comment text and not specifically rule text. Limited to marijuana scenario; does not provide other non-enforcement relief.
New Hampshire	1.2(e) A lawyer may counsel or assist a client regarding conduct ***expressly permitted by state or local law that conflicts with federal law***, provided that the lawyer counsels the client about the potential legal consequence of the client's proposed course of conduct under applicable federal law.	Limited to state (or local)/federal law express divergence (but not only as to marijuana); does not provide other non-enforcement relief.
New Jersey	1.2(d) . . . A lawyer may counsel a client ***regarding New Jersey's marijuana laws or the marijuana laws of other states, provided the lawyer meets the requirements of those states, and may assist the client to engage in***	Limited to marijuana scenario; does not provide

	conduct that the lawyer reasonably believes is authorized by those laws. The lawyer shall also advise the client regarding related federal law and policy.	other non-enforcement relief.
North Dakota	1.2(e) A lawyer may counsel or assist a client regarding ***conduct expressly permitted by North Dakota law***. To the extent required by Rule 1.1, a lawyer shall counsel such a client about the legal consequences, under other applicable law, of the client's proposed course of conduct.	Limited to state/federal law express divergence (but not only as to marijuana); does not provide other non-enforcement relief.
Ohio	1.2(d)(2) A lawyer may counsel or assist a client regarding conduct ***expressly permitted under Sub. H.B. 523 of the 131st General Assembly authorizing the use of marijuana for medical purposes and any state statutes, rules, orders, or other provisions implementing the act***. In these circumstances, the lawyer shall advise the client regarding related federal law.	Limited to marijuana scenario; does not provide other non-enforcement relief.
Oregon	1.2(d) Notwithstanding paragraph (c), a lawyer may counsel and assist a client regarding ***Oregon's marijuana-related laws***. In the event Oregon law conflicts with federal or tribal law, the lawyer shall also advise the client regarding related federal and tribal law and policy	Limited to marijuana scenario; does not provide other non-enforcement relief.
Pennsylvania	1.2 (e) A lawyer may counsel or assist a client regarding ***conduct expressly permitted by Pennsylvania law,*** provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct.	Limited to state/federal law express divergence (but not only as to marijuana); does not provide other non-enforcement relief.
South Dakota	1.2 (e) Notwithstanding subsection (d), a lawyer may counsel or assist a client regarding ***conduct expressly permitted by South Dakota Cannabis laws,*** even if the same conduct violates federal law, but the lawyer must inform the client that the conduct violates federal law and advise the client about the legal consequences under federal law of the client's proposed course of conduct	Limited to marijuana scenario; does not provide other non-enforcement relief.
Utah	1.2(d)(2) A lawyer may counsel a client regarding the validity, scope, and meaning of ***Utah's cannabis statutes and may assist a client in conduct that the lawyer reasonably believes is permitted by those statutes*** and related rules, regulations, orders, and ordinances. In these circumstances, the lawyer must also advise the client regarding the potential consequences of the client's conduct under related federal law and policy.	Limited to marijuana scenario; does not provide other non-enforcement relief.

Virginia	1.2(c)(3) counsel or assist a client regarding ***conduct expressly permitted by state or other applicable law that conflicts with federal law***, provided that the lawyer counsels the client about the potential legal consequence of the client's proposed course of conduct under applicable federal law.	Limited to state (or other)/federal law express divergence (but not only as to marijuana); does not provide other non-enforcement relief.
West Virginia	1.2(e) A lawyer may counsel a client regarding ***West Virginia law and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws***. If West Virginia law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and its potential consequences	Limited to state/ federal law express divergence (but not only as to marijuana); does not provide other non-enforcement relief.

In addition to rule or comment text, some states have legal ethics opinions weighing in on the issue of how to navigate state versions of ABA Model Rule 1.2(d) when federal and state law diverges. *See, e.g.,* Ariz. Ethics Op. 11-01 (2011) (permissible under AZ Rule 1.2(d) for lawyer to assist clients wishing to start businesses or engage in other actions permitted under Arizona Medical Marijuana Act); Miss. Ethics Op. 265 (2022) (lawyer may counsel client in activities relating to state's Medical Cannabis Act if lawyer advises client of relevant federal law); Wash. Ethics Op. 201501 (2015) (Washington state lawyers may advise clients operating marijuana-related businesses on effect of relevant laws but not on how to violate them or conceal violations).

As to the "non-enforcement" policy, apart from an express state law authorizing the conduct, Maine Ethics Opinion 199 (2010) sums up the bottom line: ABA Model Rule 1.2 makes no distinction in terms of attorney conduct between laws that are enforced and those that are not:

> However, the Rule which governs attorney conduct does not make a distinction between crimes which are enforced and those which are not. So long as both the federal law and the language of the Rule each remain the same, an attorney needs to perform the analysis required by the Rule and determine whether the particular legal service being requested rises to the level of assistance in violating federal law.

The Maine Ethics Opinion 199 further delineates the risk associated with changing policies:

> It is worth noting that there is no guarantee that, with a change in policy, administration, or resources, the federal law might ultimately be enforced to the chagrin of lawyers whose conduct enabled the dispensaries. Even under the present policy, it is a situation where potential clients may ultimately, if not initially, use the medical dispensary and state law as a pretext for other more lucrative ventures.

In short, the lawyer who "assists" on the theory that enforcement is unlikely does so in violation of ABA Model Rule 1.2(d) and the state rules modeled on it.

III. LAWYERS IN THE CROSSHAIRS

The Preamble to the ABA Model Rules of Professional Conduct ("ABA Model Rules"), comment [1], says that 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." What it does not say is that, in performing those roles, a lawyer may end up in someone's crosshairs, whether because of ethics complaints, sanctions motions, government investigation or enforcement, media attention, pressure from clients or employers, or some combination of these. This will certainly feel chaotic to the lawyer in the crosshairs. The circumstances certainly drive which professional rules are most relevant. Below are some examples as well as some of the points on the ethical compass.

A. EXAMPLES OF LAWYERS IN THE CROSSHAIRS

1. McCarthy Era: Maurice L. Braverman [from ChatGBT]

Nature of investigation/prosecution

- Braverman was a civil rights lawyer and sometime member of the Communist Party USA (CPUSA). Wikipedia +1
- In 1952 he was convicted under the Smith Act (which made it a crime to advocate the overthrow of the U.S. Government) for "membership" in the Communist Party. He served 28 months of a 36-month sentence. Wikipedia +1
- Immediately after, he faced disbarment proceedings in Maryland (and later in federal court) because of that conviction. Wikipedia +1

Outcome

- He was eventually reinstated: Maryland courts reinstated him in 1974, and federal courts in 1975. Wikipedia
- The case illustrates how attorneys who were themselves labelled "subversive" were penalized both criminally and professionally (in the bar discipline sense) under McCarthy-era pressures.

Significance

- Braverman is a high-profile example of a lawyer *being prosecuted* (unlike many others who were investigated but not charged) during the anti-Communist era.
- His story shows the broader ripple effect: legal representation of "suspected Communists" could itself become suspect, and attorneys were vulnerable to loyalty-screening, disbarment, and criminal sanction.
- He appears in the scholarship on "progressive lawyers under siege" in the McCarthy years. Bloomsbury

The Wikipedia bio for Maurice Braverman confirms the factual underpinnings of the ChatGPT summary above. *See* https://en.wikipedia.org/wiki/Maurice_Braverman (last visited Oct. 24, 2025) (citations omitted).

2. Watergate Era: John N. Mitchell [from ChatGBT]

Background

John N. Mitchell served as U.S. Attorney General from January 1969 until March 1972 under President Richard Nixon. Encyclopedia Bri... +1 In March 1972 he resigned as Attorney General to become head of Nixon's re-election campaign (the Committee to Re-Elect the President). Encyclopedia Bri... +1

In June 1972, burglars were arrested breaking into the Democratic National Committee headquarters at the Watergate complex in Washington, D.C. The subsequent investigation revealed far broader illegal activities and a cover-up. fordlibrarymuse... +1

Mitchell was implicated because as campaign head and former Attorney General he had ties to or oversight of the re-election committee and the Justice Department, and came under investigation for his role in planning or covering up the break-in and related surveillance and obstruction. FBI +1

Nature of the Investigation and Charges

The investigation into Mitchell and others was led by the Special Prosecution Force (Watergate Special Prosecutor) and involved the FBI and Department of Justice. National Archives +1
Key allegations against Mitchell included:

- Conspiracy to obstruct justice in connection with the burglary and subsequent investigation. fordlibrarymuse... +1
- Obstruction of justice: interfering with the FBI/Grand Jury investigation by concealing facts, arranging hush money, influencing witness testimony, etc. fordlibrarymuse... +1
- Perjury and false statements: lying to a Grand Jury and to FBI agents regarding his knowledge or involvement in the break-in and cover-up. National Archives +1
- False statements to an FBI agent and other federal investigators about his role. FBI

For example, an indictment (Criminal No. 74-110) in the U.S. District Court for the District of Columbia charged Mitchell with offenses under 18 U.S.C. § 371 (↓ spiracy), § 1503 (obstruction of justice), § 1001 (false statements), and others.

Outcome of the Prosecution

- Mitchell was indicted in March-April 1974 by a U.S. Grand Jury on multiple counts.
- On **January 1, 1975**, Mitchell was convicted of conspiracy, obstruction of justice, and perjury.
- The initial sentence, handed down by Judge , was 2½ to 8 years in prison.
- The sentence was later reduced to 1 to 4 years.
- Mitchell served 19 months in a minimum-security federal prison (Federal Prison Camp, Montgomery, at Maxwell Air Force Base in Alabama) before being released on parole for medical reasons on January 20, 1979.

Disbarment and Aftermath

As a result of his conviction, Mitchell was disbarred from practicing law in New York (and essentially his legal career ended).
He became the only U.S. Attorney General to serve a prison sentence.

Significance

The prosecution of John Mitchell was among the high-profile outcomes of Watergate, showing that even senior officials—including a former Attorney General and campaign chief—could be held accountable for abuse of power, obstruction, and lying under oath. The case also reinforced the importance of independent prosecutorial investigations, grand jury oversight, and the means by which the break-in and cover-up unraveled (including White House tapes).

The Wikipedia bio for John Mitchell confirms the factual underpinnings of the ChatGPT summary above https://en.wikipedia.org/wiki/John_N._Mitchell (last visited Oct. 24, 2025) (citations omitted).

3. Disciplinary Action Following Investigation and House Impeachment of President Bill Clinton [from ChatGBT]

Investigation / Inquiry Background

1. **Kenneth W. Starr Independent Counsel Investigation**
   - In 1994, Attorney General Janet Reno appointed Special Counsel Robert Fiske to investigate certain dealings involving Clinton and his wife. Legal Informatio... +2
   - In August 1994, the Special Division of the D.C. Circuit appointed Kenneth Starr as Independent Counsel for the probe. Legal Informatio... +2
   - The investigation covered several issues including the "Whitewater" real-estate interests, Clinton's testimony in other cases, and ultimately the affair with Monica Lewinsky, and alleged false statements under oath. Wikipedia +2
2. **Impeachment Proceedings**
   - Based on the Starr Report (delivered to Congress September 9, 1998) which identified multiple possible grounds (perjury, obstruction of justice, witness tampering, abuse of power) related to Clinton's testimony and actions. Wikipedia +2
   - On December 19, 1998 the U.S. House of Representatives impeached Clinton for two articles (lying under oath and obstruction of justice). Wikipedia +1
   - The Senate trial ran from January 7 to February 12, 1999, and the Senate **acquitted** Clinton on both charges (he remained in office). HISTORY +1

Outcome & Legal / Disciplinary Consequences

- **No criminal prosecution of Clinton personally**: Although the Independent Counsel investigated whether criminal charges were appropriate, the result was a negotiated agreement rather than indictment. On January 19, 2001, Clinton admitted that he had given false testimony/deposition answers in the Paula Jones case (related to the Lewinsky affair) and accepted a **five-year suspension** of his Arkansas law license (rather than full disbarment) as part of the deal. PBS
- As part of that agreement, Clinton paid a $25,000 fine, agreed not to seek reimbursement of investigation-related attorney fees, and secured immunity from further prosecution under the Independent Counsel's investigation. PBS +1
- On the question of removal or impeachment, the Senate did not convict, so Clinton completed his term.

Disbarment / Law License Consequence

- Rather than full disbarment, the consequence was a **five-year suspension** of his Arkansas law license (as per the agreement with Robert Ray, the succeeding Independent Counsel). PBS
- He did **not** continue to face criminal charges after that agreement.

The Wikipedia summary of the "Impeachment of Bill Clinton" at https://en.wikipedia.org/wiki/Impeachment_of_Bill_Clinton (last visited Oct. 24, 2025) (citations omitted) and his Wikipedia bio at https://en.wikipedia.org/wiki/Bill_Clinton (last visited Oct. 24, 2025) (citations omitted) confirms the factual underpinnings of the ChatGPT summary above. Note that the five-year suspension of his Arkansas license was premised on a violation of Rule 8.4(d) (conduct prejudicial to the administration of justice) for "giving knowingly evasive and misleading discovery responses concerning his relationship with Monica Lewinsky." *See* Arkansas Supreme Court Committee on Professional Conduct Notice of Suspension of Attorney's Privilege to Practice Law, *In re: William Jefferson Clinton,* Arkansas Bar ID # 73019 (February 21, 2001), https://www.arcourts.gov/sites/default/files/opc_opinions/2000-013.pdf.

4. Disciplinary Actions Following 2020 Election Fraud Litigation

On January 6, 2021, a joint session of Congress was set to convene in the U.S. Capitol to certify President-elect Joe Biden's electoral vote win. That joint session was interrupted by thousands of President Donald Trump supporters who gathered at the White House and ultimately marched to and broke into the Capitol Building. It was widely reported that what became known as the January 6 "insurrection" was the culmination of "election fraud" claims advanced by Trump supporters. The election fraud claims were advanced in what Wikipedia says was 62 lawsuits contesting election processes, vote counting, and the vote certification process in 9 states (including Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin) and the District of Columbia. *See https://en.wikipedia.org/wiki/Post-election_lawsuits_related_to_the_2020_U.S._presidential_election* (last visited October 24 2025). It was reported that "[o]f the more than 60 lawsuits filed in the post-election period, Trump obtained a favorable ruling in only one case — the remainder were eventually either dismissed, settled or voluntarily withdrawn." Daniel Barnes, *How Trump's challenges to the 2020 election unfolded in the courtroom*, NBC News (Nov. 2, 2024)

https://www.nbcnews.com/politics/2024-election/trumps-challenges-2020-election-unfolded-courtroom-rcna175490. In the weeks and months that followed, many lawyers who participated in bringing the election challenge lawsuits found themselves in the crosshairs of ethics complaints that centered on claims that there was not sufficient support for those legal challenges to the 2020 presidential election results. In addition, many complaints focused on alleged dishonesty.

One of the self-declared watchdog groups dubbed "The 65 Project" organized for the purpose of putting the election challengers in the crosshairs by filing disciplinary complaints. The 65 Project, https://the65project.com (last visited October 24, 2025), explains its mission as follows:

> A bipartisan effort to deter future abuse of the legal system by lawyers seeking to overturn legitimate elections. We will hold such lawyers accountable for past abuses and will work to revitalize the state bar disciplinary process so that lawyers, including public officials, who lie about election results and who fuel insurrection will face professional consequences.

The website for The 65 Project posts its letters to various state bars seeking action against the various attorneys targeted by The 65 Project. While the bases for the various bar complaints may vary, The 65 Project points in large part to "factually and legally baseless claims:"

> "Across the country, lawyers who lent their credibility as officers of the court to Donald Trump to file factually and legally baseless claims to overturn legitimate election results have been investigated by state bar associations, been fined, had their licenses suspended, and even disbarred," said The 65 Project Managing Director Michael Teter. "We have filed 86 bar complaints to date and are reminding lawyers that we – and the public – will be watching them."

See *The 65 Project Warns Aspirant Big Lie Lawyers: Don't Lose Your Law License for Trump*, The 65 Project News (September 23, 2024), https://the65project.com/the-65-project-warns-aspirant-big-lie-lawyers-dont-lose-your-law-license-for-trump/.

Another group called "Lawyers Defending American Democracy" (LDAD), see https://ldad.org/about, likewise have lawyers in their sights, claiming:

> We unite members of the legal profession in:
>
> - Enforcing and upholding principles of democracy and law, consistent with our obligations as lawyers
> - Demanding accountability from lawyers and public officials
> - Calling out attacks on legal norms and prescribing redress.

One way in which LDAD pursues its mission is by filing bar complaints against lawyers. One such example is the bar complaint LDAD filed with the New York

State Bar against former New York City Mayor, Trump advisor, and lawyer Rudy Giuliani. That complaint, published on the LDAD website, opens as follows:

> This complaint is about law, not politics. Lawyers have every right to represent their clients zealously and to engage in political speech. But they cross ethical boundaries—which are equally boundaries of New York law—when they invoke and abuse the judicial process, lie to third parties in the course of representing clients, or engage in conduct involving dishonesty, fraud, deceit, or misrepresentation in or out of court.
>
> By these standards, Mr. Giuliani's conduct should be investigated, and he should be sanctioned immediately while the Committee investigates. As lead counsel for Mr. Trump in all election matters, Mr. Giuliani has spearheaded a nationwide public campaign to convince the public and the courts of massive voter fraud and a stolen presidential election. Mr. Giuliani personally advanced and argued claims in court that were frivolous and had no reasonable purpose other than to fuel the extrajudicial campaign of falsehoods.

See https://ldad.org/wp-content/uploads/2021/05/LDAD-Attorney-Grievance-Committee-Complaint.pdf. In this way, LDAD focused predominantly on the alleged fraud or false statements, though it also references "frivolous" claims.

A New York appellate court suspended Giuliani's New York license to practice law, finding that "there is uncontroverted evidence that [Giuliani] communicated demonstrably false and misleading statements to courts, lawmakers and the public at large" in defending Trump's false claim that he won the 2020 election. Ari Ephraim Feldman, *Rudy Giuliani suspended from practicing law in New York*, Spectrum News (June 24, 2021, at 11:32 a.m.) (and updated June 24, 2021, at 11:45 a.m.), https://ny1.com/nyc/all-boroughs/news/2021/06/24/rudy-giuliani-suspended-from-practicing-law-in-new-york.

America First Legal – a government watchdog group (https://aflegal.org) – has accused The 65 Project of engaging in a "left-wing attempt to intimidate conservative lawyers, filing a bar complaint earlier this week against the 65 Project's top lawyer Michael Teter. The Oct. 28 complaint said Teter was targeting lawyers 'based solely upon their representation of a disfavoured client.'" Reuters, *65 Project vs. America First Legal: As Harris, Trump race in a tight contest, lawyers fight over ethics*, Firstpost (November 4, 2024, at 13:52:24 IST), https://www.firstpost.com/world/65-project-vs-america-first-legal-as-harris-trump-race-in-a-tight-contest-lawyers-fight-over-ethics-13831690.html

5. Calls for Disciplinary Action Related to Prosecution of James Comey and Letitia James

James Comey is a lawyer who was the Director of the Federal Bureau of Investigation from 2013 through his termination by Pres. Trump in May 2017. Appointed by President Barack Obama, Comey oversaw the FBI's investigation of the Hillary Clinton email controversy.

During her tenure as the United States Secretary of State, Hillary Clinton used a private email server for official public communications rather than using official State Department email accounts maintained on federal servers. Some experts, officials, and members of Congress contended that Clinton's use of a private email system and private server violated federal law. The controversy was a major point of contention in the 2016 presidential election. In July 2016, FBI Director Comey announced that the FBI investigation had concluded that Clinton had been "extremely careless" but recommended that no charges be filed because Clinton did not act with criminal intent, the historical standard for pursuing prosecution. On this point, Comey said: "I think she was extremely careless. I think she was negligent. That I could establish. What we can't establish is that she acted with the necessary criminal intent . . . 'Should have known,' 'must have known,' 'had to know' does not get you there. You have to prove beyond a reasonable doubt that they knew they were engaged in something that was unlawful." *See What FBI Director James Comey Really Said About Hillary Clinton Email Probe*, ABC News, (August 2, 2016, 2:12 p.m.), https://abcnews.go.com/Politics/fbi-director-james-comey-hillary-clinton-email-probe/story?id=41044927; *see also Hillary Clinton email controversy*, Wikipedia, https://en.wikipedia.org/wiki/Hillary_Clinton_email_controversy (last visited October 24, 2025).

On the campaign trail, Democratic Party nominee for President Hillary Clinton said she never sent or received classified information over the server while serving as Secretary of State. Comey described such statements as "not true." According to FBI Director Comey, "Our investigation found ... 110 [emails with then-classified information] that she either received or sent." *See What FBI Director James Comey Really Said About Hillary Clinton Email Probe*, ABC News (August 2, 2016, 2:12 p.m.), https://abcnews.go.com/Politics/fbi-director-james-comey-hillary-clinton-email-probe/story?id=41044927. After the FBI's July 2016 report and eleven days before the election, FBI Director Comey notified Congress that the FBI had started looking into newly discovered emails. On November 6, Comey notified Congress that the FBI had not changed its conclusion not to recommend charges against Clinton.

At the time President Trump fired FBI Director Comey, Comey was leading an investigation into alleged Russian election interference and whether there were any links between Moscow and Trump's campaign. The "Russia" investigation was taken over by special counsel Robert Mueller. Summarizing Mueller's 2019 report to Congress, Attorney General Barr stated that Mueller's investigation "did not find that the Trump campaign or anyone associated with it conspired or coordinated with Russian in its efforts to influence the 2016 U.S. presidential election," nor did it take a stance on whether or not Trump committed obstruction of justice. *See* Carrie Johnson, Philip Ewing, Jessica Taylor, *Mueller Report Doesn't Find Russian Collusion, But 'Can't Exonerate' On Obstruction*, NPR (March 24, 2019, 10:52 a.m. ET), https://www.npr.org/2019/03/24/706318191/trump-white-house-hasnt-seen-or-been-briefed-on-mueller-investigation-report.

Ahead of the 2020 election, Comey was called to give testimony in September 2020 about the "Russia" investigation. In the course of giving that testimony, Comey was asked whether he stood by the testimony he gave in May 2017 regarding the investigation of Clinton, specifically that he did not disclose or approve the disclosure of information to the news media about FBI investigations into either Trump or his 2016 opponent Democrat Hillary Clinton. Comey indicated that he stood by such testimony.

On September 25, 2025, a grand jury issued an indictment charging Comey with one count of making false statements and another of obstruction of justice related to his September 2020 video appearance before the Senate Judiciary Committee. Interim U.S. Attorney for the Eastern District of Virginia Lindsey Halligan alleged Comey made false statements when he stood behind 2017 Senate testimony in which he said he did not disclose or approve the disclosure of information to the news media about FBI investigations into either Trump or his 2016 opponent Democrat Hillary Clinton. The indictment came days after President Trump called for prosecutions against Comey, Letitia James, and others. *See* Katherine Faulders, Alexander Mallin, and Peter Charalambous, *Former FBI Director James Comey indicted days after Trump demanded his DOJ move 'now' to prosecute enemies*, ABC News (September 25, 2025, 10:01 p.m.), https://abcnews.go.com/US/former-fbi-director-james-comey-indicted-days-after/story?id=125935658; Vaughn Hillyard, Chloe Atkins and Dareh Gregoria, *Trump's newly appointed U.S. attorney presented Comey case to grand jury on her own, source says*, NBC News (September 26, 2025, 3:21 p.m. EDT), https://www.nbcnews.com/politics/justice-department/trumps-newly-appointed-us-attorney-presented-comey-case-grand-jury-sou-rcna233880.

Letitia James was elected New York Attorney General in 2018. "James campaigned as 'the people's lawyer' and pledged to make the attorney general's office a firewall against Trump's policies. In her victory speech, she called the president a 'con man' and 'carnival barker' and pledged to shine a 'bright light into every dark corner of his real estate dealings.'" Michael R. Sisak, *Who Is Letitia James? New York's Attorney General Has Battled Trump, Big Tech and the NRA*, The Associated Press (October 10, 2025, 8:16 p.m. EDT), https://apnews.com/article/letitia-james-indictment-mortgage-fraud-trump-f4a189a27bb1cca72f810ca8a4d96a5e. In 2022, James filed a civil lawsuit against Trump for fraud, alleging that he inflated his net worth by billions to mislead banks and insurers about the value of his assets. The lawsuit was the "culmination of the Democrat's three-year civil investigation into Trump and the Trump Organization. Trump's three eldest children, Donald Jr., Ivanka, and Eric Trump, were also named as defendants, along with two longtime company executives." Michael R. Sisak and Larry Neumeister, *'Art of the steal': Trump accused of vast fraud in NY suit*, The Associated Press (September 21, 2022, 10:40 p.m. EDT), https://apnews.com/article/donald-trump-sued-new-york-letitia-james-ec6b3b91b6c8594495ada7d0a2b80a2f.

Interim U.S. Attorney for the Eastern District of Virginia Lindsey Halligan presented evidence to a grand jury which then issued on October 9, 2025, an indictment charging New York Attorney General Letitia James with bank fraud and making false statements to a financial institution. *See* Press Release, U.S. Attorney's Office for the Eastern District of Virginia, New York State Attorney General Indicted, (October 9, 2025), https://www.justice.gov/usao-edva/pr/new-york-state-attorney-general-indicted.

Many decry the prosecutions of Comey and James as political retribution and weaponization of the justice system. *See, e.g.,* Jill Colvin, *Trump escalates retribution campaign with charges against Comey and threats against liberal groups*, The Associated Press (September 26, 2025, 5:38 p.m. EDT) at https://apnews.com/article/trump-retribution-comey-e5700c9f8dff30d358d9d5f39501c16c. In addition, "[t]hree former White House ethics attorneys who served under Republican and Democratic presidents have raised alarms in complaints with the U.S. Department of Justice and

Congress seeking investigations into Halligan's alleged 'vindictive and meritless' prosecutions of ex-FBI Director James Comey and New York Attorney General Letitia James." Phillip Bantz, *Why Ethics complaints Against Halligan Face 'Very High Bar'*, Law360 (October 16, 2025) https://www.fordobrien.com/wp-content/uploads/sites/1403994/2025/10/EthicsComplaintsHalligan.pdf. Despite the grand jury indictments and early stage of the cases, commentators have already begun speculating about ethics rule violations by Halligan for even bringing the charges. *Id.*

In the battle of the ethics complaints, add to it an April 24, 2025 bar complaint filed with the New York Committee on Professional Standards against Letitia James by America First Legal. *See* Press Release, America First Legal, America First Legal Files Bar Complaint Against New York Attorney General Letitia James (April 28, 2025), https://aflegal.org/press-release/america-first-legal-files-bar-complaint-against-new-york-attorney-general-letitia-james/. The complaint asserts that Letitia James violated professional rules by falsifying bank documents and property records.

6. Executive Orders Targeting Law Firms

In 2025, President Donald Trump issued a series of executive orders targeting prominent law firms and imposing significant penalties, including suspension of security clearances, termination of federal contracts, and restrictions on access to federal buildings. The executive orders variously cite the targeted firm's association with lawyers who pursued claims against those who participated in the January 6, 2021, actions or against Trump, his family, or associates. In addition, the executive orders cite allegedly unlawful discrimination under the guise of diversity, equity, and inclusion. While some law firms challenged the executive orders, others entered into settlement agreements, the key aspects of which involved revamping what may previously have been "DEI" initiatives and agreeing to devote quantities of pro bono hours to designated purposes. There was widespread and vehement condemnation of the Trump administration for its executive order approach. One such example recounts:

> In the early days of the second Trump administration, over 50 bar associations, mostly metropolitan and county bar associations, also condemned 'government actions that seek to twist the scales of justice' including the intimidation of law firms and lawyers. Also, over 1,300 former alumni of the DOJ, who have collectively served both Republican and Democratic administrations, have condemned President Trump's and the DOJ's campaign of intimidation and retaliation against lawyers and law firms. They have called such executive branch actions, "an affront to the Constitution and the rule of law . . . undermin[ing] our legal system, the pursuit of justice, and our democracy."

James "Jim" Saranteas, *Trump Attorneys' Ethics Violations Require State Bar Action*, American Constitution Society: Expert Forum (September 3, 2025), https://www.acslaw.org/expertforum/trump-attorneys-ethics-violations-require-state-bar-association-action/. However, this author takes issue both with those lawyers assisting the Trump administration as well as those lawyers "capitulating" through settlements with the Trump administration, arguing for investigation and disciplinary action for attorneys involved in either "unethical intimidation" or "capitulation." *Id.,* citing ABA Rule 8.4's prohibitions on dishonesty, actions prejudicial to the administration of justice, or inducing another attorney to

violate the professional rules. *See also,* Carrie Johnson, *Trump's deals with law firms are like deals 'made with a gun to the head,' lawyers say*, NPR (May 31, 2025, 5:00 a.m. ET), https://www.npr.org/2025/05/31/nx-s1-5406173/trump-deals-law-firms?utm; Paul Blumenthal, *How a Few Law Associates Revealed the Power of Resigning from Firms that Cut Deals with Trump*, The Huffington Post (May 12, 2025, 4:20 p.m. EDT), https://www.huffpost.com/entry/donald-trump-law-firm-resign_n_6822471de4b0abb58358aa6f.

Law firms targeted by the Trump Executive Orders did not just face criticism in the press. Many faced lawyer resignations. *See, e.g.,* Tatyana Monnay, *Abbe Lowell Wants to Go Where Big Law Can't at New Trial Firm*, Bloomberg Law (May 23, 2025, 5:00 a.m. EDT), https://news.bloomberglaw.com/business-and-practice/abbe-lowell-wants-to-go-where-big-law-cant-at-new-trial-firm; David Lat, *As Big Law Shrinks from Taking on Trump, Boutiques Step Up*, Bloomberg Law (June 4, 2025, 4:30 a.m. EDT), https://news.bloomberglaw.com/us-law-week/as-big-law-shrinks-from-taking-on-trump-boutiques-step-up. In addition, some may also have faced client abandonment. *See, e.g.,* Sophie Clark, *Major Companies Abandon Law Firms that Signed Deals with Trump: Report*, Newsweek (June 2, 2025, 8:11 a.m. EDT, updated June 5, 2025, 5:30 a.m. EDT), https://www.newsweek.com/major-companies-abandon-law-firms-that-signed-deals-trump-report-2079712.

B. ETHICAL COMPASS POINTS

1. Meritorious Claims & Contentions (Rule 3.1) vs. Improper Purpose (Rule 4.4)

ABA Model Rule 3.1 is substantive in nature, focusing on the legitimacy of a lawyer's claims and contentions. The key concern is whether the lawyer's case has merit or is frivolous. ABA Model Rule 4.4(a) focuses more on the means and methods employed by the lawyer, seeking to prohibit conduct that has no substantial purpose other than to cause harm or inconvenience. As discussed further below, while a lawyer's or client's purpose may not be the focus of ABA Model Rule 3.1, the lawyer's or client's purpose is assessed relative to the lawyer's means or methods.

ABA Model Rule 3.1 states that a "lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, ***unless there is a basis in law and fact for doing so that is not frivolous***, which includes a good faith argument for an extension, modification or reversal of existing law" (emphasis added). This rule correlates in large part to Rule 11 of the Federal Rules of Civil Procedure, which provides:

> (b) By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Fed. R. Civ. P. 11(b). This federal rule – and likely its state law counterparts – makes sanctions available for a violation as against both the party litigants and counsel for those litigants. Unlike the "sanctions" available under rules of civil procedure, ABA Model Rule 3.1 is applicable only to attorneys who face risk of an ethics complaint and discipline by the applicable state bar association.

ABA Model Rule 3.1 and the federal Rule 11 each require a nonfrivolous basis in fact and law for claims and contentions. Sanctions under the federal Rule 11, however, can also be premised on any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation. Not so under ABA Model Rule 3.1. "The client's purpose is not relevant to the objective merits of the client's claim." American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013, at 444 (2013). Nevertheless, ABA Model Rule 4.4(a) adds purpose back to the calculus: "(a) In representing a client, a lawyer shall not use means that have ***no substantial purpose other*** than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." ABA Model Rule 4.4(a) (emphasis added).

The predecessor to the ABA Model Rules was the ABA Model Code of Professional Responsibility (ABA Model Code), which was replaced in 1983. The ABA Model Code coupled the "meritorious claims and contentions" aspect of ABA Model Rule 3.1 with the "no substantial purpose" language of ABA Model Rule 4.4 in what was Disciplinary Rule 2-109 (Acceptance of Employment):

(A) A lawyer shall not accept employment on behalf of a person if he knows or it is obvious that such person wishes to:

(1) Bring a legal action, conduct a defense, or assert a position in litigation, or otherwise have steps taken for him, ***merely for the purpose of harassing or maliciously injuring any person***.

(2) Present a claim or defense in litigation that is ***not warranted under existing law***, unless it can be supported by good faith argument for an extension, modification, or reversal of existing law.

ABA Model Code DR 2-109 (emphasis added). When ABA Model Rule 3.1 was first adopted in 1983, it carried forward the link to purpose or motives in comment [2], stating that an action would be considered frivolous if the "client desires to have the action taken ***primarily for the***

purpose of harassing or maliciously injuring a person." Rule 3.1, cmt. [2] (1983) [superseded] (emphasis added). This language was deleted in 2002, reflecting the ABA's view that the meritorious claim or contention analysis under ABA Model Rule 3.1 should proceed without reference to motives.

Unlike with ABA Model Rule 3.1, ABA Model Rule 4.4 puts "purpose" with respect to the lawyer's "means" employed in advancing the representation back on center stage. The lawyer may be satisfied that there is a legally and factually sufficient basis for advancing a claim or contention, and yet, the lawyer could employ means with "no substantial purpose other than to embarrass, delay, or burden a third person. " ABA Model Rule 4.4(a). There is doubtless overlap between ABA Model Rules 3.1 and 4.4 as frivolous claims are often occasioned by intent to harass, embarrass, or otherwise injure or inconvenience a party, or by some other improper motive. *See* ABA Model Rule 3.1 annotation in Ellen J. Bennett, Helen W. Gunnarsson, and Nancy G. Kisicki, Annotated Model Rules of Professional Conduct, Tenth Edition (American Bar Association) (Kindle Edition), citing *In re Farmer*, 835 S.E. 2d 629 (Ga. 2019) (attempting "to disrupt the judicial process to the point that either the court or the opposing party would simply capitulate for the sake of restoring order, including abusive litigation tactics such as threatening witnesses, filing baseless motions and appeals, and routinely making ad hominem attacks against parties, the trial judge and court staff, and participants who took positions contrary to those of lawyer's client"; frivolous conduct was so outrageous that it resulted in RICO liability); *In re Wells*, 36 So. 3d 198 (La. 2010) (lawyer charged with extortion filed civil suit against prosecutor and judges); *Att'y Grievance Comm'n of Md. v. Phillips*, 155 A. 3d 476 (Md. 2017) (filing frivolous motion for protective order and to quash subpoena to obstruct and delay bar counsel's investigation of misconduct); *In re Disciplinary Action Against Selmer*, 568 N.W. 2d 702 (Minn. 1997) (lawyer repeatedly asserted baseless claims of racial discrimination to thwart creditor's collection efforts); *In re Hess*, 406 S.W. 3d 37 (Mo. 2013) (deliberately filing frivolous claims against former clients to obtain fees to which lawyer not entitled); *In re Coaty*, 985 A. 2d 1020 (R.I. 2010) (lawyer who was fired by client and instructed to deliver case file to new lawyer instead filed suit against client and new lawyer); *In re Samuels*, 666 S.E. 2d 244 (S.C. 2008) (lawyer filed frivolous countersuit against heating contractor who sued lawyer and his wife to collect $ 2,600 bill); *In re Disciplinary Action Against Voss*, 795 N.W. 2d 415 (Wis. 2011) (lawyer maliciously disseminated highly personal information about former client, including voluminous psychiatric and other medical records, to court and in lawyer disciplinary proceeding); *Bd. of Prof. Resp., Wyo. State Bar v. Stinson*, 337 P. 3d 401 (Wyo. 2014) (expert testimony unnecessary for finding Rule 3.1 violation where evidence showed lawyer included assertions in answer and counterclaim with no good faith basis and to publicly embarrass opponent); N.Y. City Ethics Op. 2015-5 (2015) (lawyer may not threaten to report opposing counsel's conduct to lawyer disciplinary agency to coerce more favorable settlement terms).

Although the ABA Model Rule 3.1 excludes motive or purpose from its coverage, state versions of this rule may still retain a prohibition based on improper purpose within its version of Rule 3.1. *See, e.g.,* versions of Rule 3.1 as adopted in Alabama, California, Georgia, Montana, New York, Wisconsin, and Wyoming.

2. Prosecutorial Discretion & Duties (Rule 3.8)

ABA Model Rule 3.8 admonishes a prosecutor in a criminal case to "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." This sets the standard for proceeding as point of professional responsibility that ties to the burden the prosecutor must meet to withstanding dismissal. The significance, however, is that the prosecutor must form a belief in the sufficiency as well as the merits of the charges advanced. This contrasts with the duty of a lawyer representing a criminal defendant who is entitled under ABA Model Rule 3.1 to "defend the proceeding as to require that every element of the case be established" notwithstanding the lawyer's belief with respect to the merits of the charges against the defendant. As comment [1] to ABA Model Rule 3.8 states, the prosecutor has the high responsibility of a "minister of justice and not simply that of an advocate."

The converse of ABA Rule 3.8's rule requiring a prosecutor to have "probable cause" for advancing a charge is the doctrine of "prosecutorial discretion." Rooted in Article II, Section 3 of the U.S. Constitution's "Take Care Clause" (". . . he shall take Care that the Laws be faithfully executed"), the doctrine of prosecutorial discretion allows prosecutors broad discretion in setting enforcement priorities, deciding whether to prosecute, selecting charges, negotiating plea deals, and recommending sentences. Since the Constitution leaves these decisions in the hands of the executive, the policy of separation of powers weighs against too much judicial oversight of the prosecutor's discretion. The Constitution, however does not confer unfettered discretion. Under the equal protection clause, courts may review a prosecutor's decision for unconstitutional motive such as race or religion. *See* James B. Zagel, *Prosecutorial Discretion and Its Constitutional Limits*, Encyclopedia.com (2000), https://www.encyclopedia.com/politics/encyclopedias-almanacs-transcripts-and-maps/prosecutorial-discretion-and-its-constitutional-limits. *See also*, Cassandra J. Barnum, Legislative Attorney, for the Congressional Research Service, *Federal Prosecutorial Discretion: A Brief Overview*, (June 20, 2025), https://www.congress.gov/crs_external_products/LSB/PDF/LSB11326/LSB11326.1.pdf. Barnum identifies the following as limits on prosecutorial discretion:

- Constitutional Constraints:
  - Fifth Amendment requires grand jury indictments for felonies and prohibits double jeopardy.
  - Equal Protection: Prohibits exercising prosecutorial discretion with discriminatory intent, such as race or religion or in retaliation for exercising legal rights.
- DOJ Policy:
  - DOJ's Justice Manual outlines principles for reasoned discretion, including when not to prosecute.
  - These guidelines are non-binding but deviations require DOJ leadership approval.
- Professional Responsibility:

    - Prosecutors must adhere to ABA Model Rule 3.8, including obligations to correct wrongful convictions.
- Procedural Requirements:
    - Statutes like 18 U.S.C. § 851 and § 3593(a) impose notice requirements.
    - The Crime Victims' Rights Act (CVRA) mandates victim consultation but does not override prosecutorial discretion.
    - The Speedy Trial Act (STA) allows deferred prosecution agreements (DPAs) with court approval, but courts cannot supervise their substance.
    - Rule 11 of the Federal Rules of Criminal Procedure allows judges to accept or reject plea agreements, but must respect prosecutorial prerogatives.

Id. In addition, Barnum points to Congressional ability to exercise oversight by requiring reports from the Department of Justice, establishing commissions to investigate law enforcement practices, restricting funding allocations to and uses by the DOJ, and setting legislative standards for exercising discretion. Nevertheless, Congress cannot dictate specific prosecutions.

In the current climate, much is being written about the extent to which there are – or should be – guardrails on the exercise of federal prosecutorial discretion. Commentators point out that a tradition of independence for the DOJ was established following the Watergate scandal. While expecting a level of independence from the DOJ may have become the norm, this is by policy and practice rather than by constitutional or statutory requirement. Commentators are decrying what they see as the erosion of that policy and practice in the Trump administration. *See* Deborah Rod, *The Trump Administration's Control of the Department of Justice*, GovFacts (last updated October 23, 2025 2:04 p.m.), at https://govfacts.org/analysis/the-trump-administrations-control-of-the-department-of-justice/. Watchdog groups see the need for independence as fundamental to democracy:

> Protect Democracy has long taken the position that a justice system where no one is above the law is a central feature of a well-functioning democracy. This means that prosecuting politicians and politically-significant cases is not only acceptable, but necessary *when doing so is consistent with the law and nonpartisan criminal enforcement policies*. However, using the government's law enforcement powers as a means of punishing political opponents, chilling dissent, or as a pretext for achieving political objectives is a central component of the authoritarian playbook.

Assessing the Trump DOJ's Investigations and Prosecutions, Protect Democracy (September 4, 2025) https://protectdemocracy.org/work/assessing-trump-dojs-investigations-prosecutions/

It is very likely the absence of clear limits on prosecutorial discretion that have caused many to instead focus on lawyers and professional rules. Without guardrails in the Constitution, statutes, or other laws, it is the professional rules that provide the ethical compass points and focal points for those who put lawyers in their crosshairs.

3. Honesty (Rules 3.3, 4.1, 8.1-8.3, 8.4(c))

A lawyer's charge to be honest is fundamental. A lawyer does not receive a license to practice without passing the relevant state bar's "character and fitness" review, which assesses whether the candidate has the necessary character to justify the trust and confidence of clients, the public, and the legal system. Once licensed, the professional rules admonish honesty in multiple rules:

- ABA Model Rule 8.4(c) makes it "professional misconduct" for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

- ABA Model Rule 8.3 requires a lawyer to report another lawyer's professional misconduct that "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."

- ABA Model Rule 8.1 prohibits a lawyer from making a false statement, or failing to disclose a fact necessary to correct a misapprehension, in connection with a bar admission application or a disciplinary matter.

- ABA Model Rule 3.3 prohibits a lawyer from knowingly making a "false statement of fact or law to a tribunal" and requires a lawyer "to correct a false statement of material fact or law previously made to the tribunal by the lawyer" and take remedial measures to prevent or remediate attempts to use the lawyer's service to perpetuate a crime or fraud.

- ABA Model Rule 4.1 prohibits a lawyer from knowingly making "false statement of material fact or law to a third person" and requires a lawyer to "disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6" (which permits disclosures in defined circumstances).

As the Preamble to the ABA Model Rules observes in comment [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." While much of ABA Model Rules speaks to a lawyer's duties as a "representative of clients," the ABA Model Rules put honesty at the top of the pyramid of duties trumping even the lawyer's sacrosanct duty of confidentiality to clients in defined circumstances. This prioritization reflects the paramount importance of a lawyer's role as an officer of the court. In that role, "a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority." ABA Model Rules, Preamble comment [6].

4. Within the Bounds of the Law (Rules 1.2(d), 1.16, 8.4(a))

Canon 7 of the ABA Model Code called a lawyer to "represent a client **zealously** within the bounds of the law." Although none of the Disciplinary Rules themselves directed a lawyer to "zealously represent" a client, DR 7-101 was entitled "Representing a Client Zealously," and it stated what a lawyer shall not intentionally do (fail to seek the client's lawful objectives through reasonably available means; fail to carry out the contract of employment except when withdrawal is permitted; prejudice a client) and what a lawyer "may" do (exercise professional judgment to waive or fail to assert a right or position; refuse to aid or participate in conduct believed to be unlawful). This rule is followed by DR 7-102 entitled "Representing a Client Within the Bounds of the Law."

By the time of the ABA Model Rules, the term "zeal" was relegated to the Preamble and a comment to Model Rule 1.3. *See* Preamble to the Model Rules, comment [2] ("A lawyer performs various functions. . . . As advocate, a lawyer **zealously** asserts the client's position under the rules of the adversary system."); Preamble comment [8] ("when an opposing party is well represented, a lawyer can be a **zealous** advocate on behalf of a client and at the same time assume that justice is being done."); Preamble comment [9] ("These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system"); and Model Rule 1.3, comment [2] ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").[3]

Although a lawyer's call to "zeal" may have been ratcheted back, the ABA Model Rules did not back off from the admonition that a lawyer's conduct must remain within the bounds of the law:

- ABA Model Rule 1.2(d), as discussed above, states that a lawyer "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent."

- Recently amended, ABA Model Rule 1.16 requires a lawyer to "inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation." In addition, this rule requires a lawyer to decline or withdraw from a representation if "(1) the representation will result in violation of the Rules of Professional Conduct or other law," or "(4) the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud."

[3] For a discussion of the origin of ethical "zeal" and its "disappearance" from the Model Rules, *see* Lawrence J. Vilardo, Vincent E. Doyle III, *Where Did the Zeal Go?* ABA Litigation Journal (Fall 2011) https://www.americanbar.org/groups/litigation/publications/litigation_journal/2011_12/fall/where_did_zeal_go/.

- Finally, it is professional misconduct to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

5. Representing and Counseling a Client (Within the Bounds of the Law) Is Not Endorsing the Client's Views (Rules 1.2, 2.1)

A lawyer is free to undertake a representation or to decline it. If, however, the lawyer undertakes the representation, the lawyer is charged with representing the client with honesty and within the bounds of the law. In doing so, a lawyer is called to "exercise independent professional judgment and render candid advice," referring to "not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." ABA Model Rule 2.1. After consulting with the client and rendering candid advice, ultimately the lawyer "shall abide by a client's decisions concerning the objectives of representation." But when doing so, the role of the lawyer is meant to be viewed as a "representative." According to ABA Model Rule 1.2(b), a "lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." This is because "[l]egal representation should not be denied to people . . . whose cause is controversial or the subject of popular disapproval." ABA Model Rule 1.2, comment [5].

It cannot reasonably be debated that many lawyers acting for or against President Trump – whether in his personal capacity or as former or current President or presidential candidate – find themselves with a client whose causes are controversial. On both sides of the current controversies, lawyers have found themselves in the crosshairs based on the identity of their clients. There are many accusations and debate about whether the focus on the lawyers is because they allegedly overstepped the boundary of the professional rules or merely because of the identity of their respective clients or the controversial causes of their clients. There have been many calls to boycott those lawyers with unpopular clients (or with clients who have unpopular causes). *See, e.g.,* Caroline Spiezio, *Blowback against Trump campaign law firm targets clients, recruiting*, Reuters (November 12, 2020, 7:35 am EST), https://www.reuters.com/world/us/blowback-against-trump-campaign-law-firm-targets-clients-recruiting-2020-11-12/; Malcolm Ferguson, *Law Firms That Caved to Trump Suddenly Lose a Lot of Big Business*, The New Republic (June 2, 2025), https://newrepublic.com/post/195999/big-companies-law-firms-trump-deals. It is certainly the right of clients to choose lawyers as they see fit. There is also nothing to shield lawyers or law firms from the public relations that accompany their association with particular clients. The recognition in the rules that a lawyer does not "endorse" the client's views or activities merely by representing the client provides the lawyer will moral support, not practical support.

6. Conflicts & Communication (Rules 1.4, 1.7, 1.10)

Lawyers who find themselves in the "crosshairs" will be called upon to communicate with their clients about the ways in which those circumstances could impact the lawyers' ability to carry out the representation. ABA Model Rule 1.4. The scope of the duty to communicate is broad, encompassing the duty to inform the client of circumstances requiring the client's informed consent, to consult with the client about the means to achieve the client's objectives, to

keep the client reasonably informed about the status of the matter, and to consult with the client about any limitations on the lawyer's conduct. *Id.*

Depending on the nature of the scrutiny of the lawyer or law firm, there is a risk of conflict issues arising from the lawyer's or law firm's own interests. ABA Model Rule 1.7 identifies as a conflict the circumstance involving a "significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer." ABA Model Rule 1.7(a)(2). A lawyer targeted by a sanctions motion, a government investigation or prosecution, intense public scrutiny (such as may result in a call to boycott the lawyer or law firm), or an ethics complaint must assess the conflict issue and whether disclosure and informed consent are an option to resolve it. It is at least theoretically possible that a conflict issue of one lawyer will not impute the firm under ABA Model Rule 1.10 (such as when the "prohibition is based on a personal interest of the disqualified lawyer" that does not "present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm").

7. Conduct Prejudicial to the Administration of Justice (Rule 8.4(d))

ABA Model Rule 8.4(d) defines professional misconduct as "conduct that is prejudicial to the administration of justice." This is a broad "catch all" provision that might be likened to the line between what is pornography and what is not as described by U.S. Supreme Court Justice Potter Stewart who famously said: "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Comment [7] to ABA Rule 8.4(d) notes that a "lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization."

This particular aspect of "professional misconduct" may not be the typical hook on which to hang a "professional misconduct" charge by itself. It may more commonly "tag along" with a laundry list of other rule violations. Nevertheless, it is usually applied to conduct connected with proceedings of a tribunal. *See,* e.g., *People v. Jaramillo*, 35 P. 3d 723 (Colo. O.P.D.J. 2001) (violation of Rule 8.4(d) "requires proof of some nexus between the conduct charged and an adverse effect upon the administration of justice"); *In re Carter*, 11 A. 3d 1219 (D.C. 2011) (to violate rule, conduct must be improper, bear directly on judicial process, and "taint the judicial process in more than a de minimis way"; lawyer's failure to pay arbitration awards did "not bear directly upon the judicial process" and therefore did not violate rule). One court went so far as to state that this rule would not justify discipline on a stand-alone basis "unless it is so 'egregious' and 'flagrantly violative of accepted professional norms' as to 'undermine the legitimacy of the judicial process.'" *In re Discipline of Att'y*, 815 N.E.2d 1072 (Mass. 2004) (citations omitted). That said, "conduct that is prejudicial to the administration of justice" features prominently in many of the disciplinary complaints brought against lawyers participating in litigation challenging the 2020 presidential election. Mass. R. Prof. C. 8.4(d).

IV. JUDGES IN THE CROSSHAIRS

While it is certainly possible that judges find themselves in the crosshairs of investigation, disciplinary action, or bad public relations, for purposes of focusing on lawyers' ethics, the

examples discussed below and related professional rules focus on those circumstances when a lawyers' criticism of judges becomes an ethics violation.

A. EXAMPLES OF JUDGES IN THE CROSSHAIRS

1. In re: Contempt of Tauber, No. 371447, 2025 WL 2793124 (Mich. Ct. App. Sept. 30, 2025)

A Michigan trial judge appointed Marshall Tauber to represent Montell Bennett, a criminal defendant who was charged with uttering and publishing--i.e., forcing checks (the "Case"). *In re: Contempt of Tauber* at *1. Prior to Tauber's appointment, Bennett had been released on bond. *Id.* While released on bond, a separate court had arraigned Bennett for distinct forgery charges (the "New Charges"). *Id.* These events leading to these charges had occurred prior to the events relevant to the Case. *Id.* After the Case's trial judge learned about the New Charges at a pretrial hearing, she increased the bond amount and remanded Bennett to the County jail. *Id.* at *2. Tauber spoke up to try to explain that the New Charges did not stem from activity while Bennett was on bond but the trial judge was not persuaded. *Id.*

The following day, Tauber filed an emergency motion further explaining that the New Charges resulted from activity that predated Bennett's time on bond and sought reinstatement of the original bond so Bennett could continue working and spending time with his family. *Id.* at *2. Tauber insinuated that the trial court was unaware of the sequencing of these events when it increased Bennett's bond amount. *Id.*

The court held a zoom hearing the following week, and the trial judge disagreed with Tauber's assertion that she was unaware of the timing of events. *Id.*. Ultimately, the trial court kept the increased bond and scheduled Bennett's arraignment. *Id.* at *3 As the hearing concluded, the record reflects the following exchange:

> *The Court*: I'll see everyone then, thank you.
> *The Clerk*: Thank you.
> *Tauber*: Judge - - thank you. F*cking c*nt.
> (Court in recess at 10:21 a.m.)

Id.

Later that day, the trial court issued a show cause order against Tauber why he should not be found in direct criminal contempt of court for his conduct pursuant to MCL 600.1701(a) for "engaging in a willful disregard of the authority of the Court." *Id.* At a hearing on the criminal show cause, Tauber attempted to argue that while his words were "horrid" he thought he had already left the zoom hearing and had not intended for anyone, including his own client, to hear what he said. *Id.* at *5. Unconvinced, the court ultimately held him in criminal contempt and issued a $7,500 fine. *Id.* The Michigan Court of Appeals affirmed. *Id.* at *11.

2. Freshub, Inc. v. Amazon.com Inc., 576 F. Supp. 3d 458 (W.D. Tex. 2021)

In this patent infringement action, a jury trial ultimately led to a complete victory for Defendant Amazon.com, Inc. and its related entities ("Amazon"). *Freshub, Inc. v. Amazon.com Inc.,* at 461. Following the jury verdicts, Plaintiff Freshub, Inc. ("Freshub") filed motions for judgment as a matter of law and for a new trial. The court denied the motion for judgment as a matter of law, and that motion and its disposition is not relevant to the sanctions in this case. *Id.* at 467.

In arguing that it was entitled to a new trial, Freshub raised arguments that the court interpreted as implying it (i.e., the court) acted improperly. *Id*. Specifically, Freshub, an Israeli company, asserted that Amazon "played on the stereotype of greedy Jewish executives of an Israeli company allegedly taking advantage of U.S. companies, to trigger religious biases and deepen the 'us v. them' nationalistic divide in the minds of jurors." *Id.* at 465. The court noted that Freshub asserted these stereotypes were relied on "throughout trial" and "at every opportunity," but Freshub's counsel did not once make an objection on such a basis. *Id.* at 466. The court noted that Freshub was asserting "at least implicitly, that the [c]ourt must grant a new trial to preserve its own integrity and public reputation" as the motion "essentially accuses the Court of turning a blind eye to Defendants' highly prejudicial" arguments. *Id.* The Court held a hearing on the motion, and it noted that Freshub "could not point to any concrete evidence—or indeed, any evidence at all—that [Amazon] made arguments that intentionally played into Freshub's Israeli ties or any Freshub witnesses' race, heritage, or religion." *Id.*. In denying the motion for a new trial, the court noted that Freshub's "vitriolic and unsubstantiated allegations are not only shocking, but also offensive to this Court." *Id.* at 467. The court then imposed sanctions on all attorneys who signed Freshub's motion for a new trial. *Id*.

3. Standing Committee on Discipline of United States Dist. Ct. For C.D. Cal. v. Yagman, 55 F.3d 1430 (1995)

Stephen Yagman, a civil rights attorney known for his outspoken criticism of judges, was suspended from practicing in the U.S. District Court for the Central District of California. The suspension stemmed from his public and written remarks about Judge William Keller, which were deemed to impugn the integrity of the court and interfere with judicial administration.

Yagman had a history of contentious interactions with Judge Real and Judge Keller, including prior sanctions and disqualification motions. He made inflammatory statements about Judge Keller, including accusations of anti-Semitism and being "drunk on the bench." He sent a harshly worded letter to Prentice Hall for a judicial profile and placed an ad soliciting complaints about Keller. Yagman allegedly admitted to another attorney that his goal was to provoke Keller into recusing himself from future cases.

Judge Keller referred Yagman to the California State Bar for disciplinary action, which issued a Petition for Issuance of an Order to Show Cause why Yagman should not be suspended from practice or otherwise disciplined. The matter was assigned to a 3-judge panel of the Central District of California. The court considered evidence and argument as to whether Yagman's statements violated the local rule, C.D. Cal. R. 2-5.2, which prohibits any conduct that "degrades or impugns the integrity of the Court" or "interferes with the administration of

justice." In addition, the court considered Yagman's First Amendment challenge. The Central District Court sanctioned Yagman.

The U.S. Court of Appeals for the Ninth Circuit overturned the disciplinary ruling against Yagman. In so doing, the Court adopted an objective malice standard from *Standing Committee on Discipline of United States Dist. Ct. for the Eastern District of Washington v. Sandlin*, 12 F.3d 861 (9th Cir. 1993), which interpreted the rule as prohibiting only false statements made with either knowledge of their falsity or with reckless disregard as to their truth or falsity judged from the standpoint of a "reasonable attorney." *Id.* at 867. As explained by the *Yagman* Court,

> [T]here are significant differences between the interests served by defamation law and those served by rules of professional ethics. Defamation actions seek to remedy an essentially private wrong by compensating individuals for harm caused to their reputation and standing in the community. Ethical rules that prohibit false statements impugning the integrity of judges, by contrast, are not designed to shield judges from unpleasant or offensive criticism, but to preserve public confidence in the fairness and impartiality of our system of justice. *See* In re Terry, 271 Ind. 499, 394 N.E.2d 94, 95 (1979); In re Graham, 453 N.W.2d 313, 322 (Minn. 1990).

Yagman, 55 F.3d at 1437, citing *Sandlin.* The Yagman Court found that Yagman's claim that Judge Keller sanctioned Jewish lawyers was factual and not proven false. His opinion that Keller was anti-Semitic was based on disclosed facts and thus protected. The court emphasized that while attorneys may criticize judges, they must do so with factual integrity to preserve public confidence in the judiciary.

***In re Mire,* 197 So. 3d 656 (La. 2016)** Christine M. Mire represented clients in family law cases before Judge Phyllis Keaty who presided over family law matters in state court in Louisiana. In one case, *McNabb v. McNabb,* 45 So.3d 1087 (La. 2010), Mire filed a motion to recuse Judge Keaty, on grounds of bias and incompetence. Judge Keaty recused herself in the McNabb matter without assigning her reasons for recusal. The merits of the case were appealed. One of the issues focused on whether the appeal should be considered de novo because of the recusal, which occurred after the ruling on the merits, or pursuant to a "manifest error" standard. The Court of Appeal found the record insufficient as to the impact of the recusal on the merits, concluding that the issue was not properly before the Court of Appeal. Ultimately, Mire appealed the Court of Appeal's ruling to the Louisiana Supreme Court.

In another case, Mire was representing an ex-husband in a custody, visitation, and support proceeding before Judge Keaty concurrent with the *McNabb* representation discussed above. In that case, *Hunter v. Hunter,* Judge Keaty disclosed a relationship between herself and her family on the one hand and the ex-wife and the ex-wife's family on the other hand. Mire did not object at that time but later became concerned that Judge Keaty was biased in favor of the ex-wife. In addition, Mire discovered some additional connections between the judge's family and the ex-wife's family, which she believed made Judge Keaty's earlier disclosure inadequate. At the request of her client, the ex-husband, Mire moved for Judge Keaty to recuse herself, alleging: (1) Judge Keaty failed to fully disclose the extent of the relationship between herself and her family and the ex-wife and her family; (2) Judge Keaty indicated that she would not follow the

law regardless of the evidence presented at trial [relating to the use of Worksheet "B" in shared custody arrangements]; and (3) the manner in which the case had been handled, the rulings made, and the deference given to the ex-wife over the ex-husband all manifested a bias or prejudice in favor of the ex-wife.

Judge Keaty took the recusal motion under advisement and stayed the proceedings. Mire contacted the court reporter to obtain transcripts of three prior hearings. Mire claimed that one of them contained a statement not made at the hearing. Mire obtained the court reporter's tapes and had them analyzed, but the court never made any factual findings regarding any alleged alterations to the hearing transcript.

The events culminating in the recusal motion in the *Hunter* case had transpired prior to Mire's appeal in the *McNabb* case to the Louisiana Supreme Court. Mire's writ of application to the Louisiana Supreme Court stated:

> This case personifies the double edged sword of Justice. This case highlights the unfavorable consequences of the legal profession—incompetence and/or corruption of its members. Undeniably, the people who are elected to uphold the higher purpose of the law sometimes go their own way and believe that the people's vested power is their own. The general public assumes that the vast majority of our legal community believes that no one does more harm to the legal system than one who has the name and rank of honor while he/she acts perversely. Unfortunately, this case also exemplifies an additional and more horrifying issue—the tolerance and indifference of other judges, the Court of Appeals and other officers of the court who did nothing to help the financial and emotional pain of family law litigants and the most innocent of all victims—Stanford McNabb's children.
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> The corruption and/or incompetence of attorneys and judges in this case is not only a systemic problem; it is an opportunity for reparation for Stanford McNabb and everyone who was victimized by a system designed to protect their rights.
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> * * *
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> Stanford McNabb drives past Judge Phyllis M. Keaty's billboards and signs which advertise her desire to be the next member of the lower court which recently issued a decision contrary to the panels' [sic] statements at oral argument, the record, and the law. Although the lower court which affirmed the egregious actions of the trial court is the same court Judge Keaty is actively campaigning to sit upon, Stan did not presume wrongdoing. Rather, Stan presumed that the lower court's opinion was a mistake since it was contrary to the panels' [sic] statements at oral argument. However, when the rehearing was denied, a mistake became difficult to defend. This Honorable Court should consider this case from the vantage point of a litigant or outside third party. There are two plausible

> explanations: 1.) The lower court inadvertently issued an opinion written prior to oral argument. When Stan gently alerted them to the fact that the Motion and Order of Recusal was part of the record, the panel was confused and/or did not remember the oral argument of the matter and therefore again inadvertently denied rehearing; or 2.) The lower court wants to cover up the egregious actions of the trial court so it cannot be used in the current election. Either way this Court's active intolerance of such incompetence and/or corruption is essential to restore integrity to the judicial system.

In re Mire, 197 So. 3d at 659.

The Louisiana Supreme Court did not consider the *McNabb* writ, because it was not timely filed. However the Louisiana Supreme Court expressed concerns with the language used in the writ application. Nevertheless, Mire distributed the same by e-mail to friends and colleagues in the local bar association.

A disciplinary proceeding was initiated against Mire for her statements in the writ of application. The disciplinary committee alleged that Mire's conduct violated Louisiana Rules of Professional Conduct, specifically Rules 3.1 (meritorious claims and contentions), 3.2 (failure to make reasonable efforts to expedite litigation), 3.5(d) (a lawyer shall not engage in conduct intended to disrupt a tribunal), and 8.2(a) (a lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge). At the disciplinary hearing, the disciplinary committee heard evidence about the recordings made of the trial proceedings in the *Hunter* action, to which Mire had referred in the writ of application in the *McNabb* matter. In addition, the disciplinary committee considered a separate issue relating to an order to refund a client fee in an entirely unrelated case.

The disciplinary committee ultimately determined that Mire's derogatory statements about the judges in the *McNabb* writ of application were false and were made with reckless disregard for the truth, and furthermore, the frivolous allegations of incompetence and/or corruption were prejudicial to the effective administration of justice and were intended to disrupt and delay. The disciplinary board ultimately recommended that Mire be suspended from the practice of law for one year and one day, with six months deferred, followed by a two-year period of unsupervised probation with the condition that she attend the Louisiana State Bar Association's Ethics School. Additionally, the board recommended that Mire be assessed with all costs and expenses of these proceedings.

The Louisiana Supreme Court reviewed the matter to determine whether the alleged misconduct had been proven by clear and convincing evidence. The Court focused on the statements about the "incompetence and/or corruption" of the members of the legal profession and the suggestion that the court of appeal wanted "to cover up the egregious actions of the trial court so it cannot be used in the current election." *Mire,* 197 So. 3d at 659. The Court concluded that Mire's actions violated Louisiana Rule 8.2(a), finding objective evidence that Mire either knew her statements were false or made them with reckless disregard for the truth. One dissenter cautioned against creating "an environment in which an attorney, who is duty-bound to report

concern about our judicial system, will become too timid in lodging a concern due to fear of being disciplined." *Id.* at 670.

B. ETHICAL DUTIES IMPLICATED WHEN LAWYERS TAKE AIM AT JUDGES' DECISIONS AND ACTION

There are four rules with particular relevance to determining when a lawyer steps over the ethical lines when taking aim at judges: ABA Model Rules 8.2(a), 3.4(c), 3.5(d) and 8.4(d).

1. ABA Model Rule 8.2(a)

Under ABA Model Rule 8.2(a), lawyers are prohibited from making statements about a judge's qualifications or integrity that they know to be false or that they make with reckless disregard for the truth. Violations can lead to disciplinary action. Comment [1] to ABA Rule 8.2(a) explains the importance of this rule:

> Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

A lawyer accused of violating a state's version of ABA Model Rule 8.2(a) will undoubtedly raise First Amendment-based defenses. While the First Amendment does come into play, the Rule 8.2(a) restrictions on lawyer free speech have withstood constitutional challenge. *See In re Snyder*, 472 U.S. 634 (1985) ("The license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice"); *Fla. Bar v. Ray*, 797 So. 2d 556 (Fla. 2001) (rules prohibiting lawyers from impugning integrity of judges are not designed to protect judges from criticism, but to preserve public confidence in fairness of justice system), cert. denied, *Ray v. Fla. Bar*, 535 U.S. 930 (2002).

The U.S. Supreme Court has held that the First Amendment protects a lawyer from civil or criminal liability for derogatory statements about judges unless the lawyer speaks "with 'actual malice'— that is, with knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *Garrison v. Louisiana*, 379 U.S. 64 (1964) (citation omitted). The U.S. Court of Appeals for the Ninth Circuit discussed the "actual malice" standard at length in *Yagman,* 55 F.3d 1430, citing its discussion in *Sandlin,* 12 F.3d 861:

> Though the language of the rule closely tracked the *New York Times* malice standard, we held that the purely subjective standard applicable in defamation cases is not suited to attorney disciplinary proceedings. Instead, we held that such proceedings are governed by an objective standard, pursuant to which the court must determine "what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances." The

> inquiry focuses on whether the attorney had a reasonable factual basis for making the statements, considering their nature and the context in which they were made.
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> . . .
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> *Sandlin* held that an objective malice standard strikes a constitutionally permissible balance between an attorney's right to criticize the judiciary and the public's interest in preserving confidence in the judicial system: Lawyers may freely voice criticisms supported by a reasonable factual basis even if they turn out to be mistaken.

Yagman, 55 F.3d at 1437-38 (citations omitted).

The *Yagman* court applied an analysis that considered if (1) disciplinary authority proves criticism was false statement of fact, or was statement of opinion that necessarily implied undisclosed assertion of fact; and (2) lawyer acted with actual malice— that is, with knowledge of or in reckless disregard of its falsity:

> Attorneys who make statements impugning the integrity of a judge are, however, entitled to other First Amendment protections applicable in the defamation context. To begin with, attorneys may be sanctioned for impugning the integrity of a judge or the court only if their statements are false; truth is an absolute defense. *See Garrison v. Louisiana,* 379 U.S. 64, 74, 85 S.Ct. 209, 215, 13 L.Ed.2d 125 (1964). Moreover, the disciplinary body bears the burden of proving falsity. *See Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 776-77, 106 S.Ct. 1558, 1563-64, 89 L.Ed.2d 783 (1986); *Porter,* 766 P.2d at 969.
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> It follows that statements impugning the integrity of a judge may not be punished unless they are capable of being proved true or false; statements of opinion are protected by the First Amendment unless they "imply a false assertion of fact." *See Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 19, 110 S.Ct. 2695, 2706, 111 L.Ed.2d 1 (1990); *Lewis v. Time, Inc.,* 710 F.2d 549, 555 (9th Cir. 1983); Restatement (Second) of Torts § 566 (1977) (statement of opinion actionable "only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion"). Even statements that at first blush appear to be factual are protected by the First Amendment if they cannot reasonably be interpreted as stating actual facts about their target. *See Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 50, 108 S.Ct. 876, 879, 99 L.Ed.2d 41 (1988). Thus, statements of "rhetorical hyperbole" aren't sanctionable, nor are statements that use language in a "loose, figurative sense." *See National Ass'n of Letter Carriers v. Austin,* 418 U.S. 264, 284, 94 S.Ct. 2770, 2781, 41 L.Ed.2d 745 (1974) (use of word "traitor" could not be construed as representation of fact); *Greenbelt Coop. Publishing Ass'n v. Bresler,* 398 U.S. 6, 14, 90 S.Ct. 1537, 1541, 26 L.Ed.2d 6 (1970) (use of word "blackmail" could not have been interpreted as charging plaintiff with commission of criminal offense).

Id., 55 F.3d at 1438.

2. ABA Model Rule 3.4(c)

Under ABA Model Rule 3.4(c), a "lawyer shall not: . . . (c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists." This rule provides a "hook" for potential professional discipline when a lawyer's conduct transgresses statutes or rules applicable in a tribunal. That could include disobeying a court order or rules and statutes defining when a court may sanction a lawyer. It could also include local rules adopting a standard of civility.

3. ABA Model Rule 3.5(d)

Pursuant to ABA Model Rule 3.5(d), a "lawyer shall not: . . . (d) engage in conduct intended to disrupt a tribunal." Comment [5] to this rule makes clear that the "duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition." Comment [4] explains:

> The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

Notwithstanding the language focusing on a tribunal, this rule has even been applied relative to conduct that was not in the courtroom. *See, e. g., Fla. Bar v. Wasserman*, 675 So. 2d 103 (Fla. 1996) (profane out-of-court statements to judicial assistant and contemptuous behavior toward judge during hearing). Moreover, it has been extended to pleadings, briefs, and even e-mails to the court. *See, e.g*., *In re Oladiran*, No. MC-10-0025-PHX-DGC, 2010 WL 3775074, at *1-2, 4 (D. Ariz. Sept. 21, 2010) ("motion for an honest and honorable court system" referring to judge as "Dishonorable" and a "brainless coward" was "abusive, obstreperous, and disrupted the proceedings"); *In re Shearin*, 721 A. 2d 157 (Del. 1998) (appellate brief contained personal attacks on trial judge and suggested judge had been bribed by opponent); *Hancock v. Bd. of Prof. Responsibility of Supreme Court of Tenn.,* 447 S.W. 3d 844, 853 (Tenn. 2014) (e-mail to judge after denial of fee petition with "threatening tone" was "abusive" and "obstreperous" conduct).

4. ABA Model Rule 8.4(d)

See discussion in Section III(B)(7) above.