

REGULATION OF LAWYERS IN GOVERNMENT BEYOND THE CLIENT REPRESENTATION ROLE

ELLEN YAROSHEFSKY

INTRODUCTION

In February 2017, fifteen legal ethicists filed a complaint against Kellyanne Conway, Senior Counselor to the President,¹ alleging that a number of her public statements were intentional misrepresentations. The complaint filed in the District of Columbia, one of the two jurisdictions where Ms. Conway is admitted to practice, acknowledged that there are limited circumstances in which lawyers who do not act in a representational capacity are, and should be, subject to the anti-deceit disciplinary rules.²

The complaint stated:

As Rule 8.4(c) states, “It is professional misconduct for a lawyer to [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation.” This is an admittedly broad rule, as it includes conduct outside the practice of law and, unlike 8.4(b), the conduct

1. Conway was appointed as Counselor to the President in December 2016. The term “Counselor to the President” has varied definitions depending upon who is the President. The position of Counselor to the President was created by Richard Nixon and assigned Cabinet rank. Edwin Meese held this position during the Reagan administration. During the Clinton years, the position became more a communications one. During the initial three years of Bush’s terms, the position was abolished and then filled in 1992. Obama abolished the position and assigned various roles to three advisers. A July 2017 Washington Times article noted that she was Senior Counselor. Sally Persons, *Kellyanne Conway: It’s Time for Congress to ‘Do Its Job’ on Health Care*, WASH. TIMES (July 21, 2017), <https://www.washingtontimes.com/news/2017/jul/21/kellyanne-conway-its-time-for-congress-to-do-its-j/>.

2. In July 2017, the D.C. Bar acknowledged that the complaint was received on February 24, 2017. The complaint was sent to the N.J. Bar in March 2017. The N.J. Bar dismissed the complaint by letter dated February 13, 2018 stating that “your grievance, even if proven, would not constitute unethical conduct.” (letter on file with author). There has been no further information about the progress of the D.C. complaint. I was one of the signatories to that complaint. The full complaint: <http://apps.washingtonpost.com/g/documents/national/read-the-misconduct-complaint-sent-by-law-professors-against-white-house-counsel-kellyanne-conway/2346/>. Others filed a complaint; on March 5, 2018, a complaint was filed in New York against Kellyanne Conway alleging that she violated the Hatch Act for her involvement in the political campaign of Roy Moore in the 2018 Alabama Senate Race. Julie Hirschfeld Davis, *White House Aides Blur the Legal Lines Between Partisans and Public Service*, N.Y. TIMES (Mar. 12, 2018), <https://www.nytimes.com/2018/03/12/us/politics/trump-white-house-hatch-act.html>.

need not be criminal. We are mindful of the Rule's breadth and aware that disciplinary proceedings under this Rule could lead to mischief and worse. Generally speaking, we do not believe that lawyers should face discipline under this Rule for public or private dishonesty or misrepresentations unless the lawyer's conduct calls into serious question his or her "fitness for the practice of law," [(JD[.]C[.] Rule 8.4, Comment 1,)] or indicates that the lawyer "lacks the character required for bar membership." [(JD[.]C[.] Bar, Ethics Opinion 323, Misrepresentation by an Attorney Employed by a Government Agency as Part of Official Duties, at <https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion323.cfm>.)]

However, we believe that lawyers in public office—Ms. Conway is Counselor to the President—have a higher obligation to avoid conduct involving dishonest[y], fraud, deceit, or misrepresentation than other lawyers. Although the D[.]C[.] Rules contain no Comment specifically relating to 8.4(c), the American Bar Association's Model Rules of Professional Conduct (MR) make this point. MR 8.4(c), Comment 7 states that "Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers." *Cf.* D[.]C[.] Rule 1.11 (on the special conflict of interest rules for lawyers who have served in government).

It is not surprising that the Model Rules distinguish lawyers in public office from other lawyers. The ABA knows well the history of professional responsibility as an academic requirement in American law schools: following the Watergate scandal, which involved questionable conduct by a number of high-ranking lawyers in the Nixon administration, the ABA mandated that law students take such a course in order to graduate As the Preamble to the Model Rules states, a lawyer plays an important role as a "public citizen" in addition to our other roles.

The complaint alleged specific instances of material misrepresentations that are relatively well-known: Conway's repeated references, even when challenged by actual facts, to the nonexistent "'Bowling Green Massacre' to justify [an] executive order banning immigrants from seven overwhelmingly Muslim countries"; repeated false statements that President Obama "banned Iraqi refugees" from entering the country; repeated references to "alternative facts" with examples including President Trump's relationship with intelligence agencies.³

3. The complaint alleges:

On several occasions, including in an interview on MSNBC in early February, 2017, Ms. Conway referred to the "Bowling Green Massacre" to justify President Donald Trump's executive order banning immigrants from seven overwhelmingly

Muslim countries. Not only was there no “massacre” in Bowling Green, Kentucky (or Bowling Green, New York, for that matter), but Ms. Conway knew there was no massacre. Although Ms. Conway claimed it was a slip of the tongue and apologized, her actual words belie her having misspoken: “I bet it’s brand-new information to people that President Obama had a six-month ban on the Iraqi refugee program after two Iraqis came here to this country, were radicalized, and were the masterminds behind the Bowling Green Massacre. Most people don’t know that because it didn’t get covered.” See generally Clare Foran, *The Bowling Green Massacre That Wasn’t*, THE ATLANTIC (Feb. 3, 2017), at <https://www.theatlantic.com/politics/archive/2017/02/kellyanne-conway-bowling-green-massacre-alternative-facts/515619/>. Moreover, she cited the nonexistent massacre to media outlets on at least two other occasions. See Aaron Blake, *The Fix: Kellyanne Conway’s ‘Bowling Green Massacre’ Wasn’t a Slip of the Tongue. She Has Said It Before*, WASH. POST (Feb. 6, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/06/kellyanne-conways-bowling-green-massacre-wasnt-a-slip-of-the-tongue-shes-said-it-before/?utm_term=.b2de9c3f0582.

Compounding this false statement, in that same MSNBC interview Ms. Conway also made a false statement that President Barack Obama had “banned” Iraqi refugees from coming into the United States for six months following the “Bowling Green Massacre.” *Id.* However, President Obama did not impose a formal six-month ban on Iraqi refugees. He ordered enhanced screening procedures following what actually happened in Bowling Green—the arrest and prosecution of two Iraqis for attempting to send weapons and money to al-Qaeda in Iraq. The two men subsequently pled guilty to federal terrorism charges and were sentenced to substantial prison terms. See Glenn Kessler, *Fact Checker: Trump’s Facile Claim That His Refugee Policy Is Similar to Obama’s in 2011*, WASH. POST (Jan. 29, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/01/29/trumps-facile-claim-that-his-refugee-policy-is-similar-to-obama-in-2011/?utm_term=.87f35b046de2.

This was not the first time Ms. Conway had engaged in conduct involving “dishonesty, fraud, deceit, or misrepresentation.” On January 22, 2017, on the NBC television show *Meet the Press*, Ms. Conway said that the White House had put forth “alternative facts” to what the news media reported about the size of Mr. Trump’s inauguration crowd. She made this assertion the day after Mr. Trump and White House press secretary Sean Spicer accused the news media of reporting falsehoods about the inauguration and Mr. Trump’s relationship with intelligence agencies. See Nicholas Fandos, *White House Pushes ‘Alternative Facts.’ Here Are the Real Ones*, N.Y. TIMES (Jan. 22, 2017), <https://www.nytimes.com/2017/01/22/us/politics/president-trump-inauguration-crowd-white-house.html>. As many prominent commentators have pointed out, the phrase “alternative facts” is especially dangerous when offered by the President’s counselor. Moreover, “alternative facts[“] are not facts at all; they are *lies*.” Charles M. Blow, *A Lie by Any Other Name*, N.Y. TIMES (Jan. 26, 2017), <https://www.nytimes.com/2017/01/26/opinion/a-lie-by-any-other-name.html>.

Ms. Conway has also misused her position to endorse Ivanka Trump products on February 9, 2017 in an interview on Fox News from the White House briefing room with the White House insignia visible behind her. While this conduct does not fall within D[.]C[.] Rule 8.4, it is a clear violation of government ethics rules, about which a *lawyer* and member of the Bar should surely know. Federal rules on conflicts of interest specifically prohibit using public office “for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives or persons with whom the

Unsurprisingly, many legal ethicists did not sign onto the complaint for a host of reasons, some of which were expressed by the several scholars who offered trenchant criticisms arguing that the complaint was “dangerously misguided,” would set a “terrible precedent,” punished pure political speech, or was frivolous and politically motivated.⁴

On the other hand, numerous lawyers commented upon the important role of lawyers in upholding a democratic and fair system of government. Those lawyers thought it necessary for the members of the Bar to speak publicly about the nature of fact and of truth, and for state disciplinary committees to sanction those lawyers who intentionally present false facts, particularly because lawyers are sworn to uphold the Constitution and laws of the United States and pursue the fair administration of justice.

The Conway complaint raises a politically charged version of the primarily post-Watergate question of the circumstances in which lawyers who work for the government (hereinafter “LIG”—lawyers in government—but in a non-representational capacity) should be subject to disciplinary rules for engaging in conduct that constitutes misrepresentation or deceit. Those Watergate scandals, were, of course, a watershed moment in the world of legal ethics. The criminal conviction of lawyers and subsequent disbarments were the backdrop for the ABA Formal Opinion 336 recognizing that “lawyers are subject to discipline for improper conduct in connection with business activities, individual or personal activities, and activities as a judicial, governmental or public official.”⁵

Building on the idea that lawyers owe the public a duty of honesty and integrity, that era led to a smattering of cases around the country where lawyers were disciplined for conduct outside the practice of law. Famously, Bill Clinton was cited for deceit and misrepresentations during depositions in violation of Rule 8.4(c) and relinquished his Arkansas law license. Judge Susan Weber

employee is affiliated in a nongovernmental capacity.” The government’s chief ethics watchdog denounced Conway’s conduct in a letter to the White House. Richard Pérez-Peña, *Ethics Watchdog Denounces Conway’s Endorsement of Ivanka Trump Products*, N.Y. TIMES (Feb. 14, 2017), <https://www.nytimes.com/2017/02/14/us/politics/Kellyanne-Conway-ivanka-trump-ethics.html>. See also D.C. RULES OF PROF’L CONDUCT r 1.11 cmt. 2 (noting that, in addition to ethical rules, lawyers are subject to statutes and regulations concerning conflict of interest and suggesting that, given the many lawyers who work in the federal or local government in the District of Columbia, “particular heed must be paid to the federal conflict-of interest statutes.”).

4. Steven Lubet, *In Defense of Kellyanne Conway*, SLATE (Feb. 27, 2017, 9:22 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/02/the_misconduct_complaint_against_kellyanne_conway_is_dangerously_misguided.html; Jonathan Turley, *Law Professors File Ethics Complaint Against Kellyanne Conway*, JONATHAN TURLEY (Feb. 24, 2017), <https://jonathanturley.org/2017/02/24/law-professors-file-ethics-complaint-against-kellyanne-conway/>; Paul Alan Levy, *First Amendment Implications of Bar Charges Against Kellyanne Conway*, PAUL ALAN LEVY’S BLOG (Feb. 23, 2017, 6:55 PM), <http://paulalanlevy.blogspot.com/2017/02/first-amendment-implications-of-bar.html>.

5. ABA Comm’n on Ethics & Prof’l Responsibility, Formal Opinion 336 (June 3, 1974).

Wright, who also imposed fines upon Clinton for his conduct, noted that “[i]t is not acceptable to employ deceptions and falsehoods in an attempt to obstruct the judicial process.”⁶ The Court noted the even higher standard expected of him because of his position. Judge Wright added that the president’s “conduct in this case, coming as it did from a member of the bar and the chief law enforcement officer of this Nation, was without justification and undermined the integrity of the judicial system.”⁷ Other high-level government officials, including Eliot Abrams and Scooter Libby, were disciplined based upon their criminal convictions.⁸ None of their conduct was within the practice of law, but it did reflect adversely on their “fitness to practice law.”⁹

This paper considers the extent to which LIGs should be governed by the Rules of Professional Conduct, notably Rule 8.4’s anti-deceit provision. It explores constitutional, statutory, regulatory, and policy issues. It considers well-known paradigms of legal ethics regulation; differences in lawyer regulation of private counsel and government lawyers; various roles of government officials; First Amendment implications; and other aspects of this controversial issue.

It concludes that lawyers who work in government (LIGs), whether on legal matters or other matters, should be subject to Rule 8.4(c)’s prohibition where those lawyers have willfully or intentionally engaged in significant acts of deceit or misrepresentation and such conduct adversely reflects upon that lawyer’s fitness to practice law. LIGs who advise or counsel government officials—including those who are held out to the public as advisors or counselors whether on “pure legal matters” or otherwise—are among those subject Rule 8.4(c)’s provisions.

It suggests the need for Commentary to Rule 8.4 to provide notice to government lawyers of the applicability of the Rule to conduct outside of the traditional “practice of law.” That commentary should note that the Rules are applicable to LIGs who counsel or advise government officials within or outside of a representational capacity; lawyers who work within various government agencies in executive, policy making, or other positions; lawyers who work for agencies in an advisory capacity where a law degree is not a prerequisite for the position; and lawyers who advise or counsel government officials on what would otherwise be noted as political matters, but are held out to the public as “counselors.”¹⁰

6. David M. Bresnahan, *Disbarment Decided by Clinton Cronies*, WND (Feb. 11, 2000, 1:00 AM), <http://www.wnd.com/2000/02/417/#6ys2dguAMtJVcfXJ.99>.

7. *Id.*

8. *In re Abrams*, 689 A.2d 6 (D.C. 1997); *In re Libby*, 945 A.2d 1169 (D.C. 2008). The regulations affect lawyers who are licensed in particular jurisdictions. Lawyers who do not have current licenses are not within the ambit of this paper.

9. *Abrams*, 689 A.2d at 21.

10. Among the many articles and commentary on this issue is Eric Lipton, Ben Protes, & Andrew W. Lehren, *With Trump Appointees, a Raft of Potential Conflicts and ‘No Transparency’*, N.Y. TIMES (Apr. 15, 2017), <https://www.nytimes.com/2017/04/15/us/politics/trump-appointees-potential-conflicts.html>

The paper addresses a continuum of conduct that subjects a LIG to sanctions for violations of Rule 8.4. At one end is the well-established disciplinary consequence for lawyers who have engaged in criminal conduct. On the other end is the notion suggested in this paper—that significant intentional misrepresentations that adversely reflect upon fitness to practice law should give rise to sanctions. Along the continuum are various civil and regulatory violations for intentional misrepresentations that may give rise to internal government sanctions that should also subject the lawyer to disciplinary consequences.

Finally, it notes, but does not address, the significant other legal ethics issues for government lawyers in the Trump administration, notably conflicts of interest for lawyers who formerly worked for companies and now hold representational or non-representational positions in government.

CONTEXT

This issue arises in an era of increasing cynicism about the value of democratic forms of government. As social scientists document, the “crisis of democratic legitimacy extends across a much wider set of indicators than previously appreciated.”¹¹ Not only is there a longstanding trend toward withdrawal from participation in democratic institutions, but there is a disturbing rise in support for various authoritarian alternatives.¹² For instance, support for the “army to rule” has grown threefold in the U.S. in the past twenty years from five percent to sixteen percent.¹³ The percentage of U.S. citizens who believe that it would be “better to have a ‘strong leader’ who does not have to ‘bother with parliament and elections’” has risen from twenty-four percent to thirty-two percent over the course of the sixteen years from 1995 to 2011.¹⁴ It

(“populating the White House and federal agencies with former lobbyists, lawyers and consultants who in many cases are helping to craft new policies for the same industries in which they recently earned a paycheck”). On July 6, 2017, the White House Ethics advisor, Walter Shoub, resigned. Nicholas Fandos, *Government Ethics Chief Resigns, Casting Uncertainty over Agency*, N.Y. TIMES (July 6, 2017, 12:00 AM), <https://www.nytimes.com/2017/07/06/us/politics/walter-shaub-office-of-government-ethics-resign.html> (stating that ethics officials in the federal government are committed to “public service [a]s a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.”).

11. Roberto Stefan Foa & Yascha Mounk, *The Democratic Disconnect*, 27 J. DEMOCRACY 5, 7 (2016) (detailing results of public opinion polls from 1995-2011). *But see* PIPPA NORRIS, *DEMOCRATIC DEFICIT: CRITICAL CITIZENS REVISITED* (Cambridge U. Press 2011); CHRISTIAN WELZEL, *FREEDOM RISING: HUMAN EMPOWERMENT AND THE QUEST FOR EMANCIPATION* (2011); Russell Dalton & Christian Wetzel, eds. *THE CIVIC CULTURE TRANSFORMED: FROM ALLEGIANT TO ASSERTIVE CITIZENS* (Cambridge U. Press 2011) (arguing that trends are benign indicators of political sophistication of youth and that there is robust support for democracy as a system of government).

12. Foa & Mounk, *supra* note 11, at 7.

13. *Id.* at 12.

14. *Id.*

is striking that such undemocratic sentiments have risen sharply in the past decade not only by the wealthy, but among youth who are traditionally more liberal in their twenties.¹⁵

This decline in support for democratic institutions in the U.S. arises in a legal and regulatory context that eschews limitations upon speech, even attorney speech, because of the paramount importance of truth seeking through the proverbial “marketplace of ideas.”¹⁶

The idea that unbridled freedom to exchange ideas in a “marketplace” will lead to the selection of truths or best beliefs stretches back at least to John Stuart Mill¹⁷ and is articulated in Justice Holmes’ dissent in *Abrams v. United States*.¹⁸ Like the economic theory of markets, the idea is that a process of robust debate will lead to the discovery of truth, or at least the best perspectives or solutions for societal problems.¹⁹ The First Amendment is at the heart of various cultural debates in the U.S., and from *N.Y. Times Co. v. Sullivan*²⁰ to *Texas v. Johnson*,²¹ our laws have propagated the free exchange of ideas.

Historically democratic institutions—which includes laws, social norms, and mores in addition to organizations—have played and continue to play important roles in the free exchange of ideas. Political institutions considered to be essential to free speech and the “marketplace” include political bodies like legislatures, city councils, and regulatory bodies.²² Either explicitly or implicitly, these institutions have assured listeners that the information they are receiving is trustworthy.²³

15. Among journalists discussing these issues are Joshua Muravchik & Jeffrey Gedmin, *This Is What the Beginning of the End of Democracy Looks Like*, WASH. POST (Apr. 19, 2017, 2:22 PM), https://www.washingtonpost.com/posteverything/wp/2017/04/19/this-is-what-the-beginning-of-the-end-of-democracy-looks-like/?noredirect=on&utm_term=.b38628b223cc; Linda Greenhouse, *The Corrosive Election and the New Abnormal*, N.Y. TIMES (Oct. 27, 2016), <https://www.nytimes.com/2016/10/27/opinion/the-corrosive-election-and-the-new-abnormal.html>.

16. W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305 (2001) [hereinafter Wendel, *Free Speech*] (discussing and criticizing various theories, including the truth-seeking marketplace of ideas rationale, for the paramount role of the first amendment in jurisprudence).

17. JOHN STUART MILL, ON LIBERTY 17-52 (David Spitz ed., W. W. Norton 1975) (1859).

18. *Abrams v. United States*, 250 U.S. 616 (1919).

19. *Id.* at 630 (Holmes, J., dissenting).

20. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

21. *Texas v. Johnson*, 491 U.S. 397 (1989).

22. Joseph Blocher, Note, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 842 (2008); see *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (“Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . .”).

23. Blocher, *supra* note 22, at 858 (“Those who hear a well-known professor give a lecture . . . feel less of a duty to ‘double-check’ the information The trust the listeners place in the information they receive saves them from having to pay what could otherwise be substantial information costs.”).

Of course, the institutional press' role in the "marketplace" is essential, historically serving as a clearinghouse for information.²⁴ Throughout its existence, it has played the critical role of explaining and distributing information about other institutions, without which the average citizen would be lost or misinformed. Active and critical reporting has allowed citizens to cast informed votes,²⁵ and as such, the press is the archetypal institution in the "marketplace."

However, the "marketplace of ideas" metaphor assuming that a single marketplace where factual truths are exchanged and debated has become a misnomer.²⁶ The current internet era, the proliferation of mass media, and the phenomenon of fake news has turned the fundamental concept of the "marketplace of ideas" topsy turvy. The disproportionate presence of viewpoints in mass media has made it difficult for the "marketplace" to generate objective truths.²⁷ This is a disturbing and unique context in the history of democratic forms of government. Because of technological innovation, producing hundreds of media outlets dividing the country by an individual's preferred sources of information; by globalization and political developments, there is no longer a shared common public discourse about underlying facts and events. Ideas that are based upon "fact" are often not the underpinning for public debate.²⁸ In other words, there is no longer one marketplace of ideas, but seemingly alternate marketplaces in which "truthful facts" is not a governing premise. Consequently, it is increasingly difficult to preserve and promote democratic institutions and values. The rule of law itself is challenged.²⁹

One question that this paper addresses, is whether, and to what extent this seeming paradigm shift in fact-reliance in public discourse should inform a government lawyer's ethical obligation not to engage in misrepresentation.

24. *Id.* at 857.

25. *Id.*

26. Foa & Mounk, *supra* note 11 (noting that the data for youth (under twenty-five) indicates a declining lack of support for traditional First Amendment protections looking to issues such as "hate speech").

27. This is not a phenomenon unique to the internet era, but it is exacerbated by the proliferation of sources of information. *See, e.g.*, C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 965-66 (1978) (contending that the disproportionate presence of certain viewpoints in mass media renders the marketplace of ideas incapable of generating objective truth).

28. Of course, propaganda to undermine truth is not unique to this era. Hitler and Stalin utilized "ruthless media strategies" to manufacture propaganda. Piers Brendon, *Death of Truth: When Propaganda and 'Alternative Facts' First Grippled the World*, GUARDIAN (Mar. 11, 2017), <https://www.theguardian.com/media/2017/mar/11/death-truth-propaganda-alternative-facts-grippled-world>; Mikhail Iossel, *Life Under Alternative Facts*, NEW YORKER (Feb. 5, 2017), <https://www.newyorker.com/culture/culture-desk/life-under-alternative-facts>.

29. There are varied definitions of the Rule of Law. In popular terms, as Linda Greenhouse notes, the "rule of law" is both a process and an end state: the product is not a list of mandates but of ingrained habits, a collective turn of mind, shared expectations about how a civil society organizes its affairs and resolves conflicts. Greenhouse, *supra* note 15.

Does the current political climate demand a revised look at the legal profession's view of government lawyers? Even if this climate does not alter obligations, to what extent should government lawyers who are not engaged in client representation be bound by the Rules of Professional Conduct (hereinafter "RPCs")?

This question should be fundamental to the profession and its regulation, yet in the current legal ethics regime, the rules governing the profession are based primarily upon client representation and the "practice of law," rather than a more robust view of the role of the lawyer. The broader obligation of those with law licenses is readily dismissed for a host of reasons. First, of course, is the fundamental question of the extent to which lawyers who do not practice law should be governed by the Rules of Professional Conduct at all. Scholars have long debated the role of lawyers in society and the premise and scope of lawyer regulation. And

even though the RPCs and scholars readily acknowledge the special role of government lawyers,³⁰ there is little suggestion of regulation for government lawyers beyond the client-based roles. One reason for concern is that thousands of government lawyers are employees who are not engaged in representation, thus regulation would cast too wide a net that would be counterproductive and unwieldy. Second, even if those lawyers are subject to regulation, Rule 8.4(c) remains subject to extensive criticism, especially because of its vagueness and its overbroad application.

Despite these concerns, I contend that, especially in an era of fundamental challenges to the very notion of a democratic government and fact-based culture, a more robust examination of regulation of the conduct of the government lawyers who are counselors or advisors to government officials is warranted. I advocate the adoption of a Comment to Rule 8.4 to clarify the application of the anti-deceit provision to government lawyers.

This paper will proceed in four parts: Part I discusses the longstanding and ongoing scholarly debate about the role and regulation of lawyers and of government lawyers in and out of the practice of law. Part II traces the history of Rule 8.4(c) on misrepresentation and deceit. Part III discusses first amendment law as it pertains to lawyers and its intersection with rules of professional conduct and Part IV makes a proposal for the regulation of government lawyers under Rule 8.4.

I. LAWYER ROLES AND RULES OF PROFESSIONAL CONDUCT

The legal profession has long viewed lawyers as having a special role within society but has expressed such notions in terms that have few practical Rules-based consequences. The Preamble to the ABA's *Model Code of Professional Responsibility* boldly proclaimed, "[l]awyers, as guardians of the law, play a vital role in the preservation of society." The ABA's current Preamble to the *Model Rules of Professional Conduct* observes that "[a] lawyer

30. See *infra* notes 43–44 and accompanying text.

... is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”

Of course, the preamble is merely hortatory. The dominant view of legal ethics regulation is that it governs lawyers primarily in the practice of law although there are regulations governing lawyers in other roles.³¹ In the modern era, where the discussion of legal ethics is often bereft of moral discourse and instead is solely about lawyer regulation, the focus is upon private lawyers, notably upon business lawyers and the business of lawyering.³² Scant attention in the regulatory regime is directed toward public interest lawyers or to government lawyers.

Despite the lack of regulatory focus on these specific roles, there is a long-standing scholarly debate about the role of lawyers in society, the legal theories that undergird the profession, and the extent of a lawyer's obligations beyond the individual client. The quest for consensus among scholars about these fundamental issues has proven to be illusive. Broadly speaking, on the one hand is the view articulated by Justice Brandeis, that a lawyer is a public citizen whose role is to promote justice, particularly to enhance democracy.³³ The lawyer is a leader in the society and her actions should adhere to the highest moral standards.³⁴ This view supports the lawyer taking various actions both in litigation and in counseling to “do justice” even when it may be contrary to the interest of the client if it is in public interest. Modern legal theorists promote versions of this fundamental moral obligation.³⁵ Those moral philosophy notions that lawyers have broad obligations to the society are posited as Lawyer/Statesman,³⁶ lawyers as leaders,³⁷ lawyers serving the public good,³⁸

31. See *infra* note 38.

32. During the 1970s, the Bar “capitulated to a market understanding of the role of the lawyer” and even “public interest” was redefined to include serving individual clients was the public interest. The ABA said: “As lawyers, when we rigorously and competently represent our own private clients, we are serving the public interest in the same sense that a member of a ‘public interest’ law firm serves it by representing rigorously and competently his or her clients.” Chesterfield Smith, *President's Page*, 60 A.B.A. J. 641, 641 (1974).

33. WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE*, 130-31 (1998) (concerning Brandeis's implicit legal theory drawn out by Henry Hart and James Willard Hurst).

34. Scholars promote versions of this moral philosophy approach to the profession. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988). Anthony Kronman refers to the Lawyer/Statesman in *THE LOST LAWYER* (1993). ANTHONY T. KRONMAN, *THE LOST LAWYER* (1993). Theoretical approaches of other scholars include: Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE WESTERN RES. L. REV. 665 (1994); THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (1994); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); RONALD DWORKIN, *LAW'S EMPIRE* (1988).

35. LUBAN, *supra* note 34 (contrasting criminal justice where the defense guards against abuse of state power and therefore aggressive defense is to be applauded).

36. KRONMAN, *supra* note 34.

37. DEBORAH RHODE, *LAWYERS AS LEADERS* (2013).

38. SIMON, *supra* note 33; LUBAN, *supra* note 34; SHAFFER & COCHRAN, *supra* note 34; William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 HOW. L.J. 539 (1986).

and contrasted by the prevailing contractual view that lawyer regulation is limited primarily to the conduct arising from client representation.³⁹ In the former view, lawyers by dint of their training, orientation, temperament, and experience should play a leading role in their communities and share a devotion to the public good.

Deborah Rhode, in *Ethics in Practice*, gathered leading scholars, sociologists, philosophers, economists, and political scientists to examine aspects of the profession. Those scholars are “united in their conviction that lawyers have public obligations that have not been adequately institutionalized in practice.”⁴⁰ Anthony Kronman, adopting the notion that lawyers should aspire to be the Lawyer/Statesman calls for a republican legal ethics where:

The leading question here will not be, “what is the maximum that a lawyer is permitted to do within a system of laws?”, but rather, “what are the ideals toward which lawyers should aspire and how can these be achieved?” [It] will emphasize the obligation of lawyers to be an improving force . . . [a]nd it will stress, too, that lawyers have a duty not merely to accept the law as a given framework of rules that imposes limits on their clients’ conduct and their own, but also to work actively to improve these rules so that they better serve the good of the community as a whole. In these respects, a republican legal ethics will tend to be aspirational and communitarian in character.

William Simon sets forth a version of the view of the lawyer’s role grounded in moral philosophy as the Contextual Lawyer, which he acknowledges may be “inconceivably utopian.” His theory positing that lawyers should “take such action as considering the relevant circumstances of the particular case[] seem[s] likely to promote justice.”⁴¹

Versions of this moral philosophy view of the role of lawyers have not gained traction within legal regulatory frameworks although there is often hortatory language in the Preamble and in commentary to the Rules of Professional Conduct that acknowledges the importance of such considerations.⁴² Instead, as William Simon critiques, “[t]he profession has promulgated an ideology, backed by disciplinary rules and sanctions, that mandates unreflective, mechanical, categorical judgment rather than practical reason.”⁴³ Labeling this the “Dominant View,” he pointedly concludes “[t]he Bar and its rule based, disciplinary regime has stunted the moral quality of practice.”⁴⁴

39. See generally SIMON, *supra* note 31.

40. DEBORAH RHODE (ed.), Preface, *ETHICS IN PRACTICE* (2000).

41. SIMON, *supra* note 33, at 6.

42. MODEL RULES OF PROF’L CONDUCT r. 8.4(b) (AM. BAR ASS’N, 1983).

43. SIMON, *supra* note 33, at 23.

44. Simon notes “[t]his Dominant view gives lip service to moral considerations and aspirational values, but these are merely “hypocritical posturing.” Instead, in the vast majority of civil cases, lawyers serving individual clients can be described “self-serving profit maximizers”

In this dominant and contractual view, lawyers do not bring a devotion to the public good, not force that on their clients. Rather, lawyers have legal expertise to assist clients in pursuing their self-interest within the bounds of the law. The client's self-interest is the sole value judgment and lawyers are no more public spirited than their clients.

The RPCs certainly have adopted the contractual model with some modicum of attention to more expansive view of lawyers as serving the "public good" reflected in the Preamble and Commentary to the RPCs.⁴⁵ And within the dominant view, the legal ethics debates about the extent to which lawyers should be regulated outside the practice of law is focused primarily upon lawyers engaged in business endeavors as well as a smattering of disciplinary cases sanctioning lawyers for private conduct, mostly for criminal convictions.⁴⁶

Of course, neither the dominant view nor any of the scholarly advocacy of a moral philosophy paradigm adequately reflects a comprehensive approach of professional regulation because the profession consists of a wide range of lawyers engaged in remarkably different work. There is increasing specialization. Some argue, noting the decline in "cohesion, consensus and community" within the bar that lawyers are not a unified group but an "amalgamation . . . [of members] pursuing difference objectives in different manners and more or less delicately held together under a common name . . ." ⁴⁷ Consequently, the rules regulating lawyers can be and are increasingly nuanced to reflect different lawyer roles and contexts.⁴⁸

These different contexts could be informed by either the moral philosophy and contractual approaches of the legal ethics paradigm or a combined version

(11) whose ethical responsibilities have been defined increasingly as cabined by relatively clearly defined rules of professional conduct. Indeed, the course of legal ethics in the last forty years has been toward greater rule compliance rather than a continuation of the aspirational tradition of the Preamble and Comments to RPCs.

45. MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N, 1983). The Preamble and Comments to RPCs acknowledge that lawyers can take into account moral and social considerations as well as strictly legal ones.

46. See, e.g., *In re O'Hara*, 101 A.3d 433 (D.C. 2014) (disbarring attorney who was convicted of conspiracy to commit mail fraud and deprivation of honest services); *In re Grant*, 317 P.3d 612 (Cal. 2014) (disbarring attorney for possession of child pornography, citing moral turpitude).

47. Sharyn L. Roach Anleu, *The Legal Profession in the United States and Australia: Deprofessionalization or Reorganization?*, 19 WORK & OCCUPATIONS 184, 188 (1992); see Rebecca Roiphe, *The Decline of Professionalism*, 29 GEO. J. LEGAL ETHICS 649, 674 (2016) (tracing history of changes in lawyer regulation).

48. See, e.g., MODEL RULES OF PROF'L CONDUCT r. 1.11, 1.13, 2.1-4 (AM. BAR ASS'N, 1983). RPC 2.1 (lawyer as advisor); RPC 2.2 (lawyer as intermediary); RPC 2.3 (lawyer as evaluator); RPC 2.4 (role as third party neutral); RPC 1.13 (organizational clients); RPC 1.11 (government lawyers). Of course, as Deborah Rhode astutely and consistently observes, the bar's failure to address "institutional and ideological structures that compromise moral commitments" such as economic conditions, adversarial premises and regulatory frameworks" there will be a gap between the ideals and the institutions." DEBORAH RHODE, *supra* at note 37.

of these philosophies. In other words, even if the rules-based dominant legal ethics approach is applicable for most of the profession, a different approach can be utilized for the government lawyer who serves the public, not a private client.

The government, by definition, exists by and for the people. Its lawyer, unlike their private counterpart, should be deemed to bear responsibility to serve the public. As Steven Berenson notes, government lawyers should have heightened responsibility because they themselves are government officials.⁴⁹ At the very least, the notion of serving the public should include the fact that a government lawyer, employed by the public, should not engage in intentional falsehoods and other misrepresentations, whether in client representation or in other capacities.

Most scholars reject the notion that government lawyers should consider the “public interest,” concluding that it is too vague a standard for government lawyers to apply in specific situations.⁵⁰ However, such a fundamental obligation against deceit does not require intensive debate about what it means to “serve the public.” Application of anti-deceit measures to government lawyers is not a vague standard that requires extensive discussion about difficult issues such as “who is the government lawyer’s client.”⁵¹

This paper suggests and supports the scholarship promoting a broader view of the lawyer’s role in government service. It utilizes the construct that Robert Gordon offered in the context of advocacy: “disputes . . . cannot really be disputes over freedom versus regulation, but rather over . . . the form and content of regulation.”⁵²

49. Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789 (2000).

50. Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 WASH. U. L. REV. 1033 (2007); Geoffrey P. Miller, *Government Lawyers’ Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1294 (1987) (“[T]he notion that government attorneys represent some transcendental ‘public interest’ is, I believe, incoherent.”); Josephson & Pearce, *supra* note 38, at 564 (“The government lawyer who uses the public interest approach . . . is not a lawyer representing a client but a lawyer representing herself.”) (emphasis added); Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951 (1991) (criticizing the public interest approach as anti-democratic).

51. Lanctot, *supra* note 50 (discussing various issues in the public interest approach). There is some support for the proposition that government lawyers should consider the public interest when making decisions, such as whether to disclose information. The Hawaii Rules of Professional Conduct specifically state that government lawyers should assess “the public good” when deciding whether or not to disclose information about government wrongdoing. Kathleen Clark argues that “[a] more modest, alternative formulation of the public interest approach is that the public interest is embodied in a government’s duly enacted statutes, regulations, and rules. A government lawyer promotes the public interest by ensuring compliance with the law. Clark, *supra* note 50 at 1072.

52. See Renee Newman Knake, *Attorney Advice and the First Amendment*, 68 WASH. & LEE L. REV. 639, 702 (2011).

Thus, the critical question is the extent to which Rule 8.4 should extend to conduct outside the practice of law for all lawyers, and notably for government lawyers.

II. REGULATION OF GOVERNMENT LAWYERS

One of the most vexing problems in contemporary legal ethics is how to think about the professional responsibilities of government lawyers. The problem arises because of the tension between the government lawyer's public role and the private relationship basis of traditional conceptions of legal ethics.⁵³

The RPCs, as well as scholarly literature, acknowledge the special role of the government lawyer and, to some extent, how it differs from those of the private sector lawyer.⁵⁴ In some commentary, there is an acknowledgement that government lawyers must act for the public good and case law often supports this notion.⁵⁵ For example, the comment to Model Rule 1.13 explains, "a government lawyer may have authority under applicable law to question [government officials'] conduct more extensively" than would a lawyer for a private organization. As a result, "a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved."⁵⁶

However, the Rules are not particularly useful in addressing the circumstances in which government lawyers work, especially because of the question of "who is the client." Is it the individual agency or an office within an agency? Is it the "public interest"? It is readily acknowledged that the

53. *Rethinking the Professional Responsibilities of Federal Agency Lawyers*, 115 HARV. L. REV. 1170, 1170 (2002).

54. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 97 (AM. LAW INST. 2000) (noting three aspects where government lawyer role differs from private lawyer); Berenson, *supra* note 49, at 789 ("It is an uncontroversial proposition in mainstream American legal thought that government lawyers have greater responsibilities to pursue the common good or the public interest than their counterparts in private practice . . ."); Douglas Letter, *Lawying and Judging on Behalf of the United States: All I Ask For Is a Little Respect*, 61 GEO. WASH. L. REV. 1295, 1297 (1993) ("In theory, federal public servants have a single master: the people of the United States."); Ralph Nader & Alan Hirsch, *A Proposed Right of Conscience for Government Attorneys*, 55 HASTINGS L.J. 311, 313-14 (2003) (explaining the government attorney's special responsibilities); Elisa E. Ugarte, *The Government Lawyer and the Common Good*, 40 S. TEX. L. REV. 269, 274 (1999) (citing the government lawyer's "obligation as a public servant").

55. For example, Model Rule 1.13, "Organization as Client," treats governments like other client entities to which lawyers owe duties and does not account for differing structures of government versus private entities. MODEL RULES OF PROF'L CONDUCT r. 1.13 (AM. BAR ASS'N, 2018). See generally Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460 (1996); Judith A. McMorrow, *The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 SMU L. REV. 3 (2005).

56. Nancy Leong, Note, *Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys*, 20 GEO. J. LEGAL ETHICS 163, 196 (2007).

private sector lawyer forms the model for which the ethical rules were devised and consequently, the rules do not address many of these fundamental concerns for government lawyers.⁵⁷ In traditional litigation or transaction settings there is often symmetry in the application of the Rules, but the RPCs do not sufficiently contemplate the ethical obligation of government lawyers outside of those settings.⁵⁸ Significant debate ensues and confusion often reigns. As Kathleen Clark points out, “[i]f a legislative lawyer looked to the American Bar Association’s Model Rules of Professional Conduct for guidance, she could be led very badly astray.”⁵⁹

If the Rules do not adequately address the role of the government lawyer who represents a client, they certainly do not address the role of LIGs where those lawyers are not giving legal advice or practicing law in any traditional sense. These lawyers work on policy, planning, and administrative matters, to name a few.⁶⁰ They exercise discretion in implementing policies of their agency.⁶¹

Scholarly literature acknowledges the varied roles of a government lawyer and the difficulty of clear delineations of who the lawyer serves,⁶² but there is scant authority about the ethical obligations of government lawyers outside the traditional settings of the practice of law and whether, and to what extent, ethics rules apply to the many lawyers who work in government.⁶³

There is a profound lack of clarity of which functions and responsibilities subject the government lawyer to the RPCs. While there is substantial literature about the role of White House Counsel, the Office of Legal Counsel, and a few

57. See Ted Schneyer, *On Further Reflection: How “Professional Self-Regulation” Should Promote Compliance with Broad Ethical Duties of Law Firm Management*, 53 ARIZ. L. REV. 577, 577 (2011) (“American lawyers continue to be regulated under a regime that took shape when solo practice was the norm.”).

58. See *Government Counsel and Their Obligations*, 121 HARV. L. REV. 1409 (2008).

59. Kathleen Clark, *The Ethics of Representing Elected Representatives*, 61 L. & CONTEMP. PROBS. 31, 36 (1998).

60. See, e.g., CHARLIE SAVAGE, *POWER WARS: INSIDE OBAMA’S POST-9/11 PRESIDENCY* 65 (2015) (“Lawyerliness shaped Obama’s governance as a matter of style and thought, not just process. Obama was a lawyer and a law teacher, not a CEO, and he chose many other people with law degrees . . . to be members of his team. This was important, because lawyers are trained to think in very particular ways.”).

61. *Rethinking the Professional Responsibilities of Government Agencies*, *supra* note 53, at 1180.

62. See, e.g., Cornelia T. L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 684 (2005) (discussing the Solicitor General, Office of Legal Counsel and “suggesting that the lawyers’ role in serving the sometimes divergent interests of the president, the executive branch, and the people is complex and not always very clear.”); See, e.g., Jeremy Rabkin, *White House Lawyering: Law, Ethics, and Political Judgments*, in *GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY AND PRESIDENTIAL POLITICS* 107 (Cornell W. Clayton ed., 1995).

63. Hugh D. Spitzer, *Model Rule 5.7 and Lawyers in Government Jobs—How Can They Ever Be “Non-Lawyers”?*, 30 GEO. J. LEGAL ETHICS 45 (2017).

articles about lawyering for legislators,⁶⁴ there is little that examines the lawyer's role across government positions.⁶⁵

Of course, there is the fundamental question of the definition of a government lawyer.⁶⁶ "Government lawyer" denotes a broad range of jobs in federal, state and local branches of government and agencies. This includes prosecutors and adjudicators, among others.⁶⁷ The RPCs have limited rules specifically addressing government lawyers engaged in the practice of law, notably the conflict of interest rules regarding government service as well as rules for prosecutors.⁶⁸ In addition to ethical obligations, statutes and various regulations apply to many government lawyers.⁶⁹ Various attempts to exempt

64. Clark, *supra* note 59, at 31; David A. Marcello, *The Ethics and Politics of Legislative Drafting*, 70 TUL. L. REV. 2437 (1996); Robert J. Marchant, *Representing Representatives: Ethical Considerations for the Legislature's Attorneys*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 439 (2003); Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 WASH. U. L. REV. 1033 (2007); Josephson & Pearce, *supra* note 38; Robert P. Lawry, *Who Is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 FED. B.J. 61 (1978); PATRICIA E. SALKIN, *ETHICAL STANDARDS IN THE PUBLIC SECTOR* (Patricia E. Salkin, ed., 2d ed. 2008); Maureen A. Sanders, *Government Attorneys and the Ethical Rules: Good Souls in Limbo*, 7 BYU J. PUB. L. 39 (1992); Eric Schnapper, *Legal Ethics and the Government Lawyer*, 32 REC. ASS'N B. CITY N.Y. 649 (1977); Richard C. Solomon, *Wearing Many Hats: Confidentiality and Conflicts of Interest Issues for the California Public Lawyer*, 25 SW. U. L. REV. 265 (1996); Jack B. Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 ME. L. REV. 155 (1966); Jack B. Weinstein & Gay A. Crosthwait, *Some Reflections on Conflicts Between Government Attorneys and Clients*, 1 Touro L. REV. 1 (1985).

65. Charles Wolfram in his seminal treatise, *Modern Legal Ethics*, discusses the role of lawyers "in the political process" and in government. This includes lawyer/lobbyists, legislators, legal advisers and policy makers. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS*, 747-759 (1986). Terminology about government lawyers varies.

66. Kathleen Clark uses the term "Political lawyer" as the person who she owes her loyalty and her job to an individual senator and must be particularly sensitive to that Senator's and committee staff and all must have confidence that when you assist them, you do so with your knowledge of your field, not from your convictions of "what ought to be done." Clark, *supra*, note 59.

67. Government lawyers "implement the law; promulgate and apply regulations; provide legal counsel to government officials; defend legislation, regulations, agency policies, and action from legal challenges; and engage in civil and criminal enforcement. They may also be involved in defending and advocating the policies of the current administration, whether headed by a president, governor, or mayor (or, on occasion, independently elected attorneys general or other cabinet-level state officials)." Marcia E. Mulkey, *A Crisis of Conscience and the Government Lawyer*, 14 TEMP. POL. & CIV. RTS. L. REV. 649, 649 n.1 (2005).

68. MODEL RULES OF PROF'L CONDUCT r. 1.11, 3.8 (AM. BAR ASS'N, 1983).

69. Various federal, state, and municipal agencies have regulations that affect the conduct of lawyers within their agencies. *See, e.g.*, 17 C.F.R. § 205 (2003) (standards of professional conduct for attorneys appearing before the Securities and Exchange Commission); The Office of Government Ethics is responsible for directing federal executive branch policies related to preventing conflicts of interest; *see also* 18 U.S.C. § 208 (2012) (prohibiting government officials from participating in certain matters in which they have a financial interest); The Hatch Act: such

them from state ethics rules or to substitute or add different rules for these lawyers have been unsuccessful.⁷⁰ Whatever the contours of the definition, “government lawyer,” however, should be distinguished from politicians who have law degrees and are licensed in individual states. While it may be controversial, notably in the current era, the normative view about elected officials, including those who are lawyers but do not practice law, is that they are permitted to engage in falsehoods. As Hannah Arendt and many others have famously noted, “[t]ruthfulness has never been counted among the political virtues,” and lies have always been regarded as justifiable tools in political dealings.⁷¹ We should tolerate political lies because they serve as “substitutes for more violent means,” making them “relatively harmless tools in the arsenal of political action.”⁷² Lying is integral to politics.

Aside from money, nothing is more integral to a political campaign than lies. Campaigns lie about the other campaigns; they lie about their own positions, too. They lie about the consequences of the legislation and policies they propose. They lie in their speeches, they lie in their campaign literature, and they lie on TV, radio, on billboards, and over the Internet. Lies, integral as they are to campaigns, can’t be exterminated unless you snuff the campaigns themselves.⁷³

This “lying norm” does not apply to elected officials who engage in the practice of law such as prosecutors, public defenders, and attorneys general.⁷⁴ It also is

regulation outside of ethics rules is not unique to government lawyers; Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147 (2009).

70. Congress expressly mandated that U.S. Department of Justice attorneys and certain other government lawyers “shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.” 28 U.S.C. § 530B(a). *See generally* Bruce A. Green, *Whose Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?* 64 GEO. L. REV. 460 (1996) (suggesting that federal courts should strengthen their rules to supplement state ethics rules); McMorrow, *supra note 55*; *In re Advisory Comm. on Prof’l Ethics Op. 621*, 608 A.2d 880, 886 (N.J. 1992) (separation of powers doctrine does not prevent the judiciary from regulating lawyers who work in the legislative branch); Robert J. Marchant, *Representing Representatives: Ethical Considerations for the Legislature’s Attorneys*, 6 NYU. J. LEGIS. & PUB. POL’Y 439, 448–49 (2003) (judiciary has exclusive authority to regulate the practice of law, including lawyers working in a separate branch of government).

71. Jack Shafer, *In Defense of Political Lying*, REUTERS (Apr. 23, 2014), <http://blogs.reuters.com/jackshafer/2014/04/23/in-defense-of-political-lying>.

72. *Id.* In *Susan B. Anthony List v. Driehaus*, Justices of the Supreme Court ridiculed the Ohio State Solicitor “as he attempted to defend a state law that bans false statements during a political campaign.” *Id.*

73. *Id.*

74. The norms do not regularly lead to disciplinary consequences. Most notably, as former federal Judge Nancy Gertner points out about Attorney General Jeff Sessions, his statements were certainly sanctionable, if not ones that would subject him to criminal penalties. The Bar took no action. Nancy Gertner, *How ‘Confused’ Could Jeff Sessions Have Been?*, BOSTON GLOBE (Mar. 6,

not applicable to politicians who lie in the course of judicial proceedings or otherwise engage in criminal conduct such as making false statements to a government official.⁷⁵

Oftentimes, the lines between a government lawyer and a politician may be blurred, as has been alleged in the case of Kellyanne Conway. Is she operating as an advisor and counselor to a public official in a capacity that calls upon legal knowledge or is she solely a politician?⁷⁶

Neither the American Bar Association nor state disciplinary or other agencies have undertaken the initiative to clarify this issue or the range of conduct that subjects an LIG to discipline. The debates surrounding the adoption of Model Rule 5.7, a regulation that imposes obligations upon lawyers who perform “law related services” may have provided an opportunity for some clarity on the issue of government lawyers, but it was and remains difficult to establish a consistent definition of what constituted “law related services.” Rule 5.7 addresses the need to notify clients if the lawyer is engaged in “law related services.” The goal is to ensure that the public is not misled by the lawyer’s role. Among the problems with Rule 5.7 is the profession’s inability to define the “practice of law” or certainly “law related services” and the definition of legal practice from state to state.⁷⁷ The language of the Rule applies to

2017), <https://www.bostonglobe.com/opinion/2017/03/06/how-confused-could-jeff-sessions-have-been/WnMFaVIV1ubyu67pkBA9RM/story.html>.

75. 18 U.S.C. § 1001.

76. Support for the view that Conway was acting to implement public policy comes from a “playbook” article as to how a conservative executive branch should operate: “conservatives governing from the executive branch have a special need to be able to reach over the heads of the media to rally their parties and the country itself. This can only be done by consistently, clearly, patiently, and cheerfully painting a conservative agenda in bold colors day after day.” Steven Calabresi, *Advice to the Next Conservative President of the United States*, 24 HARV. J.L. & PUB. POL’Y 369, 370 (2001). One can view this statement as a method to implement public policy, thereby generating regulatory consequence for lawyers who advise or counsel executive officials as to how to achieve such policy, or as pure political speech. Admittedly, such distinctions are murky, at best. Steve Lubet argues that Conway was “defending her boss to the press, not testifying before Congress or implementing an executive branch directive. It might be different if she had been acting in an official capacity, which could be construed broadly as related to the practice of law, but she is a political adviser to Trump with no governmental responsibility.” Steve Lubet, *In Defense of Kellyanne Conway*, SLATE (Feb. 27, 2017, 9:22 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/02/the_misconduct_complaint_against_kellyanne_conway_is_dangerously_misguided.html. But, when Conway was appointed, the Trump administration announced: Conway will “continue her role as a close advisor to the president and will work with senior leadership to effectively message and execute the Administration’s legislative priorities and actions.” See, e.g., Gabrielle Levy, *Kellyanne Conway Names as Counselor to Donald Trump*, U.S. NEWS (Dec. 22, 2016, 10:13 AM), <https://www.usnews.com/news/politics/articles/2016-12-22/kellyanne-conway-named-as-counselor-to-donald-trump>.

77. Consequently, only 34 states have adopted versions of Rule 5.7 and there is no clarity as to whether states will apply Rule 5.7 to government lawyers. *Jurisdictional Rules Comparison Charts*, ABA (Apr. 16, 2018),

government lawyers across a wide range of employment because the work could be deemed “law services” or “law related services.” Hugh Spitzer suggests the following resolution:

[F]or a government employee with a bar card who serves in a non-lawyer job and wishes to avoid the full panoply of the applicable rules of professional conduct, the best approach is to determine whether the position needs to be treated as one providing “law-related services” under Model Rule 5.7. If so, then the non-lawyer lawyer should follow the formal steps under that Rule to notify the recipients of services, and certain others as well, that the lawyer is not providing legal services and that protections of the rules of professional conduct will not apply.⁷⁸

Whether or not Spitzer’s proposal would be effective, the ABA’s adoption of Rule 5.7 points in the direction of control over conduct of lawyers outside the traditional notions of practice of law.⁷⁹ At the very least, the Bar’s recognition that it is necessary to give clients notice of the lawyer’s role in the sphere of private practice speaks volumes to the need for government counsel who speak publicly to, at the very least, make their role clear if they are not acting as counsel or advisor. All LIGs would have the obligation to clarify their role.

III. RPC 8.4(C) HISTORY AND APPLICATION

The current “anti-deceit” or “dishonesty” rule derives from the 1908 American Bar Association Canons of Professional Ethics. Canon 22 imposed upon lawyers a general duty of “candor and fairness.”⁸⁰ That language limited its application to “conduct of the lawyer before the Court and with other lawyers” and it confined its reach to specific types of conduct relating principally to litigation and negotiation.⁸¹ However, it was understood that the Canon was hortatory, intended for education and edification of the bar.⁸²

This was changed and broadened in the 1969 ABA Code of Professional Responsibility. The Code’s cornerstone was that its provisions would govern an

https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_7.authcheckdam.pdf.

78. Spitzer, *supra* note 61, at 45.

79. A contrary view is that “law-related services” are only directed to a specific legal problem. “[F]unction[ally], the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of professional judgment of the lawyer is *the educated ability to relate the general body and philosophy of law to a specific legal problem of a client*. NYSBA Comm. on Prof’l Ethics, Formal Op. 677 (1995) (emphasis added) (discussing the delegation of lawyers’ duties to paralegals), <https://www.nysba.org/CustomTemplates/Content.aspx?id=5453>.

80. MODEL CODE OF PROF’L RESPONSIBILITY CANON 22 (AM. BAR ASS’N 1908).

81. *Id.* These limitations are otherwise absent from Rule 8.4(c).

82. See Sean Keveney, *The Dishonesty Rule: A Proposal for Reform*, 81 TEX. L. REV. 381 (2002).

individual's conduct not only in his capacity as a lawyer, but also as a private citizen. Consequently, it expanded liability and Rule 1-102(A)(4) was even broader in scope than Canon 22 because it included a requirement of "honesty."⁸³

In the 1983 redrafting of the Code of Professional Responsibility, it appeared that the scope of the dishonesty rule, acknowledged to be overbroad, would be narrowed but this was not to be. The submitted proposal limiting the rule's prohibition to the commission of a "criminal or fraudulent act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" was defeated.⁸⁴ Instead, Rule 8.4(c) was added as a separate provision, thus yielding Rules 8.4(b) and (c) as they presently read.⁸⁵ The narrower original version, had it been retained, might have avoided the problems of vagueness and overbreadth of the current Rule 8.4(c).

Rule 8.4(c) serves as a somewhat of a catch-all provision designed to discipline a range of lawyer misconduct that might otherwise go unpunished and its broad scope often overlaps with other RPC provisions. Commentators point to its breadth and vagueness to argue that it is subject to constitutional challenge. Some scholars deem it to be poor public policy because it chills diligent representation, is inefficient and creates the danger of disparate

83. DR 1-102 (A)(4) tracks current Rule 8.4 that prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation" MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102 (AM. BAR ASS'N 1980). There is no question that the drafters of Rule 8.4(c) intended it to cover a broad range of conduct. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 336 (1974) (construing DR 1-102(A)(4), the predecessor to Rule 8.4(c), and noting that "lawyers are subject to discipline for improper conduct in connection with business activities, individual or personal activities, and activities as a judicial, governmental or public official"); Peter R. Jarvis & Bradley F. Tellam, *The Dishonesty Rule—A Rule With a Future*, 74 OR. L. REV. 665, 667 (1995) (the drafters of the rule intended it to cover a lawyer's private conduct); 3 Geoffrey C. Hazard, Jr. & William Hodes, THE LAW OF LAWYERING § 8.3:101 (2d ed. 1990 & Supp. 1992) (noting that the Kutak commission felt that the dishonesty rule was too vague); Center for Prof'l Responsibility, Am. Bar Ass'n, *The Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates*, 198–200 (1987) [hereinafter *Legislative History*].

84. In fact, the version of Rule 8.4(c) submitted in 1982 by the ABA Commission on Evaluation of Professional Standards was significantly narrower than the version that eventually emerged as part of the 1983 Rules. The broad language of the current Rule 8.4(c) prohibiting "conduct involving dishonesty, fraud, deceit or misrepresentation" was not in the original draft. Instead, the proposal was only Rule 8.4(b) that prohibited the commission of a "criminal or fraudulent act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

85. Rule 8.4 deems it professional misconduct for a lawyer to (b) "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation." MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 1980). Pursuant to a proposal from the Iowa State Bar Association at the 1983 Midyear Meeting of the ABA House of Delegates, the words "fraudulent act" were deleted from the original 8.4(b) and language tracking Disciplinary Rule 1-102(A)(4) of the 1969 Code was inserted instead.

application.⁸⁶ Overall, the challenge is that it sweeps too broadly over conduct that “is inconsistent with the appropriate function of a disciplinary rule.”⁸⁷

Despite often compelling arguments that Rule 8.4 is unconstitutionally vague and broad, the “common sense” sentiment seemingly adopted by courts is akin to the notion that one “does not have to be an etymologist or Kantian philosopher to know what honesty, good faith, and fairness mean in the everyday practice of law.”⁸⁸ Consequently, especially for cases about conduct within the practice of law, constitutional challenges have had little success.⁸⁹ Courts opine that “the traditions of the legal profession”⁹⁰ flesh out the rules and provide adequate notice of prohibited conduct to reasonable lawyers. Discipline for Rule 8.4 violations is inconsistent and, as one might surmise, context dependent.⁹¹

Certainly, the Rule applies to conduct within the context of client representation but there is a lack of clarity of the application outside that context. Even though the Preamble to the Model Rules, listing the lawyer’s responsibilities, states, “[a] lawyer . . . is a representative of clients, an officer of the legal system and a public citizen,” this phrase could be read to suggest that the lawyer’s duties to the public and profession outside the practice of law

86. W. Bradley Wendel, *Government Lawyers in the Trump Administration*, 69 HASTINGS L.J. 275, 282 (2017).

87. Keveney, *supra* note 82 (engaging in a cost/benefit analysis to argue that the cost will be borne by the system not the offending lawyer, and since its reach is for discipline on the margins of conduct, it achieves little benefit). Some commentators have challenged the idea that Rule 8.4(c) should be interpreted as a catch-all provision. See David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 GEO. J. LEGAL ETHICS 791 (1995) (arguing that under standard rules of statutory construction, Rule 8.4(c) should be read not as overlapping other rules, but as covering only grave misrepresentations made in a private capacity). Commentators have pointed out that Rule 8.4(c) does not apply to conduct amounting to “social convention in a personal context.” Jarvis & Tellam, *supra* note 83, at 689.

88. Richard K. Burke, “*Truth in Lawyering*”: *An Essay on Lying and Deceit in the Practice of Law*, 38 ARK. L. REV. 1, 4 (1984) (“Fundamental in our legal system are the general obligations of citizens to bear witness to civil and criminal wrongs and to tell the truth in doing so.”).

89. See e.g., *In re Vogel*, 382 A.2d 275, 280 (D.C. 1978) (“[C]ourts have recognized that the words in a statute or rule describing prohibited conduct must be general, that the duty of the professional is high, and that the professional is to be charged with understanding the level and content of that duty.”).

90. *Comm. on Legal Ethics v. Douglas*, 370 S.E. 2d 325, 328 (W.Va. 1988); see W. Bradley Wendel, *Free Speech for Lawyers*, *supra* note 16, at 389 n. 418 (citing numerous cases where state and federal courts have “accepted the argument that professional norms or traditions are sufficiently clear to provide guidance for lawyers” and make statements such as the “‘lore of the profession’ must be set forth in disciplinary codes in order to serve as grounds for sanctions”).

91. *Office of Disciplinary Counsel v. Grigsby*, 425 A.2d 730, 733 (Pa. 1981) (“Truth is the cornerstone of the judicial system; a license to practice law requires allegiance and fidelity to truth . . . [F]alse swearing and dishonest conduct are the antithesis of these requirements.”).

are not a proper subject for discipline.⁹² Nevertheless, this Rule has been invoked for conduct outside the practice of law.

Most famously, in a lawyer disciplinary case against former Vice President Spiro Agnew during the Watergate era, the Maryland Court stated:

The professional ethical obligations of an attorney, as long as he remains a member of the bar, are not affected by a decision to pursue his livelihood by practicing law, entering the business world, becoming a public servant, or embarking upon any other endeavor. If a lawyer elects to become a businessman, he brings to his merchantry the professional requirements of honesty, uprightness, and fair dealing.”⁹³

Bar opinions in other jurisdictions have achieved consensus about lawyer discipline outside the practice of law, but the parameters of such sanctionable conduct are not always clear. So, for example, Pennsylvania. State Bar Opinion 94-118 (1994) found that the rules do apply to the lawyer who worked as an account executive selling securities and financial products to the public and Rhode Island Opinion 92-57 (1992) stated that a lawyer who seeks employment as a zoning consultant must adhere to Rule 4.2 the No-Contact Rule. Other cases sanction lawyers for conduct in business and other dealings.⁹⁴

In addition to subjecting businesspeople who are lawyers to the RPCs, the rules apply to lawyers who engage in criminal conduct outside the practice of law as well as to conduct that is deemed so beyond norms of reasonableness that it adversely affects the trustworthiness and integrity of the lawyer. In 2004, a lawyer was sanctioned because he posted a message on an Internet site and falsely claimed to be a teacher who was a local high school counselor and coach. He implied in that message that the teacher had engaged in sexual behavior with students.⁹⁵ The court examined the “rational connection” between that lawyer’s conduct and whether it “jeopardizes the public’s interest in the integrity and trustworthiness of lawyers.” The Court found that this conduct that disregarded

92. MODEL RULES OF PROF'L CONDUCT pmb1. (AM. BAR ASS'N 1983).

93. Md. State Bar Ass'n, Inc. v. Agnew, 318 A.2d 811, 815 (Md. 1974).

94. See also Iowa Supreme Court Bd. of Prof'l Ethics and Conduct v. Mulford, 625 N.W.2d 672, 679 (Iowa 2001) (court's authority to discipline lawyer “is not suspended merely because the attorney does not hold an active license and is not actively engaged in the practice of law”). Nevada Opinion 45 (2011) allows a lawyer to own and operate a nonlaw business but all the applicable ethics rules still apply to the lawyer. The Nevada opinion voiced an oft-heard concern that lawyers not use the business as a means of soliciting clients to the law practice. Any referral to the law practice would be considered to be a conflict under rules 1.7 *Conflict of Interest: Current Clients* and 1.8 *Conflict of Interest: Current Clients: Specific Rules*. See also District of Columbia Opinion 336 (2006) (lawyer who acts as guardian for disabled individual must at all times comply with Rule 8.4(c). Opinion 90-9 (1990) the Ohio Board of Commissioners on Grievances and Discipline found that a lawyer, whether acting as lawyer or realtor, is bound by the applicable disciplinary rules. It set forth strict restrictions against overlap between the two businesses, particularly in regards to signage, letterhead and referrals.

95. *In re* Conduct of Jim Carpenter, 95 P.3d 203 (Or. 2004).

the rights of the teacher reflected adversely on the trustworthiness and integrity of the lawyer.

A 2003 Colorado Lawyer journal notes a “trend around the country to “expect lawyers to always conform to formal rules of professional conduct, even when they are engaged in “private” activities separate from lawyers’ professional activities. A “trend” may be an overstatement because *there are few cases disciplining lawyers for such violations in the last decade. Perhaps the most notorious is the 1986 case, In re Johnson*, where a lawyer was disciplined in the political context for making false statements against a candidate for county attorney by his opponent that were deemed prejudicial to the administration of justice and a violation of DR 1-102 (A)(5).⁹⁶

Such cases are not unique. It is generally understood that lawyers can be disciplined for conduct outside the profession if the conduct “functionally relates” to the practice of law.⁹⁷ This, of course, leads to the question of the meaning of “functionally related,” a term rarely used by courts and not sufficiently defined or applied consistently.⁹⁸

If private lawyers are subject to discipline for conduct outside the practice of law, there is a stronger case to be made for discipline under Rule 8.4 for LIGs. It is certainly the case that the public has the right to expect those who serve them at the “municipal, state or federal level to act according to general standards of decency,” and “members of a bar can be assumed to know that certain kinds of conduct, generally condemned by responsible men, will be grounds for disbarment.”⁹⁹ In fact, the D.C. Ethics Opinion 323 specifically addressed the application of Rule 8.4 in the context of government employees.¹⁰⁰ The issue was whether it was a violation of Rule 8.4 for a lawyer to engage in “misrepresentations made in the course of official conduct as an employee of an agency of the United States if the attorney reasonably believes

96. *In re Johnson*, 729 P. 2d 1175, 1182 (Kan. 1986) (DR 1-102 is the precursor to Rule 8.4); *Comm on Prof'l Ethics & Conduct of Iowa State Bar Ass'n v. Mollman*, 488 N.W.2d 168 (Iowa 1992) (lawyer sanctioned for securing admissions to criminal conduct by deceit and misrepresentation from friend who was a former client; even though the lawyer acted as a private citizen and not as an attorney, lawyer's argument that there is a “zone of privacy” here for “purely personal matters” that remains free from scrutiny from the Disciplinary committee because the victim relied on the lawyer for guidance).

97. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *The Lawyer's Deskbook on Professional Responsibility* § 8.4-1(a) (2013).

98. *In re Kline* rejected the argument that 8.4 (c) is only for conduct “egregious and flagrantly violative of accepted professional norms that would be recognized by a reasonable attorney practicing in the same situation.” *Kline* also rejected the argument that KRPC 8.4(c) requires proof that the lawyer acted with “malevolent intent that rises above mistake.” *In re Kline*, 311 P.3d 321, 338 (Kan. 2013).

99. Keveney, *supra* note 82, at 398 (quoting *In re Ruffalo*, 390 U.S. 544, 555 (1968) (White, J., concurring)). *But see In re Carpenter*, 95 P.3d 203 and cases cites therein.

100. D.C. Bar, Ethics Op. 323 (2004) (discussing misrepresentation by an attorney employed by a government agency as part of official duties), <https://www.dcb.org/bar-resources/legal-ethics/opinions/opinion323.cfm>.

that the conduct in question is authorized by law.”¹⁰¹ The opinion held that such misrepresentations were not a Rule 8.4 violation. Its discussion of this classic issue of deceit in government investigation noted the D.C. Bar’s intention to limit the scope of Rule 8.4 to conduct which indicates that an “attorney lacks the character required for bar membership.”¹⁰² The Comments to D.C. Rule 8.4 elaborate that this may include “violence, dishonesty, breach of trust, or serious interference with the administration of justice.”¹⁰³ The opinion clarified that this does not encompass all acts of deceit—for example, a lawyer is not to be disciplined professionally for committing adultery, or lying about the lawyer’s availability for a social engagement.¹⁰⁴

Interestingly, the D.C. bar was careful to “emphasize the narrow scope of [its] opinion.”¹⁰⁵ “It applies only to misrepresentations made in the course of official conduct when the employee (while acting in a non-representational capacity) reasonably believes that applicable law authorizes the misrepresentations.”¹⁰⁶ It is not blanket permission for an attorney employed by government agencies to misrepresent themselves. Nor does it authorize misrepresentation when a countervailing legal duty to give truthful answers applies. Thus, for example, false testimony under oath in a United States court or before the Congress is prohibited.¹⁰⁷

The District of Columbia, home to many government lawyers, could readily deem certain categories of misrepresentations made by LIGs to be a Rule 8.4 violation.

IV. FIRST AMENDMENT AND LAWYER REGULATION OF ATTORNEY SPEECH

If regulation of LIGs includes regulation of public statements by such lawyers, it is necessary to address First Amendment implications of lawyer speech. This is a body of law that is fraught, inconsistent, and context dependent.¹⁰⁸ Over the years, courts have addressed the relationship between attorney regulation and the First Amendment concerning issues of advertising

101. *Id.*

102. *Id.*

103. *Id.* (quoting D.C. Rule 8.4, Comment [1]).

104. *Id.*

105. *Id.*

106. *Id.*

107. *See In re Abrams*, 689 A.2d 6 (D.C. 1997) (en banc) (“[a]nd, of course, this opinion does not authorize deceit for non-official reasons, or where an attorney could not, objectively, have a reasonable belief that applicable law authorizes the actions in question.” The Court opined that Rule 8.4 is limited in scope to “conduct demonstrating lack of character for bar membership.”

108. W. Bradley Wendel, *Free Speech for Lawyers*, *supra* note 16.

and solicitation,¹⁰⁹ statements to the press,¹¹⁰ bar admission and licensing,¹¹¹ and government attorneys in the employment context.¹¹² Many First Amendment cases concern appropriate limits of criticism of judges, and scholars have commented upon the often inconsistent treatment of these cases, notably the deference to notions of protecting the “administration of justice” at the expense of First Amendment protection for lawyers.¹¹³ Brad Wendel, Kathleen Sullivan, and others have offered comprehensive analyses of the varied and inconsistent applications of the First Amendment across a broad range of issues that include racist/hate speech, whistleblowing, and online speech as well as the aforementioned areas.¹¹⁴ But, there is no clear demarcation of protected speech for lawyers that cuts across varied contexts. The tensions noted by Kathleen Sullivan in 1998 still reverberate:

On the one hand, lawyers are sometimes perceived as classic speakers in public discourse, free of state control and entitled to all the ordinary protections of speech and association available to other speakers. Indeed, in light of their frequent role as representatives of underdogs and challengers to the state and the status quo, lawyers may be perceived to be entitled to extraordinary speech protections. On the other hand, lawyers are sometimes thought of as delegates of state power—officers of the court and professional licensees whose special privileges are conditioned upon foregoing some speech rights that others enjoy.¹¹⁵

109. See, e.g., *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978).

110. See, e.g., *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991); *United States v. Scarfo*, 263 F.3d 80 (3d Cir. 2001).

111. See, e.g., *Hale v. Comm. on Character & Fitness for Ill.*, 335 F.3d 678 (7th Cir. 2003).

112. See *Connick v. Myers*, 461 U.S. 138, 147–48 (1983) (using a balancing test in determining a public employee’s rights of free speech); *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (same).

113. See, e.g., Terri R. Day, *Speak No Evil: Legal Ethics v. the First Amendment*, 32 J. LEGAL PROF. 161, 161 (2008) (noting that “[t]he extent that attorneys may enter the debate [about the role of judges] is controversial”); Lawrence A. Dubin, *Fieger, Civility and the First Amendment: Should the Mouth That Roared Be Silenced?*, 82 U. DET. MERCY L. REV. 377, 396 (2005) (advocating for greater protection of speech criticizing the judiciary); Margaret Tarkington, *The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation*, 97 GEO. L. J. 1567, 1575 (2009) (discussing First Amendment concerns and criticism of the judiciary); Note, *Attorney Discipline and the First Amendment*, 49 NYU L. REV. 922, 922 (1974) (describing the conflict between an attorney’s right of free speech and the judicial interpretation of ethical standards).

114. Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers’ First Amendment Rights*, 67 FORDHAM L. REV. 569, 569 (1998); W. Bradley Wendel, *Free Speech for Lawyers*, *supra* note 14; Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1284, 1343 (2005) (observing that the Supreme Court “has never squarely confronted” the First Amendment status of “professional advice to clients”).

115. Sullivan, *supra* note 114, at 569.

As Brad Wendel notes, “[o]ne of the most important unanswered questions in legal ethics is how the constitutional guarantee of freedom of expression ought to apply to the speech of attorneys.”¹¹⁶ Wendel’s conclusion regarding the paradigm for resolution of the conflict in First Amendment jurisprudence and lawyer speech is a “functional analysis” where courts do and should look to the underlying interests, goals, or utilitarian calculations to be advanced by the constitutional value of “the freedom of speech.”¹¹⁷

Thus, in the employment context, First Amendment rights of government employees are more limited than that of other citizens. The notion is that public employees occupy positions of trust and therefore the government employer needs to ensure the proper performance of government functions.¹¹⁸ Consequently, when a person enters government services, they must accept a significant degree to which the employer may limit what would otherwise be considered free expression.

In the litigation context, “[o]bedience to ethical precepts may require abstention from what, in other circumstances, might be constitutionally protected speech.” Thus, *Gentile v. State Bar of Nevada*, 50 U.S. 1030, 1031 (1991) accepted constraints upon lawyer speech because “[l]awyers . . . are key participants in our system of justice and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct.”¹¹⁹

Outside of litigation, restrictions on lawyer speech through discipline for Rule 8.4 are troubling. Most recently, this challenge arises in the context of anti-discrimination provisions in the Model Rules. For example, in “*In re Kelley*, a lawyer, who had received multiple calls on her personal cell phone from a company that left pre-recorded messages for her husband, called the toll-free number given in the messages and identified her husband as her client. Upon hearing the “feminine sounding” voice of the male company representative, the lawyer asked if he was “gay or sweet.” For “gratuitously”

116. W. Bradley Wendel, *Free Speech for Lawyers*, *supra* note 16, at 305.

117. *Id.*; see *In re Sawyer*, 360 U.S. 622, 646–47 (1959) (Stewart, J., concurring); see also *In re Pyle*, 156 P.3d 1231, 1243 (Kan. 2007) (“A lawyer’s free speech is tempered by his or her obligations to the courts and the bar, obligations ordinary citizens do not undertake.”); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1031 (1991) (“Lawyers in such cases are key participants in our system of justice and the State may demand some adherence to the system’s precepts in regulating their speech as well as their conduct.”).

118. *Garcetti v. Ceballas*, 547 U.S. 410, 418–19 (2006).

119. *Gentile*, 501 U.S. at 1074. Justice Kennedy said that the unique position of lawyers justifies more protection for their speech. He wrote: “To the extent the press and public rely upon attorneys for information because attorneys are well-informed, this may prove the value to the public of speech by members of the bar. If the dangers of their speech arise from its persuasiveness, from their ability to explain judicial proceedings, or from the likelihood the speech will be believed, these are not the sort of dangers that can validate restrictions. The First Amendment does not permit suppression of speech because of its power to command assent.” *Id.* at 1056–57.

asking that question of the company representative, the lawyer was disciplined for violating Indiana's Rule 8.4(g)¹²⁰—an anti-discrimination provision.

Such cases squarely raise the question of to the standard to be applied in judging attorney speech. Scholars like Erwin Chermersky have long advocated that speech should be protected unless it meets the “actual malice” standard announced in *New York Times v. Sullivan*, applicable to public figures; the Supreme Court has yet to decide this question.¹²¹

Any proposal to regulate speech, notably in the political arena should be subject to various strict scrutiny notions, both as a matter of law and policy.¹²² Certainly, pure political speech is protected. But lawyer speech, especially that which is the result of advising or counseling government officials, is deserving of regulation for intentional and significant misrepresentation where it reflects adversely upon a lawyer's fitness to practice. The countervailing government interest in promoting the rule of law and democratic government is of paramount concern. This is of particular importance in the current era of multiple media outlets with fake news and “fact-free news.” Timothy Wu argues that in the current era of multiple media outlets where “it is no longer speech itself that is scarce, but the attention of listeners,” that the First

120. Lindsay Keiser, *Lawyers Lack Liberty, State Codifications of Comment 3 of Rule 8.4 Impinge on Lawyers' First Amendment Rights*, 28 GEO. J. LEGAL ETHICS 629, 637 (2015) (discussing *In re Kelley*, 925 N.E. 2d 1279 (Ind. 2010)). Indiana's R 8.4 (g) is not an anti-deceit provision but is Indiana's anti-discrimination provision disciplining a lawyer who “engage[s] in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors. Legitimate advocacy respecting the foregoing factors does not violate this subsection. A trial judge's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

Id. (citing other cases of violations that run afoul of Comment 3's anti-discrimination language); Christopher B. McLaughlin, *The Intersection of the First Amendment and Professional Ethics for Government Attorneys*, UNC School of Government (2016), http://canons.sog.unc.edu/wp-content/uploads/2010/10/Microsoft-Word-manuscript_mclaughlin_workplace_and_constitution1.pdf. (First Amendment rights of government attorney-employees contrasted with the North Carolina Rules of Professional Conduct).

121. Chermersky argues for such a standard, at least in a litigation context. *Gentile v. State of Nevada* rejected a strict scrutiny test. The New York Court of Appeals in *In re Holtzman* specifically declined to extend “constitutional malice” protection to attorney discipline since the Supreme Court of the United States has not done so. *In re Holtzman*, 577 N.E.2d 30, 34 (N.Y. 1991). The implication was that if the Supreme Court applied the *New York Times* standard to attorney discipline so too would the New York State Court of Appeals. The Court denied writ of certiorari to the *Holtzman* case and *In re Westfall*, 502 U.S. 1009 (1991). Commentators have noted the effect of these various standards: “Today as far as the right of lawyers . . . the First Amendment means many things in many states.” Marcia Chambers, *Bar Sanctions Lawyers Who Fault Judges*, NAT'L L.J. (1991), at 13.

122. See *supra* note 121, indicating that strict scrutiny was rejected in *Gentile v. State of Nevada*.

Amendment paradigm needs reconsideration.¹²³ Scholars Randall Bezanson and William Buss challenge the notion that government lawyers should even be holders of First Amendment rights. They argue that if the government is a First Amendment rights holder, then the First Amendment loses coherence.¹²⁴ This is because the Constitution places limitations on the government to control speech, thus the notion that a government lawyer, acting on behalf of the government, should be entitled to the same protections as private attorneys is contrary to the First Amendment's underpinnings.¹²⁵

It behooves a democratic system of government for its officials and employees who speak on its behalf to provide its citizenry with verifiable facts, not intentional misrepresentations. Given the government's power as a speaker, its resources and self-interest, and the presumptive trust placed in it by the public, it is imperative to define and delimit the boundaries for discipline of its lawyers who, at times, unscrupulously wield the privileges of the two positions by uttering significant false facts.

Necessarily, the governmental interest needs to be carefully defined so as to attempt to avoid issues of overbreadth and vagueness. And, of course, the difficulty of distinguishing "political speech" from sanctionable "lawyer speech" remains a challenge.¹²⁶ But a functional analysis that weighs the value of the underlying First Amendment concerns against the disciplinary system's role to ensure trustworthiness and fitness of lawyers should be adopted to provide for discipline for speech that runs afoul of Rule 8.4's anti-deceit proscriptions when it reflects upon that lawyer's fitness to practice law.

The precise contours of sanctionable lawyer speech can be determined in a traditionally common law process on a case-by-case basis. A range of factors will determine whether and to what extent the speech is primarily political or lawyer speech. Among the factors are whether the person is readily identified as a lawyer, the extent to which the speech relies upon legal knowledge and judgment, the expectations in the role that the lawyer assumed and the clarity of those expectations, and the significance of the misrepresentation. There needs to be clarity as to what speech subjects a lawyer to sanctions for intentional misrepresentations outside the practice of law.

123. Tim Wu, *Is the First Amendment Obsolete?*, Knight First Amendment Institute (September 2017).

124. Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1502 (2001).

125. *Id.*

126. "Lawyer speech" is typically viewed in the context of litigation, whether statements to the press or criticism of courts and the judicial process. "Political speech" as noted by Justice Black in *Mills v. State of Alabama*, includes discussions of candidates, the form of government, how government should be run, and any other discussion of the political process. 384 U.S. 214, 218-19 (1966). Political speech is judged by a strict scrutiny standard.

V. PROPOSAL FOR REGULATION OF GOVERNMENT LAWYERS AND 8.4

All government lawyers, including LIGs, should be held to account for significant, intentional misrepresentations that reflect adversely on their fitness to practice law. For lawyers who represent the government in some capacity, Rule 8.4 is clearly applicable. Many lawyers who do not represent the government but act in various roles on behalf of the government should also be subject to Rule 8.4's anti-deceit prohibition. LIGs who counsel or advise government officials outside of a representational capacity, lawyers who work within various government agencies in executive, policy making or other positions, lawyers who work for agencies in an advisory capacity where a law degree is not a prerequisite for the position, and lawyers who advise or counsel government officials on what would otherwise be noted as political matters should be subject to Rule 8.4 (c)'s anti-deceit provisions. Certainly, lawyers who are held out to the public as "counselors" to government officials should be subject to this Rule. The public should be able to rely upon an expectation that "counselor" has a commonly understood meaning indicating that the person is giving advice. Although these lawyers are likely subject to federal regulation,¹²⁷ they should also be subject to the Rules of Professional Conduct for such misrepresentation.

Not all of the thousands of lawyers who work for federal, state, and local government agencies in nonrepresentational capacities should be subject to these rules. Lawyers who are not expected to be engaged in any capacity that could be perceived as advising or counseling or otherwise relying upon legal knowledge should not be subject to this provision.¹²⁸ The demarcation among government lawyers may be difficult to establish, but this should be clarified in commentary to ethics rules to ensure both notice to lawyers of responsibility for their conduct in nonrepresentational capacities and to provide a modicum of assurance to the public that lawyers, especially those who serve as advisors and counselors to government officials and make public statements in that capacity, are engaged in a factually trustworthy endeavor.¹²⁹ The public has the right to rely upon statements by lawyers who serve as LIGs. This is of particular significance on a local and state level.

Nor should those government lawyers who are subject to the RPCs be liable for all misrepresentations. Despite the lack of clarity in RPC 8.4(c) and various cases that are inconsistent in interpretation, the legal standard for false statements to Congress¹³⁰ should be adopted for Rule 8.4(c) violations. That is,

127. See, e.g., 12 C.F.R. 748.1; 8 C.F.R. 292.3(a)(3); 31 C.F.R. 10.34(a); 17 C.F.R. § 205; Fred C. Zacharias, *Understanding Recent Trends in Federal Regulation of Lawyers*, PROF. LAW. 2003 Symposium Issue (2004); Kathleen Clark argues that statutory regulation and not ethics rules are the appropriate enforcement mechanism for such conduct. But these are not mutually exclusive. Lawyers, including prosecutors, other government lawyers and private lawyers are subject to both statutory and ethical constraints. See McDade Amendment; MODEL RULES OF PROF'L CONDUCT r. 3.1, 4.2, 5.5, 11 (AM. BAR ASS'N 1983). "The unauthorized practice of law" is prohibited by ethics rules as well as statutory law. See e.g., Christina L. Underwood, *Balancing Consumer Interests in a Digital Age: A New Approach to Regulating the Unauthorized Practice of Law*, 79 WASH. L. REV. 437, 439 (2004).

128. Knake, *supra* note 52 (other sources discussing the contours of the "advise" role).

129. *Id.*

130. 18 U.S.C. § 1001 prohibits "knowingly and willfully making false or fraudulent statements, or concealing information, in any matter within the jurisdiction of the federal government of the United States."

to fall within RPC's constrictions, the misrepresentation must be (1) false, (2) concern a material fact, not a minor or incidental one, and (3) made willfully and knowingly.¹³¹ Moreover, the misrepresentation must adversely reflect upon that lawyer's fitness to practice law, that is, it reflects a lack of trustworthiness and integrity. Misrepresentations by a person who blatantly and repeatedly lies to the public, especially about life and death issues, demonstrates that such a person has an unacceptably high risk of lying to courts, adversaries, and otherwise engaging in conduct that is untrustworthy. Certainly, the extent to which that lawyer's conduct also violates regulations or other laws informs the extent to which the misrepresentation is significant and should subject that lawyer to discipline.¹³²

Reasonable people may disagree as to whether Kellyanne Conway was acting in an official capacity with government responsibility as the President's advisor or counselor to implement public policy based upon her legal knowledge or whether she was purely a political adviser with no government responsibility.¹³³ Such a disagreement points to the need for clarity as to which government lawyers should be subject to RPCs or other regulation.

A comment should be added to Rule 8.4 to provide notice to government lawyers of the applicability of the Rule to conduct outside of the traditional practice of law. That commentary should note that the Rules are applicable to LIGs who counsel or advise government officials within or outside of a representational capacity; lawyers who work within various government agencies in executive, policy making or other positions; lawyers who work for agencies in an advisory capacity where a law degree is not a prerequisite for the position and lawyers who advise or counsel government officials on what would otherwise be noted as political matters, but are held out to the public as "counselors."

At the very least, the issue of regulation of LIGs needs to be subject to robust discussion. The need to create and reinforce norms that lawyers who serve in government have an obligation to report facts accurately could not be greater in this era. If the public is to maintain faith both in its government entities and in lawyers who serve them, carefully defined applications of Rule 8.4 anti-deceit provision to sanction lawyers whose misrepresentations adversely affect their fitness to practice needs emphasis.

131. Gertner, *supra* note 74 (noting the standard to be found guilty of making a false statement under oath).

132. In the case of Kelly Anne Conway, her violations of federal rules on conflicts of interest for endorsing Ivanka Trump's products and misuse of her position should give rise to heightened scrutiny under Rule 8.4.

133. Steve Lubet argues that Conway was "defending her boss to the press, not testifying before Congress or implementing an executive branch directive. It might be different if she had been acting in an official capacity, which could be construed broadly as related to the practice of law, but she is a political adviser to Trump with no governmental responsibility." *But see, infra*, note 76 (statement appointing Kellyanne Conway). Since the filing of this complaint, Kelly Anne Conway in her various statements and appearances seems to be more of a political operative than a counselor. She is now called "Trump adviser and spokesperson." Lubet, *supra* note 76.