THE USE OF STATE DISCIPLINE TO SANCTION ATTORNEYS GENERAL AND OTHER HIGH-RANKING LEGAL OFFICERS

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ABSTRACT

The United States Attorney General, state attorneys general, and high-ranking officials in their offices, like all lawyers, are subject to rules of professional conduct. Increasingly, when they push the boundaries of these rules and other well-established professional norms, individuals and organizations are filing state lawyer disciplinary grievances against them. While some see troubling conduct by these high-ranking government officials, others view these disciplinary grievances as politically motivated. State lawyer disciplinary authorities often try to avoid addressing these grievances. This article examines why it is nonetheless important for state lawyer disciplinary authorities—which are agencies of state courts—to act on certain grievances. It explains why the political process cannot be relied upon to respond to serious misconduct by these high-ranking legal officers, and why other institutions that could address misconduct are ill-equipped or unlikely to act. The article then describes developments in one state that make it more difficult for some grievants to file actionable grievances and for state disciplinary authorities to pursue certain grievances against these high-ranking officials. It explains why these developments are misguided. It then suggests some ways to accommodate the concerns and competing interests at stake when state disciplinary authorities receive grievances against these officials. The article also identifies some types of professional misconduct by these officials that are sufficiently problematic that state disciplinary authorities should act to address those grievances.

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INTRODUCTION

The United States Attorney General, state attorneys general, and high-ranking officials in their offices are almost always lawyers. When, if ever, should they be subject to state lawyer discipline for violations of the rules of professional conduct? This has become an important question in the face of recent efforts to initiate state disciplinary proceedings against these officials. United States Attorney General Pamela Bondi, acting assistant U.S. Attorney General Emil Bove, and acting U.S. Attorney Edward Martin (among others) have been the subject of state lawyer grievances.[1] So, too, have several state attorneys general and their deputies.[2] The rules of professional conduct, which serve as the basis for lawyer discipline, make no exception for lawyers who hold political office. Nor do they

[1] *See* Letter from Jon May et al. to the Florida Bar (June 5, 2025) (describing grievances against Bondi); Emily Saul, *"No Further Action": State Grievance Committee Reportedly Punted on Emil Bove Investigation*, LAW.COM (Sept. 4, 2025), https://www.law.com/njlawjournal/2025/09/05/no-further-action-state-grievance-committee-repeatedly-punted-on-emil-bove-investigation/; Sara N. Lynch, *Top Trump Prosecutor in DC Faces Bar Complaint for Dismissing January 6 Charges Against Client,* REUTERS (Feb. 6, 2025), https://www.reuters.com/world/us/top-trump-prosecutor-dc-faces-bar-complaint-dismissing-january-6-charges-against-2025-02-06/.

[2] *See* Monica Obradovic, *Hazelwood schools files ethics complaint against AG Bailey over DEI investigation*, ST. LOUIS POST-DISPATCH (May 2, 2024), https://www.stltoday.com/news/local/education/hazelwood-schools-files-ethics-complaint-against-ag-bailey-over-dei-investigation/article_518f7ca0-07d2-11ef-a43d-9f3e0e63bf97.html; John Hult, *State Supreme Court suspends law license of former attorney general for six months*, S. DAK. SEARCHLIGHT (Sept. 19, 2024), https://southdakotasearchlight.com/2024/09/19/state-supreme-court-suspends-law-license-of-former-attorney-general-for-six-months/; *infra* notes 23, 215, 303, 320, 359 and accompanying text (describing recent grievances or disciplinary proceedings against attorneys general in Idaho, Indiana, Missouri, Montana, New York, South Dakota, and Texas). At one point, half of all Republican state attorneys general had grievances pending against them. Joy Pullmann, *Effective Republican Attorneys General Get Slapped with Politicized Ethics Charges* (Feb. 5, 2024), FEDERALIST, https://thefederalist.com/2024/02/05/effective-republican-attorneys-general-get-slapped-with-politicized-ethics-charges/.

exempt other high-ranking officials in the Department of Justice (DOJ) or the offices of state attorneys general.[3]

Presidents, members of Congress, federal and state attorneys general, and other high-level officials have been subject to state lawyer discipline when they commit crimes.[4] But the filing of disciplinary grievances against attorneys general and other high-ranking legal officers—for reasons other than convictions—seem to be increasing.[5] It is difficult to quantify the increase, because most jurisdictions treat grievances as confidential, at least until there is a probable cause determination.[6] Yet it appears that starting in 2020, due in part to the efforts of organizations such as The 65 Project, which publicize the grievances it files, attorneys

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[3] *See* Hannah Rabinowitz, *Board Recommends that Trump White House Official Jeffrey Clark be Disbarred for Efforts to Overturn 2020 election*, CNN (July 31, 2025), https://www.cnn.com/2025/07/31/politics/jeffrey-clark-dc-bar (describing discipline recommended for former acting U.S. Assistant Attorney General for violations of professional conduct rules).

[4] President Richard Nixon was disbarred for his criminal conduct in connection with the Watergate scandal. Tom Goldstein, *New York Court Disbars Nixon for Watergate Acts*, N.Y. TIMES, July 9, 1976, at 1. So, too, was John Mitchell, Nixon's Attorney General. Morris Kaplan, *Mitchell Disbarred as Lawyer in State*, N.Y. TIMES, July 4, 1975, at 1. President Bill Clinton agreed to a five-year suspension of his law license to avoid prosecution for lying under oath while in office. *Clinton Admits He "Misled," Avoids Indictment*, PBS NEWS (Jan. 19, 2001), https://www.pbs.org/newshour/politics/white_house-jan-june01-clinton_01-19. Likewise, U.S. Senator Robert Menendez, Governor Rod Blagojevich, and Pennsylvania Attorney General Kathleen Kane were disciplined for criminal conduct committed while in office. *See* David Wildstein, *Menendez Loses Law License, Temporarily*, N.J. GLOBE (Nov. 18, 2024), https://newjerseyglobe.com/judiciary/menendez-loses-law-license-temporarily/; Jason Meisner, *Convicted Ex-Governor Rod Blagojevich Officially Disbarred*, CHI. TRIB. (May 18, 2020), https://www.chicagotribune.com/2020/05/18/convicted-ex-gov-rod-blagojevich-officially-disbarred/; Matt Miller, *Jailed Ex-Attorney General Kathleen Kane is Disbarred by Pa. Supreme Court*, PENNLIVE (Mar. 22, 2019), https://www.pennlive.com/news/2019/03/jailed-ex-attorney-general-kathleen-kane-is-disbarred-by-pa-supreme-court.html.

[5] The term "grievance" is used in this article to mean the initial allegation of lawyer misconduct that is submitted by an individual or organization to disciplinary authorities.

[6] *See* Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS, 1, 19 (2007). For instance, even though knowledgeable observers believed that a grievance was likely filed against Attorney General Alberto Gonzales in 2007 for alleged misconduct while in office, it was not possible to determine whether this occurred. *See* Michael Roston, *Legal Ethics Expert: Gonzales Likely Under Investigation by State Bar*, HUFFPOST (Sept. 18, 2007), https://www.huffpost.com/entry/texas-legal-ethics-expert_n_64790.

general and other high-ranking officials they direct have increasingly become the target of disciplinary grievances.[7]

Of course, a grievance merely alerts state disciplinary authorities to the possibility of lawyer misconduct. These authorities, which are arms of state courts,[8] then decide whether to proceed with an investigation and hearing. If disciplinary authorities find that misconduct occurred, they can typically seek to impose a lesser sanction, such as a public reprimand. The lawyer can object to this sanction and ask a court to review the matter.[9] Where a more serious sanction seems appropriate, courts will typically decide the sanction.[10]

It is important for the U.S. attorney general, state attorneys general, and other high-ranking legal officers to be subject to, and conform to, certain basic lawyer norms and rules of professional conduct. Until recently, this has been relatively uncontroversial.[11] If these officials are not required to comply with these rules—or subject to consequences when they refuse—this may embolden officials to continue to flout them.[12] Moreover, these high-ranking legal officers set the norms and expectations for professional rule compliance in their offices.[13] Their failure to adhere to professional conduct rules invites other lawyers in their offices to similarly disregard the rules. This can, in turn, encourage disrespect for the

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[7] *See Ethics Complaints*, 65 PROJECT, https://the65project.com/ethics-complaints/. The 65 Project was formed after the 2020 presidential election to "hold accountable the lawyers who raise fraudulent claims to overturn legitimate elections results. *See About Us*, 65 PROJECT, https://the65project.com/about/. For another organization that publicizes the grievances it files, see *Our Work*, LAWS. DEFENDING AM. DEMOCRACY, https://ldad.org/letters-briefs.

[8] *See, e.g., Office of Chief Disciplinary Counsel*, https://mochiefcounsel.org/; Levin, *supra* note 6, at 17.

[9] *See* MODEL RULES FOR LAW. DISCIPLINARY ENF'T r. 11(F) (AM. BAR ASS'N 2002); UTAH CODE JUD. ADMIN. Rule 11-534(b) (2020).

[10] *See, e.g.,* N.Y. COMP. CODES R. & REGS. tit. 22, § 1240.8(b)(1) (2018).

[11] *See* U.S. DEPARTMENT OF JUSTICE MANUAL § 1-4.1100, U.S. DEPT. OF JUST. (2021), https://www.justice.gov/jm/jm-1-4000-standards-conduct#1-4.110 (stating that DOJ employees are expected to be aware of, and to comply with, all ethics-related laws, including the bar rules of the jurisdiction); Webster v. Comm'n for Law. Discipline, 704 S.W.3d 478, 402 (Tex. 2024) (noting that the Texas first assistant attorney general "does not dispute that he is bound by the disciplinary rules, which indeed bind all lawyers").

[12] *See* Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 772 (2001) (noting that when disciplinary agencies fail to enforce rules against a segment of the bar, "they encourage disrespect for the codes' letter and spirit").

[13] *See, e.g*., Ellen Yaroshefsky & Bruce A. Green, *Prosecutors' Ethics in Context: Influences on Prosecutorial Disclosure*, in LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 269, 282-83 (Leslie C. Levin & Lynn Mather eds. 2012).

rules among the lawyers who litigate against them.[14] When these high-ranking legal officers do not comply with important professional norms and conduct rules, this can also undermine public confidence in these officials, their offices, and potentially, other government institutions.[15] Their actions can threaten the legitimacy of our legal system and the rule of law.

This article examines the use of state lawyer disciplinary processes against the highest level federal and state legal officers in this country. This includes the pursuit of state lawyer discipline against the U.S. attorney general and other high-level DOJ lawyers nominated by the president, including the deputy and assistant U.S. attorneys general and the ninety-four U.S. attorneys. It also addresses efforts by state lawyer disciplinary agencies to proceed against state attorneys general and the highest-level lawyers in their offices, such as the first assistant attorney general or chief deputy.[16]

The U.S. attorney general is considered the chief law enforcement officer in the federal system.[17] Some state attorneys general do not have broad prosecutorial authority and are better described as the state's chief legal officer. For this reason, the term "high-ranking legal officer" is used here to describe these lawyers collectively.

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[14] *See* Zacharias, *supra* note 12, at 772.

[15] Admittedly, not everyone will lose confidence. Some will be unaware of the officials' non-compliance with professional conduct rules. Others, for partisan reasons, will likely approve of the conduct and will be unconcerned that the conduct may constitute serious violations of professional conduct rules.

[16] The article does not examine state lawyer discipline directed at lower-level prosecutors because this is already an established, although relatively infrequent practice. As the U.S. Supreme Court has noted, "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." Imbler v. Pachman, 424 U.S. 409, 429 (1976). Likewise, it does not examine efforts to discipline elected district attorneys, which is also an accepted practice in most jurisdictions. *See, e.g., DA Disbarred for Sending Texas Man to Death Row,* CBS NEWS (June 12, 2015), https://www.cbsnews.com/news/charles-sebasta-prosecutor-of-wrongfully-convicted-man-anthony-graves-loses-law-license/; David Sutor, *Somerset County's Thomas latest Pennsylvania DA to face legal issues*, TRIB.-DEMOCRAT (Sept. 23, 2021) (identifying two county district attorneys who recently had been disciplined); Andrew Strickler, *Calif. DA Convicted of Perjury Gets Interim Suspension*, Law360 (July 31, 2017), https://www.law360.com/articles/949880. At least one state has legislation that provides for a replacement when the district attorney is suspended or disbarred. 16 PA. CONS. STAT. § 1401(b) (2024).

[17] *Office of the Attorney General*, U.S. DEPT. OF JUST., https://www.justice.gov/ag#:~:text=About%20the%20Office,for%20enforcement%20of%20federal%20laws.

While there are important differences between these federal and state officials, there are enough similarities to warrant examining together the questions raised when state lawyer disciplinary authorities receive grievances against these officials. As the highest-ranking legal officers of the federal or state government, they operate within the executive branch of their jurisdictions. The types of investigative and law enforcement work their offices perform on the civil side are often similar, although this is less true of criminal matters.[18] The institutional damage they can do when they fail to comply with professional rules and norms is virtually identical, although misconduct by the U.S. attorney general and high-ranking DOJ officials may be more widely observed and have more far-reaching repercussions.[19] As executive branch actors with broad authority and discretion, both have raised separation of powers arguments to resist efforts by courts and state disciplinary agencies to impose discipline on them. They have relied on some of the same case law and arguments to do so.[20]

Two preliminary points deserve emphasis. First—and this is no secret—the work of some high-ranking DOJ officials and state attorneys general's offices has become highly politicized. Long-established norms of independence and non-partisanship have been discarded.[21] At the same time, disciplinary grievances filed against these high-ranking officials are also viewed, by some, as politically motivated.[22] High-level Republican officials have been the subject of most of the recently publicized grievances, but this is not a one-way street. For example, Stephen Miller's America First Legal and Republican Congresswoman Elise Stefanik filed separate disciplinary grievances against New York Attorney General Letitia James, who prosecuted Donald Trump.[23] American Accountability

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[18] High-ranking DOJ lawyers have responsibility for prosecuting a broader range of crimes than do state attorneys general in most jurisdictions. *See infra* notes 49, 78 and accompanying text.

[19] State attorneys general are increasingly litigating on the national stage, however, and their conduct can also potentially have significant national effects. *See infra* notes 211, 290. *See also* Katherine Hamilton, *Attorneys General Sign $7.4 Billion Purdue Pharma Opioid Settlement*, WALL ST. J. (June 16, 2025), https://www.wsj.com/health/pharma/attorneys-general-sign-7-4b-purdue-pharma-opioid-settlement (describing settlement that provided every state with funds for opioid addiction treatment and prevention).

[20] DOJ lawyers have also sought to avoid state lawyer discipline on federalism grounds.

[21] *See, e.g.*, Sarah N. Lynch, *Under Attorney General Bondi, critics see a Justice Dept carrying out Trump's revenge tour*, Reuters (Sept. 16, 2025), https://www.reuters.com/legal/government/under-attorney-general-bondi-critics-see-justice-dept-carrying-out-trumps-2025-09-16/.

[22] *See, e.g.,* Pullmann, *supra* note 2.

[23] *America First Legal Files Bar Complaint Against New York Attorney General Letitia James*, AM. FIRST LEGAL (Apr. 28, 2025), https://aflegal.org/america-

Foundation, a conservative watchdog group, filed a grievance against Fulton County District Attorney Fani Willis, who had sought to prosecute Trump for election interference.[24]

Second, most state disciplinary authorities have shown little appetite for investigating grievances filed against attorneys general and other high-ranking legal officers. When four former D.C. Bar presidents and other lawyers filed a grievance against former Attorney General William Barr for his handling of Special Counsel Robert Mueller's report and other alleged misconduct, the D.C. Office of Disciplinary Counsel declined to pursue the matter, stating "[i]n general, this Office will not intervene in matters that are currently and publicly being discussed in the national political arena."[25] The letter also cited the complainants' lack of personal knowledge of the events alleged, even though the DC Bar's rules contained no such requirement.[26] New York's First Department Attorney Grievance Committee declined to consider grievances against acting Assistant Attorney General Bove, claiming that the DOJ's Office of Professional Responsibility was "better suited" to investigate the matter even though it is obvious that the grievances will not be seriously considered in the current DOJ.[27] The Florida Bar recently declined to act on grievances filed against Attorney General Bondi, stating that it "does not investigate or prosecute sitting officers appointed under the U.S. Constitution while they are in office."[28] When disciplinary grievances

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first-legal-files-bar-complaint-against-new-york-attorney-general-letitia-james/; Megan Lebowitz, *Rep. Elise Stefanik Files Complaint Against new York Attorney General Letitia James Over Trump Case*, NBC NEWS (Feb. 13, 2025), https://www.nbcnews.com/politics/congress/rep-elise-stefanik-file-ethics-complaint-new-york-attorney-general-tru-rcna138503.

[24] Brianna Herlihy, *Fani Willis, Nathan Wade Referred to Georgia State Bar for Misconduct by Watchdog Group*, FOX5 ATLANTA (Feb. 29, 2024), https://www.fox5atlanta.com/news/fani-willis-nathan-wade-referred-to-georgia-state-bar-for-misconduct-by-watchdog-group.

[25] Letter from Angela Walker, Staff Attorney, D.C. Office of Disciplinary Counsel, to Gershon M. Ratner (Aug. 4, 2020), https://drive.google.com/file/d/1zWvvUcoCku6HNLeOSOsn4lj0M5PJ5HLq/view?pli=1.

[26] *Id.*

[27] *See* Saul, *supra* note 1; Letter from Jorge Dopico, Chief Att'y, First Dep't Att'y Discipline Comm., to Off. of Pro. Responsibility, U.S. Dept. of Just. (May 27, 2025), https://www.whitehouse.senate.gov/wp-content/uploads/2025/06/2025.0793-R-OA.pdf. For a discussion of why the DOJ cannot be relied upon to seriously consider such grievances, see *infra* Part II(C)(1).

[28] Letter from Allie F. Huston, Bar Counsel, Fla. Bar, to Deborah A. Wolfe (May 20, 2025) (on file with author). It further stated that such proceedings "could encroach on the authority of the federal government concerning these officials and the exercise of their duties. The Florida Supreme Court subsequently declined to

were filed against Texas First Assistant Attorney General Brent Webster for alleged misrepresentations in a U.S. Supreme Court filing, the state disciplinary authority initially declined to act on them.[29]

It is unsurprising that state disciplinary authorities want no part of these grievances. This article explains why it is nonetheless important for these authorities to act on the grievances and how they might address some of the legitimate concerns that arise when the disciplinary process is brought to bear on attorneys general and other high-ranking legal officers. Part I starts with a brief discussion of the history and responsibilities of these legal officers. It also describes the limited ways that misconduct by these officials can otherwise be addressed. Part II demonstrates why the political process cannot be relied upon to address professional misconduct by these high-level officials. It then looks at the institutions that might respond to misconduct and evaluates their power to act and likely efficacy. It explains why state lawyer disciplinary authorities are often better positioned to address misconduct by these high-ranking legal officers than the other alternatives.

Part III turns to recent developments in one jurisdiction that make it harder for state lawyer disciplinary authorities to do this work. It describes a Texas law enacted to combat the perceived "weaponization" of the state disciplinary process that makes it more difficult to file actionable disciplinary grievances.[30] Then in 2024, the Texas Supreme Court ruled on separation of powers grounds that the state disciplinary authority could not pursue a discipline case against the First Assistant Attorney General for alleged misrepresentations in initial pleadings challenging the outcome of the 2020 presidential election.[31] Instead, in *Webster v. Commission for Lawyer Discipline*, the court held that only the court before which the initial pleadings were filed could consider whether discipline should be imposed. The problems with *Webster's* approach—which high-level legal officers are urging other courts to adopt—are discussed. Part IV attempts to identify a better path forward. It first explains why cutting off actionable grievances, as Texas has done, is not a good solution. It then suggests how grievances against attorneys general and other high-ranking legal officers could be evaluated, processed, and resolved by lawyer disciplinary authorities to help address concerns about the perceived weaponization of grievances and to accommodate the competing interests at stake. It identifies some categories of misconduct allegations on which, at a minimum, state disciplinary authorities should act. It concludes by

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require the Florida Bar to act. Order, May v. Fla. Bar, SC2025-1020 (Fla. Sup. Ct. Oct. 13, 2025), https://www.law360.com/articles/2399198/attachments/0/

[29] Its decision was reversed, and it was later required to act. *See infra* notes 228-30 and accompanying text.

[30] TEX. GOV'T CODE § 81.073(a) (2024).

[31] Comm'n for Lawyer Discipline v. Webster, 704 S.W.3d 478, 503-04, 506 (Tex. 2024).

emphasizing the importance of state disciplinary authorities acting on grievances filed against high-ranking legal officers in appropriate cases.

I. HISTORY, RESPONSIBILITIES, AND CONSTRAINTS

The United States Attorney General and state attorneys general in almost half the states are not required to be admitted to practice.[32] Nevertheless, for more than a century, the U.S. attorney general has been admitted to practice and the current state attorneys general are all licensed lawyers.[33] Other high-ranking lawyers in the DOJ and in most state attorneys general offices are required to be admitted to practice.[34] This Part briefly provides some salient background about these officials.

A. THE U.S. ATTORNEY GENERAL AND HIGH-RANKING DOJ OFFICIALS

The Office of the United States Attorney General was established by the Judiciary Act of 1789.[35] At the time, his responsibilities were limited to advising the president and members of the administration on the law and representing the interests of the United States before the U.S. Supreme Court.[36] The Act identifies the Attorney General's client as the United States, not the president or the executive branch.[37] In 1870, Congress made the Attorney General head of the DOJ.[38] The legislation also gave the Attorney General exclusive supervisory responsibilities over the district attorneys (now known as United States Attorneys).[39] Today, the Attorney General oversees ninety-four U.S. Attorneys offices and more than forty separate organizations with law enforcement and other responsibilities.[40]

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[32] *See* Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning there was Pragmatism*, 1989 DUKE L.J. 561, 566 (1989) (describing requirement that U.S. attorney general be "learned in the law"); *Attorney General Office Characteristics*, NAT'L ASS'N ATT'YS GEN., https://www.naag.org/news-resources/research-data/attorney-general-office-characteristics/.

[33] *Attorneys General of the United States*, U.S. DEPT. OF JUST., https://www.justice.gov/ag/historical-bios; *Find my AG*, NAT'L ASS'N ATT'YS GEN., https://www.naag.org/find-my-ag/.

[34] *See, e.g.,* U.S. DEPARTMENT OF JUSTICE MANUAL, *supra* note 11, at § 1-4.1100; ALA. CODE 1975 § 36-15-5.1(d) (2025).

[35] *See* Bloch, *supra* note 32, at 566.

[36] *Id.* at 566-67.

[37] *See* Nancy Virginia Baker, *History, Norms and Conflicting Loyalties in the Office of Attorney General,* 72 MERCER L. REV. 833, 836 (2021).

[38] ACT TO ESTABLISH THE DEPARTMENT OF JUSTICE, 16 STAT. 162 (1870).

[39] *Id*.

[40] *About DOJ*, U.S. DEPT. JUST., https://www.justice.gov/about; *Our Work*, U.S. DEPT. JUST., https://www.justice.gov/our-work.

The United States attorney general, deputy and assistant attorney generals, and U.S. attorneys are appointed by the president, subject to confirmation by the Senate.[41] The president has the power to remove these high-ranking legal officers, and Congress can remove them through the impeachment process for treason, bribery, or other high crimes and misdemeanors.[42] The administration's policy objectives typically inform the DOJ's enforcement priorities.[43] Nevertheless, the DOJ has traditionally operated somewhat independently of the president,[44] with some significant exceptions.

In fact, during the twentieth century, both parties eroded the U.S. attorney general's norms of political independence.[45] These trends contributed to "allowing some presidents to imagine the attorney general as the president's personal lawyer and fixer."[46] One of the most infamous examples was when U.S. Attorney General John Mitchell participated in the planning and cover-up of the Watergate scandal to assist President Nixon's reelection efforts. Mitchell was subsequently convicted of perjury and disbarred.[47] Since then, several U.S. attorneys general have sought to restore the DOJ's independence from the president, but others have not sought to maintain boundaries between the DOJ and the president.[48]

The Office of the U.S. Attorney General oversees the administration and operation of the DOJ, including, *inter alia*, the Federal Bureau of

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[41] U.S. GOVERNMENT, SEN. COMM. ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, POLICY AND SUPPORTING POSITIONS 89-99 (2024), https://www.govinfo.gov/content/pkg/GPO-PLUMBOOK-2024/pdf/GPO-PLUMBOOK-2024.pdf. This is also true of the U.S. Solicitor General. *Id*. at 99.
[42] U.S. CONST. ART II, sec. 4; Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Powers of Removal*, 136 HARV. L. REV. 1758, 1759-61 (2023).
[43] *See, e.g*., Memorandum from Brett A. Shumate, Assistant U.S. Att'y Gen., U.S. Dep't of Just., to All Civ. Div. Emps., U.S. Dep't of Just. (June 11, 2025), https://www.justice.gov/civil/media/1404046/dl?inline ("President Trump and Attorney General Bondi have directed the Civil Division to use its enforcement authorities to advance the Administration's policy objectives.").
[44] *See* Baker, *supra* note 37, at 841-43; *About DOJ*, *supra* note 40.
[45] Jed Handelsman Shugerman, *Professionals, Politicos, and Crony Attorneys General: A Historical Sketch of the U.S. Attorney General as a Case for Structural Independence*, 87 FORDHAM L. REV. 1965, 1966, 1971 (2019).
[46] *Id.* at 1966.
[47] Kaplan, *supra* note 4.
[48] *Compare, e.g.,* Pam Fessler, *Mukasey Vows Independence from White House*, NPR (Oct. 17, 2007), https://www.npr.org/2007/10/17/15340525/mukasey-vows-independence-from-white-house, *with* Memorandum from the Attorney General to All Department Employees (Feb. 5, 2025), https://www.justice.gov/ag/media/1388521/dl?inline (stating that DOJ attorneys' "refusal to advance good-faith arguments by declining to appear in court or sign briefs, it undermines the constitutional order and deprives the President of the benefit of his lawyers").

Investigation, the Drug Enforcement Administration, the Bureau of Prisons, the U.S. Attorneys' offices, and the U.S. Marshals Service.[49] The DOJ has seven litigating offices, including the civil, criminal, tax, and antitrust divisions.[50] Each of the ninety-four U.S. Attorneys offices also have criminal and civil divisions. There is one deputy attorney general, one associate attorney general, and currently six assistant attorneys general who are nominated by the president and confirmed by the Senate.[51] The DOJ employs more than 10,000 lawyers nationwide.[52]

Many laws, regulations, and rules govern the conduct of these lawyers, including the DOJ's own rules.[53] The DOJ has occasionally resisted the imposition of certain state rules of professional conduct on its lawyers. In 1989, Attorney General Richard Thornburgh, concerned about defense lawyers' claims that DOJ lawyers were violating state "no contact rules" when conducting some undercover operations, issued a memorandum stating that when conducting investigations, DOJ lawyers were not bound by state rules of professional conduct prohibiting contact with represented parties.[54] Thornburgh stated that the DOJ "will resist, on Supremacy Clause grounds, local attempts to curb legitimate federal law enforcement techniques."[55] In 1998, Attorney General Janet Reno elaborated upon and codified this position in regulations stating that "[t]he Attorney General shall have exclusive authority over this part and any violations of it."[56] In response, Congress passed the McDade Amendment, which superseded the DOJ regulations and provides that "[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages

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[49] *Agencies*, U.S. DEPT. JUST., https://www.justice.gov/agencies/chart/grid.
[50] *Id.*
[51] *See Nominations Confirmed*, U.S. SENATE, https://www.senate.gov/pagelayout/legislative/one_item_and_teasers/nom_confc.htm.
[52] *Office of Attorney Recruitment & Management*, U.S. DEPT. JUST., https://www.justice.gov/oarm#:~:text=Attorney%20Recruitment%20&%20Management-,About%20the%20Office,Learn%20More.
[53] U.S. DEPARTMENT OF JUSTICE MANUAL, *supra* note 11, at §§ 1-4.010, 1-4.100.
[54] Memorandum from Richard Thornburgh for All Justice Department Litigators Re Communications with Persons Represented by Counsel (June 8, 1989), *reprinted in In re* Doe, 801 F. Supp. 478, 489-93 (D. N.M. 1992). He was referencing ABA Model Code of Professional Responsibility 7-104(A)(1) and ABA Model Rules of Professional Conduct 4.2, which prohibit a lawyer from communicating with a person represented by counsel on the subject of the representation unless the lawyer has the consent of counsel or is authorized by law to do so.
[55] *In re* Doe, 801 F. Supp. at 486.
[56] 28 C.F.R. §§ 77.10(a), 77.11(a) (1998).

in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."[57]

The McDade Amendment potentially raises complicated questions under the Supremacy Clause and separation of powers principles about who can regulate federal prosecutors.[58] The DOJ has not successfully tested most of these questions, and courts have deferred to Congress's determination that DOJ lawyers shall be subject to state professional conduct rules.[59] Courts have, however, sometimes interpreted state professional conduct rules in ways that accommodate prosecutors' special needs.[60] Some courts have also concluded that the McDade Amendment applies only to state "ethics rules" and differentiates those rules from other substantive, procedural, or evidentiary obligations.[61] For the most part, however, the McDade Amendment has remained relatively undisturbed for more than twenty-five years.[62] So, too, has the view that states can impose discipline on federal prosecutors, although such discipline is rare.[63]

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[57] 28 U.S.C. § 530B(a) (1998). The regulation defining "attorneys for the Government" appears at 28 C.F.R. § 77.2 (1999). For a more detailed description of events leading up to the enactment of the McDade Amendment, see Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L. J. 207, 211-15 (2000).

[58] *See* Zacharias & Green, *supra* note 57, at 245-259. *See also* Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 387, 418-19, 437 (2002).

[59] *See e.g.*, U.S. v. Ky. Bar Ass'n, 439 S.W.3d 136, 143-44 (Ky. 2014); Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 879 (2012).

[60] *See* Green, *supra* note 59, at 879; Green & Zacharias, *supra* note 58, at 398-99.

[61] *See* Fred C. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory*, 56 VAND. L. REV. 1303, 1332 (2003).

[62] One exception is United States v. Supreme Court of New Mexico, 839 F.3d 888 (10th Cir. 2016). The court found that part of a state rule of professional conduct that limited a prosecutor's ability to subpoena a lawyer to provide testimony about a client in a grand jury was pre-empted because it conflicted with the U.S. Constitution's Grand Jury Clause and therefore violated the Supremacy Clause. *Id.* at 928.

[63] *See* Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 89-91 (1995); *see also In re* Kline, 113 A.3d 202, 215-16 (D.C. Ct. App. 2014) (declining to impose sanction on Assistant U.S. Attorney notwithstanding *Brady* violation). *But see* Rabinowitz, *supra* note 3; Kaplan, *supra* note 4. As a practical matter, regulators rarely impose discipline on any prosecutors. *See, e.g.,* Zacharias, *supra* note 12, at 722, 755; Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, OHIO STATE J. CRIM. L. 143, 155 (2016).

DOJ lawyers can also be criminally prosecuted for misconduct relating to their work, but this, too, occurs infrequently.[64] They are insulated by absolute immunity from civil suit when performing prosecutorial-type advocacy functions and have qualified immunity when performing other functions.[65] Federal courts can sanction the government for violations of Federal Rule of Civil Procedure 11 and other litigation misconduct,[66] but any monetary sanctions are typically assessed against the government and not DOJ lawyers.[67]

B. STATE ATTORNEYS GENERAL AND THEIR DEPUTIES

The Office of the Attorney General was brought to the colonies from England and existed in the thirteen original states.[68] The office is now established in most states' constitutions.[69] Some states made it part of the

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[64] *See, e.g.,* Arnold H. Lubasch, *Ex-Prosecutor Gets 3 Years in Drug Thefts*, N.Y. TIMES (Jan. 11, 1986), https://www.nytimes.com/1986/01/11/nyregion/ex-prosecutor-gets-3-years-in-drug-thefts.html; Jennifer Mason McAward, *Understanding* Brady *Violations*, 78 VAND. L. REV. 875, 896 (2025) (reporting that only two prosecutors—both state—have been convicted for *Brady* violations).

[65] *See* Imbler v. Pachtman, 424 U.S. 409, 424, 430 (1976) (finding that prosecutors have absolute immunity from civil suit brought under 28 U.S.C. § 1983 for conduct "intimately associated with the judicial phase of a criminal case"); Buckley v. Fitzsimmons, 509 U.S. 259, 273-74 (1993) (stating that when a prosecutor functions as an administrator or performs investigative functions normally performed by police, only qualified immunity is available); Cooper v. Parrish, 203 F.3d 937, 947 (6th Cir. 2000); Schrob v. Catterson, 948 F.2d 1402, 1411 (3d Cir. 1991) (noting that "absolute immunity is extended to officials when their duties are functionally analogous to those of a prosecutor, regardless of whether those duties are performed in the course of a civil or criminal action"). Where absolute immunity is not available, qualified immunity is the norm for executive branch officials when they face suit for unconstitutional conduct. *See* Buckley v. Fitzsimmons, 509 U.S. at 274; Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

[66] *See* Mattingly v. United States, 939 F.2d 816, 818 (9th Cir. 1991); Adamson v. Bowen, 855 F.2d 668, 672 (10th Cir. 1988).

[67] *See, e.g*., Smith v. Gilbert Realty Co., 34 F. Supp. 2d 527, 534 (E.D. Mich. 1998); Larkin v. Heckler, 584 F. Supp. 512, 513–14 (N.D. Cal. 1984); *but see* Mescal v. United States, 161 F.R.D. 450, 455–56 (D.N.M. 1995) (imposing sanction on Government and DOJ prosecutor personally).

[68] William P. Marshall, *Break up the Presidency - Governors, State Attorneys, General and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2450 (2006).

[69] Emily Myers*, Qualifications, Selection, and Term*, *in* STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES 12 (Emily Myers ed., 4th ed. 2019). The powers and the structure of the office are also the product of statute and

executive branch to weaken the power of the chief executive and "to further an intra-branch system of checks and balances."[70]

Most state attorneys general are elected.[71] As chief legal officers of the jurisdiction, they are important policymakers at the state and national level.[72] They "serve as counselor to state government agencies and legislatures, and as a representative of the public interest."[73] They typically have the power to conduct investigations, prosecute state law violations, represent the state in legal disputes, issue opinions on state law, and engage in legislative advocacy.[74] Most state attorneys general have the discretion to litigate without the approval of the governor or the legislative branch.[75] They have broad common law authority to define the public interest and litigate in its behalf.[76]

The offices of state attorneys general are much smaller than their federal counterpart, with some of the most populous states employing over 700 lawyers.[77] One of the state attorney general's main duties is to conduct litigation, and they often have units within their offices that handle specialized litigation such as consumer protection, environmental litigation, and antitrust.[78] State attorneys general sometimes sue the federal government and other states, and sometimes defend their state's officials against federal claims, which means they litigate in both state and federal courts. Their powers to prosecute criminal matters vary. In three states, the

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common law. Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 FLA. J. LAW & PUB. POL'Y 1, 2 (1994).

[70] Marshall, *supra* note 68, at 2451.

[71] *See Attorney General Office Characteristics,* NAT'L ASS'N ATT'YS GEN., https://www.naag.org/news-resources/research-data/attorney-general-office-characteristics// (indicating that attorney generals are elected in 43 states and the District of Columbia). In five states they are appointed by the governor, in one by the legislature, and in another by the state supreme court. *Id.*

[72] *See, e.g*., Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 REV. OF POL. 525, 526 (1994); Mark C. Miller, *State Attorneys General, Political Lawsuits, and the Collective Voice in the Inter-Institutional Constitutional Dialogue*, 48 J. LEGIS. 1, 5-6, 8 (2021).

[73] *What Attorneys General Do*, NAT'L ASS'N ATTY'S GEN., https://www.naag.org/attorneys-general/what-attorneys-general-do/.

[74] *Id*.; Marshall, *supra* note 68, at 2452, 2460.

[75] Miller, *supra* note 72, at 4.

[76] *Id*.; Marshall, *supra* note 68, at 2456.

[77] *About the Attorney General*, KEN PAXTON, https://www.texasattorneygeneral.gov/about-office#:~:text=That%20includes%20nearly%20750%20attorneys,in%20court%2C%20among%20other%20things; *About the Office*, LETITIA JAMES, N.Y. STATE ATT'Y GEN., https://ag.ny.gov/about/about-office.

[78] Emily Myers, *Conduct of Litigation, in* STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES, *supra* note 69, at 91.

attorney general has sole criminal jurisdiction, and in more than two-thirds of states, the attorney general has concurrent jurisdiction over criminal matters or authority to initiate criminal prosecutions in select areas such as organized crime and Medicaid fraud.[79] All state attorneys general handle criminal appeals and post-conviction matters to some degree.[80]

Some of the work state attorneys general perform is coordinated through the National Association of Attorneys General (NAAG). Starting in the 1970s, NAAG began to work to create national regulatory standards and to challenge federal preemption of state law.[81] Since the 1980s, it has maintained standing committees that address policy issues of common state concern on subjects such as environmental protection, antitrust law, and securities regulation.[82] In 1982, NAAG established a Supreme Court Clearinghouse that facilitates and coordinates state amicus brief participation.[83]

Over time, some Republican state attorneys general began to view NAAG as too closely aligned with Democratic ideology.[84] In 1999, they formed the Republican Attorneys General Association (RAGA) with the goal of electing more Republican attorneys general and litigating cases based on conservative legal philosophy.[85] RAGA quickly began to take in significant contributions from large businesses.[86] In 2002, some state attorneys general formed the Democratic Attorneys General Association (DAGA).[87] RAGA and DAGA both hold events where companies that

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[79] Chris Toth, *Criminal Justice, in* STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES, *supra* note 69, at 359-60, 370-72.
[80] *Id.* at 363.
[81] Clayton, *supra* note 72, at 540.
[82] *Id*.
[83] *Id.* at 542; Colin Provost, *When to Befriend the Supreme Court? Examining State Amici Curiae Participation Before the U.S. Supreme Court,* 11 STATE POL. & POL'Y Q. 4, 6 (2012).
[84] *See* George Lardner, Jr. & Susan Schmidt, *Attorneys General Raise Funds for GOP; Corporations in State Suits are Solicited*, WASH. POST, Mar. 30, 2000, at A01; Mark L. Early, "*Special Solicitude": The Growing Power of State Attorneys General,* 52 UNIV. RICHMOND L. REV. 561, 564 (2018) (noting that Republican attorneys general viewed NAAG's dominant focus to be suing tobacco and private businesses rather than on issues within their states).
[85] Paul Nolette, *The Dual Role of State Attorneys General in American Federalism: Conflict and Cooperation in an Era of Partisan Polarization* 47 PUBLIUS 342, 346 (2017); Rachel M. Cohen, *The Hour of the Attorney General*, AM. PROSPECT (Mar. 22, 2017), https://prospect.org/power/hour-attorneys-general/.
[86] Lardner & Schmidt, *supra* note 84.
[87] Democratic Attorneys General Association, https://dems.ag/; Republican Attorneys General Association, https://republicanags.com/.

contribute to attorneys general's campaigns can directly lobby for their clients' interests.[88]

Since the late 1990s, state attorneys general have become more overtly partisan in their litigation positions on the national stage. Many have joined with other state attorneys general from their own party to sue the federal government or file amicus briefs when the opposing party is in power.[89] They are able to play this role due, in part, to money from outside groups and loose alliances with ideological allies, corporate interests, and civil society organizations.[90] As former Republican Texas Attorney General Greg Abbott famously described his job during Barack Obama's presidency: "I go into the office in the morning, I sue the federal government, and then I go home."[91] Abbott was not alone. Republican state attorneys general sued the Obama administration seventy-eight times.[92] Mostly Democratic state attorneys general brought 138 multistate lawsuits against the first Trump administration,[93] while Republican attorneys general brought 120 multistate lawsuits against the federal government during Joe Biden's presidency.[94]

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[88] *See* Eric Lipton, *Lobbyists, Bearing Gifts, Pursue Attorneys General*, N.Y. TIMES (Oct. 29, 2014), https://www.nytimes.com/2014/10/29/us/lobbyists-bearing-gifts-pursue-attorneys-general.html (reporting that this lobbying includes pushing the state attorneys general to drop investigations, change policies, and negotiate favorable settlements).

[89] *See,* Miller, *supra* note 72, at 19 (noting that mostly Democratic state attorneys general sued the George W. Bush administration 76 times); *see also* Margaret H. Lemos & Kevin M. Quinn, *Litigating State Interests: Attorneys General as Amici*, 90 NYU L. REV. 1229, 1265 (2015) (noting increased partisanship in coalitions of state attorneys general filing merits briefs in Supreme Court).

[90] Paul Nolette & Colin Provost, *Change and Continuity in the Role of State Attorneys General in the Obama and Trump Administrations*, 48 J. FEDERALISM 469, 472, 478-79 (2018); Nolette, *supra* note 85, 349-50.

[91] Wayne Slater, *Atty Gen Greg Abbott Says His Job is Simple: Sue the Federal Government, then Go Home,* DALL. MORNING NEWS (June 7, 2012), https://www.dallasnews.com/news/politics/2012/06/07/updated-atty-gen-greg-abbott-says-his-job-is-simple-sue-the-federal-government-then-go-home/.

[92] Eleanor Klibanoff, *Texas Backlash to Obama Fueled Conservative Drive to Reinterpret U.S. Constitution*, TEX. TRIB. (July 31, 2023), https://www.texastribune.org/2023/07/31/texas-federal-courts-conservative-takeover-obama-paxton/.

[93] Eric Ortiz, *State Attorneys General Have Sued Trump's Administration 138 Times—Nearly Double Those of Obama and Bush*, NBC News (Nov. 16, 2020), https://www.nbcnews.com/politics/politics-news/state-attorneys-general-have-sued-trump-s-administration-138-times-n1247733. Only six of the lawsuits included a Republican attorney general. *Id.*

[94] *Searchable Lists of Multistate Lawsuits*, STATE LITIG. & AG ACTIVITY DATABASE, https://attorneysgeneral.org/multistate-lawsuits-vs-the-federal-government/list-of-lawsuits-1980-present/.

State attorneys general have proven to be powerful and influential advocates. They are the second most active litigants in the U.S. Supreme Court, both as direct parties and amici, after the federal government.[95] They are also the second most successful litigants after the federal government.[96] In recent years, coalitions of Republican attorneys general and Democratic attorneys general have been on opposite sides of issues before the U.S. Supreme Court.[97]

State attorneys general can be prosecuted for crimes committed while in office[98] and can be removed in several states for a felony conviction.[99] They and the lawyers in their offices are afforded absolute or qualified immunity for much of their official conduct.[100] They are subject to litigation sanctions, although like DOJ lawyers, they are almost never required to personally pay.[101] State attorneys general and their deputies are also rarely disciplined for violations of professional conduct rules.[102]

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[95] Lemos & Quinn, *supra* note 89, at 1235.
[96] *Id.* at 1236.
[97] *See, e.g.*, Jamie Joseph, *Republican State AGs Back Trump Birthright Citizenship Order in Court Filing: "Taxpayers are on the Hook,*" FOX NEWS (Feb. 3, 2025), https://www.foxnews.com/politics/republican-state-ags-back-trump-birthright-citizenship-order-court-filing-taxpayers-hook.
[98] *See, e.g.*, Bill Fraser, *Ex-Attorney General Kane Headed to Jail After Appeal Fails*, PHILA. INQUIRER, (May 18, 2018), https://www.inquirer.com/philly/news/breaking/disgraced-former-pa-attorney-general-kathleen-kane-exhausts-appeals-jail-perjury-20181126.html.
[99] Myers, *supra* note 69, at 20.
[100] The U.S. Supreme Court's civil immunity analysis is largely based on cases involving state officials. *See, e.g.,* Imbler v. Pachtman, 424 U.S. 409, 424 (1976). *See also* Meade v. Grubb, 841 F.2d 1512, 1532-33 (10th Cir. 1988) (finding state attorney general absolutely immune from liability for decisions not to initiate civil or criminal proceedings against other state officials).
[101] *But see* Enriquez v. Estelle, 827 F. Supp. 830, 832, 834 (S.D. Tex. 1993) (holding state attorney general personally liable for $500 sanction).
[102] *See* Walter Borges, *Vetting Vega; Dropped Ethics Case Against AG Highlights Prosecution Dilemma*, TEX. LAW., Mar. 25, 1996, at 3 (describing decision not to pursue discipline against first assistant attorney general); Allison Kite, *Missouri Supreme Court Rejects Request for Ethics Investigation in AG Andrew Bailey*, MO. INDEP. (Oct. 2, 2024), https://missouriindependent.com/2024/10/02/missouri-supreme-court-rejects-request-for-ethics-investigation-into-ag-andrew-bailey/ (describing refusal to require disciplinary agency to pursue disciplinary grievance filed against state attorney general). For decisions imposing discipline on current or former state attorneys general see *In re* Rokita 219 N.E.3d 733 (Ind. 2023) (reprimand for comments about doctor who performed abortion); *In re* Kline, 311 P.3d 321 (Kans. 2013) (suspension for misconduct concerning abortion opinion and other conduct); Disciplinary Counsel v. Dann, 979 N.E.2d 1263 (Ohio 2012) (suspension following conviction of crimes while serving as attorney general);

II. INSTITUTIONAL CHOICES FOR ADDRESSING MISCONDUCT

As a preliminary matter, it is important to consider who can best address misconduct by attorneys general and other high-ranking legal officers. One option is to rely on voterst. Unfortunately, for reasons discussed below, this sort of political reckoning is very unlikely. It is therefore necessary to consider which institutions are best positioned to address professional misconduct by these officials.

Ordinarily, lawyer misconduct would be handled by the states. As the U.S. Supreme Court has noted: "The States prescribe the qualifications for admission to practice and the standards of professional conduct. They also are responsible for the discipline of lawyers."[103] States courts have long claimed the inherent authority to admit lawyers to practice and to discipline lawyers when they engage in misconduct.[104]

Of course, these are not ordinary lawyers. When conducting an institutional analysis, it is important to consider which institutions have the power to act, the independence, the resources, and the will to do so. As the discussion below indicates, there are several institutions that have the power to perform this function, but most are unlikely to have the resources or independence to do so. Some are likely to be influenced by partisan preferences. The institutional analysis reveals that the best institutions to reliably address misconduct by high-ranking legal officers are the ones already established to deal with lawyer misconduct: state disciplinary agencies, with the opportunity for review by courts.

A. RELIANCE ON VOTERS

Voters are not well-equipped, and cannot be relied upon, to address misconduct by attorneys general or other high-ranking legal officers. Voters cannot develop and learn all the relevant facts in the same way as an investigative body. Moreover, voting for president can be driven by certain salient issues, but misconduct by the U.S. attorney general or high-

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Neb. State Bar Ass'n v. Douglas, 416 N.W. 2d. 515 (Neb. 1987) (suspension for conflicts and failure to reveal information while under oath).

[103] Leis v. Flynt, 439 U.S. 438, 442 (1979).

[104] *See, e.g.*, Clark v. Austin, 101 S.W.2d 977, 980 (Mo. 1937) (noting that the court "has inherent power to define and regulate the practice of law"); Unauthorized Prac. of Law Comm. v. Am. Home Assurance Co., 261 S.W.3d 24, 33 (Tex. 2008) (noting that the court's inherent power to regulate the practice of law derives from the state constitution); *see also* Laurel A. Rigertas, *Lobbying and Litigating Against "Legal Bootleggers"—The Role of the Organized Bar in the Expansion of the Courts' Inherent Powers in the Early Twentieth Century*, 46 CAL. W. L. REV. 65, 69, 88-91 (2009).

level DOJ officials is unlikely to be important to most voters.[105] Voters are motivated to vote by partisan identification.[106] Due to the limited information many voters have about complex political issues, party ties provide a cue to which candidates they should support.[107] Although voters might conceivably focus more on misconduct when voting for state attorney general—the chief legal officer in the state—given the strong pull of partisan identification and the advantages of incumbency,[108] this also seems unlikely. Indeed, Texas Attorney General Paxton was reelected in 2022 even though he was awaiting trial on state securities fraud charges and accused by top aides of serious misconduct.[109] Voter recalls are another way to remove the state attorney general in eighteen states,[110] but have not been used to remove an attorney general for more than a century.[111]

B. REMOVAL BY OTHER POLITICAL ACTORS

It is also unlikely that political actors who hold the power to remove attorneys general and other high-ranking legal officers will do so to address misconduct. As noted, the president can fire the U.S. attorney general and other high-level DOJ officials he nominated, but will have little incentive to do so when these lawyers are acting to further the

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[105] *See generally* Bruce A. Green & Rebecca Roiphe, *Who Should Police Politicization of the DOJ?,* 35 NOTRE DAME J. L., ETHICS & POL. 671, 676 (explaining why partisan conduct by the DOJ unlikely to influence voting in presidential elections).

[106] *See* Russell J. Dalton, *Party Identification and Its Political Implications*, OXFORD RESEARCH ENCYCLOPEDIAS, POLITICS 2, 7-8 (2021), https://oxfordre.com/politics/display/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-72.

[107] *See, e.g.,* Stephen P. Nicholson, *Polarizing Cues*, 56 AM. J. POL. SCI. 52, 53 (2012).

[108] *See* Stephen Ansolabehere & James M. Snyder, *The Incumbency Advantage in U.S. Elections: An Analysis of State and Federal Offices, 1942–2000*, 1 ELECTION L.J. 315, 315-16 (2002).

[109] *See* Jasper Scherer, *Ken Paxton Agrees to Community Service, Paying Restitution to Avoid Trial in Securities Fraud Case*, TEX. TRIB. (March 26, 2024), https://www.texastribune.org/2024/03/25/ken-paxton-plea-deal-securities-fraud-felony/; Tony Plohetski & Chuck Lindell, *Top Aides Accuse Texas Attorney General Ken Paxton of Bribery, Abusing Office*, AUSTIN AM.-STATESMAN (Oct. 3, 2020), https://www.statesman.com/story/news/local/2020/10/03/top-aides-accuse-texas-attorney-general-ken-paxton-of-bribery-abusing-office/114215708/.

[110] Myers, *supra* note 69, at 20.

[111] *Recall of State Officials,* NCSL (2025), https://www.ncsl.org/elections-and-campaigns/recall-of-state-officials (describing recall of North Dakota Governor and Attorney General in 1921).

president's agenda.[112] Trump effectively removed Attorney General Jeff Sessions from office by pressuring him to resign, but it was largely because Sessions had followed the law when appointing a special counsel—not because Sessions violated professional rules or norms. [113] It is also unlikely that the U.S. attorney general or other high-ranking DOJ officials would be removed by Congress for professional misconduct through impeachment. Although there have been calls in Congress to impeach four recent U.S. attorneys general, it is often for partisan reasons, rather than concerns about professional misconduct.[114] Congress has never voted to impeach a U.S. attorney general or other high-ranking DOJ official.[115]

On the state level, most Governors do not have the authority to remove an elected state attorney general.[116] Virtually all state legislatures can impeach the state attorney general under some circumstances, but only one attorney general has been removed through that method—for vehicular manslaughter—during the modern era.[117] Partisanship can trump concerns about official misconduct. In 2023, the Texas House of Representatives voted to approve sixteen articles of impeachment against

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[112] *See* Green & Roiphe, *supra* note 105, at 676. For one exception, see Anthony Leviero, *Upsets Come Fast; Resignation of McGrath Follows Quickly His Ousting of Morris*, N.Y. TIMES, APR. 4, 1952, at 1 (describing President Harry Truman's request that U.S. Attorney General J. Howard McGrath resign after McGrath fired Administration's corruption investigator to protect the President's interests).

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

[114] For a recent effort to impeach a U.S. attorney general, see H. Res. 1318, 117th Cong. (2022) (resolution to impeach Merrick Garland for persecuting Donald Trump). There were also calls in Congress to impeach Attorneys General Alberto Gonzales, Eric Holder, and William Barr.

[115] *See List of Individuals Impeached by the House of Representatives*, U.S. HOUSE OF REP., https://history.house.gov/Institution/Impeachment/Impeachment-List/.

[116] In the five states where attorneys general are appointed, and in six other states, the governor can remove the attorney general in certain circumstances. *See* Myers, *supra* note 69, at 19-20. In some of those states, a hearing or senate approval is required. *Id.* at 20.

[117] *See* Stephen Groves, *South Dakota AG Convicted on 2 Impeachment Charges, Removed,* AP (June 22, 2022), https://apnews.com/article/jason-ravnsborg-south-dakota-impeachments-e5d62c76eedecf4c9290fecd821496aa. The next most recent removal seemingly occurred in 1947, after the Arizona Attorney General was convicted of violating state gambling laws. *See* Clayton, *supra* note 72, at 530.

Attorney General Paxton for serious misconduct involving his office,[118] but the Texas Senate voted, largely along party lines, to acquit him.[119]

C. OTHER LEGISLATIVE OVERSIGHT

Congress and state legislatures are not otherwise well-positioned to address misconduct by high-ranking legal officers. Congress can initiate inquiries into the DOJ's activities, and has on occasion done so with positive results.[120] Yet Congress is already occupied with many other responsibilities including oversight of other cabinet departments and many federal agencies.[121] Congressional committees tend to devote less attention to oversight when the chambers are controlled by the same party as the White House,[122] which may be when oversight of high-ranking DOJ officials is especially important. Moreover, in recent years some Congressional committee investigations have been so partisan that committees became dysfunctional. High-ranking DOJ lawyers can thwart Congressional investigative efforts by declining to answer questions, refusing to appear before Congress, or directing others not to do so.[123] Even if Congress votes to hold the official in criminal contempt, it must rely on the DOJ to bring the matter to a grand jury.[124] Not surprisingly, the DOJ routinely declines to pursue these criminal charges against the U.S. attorney general or other high-level DOJ lawyers, thwarting Congress's oversight efforts.[125]

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[118] Plohetski & Lindell, *supra* note 109; Chuck Lindell & James Barragan, *Here are the 16 articles of impeachment Texas Attorney General Ken Paxton is facing*, TEX. TRIB. (Sept. 1, 2023), https://www.texastribune.org/2023/09/01/ken-paxton-impeachment-articles/.

[119] *See* Zach Despart, *Texas Attorney General Ken Paxton Acquitted on All 16 Articles of Impeachment*, TEX. TRIB. (Sept. 16, 2023), https://www.texastribune.org/2023/09/16/ken-paxton-acquitted-impeachment-texas-attorney-general/.

[120] *See* Green & Roiphe, *supra* note 105, at 682, 683.

[121] *Id.* at 683.

[122] Molly E. Reynolds & Naomi Machs, How *Partisan and Policy Dynamics Shape Congressional Oversight in the Post-Trump Era*, BROOKINGS (July 31, 2023), https://www.brookings.edu/articles/how-partisan-and-policy-dynamics-shape-congressional-oversight-in-the-post-trump-era/.

[123] For example, Attorney General Barr was voted in contempt of Congress for refusing to appear in response to a subpoena at a House Judiciary Committee hearing and ordering another DOJ attorney not to appear for a deposition. H. Res. 497, 116th Cong. (2019).

[124] 2 U.S.C. § 194 (2024).

[125] *See* Luke Barr, *DOJ Declines to Prosecute Garland After House Republicans Pass Contempt Resolution*, ABCNEWS (June 14, 2024); https://abcnews.go.com/Politics/doj-declines-prosecute-garland-after-house-republicans-pass/story?id=111136606; Jacqueline Thomsen, *DOJ Says It Won't Prosecute Barr, Ross After House Criminal Contempt Vote*, THE HILL (July 24,

Similarly, state legislatures are also not the best-situated institutions to address misconduct by state attorneys general or their deputies. State legislatures have the power to investigate activities in the state attorney general's office as part of the appropriations process and can exert pressure through budget appropriations.[126] Most state legislature can also restrict or withdraw common law authority vested in the attorney general.[127] Nevertheless, like Congress, state legislatures have a great deal of other work they need to accomplish. Only ten states have full-time legislatures that meet throughout the year, and a few only meet every other year.[128] Some state legislatures are seriously under-resourced in terms of money and staff,[129] making meaningful oversight difficult. Partisanship is also likely to determine whether state legislatures act to investigate potential misconduct by the state attorney general and other high-ranking officials in that office.[130] Legislative investigations of misconduct by state attorneys general or their deputies seem less likely in the thirty-eight states where the state attorney general and the majority in both legislative chambers are from the same party.[131]

D. INTERNAL OVERSIGHT WITHIN THE EXECUTIVE BRANCH

2019), https://thehill.com/policy/national-security/454606-doj-says-it-wont-prosecute-barr-ross-after-house-criminal-contempt/.

[126] For an example, see Dana DiFilippo, *Attorney General Grilled Over Guns, Court Losses in Senate*, N.J. MONITOR (Apr. 3, 2025). https://newjerseymonitor.com/2025/04/03/attorney-general-grilled-over-guns-court-losses-in-senate-hearing/. Many legislatures have given themselves statutory authority to investigate the Office of the Attorney General. *See, e.g.,* GA. CODE ANN. § 45-15-19 (2024).

[127] Early, *supra* note 84, at 4.

[128] *States with a Full-Time Legislature*, BALLOTPEDIA, https://ballotpedia.org/States_with_a_full-time_legislature; Susan Fox, *Annual vs. Biennial Legislative Sessions* (2014), https://archive.legmt.gov/content/Committees/Administration/Legislative-Council/2019-20/Committee-Topics/SB310/ANNUALSESSIONSOTHERSTATES.pdf.

[129] *Full-and Part-time Legislatures*, NCSL (2021), https://www.ncsl.org/about-state-legislatures/full-and-part-time-legislatures.

[130] Evidence that partisanship is driving state legislative treatment of state attorneys general can be seen in the fact that some state legislatures have been attempting to remove power from state attorneys general—or add to it—depending upon whether the attorney general is from the same political party as the legislative majority. *See* Dylan Erikson, *Attorney General Duties are a Frequent Target of Legislative Gamesmanship*, STATE COURT REPORT (June 18, 2025), https://statecourtreport.org/our-work/analysis-opinion/attorney-general-duties-are-frequent-target-legislative-gamesmanship.

[131] *See State Government Trifectas and Triplexes,* BALLOTPEDIA, https://ballotpedia.org/State_government_trifectas_and_triplexes.

Both the DOJ and a few states have designated offices or inspectors general within the executive branch that can investigate possible misconduct by high-ranking legal officers. These arrangements avoid intra-branch separation of power issues. These entities are also better suited to address misconduct than Congress or state legislatures. Nevertheless, they also have significant limitations, especially at this time.

1. THE DOJ

The DOJ has an internal process for investigating whether its lawyers engaged in professional misconduct. It begins with the Office of Professional Responsibility (OPR), which receives complaints alleging misconduct by current or former DOJ employees and decides whether to investigate them.[132] The DOJ's Professional Misconduct Review Unit (PMRU), reviews "matters in which OPR finds intentional or reckless professional misconduct and determines whether those findings are supported" by the facts and the law.[133]

If PMRU upholds the recommendation and the lawyer still works at the DOJ, PMRU can impose an internal sanction such as a two-week suspension without pay.[134] If a rule of professional conduct is implicated, PMRU authorizes OPR to refer the matter to state attorney disciplinary authorities, but this only happens infrequently.[135] Both OPR and PMRU report to the deputy attorney general.[136]

One positive aspect of these internal processes is that OPR and PMRU lawyers work within the DOJ, so they understand the difficult role that government lawyers play and how they should function. But because they are part of the DOJ, they may have difficulty being objective.[137] OPR's bar is also very high for finding professional misconduct. It defines professional misconduct as intentional or reckless disregard of a "clear and unambiguous" rule or standard.[138] Its most recent report indicates that it

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[132] U.S. DEPARTMENT OF JUSTICE, OFFICE OF PROFESSIONAL RESPONSIBILITY, FY 2024 ANNUAL REPORT 4, https://www.justice.gov/opr/media/1386331/dl?inline. The term "complaint" is used here because that is the term employed by OPR. *Id*. at 1.

[133] *Id*. at 5.

[134] *Id*.

[135] *Id.* at 5, 16, 39 (indicating that OPR referred three DOJ lawyers to state disciplinary authorities in FY 2024).

[136] *Id.* at 5.

[137] *See* Green & Roiphe, *supra* note 105, at 686.

[138] U.S. DEPARTMENT OF JUSTICE, OFFICE OF PROFESSIONAL RESPONSIBILITY, FY 2024 ANNUAL REPORT, *supra* note 132, at 14

received 1,346 new complaints during the preceding year and found professional misconduct in seven cases.[139]

OPR has been the subject of scathing criticism, notwithstanding several efforts to improve it.[140] The biggest problem for the purposes of this discussion is that OPR reports to a deputy attorney general who can overrule its findings.[141] This did, in fact, occur in connection with a complaint against then Deputy Assistant General John Woo, the principal drafter of the "torture memos," which provided legal justification for the first Bush administration to use waterboarding on detainees.[142] Even if OPR again found the courage to conclude that a high-level DOJ official engaged in intentional or reckless misconduct, OPR's findings would likely be overruled by the deputy attorney general. Recent developments also suggest that the work of the traditionally non-partisan OPR is being seriously undermined, at least for the next few years. Former Acting Deputy Attorney General Emil Bove has installed two political appointees at OPR, with no prior DOJ experience, to make final determinations on adverse personnel actions, bar referral matters, and ethics recusals and

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[139] *Id.* The findings of misconduct involved eight attorneys. Some of the cases where misconduct was found may have been from complaints submitted in an earlier year.

[140] Mike Fox, *How the DOJ Helps Federal Prosecutors Escape Accountability & Evade Public Scrutiny,* CATO INST. (Jan. 25, 2025), https://www.cato.org/blog/how-doj-helps-federal-prosecutors-escape-accountability-evade-public-scrutiny (stating that OPR has "become a veritable graveyard where allegations of prosecutorial misconduct go to die"); Brooke Williams, Samata Joshi & Shawn Musgrave, *The Secretive "Discipline" Process for Federal Prosecutors Buries Misconduct Cases*, INTERCEPT (Oct. 10, 2019), https://theintercept.com/2019/10/10/justice-department-federal-prosecutors-accountability/ (referring to OPR's nickname, the "roach motel" where complaints go in but nothing comes out); *see also* Peter Joy & Kevin C. McMunigal, *Department, Ethics Supervisors, Subordinates and* Sanctions, 28 CRIM. JUST. 64, 65-67 (2013) (discussing problems with OPR's handling of misconduct in prosecution of Senator Ted Stevens).

[141] U.S. DEPARTMENT OF JUSTICE, OFFICE OF PROFESSIONAL RESPONSIBILITY, FY 2024 ANNUAL REPORT, *supra* note 132, at 5.

[142] *See* Green & Roiphe, *supra* note 104, at 686. After OPR concluded that Yoo engaged in professional misconduct, the Associate Attorney General overruled OPR's findings and conclusion that the DOJ should refer Yoo to state disciplinary authorities. Memorandum from David Margolis, Associate Deputy Attorney General 67 (Jan. 5, 2010), https://irp.fas.org/agency/doj/opr-margolis.pdf.

waivers.[143] In addition, the head of OPR was fired in early 2025 and has not been replaced.[144]

Another option might be for the DOJ's Inspector General (IG) to investigate alleged misconduct by the Attorney General and other high-ranking DOJ officials. The Offices of Inspector General are created by statute to be independent.[145] The DOJ's IG is responsible for combatting fraud, waste, abuse, and misconduct within the DOJ.[146] The IG is appointed by the president, without a term limit, subject to confirmation by the Senate,[147] and does not answer to the U.S. attorney general or any other official in the DOJ. The Attorney General can, however, limit the IG's access to certain sensitive information.[148] In addition, the president can fire IGs, and Trump fired several of them early in his second term without providing the statutorily required notice and explanation to Congress.[149]

Congress made OPR, and not the IG, primarily responsible for investigating DOJ attorneys' discretionary decisions.[150] The IG can help with the task of investigating high-level wrongdoing but faces some significant limitations. For example, in late December 2024, the IG issued a report concerning three "then senior DOJ officials" who leaked non-public information shortly before the 2020 election, in violation of the DOJ's media contact policy.[151] The IG was unable to interview the

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[143] Ben Penn, *Trump DOJ Delegates Sensitive Ethics Powers to Political Aides*, BLOOMBERG LAW (Feb. 16, 2025), https://news.bloomberglaw.com/us-law-week/trump-doj-delegates-sensitive-ethics-powers-to-political-aides

[144] Rebecca Beitsch, *Schiff, Democrats Demand Rationale on Bondi Firing of Ethics Attorney*, THE HILL (July 16, 2025), https://thehill.com/homenews/administration/5404767-justice-department-fires-career-ethics-official/.

[145] Ben Wilhelm, Cong. Res. Servs., Statutory Inspectors General in the Federal Government: A Primer 1-3 (Nov. 13, 2023), https://www.congress.gov/crs-product/R45450 https://www.congress.gov/crs-product/R45450.

[146] *About the Office,* OFF. OF THE INSPECTOR GEN., U.S. DEPT. OF JUST., https://oig.justice.gov/about.

[147] *Id*.

[148] Green & Roiphe, *supra* note 105, at 690.

[149] David Shepardson, *US Senate Judiciary Committee Asks Trump to Detail Rationale for Firing 18 IGs*, REUTERS (Jan. 28, 2025), https://www.reuters.com/world/us/us-senate-judiciary-committee-asks-trump-detail-rationale-firing-18-igs-2025-01-28/.

[150] Green & Roiphe, *supra* note 105, at 690.

[151] Attorney General Barr and Assistant Attorney General for Civil Rights Eric Drieband may have been involved. *See* Josh Gerstein, Daniel Han & Nick Reisman, *Watchdog Finds Signs Politics Drove Trump DOJ's Probes of Pandemic Nursing Home Deaths*, POLITICO (Jan. 7, 2025), https://www.politico.com/news/2025/01/07/watchdog-finds-signs-politics-drove-trump-doj-probes-pandemic-nursing-home-deaths-002055.

attorneys involved because they had left the DOJ.[152] After more than three years of investigation, the IG found misconduct, but he was limited to issuing his report to Congress and providing it to the PMRU for appropriate action.[153]

Of course, the IG's role could conceivably be strengthened to give that office more responsibility for addressing lawyer misconduct. It seems unlikely, however, that Congress would be willing to increase the IG's powers, at least at this time. Moreover, the IG's budget and staff were cut by 28% for 2026.[154] The DOJ's IG would need significantly more funding to take on this additional investigative role. Even then, its investigative process is likely to remain relatively slow and its findings would have limited impact if they can be held up once a report is delivered to the PMRU.

At this time, the DOJ IG does not appear to be functioning effectively.[155] There is reportedly fear inside the offices of inspectors general "that simply doing their jobs could get them fired."[156] At some point, if the DOJ IG had more power, resources, and independence, it might be able to effectively address misconduct by high-level DOJ lawyers. Unfortunately, it seemingly cannot do so at this time.

2. STATE INSPECTORS GENERAL

The offices of state attorneys general do not have internal divisions comparable to OPR. While a number of states have inspectors general, their focus is typically state-wide—meaning they have responsibility for an enormous number of employees and agencies—or limited to a single department. Only two jurisdictions, Florida and Illinois, appear to have an inspector general focused specifically on misconduct in the state attorney general's office.[157] In Florida, the IG is appointed and supervised by the

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[152] Office of the Inspector General, U.S. Dept. of Justice, Investigative Summary 25-019, https://oig.justice.gov/sites/default/files/reports/25-019.pdf.
[153] *Id.*
[154] U.S. DEPT. OF JUST., FISCAL YEAR 2026 BUDGET AND PERFORMANCE SUMMARY 49 (June 13, 2025), https://www.justice.gov/media/1403736/dl/.
[155] *See, e.g.*, Devlin Barrett, *Unnoticed Whistle-Blower Document Alarms Justice Veterans*, N.Y. TIMES (July 31, 2025), https://www.nytimes.com/2025/07/31/us/politics/emil-bove-whistle-blower.html (describing IG's failure to act on whistleblower allegations concerning high-ranking DOJ official for more than two months).
[156] Luke Broadwater, *In the Trump Administration, Watchdogs Are Watching their Backs*, N.Y. TIMES (July 17, 2025), https://www.nytimes.com/2025/07/17/us/politics/inspectors-general-trump.html.
[157] *Directory of State and Local Inspector General Agencies*, ASS'N OF INSPECTORS GEN., https://inspectorsgeneral.org/useful-links/directory-of-state-and-local-government-oversight-agencies/; Office of Inspector General, FLA. OFF. ATT'Y GEN., https://www.myfloridalegal.com/overview/office-of-inspector-

attorney general, which would make it difficult for the IG to act on misconduct by that official or the deputy.[158] In addition, the Florida IG's work appears to be mainly focused on audits and not on professional misconduct.[159] In Illinois, the attorney general appoints the Executive IG, with consent of the state senate, and the attorney general can only remove the IG for cause.[160] The Executive IG has jurisdiction over the attorney general and everyone in that office.[161] Following an investigation, the Illinois IG can make recommendations to the attorney general but cannot impose sanctions.[162] She may recommend that a determination be made as to whether the misconduct should be reported to state disciplinary authorities.[163] If the attorney general is the subject of the investigation, the recommendation can be made to another authority.[164]

The Illinois system provides the Office of the Executive IG with a good deal of independence. Nevertheless, it may be difficult for the IG to remain objective when investigating the person who appointed her. Where the investigation focuses on the Illinois attorney general, it is unclear to whom the IG's recommendations could be made who would be likely to take appropriate action. The governor does not have the power to remove the attorney general,[165] and impeachment by the state legislature would likely depend, at a minimum, on whether the legislative majority and the

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general; Executive Inspector General Diane Saltoun for the Office of the Attorney General, https://www.illinoisattorneygeneral.gov/open-and-honest-government/inspector-general/.

[158] *See* FLA. STAT. 20.055 (3)(a)(1), (b) (2024).

[159] The investigations appeared to be focused on issues such as harassment, employee work violations, retaliation for filing complaints, and misuse of department funds. *See* Florida Office of Attorney General, Office of Inspector General 2024-2025 Annual Report, at 14-17 (2025), https://www.floridaoig.com/library/Annual_rpts/2024-2025/2024-25%20OAG%20Annual%20Report.pdf.

[160] 5 ILL. COMP. STAT. 430 20/10(b), (f) (2024).

[161] 5 ILL. COMP. STAT. 430 20/10(c) (2024).

[162] OFFICE OF EXECUTIVE INSPECTIVE GENERAL FOR THE AGENCIES OF THE ILLINOIS GOVERNOR, INVESTIGATIONS POLICY AND PROCEDURES MANUAL 12 (July 30, 2024), https://oeig.illinois.gov/content/dam/soi/en/web/oeig/documents/OEIG%20Investigation%20Policy%20and%20Procedure%20Manual_9-19-2024.pdf.

[163] *See, e.g.*, In re Ewick, Young, & Young, OEIG Investigative Report, Case # 23-IG-00056, at 31 (Dec. 29, 2023).

[164] E-mail from Diane L. Saltoun, Exec. Inspector Gen. for Off. of Ill. Att'y Gen., to author (July 23, 2025).

[165] The governor can declare the office vacant, but only under limited circumstances not relevant here. *See* 15 ILL. COMP. STAT. 205/3 (2024) (providing that governor can declare office vacant if attorney general fails to take oath of office or post a bond within twenty days after notice of the bond requirement).

attorney general are affiliated with the same political party. It is conceivable that if the Executive IG uncovers evidence that a federal crime was committed, the DOJ might prosecute. These are all uncertain paths to addressing misconduct by these high-ranking officials, which suggests that while Illinois's IG system has positive features, it should not be the exclusive way to address misconduct by the state attorney general or that official's deputies.

E. COURTS

Courts are often better positioned than the previously discussed candidates to address misconduct by attorneys general and other high-ranking legal officers. Judges have various tools they can use to sanction lawyers without the lengthy delays associated with legislative oversight or internal investigations. As discussed below, federal courts are more limited than state courts in their power to address lawyer misconduct. Neither is especially interested in policing lawyer misconduct.

1. FEDERAL COURTS

Federal courts are courts of limited jurisdiction.[166] They admit lawyers for the sole purpose of conducting federal litigation[167] and can impose litigation sanctions and discipline on those lawyers.[168] Federal courts regulate these lawyers, in part, through authority delegated by Congress. This authority enables federal courts to adopt local practice rules that dictate whether state professional conduct rules—or some other rules—apply to the lawyers who appear before them.[169] Federal judges also have inherent authority to regulate lawyers in order to manage court affairs and preserve core judicial functions.[170] These courts seemingly do not, however, have broad authority to regulate federal prosecutors in all aspects of their work.[171]

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[166] *See* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994).
[167] Zacharias & Green, *supra* note 61, at 1370.
[168] *See, e.g.,* FED. R. CIV. PROC. 11(c), 37(b)-(f)*;* FED. R. APP. PROC. 46.
[169] *See* Green & Zacharias, *supra* note 58, at 410-11.
[170] *See, e.g.,* United States v. Roark, 288 Fed. Appx. 182, 186 (5th Cir. 2008) (noting federal court's authority to regulate conduct of lawyers who appear before it to manage court's affairs); United States v. Ray, 375 F.3d 980, 992-93 (9th Cir. 2004) (finding that court had authority to require government to prepare sentencing document so that court could perform its core functions); Houston v. Welt, 632 Fed. Appx. 580, 583 (11th Cir. 2015) (stating that federal courts have inherent power to impose sanctions on parties and their lawyers).
[171] *See* Zacharias & Green, *supra* note 61, at 1374-76.

Federal courts that seek to impose sanctions on federal executive branch lawyers do not present Supremacy Clause problems.[172] While prosecutors have sometimes argued that separation of powers principles exempt them from professional regulation by courts, the courts have rejected these arguments.[173] Separation of powers concerns may, however, deter federal judges from probing federal prosecutors' discretionary decision-making.[174] This may help explain why federal courts only lightly review prosecutors' discretionary decisions, such as those concerning charging and plea bargaining.[175]

One problem with relying on courts to address misconduct by attorneys general and other high-ranking officials, however, is that judges are focused on resolving the disputes before them and do not want to police lawyer misconduct. This can be seen in their frequent failure to enforce Rule 11 of the Federal Rules of Civil Procedure, which prohibits frivolous pleadings.[176] Likewise, they mostly decline to sanction lawyers for discovery abuses,[177] giving lawyers repeated opportunities to comply with the rules, even in the face of egregious violations. Judges' disinterest in policing litigation misconduct is unsurprising: They lack the time to address these issues, which are collateral to the main dispute. Federal judges are pressured to move cases off their dockets.[178]

For reasons discussed in Part III(C), it is especially unlikely that federal judges will act to address litigation misconduct by attorneys general and other high-ranking legal officers. As noted, these courts have proven reluctant to sanction even lower-level federal law enforcement

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[172] *See, e.g.*, Whitehouse v. U.S. Dist. Ct., 53 F.3d 1349, 1365 (1st Cir. 1995) (rejecting Supremacy Clause argument when federal court had adopted state ethics rule).

[173] *See* Green, *supra* note 59, at 900.

[174] *See* Green & Roiphe, *supra* note 105, at 679.

[175] Green & Levine, *supra* note 63, at 166-67.

[176] M. Todd Henderson & William H.J. Hubbard, *Judicial Noncompliance with Mandatory Procedural Rules Under the Private Securities Litigation Reform Act*, 44 J. LEGAL STUD. S87, S91-92 (2015) (finding that courts make the required Rule 11 findings in less than 14% of applicable cases); *see also* Diego Zambrano, *The Unwritten Norms of Civil Procedure*, 118 NW. U. L. REV. 853, 888 (2024) (noting with respect to Rule 11 that "most judges do not punish any behavior or sanction any parties at all").

[177] *See* Victor Marrero, *The Cost of Rules, the Rule of Costs*, 37 CARDOZO L. REV. 1599, 1657 (2016) (stating that discovery is "a virtually unpatrolled no-man's land of litigation").

[178] *See* Miguel F.P. de Figuereido, Alexandra D. Lahav & Peter Siegelman, *The Six-Month List and the Unintended Consequences of Judicial Accountability*, 105 CORNELL L. REV. 363, 372-74, 376 (2020) (describing pressure exerted by the Six Month List to move older cases off of dockets).

officials (i.e., prosecutors).[179] Moreover, federal courts do not sanction lawyer misconduct that is unrelated to their court proceedings, except when a lawyer admitted to practice before them has been subject to professional discipline elsewhere.[180]

2. STATE COURTS

State courts admit lawyers to practice law in their jurisdictions and have the power to discipline lawyers practicing in the state. State courts have statutory, inherent, supervisory, and sometimes constitutional authority to discipline lawyers for a wide range of conduct both in and out of court.[181] State courts have rejected arguments that state prosecutors, as executive branch officials, should not be subject to judicial regulation.[182] They have also rejected federal prosecutors' arguments that because of the Supremacy Clause, federal prosecutors cannot be subject to state judicial discipline.[183] State courts have been more willing than federal courts to inquire into various aspects of prosecutors' discretionary decision-making when considering whether to sanction prosecutors.[184]

State courts have imposed litigation sanctions and professional discipline on state attorneys general and their deputies in a few cases.[185] They have also disciplined DOJ lawyers on occasion, including a U.S.

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[179] *See supra* note 63 and accompanying text. Some judges may want to give prosecutors, who have special obligations and a heavy burden of proof, some leeway to operate. In addition, 36% of federal judges were once prosecutors and they may identify closely with those lawyers. *See* Clark Neily, *Are a Disproportionate Number of Federal Judges Former Government Advocates?*, CATO (May 27, 2021), https://www.cato.org/study/are-disproportionate-number-federal-judges-former-government-advocates.

[180] *See infra* note 190 and accompanying text.

[181] *See, e.g.*, Webster v. Comm'n for Law. Discipline, 704 S.W.2d 478, 493 (Tex. 2004) (discussing court's inherent authority to discipline lawyers); Gilbert v. Utah Down Syndrome Found., 301 P.3d 979, 982 (Utah 2012) (discussing constitutional and statutory authority); *In re* Harris, 498 P.3d 778, 782 (Or. 2002) (discussing statutory authority).

[182] *See* Massameno v. Statewide Grievance Comm'n, 633 A.2d 317, 337 (Conn. 1995) ("the separation of powers doctrine does not obliterate the obligation and authority of the judicial branch to investigate and discipline prosecutors").

[183] Green & Levine, supra note 63, at 155, 169.

[184] Darryl Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225, 1250-51 (2016) (noting that "some states have recognized the judicial capacity for a modest supervisory role over critical aspects of prosecutorial discretion"); Green & Levine, *supra* note 63, at 148 (stating that "state courts often exercise the authority to inquire into various aspects of prosecutors' decision making, both in adjudicating criminal cases and sanctioning prosecutors").

[185] *See supra* note 102.

attorney general,[186] typically after a criminal conviction. Like federal courts, however, state courts are busy and not interested in policing litigation or other misconduct. Moreover, state courts do not have procedures or the investigative capacity to address lawyer misconduct that occurs outside of litigation, except through their disciplinary agencies.

F. DISCIPLINARY AUTHORITIES

Rather than handle most disciplinary grievances against lawyers themselves, most state courts established lawyer disciplinary authorities to process and hear lawyer disciplinary matters.[187] In some states, the disciplinary authorities work within mandatory state bars and in others they are separate agencies that operate under court supervision.[188] Federal courts utilize less well-resourced panels and committees to address disciplinary grievances and recommend sanctions.

1. FEDERAL COURT DISCIPLINARY AUTHORITIES

Federal courts take a variety of approaches to imposing lawyer disciplinary sanctions.[189] The federal courts adopt state rules of professional conduct of the state in which they sit, the Model Rules of Professional Conduct, or draft their own rules of conduct to govern the lawyers who appear before them.[190] Most of the lawyer disciplinary sanctions imposed by federal courts on lawyers who practice in those courts are reciprocal discipline, which is imposed on lawyers after they have been disciplined in another jurisdiction.[191] When misconduct occurs in federal district court matters, some federal district courts refer the

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[186] *See* Kaplan, *supra* note 4.

[187] For discussion of the reasons why courts established these disciplinary authorities and how they were constituted, see Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions,* 48 AM. U. L. REV. 1, 1-4 (1998).

[188] *See* Leslie C. Levin, *The End of Mandatory State Bars?*, 109 GEO. L.J. ONLINE 1, 2, 6 (2020).

[189] The term "disciplinary sanctions" refers to sanctions such as suspensions or reprimands that are imposed for violations of professional conduct rules as opposed to sanctions for violations of discovery or other rules that regulate lawyers.

[190] *See, e.g.*, STANDARDS FOR PROFESSIONAL CONDUCT WITHIN THE SEVENTH FED. JUD. CIR., https://www.ca7.uscourts.gov/pages/LandingPage.php?page=standards-for-professional-conduct; W.D. Tex. Civ. Att'y R. 7(a); 30 MOORE'S FED. PRAC. § 802.06.

[191] E-mail from Member, Conn. Dist. Ct. Grievance Comm., to author (Aug. 5, 2025) (on file with author).

matter to state disciplinary authorities or appoint a lawyer to investigate.[192] Other district courts maintain disciplinary committees of volunteer lawyers to process, investigate, and hear grievances concerning any lawyer who is admitted to practice in that federal district.[193] Committees can also recommend discipline.[194] A federal judge then decides whether a disciplinary sanction should be imposed.[195]

Disciplinary processes on the federal circuit court level are even more varied. Any lawyer who is admitted to the circuit court or who practices before it can be subject to disciplinary sanctions.[196] Like some federal district courts, the Eleventh Circuit appoints a committee of volunteer lawyers for three-year terms to conduct investigations and hearings.[197] In some circuits, discipline is handled largely by the clerk of the circuit and the circuit court judges.[198] The Third Circuit and Fourth Circuit have standing committees of circuit judges who handle disciplinary matters, also appointed for a period of three years.[199] In some circuits, the chief judge may appoint counsel to investigate or prosecute matters or use state disciplinary counsel for that purpose.[200] The Sixth Circuit may refer the entire matter to state disciplinary authorities.[201]

Federal court disciplinary processes are not the best way to handle claims that attorneys general and other high-ranking legal officers violated professional conduct rules. Federal court disciplinary committees predominantly handle fairly routine reciprocal disciplinary matters. They do not have their own professional staff who can investigate grievances or budgets to hire investigators.[202] They mostly rely on volunteer lawyers to

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[192] D.S.C. Civ. R. 83.1.08(V) (describing disciplinary procedures in the District of South Carolina).
[193] *See, e.g.*, D. Conn. L. Civ. R. 83.2(b).
[194] *See* D. Conn. L. Civ. R. 83.2(d)-(g).
[195] *See* D. Conn. L. Civ. R. 83(d)(5)-(9).
[196] *See* U.S. Ct. of Appeals for the Third Cir., Rules of Att'y Disciplinary Enf't R. 2(1)(d) (2015); 6th Cir. R. 46(c).
[197] Rules Governing Att'y Discipline in the U.S. Ct. of Appeals for the Eleventh Cir., Addendum 8, R. 2.
[198] *See, e.g.,* U.S. Ct. of Appeals for the Third Cir., Rules of Att'y Disciplinary Enf't R. 4(1), 5, 6, 11 (2015); 8th Cir. R. 46A.
[199] U.S. Ct. of Appeals for the Third Cir., Rules of Att'y Disciplinary Enf't R.4(3); 4th Cir. R. 46. The chief judge of the Sixth Circuit may assign the task of conducting an investigation to a single judicial officer who also hears the matter. 6th Cir. R. 46 (c)(4)(C)(7)-(8).
[200] U.S. Ct. of Appeals for the Third Cir., Rules of Att'y Disciplinary Enf't R. 14; 4th Cir. R. 46(g); U.S. Ct. of Appeals for the Third Cir., Rules of Att'y Disciplinary Enf't R. 11,
[201] 6th Cir. R. 46 (c)(4)(C)(3).
[202] *See* E-mail from Member, *supra* note 191 (stating that the only money expended appears to be for transcripts).

act as disciplinary counsel in hearings.[203] The lawyers and judges on committees generally serve for three-year terms and therefore have limited institutional memories about committee procedures or how to approach serious grievances or referrals. Disciplinary cases involving high-ranking legal officers are not an appropriate task for a part-time committee of volunteers or a panel of judges that infrequently handle disciplinary cases from start to finish.

2. STATE DISCIPLINARY AUTHORITIES

At this time, state disciplinary authorities are seemingly the best situated to deal with professional rule violations by attorneys general and high-ranking legal officers. This does not mean that state authorities should be the only institution to address this misconduct or that they are a perfect fit for this task. Nevertheless, state disciplinary agencies are set up to address lawyer misconduct and are exclusively focused on this work. They have professional disciplinary counsel and investigators. As an arm of state courts, they are less susceptible to pressure from the DOJ, a state attorney general's office, or other executive branch actors. They are also more likely to see the disciplinary matter through to a conclusion than legislative bodies and are less likely to be derailed by partisan struggles. When they conclude that sanctions are warranted, the matter can be reviewed by state courts.[204] This serves as a check on their work. Moreover, because state disciplinary authorities have performed an investigation, this spares courts from the need to perform this resource-intensive and time-consuming work. In many jurisdictions, courts will also rely on the hearing conducted by the disciplinary agency, which further reduces the time courts must expend on these matters.

Admittedly, there are also potential problems with state lawyer disciplinary authorities handling these matters. State disciplinary processes can be slow and secretive.[205] They are often not well-funded.[206] If they become inundated with complaints aimed at many high-ranking officials, this can potentially interfere with their other important work. State disciplinary systems are not courageous. Some have devised reasons to avoid involvement in politically-charged claims of misconduct by these high-ranking officials.[207] Because they answer to courts and often must go to courts for the imposition of discipline, these authorities may respond to

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[203] *See, e.g.*, D. Conn. L. Civ. R. 83.2(b)(3).
[204] *See supra* note 9 and accompanying text.
[205] *See* Stephen Gillers, *Lowering the Bar: How Lawyer Discipline in New York Fails to Protect the Public*, 17 NYU J. LEGIS &. PUB. POL'Y, 485, 496-502 (2014).
[206] *See* Leslie C. Levin, *When Lawyers Screw Up*, 32 GEO. J. LEGAL ETHICS 109, 128 n.141 (2019).
[207] *See supra* notes 25-29 and accompanying text.

grievances based on the judges' perceived political preferences rather than on the merits of the matter.

On balance, however, state disciplinary authorities appear to be the best option for addressing certain misconduct by attorneys general and other high-ranking legal officers. Indeed, several of the alternatives (the DOJ's PMRU, the DOJ IG, state IGs, some federal courts) ultimately refer misconduct matters to state disciplinary authorities. The next best alternative—state courts—could do more, but they have proven unwilling to take the time to sanction even ordinary lawyers for much misconduct that judges observe during litigation. If state courts were to become involved in handling grievances against high-ranking legal officers from the grievance stage, it would consume considerable court time. Thus, state disciplinary authorities remain the best institution to address professional misconduct allegations lodged against these high-ranking officials.

III. EFFORTS TO LIMIT THE USE OF STATE DISCIPLINE AGAINST ATTORNEYS GENERAL AND OTHER HIGH-RANKING LEGAL OFFICERS

Even though state disciplinary authorities are the best-positioned to handle grievances against high-ranking legal officers, there have been recent efforts in Texas to limit their ability to do so. The Texas legislature has narrowly defined who can file grievances, and the state supreme court has determined that state lawyer disciplinary authorities cannot pursue certain grievances against the state attorney general and their first assistant unless the judge who is hearing the case refers the official to disciplinary authorities. The Texas court's decision in *Commission for Lawyer Discipline v. Webster* is now being used to try to prevent disciplinary authorities from pursuing grievances against high-ranking legal officers in other jurisdictions.[208] The potential significance of these developments is discussed below.

A. Limiting Actionable Grievances

Lawyers' efforts to overturn the results of the 2020 presidential election prompted a spate of lawyer disciplinary grievances against them in Texas and elsewhere.[209] In December 2020, Texas Attorney General Paxton and First Assistant Attorney General Brent Edward Webster sought to file a case on behalf of Texas in the U.S. Supreme Court, challenging the administration of the election in Georgia, Michigan,

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[208] 704 S.W.3d 478, 483 (Tex. 2024). For examples of where other officials have argued for the application of *Webster*'s reasoning, see *infra* notes 303-04.

[209] *See, e.g.,* Avalon Zappo, *Ethics Complaint Filed Against Red State AGs that Backed Bid to Undo 2020 Election Results*, NAT'L L.J. (Sept. 21, 2022), https://www.law.com/nationallawjournal/2022/09/21/ethics-complaints-filed-against-republican-state-ags-that-backed-bid-to-undo-2020-election-results/.

Pennsylvania and Wisconsin, where Biden had been declared the winner.[210] In *Texas v. Pennsylvania,* Texas sought extraordinary relief that would effectively disenfranchise the voters in four states.[211] Seventeen Republican attorneys general filed an amicus brief in support of Paxton's petition.[212] The case—which Trump called "the big one"[213]—garnered substantial national attention. Many commentators viewed the lawsuit as frivolous.[214] Within four days, the Court denied Texas permission to file the complaint, finding that Texas had not "demonstrated a judicially cognizable interest in the manner in which another State conducts its elections."[215]

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[210] Petitioner Texas's Motion for Leave to File a Bill of Complaint, Texas v. Pennsylvania, 141 S. Ct. 1230 (2020), https://www.supremecourt.gov/DocketPDF/22/22O155/162953/20201207234611533_TX-v-State-Motion-2020-12-07%20FINAL.pdf.

[211] *Id*. at 39.

[212] Brief of Missouri and 16 Other States as Amici Curiae in Support of Plaintiff's Motion for Leave to File Bill of Complaint, Texas v. Pennsylvania, 141 S. Ct. 1230 (2020), https://www.supremecourt.gov/DocketPDF/22/22O155/163215/20201209144840609_2020-12-09%20-%20Texas%20v.%20Pennsylvania%20-%20Amicus%20Brief%20of%20Missouri%20et%20al.%20-%20Final%20with%20Tables.pdf.

[213] Evie Fordham, *Trump touts Texas Supreme Court case as 'the big one,' says 'we will be intervening'*, FOX NEWS (Dec. 9, 2020), https://www.foxnews.com/politics/trump-texas-supreme-court-election-lawsuit.

[214] *See, e.g*., Aaron Blake*, Can Trump's lawyers get in trouble for frivolous lawsuits?*, WASH. POST (Dec. 11, 2020), https://www.washingtonpost.com/politics/2020/12/11/can-trumps-lawyers-get-trouble-frivolous-lawsuits/; Michael McGough, *GOP Support for a Frivolous Lawsuit Shows How Trump Has Corrupted the Party*, L.A. TIMES (Dec. 11, 2020), https://www.latimes.com/opinion/story/2020-12-11/opinion-gop-support-for-a-frivolous-lawsuit-shows-how-trump-has-corrupted-the-party; R Robin McDonald, *"No Chance of Success": Lawyers Demolish Ken Paxton's Latest Election Lawsuit*, AM. LAW. (Dec. 8, 2020), https://www.law.com/2020/12/08/no-chance-of-success-lawyers-demolishes-ken-paxtons-latest-election-lawsuit/; *see also* Editorial Board, *Texas Tries an Election Long Shot; Can a state be harmed by the way other states conduct their elections?*, WALL ST. J. (Dec. 10, 2020), https://www.wsj.com/articles/texas-tries-an-election-long-shot-11607644280 (stating that Ken Paxton "seems intent on developing a name for himself as the patron saint of lost legal causes"); Mairead McDonald, *Sasse Predicts Supreme Court Will Toss 'PR Stunt' Texas Election Lawsuit*, NAT'L REV. (Dec. 10, 2000), https://www.nationalreview.com/news/sasse-predicts-supreme-court-will-toss-pr-stunt-texas-election-lawsuit/ (reporting on comment by Republican Senator Ben Sasse).

[215] Texas v. Pennsylvania, 141 S. Ct. 1230 (2020). Justices Samuel Alito and Clarence Thomas dissented on the grounds that the Court did not "have

The Texas Commission for Lawyer Discipline (the Commission) received eighty-one disciplinary grievances against Paxton—including one from Lawyers Defending American Democracy—and three grievances against Webster.[216] The 65 Project submitted a grievance against Texas Senator Ted Cruz due, in part, to his planned involvement in *Texas v. Pennsylvania*.[217] During this time, the Commission also received ten grievances against Texas lawyer Sidney Powell, who was involved in litigation in several states contesting the outcome of the 2020 election.[218] In addition, grievances were filed against the seventeen state attorneys general in other states who had signed the amicus brief in *Texas v. Pennsylvania*.[219]

In 2023, Texas legislators introduced a bill to limit those who could effectively file a disciplinary grievance to those who had involvement in the subject of the grievance in a representative capacity, the judge, certain other persons directly involved in the matter, or an "other person who has a cognizable individual interest in or connection to the legal matter or facts alleged in the grievance."[220] If such persons alleged professional misconduct, their grievances would be classified as "complaints." Grievances from others would be classified as "inquiries" and would not be considered by the Commission.[221] The explanation accompanying the bill stated that "[i]nconsequential complaints against Texas attorneys are overwhelming the Texas State Bar every year, costing taxpayer money and state resources, and burdening Texas attorneys in a time consuming and nerve-wracking complaint process initiated by people with no personal legal interest in the underlying matter."[222] This concern was

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discretion to deny the filing of a bill of complaint in a case that falls within our original jurisdiction." They noted that they did not express a view on any other issue. *Id*.

[216] Comm'n for Lawyer Discipline v. Webster, 676 S.W.3d 687, 693 (Tex. App. Div. 2023).

[217] Letter from Michael Teter, Managing Dir., The 65 Project, to Off. of Disciplinary Counsel, State Bar of Tex. (May 18, 2022), https://the65project.com/wp-content/uploads/2022/05/Ethics-Complaint-Against-Senator-Ted-Cruz.pdf. Cruz had announced that he would argue *Texas v. Pennsylvania* before the U.S. Supreme Court. *Id*.

[218] David Lee, *Texas Bar Files Disciplinary Action Against Former Trump Attorney*, COURTHOUSE NEWS SERV. (March 8, 2022), https://www.courthousenews.com/texas-bar-files-disciplinary-action-against-former-trump-attorney/.

[219] *See Our Work*, *supra* note 7.

[220] Grievances that could be classified as "complaints" included those filed by family members of wards or decedents in probate matters, judges, lawyers, witnesses, court staff, or jurors involved in a matter that is the subject of the grievance. TEX. GOV'T CODE § 81.073(a)(1)(B) (2023).

[221] TEX. GOV'T CODE § 81.073(a)(2)(B) (2023).

[222] Bill Analysis, H.B. 5010, 88th Leg., Reg. Sess. (Tex. 2023)

seemingly belied by the fact that the State Bar of Texas opposed the legislation.[223] The more likely reason for the bill, later stated by the sponsor during House discussion, was that "over the last few years, grievances have become weaponized. Not just here, but across the country."[224] After the legislature passed the bill, the Texas Supreme Court sought comment and acquiesced in the amended law, and it became effective September 1, 2023.[225]

B. LIMITING THE DISCIPLINARY AGENCY—THE *WEBSTER* CASE

In 2021, Brynne VanHettinga, an inactive member of the State Bar of Texas who lived outside of Texas, was among those who filed a grievance against Webster.[226] The grievance claimed that Webster, whose name appeared on the papers in *Texas v. Pennsylvania*,[227] violated Texas Disciplinary Rules of Professional Conduct 3.01 (concerning frivolous proceedings), 3.03 (concerning false statements to a tribunal), 8.04(a)(3) (prohibiting conduct "involving dishonesty, deceit or misrepresentation"), and 4.01 comment 5 (knowingly assisting a client in the commission of a criminal or fraudulent act).[228] The Chief Disciplinary Counsel classified the grievance as an inquiry and dismissed it.[229] VanHettinga appealed that classification to the Board of Disciplinary Appeals (BODA), an independent body of twelve attorneys appointed by the Texas Supreme Court.[230] BODA found the grievance alleged possible violations of Rules 3.01 and 3.03 and returned the matter to the Commission as a complaint for investigation and a determination of whether there was just cause to believe Webster had committed professional misconduct.[231] Thereafter, an Investigatory Hearing Panel held a hearing and in January 2022, the Commission notified Webster that the panel had concluded that there was credible evidence to support a finding that Webster had violated Rule 8.04(a)(3), and recommended resolution of the complaint with a public

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[223] Lowell Brown, *Board Approves Proposed Budget, Elects New Chair for 2023-2024*, 86 TEX. B.J. 384 (2023).
[224] Tex. House J., 88th Leg., Reg. Sess. 2555 (May 1, 2023), https://journals.house.texas.gov/hjrnl/88r/pdf/88RDAY52FINAL.PDF#page=85.
[225] H.B. 5010, 88th Leg., Reg. Sess. (Tex. 2023).
[226] Webster v. Comm'n for Law. Discipline, 704 S.W.3d 478, 485 (Tex. 2024).
[227] Paxton was counsel of record. *Id.* at 483. At that time, anyone could file a grievance in Texas that could be classified by the chief disciplinary counsel as a complaint.
[228] Comm'n for Law. Discipline v. Webster, 676 S.W.3d 687, 693 (Tex. App. 2023).
[229] *Id*. at 694.
[230] Texas Board of Disciplinary Appeals, https://www.txboda.org/.
[231] Comm'n for Law. Discipline v. Webster, 676 S.W.3d at 694.

reprimand.[232] Webster elected to have the complaint heard in district court rather than accept the sanction.[233]

The Commission then filed a four-page disciplinary petition in the Williamson County Judicial Court alleging that Webster had made misrepresentations and engaged in dishonest conduct in connection with Texas's efforts to challenge the 2020 presidential election results in *Texas v. Pennsylvania*.[234] The petition further alleged that the pleadings misrepresented to the U.S. Supreme Court that an "outcome-determinative" number of votes in the four states were due to unregistered voters; that Dominion voting machines switched votes; that states unconstitutionally revised their state's election statutes; and that illegal votes had affected the election outcome.[235] In addition, the petition alleged that Webster misrepresented that Texas had "uncovered substantial evidence…that raises serious doubts as to the integrity of the election process" in the four states and that Texas had standing to bring the claims.[236] It further stated that the conduct alleged violated Texas Disciplinary Rule 8.04(a)(3), which states that "a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."[237]

Webster moved to dismiss the disciplinary petition on separation of powers and sovereign immunity grounds. The district court dismissed the case, finding that exercising jurisdiction over the lawsuit would violate the Texas Constitution's separation of powers doctrine.[238] The Eighth Court of Appeals reversed, finding that neither the separation of powers doctrine nor sovereign immunity required dismissal.[239] Webster appealed and eighteen Republican state attorneys general filed an amicus brief in support of his position.[240] In a 5-2 decision, the Texas Supreme Court reversed the Court of Appeals on separation of powers grounds and reinstated the judgment of dismissal.[241]

In *Webster v. Commission for Lawyer Discipline*, the Texas Supreme Court described the separation of powers conflict as involving two valid powers. It noted that the "Texas Constitution endows the attorney general (and at his direction, the first assistant) with the authority to both file

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[232] *Id*.
[233] *Id*. at 695.
[234] Original Disciplinary Petition, Comm'n for Law. Discipline v. Webster, 22-0594-C368 (Dist. Ct. Williamson Cty. Tex. May 6, 2022).
[235] *Id.* at 3.
[236] *Id*.
[237] TEX. DISCIPLINARY RULE OF PRO. CONDUCT r. 8.04(a)(3).
[238] 704 S.W.3d 478, 483 (Tex. 2024).
[239] Comm'n for Law. Discipline v. Webster, 676 S.W.3d at 691.
[240] Brief of Montana and 17 Other States as Amici Curiae Supporting Petitioner, Webster v. Comm'n for Law. Discipline, 704 S.W.3d 478 (Tex. 2024), https://law.alaska.gov/pdf/amicus/2024/041224-Amicus.pdf.
[241] 704 S.W.3d at 506.

petitions in court and to assess the propriety of the representations forming the basis of the petitions," and that this authority could not be controlled by the other branches of government.[242] Yet the Constitution also endows the court with the power to discipline attorneys admitted to the bar.[243] Respect for separation of powers "leads each branch to avoid stoking needless friction with the other coordinate branches of government."[244] In the majority's view, the "potential for direct scrutiny by a court to whom representations are made wholly accommodates the legitimate interests of all branches of government."[245] Allowing "collateral attacks" like the Commission's petition would "improperly invade the executive branch's prerogatives and risk the politicization and thus the independence of the judiciary."[246]

The court explained that the Commission is a standing committee of the State Bar, which is an administrative agency of the judicial department.[247] It noted that the Texas Constitution vests all judicial power only in the courts.[248] It characterized the Commission as having "a significant but limited role in assisting this Court in its duty to superintend . . . the role of attorneys within the judicial system."[249]

The court then described the power of the first assistant attorney general, stating that "when the first assistant acts under the direction of the attorney general, he does so as if the attorney general himself had acted."[250] It claimed that the court had previously "resolved" that the Texas attorney general's judgment and discretion "*will not be* controlled by other authorities."[251] That judgment and discretion included not only bringing lawsuits but also the "right to investigate the facts and [to] exercise his judgment and discretion regarding the suits in which the State is an interested party.[252] The court further stated that "the attorney general's assessments in bringing suit are privileged at a *constitutional* level from collateral review by the other branches."[253]

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[242] *Id.* at 484.
[243] *Id.*
[244] *Id.* at 487.
[245] *Id*. at 484.
[246] *Id*.
[247] *Id*. at 489 (citing TEX. GOV'T CODE 81.011(a)).
[248] *Id*. at 491.
[249] *Id*. at 493.
[250] *Id*. at 494.
[251] *Id*. at 495 (quoting Charles Scribner's Sons v. Marrs, 262 S.W. 722, 727 (Tex. 1924)). In *Marrs*, the court was referring to the state attorney general's discretion not to file a contract suit. The state attorney general was not a party to that action, and that the statement was essentially dictum.
[252] *Id*. at 495 (quoting Agey v. Am. Liberty Pipeline Co*.,* 172 S.W.2d 972, 974 (Tex. 1943)). In *Agey*, the court dismissed the case because the attorney general had not joined the action on behalf of the state.
[253] Webster, 704 S.W.3d at 495-96.

Yet the court noted that the state attorney general's power is not unlimited, and in suits brought by the attorney general, "the authority of the court hearing the case naturally includes holding even the attorney general (and any other executive-branch lawyer) to account for litigation conduct."[254] The majority's concern was that the Commission claimed "a free-ranging power to second-guess the attorney general's and his first assistant's exercise of discretion in making initial filings," which created "unauthorized friction between the judicial and executive departments."[255] The court reasoned that "if the contents of the pleadings are objectionable, whether for legal or ethical reasons, only *direct* scrutiny—that is, by the court to whom the pleadings are presented—is permissible under the separation-of-powers doctrine."[256]

In the majority's view, the Commission was impermissibly seeking to challenge Webster's "legal determinations and assessments of the available facts and evidence at the time he filed the initial pleadings" in *Texas v. Pennsylvania.*[257] At points it seemed to read the Commission's disciplinary petition as focused on the sufficiency of the pleadings before the U.S. Supreme Court rather than on the claim that they were false and misleading.[258] It also found the Commission's deployment of Disciplinary Rule 8.04(a)(3)—prohibiting "conduct involving dishonesty, fraud, deceit, or misrepresentation"—problematic because it is vague and had only been used once before as the exclusive basis for disciplining any lawyer.[259] It even questioned whether "collateral" use of Rule 8.04(a)(3) was a proper way to scrutinize the contents of initial pleadings of any attorney.[260] Moreover, by not giving Webster the good faith presumption afforded executive branch actors or "recognizing the attorney general's authority to determine the arguments and assess the evidence that warrant bringing suit on behalf of the State, the commission's unbounded construction of Rule 8.04(a)(3) forcefully pits the judicial department against the executive."[261]

The *Webster* majority was obviously deeply unhappy to be hearing this case. It noted that VanHettinga would not have had her grievance categorized as a complaint if she had filed the grievance after September

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[254] *Id*. at 496.
[255] *Id*.
[256] *Id*. at 497.
[257] *Id*. at 498.
[258] For example, it suggested that the Commission's view of Disciplinary Rule 8.04(a)(3) was in tension with the federal pleading standards *in Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), which addressed the adequacy of factual pleadings. *See* Webster, 704 S.W.3d at 499. At another point the court suggested that the Commission had merely "relabeled the assessments and determinations that informed and populated the initial pleadings as 'misrepresentations.'" *Id.* at 501.
[259] *Id*. at 500-01.
[260] *Id.* at 484.
[261] *Id*. at 501.

1, 2023.[262] It also expressly questioned the Commission's good faith in bringing the case.[263] It further observed that "[c]ollaterally disciplining an official like the first assistant for statements made in initial pleadings—particularly when a filing involves a politically sensitive lawsuit—creates a serious risk that the judicial branch will venture into, or be dragged into, the contentious arena of political disputes."[264] While acknowledging that direct review might impose similar risks, it believed that the Commission's case against Webster "*maximizes* such a risk, including by opening up the process to anyone, anywhere, who for his own reasons—whether good or bad—desires to harness the judicial power of this State and to unleash that power in response to decisions of the executive branch that a complainant opposes."[265]

Thus, in this "narrow circumstance," the court concluded, "separation of powers requires that violations of the sort alleged here—based wholly on representations in initial pleadings—must be addressed directly by the court to whom the pleadings are presented" rather than the Commission.[266] It expressed confidence that the adversarial system "provides a powerful safeguard" against executive branch authorities who may violate the Disciplinary Rules during litigation because "the opposing party has every incentive—and indeed obligation—to identify *any* problems, ethical or otherwise, with the government's case or its filings."[267] It observed that "while our precedent suggests that a judge 'must' refer unethical conduct to disciplinary proceedings," the U.S. Supreme Court made no referral to the Commission in this case."[268] (Of course, the U.S. Supreme Court is not bound by Texas case law on this point and has no such referral rule.) It left open the question of whether the Commission could institute disciplinary proceedings in other types of cases involving the attorney general or the lawyers in that office.[269]

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[262] The court noted that she lived out of state and lacked "a cognizable individual interest in or connection to the legal matter or facts alleged in the grievance." Nevertheless, because VanHettinga had filed the grievance before the statute was amended, the court applied the previous rule for pursuing grievances. *Id.* at 485.
[263] *Id*. at 501 (stating "although the commission disclaimed any allegation of bad faith at oral argument, its view of Rule 8.04(a)(3) in this case suggests the opposite").
[264] *Id*. at 501.
[265] *Id*.
[266] *Id*. at 503.
[267] *Id*. at 505.
[268] *Id*.
[269] The court noted that Webster had agreed that the Commission might pursue disciplinary cases involving these officials in other circumstances such as private representations (for example, of family members), criminal activity, or *ultra vires* conduct. The majority stated, however, "we have no occasion here to address these or other examples." *Id*. at 506.

The dissent noted that the majority's "freshly minted direct/collateral distinction" was "unheard of in separation-of-powers jurisprudence" and illogical.[270] It observed, "If (as the Court concedes) the judicial branch has inherent power to discipline an executive-branch attorney for engaging in professional misconduct, it may—consistent with the separation-of-powers doctrine—discipline that attorney through any lawful exercise of that power."[271] In the dissent's view, the majority had announced "that the separation of powers limits the *means* by which the judicial branch can perform such regulation."[272] Yet no other court had recognized the direct/collateral distinction and no court "has ever held that the separation of powers prohibits the judicial branch from regulating the practice of law by one lawful means when it permits the branch to have the same effect by another."[273]

The dissent also noted that the majority had failed to explain how "collateral" review through the disciplinary process poses a greater risk of usurping executive branch authority than judicial "direct" review. It stated, "a court's 'direct' action addressing the attorney general's conduct 'usurps' the very same powers to the same extent; it just interferes and usurps 'directly' instead of 'collaterally.'" Moreover, the friction that occurs when the Commission reviews an attorney's conduct is "authorized by the Legislature *and by this Court,* in the exercise of the inherent powers the Court concedes belongs to the judicial branch."[274]

In addition, the dissent stated that "the Court's opinion seems to reflect a level of disdain or distrust" for the Commission or the disciplinary rules and procedures that govern the Commission.[275] It observed that the majority "doubts, for example, that the Commission should ever be able to use Rule 8.04(a)(3) to scrutinize the contents of initial pleadings of any attorney," even though the Commission followed the exact process prescribed by the Texas Rules of Disciplinary Procedure "which *this Court* adopted."[276] It added, "[i]f we are dissatisfied with the process we ourselves created, we should change it, not declare portions constitutionally inapplicable, case-by-case, based on principles we make up as we go along."[277]

In a footnote, the dissent also addressed the majority's suggestion that allowing "collateral" scrutiny of an executive branch attorney's professional conduct would "risk the politicization and thus the

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[270] *Id*. at 507.
[271] *Id.* at 507.
[272] *Id.* at 509.
[273] *Id.* at 510-11.
[274] *Id.*
[275] *Id.* at 512-13.
[276] *Id.* at 513.
[277] *Id.*

independence of the judiciary."[278] It stated, "'politicization' risks are not any more salient when the judicial branch disciplines an executive-branch attorney than when the judicial branch decides cases involving the executive branch—as it does regularly."[279] It further observed that "the risk that the commission or a court will improperly act politically by pursuing discipline against an executive-branch attorney is no greater than the risk that the commission or a court will act politically by declining to pursue such discipline."[280] It concluded, "[i]f fear of appearing to be acting politically were sufficient to prevent the judicial branch from exercising its constitutional powers, we shouldn't be deciding this case at all."[281]

Following the court's decision in *Webster*, the Commission moved to dismiss the disciplinary complaint against Attorney General Paxton, which was nearly identical to the one against Webster. The Texas Supreme Court granted that motion.[282]

C. THE PROBLEMS WITH *WEBSTER*'S APPROACH

The *Webster* court may have reached the rightresult—but for the wrong reasons. If the U.S. Supreme Court is unconcerned with the contents of cert petitions, why should a state court, through its disciplinary arm, impose its state rules and pursue a disciplinary case against an attorney general? Should state courts decide what is required in initial federal pleadings in a fast-moving election case where there is limited time to develop the facts? Perhaps federalism considerations should have guided the *Webster* court's reasoning. Alternatively, maybe the court was correct that Texas Disciplinary Rule 8.04(d) was so vague that in deference to separation of powers considerations, it should not be used to impose discipline on Webster in that case.The court could have explained how the rule should be read as applied to initial pleadings going forward.

That is not, however, what the court decided. The *Webster* case precludes anyone but the judge before whom the pleadings are filed from initiating disciplinary proceedings against the attorney general, his deputy, and potentially others in his office, for the contents of initial pleadings in state or federal cases. For reasons the dissent outlined, it makes little sense that if the court has the power to discipline these lawyers, it cannot delegate the handling of discipline matters to the Commission, which is

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[278] *Id.* at 514 n.20.
[279] *Id.*
[280] *Id.*
[281] *Id.*
[282] Jasper Scherer, *Texas Supreme Court Dismisses State Bar's Lawsuit Against Ken Paxton for Challenging 2020 Presidential Election*, TEX. TRIB. (Jan. 23, 2025), https://www.texastribune.org/2025/01/23/ken-paxton-texas-state-bar-lawsuit-dismiss-2020-election/.

part of the State Bar of Texas (an administrative agency of the judicial department).[283] Moreover, even if the Commission pursues a disciplinary complaint, lawyers in the attorney general's office—like all Texas lawyers—could elect to have the complaint heard in court, as Webster did.[284]

The *Webster* court's reasoning for stripping the Commission of its authority to act in this situation is deeply problematic. The contention that any discipline, if merited, should have been instigated by the U.S. Supreme Court was fanciful. The Court receives 7000-8000 certiorari petitions each term,[285] some of which are undoubtedly misleading, deceitful, or frivolous. It does not appear, however, that the Court has ever imposed disciplinary sanctions for such a filing or referred such a case to state disciplinary authorities. The Court almost exclusively limits itself to imposing reciprocal discipline on lawyers admitted to the Court's bar after another jurisdiction has imposed discipline.[286] There was seemingly only one instance, almost a century ago, in which the Court imposed a disciplinary sanction on a lawyer in the first instance—and that was for a failure to follow its order.[287] Indeed, in a 1985 opinion, Justice John Paul Stevens, joined by three justices, explained that they opposed even awarding minor monetary damages for frivolous litigation because it was too time consuming to do it fairly.[288] The Court does not have the time,

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[283] TEX. GOV'T CODE § 81.011 (2024).

[284] *See* TEX. RULES OF DISCIPLINARY PRO. r. 2.15.

[285] *About the Court, Frequently Asked Questions*, SUP. CT. U.S., https://www.supremecourt.gov/about/faq_general.aspx#:~:text=How%20many%20cases%20are%20appealed%20to%20the,hears%20oral%20argument%20in%20about%2080%20cases.

[286] *See Docket Search*, SUP. CT. U.S., https://www.supremecourt.gov/docket/docket.aspx.

[287] *In re* Gilbert, 276 U.S. 294, 298 (1928). I could find only one other case in which the Court issued a show cause order why a lawyer should not be sanctioned. It involved a large firm lawyer who submitted a "nearly unintelligible" brief with the assistance of a non-lawyer. Even then, the Court declined to impose discipline. Lyle Deniston, *The Howard Shipley Case: A Lesson for Others*, SCOTUSBLOG (Mar. 24, 2015), https://www.scotusblog.com/2015/03/the-howard-shipley-case-a-lesson-for-others/.

[288] Talamini v. Allstate Ins. Co., 470 U.S. 1067, 1069-70 (1985). Justice Stevens wrote that because of the large number of applications regularly filed in the Court, "the public interest in the efficient administration of our docket requires that we minimize the time devoted to the disposition of applications that are plainly without merit." He added, "Any evenhanded attempt to determine which of the unmeritorious applications should give rise to sanctions . . . would require us either to adopt a procedure for assessing a fair compensatory damages award in particular cases, or to impose a somewhat arbitrary penalty whenever such a motion is granted." *Id.*

staff, or inclination to carefully consider whether the thousands of petitions before it, or other filings, merit discipline or referral to a disciplinary agency.[289]

Yet deceptive or frivolous filings in the U.S. Supreme Court can affect public perceptions, especially when they are filed by attorneys general. Paxton's petition in *Texas v. Pennsylvania* lent an air of legitimacy to a political claim that the presidential election had been stolen. When seventeen Republican state attorneys general filed an amicus brief supporting the petition, it added gravitas to Paxton's filing. Indeed, Sean Hannity told his 4.3 million viewers on Fox News shortly after the amicus brief was filed:

> Let's be clear. No state's attorney general, you've got to understand politics here, would ever put their name or reputation on the line over a case that lacks merit on the law or [is] without a strong constitutional basis. Definitely not seventeen attorneys general. That is what happened. Eighteen total when you include Texas, no matter what political alliances they have or don't have.[290]

While that case was extraordinary, some attorneys general in other cases have demonstrated a willingness to file petitions with the Supreme Court for improper reasons.[291] The *Webster* court's approach, if adopted

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[289] In the course of my research, I heard, but could not document, that one justice had referred a lawyer who filed a cert petition to state disciplinary authorities. In that case, the attorney allegedly filed the petition without the client's permission.

[290] *See* Yael Halon, *Hannity: Texas is leading the charge to restore election integrity with latest lawsuit*, FOX NEWS, (Dec. 9, 2020), https://www.foxnews.com/media/hannity-texas-election-integrity. *See also* Rick Casey, *The Supreme Court Stops the Steal*, SAN ANTONIO REP. (Dec. 15, 2020), https://sanantonioreport.org/the-supreme-court-stops-the-steal/ (noting that amicus brief filed by attorneys general added to gravitas of Paxton's effort).

[291] For example, in June 2024, after Trump was convicted of fraud in a New York state court, he remained subject to a limited gag order until his sentencing. In July 2024, Missouri Attorney General Andrew Bailey sought leave from the U.S. Supreme Court to file a complaint asking the Court to lift the New York court's gag order and stay Trump's sentencing. This occurred a month before the highly competitive Missouri Republican primary for state attorney general. Kacen Bayless & Jonathan Shorman, *Missouri AG Bailey Asks Supreme Court to Halt Trump's Sentencing Until After Election*, K.C. STAR (July 4, 2024), https://www.kansascity.com/news/politics-government/article289733289.html; https://ballotpedia.org/Missouri_Attorney_General_election,_2024. Observers viewed the request, which the Court denied, as a political stunt. *See* Lawrence Hurley, *Supreme Court Rejects Missouri's Long Shot Bid to Block Trump's Gag Order and Sentencing in Hush Money Case*, NBC NEWS (Aug. 5, 2024), https://www.nbcnews.com/politics/supreme-court/supreme-court-rejects-missouris-long-shot-bid-block-trumps-gag-order-h-rcna163629 ("Many commentators said the filing was more of a political stunt aimed at gaining

elsewhere, virtually guarantees that some state attorneys general—sometimes funded by outside interests—will continue to do this. There would be no consequences if they do so.

The *Webster* court also disregards the realities of lower court practice when it claims that the adversarial system provides a "powerful safeguard" against executive branch authorities who engage in unethical behavior. It assumes that the opposing party will identify and raise ethical problems with the government's case or its filings. Yet lawyers who repeatedly litigate against the attorney general's office may be reluctant to assert that the attorney general has behaved unethically. Parties may fear that such an assertion would provoke some sort of outsized reaction from a powerful adversary, making it harder to reach a settlement or plea deal. Moreover, the likelihood that an opposing party would identify ethical misconduct will depend on the quality of opposing counsel. In some cases where misconduct occurs, the opposing party may not be represented by counsel at all.

More important, as previously noted, courts have little appetite for policing lawyer misconduct. Even when confronted with egregious misconduct, courts may simply admonish the offending lawyer not to repeat it.[292] Judges also rarely refer matters to disciplinary authorities. In one jurisdiction, judges filed less than .2% of the grievances against lawyers.[293]

Judges are especially reluctant to seriously sanction attorneys general or other high-ranking legal officers for misconduct that occurs in the course of litigation. When U.S. Attorney General John Ashcroft violated a court's gag order, the court publicly admonished him in a decision rather than hold him in contempt.[294] Even if these officials are held in contempt for disobeying a court order, there are almost never consequences other

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publicity than a serious legal claim."); Editorial, *In Latest Cynical Stunt, Bailey Inserts Missouri Into Trump's NY Criminal Cas*e, ST. LOUIS DISPATCH (June 26, 2024), https://www.stltoday.com/opinion/editorial/article_a9cb0ef8-32fb-11ef-9de1-7f05ef179b66.html *See also* Bayless & Shorman, *supra* (suggesting filing was a "press release styled as a lawsuit").

[292] *See, e.g.*, Fed. Trade Comm'n v. Amazon.com, 2:23-cv-00932, 2025 U.S. Dist. LEXIS 13142, at 15 (W.D. Wash. July 10, 2025) ("Amazon and its counsel are admonished that their conduct during discovery was tantamount to bad faith. Similar conduct may lead to more serious sanctions.").

[293] Leslie C. Levin & Susan Saab Fortney, Report to the Wisconsin Office of Lawyer Regulation: Analysis of Grievances Files in Criminal and Family Matters from 2013-2016, at 28 (2020), https://digitalcommons.lib.uconn.edu/cgi/viewcontent.cgi?article=1609&context=law_papers.

[294] *See, e.g.*, United States v. Koubriti, 305 F. Supp. 2d 723, 764 (Mich. 2003).

than the signal of disapproval inherent in the contempt finding.[295] On those rare occasions where the court holds an attorney general in contempt, the order is often reversed on appeal.[296]

The political environment may also make it harder for judges to impose sanctions in the first instance, especially when the judge and the official are from opposing political parties. Critics of judicial decisions routinely accuse the deciding judges of being politically motivated and even threaten violence against them.[297] The effects of threats aimed at judges and their families are sometimes significant.[298] Thus, it is important that there be another way to initiate disciplinary proceedings against attorneys general and other high-ranking legal officers apart from reliance on judges to do so during litigation.[299]

Finally, the future reach of *Webster* is concerning.[300] The court was interpreting the attorney general's powers under the Texas Constitution and state law, but its basic approach is problematic. The decision seems to suggest that there may be virtually no limit on what the attorney general

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[295] *But see infra* note 340 and accompanying text. In one other case, the Montana Supreme Court ordered the state attorney general to pay $250 as a fine for civil contempt for violating a court order. Even then, the attorney general could purge himself of the contempt if he appeared in open court within ten days and said he would obey the court order going forward. State *ex. rel* Angel v. Woodahl, 555 P.2d 501, 503 (Mont.1976).

[296] *See, e.g.,* Newman v. Graddick, 740 F.2d 1513, 1528 (11th Cir. 1984); Rhode Island v. Lead Indus. Ass'n, 951 A.2d 428, 469 (R.I. 2008); State v. Culp, 823 So.2d 510, 515 (Miss. 2002).

[297] Mattathias Schwartz, *Marshals' Data Shows Spike in Threats Against Federal Judges*, N.Y. TIMES (May 27, 2025), https://www.nytimes.com/2025/05/27/us/politics/federal-judges-threats.html; Ned Parker, et al., *Over Half of Judges Report Threats, Environment Affecting Mental Health*, NAT'L JUD. COLL. (June 27, 2024), https://www.judges.org/news-and-info/over-half-of-judges-report-threats-environment-affecting-mental-health/.

[298] *See, e.g*., Madison Hall, *The Judge Who Blocked Trump's First Travel Ban Said He Received 40,000 Threatening Messages, Forcing US Marshals to Guard His Home*, BUS. INSIDER (Feb. 22, 2021), https://www.businessinsider.com/judge-who-blocked-trumps-muslim-ban-received-40000-threats-2021-2.

[299] Of course, judges may face claims of partisanship and threats if they impose sanctions based on a state disciplinary agency's recommendation. But there should be somewhat less animus directed at the judge if the court imposes a sanction based on the agency's recommendation than if the court initiates discipline on its own.

[300] One concern is the Commission's future ability to use Rule 8.04(c) to pursue discipline based on the contents of initial pleadings in cases brought by ordinary litigants. *See supra* note 259 and accompanying text. This concern is significant but beyond the scope of this article.

can put into initial pleadings that even the court would address.[301] While the majority described the "narrow circumstances" before it as "based wholly on representations in initial pleadings,[302] it is unclear how far its limitation on "collateral" Commission action might extend. For example, why—given the *Webster* majority's separation of powers concerns—would it not apply to other lower-level lawyers in that office when the attorney general's name appears on the papers (as it usually does)? The same separation of powers concerns about "collateral" Commission proceedings would seemingly also arise when attorneys general violate disciplinary rules in pre-litigation activities, such as investigations and certain other discretionary activities. Not surprisingly, some attorneys general are arguing elsewhere that *Webster's* reasoning should be adopted in cases that do not involve initial pleadings.[303] *Webster's* reasoning has also been invoked in an attempt to insulate former acting U.S. Assistant Attorney General Jeffrey Clark from efforts to impose discipline on him.[304]

IV. FASHIONING A BETTER APPROACH

So what is the best way to approach possible violations of state professional conduct rules by attorneys general and other high-ranking legal officers? For reasons previously noted, it is important that these officials comply with the rules of professional conduct. Yet if the lawyer disciplinary system is used to harass or deter these high-ranking legal officers from engaging in lawful official conduct, it can impinge on officials' legitimate exercise of their discretion. Responding to grievances

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[301] *See supra* notes 250 and accompanying text.

[302] Webster v. Comm'n for Law. Discipline, 704 S.W.3d at 503.

[303] Montana Attorney General Austin Knudsen invoked *Webster*'s reasoning in his discipline case, in which he faces forty-one charges of violations of professional conduct rules. *In re* Knudsen, Respondent's Reply in Support of Objections, 22-25 (Mont. Feb. 7, 2025); Darrell Ehrlick, *Commission on Practice Says Charges Against Knudsen Can Continue*, DAILY MONTANAN (Sept. 12, 2024), https://dailymontanan.com/2024/09/12/commission-on-practice-says-charges-against-knudsen-can-continue/. Two Republican attorneys general filed an amicus brief in support of this position, arguing that *Webster's* reasoning should be applied in that case. Brief of States as Amici Curiae Supporting Respondent, In re Austin Miles Knudsen, No. PR 23-0496, at 13-14, 18-19 (Comm'n on Prac. Mont. March 14, 2025). Indiana Attorney General Rokita also sought to avoid discipline based on the reasoning in *Webster*. Respondent's Motion to Dismission, In re Theodore E. Rokita, No. 25S-DI-29, at 19-20 (Ind. Sup. Ct. Feb. 20, 2025).

[304] *See In re* Jeffrey B. Clark, Report and Recommendations, No. 22-BD-039, at 41-42 (D.C. Bd. of Pro. Resp. July 31, 2025), https://www.dcbar.org/ServeFile/GetDisciplinaryActionFile?fileName=JeffreyBClark22BD039.pdf (rejecting Clark's argument based on *Webster*).

can become burdensome. Concerns about disciplinary grievances may also make these officials overly cautious.[305] When individuals or organizations file baseless disciplinary grievances against these officials, they can also burden under-resourced lawyer disciplinary systems and divert them from their other work.

The answer is not, however, for courts to strip state disciplinary authorities of the power to proceed or for disciplinary authorities to find excuses to avoid these grievances. To devise a better approach to the potential problems raised when disciplinary grievances are filed against these high-ranking officials, it is useful to consider three questions: Should there be limits, like those in Texas, on who can file an actionable grievance? [306] How should grievances against high-ranking legal officers be processed, evaluated, and resolved by lawyer disciplinary authorities and courts? What sorts of violations of the Rules of Professional Conduct should be considered, or excluded from consideration, by state disciplinary authorities? These questions are examined—but by no means fully resolved—below.

A. SHOULD THERE BE TEXAS-TYPE LIMITS ON WHO CAN FILE A GRIEVANCE?

Every year, state disciplinary authorities receive many grievances that do not assert wrongdoing under professional conduct rules. Grievances are sometimes filed by parties who are upset about case outcomes. Some are simply unhappy with attorneys' bills. Opposing lawyers seeking an advantage in litigation sometimes submit grievances.[307] These grievances are not, however, the focus of Texas's law governing who can file an actionable grievance, nor will their numbers be substantially reduced because of that law. Texas's effort to limit who can file an actionable grievance to a "person" with a "cognizable individual interest"—and a few other categories of individuals—is aimed at reducing the perceived weaponization of grievances by individuals and organizations with no direct involvement in the matter in which the alleged misconduct occurred.

The term "cognizable individual interest" is not found elsewhere in Texas law, but the term "cognizable interest" is often used to discuss standing. In standing doctrine taxpayers and members of the public are not typically considered to have a "cognizable interest" that enables them to

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[305] *See* Green, *supra* note 59, at 880.

[306] The term "actionable grievance" means one that can be investigated by disciplinary authorities. Under Texas law, other grievances are classified as "inquiries" and are not investigated. *See supra* note 220 and accompanying text.

[307] Levin, *supra* note 6, at 23.

bring suit unless they have a concrete and particularized injury.[308] Thus, it seems unlikely that the "cognizable individual interest" language in Texas's law will be interpreted to permit individuals to file an actionable grievance simply because they are taxpayers or residents. The language would seemingly also preclude an organization—which is not a "person" and does not have an "individual" interest—from submitting an actionable grievance.[309] Thus, some organizations that brought meritorious grievances against lawyers in the past would be unable to submit actionable disciplinary grievances in Texas.[310]

The idea that there should be a restrictive standing requirement—like those in courts—to file an actionable disciplinary grievance is misguided. Like a complaint made to police, a grievance does not commence a lawsuit; it merely informs disciplinary authorities of the possibility that misconduct occurred. Disciplinary authorities are mostly reactive,[311] and except when a lawyer has been convicted of a crime, disciplined in another jurisdiction, or overdrawn a trust account, disciplinary authorities generally rely on grievances to determine which matters they will investigate. This is especially true in cases involving high-ranking legal officers, which disciplinary authorities are not eager to undertake.

There are good reasons why other jurisdictions do not limit who can file a disciplinary grievance. The purpose of lawyer discipline is to protect the public and the administration of justice.[312] It is not designed for the

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[308] *See, e.g.*, Daimler Chrysler v. Cuno, 547 U.S. 332, 342-44 (2006); Hunt v. Bass, 664 S.W.2d 323, 324 (Tex. 1984); 15 Moore's Fed. Prac. – Civil § 101.60[6], Lexis (database updated June 2025); David Hutchison, *Standing in Texas: Exploring Standing Under the Original Meaning of the Texas Constitution*, 103 TEX. L. REV. ONLINE 227, 236-37 (2024), https://texaslawreview.org/standing-in-texas-exploring-standing-under-the-original-meaning-of-the-texas-constitution/.

[309] Presumably a shareholder could do so, however, if the misconduct arose out of a matter in which an organization was directly involved.

[310] This includes grievances against Jeffrey Clark, Kenneth Chesebro, Rudy Giuliani, John Eastman, and some other lawyers working to advance Trump's claims about the 2020 presidential election. *See, e.g., Ethics Complaints*, *supra* note 7; *Our Work*, *supra* note 7; *Trump Lawyers Who Were Disbarred or Had Law Licenses Suspended*, NEWSWEEK (Oct. 31, 2024), https://www.newsweek.com/trump-lawyers-disbarred-law-licenses-suspended-chesebro-giuliani-cohen-1978351. Clark and Eastman are still appealing the recommended sanctions.

[311] Ted Schneyer, *The Case for Proactive Management-Based Regulation to Improve Professional Self-Regulation for U.S. Lawyer*s, 42 HOFSTRA L. REV. 233, 234 (2013).

[312] *See* ANNOTATED STANDARDS FOR IMPOSING LAWYER SANCTIONS 1.1 (Am. Bar Ass'n, Ellyn Rosen, ed., 2d ed., 2019); TEX. R. DISCIP. PROC. 15.01(A) (2024).

benefit of an individual grievant.[313] Thus, whether the grievant has a cognizable individual interest in the matter is irrelevant. By categorically limiting the filing of actionable grievances to those who have a "cognizable individual interest" in the matter or who are directly involved "in the legal matter that is the subject of the grievance," the law is likely to discourage reports to disciplinary authorities of some serious lawyer misconduct.[314] So, for example, if a lawyer's neighbor learns that the lawyer is stealing money from a client or having a sexual relationship with a client, the neighbor could not file an actionable grievance. This law undermines discipline's most important purpose: public protection.

When an attorney general sues another state and engages in conduct that violates professional conduct rules, there may be no person with a "cognizable individual interest." Even in matters where there are such parties, those individuals may fear retribution if they file a grievance. They may wish to avoid the public ridicule that can come from doing so.[315] Lawyers for these parties could file an actionable grievance in Texas, but they, too, may have personal or professional reasons for being reluctant to do so. This helps explain why grievants against high-ranking government official tend to be organizations or former judges, bar presidents, and academics who are relatively secure in their positions.

The claimed concern used to justify Texas's limits on who can file an actionable grievance—that "[i]nconsequential complaints against Texas attorneys are overwhelming the Texas State Bar"—appears to be exaggerated. As noted, the State Bar of Texas opposed the rule change, suggesting it was not seriously burdened.[316] Because grievances are

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[313] *See, e.g.*, Petition of Lath, 154 A.3d 1240, 1245 (N.H. 2017) (noting that public benefits from attorney discipline and grievant receives no legally cognizable benefit). For a discussion of how little grievants receive from the disciplinary process, see Leslie C. Levin & Jennifer K. Robbennolt, *To Err is Human, to Apologize is Hard: The Role of Apologies in Lawyer Discipline*, 34 GEO. J. LEGAL ETHICS 513, 515 (2021).

[314] Even in ordinary cases, the individuals who are most directly affected by lawyer misconduct may not file a grievance. They may prefer to quickly settle a matter and fear that filing a grievance against a lawyer in the case will complicate or frustrate that effort. They may recognize that they will derive no personal benefit—such as monetary compensation—from filing a grievance with disciplinary authorities.

[315] For example, DOJ Chief of Staff Chad Mizelle stated in response to a grievance submitted against Attorney General Bondi, "This third vexatious attempt will fail to do anything other than prove that the signatories have less intelligence —and independent thoughts — than sheep." Sophie Clark & Shane Croucher, *Pam Bondi Accused of "Serious Misconduct' in Florida Bar Complaint*, NEWSWEEK (June 6, 2025), https://www.newsweek.com/pam-bondi-accused-serious-misconduct-florida-bar-complaint-2081798?utm_source=substack&utm_medium=email.

[316] *See supra* note 222 and accompanying text.

typically confidential, it is hard to know how many grievances the Commission receives annually against high-ranking legal officers. After *Texas v. Pennsylvania* was filed, the Commission received eighty-one grievances against Paxton, but that was a highly unusual case.[317] The grievances were ultimately reduced to a single complaint against Paxton, which was "nearly identical" to the complaint against Webster.[318]

This history demonstrates that multiple grievances against high-ranking legal officers can be consolidated into a single, manageable matter. Disciplinary authorities already do this in some other cases when they receive grievances from different clients involving the same lawyer that allege similar misconduct (*e.g.,* neglect of matters, theft of client funds). It would have been even easier for disciplinary authorities to do this streamlining with the grievances filed against Paxton and Webster, where the grievances were based on the filing of *Texas v. Pennsylvania,* because the grievances arose out of the same set of facts.

The claim that the disciplinary system is being "weaponized" for political purposes may be more rooted in rhetoric than reality. There is little, if any, evidence that grievances filed against these officials wholly lack merit or are not filed in good faith. Even the fact that grievants sometimes publicize their grievances does not necessarily reflect a lack of good faith. Lawyer disciplinary processes are notoriously secretive, and publicizing the filing of grievances helps to ensure that they are not buried or ignored by disciplinary authorities that would often prefer not to address these grievances at all. Moreover, as noted, there is no evidence that such grievances are overwhelming the Texas disciplinary system or any other disciplinary authority. Unfortunately, Texas's approach will likely cut off some valid grievances, including in ordinary cases.[319]

B. HOW SHOULD THESE MATTERS BE PROCESSED, EVALUATED, AND RESOLVED?

The *Webster* majority expressed legitimate concerns about invading the executive's prerogatives and about judges being dragged into political disputes if the Commission pursued disciplinary grievances against the

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[317] Some of the grievances probably also related to the serious misconduct allegations that gave rise to Paxton's impeachment proceedings.

[318] Scherer, *supra* note 281.

[319] The District of Columbia's approach to grievances against high-ranking legal officers is also not the answer. When a grievance was filed against Attorney General Barr, the Office of Disciplinary Counsel stated that one reason it would not pursue the grievance was because the grievants lacked personal knowledge of the misconduct. *See supra* note 26 and accompanying text. Grievances based on court records and public statements can be well-founded even if the grievant was not personally involved. Indeed, the U.S. legal system routinely permits allegations in complaints and indictments that are based, at least in part, on second-hand knowledge.

First Assistant Attorney General. Nevertheless, the failure to address serious misconduct by high-ranking legal officers is also problematic. Courts should adopt rules for handling grievances against these officials that help reduce partisanship in agency decision-making so that courts are not unnecessarily dragged into partisan disputes. There are also some measures that disciplinary agencies and courts can adopt that should limit the grievances disciplinary authorities pursue against these officials and help to accommodate separation of powers and federalism concerns.

1. POLITICALLY BALANCING THE DECISIONMAKERS

Whenever a grievance is filed against an attorney general or other high-ranking legal officer, the official routinely complains—rightly or wrongly—that it is nothing more than a political vendetta.[320] One way for courts to address concerns about partisanship driving decision-making within disciplinary agencies is to amend the procedures for handling grievances filed against public officials. The change would require agencies to use politically balanced panels of decisionmakers at key points in the grievance review and hearing process. Using Texas's procedures, for example, rather than have disciplinary counsel decide that an actionable grievance should be classified as a complaint,[321] disciplinary counsel should make a recommendation and the classification decision should be made by a three-person panel composed of one person affiliated with the Democratic party, one with the Republican party, and one independent.[322] Once the panel makes a decision, both disciplinary counsel and the respondent lawyer should have the right to challenge the classification decision. (This happened in *Webster*, when the matter was appealed to BODA.[323]) Any appeal should be heard by a politically balanced panel of BODA members. If the matter proceeds to a hearing, the

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[320] *See, e.g.*, Ehrlick, *supra* note 303 (reporting on statement by Montana Commission on Practice that "[c]ontrary to [Attorney General Knudsen's] (repeated) pronouncements that these proceedings are political in nature, they clearly are not"); Kyle Pfannenstiel, *Attorney General Labrador Under Ethics Investigation by Idaho Bar After Complaint*, IDAHO STATE J. (Sept. 2, 2024), https://www.idahostatejournal.com/news/local/attorney-general-labrador-under-ethics-investigation-by-idaho-state-bar-after-complaint/article_cce5caf0-6978-11ef-8a20-a3247ef1ee13.html (referring to ethics complaint as a "political hit"); *In re* Jeffrey B. Clark, *supra* note 304, at 43, 59 (describing former Acting Assistant U.S. Attorney General Clark's arguments that investigation was "infected with political bias" and that he was the victim of "selective prosecution based on partisan political classification").

[321] TEX. RULE OF DISCIPLINARY PROC. 2.10 (2024).

[322] In some jurisdictions like New York, a much larger committee must approve or disapprove the staff's recommendation about whether to initiate charges. Even with larger committees or panels, the same approach should be used.

[323] *See supra* note 230 and accompanying text.

hearing panel should be composed of individuals from both political parties and an independent. If the panel recommends a sanction, and if the official does not consent to the sanction, the official can elect to have the matter heard by a judge. Of course, judges have their own partisan orientations. Nevertheless, this process should help address the *Webster* court's concern about political bias or bad faith affecting the disciplinary authority's decisions.

2. Declining to Pursue Grievances Alleging Low-level Misconduct

In deference to federalism concerns, disciplinary authorities should consider not pursuing grievances that allege only low-level misconduct by the U.S. attorney general or other high-ranking federal officials. Similarly, separation of powers principles suggest the same approach would be appropriate when such grievances are filed against state attorneys general or their deputies. Low-level misconduct could be defined as misconduct that would not ordinarily result in a sanction greater than a private admonition. According to the ABA *Standards for Imposing Lawyer Sanctions*, this sanction is generally appropriate when the conduct is merely negligent, there is little or no harm, and little likelihood of repetition.[324] This approach should help reduce any concerns that disciplinary grievances are being used to harass these high-ranking officials. While this policy could also raise the risk that such rule violations will be repeated, this seems unlikely. Attorneys general and other high-level legal officers typically wish to be seen as performing their work carefully and competently to maintain their credibility with the courts, opposing counsel, and the public. Moreover, if the misconduct is repeated, a private admonition would not be appropriate, and disciplinary authorities would have reason to pursue discipline at that time.

3. Deferring to Some Courts' Responses to Misconduct that Does Not Cause Significant Harm

Another way to reduce the number of grievances against high-ranking officials that proceed to a hearing is for disciplinary authorities to consider, as some do now, whether a court has already addressed the alleged misconduct.[325] Of course, the fact that a court has, or has not, addressed the misconduct does not preclude disciplinary authorities from

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[324] *See* Model Rules Law. Disciplinary Enf't 10(A)(5) (Am. Bar Ass'n 2020); Standards for Imposing Law. Sanctions 4.44, 4.54 (Am. Bar Ass'n 2005).

[325] *See* Jona Goldschnidt, *How Do Lawyer Disciplinary Agencies Enforce Rules Against Litigation Misconduct? Or Do They? Results of a Case Study and a National Survey of Disciplinary Counsel*, 27 Suffolk J. Trial & App. Advoc. 1, 31-32 (2022).

also doing so.[326] Moreover, a trial court's failure to act on litigation misconduct that is brought to its attention should not be dispositive if the court's response was obviously inadequate or new information emerges after the proceeding has concluded. Yet in cases where the rule violation does not cause significant harm, the court's response was reasonable and effective, and disciplinary authorities have treated other grievances based on the same rule violation similarly, a policy of deferring to the court's handling of the matter may be appropriate.

Consider the comments made by U.S. Attorney General Bondi on Fox News in April 2025 about Luigi Mangione, who is charged with shooting UnitedHealthcare CEO Brian Thompson on a midtown Manhattan street. She stated, "Luigi Mangione's murder of Brian Thompson—an innocent man and father of two young children—was a premeditated, cold-blooded assassination that shocked America."[327] Her comment seemingly violated Model Rule 3.8, which states that prosecutors should refrain from making extrajudicial statements that have "a substantial likelihood of heightening public condemnation of the accused."[328] After defendant's counsel complained, the judge in the case, in open court, directed the government to remind Bondi, her associates, and the Acting U.S. Attorney of the Southern District of New York that they were not to engage in "public commentary that could impede Mr. Mangione's right to a fair trial."[329] Although not a formal public reprimand, the judge's comment publicly signaled disapproval of Bondi's extrajudicial statement. If a grievance were filed against her and disciplinary authorities concluded that Bondi had likely violated an applicable rule of professional conduct,[330] they might consider that her comments, made a year before trial, had not caused significant harm, because they were unlikely to make it more difficult to empanel a fair jury in a large city like New York City. It would also be relevant if no lawyer had previously been publicly disciplined in the jurisdiction exclusively for an extrajudicial statement in a criminal

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[326] *Id.* at 34-36.

[327] Emily Saul, *Judge Reminds AG Bondi to Check Public Comments as Luigi Mangione Pleads Not Guilty*, LAW.COM (Apr. 25, 2025), https://www.law.com/newyorklawjournal/2025/04/25/judge-reminds-bondi-to-check-public-comments-as-luigi-mangione-pleads-not-guilty/.

[328] MODEL RULE PRO. CONDUCT r. 3.8(f) (AM. BAR ASS'N 2024).

[329] Victoria Bekiempis, *Judge Cautions Prosecutors in Healthcare Exec Murder Trial to Refrain from Public Comments*, GUARDIAN (May 5, 2025), https://www.theguardian.com/us-news/2025/may/05/luigi-mangione-trial-proescutors-public-comments.

[330] In fact, the language in Model Rule 3.8(f) does not appear in New York's Rules of Professional Conduct or the Local Rules of the Southern District of New York, where case was being heard. Those rules include more general language about extrajudicial comments that interfere with a fair trial or otherwise prejudice the administration of justice.

case. Under such circumstances, a disciplinary authority might reasonably decide not to pursue the grievance.

This approach does, however, have some potential drawbacks. If there is no discipline sanction, the Attorney General could understand this to mean that she is not going to be held accountable by disciplinary authorities for this type of rule violation.[331] These concerns could be largely ameliorated if the disciplinary authority wrote to Bondi to explain the reasons for not pursuing the grievance in this instance. If the grievant had made the grievance public—as some choose to do—the disciplinary authority's failure to impose discipline might lead DOJ lawyers and the public to conclude that Bondi and other high-ranking officials will not be required to follow the rules that govern other lawyers.[332] These perceptions could be addressed through a rule change that would enable the disciplinary authority to publicly reveal, when a grievance has previously been publicized, why it declined to pursue the grievance.

4. DEFERRING TO COURTS' HANDLING OF DELIBERATE VIOLATIONS OF COURT ORDERS

There is one type of serious misconduct, however, that disciplinary authorities should generally leave for courts to address. Recently, some high-ranking legal officers seemingly have been disobeying court orders or instructing others to do so.[333] The expectation that lawyers will comply with courts orders is one of the most fundamental legal norms. Lawyers are "officers of the legal system" and expected to "demonstrate respect for the legal system" and for judges.[334] Refusal to comply with a court order directly violates Rule 8.4(d) because it is prejudicial to the administration of justice. When high-ranking legal officers refuse to obey court orders, it shakes the very foundations of our legal system. It also represents a direct clash between the powers of the executive branch and the judiciary.

It is important to note, however, that courts rarely seriously sanction the highest-level federal government actors or federal agencies for a refusal to follow court orders. The failure to do so has been described as

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[331] *See* Zacharias, *supra* note 12, at 768-69 (suggesting that extrajudicial statements, which are rarely sanctioned, should be sanctioned for the rule is to have any force). While Zacharias was correct about the problems with underenforcement, sanctioning the attorney general for this rule violation when it is not otherwise enforced invites claims that the sanction is politically motivated.

[332] Of course, this same perception that Bondi was not sanctioned can occur when a private sanction is imposed. This is one reason why I suggest that if sanctions are imposed on an attorney general or other a high-ranking legal officer, they should be public sanctions. *See infra* Part IV(B)(6).

[333] *See, e.g.,* Suzanne Monyak, *Bove Told DOJ Lawyers to Ignore Court Orders*, BLOOMBERG LAW (June 24, 2025), https://news.bloomberglaw.com/us-law-week/whistleblower-alleges-bove-said-to-ignore-court-orders-at-doj.

[334] MODEL RULES OF PRO. CONDUCT preamble (AM. BAR ASS'N 2024).

"not merely random, but meaningful and motivated."[335] As previously noted, a federal district court judge admonished Attorney General Ashcroft for disobeying its gag order but declined to hold him in contempt of court.[336] In one rare case where a federal district court judge found Attorney General Griffin Bell in civil contempt for his refusal to follow a court order, the Second Circuit noted, "a contempt sanction imposed on the Attorney General in his official capacity has greater public importance, with separation of power overtones, and warrants more sensitive judicial scrutiny than such a sanction imposed on an ordinary litigant."[337] When vacating the lower court's determination, it stated, "holding the Attorney General of the United States in contempt to ensure compliance with a court order should be a last resort, to be undertaken only after all other means to achieve the ends legitimately sought by the court have been exhausted."[338]

Courts have been somewhat more willing to impose contempt sanctions on state attorneys general for their failure to obey a court order. Most recently, a federal judge found Florida Attorney General James Uthmeier in civil contempt for disregarding the court's restraining order barring enforcement of a Florida law that criminalized undocumented immigrants entering the state.[339] The judge required the attorney general to file bi-weekly reports on his enforcement activity and threatened him with possible fines or jail time.[340] State courts have also occasionally imposed contempt orders on state attorneys general who flout their orders.[341] These orders are sometimes reversed, but not because the lower state court lacked the power to hold the state attorneys general in contempt.[342]

This brings us back to the question of whether disciplinary authorities should pursue grievances based on a high-ranking legal officer's refusal to obey a court order. On the one hand, a court's willingness to impose a contempt sanction—or its reluctance to do so—and the court's immersion in the relevant facts, suggests that the judge is well-positioned to consider

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[335] Nicholas Parillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 765 (2018).
[336] *See supra* note 294 and accompanying text.
[337] *In re* Attorney General, 596 F.2d 58, 64 (2d Cir. 1979).
[338] *Id.* at 65.
[339] See Kimberly Leonard, *Florida attorney general held in contempt of court over immigration law hold*, POLITICO (June 17, 2025), https://subscriber.politicopro.com/article/2025/06/florida-attorney-general-held-in-contempt-of-court-over-immigration-law-hold-00410959.
[340] *Id.*
[341] Angel v. Woodhahl, 555 P.2d 501 (Mont. 1976); State v. Lead Industries, 951 A.2d 428 (R.I. 2008).
[342] *See, e.g.,* State v. Culp, 823 So. 2d 510 (Miss. 2022); Toledo v. State, 154 Ohio St. 3d 41 (2018); State v. Holland, 869 N.W.2d 136 (N.D. 2014).

the best way to handle the stand-off. On the other, courts have limited meaningful ways to compel compliance with their orders after holding an official in contempt. Fines are almost never paid personally by these officials and incarcerating the high-ranking official is virtually unthinkable in a system based on separation of powers. Nevertheless, the court's contempt power, in itself, can be a powerful shaming and compliance mechanism.[343] In most cases, state disciplinary authorities should defer to the court's resolution of the matter. If, however, the court refers the official to the disciplinary authorities or the judge's comments suggest that lawyer discipline would be appropriate, then the disciplinary authority should proceed. This would indicate that in the judge's view, the contempt sanction was insufficient and that disciplinary proceedings may be needed to encourage compliance or protect the administration of justice.

5. REINTERPRETING OR REVISING RULE 8.4

Another way to address some of the *Webster* court's concerns is to read certain broad rules narrowly or rewrite them, at least when applied to attorneys general and other high-ranking legal officers. For example, the court expressed concerns about the vagueness of Texas Disciplinary Rule 8.4(a)(3), which was the Commission's sole basis for seeking to discipline Webster. That rule mirrors Model Rule 8.4(c), which prohibits lawyers from engaging in conduct "involving dishonesty, fraud, deceit or misrepresentation."[344] Unlike Model Rule 4.1(a) or its Texas Disciplinary Rule equivalent, which prohibits lawyers in the course of representing a client from knowingly making a false statement of material fact to a third party,[345] Rule 8.4(c) has no knowledge or materiality requirement.

A few courts have already narrowed the reach of Rule 8.4(c). Some have determined that to fall within the rule, the statement cannot be made merely negligently, but must be reckless.[346] This recklessness includes the

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[343] Parillo, *supra* note 335, at 777.

[344] MODEL RULE PRO. CONDUCT r. 8.4(c) (AM. BAR ASS'N 2024).

[345] MODEL RULE PRO. CONDUCT r. 4.1(a) (AM. BAR ASS'N 2024); TEX. DISCIPLINARY RULES OF PRO. CONDUCT r. 4.01 (2024).

[346] *See* Romero-Barcelo v. Acevedo-Vila, 275 F. Supp. 2d 177, 206 (D.P.R. 2003) (finding that a violation of Rule 8.4(c) can be found if a lawyer makes a statement "with reckless ignorance of the truth or falsity thereof"); *In re* Evans, 902 A.2d 56, 73 (D.C. App. 2006) (stating that the rule requires knowing or reckless dishonesty); Off. of Disciplinary Counsel v. Anonymous, 714 A.2d 402, 407 (Pa. 1998) (requiring that misrepresentation be made knowingly or with reckless ignorance of its truth or falsity); People v. Rader, 822 P.2d 950, 953 (Colo. 1992) (holding that lawyer violated predecessor to Rule 8.4(c) by engaging in conduct "so careless or reckless that it must be deemed to be knowing"); *see also* Iowa Sup. Ct. Att'y Disciplinary Board v. Aeilts, 974

lawyer who "knowingly deliberately closed his eyes to facts he had a duty to see . . . or recklessly stated as facts things of which he was ignorant."[347] A few courts have read a materiality requirement into Rule 8.4(c).[348] To limit the need for disciplinary authorities to pursue grievances against high-ranking legal officers for every perceived misrepresentation or dishonest act, Rule 8.4(c) could be read or rewritten to require a knowing or reckless statement and a materiality requirement.[349] Indeed, this reading arguably should be used when Rule 8.4(c) is considered as a sole basis for imposing discipline on any lawyer.

Likewise, Rule 8.4(d), which states that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice,"[350] is vague and may invite grievances that do not merit consideration. One former state disciplinary counsel observed that the language reminded him of Justice Potter Stewart's observation about obscenity: "[H]e couldn't define it, but he knew it when he saw it."[351] Some courts have read the rule broadly to encompass conduct that harms or disadvantages the justice system generally, regardless of the context in which the conduct occurs or whether it prejudiced a particular proceeding.[352] Moreover, most courts do not require more than negligence or gross negligence when they consider Rule 8.4(d) rule violations, on the theory that the rule's focus "is on the *effect* of a lawyer's conduct on the administration of justice, rather than on the lawyer's state of mind when the conduct is undertaken."[353]

As a practical matter, almost every official action by attorneys general can be said to affect the administration of justice, and virtually any misstep can be prejudicial to it. To limit the potential overuse of the rule

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N.W.2d 119, 126 (Iowa 2022) (requiring more than mere negligence fall within rule).

[347] Off. of Disciplinary Counsel v. Anonymous, 714 A.2d at 406 (quoting United States v. Benjamin, 329 F.2d 854, 862 (2d Cir. 1964)).

[348] *See, e.g.*, *In re* Conduct of Skagen, 149 P.3d 1171, 1184 (Or. 2006); *In re* Smith, No. 12-11603, 2013 WL 1092059, at *13 (Bankr. E.D. Tenn. Jan. 30, 2013); *see also* Att'y Grievance Comm'n v. Sliffman, 625 A.2d 314, 518-19 (Md. 1993) (finding there was insufficient evidence that statement "did, or was intended to, misrepresent a material fact to anyone").

[349] "Knows" or "knowingly" is defined in the Model Rules as "actual knowledge of the fact in question. A person's knowledge can be inferred from the circumstances." MODEL RULE PRO. CONDUCT 1.0(f) (AM. BAR ASS'N 2024).

[350] *See* MODEL RULE PRO. CONDUCT r. 8.4(d) (AM. BAR ASS'N 2024).

[351] Donald R. Lundberg, *Meandering Through the Back Alleyways of Rule 8.4(d): What is Conduct Prejudicial to the Administration of Justice?*, 58 RES GESTAE 26, 26 (2015).

[352] *See In re* Kline, 311 P.3d 321, 342 (Kans. 2013) (disciplining former state attorney general).

[353] *In re* Claussen, 909 P.2d 862, 870 (Or. 1996). *See also* Fink v. Neal, 945 S.W.2d 916, 921-22 (Ark. 1997); *In re* Clark, 87 P.3d 827, 831 (Ariz. 2004).

when applied to high-ranking legal officers, disciplinary authorities should consider limiting the reach of Rule 8.4(d) when it provides the sole basis for discipline. Massachusetts has concluded, for example, that Rule 8.4(d) can serve as the sole basis for discipline only when the lawyer's conduct is so egregious or flagrantly violative of accepted professional norms as to undermine the legitimacy of the judicial process.[354] This approach enables disciplinary authorities to act in egregious cases of misconduct while limiting the potential overuse of the rule where there is no other rule violation.

6. ADJUSTING SANCTIONING PRACTICES

Sanctioning practices can also be adjusted to accommodate separation of powers and federalism concerns that arise when high-ranking legal officers have engaged in misconduct. The most commonly imposed state lawyer disciplinary sanctions are private admonitions and public reprimands, which signal a rule violation but allow the lawyer to remain in practice.[355] Private sanctions can promote specific deterrence, but little else, because they are typically communicated only to the lawyer who engaged in misconduct.[356] Public reprimands also communicate disapproval of the conduct to the legal community, thereby promoting general deterrence.[357] In addition, they inform the public that misconduct has occurred and been addressed.

Where misconduct by a high-ranking legal officer has occurred, a public reprimand is preferable to a private sanction. This type of public sanction was imposed on Indiana Attorney General Todd Rokita while he was in office.[358] The reprimand signaled misconduct and should not have interfered with his ability to perform his official duties. In his case, however, after the state supreme court imposed the reprimand, Rokita

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[354] *See In re* Discipline of an Attorney, 815 N.E.2d 1072, 1079 (Mass. 2004). *See also In re* Hinds, 449 A.2d 483, 498 (N.J. 1982) (noting that court typically only applied rule with similar language as sole basis of discipline where misconduct was particularly egregious). *But see In re* Martinez, 462 P.3d 36, 45-46 (Ariz. 2020) (rejecting this approach).

[355] ABA, 2023 SURVEY ON LAWYER DISCIPLINE (S.O.L.D.), Charts IIIA & IIIB (2025), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/sold-survey/2023/2023-sold-survey.pdf.

[356] In some jurisdictions, disciplinary authorities publish a short description of the misconduct giving rise to the discipline with the name of the attorney omitted. *See, e.g., Admonitions*, BD. BAR OVERSEERS, https://www.massbbo.org/s/admonitions.

[357] *See* Levin, *supra* note 187, at 21.

[358] *See In re* Rokita, 219 N.E.3d 733 (Ind. 2023).

immediately claimed that he had done nothing wrong.[359] This contravened his agreement with disciplinary authorities in which he admitted fault and set off a new round of disciplinary proceedings. This second matter was resolved after Rokita reaffirmed his earlier admission that he had violated two professional conduct rules.[360]

But what should be done about officials whose misconduct is so egregious that if they were not high-ranking legal officers, they would ordinarily be suspended from practice or disbarred? State courts have stripped these executive branch officials of their law licenses for criminal convictions or other serious misconduct, but this has usually occurred after the official left office.[361] Removing a state attorney general's right to practice law when a law license is required to hold the office directly interferes with the work of a coordinate branch of government. Even where a law license is not required to hold the office, such as the U.S. attorney general, an incapacitating sanction would interfere with the official's ability to appear in court and engage in the practice of law. As discussed in Part IV(C)(2) below, suspension or disbarment would nevertheless be appropriate where the legal officer has committed a serious crime that reflects on the officer's fitness to hold the office. In other cases in which a suspension or disbarment would be appropriate, the sanction could be held in abeyance until the official leaves office. This would minimize interference by the judiciary with the high-ranking legal officer's work while still signaling that serious misconduct has occurred and will have consequences.[362]

Disciplinary authorities should, however, investigate grievances, hold a hearing where appropriate, and recommend a sanction where misconduct is found, rather than follow Florida's approach. Florida law provides that grievances against constitutional officers, including its state attorney general, cannot be pursued until after the lawyer leaves office.[363] Florida

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[359] Casey Smith, *Indiana Supreme Court Dismisses Latest Disciplinary Case Against AG Todd Rokita,* IND. CAPITAL CHRON. (Oct. 9, 2025), https://indianacapitalchronicle.com/2025/10/09/indiana-supreme-court-dismisses-latest-disciplinary-case-against-ag-todd-rokita/.

[360] *Id*.

[361] For a rare exception, see *infra* notes 381-82 and accompanying text (describing temporary suspension of Pennsylvania Attorney General Kathleen Kane).

[362] While there is some risk that the official facing this sanction would continue the misconduct, concluding there is "nothing more to lose," that view would be mistaken. If a subsequent meritorious grievance is filed, a court can lengthen the suspension or the number of years before the official can seek reinstatement to practice.

[363] It states that "[i]nquiries raised or complaints presented by or to The Florida Bar about the conduct of a constitutional officer who is required to be a member in good standing of The Florida Bar must be commenced within six years after

disciplinary authorities have also taken the position that they will not investigate other high-ranking officials like Attorney General Bondi until after she leaves office, even though she is not constitutionally required to be a member of the Florida Bar.[364] This stance avoids separation of powers concerns, but raises other problems. They delay means that memories of relevant events will fade and evidence may be lost before an investigation can be conducted. Moreover, without a finding of misconduct while the individual is in office, there will be no signal to the official or other government lawyers that the conduct violates professional rules or norms. Under the Florida rule, it is unclear whether the official will even learn that a grievance has been filed unless the grievant publicizes it. The deferral of consideration of the grievance for years may lead the official to believe that the misconduct will never have adverse consequences.

C. ON WHICH MATTERS SHOULD STATE DISCIPLINARY AUTHORITIES ACT?

The preceding discussion identifies some types of grievances against high-ranking legal officers on which disciplinary authorities might reasonably decline to act. While not exhaustive, this section suggests some types of misconduct that are sufficiently serious that disciplinary authorities should act.

1. SUPERVISORY MISCONDUCT

Disciplinary authorities should pursue grievances alleging that a high-ranking legal officer directed a subordinate to violate professional conduct rules that embody fundamental legal norms or protect a criminal defendant's constitutional rights. Two important professional conduct rules are implicated. Rule 8.4(a) prohibits a lawyer from knowingly inducing another person to violate a professional conduct rule or doing so through the act of another.[365] Rule 5.1 provides that a lawyer is responsible for another lawyer's rule violation if the lawyer orders it or ratifies it.[366]

For example, if a grievance alleges that a high-ranking legal officer personally ordered a subordinate to falsify evidence in court proceedings, this could seriously interfere with a court's factfinding and would violate Rule 3.4(b).[367] In that case, disciplinary authorities should consider pursuing discipline. Likewise, if a grievance alleges that the official

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the constitutional officer vacates office." RULES REGULATING THE FLA. BAR r. 3-7.16(d) (2024).

[364] *See* Letter from Allie F. Huston, *supra* note 28.

[365] MODEL RULE PRO. CONDUCT r. 8.4(a) (AM. BAR ASS'N 2024).

[366] MODEL RULE PRO. CONDUCT r. 5.1(c) (AM. BAR ASS'N 2024).

[367] MODEL RULE PRO. CONDUCT r. 3.4(b) (AM. BAR ASS'N 2024).

knowingly ordered a subordinate to withhold *Brady* material that should be produced before trial, this would violate a criminal defendant's constitutional rights and Rule 3.8(d).[368] It would again be appropriate for disciplinary authorities to pursue discipline. Similarly, if a high-ranking legal officer directs a lawyer in the office to disobey a court order—other than in a manner that reveals the lawyer is openly refusing to obey—disciplinary authorities should consider pursuing discipline.[369] It would not tread on the legitimate work of these high-ranking officials or the lawful exercise of their discretion if they are subject to discipline for violating these fundamental constitutional rights and legal norms.

2. COMMISSION OF A CRIME

Courts and disciplinary authorities view certain criminal conduct by a lawyer as a red line that cannot be crossed. Indeed, the *ABA Model Rules of Lawyer Disciplinary Enforcement* and some states' rules treat some criminal convictions as so serious that they provide for the automatic interim suspension of a lawyer once convicted.[370] Rule 8.4(b), the relevant professional conduct rule, provides that it is professional misconduct to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.[371] Crimes that fall into this category are mostly crimes involving "violence, dishonesty, breach of trust, or serious interference with the administration of justice."[372]

Criminal conduct by any official responsible for enforcing the law is especially egregious.[373] Thus, disciplinary authorities should act where the high-ranking legal officer has committed a crime that would lead to the imposition of discipline on any other lawyer. The question, however, is at

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[368] Brady v. Maryland, 373 U.S. 83 (1963); MODEL RULE PRO. CONDUCT r. 3.8(d) (AM. BAR ASS'N 2024).

[369] *See* MODEL RULE PRO. CONDUCT r. 3.4(c) (AM. BAR ASS'N 2024) (stating that a lawyer shall not "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 is distinguished from a high-ranking officer's own refusal to obey a court order, which is discussed *supra* Part IV(B)(4).

[370] *See* MODEL RULES FOR LAW. DISCIPLINARY ENFORCEMENT r. 19(B) (AM BAR ASS'N 2002); CAL. BUS. & PROFS. CODE § 6102 (a) (West 2024); CONN. PRAC. BOOK 2-41(e) (2025).

[371] MODEL RULE PRO. CONDUCT 8.4(b) (AM. BAR ASS'N 2024).

[372] MODEL RULE PRO. CONDUCT r. 8.4 cmt 2 (AM. BAR ASS'N 2024).

[373] ANNOTATED STANDARDS FOR IMPOSING LAWYER SANCTIONS 5.21 commentary, *supra* note 31. *See also In re* Thomas, 472 N.E.2d 609, 610 (Ind. 1985) ("We observe that the Respondent violated the very laws he was obligated to enforce in his professional capacity as a Deputy Prosecutor.); People v. Unruh, 621 P.2d 948, 949 (Colo. 1980) ("Respondent's flagrant violation of the laws, which he took an oath to uphold and enforce as deputy district attorney, tends to discredit all law enforcement officers.").

what point discipline should be pursued. Rule 8.4(b) prohibits the "commission" of a crime and does not require an indictment. Even an acquittal does not preclude disciplinary authorities from sanctioning a lawyer who has committed certain crimes. This is because a lower standard of proof is required in disciplinary matters and discipline serves a different purpose than criminal proceedings.[374] Nevertheless, courts rarely, if ever, rely on Rule 8.4(b) as the sole basis for discipline unless there has been a criminal conviction.[375]

Disciplinary authorities waited for a conviction in 1995 when Pennsylvania Attorney General Ernie Preate was charged with mail fraud stemming from his campaign finance reports. He remained in office until a few days after he pled guilty and was subsequently suspended from practice for five years.[376] Likewise, Texas Attorney General Jim Mattox was indicted on charges of commercial bribery, remained in office, and was not suspended from practice; he was then acquitted.[377] More recently, Attorney General Paxton was not suspended or otherwise disciplined after he was indicted on securities fraud charges for conduct that allegedly occurred before he took office. He was never convicted.[378]

In contrast, Pennsylvania's Office of Disciplinary Counsel moved in 2015 to place Attorney General Kathleen Kane on temporary suspension after her indictment for perjury and leaking grand jury information to the

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[374] *See, e.g.*, In re Echeles, 430 F.2d 347, 352-53 (7th Cir. 1970); *In re* Hill, 144 N.E.3d 184, 189 n.3 (Ind. 2020); Maryland State Bar Ass'n v Frank, 325 A. 2d 718, 722-23 (Md. 1974); *In re* Pennica, 177 A. 2d 721, 730 (N.J. 1962), Best v. State Bar of Cal., 371 P.2d 325, 328 (Cal. 1962).

[375] Such cases may exist in unpublished decisions or elsewhere, but I was unable to find them.

[376] *Preate Cuts Deal; Will Resign Source Close to the State Attorney General Says He Signed the Agreement Earlier This Week*, TIMES-LEADER 1A (June 10, 1995), https://www.timesleader.com/archive/870413/preate-cuts-deal-will-resign-source-close-to-the-state-attorney-general-says-he-signed-the-agreement-earlier-this-week; *Former attorney general suspended for 5 years*, POCONO REC., June 24, 1999, at 1.

[377] W. Gardner Shelby, *Texas Attorney General Acquitted of Bribery*, WASH. POST (Mar. 14, 1985), https://www.washingtonpost.com/archive/politics/1985/03/15/texas-attorney-general-acquitted-of-bribery/20991f08-007b-4905-9e5a-1d1af3951a8f/. The Texas Disciplinary Rule, like ABA Model Rule 8.4(b), states that a lawyer shall not "commit" a crime. TEX. DISCIPLINARY RULE OF PRO. CONDUCT 8.04(a)(2) (2025).

[378] In exchange for prosecutors dropping the charges, he agreed to pay $300,000 in restitution and perform 100 hours of community service. Paul J. Weber, *How the Criminal Case Against Texas AG Ken Paxton Abruptly Ended After Nearly a Decade of Delay*, AP (Mar. 26, 2024), https://apnews.com/article/paxton-indictment-texas-d5e57fc6cd062c995ced91e9d2542199.

media.[379] In Pennsylvania, temporary suspension can be imposed whenever it appears that the continued practice of law by a lawyer is causing immediate and substantial public harm because of "egregious conduct, in manifest violation of the Disciplinary Rules or the Enforcement Rules."[380] The Pennsylvania Supreme Court granted the motion, but stated that its order "should not be construed as removing Respondent from elected office."[381] Kane remained in office for another eleven months even though she was required to be a member of the Pennsylvania bar to serve as attorney general.[382] She resigned from her position a few days after she was convicted and was subsequently disbarred.[383]

Disciplinary authorities should investigate grievances against high-ranking legal officers alleging criminal conduct that would violate Rule 8.4(b). If criminal investigations or prosecutions are in progress, disciplinary authorities should ordinarily wait for the criminal matter to conclude before proceeding with a disciplinary hearing. This limits the possibility of interfering with the criminal matter and allows for a more thorough factual investigation than disciplinary authorities may be able to undertake. If a conviction occurs, disciplinary authorities should not hesitate to recommend a sanction of suspension or disbarment if the crime would ordinarily garner such a sanction for other lawyers. At that point, this official will have likely resigned from office, but even if that does not occur, the disciplinary authority and court should act to suspend or disbar the individual to preserve public confidence in the justice system.

In some cases, it would also be appropriate for disciplinary authorities to investigate grievances alleging violations of Rule 8.4(b) by high-ranking legal officers even when there is no criminal investigation or prosecution. There are many reasons why officials are not prosecuted, and the failure to prosecute does not necessarily mean that a crime was not committed or that discipline is not appropriate. For example, a high-ranking DOJ official is unlikely to be prosecuted for a federal crime by the DOJ. If the allegation of the commission of a crime relates to a high-ranking legal officer's official duties, such as bribery or other public

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[379] Order, Off. Disciplinary Counsel v. Kane, Board File No. C3-15-558 (Pa. Sup. Ct. Sept. 21, 2015), https://www.pacourts.us/assets/opinions/Supreme/out/2202DD3%20-%201023669815398023.pdf.

[380] 204 PA. CODE § 91.151(a)(1) (2024); PA. RULE DISCIPLINARY ENF'T 208(f)(1).

[381] Order, Off. Disciplinary Counsel v. Kane, *supra* note 379.

[382] PA. CONST. Art. IV, sec. 5.

[383] Richard Gonzales, *Embattled Pennsylvania Attorney General Resigns After Perjury Conviction*, NPR (Aug. 16, 2016), https://www.npr.org/sections/thetwo-way/2016/08/16/490244814/embattled-pennsylvania-attorney-general-resigns-after-perjury-conviction; Miller, *supra* note 4.

corruption, it is especially important to act to protect the public and confidence in the administration of justice. Even in other cases, however, if the crime is of the sort that would normally result in sanctions under Rule 8.4(b) and the evidence of commission of the crime seems clear, disciplinary authorities should hold a hearing and recommend a sanction to preserve respect for the law, the justice system, and government institutions.

3. FALSE SWORN STATEMENTS

Of course, lying under oath is a crime,[384] and violates Model Rules 8.4(b) and 8.4(c), but this section is meant to highlight the importance of disciplinary authorities acting on grievances alleging that attorneys general or other high-ranking legal officers knowingly made a materially false statement under oath, whether it be to a court, a legislative body, or in some other matter. The state court's power to impose a disciplinary sanction on these officials when they lie under oath is arguably strongest when the misconduct occurs in court proceedings, but lying under oath in any context reflects a profound lack of respect for the meaning of oaths and a deliberate disregard for truth telling. If high-ranking legal officers are not sanctioned when they lie under oath, it signals that it is acceptable for other lawyers and the public to lie under oath in court proceedings, in commercial matters, and in other contexts. This conduct undermines trust in government institutions and respect for one of the most important principles on which the justice system operates.

4. OTHER FALSE STATEMENTS OF AN OFFICIAL NATURE

What about other false statements? At a minimum, disciplinary authorities should consider pursuing grievances alleging that a high-ranking official knowingly made a false statement to a court or failed to correct a materially false statement. Such false statements violate Model Rule 3.3(a) and can seriously impede proper decision-making by judges and juries. Although that rule prohibits knowingly making any false statement to a court, to accommodate concerns about the weaponization of grievances against high-ranking legal officers, disciplinary authorities should only pursue grievances involving materially false statements.[385] Disciplinary authorities may consider how the judge in the case addressed

[384] *See, e.g.,* 18 U.S.C. § 1621 (making it a crime to lie in federal matters in which federal law authorizes an oath under penalty of perjury to be administered); 720 ILL. COMP. STAT. 5/32-2 (2024) (making it a crime to give a materially false statement under oath in any proceeding in which an oath is required).

[385] To perhaps state the obvious, grievances should only be pursued when the high-ranking legal officer knew of the false statement, and not when her name is routinely affixed to a document, such as a brief, that contains a false statement.

the official's misconduct, but the court's response should not be entirely dispositive. It is easy to imagine, for example, a state trial judge being reluctant to sanction a state attorney general for a materially false statement during litigation. Or to take another example, a court may not realize that there has been a pattern of this sort of misconduct. Yet lying to a court undermines one of the most important professional norms on which the justice system is based. It is important for state disciplinary authorities to be willing to pursue these matters and to recommend disciplinary sanctions where appropriate.

Disciplinary authorities should also consider acting where a grievance alleges that the high-ranking legal officer knowingly made a materially false statement directly to the legislative branch or another government official with the intent that the false statement would be relied upon. Such conduct would violate Rule 4.1 (prohibiting false statements to third persons), Rule 8.4(c), and in some cases, Rule 3.9 (prohibiting false statements when representing a client before a legislative body).[386] This conduct can also constitute a crime.[387] One example arguably arose when Attorney General Barr allegedly falsely represented the contents of Special Counsel Robert Mueller's 448-page report in a letter to Congress.[388] The reason for pursuing grievances in these situations is that other government actors often rely on official statements directed to them by attorneys general and other high-ranking legal officers. These actors

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[386] *See* MODEL RULE PRO. CONDUCT r. 4.1 (AM. BAR ASS'N 2024) (stating that "[i]n the course of representing a client a lawyer shall not knowingly [make] a false statement of material fact or law to a third person"); MODEL RULE PRO. CONDUCT r. 3.9 (AM. BAR ASS'N 2024) (requiring lawyer representing a client in non-adjudicative proceedings before a legislative body or in an administrative proceeding to conform to requirements of Rule 3.3(a)).

[387] *See* 18 U.S.C. § 1001(a) (stating that knowingly making a material false statement in a matter within the jurisdiction of the executive, legislative, or judicial branch is a crime).

[388] *See DC Bar Leaders Add to Their Ethics Complaint Against Former U.S. Attorney General William Barr,* LAWS. DEFENDING AM. DEMOCRACY (May 14, 2021), https://ldad.org/letters-briefs/ethics-complaint-supplement. Barr initially refused to release the full report concerning Mueller's investigation into Russian interference with the 2016 election and possible obstruction of justice by Trump. Three days after Barr sent the letter to Congress, Mueller sent a letter to Barr stating that Barr's letter to Congress "did not fully capture the context, nature, and substance of this Office's work and conclusions." Mueller urged Barr to release immediately the Report's executive summaries stating, "[t]here is now public confusion about critical aspects of the results of our investigation." Del Quentin Wilber & Chris Megerian, *Robert Mueller Complained to William Barr About How He Characterized the Russia Investigation***,** L.A. TIMES (Apr. 30, 2019), https://www.latimes.com/politics/la-na-pol-mueller-report-william-barr-testimony-hearing-20190430-story.html.

use this information to conduct the oversight required to maintain checks and balances and to perform other government business. When legislative bodies or other government officials rely on these statements, it is often because the high-ranking legal officers are acting in their official capacities *as lawyers*. The legal officers' legitimate work and the exercise of their broad discretion would not be undermined by making them subject to discipline if they knowingly make materially false statements to other government actors.

CONCLUSION

Attorneys general and other high-ranking legal officers wield enormous power. They are ordinarily entitled to a presumption of good faith and regularity in the way they conduct their work.[389] Yet there are times when that presumption proves unfounded. When they or other high-ranking legal officers engage in professional misconduct, it can have extremely serious consequences, not only for individual litigants and court proceedings, but for the perceived legitimacy of the executive branch, the courts, and the rule of law.

State lawyer disciplinary authorities are not the sole institution that can address misconduct by these officials. Nevertheless, they are often the best-situated to do so. They have an important role to play in maintaining respect for the law and our constitutional order. Building a politically balanced decision-making process within those agencies is preferable to leaving matters to a single trial judge and hoping that the judge will respond—or respond adequately—to misconduct by high-ranking legal officers. There are many reasons why courts may not act in the first instance when misconduct occurs. Some courts will never do so.

This is not an easy undertaking for state disciplinary authorities. Pursuing disciplinary grievances against high-ranking legal officers can be time-consuming and stressful. They will face well-resourced adversaries who will fight discipline every step of the way. Disciplinary authorities may endure vituperative attacks and claims of partisanship. But the answer is not for disciplinary authorities to decline to address "political" cases or to offer ad hoc excuses for ducking these matters. Disciplinary authorities need to create a consistent and workable approach to handling grievances against these officials. They then need to find the courage to investigate these matters and recommend sanctions when it appears that these lawyers have engaged in significant professional misconduct. Disciplinary authorities play an important role in preserving norms and defending the rule of law. It is critically important that they step up and do this work.

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[389] *See* Webster v. Comm'n for Law. Discipline, 704 S.W.3d 478, 488 (Tex. 2024).