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Selectively Disciplining Advocates

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Selectively Disciplining Advocates

BRUCE A. GREEN

After lawsuits challenging the results of the 2020 presidential election failed spectacularly, some wondered whether the plaintiffs' lawyers would be disciplined for filing frivolous complaints. Time will tell. But, if these lawyers are not disciplined, one should not be surprised. This Article presents an empirical study of the New York disciplinary process, which confirms that advocates who violate disciplinary rules by overzealously pursuing their clients' interests, such as by making frivolous claims, are rarely punished in the disciplinary process. That is because disciplinary prosecutors, operating in secret, have discretion as to whether to bring formal charges against lawyers who violate the rules. They ordinarily exercise that discretion by weeding out cases involving advocacy misconduct that they regard as minor or that they believe to be better addressed by trial courts.

Employing the allegedly frivolous election challenges as an illustration, this Article argues that disciplinary charging discretion raises four questions that the legal profession and the public should give greater consideration: whether rule drafters should remove rarely-enforced advocacy rules from the disciplinary codes; whether disciplinary agencies are under-enforcing advocacy rules; whether disciplinary authorities are arbitrary or unprincipled in selecting whom to prosecute for advocacy misconduct; and whether disciplinary authorities should be more transparent about how they make charging decisions so that the public can better understand whether advocacy rules, and authorities' exercise of discretion in enforcing them, serve the public interest.

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BRUCE A. GREEN*

INTRODUCTION

After futile legal challenges to the results of the 2020 presidential election, some wondered whether the plaintiffs' lawyers would be disciplined. Trial and appellate courts were highly dismissive of the plaintiffs' factual and legal grounds for asking courts in swing states to block state officials from certifying the election results.¹ While there is ordinarily nothing wrong with filing unsuccessful lawsuits on behalf of clients who want their day in court,² the rules of professional conduct forbid advocates from filing pleadings that are legally or factually frivolous.³ Citing these

* Louis Stein Chair and Director, Stein Center for Law and Ethics, Fordham University School of Law. The empirical research in this Article was initially presented at a 2018 workshop on "The Regulation of Lawyers through Disciplinary Systems." My thanks to the International Institute for the Sociology of Law (IISL) in Oñati, Spain for hosting the workshop; to the organizers, Kay-Wah Chen and Judith McMorrow; and to the other participants for comments on the research presented there. Also, my thanks to Lonnie Brown, Leslie Levin, and Eli Wald for comments on an earlier draft, and to the Michael B. Carlinsky, Esq. Research Fund for supporting work on this Article.

¹ For example, in *Donald J. Trump for President, Inc. v. Boockvar*, the court rejected a request to invalidate millions of mail-in ballots, observing: "[T]his Court has been presented with strained legal arguments without merit and speculative accusations, unpled in the operative complaint and unsupported by evidence. In the United States of America, this cannot justify the disenfranchisement of a single voter, let alone all the voters of its sixth most populated state. Our people, laws, and institutions demand more." 502 F. Supp. 3d 899, 906 (M.D. Pa. 2020). See generally William Cummings, Joey Garrison & Jim Sergeant, *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY, <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/> (Jan. 6, 2021, 10:50 AM) (stating that out of sixty-two election challenges, plaintiffs prevailed in only one, involving a narrow procedural claim). Plaintiffs' lawyers were sanctioned for frivolous election challenges in two cases. See *King v. Whitmer*, No. 20-13134, 2021 WL 3771875, at *41 (E.D. Mich. Aug. 25, 2021) (holding that sanctions against plaintiffs' counsel were warranted for filing the lawsuit in bad faith and for an improper purpose, imposing monetary sanctions, and referring the lawyers to the disciplinary authorities); *O'Rourke v. Dominion Voting Sys. Inc.*, No. 20-cv-03747-NRN, 2021 WL 3400671, at *31–32 (D. Colo. Aug. 3, 2021) (imposing monetary sanctions on plaintiffs' counsel for filing legally frivolous claims and failing to conduct an adequate factual investigation). In rejecting efforts to overturn the election results, courts did not invariably find that the challenges were frivolous, however. See, e.g., *Trump v. Wis. Elections Comm'n*, 506 F. Supp. 3d 620, 639 (E.D. Wis. 2020) ("While plaintiff's disputes are not frivolous, the Court finds these issues do not remotely rise to the level of a material or significant departure from Wisconsin Legislature's plan for choosing Presidential Electors.").

² See *Sec. Indus. Ass'n v. Clarke*, 898 F.2d 318, 321 (2d Cir. 1990) ("A distinction must be drawn between a position which is 'merely "losing"' and one which is both 'losing and sanctionable.'").

³ See MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 1983, amended 2020) [hereinafter MODEL RULES] ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein,

rules, prominent lawyers asked the New York disciplinary authorities to sanction Rudolph “Rudy” Giuliani for filing a legally and factually baseless lawsuit in Pennsylvania;⁴ Michigan’s Governor and Attorney General asked the disciplinary authorities of Michigan and Texas to disbar Sidney Powell and three other lawyers for bringing a frivolous claim to overturn Michigan’s presidential election results;⁵ a group of Arizona lawyers urged their state’s disciplinary authorities to sanction twenty-one lawyers, licensed both in and outside the state, for frivolous submissions in ten different baseless challenges to Arizona’s election results;⁶ the Georgia Bar Association reportedly initiated a complaint against Lin Wood, alleging that he engaged in misconduct in election challenges in multiple states;⁷ a federal judge in the District of Columbia referred a lawyer to the disciplinary committee for it to determine whether he should be disciplined for filing an election

unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”)

⁴ See Letter from Scott Harshbarger, Chairman, Laws. Defending Am. Democracy, Inc., to Att’y Grievance Comm., Sup. Ct. of the State of N.Y., App. Div., First Jud. Dep’t (Jan. 20, 2021) (available at <https://ldad.org/wp-content/uploads/2021/05/LDAD-Attorney-Grievance-Committee-Complaint.pdf>) (requesting that the Attorney Grievance Committee suspend Giuliani’s license to practice law while investigating his conduct); Letter from Ronald C. Minkoff, Frankfurt Kurnit Klein & Selz PC, to Jorge Dopico, Chief Counsel, Att’y Grievance Comm., First Jud. Dep’t (Jan. 21, 2021) (available at <https://images.law.com/contrib/content/uploads/documents/389/125082/Rudy-Complaint-Past-Presidents.pdf>) (requesting that Giuliani be disciplined for his role in various frivolous lawsuits). Both complaints alleged other misconduct as well, including publicly making false statements about the election results. See ASS’N OF THE BAR OF THE CITY OF N.Y., STATEMENT OF NEW YORK CITY BAR ASSOCIATION CONCERNING GRIEVANCE COMPLAINTS FILED AGAINST RUDOLPH GIULIANI 1–2, 11 (2021), <https://s3.amazonaws.com/documents.nycbar.org/files/2021223-GiulianiStatement.pdf> (describing allegations of multiple professional conduct rule violations filed with disciplinary authority against Giuliani). In June 2021, a New York appellate court suspended Giuliani’s law license on an interim basis pending disciplinary proceedings based on “uncontroverted evidence that [he] communicated demonstrably false and misleading statements to courts, lawmakers and the public at large in his capacity as lawyer for former President Donald J. Trump and the Trump campaign in connection with Trump’s failed effort at reelection in 2020.” *In re Giuliani*, 146 N.Y.S.3d 266, 268 (N.Y. App. Div. 2021). However, the court’s decision made no reference to allegations regarding frivolous claims. *Id.*

⁵ See Hailey Konnath, *Mich. Gov. Wants Sidney Powell, 3 Other Attys Disbarred*, LAW360 (Feb. 1, 2021, 10:56 PM), https://www.law360.com/legalethics/articles/1350956/mich-gov-wants-sidney-powell-3-other-attys-disbarred?nl_pk=745c9e54-9841-4658-9953-e35eef22b47a&utm_source=newsletter&utm_medium=email&utm_campaign=legalethics&read_more=1&attachments=true (“Michigan Gov. Gretchen Whitmer said . . . that Powell ‘did not just tiptoe near a precarious ethical line—she outright crossed it.’”).

⁶ Letter from Dianne Post, Bob McWhirter, Roxana Bacon, Brendan Mahoney, Gail Gianasi Natale, Amelia Craig Cramer & Victor Aronow to the State Bar of Ariz.: Disciplinary Dep’t (Dec. 16, 2020) (available at <https://blogforarizona.net/wp-content/uploads/2020/12/New-Ethics-Complaint-to-the-Bar-12-16-20.pdf>).

⁷ Aaron Keller, *Here’s What We Learned from Lin Wood’s 1,677-Page ‘Confidential’ Georgia State Bar Disciplinary Grievance*, LAW & CRIME (Feb. 18, 2021, 7:09 PM), <https://lawandcrime.com/2020-election/heres-what-we-learned-from-lin-woods-1677-page-confidential-georgia-state-bar-discipline-grievance/>. For example, the bar’s complaint reportedly asserted that Wood filed a civil complaint in Arizona “alleg[ing] that the election process was riddled with fraud and illegality” but “presented little to no relevant or reliable evidence in support of [these] claims.” *Id.*

challenge in bad faith,⁸ and the Board of Disciplinary Appeals, appointed by the Supreme Court of Texas, instructed the Office of the Chief Disciplinary Counsel of the state's bar to investigate a citizen's complaint that the state's Attorney General filed a frivolous election challenge in the U.S. Supreme Court.⁹ Most significantly, a federal district court in Michigan, in addition to imposing sanctions, ordered the Clerk of the Court to send its decision to the disciplinary authority of the various jurisdictions in which the various attorneys for the plaintiffs are admitted.¹⁰ In general, the disciplinary complaints were predicated on judicial findings that the various lawyers' filings were woefully lacking; no evidence supported their allegations of widespread election fraud, and no legal arguments plausibly justified their requests that the courts overturn the election results.

However, it is uncertain whether the plaintiffs' lawyers will be disbarred, suspended, or even so much as publicly reprimanded for bringing frivolous lawsuits. State disciplinary prosecutors may decline to file charges, even if they believe that the plaintiffs' lawyers violated a disciplinary rule governing advocates' conduct.¹¹ As this Article discusses, disciplinary authorities typically do not bring charges for advocacy misconduct that they regard as minor or as better addressed by trial judges. Among the rules that disciplinary authorities rarely enforce are those forbidding advocates from filing frivolous complaints and making other frivolous assertions in court.¹² One might debate

⁸ Wis. Voters All. v. Pence, No. 20-3791 (JEB), slip op. at 2 (D.D.C. Feb. 19, 2021) (“[T]he relief requested in this lawsuit is staggering: to invalidate the election and prevent the electoral votes from being counted. When any counsel seeks to target processes at the heart of our democracy, the Committee may well conclude that they are required to act with far more diligence and good faith than existed here.”).

⁹ Letter from Jenny Hodgkins, Exec. Dir. & Gen. Couns., Tex. Bd. of Disciplinary Appeals, to Kevin Moran (May 27, 2021) (available at <https://aboutblaw.com/X1f>).

¹⁰ King v. Whitmer, No. 20-13134, 2021 WL 3771875, at *41 (E.D. Mich. Aug. 25, 2021). In a federal case in Colorado where defendants sought sanctions, the district court ordered two lawyers for the plaintiffs to pay close to \$187,000 in legal fees, finding that “this lawsuit has been used to manipulate gullible members of the public and foment public unrest” and “has been an abuse of the legal system and an interference with the machinery of government.” O’Rourke v. Dominion Voting Sys. Inc., No. 20-cv-03747-NRN, 2021 WL 5449070, at *9 (D. Colo. Nov. 22, 2021). However, the court did not refer the lawyers to the disciplinary authority. *Id.*

¹¹ See, e.g., Jacob Shamsian, *Could Sidney Powell Be Disbarred for Her Conspiracy Theory Election Lawsuits? Experts Say She’s ‘Playing with Fire.’*, BUS. INSIDER (Jan. 6, 2021, 10:27 AM), <https://www.businessinsider.com/could-sidney-powell-be-disbarred-for-election-lawsuits-conspiracy-theories-2020-12> (quoting different experts’ views on whether Sidney Powell will be disciplined for frivolous filings); Jacob Shamsian, *Will Rudy Giuliani Be Disbarred? Probably Not for Trump’s Election Lawsuits, Experts Say.*, BUS. INSIDER (Nov. 25, 2020, 7:07 PM), <https://www.businessinsider.com/can-rudy-giuliani-be-disbarred-election-lawsuits-trump-ukraine-investigation-2020-11> (quoting different experts’ views on whether Rudy Giuliani will be disciplined for frivolous filings and dishonesty). Lawyers may be sanctioned by courts or punished by disciplinary bodies under somewhat different standards for filing frivolous claims. See Richard G. Johnson, *Integrating Legal Ethics & Professional Responsibility with Federal Rule of Civil Procedure 11*, 37 LOY. L.A. L. REV. 819, 832–33 (2004) (comparing ABA Model Rule 3.1 to Federal Rule of Civil Procedure 11).

¹² See Lonnie T. Brown, Jr., *Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty to Report*, 62 OHIO ST. L.J. 1555, 1586–87 (2001) (stating that Rule

whether, in any given case or class of cases, disciplinary authorities are exercising laudable self-restraint or falling down on the job. But it is hard to judge since the disciplinary decision-making process is confidential and the authorities do not publicly acknowledge, much less justify, their decisions not to pursue discipline.¹³ This is the practice not only in highly visible litigation, but in hundreds of less noticed cases where disciplinary authorities exercise discretion to let advocates' misconduct go unpunished.

Lawyers' critical role in society necessitates public confidence that the bar is well-regulated through state disciplinary processes, which are the principal mechanism for overseeing lawyers. State courts adopt rules of professional conduct to govern the conduct of lawyers whom they license, and they may punish lawyers if they find, at the conclusion of disciplinary proceedings, that the lawyers violated the rules. But disciplinary counsel, like criminal prosecutors, may decline to bring charges even when they find that wrongdoing occurred, and they exercise such discretion in most cases. Scholars and practitioners who write about the disciplinary process generally ignore how disciplinary authorities winnow out cases involving misconduct.¹⁴

This Article focuses on disciplinary counsel's charging decisions in cases where advocates engage in litigation-related misconduct that is directed at the court, the opposing party, or other third parties, with the object of advancing the client's objectives. Situations where advocates overzealously pursue the client's interests may be distinguished from those where lawyers engage in self-interested misconduct at the client's expense, such as overbilling, failing to competently carry out the client's objectives or to conduct work diligently, failing to reasonably communicate with the client, or breaching the client's confidences.¹⁵ In other words, this Article

3.1 is "seldom enforced by disciplinary authorities"); Peter A. Joy, *The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers*, 37 LOY. L.A. L. REV. 765, 808–10 (2004) (concluding that disciplinary agencies rarely sanction litigators for frivolous filings); see also Jeffrey A. Parness, *Disciplinary Referrals Under New Federal Civil Rule 11*, 61 TENN. L. REV. 37, 38 (1993) (anticipating that the adoption of Civil Rule 11 would lead to increased disciplinary referrals for frivolous filings).

¹³ See *infra* notes 90–92 and accompanying text. In Rudy Giuliani's case, an organization representing journalists asked the state appellate court to make the records of disciplinary proceedings public. Letter from Reps. Comm. for Freedom of the Press to Att'y Grievance Comm., Sup. Ct. of the State of N.Y., App. Div., First Jud. Dep't (Apr. 16, 2021) (available at <https://media.sipiapa.org/adjuntos/185/documentos/001/839/0001839350.pdf>).

¹⁴ See, e.g., Debra Moss Curtis, *Attorney Discipline Nationwide: A Comparative Analysis of Process and Statistics*, 35 J. LEGAL PRO. 209 (2011) (describing state disciplinary processes, which include decisions by bar counsel regarding when to file formal complaints, but not describing the substantive grounds on which these decisions are made).

¹⁵ This distinction tracks the one made by David Wilkins between externality and agency transgressions. David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 819–20 (1992). For a discussion of how disciplinary processes address lawyers' professional misconduct directed at clients, see Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 685–91 (2003) [hereinafter Zacharias, *Purposes*].

focuses on how disciplinary authorities respond when advocates violate their duties as “officers of the court.”¹⁶

Advocacy misconduct is highly regulated by disciplinary rules. Many contemporary disciplinary rules may be traced to writings from the nineteenth century when, unlike today, most lawyers were trial lawyers.¹⁷ Consequently, the rules are directed significantly, and perhaps disproportionately, toward the regulation of trial advocacy.¹⁸ Many of these rules restrain lawyers’ advocacy on litigants’ behalf in order to promote the integrity of judicial proceedings, fairness to opposing parties and third parties, judicial efficiency, and other public and judicial values. In the course of litigation, it is not uncommon for lawyers to complain about their opposing counsel’s overzealous conduct.

Advocates’ courtroom work is highly visible. There is a cultural assumption that advocates are more likely than other lawyers to skirt the edge of the law, if not go over the edge, and parties and lawyers have an incentive to object when the opposing lawyer appears to have acted improperly. Therefore, one might expect disciplinary agencies to receive many complaints about advocates’ conduct, at least if lawyers and others expect such agencies to take complaints seriously. One might also expect disciplinary agencies to take lawyers’ visible misconduct seriously, particularly when it occurs in high-profile litigation, because of the potential impact on the public’s perception of the legal profession. This raises the possibility of over-enforcement since, besides being subject to the formal disciplinary processes in the states where they are admitted to practice law, advocates are also subject to sanction by the trial courts in which they appear in any given case.¹⁹ But, as

¹⁶ For discussions of lawyers’ role and responsibilities as “officers of the court,” see James A. Cohen, *Lawyer Role, Agency Law, and the Characterization “Officer of the Court”*, 48 *BUFF. L. REV.* 349, 380–87 (2000); Deborah M. Hussey Freeland, *What Is a Lawyer? A Reconstruction of the Lawyer as an Officer of the Court*, 31 *ST. LOUIS U. PUB. L. REV.* 425, 448–51 (2012).

¹⁷ Today, fewer lawyers are litigators, and many civil litigators devote much of their time to work outside judicial proceedings, such as arbitrations, administrative proceedings, investigations, and pre-litigation work leading to settlements. Even those who participate in civil litigation rarely conduct trials. Although judges are busy, many preside over trials infrequently. See, e.g., John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 *YALE L.J.* 522, 524 (2012) (providing statistics showing that “trials have become ‘vanishingly rare’”); Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 *J. EMPIRICAL LEGAL STUD.* 783 (2004) (discussing possible reasons why the rate of federal trials has declined).

¹⁸ See Bruce A. Green, *Judicial Regulation of US Civil Litigators*, 16 *LEGAL ETHICS* 306, 309–11 (2013) (explaining “[t]he dominance of lawyers’ civil advocacy role in the professional conduct rules”).

¹⁹ Litigators are not the only lawyers who may be disciplined outside states’ formal disciplinary processes. For example, some lawyers, such as patent lawyers and securities lawyers, may be disciplined by the administrative agencies before which they appear. See generally Michael P. Cox, *Regulation of Attorneys Practicing Before Federal Agencies*, 34 *CASE W. RES. L. REV.* 173, 195–97 (1984) (examining federal agencies’ ability to regulate attorney conduct and the federal government’s authority to impose restrictions on attorneys in the administrative realm); Jon J. Lee, *Double Standards: An Empirical Study of Patent and Trademark Discipline*, 61 *B.C. L. REV.* 1613, 1633–36 (2020) (describing the disciplinary process for lawyers appearing before the U.S. Patent and Trademark Office).

it turns out, the greater problem is under-enforcement, as trial courts defer to disciplinary agencies and vice versa.

To offer some insight into the significance and implications of disciplinary counsel's exercise of charging discretion in cases of overzealous advocacy, this Article focuses on the disciplinary process in the state of New York where a significant percentage of United States lawyers are licensed to practice.²⁰ The New York disciplinary process has previously been selected for study by others, most notably Richard Abel and Stephen Gillers.²¹ Although its disciplinary process is not wholly representative, New York is a useful state in which to study the disciplinary regulation of advocates. This is both because the state has many lawyers and many judicial proceedings and because its advocates have sometimes been associated with an aggressive, so-called "hardball" or "Rambo" style of litigation.²² Some New York lawyers' presumed propensity to test the limits of proper or civil advocacy may lead to transgressive professional conduct. Overzealousness is particularly likely to occur in settings where lawyers do not interact with each other regularly. New York's urban litigators often lack the regular professional interactions that might temper otherwise overly aggressive tendencies.

This Article begins in Part I with a brief discussion of the historical development of disciplinary law and processes, then turns in Part II to a description of the New York disciplinary process. Two defining features of the disciplinary process, like the criminal process, are prosecutorial discretion and a lack of transparency. Although there are many substantive disciplinary rules regulating advocates, and violations may occur with regularity, professional disciplinary proceedings are selectively initiated for reasons that are not publicly acknowledged. As Part III shows, this results in a substantial disparity between the perceived incidence of disciplinary misconduct by advocates and the actual imposition of discipline for overzealous advocacy. Employing the allegedly frivolous election challenges as a case study, Part IV explores four important, but under-examined, concerns raised by selective disciplinary enforcement of the rules regulating advocate conduct.

²⁰ AM. BAR ASS'N, ABA NATIONAL LAWYER POPULATION SURVEY: LAWYER POPULATION BY STATE (2021), https://www.americanbar.org/content/dam/aba/administrative/market_research/2021-national-lawyer-population-survey.pdf (reporting that, in 2021, New York had 185,076 active resident lawyers, out of 1,327,910 nationwide); RICHARD L. ABEL, LAWYERS ON TRIAL: UNDERSTANDING ETHICAL MISCONDUCT vii (2011) [hereinafter ABEL, LAWYERS ON TRIAL].

²¹ *Id.*; Stephen Gillers, *Lowering the Bar: How Lawyer Discipline in New York Fails to Protect the Public*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 485, 487 (2014).

²² *See, e.g.*, *United States v. Cutler*, 58 F.3d 825, 840 (2d Cir. 1995) (affirming the contempt conviction of a criminal defense lawyer who repeatedly violated court orders against prejudicial pretrial media interviews); *Kunstler v. Galligan*, 168 A.D.2d 146, 150 (N.Y. App. Div. 1991) (upholding the contempt conviction against a lawyer who disobeyed a court order by "contemptuously and insolently argu[ing] a motion" after the court called the next case).

I. A BRIEF ACCOUNT OF HOW DISCIPLINARY LAW AND PROCESSES DEVELOPED

In the United States, state courts regulate lawyers' professional conduct by overseeing the disciplinary process,²³ which is regarded as a distinguishing feature of our self-regulating profession.²⁴ Its purpose is to protect the public by identifying and sanctioning—including, when necessary, suspending or disbarring—lawyers who violate the applicable rules of professional conduct, which are often referred to as disciplinary rules or ethics rules.²⁵ Although lawyers are directly and indirectly regulated in other ways, the disciplinary process is considered to be the principal mechanism for regulating lawyers.²⁶

Section A briefly addresses the nineteenth century origins of state disciplinary processes. Section B describes how state judiciaries came to draw heavily from the work product of the American Bar Association (“ABA”) in adopting the substantive standards of conduct upon which disciplinary decisions are based. Section C briefly notes the development of formal disciplinary processes beginning in the late nineteenth century, as well as the shift from courts' reliance on bar associations to courts' retention of professional disciplinary counsel or bar counsel.²⁷

A. Nineteenth Century Origins of the Disciplinary Process

State courts used their disciplinary authority only sporadically through the late nineteenth century. In general, lawyers took short oaths at the time of their admission to practice, and some of the norms of conduct upon which

²³ For a discussion of the alternative possibility of federal regulation, see Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 396–406 (1994). For a broader exploration of which institutions are best situated to regulate lawyers, see generally Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures or the Market?*, 37 GA. L. REV. 1167 (2003).

²⁴ For an early discussion of the role of professional discipline in justifying professional self-regulation, see JULIUS HENRY COHEN, *THE LAW: BUSINESS OR PROFESSION?* 20–23 (1916). Courts also regulate lawyers through the admissions process, by overseeing lawyers who appear before them, and by interpreting common law and other law that regulates lawyers' conduct. See generally Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. 73, 73 (2009) (arguing that courts should “harmonize” laws that regulate lawyers in different contexts). For a discussion questioning whether courts should have such extensive regulatory oversight of the bar, see generally Eli Wald, *Should Judges Regulate Lawyers?*, 42 MCGEORGE L. REV. 149 (2010).

²⁵ For discussions of the purposes of lawyer discipline, see generally Zacharias, *Purposes*, *supra* note 15; Gillers, *supra* note 21, at 490–95.

²⁶ For a discussion of the multiplicity of lawyer regulatory mechanisms and the resulting complexities, see generally Ted Schneyer, *Legal Process Scholarship and the Regulation of Lawyers*, 65 FORDHAM L. REV. 33 (1996).

²⁷ For more extensive histories of disciplinary processes and descriptions of contemporary processes, see generally Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 GEO. J. LEGAL ETHICS 911 (1994); Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 10–21 (2007) [hereinafter Levin, *Secrecy*].

discipline was predicated were understood to be implicit in, or derived from, these oaths or from the general requirement of good moral character.²⁸ State courts occasionally suspended or disbarred lawyers for substantial misconduct, sustained misconduct, and particularly criminal wrongdoing.²⁹ State courts typically commenced the disciplinary process by ordering the lawyer to “show cause” as to why he should not be disbarred.³⁰ This was followed by a hearing into the alleged misconduct. Courts rarely initiated such proceedings, except when lawyers committed serious wrongdoing, perhaps because of the burden they imposed on judges, judges’ high tolerance for overzealousness, or their sympathy for fellow members of the bar.³¹

To some extent, the nineteenth century disciplinary process was supplemented by other processes that directly or indirectly served a regulatory function. If a lawyer wronged a client, then the client might, in theory, sue the lawyer for malpractice, breach of fiduciary duty, or breach of contract. But these remedies were rarely pursued, partially due to the difficulty of finding a lawyer to take the case.³² In judicial proceedings, if a lawyer acted improperly in relation to the judge, opposing party, or witness, the court could also impose a sanction ranging from rebuke to punishment for contempt of court.³³

²⁸ See generally Carol Rice Andrews, *The Lawyer’s Oath: Both Ancient and Modern*, 22 GEO. J. LEGAL ETHICS 3 (2009) (discussing the historical background and evolution of lawyers’ oaths in the United States). See also *Sanborn v. Kimball*, 64 Me. 140, 145–46, 153–55 (1875) (ordering that the lawyer be disbarred for engaging in forgery, which was held to be inconsistent with the “good moral character” required for ongoing admission to the bar, as well as with the lawyer’s oath at the time of admission, namely, that “you will conduct yourself in the office of an attorney within the courts according to the best of your knowledge and discretion, and with all good fidelity, as well to the courts as your clients”).

²⁹ See Devlin, *supra* note 27, at 917 (discussing how judges initiated disciplinary cases on an ad hoc basis, but only rarely and in extreme cases).

³⁰ See Levin, *supra* note 27, at 11–12 (noting that, until the twentieth century, courts typically initiated disciplinary proceedings against lawyers by issuing an order to show cause); see, e.g., *Sanborn*, 64 Me. at 141 (indicating that the lawyer must “show cause” as to why he should not be disbarred).

³¹ Cf. *Ex parte Wall*, 107 U.S. 265, 288 (1883) (“Undoubtedly, the power is one that ought always to be exercised with great caution; and ought never to be exercised except in clear cases of misconduct, which affect the standing and character of the party as an attorney. But when such a case is shown to exist, the courts ought not to hesitate, from sympathy for the individual, to protect themselves from scandal and contempt, and the public from prejudice, by removing grossly improper persons from participation in the administration of the laws.”).

³² See Susan Saab Fortney, *A Tort in Search of a Remedy: Prying Open the Courthouse Doors for Legal Malpractice Victims*, 85 FORDHAM L. REV. 2033, 2038–39 (2017) (“For decades, prospective malpractice plaintiffs faced a ‘conspiracy of silence,’ meaning that as a matter of professional courtesy lawyers did not criticize, sue, or testify against other lawyers.”). Lawyers continue to be reluctant to represent plaintiffs in legal malpractice actions. See *id.* at 2039 (“Although more lawyers are now willing to pursue legal malpractice claims, prospective plaintiffs in various circles and communities may still encounter resistance.”).

³³ See, e.g., *Ex parte Bradley*, 74 U.S. 364 (1868) (reviewing a contempt sanction against a lawyer); *In re Wood*, 45 N.W. 1113 (Mich. 1890) (reviewing same).

B. *The Development of Disciplinary Rules*

In most states, through the end of the nineteenth century, there were no extensive, much less comprehensive, written rules governing lawyers' professional conduct.³⁴ Some of the courts' normative expectations were incorporated in judicial opinions regarding lawyers' obligations to their clients established by agency law and other bodies of common law or regarding lawyers' obligations as advocates in the civil and criminal cases in which they appeared. The norms of professional conduct were also embodied in secondary writings, particularly those of David Hoffman and George Sharswood.³⁵ These professional expectations were transmitted informally within lawyers' small professional communities.³⁶

In 1878, a handful of elite lawyers from around the country formed the ABA, motivated by a concern about the degradation of law practice and by the hope of elevating professional standards.³⁷ In its early days, in addition to promoting more demanding standards for admission to the bar and for judicial practice, the ABA sought to promote standards of lawyer conduct.³⁸ In 1908, after a multi-year drafting process, the ABA adopted the Canons of Ethics ("Canons").³⁹ The Canons, a set of "pronouncements,"⁴⁰ did not have the force of law because they were adopted by a volunteer, non-governmental organization that lacked regulatory power. But the ABA's hope was that the

³⁴ For a discussion of the development of professional conduct codes, beginning with Alabama's adoption of the first state professional ethics code for lawyers in 1887, see generally Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385 (2004).

³⁵ See James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2397 n.14 (2003) (citing authority regarding the influence of Hoffman and Sharswood); Michael Ariens, *Lost and Found: David Hoffman and the History of American Legal Ethics*, 67 ARK. L. REV. 571 (2014) (describing Hoffman's influence); Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 LAW & SOC. INQUIRY 1, 9 (1999) (explaining that the drafters of the 1908 Canons looked to secondary writings, including the treatises of Hoffman and Sharswood); M.H. Hoeflich, *Legal Ethics in the Nineteenth Century: The "Other Tradition"*, 47 U. KAN. L. REV. 793, 794 (1999) (stating that Hoffman's and Sharswood's writings shaped the nineteenth century view of legal ethics); Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 250 n.60 (1992) (noting that prior to Sharswood's essay, Hoffman's writing was the only major guide for lawyers).

³⁶ Altman, *supra* note 35, at 2415–16 (describing that, before 1908, "the informal understandings of appropriate lawyer conduct, coupled with the peer pressure among lawyers in a smaller, more homogenous legal community, had seemed sufficient") (footnote omitted).

³⁷ Simeon E. Baldwin, *The Founding of the American Bar Association*, 3 AM. BAR ASS'N J. 658, 658–60 (1917).

³⁸ See Michael S. Ariens, *American Legal Ethics in an Age of Anxiety*, 40 ST. MARY'S L.J. 343, 415–17 (2008) (describing early twentieth-century efforts to raise admissions and educational standards for law licenses); Bruce A. Green & Rebecca Roiphe, *Regulating Discourtesy on the Bench: A Study in the Evolution of Judicial Independence*, 64 N.Y.U. ANN. SURV. AM. L. 497, 514 (2008) ("[T]he Canons of Judicial Ethics, published in 1924, became a way to counter growing critique that judges were merely partisans in an increasingly hostile class war.").

³⁹ COMM. ON CODE OF PRO. ETHICS, FINAL REPORT OF THE COMMITTEE ON CODE OF PROFESSIONAL ETHICS: CANONS OF ETHICS (AM. BAR ASS'N 1908) [hereinafter ABA CANONS].

⁴⁰ Green & Roiphe, *supra* note 38, at 514.

Canons would both influence lawyers in regulating their own conduct and eventually influence courts in regulating lawyers.⁴¹ Beginning in the late nineteenth and early twentieth centuries, state and local bar associations grew in number and allied themselves with the ABA's efforts to promote the Canons.⁴²

In part because the Canons drew significantly from the writings of the nineteenth century, when lawyers were primarily trial advocates, most of the original thirty-two Canons were directed at lawyers' advocacy role.⁴³ They addressed such topics as: "The Duty of the Lawyer to the Courts,"⁴⁴ "The Selection of Judges,"⁴⁵ "Attempts to Exert Personal Influence on the Court,"⁴⁶ "When [Serving as] Counsel for an Indigent Prisoner,"⁴⁷ "The Defense or Prosecution of Those Accused of Crime,"⁴⁸ "Acquiring Interest in Litigation,"⁴⁹ "How Far a Lawyer May Go in Supporting a Client's Cause,"⁵⁰ "Ill Feeling and Personalities Between Advocates,"⁵¹ "Treatment of Witnesses and Litigants,"⁵² "Appearance of Lawyer as Witness for His Client,"⁵³ "Newspaper Discussion of Pending Litigation,"⁵⁴ "Punctuality and Expedition,"⁵⁵ "Attitude Toward Jury,"⁵⁶ "Right of Lawyer to Control the Incidents of the Trial,"⁵⁷ "Stirring up Litigation, Directly or Through Agents,"⁵⁸ "Justifiable and Unjustifiable Litigations,"⁵⁹ and "Responsibility

⁴¹ Altman, *supra* note 35, at 2399–402.

⁴² Among the early leaders were the New York City Bar, founded in 1870 as the Association of the Bar of the City of New York, and the New York County Lawyers' Association (NYCLA), founded in 1908 in response to the New York City Bar's exclusionary policies. *See generally* EDWIN DAVID ROBERTSON, BRETHREN AND SISTERS OF THE BAR: A CENTENNIAL HISTORY OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION (2008) (detailing the history of the New York County Lawyers Association). Shortly after the ABA adopted the Canons, NYCLA established the first bar association "ethics committee" to publish opinions guiding lawyers on the scope of their professional obligations, and other bar associations followed suit. *See* Leah F. Chanin, *The Scope and Use of State Ethics Opinions*, 14 J. LEGAL PRO. 161, 162 (1989) (observing that the NYCLA was "the first committee on professional ethics in the United States").

⁴³ *See* Andrews, *supra* note 28, at 6 ("The model [oath's] . . . 'just' causes clause was at the center of the ABA's primary drafting debate—the proper advocacy roles of lawyers.").

⁴⁴ ABA CANONS, *supra* note 39, at Canon 1.

⁴⁵ *Id.* at Canon 2.

⁴⁶ *Id.* at Canon 3.

⁴⁷ *Id.* at Canon 4.

⁴⁸ *Id.* at Canon 5.

⁴⁹ *Id.* at Canon 10.

⁵⁰ *Id.* at Canon 15.

⁵¹ *Id.* at Canon 17.

⁵² *Id.* at Canon 18.

⁵³ *Id.* at Canon 19.

⁵⁴ *Id.* at Canon 20.

⁵⁵ *Id.* at Canon 21.

⁵⁶ *Id.* at Canon 23.

⁵⁷ *Id.* at Canon 24.

⁵⁸ *Id.* at Canon 28.

⁵⁹ *Id.* at Canon 30.

for Litigation.”⁶⁰ Even the provisions that were not directed exclusively toward advocates—such as those on conflicts of interest, advice, negotiations, handling client property, and legal fees—were applicable to advocates, and they generally captured norms that were first developed in situations in which lawyers had served as advocates.⁶¹

By the 1960s, the ABA recognized that the Canons were too vague to be fairly enforced and that they did not adequately address all the functions beyond advocacy that lawyers performed, especially in transactional settings.⁶² In 1970, after a sustained and inclusive drafting process, the ABA effectively replaced the Canons with an entirely new set of provisions, the Model Code of Professional Responsibility (“Model Code”).⁶³ At the ABA’s urging, almost all state courts adopted the Model Code (with various revisions of their own) and used its rules as the basis for imposing discipline, such as disbarment and suspension, when lawyers engaged in misconduct.⁶⁴ Around a decade later, seeing further need for improvement, the ABA launched another comprehensive drafting process, which resulted in its adoption of a different set of rules, the Model Rules of Professional Conduct (“Model Rules”), in 1983.⁶⁵ The provisions of the Model Rules were largely derived from those of the Model Code, but, again, the ABA sought to better address the roles that contemporary lawyers serve outside the courtroom.⁶⁶

⁶⁰ *Id.* at Canon 31.

⁶¹ Over the next decades, the ABA amended and expanded the Canons to address previously overlooked subjects, some important and others trivial. Important overlooked subjects included Canon 37, “Confidences of a Client,” whereas trivial overlooked subjects included Canon 33’s discussion of permissible law firm names. 51 ANN. REP. AM. BAR ASS’N 767, 778–79 (1928).

⁶² See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 54–55 (1986) (observing that the Canons “[spoke] of a kind of law practice that was carried on almost entirely in the courtroom” and that “their wording [was] too vague and general to afford guidance”).

⁶³ MODEL CODE OF PRO. RESP. (AM. BAR ASS’N 1969). The Model Code’s disciplinary rules were less vague than the earlier Canons (although they still left many questions of interpretation and judgment), and they more meaningfully addressed lawyers’ non-advocacy roles. For a history of the ABA’s drafting of the Model Code of Professional Responsibility, see generally John F. Sutton, Jr., *The American Bar Association Code of Professional Responsibility: An Introduction*, 48 TEX. L. REV. 255, 255–56 (1970).

⁶⁴ See Gregory C. Sisk, Susan Saab Fortney, Charles G. Geyh, Neil W. Hamilton, William D. Henderson, Vincent R. Johnson, Stephen L. Pepper & Melissa H. Weresh, LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION 113 (2018) (“With the exception of California, every state adopted the Model Code, at least in modified form.”).

⁶⁵ MODEL RULES, *supra* note 3.

⁶⁶ *Cf.* Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Code*, 6 GEO. J. LEGAL ETHICS 241, 246 n.34 (1992) (noting that the ABA’s shift from the Canons to the Model Code included “the lawyer’s role as negotiator and counselor” and that the shift from the Model Code to the Model Rules “represent[ed] a similar change in emphasis, especially with regard to enforcement”). Among the new rules relating to transactional lawyers was Rule 2.3, addressing lawyers’ preparation of evaluations for third parties. MODEL RULES, *supra* note 3, r. 2.3. For a discussion of Rule 2.3, see Edward A. Carr, *Attorney Opinion Letters: Model Rule 2.3 and the Texas Experience*, 37 S. TEX. L. REV. 1127 (1996). Another was Rule 2.2, which addressed lawyers’ role as intermediaries between clients, but which was later repealed. For a discussion of Rule 2.2, see John S. Dzienkowski, *Lawyers as*

The ABA has amended the Model Rules periodically since then, including a comprehensive amendment in 2002, and the Model Rules are now the basis (with variation) for almost all state courts' disciplinary rules.⁶⁷ As might be expected, the Model Rules devote significant attention to lawyers' non-advocacy roles.⁶⁸ But they include many provisions specifically related to lawyers' conduct as advocates,⁶⁹ and many of the generally applicable provisions have significance for lawyers serving as advocates, as well as in other roles.

C. *The Development of Formal Disciplinary Processes*

From the start, bar associations regarded improving the disciplinary processes as important to their project of raising professional standards.⁷⁰ They understood that the objective of discipline was to rid the profession of bad actors, both to protect the public and to promote public confidence in the legal profession.⁷¹ Bar associations offered to assume substantial responsibility for professional discipline, in part to advance the profession's claim of being self-regulating.⁷² In the 1890s, the New York state courts began delegating responsibility to the New York City Bar and other local bar associations to initiate disciplinary investigations; bring disciplinary charges; conduct disciplinary hearings; and make recommendations to the courts concerning whether a lawyer engaged in misconduct and the appropriate sanction, thereby relieving the courts of much of the burden of disciplinary proceedings.⁷³

Particularly over the past fifty years, state disciplinary processes have evolved, and the ABA has played a significant role in encouraging reform by

Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession, 1992 U. ILL. L. REV. 741.

⁶⁷ See generally Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441 (2002) (reviewing the amendments made to the Model Rules in 2002).

⁶⁸ See, e.g., MODEL RULES, *supra* note 3, r. 1.13 (addressing responsibilities in representing an organization); *id.* r. 2.1 (addressing responsibilities as an advisor); *id.* r. 2.3 (addressing responsibilities in preparing an evaluation for the benefit of a third party).

⁶⁹ *Id.* rr. 3.1–3.9.

⁷⁰ See Devlin, *supra* note 27, at 917–19 (describing early developments in bar associations and lawyer discipline).

⁷¹ See *id.* at 918–19 (“[C]oncerns about the lack of professional control began to be addressed in an organized manner with the formation of local bar associations. . . . [which] had been concerned with professional misconduct . . .”) (footnotes omitted).

⁷² See *id.* at 919 (noting that early bar associations were “organized for the purpose of good fellowship” and, over time, these bar associations began investigating grievances).

⁷³ See Bruce A. Green, *Criminal Defense Lawyering at the Edge: A Look Back*, 36 HOFSTRA L. REV. 353, 373–74 (2007) (describing an early twentieth century disciplinary case before the New York City Bar). See generally COHEN, *supra* note 24, at 1–23 (describing the role of the Grievance Committee of the Association of the Bar of the City of New York in the early 1900s).

adopting and promoting recommendations for disciplinary enforcement.⁷⁴ In many states, the disciplinary process is now overseen by full-time staff lawyers who serve in a prosecutorial role and have the responsibility to investigate allegations of lawyer misconduct, initiate disciplinary proceedings, and serve as prosecution counsel in disciplinary hearings.

II. THE CONTEMPORARY DISCIPLINARY LAW AND PROCESS: NEW YORK AS AN ILLUSTRATION

State disciplinary processes vary in many ways, and studies often focus on a single jurisdiction.⁷⁵ Rather than seeking to describe the variation, this Part focuses on New York's disciplinary law and process as an illustration. The defining features of New York's disciplinary process, which itself entails regional variation, are discretion and lack of transparency; professional disciplinary authorities pursue only a fraction of the complaints against lawyers, and they do not publicly justify their discretionary decisions.⁷⁶

In New York, attorney disciplinary proceedings generally enforce the New York Rules of Professional Conduct ("NY Rules"),⁷⁷ which are heavily

⁷⁴ For examples of ABA proposals regarding the disciplinary process, see MODEL RULES FOR LAW. DISCIPLINARY ENF'T (AM. BAR ASS'N 1989, amended 2002); STANDARDS FOR IMPOSING LAW. SANCTIONS (AM. BAR ASS'N 1986, amended 1992); STANDARDS FOR LAW. DISCIPLINE & DISABILITY PROC. (AM. BAR ASS'N 1979); AM. BAR ASS'N SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENF'T, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (1970). For critiques of the ABA's model disciplinary procedures, see generally James Duke Cameron, *Standards for Imposing Lawyer Sanctions—A Long Overdue Document*, 19 ARIZ. ST. L.J. 91 (1987); Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1 (1998). Disciplinary counsel from some states began informal meetings in the late 1950s that led, in 1965, to the formation of a non-profit group, the National Organization of Bar Counsel, which promotes exchanges between lawyer disciplinary counsel that further influence state disciplinary reform. *About NOBC*, NAT'L ORG. OF BAR COUNS., <https://www.nobc.org> (last visited Oct. 30, 2021).

⁷⁵ See generally RICHARD L. ABEL, *LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS* (2008) (providing a study based on New York disciplinary proceedings); ABEL, *LAWYERS ON TRIAL*, *supra* note 20 (providing a study based on California disciplinary proceedings); Gillers, *supra* note 21 (recommending reform of the New York disciplinary process); Jack A. Guttenberg, *The Ohio Attorney Disciplinary Process—1982 to 1991: An Empirical Study, Critique, and Recommendations for Change*, 62 U. CIN. L. REV. 947 (1994) (recommending reform of the Ohio disciplinary process).

⁷⁶ See Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 89 (1995) [hereinafter Green, *Policing Federal Prosecutors*] ("[T]he dearth of reported disciplinary proceedings brought by state authorities against federal prosecutors reflects that . . . [they are] rarely initiated."); Bruce A. Green, *Lawyer Discipline: Conscientious Noncompliance, Conscious Avoidance, and Prosecutorial Discretion*, 66 FORDHAM L. REV. 1307, 1309–12 (1998) (discussing whether disciplinary authorities should seek to sanction a lawyer who gave financial support to a client based on humanitarian impulses); Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143, 144 (2016) (discussing "[d]isciplinary authorities' deferential treatment of prosecutors").

⁷⁷ N.Y. RULES OF PRO. CONDUCT (N.Y. STATE BAR ASS'N 2009, amended 2020) [hereinafter N.Y. RULES]. The state and local bar associations, led by the New York State Bar Association, have played a substantial role in proposing professional conduct rules and amendments to those rules. See, e.g., Brandon Vogel, *A Better Proposal for the New York Rules of Professional Conduct*, N.Y. STATE BAR ASS'N (June 15, 2021), <https://nysba.org/a-better-proposal-for-the-new-york-rules-of-professional-conduct/>

influenced by the ABA Model Rules.⁷⁸ Although New York state and local bar associations sometimes issue reports promoting procedural reform of the disciplinary process in the state, they no longer play a formal role in the process. The intermediate appellate courts, which have principal responsibility for admitting and disciplining lawyers, have established grievance committees covering different regions of the state.⁷⁹ The process is staffed and administered by full-time lawyers who serve in prosecutorial roles, but it also benefits from the assistance of volunteer lawyers who oversee or assist in aspects of the staff's work.⁸⁰ The processes employed in different parts of the state varied significantly until 2016 when the state courts adopted procedures intended to make the processes more consistent, though not centralized or entirely uniform.⁸¹

The disciplinary process gives substantial discretion to the disciplinary agency to decide how to dispose of misconduct allegations. In brief outline: the disciplinary committee's staff reviews allegations of lawyer misconduct that come from current and former clients, judges, other lawyers, or other

(discussing a state bar committee's proposal to amend New York's rules). The state judiciary is heavily influenced by the state bar's work product, although it also relies on court administrators and often rejects the state bar associations' proposals.

⁷⁸ The wording of the New York Rules borrows substantially from the ABA Model Rules, but the state judiciary, often at the urging of the state bar association or of judicial administrators, has diverged from the ABA model in many small ways; has retained some provisions of the earlier ABA Model Code of Professional Responsibility that the ABA Model Rules did not; and has included some provisions that are uniquely worded. Among the notable differences is that the New York Rules subject law firms, as well as individual lawyers, to discipline. Ted Schneyer, who was initially the proponent of law firm discipline, later reconsidered its utility. 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, 616–19 (2011).

⁷⁹ NYS COMM'N ON STATEWIDE ATT'Y DISCIPLINE, ENHANCING FAIRNESS AND CONSISTENCY: FOSTERING EFFICIENCY AND TRANSPARENCY 6–8 (2015), <http://ww2.nycourts.gov/ATTORNEYS/DISCIPLINE/Documents/AttyDiscFINAL9-24.pdf>.

⁸⁰ For descriptions of staffing in the four New York departments' grievance committees, see ATT'Y GRIEVANCE COMM., SUP. CT., APP. DIV., FIRST JUD. DEP'T, HOW TO FILE A COMPLAINT 2 (2020), <https://nycourts.gov/courts/AD1/Committees&Programs/DDC/How%20to%20File%20a%20Complaint%2007.30.2020.pdf> [hereinafter FIRST JUD. DEP'T COMPLAINT INSTRUCTIONS]; *Attorney Matters: How to Make a Complaint About a Lawyer*, N.Y. CTS: APP. DIV., SECOND JUD. DEP'T, https://www.nycourts.gov/courts/ad2/attorney_matters_ComplaintAboutALawyer.shtml (last visited Oct. 30, 2021) [hereinafter *Second Jud. Dep't Complaint Instructions*]; ATT'Y GRIEVANCE COMM., SUP. CT., APP. DIV., THIRD JUD. DEP'T, OVERVIEW OF THE ATTORNEY DISCIPLINARY PROCESS 2 (2019), <https://www.nycourts.gov/ad3/agc/Forms/OverviewAttyDiscProcess.pdf> [hereinafter THIRD JUD. DEP'T COMPLAINT INSTRUCTIONS]; ATT'Y GRIEVANCE COMMS., SUP. CT., APP. DIV., FOURTH JUD. DEP'T, HOW COMPLAINTS AGAINST ATTORNEYS ARE PROCESSED, <https://www.nycourts.gov/courts/ad4/AG/AG-brochure.pdf> (last visited Oct. 30, 2021) [hereinafter FOURTH JUD. DEP'T COMPLAINT INSTRUCTIONS].

⁸¹ See generally HAL R. LIEBERMAN, J. RICHARD SUPPLE & HARVEY PRAGER, NEW YORK ATTORNEY DISCIPLINE: PRACTICE AND PROCEDURE (2016). The following description of the New York disciplinary process derives from Lieberman, Supple, and Prager and from personal experience, including that as a volunteer member of the disciplinary committee in Manhattan for a period prior to the 2016 reforms. For a critical discussion of the New York process before it was reformed, see Gillers, *supra* note 21, at 496–515.

sources, occasionally including the staff's own review of judicial opinions or news articles.⁸² If the allegations are baseless on their face because the alleged conduct would not be a disciplinary violation, or if the allegations seem trivial or otherwise unworthy of attention, the staff may close the file, with notice to any complainant, or refer the complainant to another process.⁸³ For example, clients with complaints about fees are typically advised about the process for fee arbitration.⁸⁴ With few exceptions, parties with complaints that relate to pending litigation are advised that the grievance committee will not consider the complaint at that time, but that the complainant may resubmit the allegations after the litigation has ended.⁸⁵ This practice avoids interfering with court proceedings that may address the same issue; encourages parties to raise their complaints with the courts in the first instance; and conserves disciplinary resources in cases where the court makes a finding or reaches a resolution to which the grievance committee may defer.

If some inquiry appears to be warranted, the staff asks the accused lawyer to respond to the complaint or allegation that prompted the staff's inquiry, and the staff then provides the response to the complainant and invites rebuttal.⁸⁶ In many or most cases, the staff is satisfied with the lawyer's response and, with approval from supervisors or others exercising oversight, closes the file with notice to any complainant.⁸⁷ However, if the staff is dissatisfied, it may undertake its own investigation, which may include obtaining records and questioning the lawyer, the complainant, and others. In many cases, the staff simply closes the file at the end of the investigation. Sometimes, before closing the file, the staff writes a cautionary letter to the lawyer. But, other times, it files a formal complaint that goes on to be adjudicated before a referee.⁸⁸

Throughout the process, lawyers who concede that they engaged in questionable or improper conduct may attempt to negotiate a resolution of the case, which may range from a private warning or admonition (private

⁸² FIRST JUD. DEP'T COMPLAINT INSTRUCTIONS, *supra* note 80, at 3–6; *Second Jud. Dep't Complaint Instructions*, *supra* note 80; THIRD JUD. DEP'T COMPLAINT INSTRUCTIONS, *supra* note 80, at 2–7; FOURTH JUD. DEP'T COMPLAINT INSTRUCTIONS, *supra* note 80; *Attorney Conduct and Discipline*, SUP. CT. STATE N.Y., APP. DIV., FOURTH JUD. DEP'T, <https://www.nycourts.gov/courts/ad4/Clerk/AttyMtrrs/atty-discip.html> (last visited Oct. 30, 2021) [hereinafter *Fourth Jud. Dep't Complaint Platform*].

⁸³ See LIEBERMAN ET AL., *supra* note 81.

⁸⁴ *Id.*

⁸⁵ This practice is not unique to New York. See, e.g., OFF. OF LAWS. PRO. RESP., COMPLAINTS AND INVESTIGATIONS 6, <http://lprb.mncourts.gov/complaints/LawyerComplaintDocs/Complaint%20Brochure%20-%20English.pdf> (last visited Oct. 30, 2021) (“Examples of complaints that are often dismissed without investigation include . . . most matters pending in court, unless the misconduct is clear and serious . . .”).

⁸⁶ See LIEBERMAN ET AL., *supra* note 81.

⁸⁷ *Id.*

⁸⁸ *Id.*

reprimand) to a public sanction—typically, a public reprimand, suspension, or disbarment. Those who contest the allegations in the staff’s formal complaint may opt for a hearing before a referee who makes factual findings and recommendations, which may be accepted by both sides or brought before the intermediate appellate court for its own determination.⁸⁹ As Section B discusses, the number of cases that result in a public sanction, whether by agreement or court finding, is small in proportion to the number of misconduct allegations considered by the disciplinary staff.

New York’s disciplinary process is less transparent than that of many other states.⁹⁰ The grievance committees do not make complaints from clients, judges, and others available to the public, although complainants and lawyers receiving complaints may do so. The committees do not give public explanations for their decisions to dismiss complaints, although complainants and lawyers receiving complaints may publicize their correspondence with the disciplinary counsel.⁹¹ When complaints are rejected, complainants receive only cursory explanations.⁹²

In New York, with rare exception, when complaints are not summarily dismissed, disciplinary investigations are pursued in secret; formal charges are filed in secret; and disciplinary hearings are held in secret.⁹³ Some cases of misconduct are resolved privately, for example, by a private warning or private reprimand. Unless a court imposes public discipline—typically, a public reprimand, suspension, or disbarment—there is no public record of that which occurred in the disciplinary process, save year-end reports that are unrevealing because any information they offer on specific non-public cases is mostly in generalized and highly anonymized form.⁹⁴

⁸⁹ *Id.* at 116.

⁹⁰ Levin, *Secrecy*, *supra* note 27, at 14–15, 14 n.80, 20 nn.124 & 126, 32 n.191, 35 n.208, 38.

⁹¹ In a recent case, a lawyer for New York City asserted that law professors who filed a series of disciplinary complaints against state prosecutors violated the law by publicizing their complaints, to which the professors responded by filing a civil rights lawsuit asserting that the threat of sanctions violated their free speech rights. *See* Jonah E. Bromwich, *They Publicized Prosecutors’ Misconduct. The Blowback Was Swift.*, N.Y. TIMES (Nov. 10, 2021), <https://www.nytimes.com/2021/11/10/nyregion/queens-prosecutors-misconduct.html> (reporting on grievances filed against twenty-one Queens, New York prosecutors and the subsequent response by the prosecutors’ attorney).

⁹² At the other extreme, Ohio’s disciplinary process makes complaints and filings in pending proceedings publicly available online. *Online Docket*, OHIO BD. OF PRO. CONDUCT, <http://supremecourt.ohio.gov/bpccm> (last visited July 31, 2021).

⁹³ *See* N.Y. JUD. LAW § 90(10) (McKinney 2021) (“Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential.”). New York state courts have authority to disclose disciplinary records upon a showing of “good cause” under this law but have exercised this authority only in rare and extreme cases, such as when Roy Cohn was found to have waived confidentiality by publicly accusing disciplinary authorities of corruption. *In re New York News (Cohn)*, 113 A.D.2d 92, 95 (N.Y. App. Div. 1985).

⁹⁴ The federal courts in New York have their own admissions and disciplinary processes. *See* Judith A. McMorrow & Daniel R. Coquilliet, *Disciplinary Enforcement*, in 30 MOORE’S FEDERAL PRACTICE

The committees' annual reports do provide some aggregate statistical information, however. For example, the Grievance Committee for the Fourth Judicial Department has jurisdiction over approximately 14,000 lawyers who practice in twenty-two of the state's western counties, including the three major cities of Buffalo, Rochester, and Syracuse.⁹⁵ The Grievance Committee's 2019 annual report says that it disposed of complaints involving 1,529 lawyers, some of whom were the subject of two or more complaints.⁹⁶ Of these, the complaints against 791 lawyers were rejected out of hand for failing to state a complaint, and 405 other complaints were dismissed or withdrawn, presumably after the lawyer submitted a satisfactory response or an investigation was concluded.⁹⁷ The Committee issued ninety-eight lawyers a "Letter of Advisement,"⁹⁸ which is not regarded as a disciplinary sanction and does not necessarily imply a finding of misconduct. Nineteen lawyers received a letter of admonition, which qualifies as a private sanction.⁹⁹ The report does not disclose the conduct underlying any of the matters resulting in non-public letters of advisement or admonition. One hundred and sixteen lawyers were referred to the Appellate Division.¹⁰⁰

In 2019, sixty-three cases referred by the Grievance Committee for the Fourth Judicial Department were processed in the court.¹⁰¹ (Many or most cases had probably been referred in prior years.) Of these, only forty-five clearly involved disciplinary complaints.¹⁰² (Eighteen involved non-disciplinary resignations or applications for reinstatement.¹⁰³) Of the forty-five disciplinary cases, twenty resulted in public discipline, including

806-1 (3d ed. 2013). Typically, the federal courts simply piggyback on the state disciplinary agencies' work by suspending or disbaring lawyers after they have been similarly sanctioned by the state. Jerome Davis, *Disbarment in the Federal Courts*, 85 YALE L.J. 975, 975-76 (1976). The federal courts also have ad hoc disciplinary processes for investigating and adjudicating misconduct by lawyers in federal judicial proceedings. *Id.* at 977. Federal courts are more reliant than the state processes on volunteer lawyers. It is unclear how often the federal courts invoke their own processes rather than simply referring misconduct to the disciplinary authorities of the states in which the lawyers in question are licensed. See William J. Hamilton, *Treating All Attorneys Fairly: Changing the Rules for Disbarment, Regardless of Conduct*, 32 GEO J. LEGAL ETHICS 659, 664 (2019) ("Significantly less literature is available on federal disbarments, as most journal articles seem to focus on state processes.").

⁹⁵ *Attorney Grievance Committees*, N.Y. CTS: APP. DIV., FOURTH JUD. DEP'T, <https://www.nycourts.gov/courts/ad4/AG> (last visited Aug. 1, 2021).

⁹⁶ *Annual Report*, N.Y. CTS: APP. DIV., FOURTH JUD. DEP'T, <https://www.nycourts.gov/courts/ad4/AG/AG-ann-rep.shtm> (last visited July 31, 2021) (providing the Annual Report of Fourth Department Disciplinary Activities covering the period of January 1, 2019 through December 31, 2019).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

six disbarments, two disciplinary resignations, twelve suspensions, and no public or private censures.¹⁰⁴ Thirteen cases were discontinued, dismissed, or remanded to the Grievance Committee.¹⁰⁵ The remaining cases fell within the unrevealing category of “[a]ll other [d]ispositions.”¹⁰⁶ The reports of the other New York disciplinary agencies reflect a similar selectivity.¹⁰⁷ As the statistics reflect, disciplinary authorities engage in a winnowing process in which substantial discretion is exercised by them and, to a lesser degree, the courts, resulting in less than two percent of the complaints rising to the level of public discipline.

III. ENFORCING ADVOCACY RULES

This Part shows that lawyers are disciplined for only a small percentage of overzealous advocacy. It begins in Section A by briefly describing judges’ authority to sanction advocates’ overzealousness when it occurs in cases over which the judges preside. There is good reason to conclude that, although allegations of advocacy misconduct are frequent, trial judges inquire into only a fraction of cases where misconduct is alleged. Section B

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ The largest percentage of New York State lawyers are in the First Department, which includes Manhattan and Bronx Counties. According to the First Department Disciplinary Committee’s Annual Reports, in 2013, the Committee issued seventy-one Letters of Admonition, while eighty-six lawyers were publicly disciplined through twenty-nine disbarments, seven resignations by lawyers facing disciplinary charges (which is considered equivalent to disbarment), thirty-four suspensions, and sixteen public censures. DEPARTMENTAL DISCIPLINARY COMM. OF THE APP. DIV. OF THE SUP. CT. OF THE STATE OF N.Y., FIRST JUD. DEP’T, 2013 ANNUAL REPORT 30, 33 (2014), <https://www.nycourts.gov/courts/AD1/Committees&Programs/DDC/2013%20Annual%20Report.pdf>. In 2014, the Committee issued seventy-five Letters of Admonition, while seventy lawyers were publicly disciplined through twenty-two disbarments, eleven resignations by lawyers facing charges, twenty-eight suspensions, and nine public censures. DEPARTMENTAL DISCIPLINARY COMM. OF THE APP. DIV. OF THE SUP. CT. OF THE STATE OF N.Y., FIRST JUD. DEP’T, 2014 ANNUAL REPORT 34, 37 (2015), <https://www.nycourts.gov/courts/AD1/Committees&Programs/DDC/AnnualReport2014FINAL.pdf>. In 2015, the Committee issued ninety-nine Letters of Admonition, while fifty-nine lawyers were publicly disciplined through twenty disbarments, ten resignations by lawyers facing charges, twenty-four suspensions, and five public censures. DEPARTMENTAL DISCIPLINARY COMM. OF THE APP. DIV. OF THE SUP. CT. OF THE STATE OF N.Y., FIRST JUD. DEP’T, 2015 ANNUAL REPORT 36, 39 (2016), <https://www.nycourts.gov/courts/AD1/Committees&Programs/DDC/Annual%20Report%202015%20FINAL.pdf>. The First Department’s annual reports did not provide information about the cases in which private discipline was imposed. However, according to the Third Department Committee on Professional Standards’ 2014 Annual Report, sixty-six lawyers received various forms of private sanctions including seven oral admonitions, ten Letters of Admonition, twenty-four Letters of Education, and twenty-five Letters of Caution; thirty-one lawyers were publicly sanctioned through twelve disbarments, sixteen suspensions (aside from suspensions for noncompliance with registration requirements), and two public censures. STATE OF N.Y., SUP. CT., APP. DIV., THIRD JUD. DEP’T, COMM. ON PRO. STANDARDS, ANNUAL REPORT CONCERNING ATTORNEY DISCIPLINE 2014 2–5, 8–12 (2015) [hereinafter THIRD JUD. DEP’T 2014 ANNUAL REPORT], <https://www.nycourts.gov/ad3/AGC/Forms/annualreport2014.pdf>.

then describes data showing that professional discipline is rarely imposed on New York lawyers for overzealous advocacy.

A. *Advocacy Misconduct and Judicial Sanctions*

Contemporary decisions recognize that state and federal courts have inherent or “supervisory” authority to regulate the lawyers who practice before them, which means that a judge may punish a lawyer for misconduct in the course of a case over which the judge presides.¹⁰⁸ At minimum, lawyers appearing in state court must abide by the state’s professional conduct rules.¹⁰⁹

Like the ABA Model Rules, the NY Rules include many provisions that apply, in whole or in part, to advocates. Among the disciplinary provisions governing trial advocacy are those forbidding lawyers from making non-meritorious claims and contentions,¹¹⁰ delaying litigation for no substantial purpose,¹¹¹ and knowingly making or failing to correct false statements to the court.¹¹² Some rules are derived from criminal law governing perjury and the obstruction of justice, such as rules forbidding a lawyer from exploiting or knowingly contributing to a witness’s false testimony¹¹³ or helping to hide witnesses.¹¹⁴ Other rules are generally derived from other law or court opinions, including a rule setting out improprieties in courtroom examinations and in arguments to the jury¹¹⁵ and a rule restricting ex parte communications with the court.¹¹⁶ Various other rules, although not specifically addressing advocates, have particular relevance to advocates in dealing with opposing counsel and witnesses, including a rule forbidding knowingly making false statements to others,¹¹⁷ a rule restricting direct communication with represented persons,¹¹⁸ and a rule regulating lawyers’ communication with unrepresented persons.¹¹⁹

¹⁰⁸ See generally Fred C. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory*, 56 VAND. L. REV. 1303 (2003) (analyzing potential sources of federal courts’ inherent authority to regulate lawyers). In federal cases, the leading decision is *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991).

¹⁰⁹ The courts in most federal districts have adopted the professional conduct rules of the states in which they sit, although some have adopted the Model Rules of Professional Conduct or rules of their own derived from the Model Rules. C. *ABA Model Rules of Professional Conduct*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/c-aba-model-rules-professional-conduct> (last visited Sept. 29, 2021).

¹¹⁰ N.Y. RULES, *supra* note 77, r. 3.1.

¹¹¹ *Id.* r. 3.2.

¹¹² *Id.* r. 3.3(a)(1).

¹¹³ *Id.* rr. 3.3(a)(3), 3.4(a)(4)–(5).

¹¹⁴ *Id.* r. 3.4(a)(2).

¹¹⁵ *Id.* r. 3.4(d).

¹¹⁶ *Id.* r. 3.5(a).

¹¹⁷ *Id.* r. 4.1.

¹¹⁸ *Id.* r. 4.2.

¹¹⁹ *Id.* r. 4.3.

Lawyers appearing in court are also governed by various rules and laws that overlap with the professional conduct rules or are incorporated into the professional conduct rules.¹²⁰ These include civil procedure rules forbidding the filing of frivolous claims and defenses as well as rules and laws requiring the disclosure of various evidence and forbidding the destruction or concealment of such evidence. Additionally, courts' inherent authority gives them some power to establish standards of professional conduct that are independent of, or that expand on, rules and law. For example, court opinions on the propriety of lawyers' arguments to the jury often do not refer to professional conduct rules but look back to prior opinions. Likewise, some courts have published opinions setting forth expectations regarding advocates' candor to the court that are more demanding than the professional conduct rules.¹²¹

To a significant extent, advocates may be punished in the disciplinary process for violating the normative standards incorporated in court decisions and procedural rules. This is because various professional conduct rules explicitly incorporate other law. Examples include rules forbidding lawyers from: suppressing or concealing evidence that the lawyers were legally obligated to produce or "knowingly engag[ing] in other illegal conduct;"¹²² offering to pay or paying inducements to witnesses that are "prohibited by law;"¹²³ and disregarding a court rule or ruling.¹²⁴ The result is that, with respect to advocacy misconduct, there is a substantial overlap between the enforceable legal standards governing litigation sanctions and those governing professional discipline.¹²⁵

Unlike state courts in disciplinary proceedings, individual judges in adjudicative proceedings do not have the power to suspend or disbar lawyers

¹²⁰ See Judith A. McMorrow, Jackie A. Gardina & Salvatore Ricciardone, *Judicial Attitudes Toward Confronting Attorney Misconduct: A View from the Reported Decisions*, 32 HOFSTRA L. REV. 1425, 1444–47 (2004) (discussing conduct that federal courts sanction).

¹²¹ For an example of "duty of candor" expectations, see *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 457 (4th Cir. 1993). Courts and bar associations have also adopted civility codes, standards, and guidelines that are not necessarily meant to be enforceable. See, e.g., *Dondi Props. Corp. v. Com. Sav. & Loan Ass'n*, 121 F.R.D. 284, 287–88 (N.D. Tex. 1988) (adopting "standards of practice to be observed by attorneys appearing in civil actions in this district" derived from those of the Dallas Bar Association). For a discussion of civility codes, see generally Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657 (1994). For a discussion of standards relating to criminal practitioners' work, see generally Rory K. Little, *The ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L.J. 1111 (2011).

¹²² N.Y. RULES, *supra* note 77, rr. 3.4(a)(1), (3), (6).

¹²³ *Id.* r. 3.4(b).

¹²⁴ *Id.* r. 3.4(c).

¹²⁵ See Paula Schaefer, *Attorneys, Document Discovery, and Discipline*, 30 GEO. J. LEGAL ETHICS 1, 31 (2017) ("[D]iscipline does not necessarily have to occur in a satellite proceeding.").

as a sanction for advocacy misconduct.¹²⁶ But judges have other remedies and sanctions at their disposal when they preside over civil or criminal cases in which advocates engage in wrongdoing. Courts may remedy misconduct by, for example, sustaining objections, suppressing evidence, dismissing lawsuits, or reversing judgments.¹²⁷ Sanctions directed at lawyers may include criminal contempt of court sanctions, disqualification of counsel, imposition of fines, and issuance of written opinions shaming lawyers.¹²⁸

Judges may impose sanctions when they observe misconduct in the court, and judges occasionally do so through actions such as summarily sanctioning disruptive lawyers for contempt of court. However, overzealousness occurring in a judge's presence is often relatively insignificant. For example, advocates are subject to sanction for various improprieties in examining witnesses or in their arguments to the jury, but the ordinary response to such improprieties is simply to sustain the opposing party's objection.¹²⁹ The judge may also strike the lawyer's statement from the record, rebuke the lawyer, or give a curative instruction to the jury. In the absence of an objection, the court may act on its own initiative, but judges often do not. It would be exceedingly rare for trial judges to regard such improprieties as occasions for professional discipline.

Judges may also sanction a lawyer in response to the opposing party's motion. Sanctions motions directed against the opposing lawyer are not at all uncommon (although the more usual sanctions motion is directed against the opposing party). However, unless the conduct in question is undisputed, a judge may not be able to impose sanctions without first conducting a hearing or receiving evidentiary submissions.¹³⁰ Judges are not compelled to entertain and adjudicate all allegations of lawyer misconduct that arise in a lawsuit, and they may be reluctant to entertain sanctions motions in many cases because of the amount of time required to adjudicate the misconduct allegation. Particularly if judges regard the propriety of the lawyer's conduct

¹²⁶ See Bruce A. Green, *Regulating Prosecutors' Courtroom Misconduct*, 50 LOY. U. CHI. L.J. 797, 806 (2019) [hereinafter Green, *Prosecutors' Misconduct*] (noting that trial judges may refer lawyers to disciplinary authorities, or initiate sanctions of contempt proceedings, when lawyers misbehave).

¹²⁷ See, e.g., *id.* at 805 (stating that remedies for courtroom misconduct include curative instructions and, in extreme cases, mistrials).

¹²⁸ There is a substantial body of literature on judicial sanctions. See, e.g., RICHARD E. FLAMM, *LAWYER DISQUALIFICATION: DISQUALIFICATION OF ATTORNEYS AND LAW FIRMS* 5, 6 (2d ed. 2014) (providing information on the disqualification of lawyers); GREGORY P. JOSEPH, *SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE* 11 (6th ed. 2020) (providing information on sanctions in federal litigation); Douglas R. Richmond, *Alternative Sanctions in Litigation*, 47 N.M. L. REV. 209, 210 (2017) (discussing non-monetary sanctions).

¹²⁹ See Green, *Prosecutors' Misconduct*, *supra* note 126, at 805 (Trial judges typically respond to prosecutors' trial misconduct "by sustaining objections and instructing jurors to disregard improper questions and arguments").

¹³⁰ See generally *Mackler Prods. Inc. v. Cohen*, 225 F.3d 136, 146 (2d Cir. 2000) (discussing a need for evidentiary hearings in order to satisfy due process requirements).

as irrelevant to the fairness of the proceeding, they may ignore it or decline to delve into it.

There is a substantial body of literature regarding sanctions motions against lawyers for various advocacy misconduct, such as frivolous filings, misconduct regarding the disclosure and preservation of evidence, and improper communications with witnesses.¹³¹ One may expect that advocates accuse each other of such misconduct with some frequency partially because of the perceived strategic benefit to discrediting the opposing lawyer. Accusations that the opposing lawyer was untruthful may also be common, particularly in the context of disagreements regarding compliance with pretrial disclosure rules. The legal press often covers cases where lawyers are accused of misconduct, giving the impression that allegations of advocacy misconduct are frequently raised.¹³²

Published judicial decisions sanctioning lawyers for advocacy misconduct turn out to be relatively uncommon. In general, courts express the view that disciplinary authorities have the principal responsibility to regulate lawyers' professional conduct, whereas the courts' role is to resolve lawsuits.¹³³ Even when judges entertain sanctions motions, conduct necessary hearings, and determine that the given lawyer engaged in overzealous advocacy, judges may ultimately be reluctant to issue and publish opinions because of the lasting reputational harm to the lawyer as well as the amount of time required to write an opinion justifying the sanction.¹³⁴

Judges have a professional obligation, under rules of judicial conduct, to report serious lawyer misconduct to the relevant disciplinary authority when the judge "knows" that the lawyer committed the misconduct, typically as a result of a hearing into a misconduct allegation.¹³⁵ Judges have no obligation, however, to refer allegations of misconduct to the disciplinary authority if the judge does not "know" that serious misconduct occurred.

¹³¹ For examples of such literature, see FLAMM, *supra* note 128, at 5–6; JAMIE S. GORELICK, STEPHEN MARZEN & LAWRENCE SOLUM, *DESTRUCTION OF EVIDENCE* 9 (1989).

¹³² See *supra* notes 4–11 and accompanying text (providing examples of recently publicized calls for discipline).

¹³³ Green, *Policing Federal Prosecutors*, *supra* note 76, at 82 n.72 (“[T]he general view of courts [is] that it is not their role to oversee the ethics of the lawyers who practice before them, except insofar as the purportedly unethical conduct affects the rights of the parties appearing before the court.”).

¹³⁴ Most writing about judicial shaming as an under-utilized sanction against lawyers focuses on prosecutorial misconduct. See generally Lara Bazelon, *For Shame: The Public Humiliation of Prosecutors by Judges to Correct Wrongful Convictions*, 29 GEO. J. LEGAL ETHICS 305 (2016) (describing how appellate judges shame prosecutors who defend wrongful convictions); Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059 (2009) (discussing appellate judges' reluctance to shame prosecutors who engage in misconduct).

¹³⁵ See MODEL CODE OF JUD. CONDUCT r. 2.15(B) (AM. BAR ASS'N 1990, amended 2010) (“A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.”).

Consequently, a judge may both decline to inquire into misconduct allegations that are collateral to the lawsuit and decline to refer the allegations to a formal disciplinary agency, leaving it to the party or lawyer who made the allegations to complain, if they so desire.¹³⁶ Even when they know of adversary misconduct, if judges regard it as minor, as with most discovery abuse, courts are unlikely to refer it to the disciplinary authorities.¹³⁷

In many or most cases, a party who complained to the court about the opposing lawyer will not couple or follow it with a complaint to the disciplinary authority.¹³⁸ There are a host of reasons why. First, as noted, the disciplinary authority will probably not pursue the allegation while the judicial proceeding is pending to avoid interfering with the judicial proceeding and to conserve resources. Second, if the complaint is pursued, the complainant may have to spend time providing information to the disciplinary agency and the complainant's own conduct may be challenged. Third, the disciplinary authority has no ability to provide a remedy to the complainant but may only issue a professional sanction against the offending lawyer. Fourth, a complaint may appear to be vindictive or appear to be designed to obtain improper leverage, and, by raising the level of antagonism, it may make it harder for the complainant ultimately to negotiate a favorable settlement with the opposing party. While there may occasionally be some strategic benefit to a judicial sanctions motion directed at an opposing lawyer's overzealous conduct, there is usually little to be gained, and much to be lost, by complaining to the disciplinary authority. All of that is wholly apart from the perception, for which Section B shows there is a strong foundation, that disciplinary authorities rarely sanction lawyers for adversary misconduct.

B. *Disciplinary Regulation of Overzealous Advocacy*

The disciplinary rules are not meant to be enforced in every case. Although every transgression subjects a lawyer to the possibility of discipline, disciplinary authorities are expected to exercise discretion regarding whether to pursue or impose discipline in a given case: “[T]he [Model] Rules presuppose that whether or not discipline should be imposed for a violation . . . depend[s] on all the circumstances, such as the willfulness

¹³⁶ See generally Leslie W. Abramson, *The Judge's Ethical Duty to Report Misconduct by Other Judges and Lawyers and Its Effect on Judicial Independence*, 25 HOFSTRA L. REV. 751, 766–69 (1997) (discussing when judges' duty to report misconduct arises); Arthur F. Greenbaum, *Judicial Reporting of Lawyer Misconduct*, 77 UMKC L. REV. 537, 539–41 (2009) (showing that judges tend to underreport lawyers' misconduct).

¹³⁷ See Schaefer, *supra* note 125, at 42 (concluding that “[f]ederal courts have largely ignored the disciplinary system as a tool to address and deter document discovery misconduct”).

¹³⁸ See Jim Goff, Comment, *War Is Over: The Resolution for Attorney Discipline in Texas*, 17 TEX. TECH ADMIN. L.J. 83, 83–85 (2015) (describing that, in Texas, trial courts are reluctant to sanction lawyers for discovery misconduct, but aggrieved parties are reluctant to complain to a disciplinary authority).

and seriousness of the violation, extenuating factors and whether there have been previous violations.”¹³⁹ In this respect, disciplinary agencies function like criminal prosecutors who choose which criminal offenders to prosecute based on myriad factors, including the seriousness of the wrongdoing.¹⁴⁰ Correspondingly, the disciplinary codes function like criminal laws, which have pedagogic, expressive, and deterrent value, even when they are not consistently enforced.¹⁴¹

Disciplinary authorities evidently exercise discretion robustly to weed out cases involving advocacy misconduct. New York lawyers are rarely disciplined for violating professional conduct rules regulating overzealous advocacy. This is the case notwithstanding the assumption that many New York advocates are aggressive, testing or crossing the lines drawn by the rules, and notwithstanding the frequency with which lawyers accuse each other of advocacy misconduct.

In 2017, the New York state courts issued decisions publicly disciplining fewer than one hundred lawyers, out of approximately 175,000 lawyers who were active and resided in the state.¹⁴² An electronic search of Appellate Division decisions published in 2017 yielded ninety-seven decisions imposing public discipline—censure, suspension, or disbarment.¹⁴³ In sixty-three of the ninety-seven New York disciplinary decisions, either the lawyer in question was not a litigator or the underlying misconduct was not related in any discernable way to the lawyer’s work in litigation.¹⁴⁴ In most cases, the

¹³⁹ MODEL RULES, *supra* note 3, Scope ¶ 19.

¹⁴⁰ See Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 5 (1940) (“What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.”); see generally Bruce A. Green, *Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry*, 123 DICK. L. REV. 589, 591 n.3 (2019) [hereinafter Green, *Prosecutorial Discretion*] (citing authority on prosecutorial discretion).

¹⁴¹ See Bruce A. Green & Lara Bazelon, *Restorative Justice from Prosecutors’ Perspective*, 88 FORDHAM L. REV. 2287, 2291 (2020) (“The objectives of criminal punishment include incapacitating dangerous offenders, deterring future wrongdoers, securing retribution, reinforcing the societal norms expressed in the criminal law, and rehabilitating offenders, although, in practice, prosecution and imprisonment do little to rehabilitate offenders and may be counterproductive.”) (footnotes omitted).

¹⁴² After Washington, D.C., New York has the highest number of U.S. lawyers per capita. AM. BAR ASS’N, PROFILE OF THE LEGAL PROFESSION 2021 11 (2021), <https://www.americanbar.org/content/dam/aba/administrative/news/2021/0721/polp.pdf>.

¹⁴³ The research conducted through the Westlaw database began with a search of 2017 decisions of the New York State Appellate Division containing the phrase “Rules of Professional Conduct.” It was assumed that any disciplinary decision would reference these Rules. This search yielded 168 opinions, of which twenty did not arise from the disciplinary process but rather involved appellate review of litigation. Of the remaining 148 decisions arising from the disciplinary process, twenty-two were rulings on motions to resign from the bar for non-disciplinary reasons. These short decisions revealed little or nothing about whatever disciplinary issues may have underlain the lawyers’ motions. Twenty-nine other decisions addressed motions for reinstatement to the bar in cases where lawyers had previously been suspended, typically for noncompliance with registration requirements.

¹⁴⁴ See *id.*

misconduct related to some other area of legal practice, such as transactional practice, or it related to work as a fiduciary outside law practice. In several cases, the lawyer was sanctioned for misconduct unrelated to professional work, such as driving while intoxicated.

That leaves thirty-four cases of public discipline in the year 2017 that involved misconduct having some relationship, however tangential, to the lawyer's work as an advocate in judicial proceedings.¹⁴⁵ Notably, in most of these cases—twenty-one cases of thirty-four—the relevant conduct was primarily aimed at the lawyer's client and not, except perhaps incidentally, at the court, the opposing party, or another third party.¹⁴⁶ None of these cases involved overzealousness in pursuit of the client's interests.¹⁴⁷ More than half of these cases principally involved a *lack* of zealotry— incompetence or neglect of the client's cause.¹⁴⁸ In some of these cases, the lawyer's neglect was coupled with related deficiencies, such as inadequate or misleading communications with the client.¹⁴⁹ In a typical case, the lawyer was hired to pursue a lawsuit, never commenced the lawsuit, ignored the client's requests for updates, and misled the client about the status of the lawsuit.¹⁵⁰

Other cases of clients victimized by litigators principally involved financial misconduct, such as misappropriating or mishandling client funds or making impermissible loans to the client.¹⁵¹ One case included an

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *See, e.g., In re Tarter*, 65 N.Y.S.3d 200, 202 (N.Y. App. Div. 2017) (per curiam) (disbarring an attorney for neglecting clients' cases, charging illegal fees, and other misconduct); *In re McGrath*, 63 N.Y.S.3d 56, 57 (N.Y. App. Div. 2017) (per curiam) (suspending an attorney for neglecting a client's legal matter and failing to keep the client reasonably informed about such legal matter, which adversely reflected on the lawyer's fitness); *In re Pierre*, 62 N.Y.S.3d 62, 64 (N.Y. App. Div. 2017) (per curiam) (disbarring an attorney for failing to act with diligence and promptness, failing to keep a client informed, and commingling client funds with attorney funds, among other things); *In re Marshall*, 57 N.Y.S.3d 476, 477 (N.Y. App. Div. 2017) (per curiam) (suspending an attorney for neglecting a client's matter and falsifying settlement documents); *In re Stasiuk*, 57 N.Y.S.3d 485, 485–86 (N.Y. App. Div. 2017) (per curiam) (censuring an attorney for failing to refund money to a client, but not suspending the attorney because the attorney was already suspended in the state); *In re Meagher*, 67 N.Y.S.3d 361, 363–64 (N.Y. App. Div. 2017) (per curiam) (suspending an attorney for failing to communicate with a client, failing to remit funds to a client, and engaging in conduct prejudicial to the administration of justice); *In re Bartley*, 53 N.Y.S.3d 643, 644 (N.Y. App. Div. 2017) (per curiam) (suspending an attorney for neglecting a client's matter, failing to provide competent representation, failing to act with reasonable diligence, and failing to promptly comply with the client's requests for information).

¹⁵⁰ *In re Penkovsky*, 68 N.Y.S.3d 77, 78–79 (N.Y. App. Div. 2017) (per curiam).

¹⁵¹ *See, e.g., In re Napolitano*, 68 N.Y.S.3d 143, 144 (N.Y. App. Div. 2017) (per curiam) (suspending an attorney who refused to remit funds to a client); *In re Bhukta*, 56 N.Y.S.3d 878, 879 (N.Y. App. Div. 2017) (per curiam) (suspending an attorney for three years for the misappropriation of a client's funds); *In re Taller*, 54 N.Y.S.3d 152, 153 (N.Y. App. Div. 2017) (per curiam) (suspending an attorney for one year for this misappropriation of a client's funds); *In re Fitzgerald*, 51 N.Y.S.3d 748, 748 (N.Y. App. Div. 2017) (per curiam) (suspending an attorney for advancing financial assistance to certain clients while representing them in connection with contemplated and pending litigation); *In re*

impermissible sexual relationship with the client.¹⁵² Another litigator's various misconduct included removing the client's litigation file from her office without authorization and later discarding or destroying it.¹⁵³

Only thirteen disciplinary decisions involved misconduct by advocates in which the court or a third party was, at least arguably, a victim.¹⁵⁴ In most of these, however, the client was not the beneficiary. In two cases, the client was the principal victim; one lawyer was censured for neglecting clients' cases, which included multiple failures to comply with court orders,¹⁵⁵ and another lawyer was suspended for neglecting clients' litigation by failing to appear in court and failing to file timely papers, thereby prejudicing the client and the administration of justice.¹⁵⁶ In other cases, the lawyer was the principal beneficiary of misconduct aimed at others. For example, a lawyer was suspended for one year for lying to a federal court that was investigating misconduct by the lawyer; the misconduct under investigation did involve advocacy, but the lawyer concealed and falsified information to extract a favorable settlement for a client.¹⁵⁷ Another lawyer was suspended for three years for various misconduct unrelated to advocacy and for deceiving a prison official in order to visit a client.¹⁵⁸ A third, having forgotten to secure a client's signature on a document and unwilling to visit the client in jail, falsified the client's signature and notarized it; the lawyer was censured.¹⁵⁹ None of these can fairly be called examples of overly zealous advocacy in pursuit of litigants' interests.

In only five cases it might be said that lawyers acted over-zealously on behalf of a client in litigation:

- In a bankruptcy court hearing where the trustee sought production of the client's cell phone, the lawyer made deceptive arguments that concealed the fact that the client had lost the phone, then produced a different phone from the one that the court ordered to be produced. The lawyer was censured.¹⁶⁰

Perchekly, 49 N.Y.S.3d 99, 100 (N.Y. App. Div. 2017) (per curiam) (suspending an attorney for misappropriation of client funds and misconduct regarding bank records); *In re Feng Li*, 49 N.Y.S.3d 548, 550 (N.Y. App. Div. 2017) (per curiam) (suspending an attorney for three years for the misappropriation of client funds).

¹⁵² *In re DiStefano*, 61 N.Y.S.3d 514, 514 (N.Y. App. Div. 2017) (per curiam).

¹⁵³ *In re Groom*, 51 N.Y.S.3d 622, 623 (N.Y. App. Div. 2017) (per curiam).

¹⁵⁴ See *supra* note 143 and accompanying text.

¹⁵⁵ *In re Gluck*, 59 N.Y.S.3d 368, 368 (N.Y. App. Div. 2017) (per curiam).

¹⁵⁶ *In re Schatkin*, 50 N.Y.S.3d 442, 444 (N.Y. App. Div. 2017) (per curiam).

¹⁵⁷ *In re Gilly*, 52 N.Y.S.3d 4, 5 (N.Y. App. Div. 2017) (per curiam).

¹⁵⁸ *In re Crutcher*, 60 N.Y.S.3d 621, 622 (N.Y. App. Div. 2017) (per curiam).

¹⁵⁹ *In re Dittakavi*, 62 N.Y.S.3d 463, 465 (N.Y. App. Div. 2017) (per curiam).

¹⁶⁰ *In re Aviles*, 56 N.Y.S.3d 104, 105 (N.Y. App. Div. 2017) (per curiam).

- A lawyer was suspended for three years for helping a client violate a court order and knowingly making false factual assertions in an appeal.¹⁶¹
- A lawyer was censured for improperly meeting with a client's child, who was independently represented by counsel, and for impeding the other counsel's access to the child.¹⁶²
- A lawyer was censured for improperly endorsing a check and distributing marital property to the client, in violation of a court rule, without first obtaining court approval or notifying the opposing party or counsel.¹⁶³
- A lawyer was suspended for three years for sending vulgar and insulting communications to an adversary in litigation, as well as for failing to cooperate with the investigation and failing to register.¹⁶⁴

There is no reason to assume that a higher proportion of cases culminating in private discipline involved overzealous advocacy. Most of the annual reports do not identify the conduct that led to a private sanction or warning. The exceptions are the reports of the Committee on Professional Standards of the Third Judicial Department, which has jurisdiction over the state capital of Albany and the surrounding area north of New York City. Its 2014 Annual Report Concerning Attorney Discipline, for example, briefly describes the conduct underlying the imposition of “private discipline” in sixty-six cases—including seven oral admonitions, ten letters of admonition, twenty-five letters of caution, and twenty-four letters of education—not all of which technically qualify as “discipline.”¹⁶⁵ Five of the cases may possibly have involved overzealous advocacy on a client's behalf. These were described as involving undignified conduct towards another attorney (though it is not indicated whether this occurred in the advocacy context); falsely affixing a witness's signature to a document; threatening criminal charges to gain an advantage in a lawsuit; improperly participating in an individual's defense; and initiating a verbal confrontation with an opposing party in a court facility.¹⁶⁶

¹⁶¹ *In re Etah*, 45 N.Y.S.3d 573, 574 (N.Y. App. Div. 2017) (per curiam).

¹⁶² *In re Hartwich*, 68 N.Y.S.3d 192, 194 (N.Y. App. Div. 2017) (per curiam).

¹⁶³ *In re Krzys*, 51 N.Y.S.3d 260, 261 (N.Y. App. Div. 2017) (per curiam).

¹⁶⁴ *In re Johnson*, 51 N.Y.S.3d 746, 746 (N.Y. App. Div. 2017) (per curiam).

¹⁶⁵ THIRD JUD. DEP'T 2014 ANNUAL REPORT, *supra* note 107, at 8–12.

¹⁶⁶ *Id.* at 10–12.

IV. THE PROBLEM OF SELECTIVE DISCIPLINARY ENFORCEMENT

Although courts may sanction advocates who act overzealously in pursuit of their clients' interests, courts use this power sparingly, leaving it to disciplinary agencies to regulate advocates and other members of the bar. Disciplinary agencies have ample authority to regulate advocates since disciplinary rules reach most of what might be adversary misconduct. Yet, as the New York example illustrates, the disciplinary process rarely generates discipline in cases of overzealous advocacy. This observation may not surprise advocates, but it may surprise members of the public and perhaps even members of the bar generally, and it seems inconsistent with the aspirations for a professional disciplinary process.¹⁶⁷

Because state disciplinary authorities are not expected to file charges whenever they find misconduct, they exercise discretion in most or all cases. They will have to exercise discretion one way or another, for example, in response to complaints against Rudy Giuliani, Sidney Powell, and other lawyers whose legal challenges to the 2020 presidential election results were rejected. State disciplinary authorities in New York and elsewhere will have to decide whether to treat these cases like most others involving allegedly frivolous filings or to make an exception by bringing charges against the plaintiffs' lawyers.

The public will eventually notice the outcome. The allegations will linger in the public consciousness, as there will be ongoing reminders of the election fraud litigation that may have helped incite violence at the Capitol by giving currency to claims of election fraud. In particular, the Trial Memorandum of the United States House of Representatives in the Impeachment Trial of President Donald J. Trump offered the following reminder:

President Trump and his allies ultimately filed [sixty-two] lawsuits in state and federal courts contesting every aspect of those elections. But all of these suits were dismissed, save for one marginal Pennsylvania suit that did not affect the outcome there. In dismissing these suits, judges at all levels—including several of President Trump's own judicial appointees—found that his claims were “not credible,” “without merit,” and “flat out wrong.” Courts warned that some of his suits improperly

¹⁶⁷ There is a considerable body of literature observing that, both in and out of the disciplinary context, the advocacy rules have traditionally been under-enforced against prosecutors in particular. Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 61, 61 n.55 (2016) (“The theme of the early professional literature was that rogue prosecutors were not being meaningfully held accountable for their misconduct because no potential regulatory mechanism was being effectively employed to deter or sanction prosecutors' wrongdoing. In effect, judicial sanction, civil liability, professional discipline, and internal discipline added up to very little.”). The writings assume that disciplinary authorities are reluctant to charge prosecutors in particular, but it may be that, in deference to the courts, disciplinary agencies are reluctant to police overzealous advocates in general.

aimed to “breed confusion,” “undermine the public’s trust in the election,” and “ignore the will of millions of voters.” As Judge Stephanos Bibas (a Trump appointee) observed in one characteristic opinion: “Free, fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here.”¹⁶⁸

Given the public prominence of the lawsuits’ spectacular failure, the public will be keenly interested in the disciplinary authorities’ responses.

This Part explores four questions raised by the selective enforcement of rules on overzealous advocacy, and, in exploring these questions, it references the discretionary decision that authorities must make regarding whether to formally charge lawyers for filing frivolous lawsuits seeking to overturn the 2020 presidential election result. Section A asks whether disciplinary rule drafters should eliminate advocacy rules, such as the rule against taking frivolous positions in court, that deservedly are under-enforced. Section B asks whether conduct that deserves to be punished is falling through the cracks because disciplinary agencies and judges defer to each other to enforce the relevant advocacy rules. Section C asks whether, in cases of advocates’ misconduct, disciplinary authorities can be expected to exercise their charging discretion in a principled, fair, and unbiased manner. Finally, Section D asks whether the opacity of state disciplinary processes undermines public and professional confidence that disciplinary discretion is, in fact, exercised fairly.

A. *Codifying Insignificant Advocacy Rules*

One likely reason that advocacy rules are rarely enforced by disciplinary authorities is that the misconduct in question often is not serious enough to justify a disciplinary sanction. For example, an advocate may, in theory, be disciplined for failing to cite important precedent, questioning witnesses without an adequate factual basis, or appealing to jurors’ sympathies, but courts and disciplinary authorities rarely regard this misconduct as serious enough to warrant discipline.¹⁶⁹ This misconduct is equivalent to minor procedural rule violations that recur in litigation; it rarely raises doubts about

¹⁶⁸ Trial Memorandum of the U.S. House of Reps. in the Impeachment Trial of President Donald J. Trump at 7–8, *In re Impeachment of President Donald J. Trump* (2021) (quoting Bibas, J.).

¹⁶⁹ See Green, *Prosecutors’ Misconduct*, *supra* note 126, 811–12 (“Like prosecutors themselves, disciplinary authorities exercise discretion in deciding when to bring charges. In doing so, authorities ordinarily take account of the seriousness of the wrongdoing and the extent of the wrongdoer’s culpability. There are few cases of public discipline imposed against civil litigators for low-level misconduct such as discovery abuse or frivolous filings, notwithstanding the perception that this misconduct is rife. Disciplinary authorities reserve their efforts for more serious wrongdoing. Because prosecutors’ forensic misconduct is often unpremeditated and its impact is often insignificant, disciplinary authorities tend to disregard it.”) (footnotes omitted).

the lawyer's general honesty, trustworthiness, or fitness to practice. The applicable rules are equivalent to regulatory infractions, as opposed to felonies or even misdemeanors under criminal law. It would be disproportionately harsh for lawyers to be disciplined, even privately, for these lapses unless they occurred habitually, in which event the conduct might reflect general indifference to applicable procedural regulations. In other words, to a large extent, the lack of discipline for advocacy misconduct is not attributable to inadequate enforcement by disciplinary agencies but to over-regulation by disciplinary rules.

The New York Rules' inclusion of rarely enforced provisions is largely an accident of the history discussed earlier.¹⁷⁰ In the twentieth century, the advocacy norms were incorporated into professional codes—first in the Canons, then in the Model Code—because they were not codified in any other accessible writing.¹⁷¹ The early professional codes served an educational purpose and guided lawyers in regulating their own conduct. Although the professional codes are now primarily meant to serve as the basis for discipline, they still include provisions on advocacy carried over from 110 years ago.¹⁷² The rule drafters may be wrong to assume that no harm is done by disciplinary rules that, for good reason, disciplinary agencies rarely enforce. One risk is that the lack of disciplinary enforcement will send the wrong signal to lawyers. Lawyers may read the lack of disciplinary enforcement as an expression by an authoritative body that the advocacy rules are unimportant and that compliance is unnecessary. Disciplinary agencies' lack of enforcement may also be taken as an expression that certain adversary conduct is permissible when, in fact, it is impermissible but relatively insignificant. Either way, the inclusion of unenforced disciplinary rules may detract from the seriousness of the underlying normative expectations. This would be somewhat paradoxical since the advocacy norms are codified in disciplinary rules, not merely in other writings, to underscore their importance.

Another risk is that judges may receive the wrong signal. Disciplinary agencies may assume that judges will enforce the relevant rules through the imposition of litigation sanctions, which may appear to be the more measured approach to enforcement. But courts may misinterpret the agencies' inaction. Judges may be reluctant to impose sanctions because the normative standards are incorporated in disciplinary rules, not in procedural rules or decisional law, and may therefore defer to disciplinary agencies' greater expertise. Alternatively, judges may interpret disciplinary non-enforcement as a signal that the relevant normative standards should not be enforced at all.

¹⁷⁰ See discussion *supra* Part I.B.

¹⁷¹ *Id.*

¹⁷² Over time, additions have been made to the rules regulating advocacy. For example, most provisions regulating prosecutors are relatively recent. See MODEL RULES, *supra* note 3, r. 3.8. The more recent rules are not necessarily enforced more often than the ones with earlier origins.

Finally, and most worryingly, the public may misconstrue the disciplinary authorities' inaction. Members of the public may assume that the disciplinary rules in question are more important than they are and that they deserve to be enforced. If the public perceives that advocates frequently violate certain rules with impunity, it may conclude that lawyers are scofflaws, that they are inadequately regulated, and that the rules should be enforced by a legislative or administrative body that is not dominated by lawyers and judges. That is, non-enforcement of insignificant rules may undermine public respect for the legal profession and foster public skepticism of whether the profession deserves to be self-regulating.

The allegations that Giuliani, Powell, and others violated the rule against frivolous pleadings illustrate these problems. Disciplinary authorities may opt to spare themselves the labor of analyzing whether the election fraud cases were frivolous or merely resounding losers. Based on conventional practice, and for consistency's sake, disciplinary authorities may conclude that lawyers should not be charged based on a single frivolous lawsuit. But members of the public who are hostile to lawyers and their work may perceive that the disciplinary authorities are not taking lawyers' misconduct seriously for reasons that the public could only speculate.

This raises the question whether rule drafters should eliminate advocacy rules that are not important enough to be enforced in the disciplinary process. The relevant normative standards may be better expressed elsewhere to educate lawyers about normative expectations or to serve as a basis for litigation sanctions. Depending on their function, the normative standards may be incorporated in judicial decisions, court rules, procedural rules, or bar association guidelines.¹⁷³ While rule drafters may assume that preserving the rules on advocacy misconduct augments the rules' significance, public confidence is shaken when courts publish disciplinary rules that their disciplinary arms do not enforce, even if for good reason.

B. *Underenforcing Significant Advocacy Rules*

Even when significant wrongdoing occurs in litigation, disciplinary authorities may decline to bring charges. In general, disciplinary agencies defer inquiring into allegations of wrongdoing in pending cases. But, even afterwards, if the complaint returns, authorities may decline to bring formal charges if the trial court did not refer the matter to the disciplinary authority. For example, if the trial court examined the allegation and rejected it,

¹⁷³ Bar associations may be unenthusiastic about trimming down the disciplinary codes, given their responsibility for them in the first place.

disciplinary authorities will likely defer to the court's determination, especially in the absence of new facts.¹⁷⁴

If the allegation was made during litigation and the court ignored it, the disciplinary agency may infer that the court considered the allegation implausible or considered the alleged misconduct to be too insignificant to warrant a sanction, and the agency may elect to respect the court's implicit judgment. If the relevant facts were known, but never called to the court's attention, the agency may ignore a complaint to discourage forum shopping and to encourage complainants to go to the court in the first instance. If the court conducted a hearing, found misconduct, and imposed a sanction, the agency might conclude that the lawyer has already been adequately punished and that further discipline would be disproportionately harsh and unnecessary to further the ends of the disciplinary process. All in all, both to respect the courts and to conserve resources, disciplinary authorities consider most advocacy misconduct to be a matter for the courts, rather than the disciplinary authorities, except when the courts explicitly instruct them otherwise.

The calculus changes when the trial court makes a referral, as in the cases of federal district courts in Michigan and the District of Columbia, that referred plaintiffs' lawyers in election litigation to the disciplinary authorities. Disciplinary agencies serve under the judiciary and do not want to incur judges' disfavor by ignoring their referrals. Judges are ordinarily accorded respect, and their referrals can be presumed to be less biased than those of opposing parties or opposing counsel and to be predicated on knowledge of the relevant facts and expertise regarding the relevant standards of conduct. Disciplinary agencies also might not want to discourage judges from reporting misconduct in the future. Further, where, as in the Michigan case, the referral is preceded by the court's own findings of misconduct, a disciplinary authority can ease its burden by drawing on the judicial record and giving weight to the court's finding.

There are other reasons why, in general, disciplinary authorities might ordinarily expect courts to take the lead in responding to advocacy misconduct, except where it is serious enough to call for a suspension or disbarment. Of course, discipline is the only feasible or useful response to truly serious misconduct that shows that the lawyer is dangerous. For example, disciplinary action is necessary when serious misconduct, such as committing perjury or threatening witnesses, warrants a suspension or disbarment to protect proceedings. But, otherwise, courts can impose litigation sanctions that are as effective as disciplinary sanctions. Further, it may be more efficient and cost-effective for courts to adjudicate claims of adversary misconduct; courts can resolve the issues more expeditiously than

¹⁷⁴ William Wernz, *What Would a Discipline Office Do? Examining the High-Profile Complaints Against Election Attorneys from a Lawyer Regulatory Perspective*, MSBA: CMTYS. (Mar. 15, 2021, 5:26 PM), <https://my.mnbar.org/blogs/william-wernz/2021/03/15/what-would-a-discipline-office-do-examining-the-hi> ("A Rule 3.1 charge is seldom brought without a prior civil finding.").

disciplinary authorities that wait until litigation ends, and, in court, the cost of investigating and establishing alleged misconduct is largely borne by a party that has the incentive to raise the allegation. Disciplinary agencies have limited resources that they use selectively, as do criminal prosecutors, and they have reasons not to prioritize cases of advocacy misconduct, even if they believe a disciplinary sanction is deserved.

Trial judges, however, may not share disciplinary agencies' view that courts should accept primary responsibility for disciplining errant advocates. They may take the view that disciplinary agencies have greater expertise or that judges' time is better spent focusing on more important matters. When trial judges do not make referrals, they may be, at most, agnostic or indifferent or they may nevertheless expect disciplinary authorities to deal with the allegations of advocacy misconduct. A court may assume that the disciplinary authority has the principal role in enforcing the relevant rules and assume that a referral is therefore unnecessary. The court may decline to make a referral out of fairness to the lawyer in question, as a court's referral may be misread as a predetermination that the lawyer engaged in misconduct and/or deserves a disciplinary sanction when, in fact, the court has not made any such determination. For these reasons and perhaps others, disciplinary authorities' decision to not pursue wrongdoing in litigation may reflect a misreading of the judges who oversaw the litigation in question.¹⁷⁵

In the case of the election lawsuits, for example, a sanctions motion was brought in few of the sixty-two lawsuits¹⁷⁶ perhaps because most of the public officials in charge of defending the lawsuits saw no value in prolonging the litigation by seeking to punish the lawyers. These officials, all in swing states, may have doubted whether a sanctions motion would prevail, but the motivation was more likely political; the officials might have worried that

¹⁷⁵ Further, trial judges almost certainly have different views on whether to refer lawyers to disciplinary authorities, and one might question whether disciplinary authorities should treat similar cases differently depending on the trial judges' views regarding the utility of discipline as a response to overzealous advocacy.

¹⁷⁶ A motion for Rule 11 sanctions was brought by the City of Detroit, an intervenor, in the federal lawsuit challenging the election results in Michigan. *City of Detroit's Motion for Sanctions, for Disciplinary Action, for Disbarment Referral and for Referral to State Bar Disciplinary Bodies* at iii, *King v. Whitmer*, 505 F. Supp. 3d 720 (E.D. Mich. 2020) (No. 2:20-cv-13134). Pennsylvania authorities sought sanctions in Colorado federal courts against two attorneys for the plaintiffs in an election challenge, alleging that the attorneys "made demonstrably false accusations to advance frivolous legal arguments. . . . for a dangerous purpose: to attack the Pennsylvania defendants' administration of the 2020 election and to undermine faith in the results of that election." Governor Tom Wolf's and Former Secretary Kathy Boockvar's *Motion for Sanctions* at 1, *O'Rourke v. Dominion Voting Sys. Inc.*, No. 20-cv-03747-NRN, 2021 WL 3400671 (D. Colo. Aug. 3, 2021). A Georgia county official named in an election challenge sought an award of legal fees and court costs as a sanction against the plaintiffs and their lawyers for asserting claims for which "there was a complete absence of justiciable law or fact," such that it could not be reasonably believed that a court would accept the asserted claims. Respondent Erica Hamilton's *Motion for Attorneys' Fees Pursuant to O.C.G.A. § 9-15-14* at 2, *Trump v. Raffensperger*, No. 2020-CV-343255 (Ga. Super. Ct. Feb. 22, 2021).

many voters would disfavor a punitive motion, or the officials may have thought it unwise to continue providing a judicial forum for baseless election fraud allegations. It may have independently occurred to some of the judges in these cases that the public needed protection from the plaintiffs' lawyers or that other lawyers should be deterred from bringing equally baseless litigation. But few imposed sanctions or made disciplinary referrals.¹⁷⁷

Of course, the disciplinary authorities are aware of the post-election lawsuits and do not need a judicial referral to respond. But the disciplinary authorities, who are under the auspices of state judiciaries, might erroneously infer that the trial judges did not believe that sanctions were warranted. If so, the disciplinary authorities might give weight, or even entire deference, to the trial courts' judgment. After all, a trial judge who has reviewed the plaintiffs' pleadings is in the better position to assess whether the claims were merely meritless or frivolous and therefore sanctionable. There is a high likelihood in this situation, however, that a disciplinary authority will misread the court, which may be indifferent or may favor disciplinary proceedings but simply be disinclined to initiate them.

State courts should rethink the Alphonse-Gaston routine staged by trial judges and disciplinary agencies, both of which are under the aegis of a judiciary (and often the same judiciary). Otherwise, the paradox will continue: two regulators are less effective than one, as trial judges and disciplinary agencies defer to each other to enforce disciplinary rules in situations where enforcement is warranted, and no enforcement occurs. For starters, better communication is needed between trial courts and disciplinary agencies. They need to reach an understanding regarding which body will take regulatory responsibility for cases of potentially significant adversary misconduct, so that cases worthy of discipline do not fall through the cracks. Furthermore, they, of course, need to implement whatever protocols they adopt.

C. *Arbitrary Enforcement*

Though under-explored and under-theorized, disciplinary discretion is a central aspect of disciplinary enforcement. For example, regardless of whether complaints are filed against the lawyers who brought meritless election fraud cases, disciplinary authorities face a discretionary decision. Disciplinary authorities read judicial decisions and the news, and they have authority to investigate allegations of professional misconduct that are thereby called to their attention. Although disciplinary authorities rarely initiate charges when lawyers file frivolous complaints,¹⁷⁸ they have authority to do so if their examination of the court record and any additional investigations lead them to conclude that the plaintiffs' lawyers ran afoul of

¹⁷⁷ See *supra* note 8 and accompanying text.

¹⁷⁸ See *supra* note 12 and accompanying text.

a disciplinary rule. Therefore, disciplinary prosecutors must decide whether to initiate formal disciplinary charges in these cases.

Published procedures governing the disciplinary process do not direct or cabin disciplinary prosecutors' discretion, and disciplinary prosecutors do not publish the decision-making criteria that they generally employ. Subject to their internal decision-making and review processes, disciplinary authorities may make decisions on an ad hoc basis, employing criteria that change from case to case or that are inconsistently applied. In unusual cases, such as the election fraud cases, disciplinary authorities may take account of unique considerations or may ignore unique considerations simply because they do not fit into the authorities' customary analysis.

There are many reasons—some more compelling than others and some more unusual than others—why disciplinary authorities might exercise discretion not to bring charges for filing frivolous election fraud cases, even if they conclude that the plaintiffs' lawyers violated a rule. Most obviously, as already discussed, filing frivolous lawsuits is not ordinarily as harmful as the misconduct that disciplinary authorities focus on, such as misappropriation of client funds. The disciplinary prosecutors may decide that the frivolous filings were no more harmful to the courts in the election fraud cases than in usual cases and that it would therefore be arbitrary, unprincipled, and/or discriminatory to single out these plaintiffs' lawyers. Absent a principled way to distinguish these cases, formal disciplinary charges may be, or appear to be, an unjustifiable response to public pressure or a discriminatory action based on the plaintiffs' lawyers' unsympathetic political beliefs, political objectives, or clients.

Alternatively, disciplinary authorities may regard this misconduct as best left to courts to address, as is often true of advocacy misconduct. Courts have authority and an incentive to sanction lawyers who waste their time with baseless pleadings, applications, and arguments. Additionally, it is more efficient for courts to sanction this misconduct than for disciplinary authorities to do so. Courts are already familiar with the relevant facts; they are in a better position to assess the extent of the lawyers' culpability and the extent to which the judicial process was impaired; and the judicial sanctioning process is less cumbersome. As discussed, if courts decline to punish lawyers who file frivolous papers or engage in other judicial misconduct, disciplinary authorities may interpret that as an expression, to which they might defer, that the wrongdoing does not deserve punishment.

Further, viewing the accusations of frivolous lawsuits independently of other allegations of misconduct, disciplinary authorities may perceive unique reasons why these cases are particularly inappropriate for discipline. When the lawsuits were filed immediately after the election, President Trump and others publicly insisted that the election had been stolen because of varieties of

election fraud,¹⁷⁹ and many members of the public accepted these claims. There was a public interest in resolving doubts quickly, as state officials would soon certify the election results, and to do so through litigation, which most of the public would rightly consider more trustworthy and reliable than the political process. While plaintiffs' lawyers usually have time to gather facts before filing litigation, the timing here required quick action.

A disciplinary sanction would mean, in effect, that the lawyers could not bring these sorts of election challenges to the courts because, as gatekeepers, lawyers must protect the courts from arguments that are so sure to fail that they would waste judicial resources. While the lawsuits, collectively, may have wasted judicial resources and may have been part of a strategy to delegitimize the election results that led to the violent entry of the United States Capitol on January 6, 2021, the counterargument is that courtrooms are precisely where this issue should have been resolved. While the courts' rulings did not convince every partisan—and, certainly, President Trump himself never publicly accepted them—there was a public interest in having the election challenges aired in court. There, unlike in the public square, the plaintiffs' lawyers were called on to support their election fraud claims with evidence (and failed to do so), and the claims were reviewed and resolved by judges, who generally command public respect for their neutrality and detachment and whose public rationales could be critiqued. Disciplinary authorities might well conclude that parties and counsel need more leeway than the disciplinary rules afford when claims relate to pressing, contested, volatile political issues that must quickly be resolved, whether in the courts of law, the political process, or the streets.¹⁸⁰

At the same time, one can see why disciplinary authorities might pursue disciplinary charges against the lawyers who brought frivolous challenges to the 2020 presidential election, even though few advocates who make legally or factually frivolous arguments are publicly disciplined. The election fraud claims may seem more frivolous, or more obviously frivolous, particularly after courts rejected dozens of them. The litigation strategy may seem particularly harmful to the public interest whether because the lawsuits were designed to discredit a democratic election or because some of the lawyers may have been aware that they were fueling unlawful, and even violent, extrajudicial efforts to overturn the election results. Alternatively, if the disciplinary authorities charge the lawyers in question with other misconduct, they might add a charge concerning frivolous litigation for strategic reasons—e.g., to build pressure for the lawyers to negotiate a

¹⁷⁹ Glenn Kessler & Salvador Rizzo, *President Trump's False Claims of Vote Fraud: A Chronology*, WASH. POST (Nov. 5, 2020, 5:59 PM), <https://www.washingtonpost.com/politics/2020/11/05/president-trumps-false-claims-vote-fraud-chronology/>.

¹⁸⁰ See generally Carol Rice Andrews, *Jones v. Clinton: A Study in Politically Motivated Suits, Rule 11, and the First Amendment*, 2001 BYU L. REV. 1, 96 (“[A]t least some aspects of Rule 11 are fatally flawed and . . . the courts must tolerate some politically motivated lawsuits”).

resolution. Additionally, the disciplinary authorities may decide to bring charges and allow the courts to resolve them, simply to escape criticism. By passing the buck to the court, disciplinary counsel may avoid being accused of abusing their discretion by playing favorites or playing politics.

Additional considerations might push disciplinary prosecutors one way or the other. The election fraud cases present an unusual and difficult question of discretion. Perhaps most cases are easy; either it is obvious that there was no wrongdoing or only technical or insignificant wrongdoing that is unworthy of punishment, or, in the minority of cases, it is obvious that there was serious wrongdoing that demands discipline. But there are sure to be many other cases, and plausible arguments can be made for exercising discretion in alternative ways.

Disciplinary discretion presents all the risks that come with prosecutorial and other administrative discretion, particularly where there are no enforceable criteria for its exercise or no published criteria at all.¹⁸¹ There is a risk that disciplinary authorities will make arbitrary decisions or treat similarly situated lawyers differently based on illegitimate criteria.¹⁸² There is also a risk of excessive harshness in pursuing charges or excessive leniency in not doing so. For example, one can imagine disciplinary prosecutors singling out some of the plaintiffs' lawyers in the post-election cases simply because a disciplinary decision will receive attention within the legal profession, just as criminal prosecutors selectively prosecute certain white-collar crimes to deter others from similar misconduct.¹⁸³ Or, even more questionably, some may bring formal charges because it would be interesting, give rise to good stories, and attract professional attention if the charges are successfully prosecuted. In short, discretion creates the risk that discretion will be abused.

One might raise similar concerns about criminal prosecutors' charging discretion, but disciplinary prosecutors are under even less constraint and scrutiny than criminal prosecutors, with the result being that there are even weaker incentives for them to exercise principled, fair, and consistent discretion. Because criminal prosecutors' offices and criminal prosecutors themselves have a long tradition of exercising discretion, public and

¹⁸¹ With respect to prosecutorial discretion in particular, the leading criticism remains that of Professor Vorenberg four decades ago. See generally James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981). With respect to administrative discretion in general, the seminal work was by Professor Davis more than a half century ago. See generally KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969).

¹⁸² This concern was reinforced by a 2019 study of the California disciplinary process that confirmed the perception that attorneys of color were over-represented in the disciplinary system. Memorandum from Dag MacLeod, Chief of Mission Advancement & Accountability Div., & Ron Pi, Principal Analyst, Off. of Rsch. & Institutional Accountability, to State Bar of Cal. Members & Bd. of Trs. (Nov. 14, 2019).

¹⁸³ John Braithwaite, *Challenging Just Deserts: Punishing White-Collar Criminals*, 73 J. CRIM. L. & CRIMINOLOGY 723, 750–54 (1982) (identifying reasons for not consistently enforcing white-collar crimes).

professional expectations have developed over time and, to some extent, have been codified or collected.¹⁸⁴ Particularly in recent years, the subject of prosecutorial discretion has been debated publicly in elections for chief prosecutor, and it has been discussed by law reform organizations, journalists, and others.¹⁸⁵ There is public pressure on criminal prosecutors to announce their general charging criteria and, because criminal prosecutions command public attention, there is some public scrutiny of criminal prosecutors' discretionary decisions.¹⁸⁶ Although criminal prosecutors' decision-making tends to be publicly inaccessible, the decisions generally are not and, in some contexts, criminal prosecutors may or must publicly explain their decisions and allow judges to publicly review their explanations.¹⁸⁷ All of this said, criminal prosecutors have never developed a national consensus about how to best use their discretionary power; they are only minimally accountable; and there is considerable public controversy about the fairness of their discretionary decisions.¹⁸⁸

The problem is even more dire for disciplinary counsel, who have largely escaped public and professional scrutiny. There is no evidence that the courts that delegate authority to disciplinary prosecutors can or do exercise meaningful oversight of discretionary charging decisions. Disciplinary agencies are under no discernable public or professional pressure to adopt decision-making principles, to announce them to the public or to the profession, or to adhere to them. Disciplinary counsel has even more latitude than criminal prosecutors to make arbitrary, biased, unfair, or unprincipled decisions. Even the most thoughtful, well-intentioned disciplinary counsel, in tough cases, are likely to make ad hoc decisions that allow room for a host of biases, if only unconscious ones. In the cases of lawyers accused of bringing frivolous challenges to the 2020 presidential election, for example, disciplinary authorities' own political preferences may influence their decisions one way or another.¹⁸⁹ Conversely, out of concern for avoiding the influence or the appearance of political biases, some disciplinary authorities may bend over backwards to make a decision that is contrary to their political preference.

It is not a foregone conclusion that disciplinary agencies should have discretion to simply decline cases where overzealous advocacy has occurred based on the theory that the misconduct was insignificant or on other theories. It is, of course, the settled understanding in the United States that criminal prosecutors can and should decline to bring cases in many situations

¹⁸⁴ Note, *The Paradox of "Progressive Prosecution"*, 132 HARV. L. REV. 748, 752–56 (2018).

¹⁸⁵ See *id.* at 750–53 (discussing progressive prosecutors' reform of prosecutorial discretion).

¹⁸⁶ Green, *Prosecutorial Discretion*, *supra* note 140, at 601–02.

¹⁸⁷ *Id.* at 615–18.

¹⁸⁸ *Id.* at 618–22.

¹⁸⁹ For a discussion of the influence that politics have historically played in disciplinary processes, see generally James E. Moliterno, *Politically Motivated Bar Discipline*, 83 WASH. U. L.Q. 725 (2005).

where crimes have occurred, but that is not the practice everywhere.¹⁹⁰ So, the analogy between disciplinary and criminal prosecutions may be imperfect. While criminal prosecutions, which can result in harsh direct and collateral consequences, are often disproportionate to the wrongdoing that has occurred, the same is less likely to be true of disciplinary prosecutions. In the disciplinary process, there is a broader range of sanctions, some of which are confidential, such as private reprimands; there is also a range of confidential responses, such as letters of caution and letters of education, that do not count as sanctions under the law.¹⁹¹ Of course, formal charges do not have to result in any of these if an adjudicator determines that no wrongdoing occurred or that no punishment or other response is warranted.

To be sure, disciplinary agencies undoubtedly have resource limitations. But, if there are too many lawyers committing too much misconduct in litigation, the answer is not necessarily to exercise charging discretion. An alternative worth considering would be to eliminate disciplinary rules dealing with adversary misconduct that is better addressed exclusively by courts. Trial judges could expand their sanctioning role to cover wrongdoing over which they have exclusive authority. State judiciaries and legislatures could devote adequate resources to the disciplinary processes to enable them to address serious litigation misconduct encompassed by the remaining rules. The objective would be to ensure that all significant advocacy misconduct is addressed by one institution or the other and that insignificant misconduct is eliminated from the disciplinary code and defined elsewhere. This approach would address not only the perception that disciplinary authorities ignore scofflaws or single out some minor offenders, but also the general concern about arbitrary discretion.

D. *Compounding the Problems: The Opacity of Disciplinary Discretion*

All of the problems posed by disciplinary discretion are exacerbated by the opacity of the disciplinary process. In Arizona, the District of Columbia, Georgia, Michigan, New York, and Texas, for example, the public will ultimately learn whether the lawyers who allegedly made frivolous assertions in election challenges are publicly disciplined.¹⁹² But that is only the tip of the iceberg. If no public discipline is reported, the public may not know whether disciplinary authorities declined to file charges, whether a disciplinary prosecution resulted in a lawyer's exoneration, or whether a private sanction was issued. If the lawyers forgo confidentiality and self-report that the disciplinary authorities declined to file charges, the public

¹⁹⁰ See *Lafler v. Cooper*, 566 U.S. 156, 185 (2012) (Scalia, J., dissenting) (“In Europe, many countries adhere to what they aptly call the ‘legality principle’ by requiring prosecutors to charge all prosecutable offenses . . .”).

¹⁹¹ See discussion *supra* Section III.A (discussing judicial sanctions for advocacy misconduct).

¹⁹² See *supra* notes 4–11 and accompanying text (discussing the possible issues with frivolous assertions made during election challenges).

may not know why—e.g., whether the disciplinary prosecutors concluded that the lawyers acted properly, whether authorities thought the wrongdoing was too insignificant to be charged, or for other reasons.

State disciplinary processes vary in their degree of transparency. As discussed, the New York process is as opaque as possible, protecting lawyers' reputations by keeping complaints, investigations, and proceedings secret in almost all cases, unless and until a lawyer is publicly sanctioned.¹⁹³ In general, lawyers prefer secrecy, making it hard to achieve reform.¹⁹⁴ The ABA's position is that once formal charges are filed and served, disciplinary proceedings should be made public.¹⁹⁵ Even this approach, which many states have adopted, has been criticized as too opaque.¹⁹⁶ Opening up the process after formal charges are filed gives the public greater insight into how the process deals with the small number of cases where disciplinary authorities believe that lawyers have committed misconduct worthy of punishment. But it still leaves most of the disciplinary process a secret. It affords no insight into how the disciplinary authorities winnow out most complaints filed by unhappy clients, opposing parties, lawyers, and others.

Although some jurisdictions, such as New York, publish aggregate and anonymized information about cases where disciplinary action is not pursued, the reports leave crucial questions unanswered. There is no way to know whether, based on an investigation, disciplinary authorities concluded that no misconduct occurred or whether they decided not to seek discipline even though the lawyer misbehaved. There is no way to know how often, and in what circumstances, disciplinary authorities decline to pursue charges because they conclude that the wrongdoing was minor, harmless, technical, insubstantial or aberrational; because the lawyer in question was contrite, was no longer practicing law, or seemed unlikely to reoffend; because the lawyer had already been sanctioned, formally or informally, so that further punishment would be undeservedly harsh; because disciplinary proceedings would be too expensive or time-consuming to pursue; because disciplinary proceedings would interfere with an ongoing lawsuit, criminal investigation, or criminal prosecution; because wrongdoing would be hard to prove given the passage of time or unavailability of witnesses; or for any other reasons. There would be no way to know whether the reasons not to pursue discipline

¹⁹³ See *supra* notes 90–94 and accompanying text (discussing some of the issues in the New York disciplinary process).

¹⁹⁴ For a discussion of the difficulty of significantly reforming Ohio's disciplinary process, see generally John P. Sahl, *The Public Hazard of Lawyer Self-Regulation: Learning from Ohio's Struggle to Reform its Disciplinary System*, 68 U. CIN. L. REV. 65 (1999).

¹⁹⁵ MODEL RULES FOR LAW. DISCIPLINARY ENF'T, *supra* note 74, r. 16(C).

¹⁹⁶ See, e.g., Levin, *Secrecy*, *supra* note 27, at 21–49 (arguing why greater transparency in the lawyer disciplinary process is needed); Deborah L. Rhode & Alice Woolley, *Comparative Perspectives on Lawyer Regulation: An Agenda for Reform in the United States and Canada*, 80 FORDHAM L. REV. 2761, 2767–68 (2012) (“Because the vast majority of complaints never result in public sanctions . . . consumers often lack crucial knowledge about lawyers’ practice histories.”).

were contestable or illegitimate—for example, there would be no way to know whether disciplinary authorities were making distinctions based on race, wealth, or status.

The opacity of the process undermines public confidence that disciplinary prosecutors use their discretion wisely, rather than discriminatorily, and it ultimately undermines public confidence in the legal profession's self-regulation. For example, if no charges are brought in response to the election litigation, the legal profession will be discredited even if, on balance, disciplinary authorities were wise to weed out these cases like others involving frivolous pleadings. Ordinarily, the public is unaware of frivolous pleadings and other adversary misconduct, but, on this occasion, the election challenges were in the public spotlight. The public knows that courts harshly rejected claims of voter fraud and other challenges and that disciplinary complaints followed.¹⁹⁷ If disciplinary authorities dismiss these allegations, they will have no opportunity to explain why. Those who favor the disciplinary process's outcome may assume that it is well-founded. But those who do not like its outcome, and who received no explanation, may assume the worst and lose confidence in the law as a self-regulating profession. Of course, disciplinary prosecutors undoubtedly regard themselves as independent, like criminal prosecutors. But the public sees lawyers regulating lawyers, effectively giving scofflaws a pass, in secret and without any justification. The secrecy reinforces the public perception—likely undeserved—that the fox is guarding the henhouse but not doing a conscientious job of it.

Conversely, if disciplinary authorities were required to acknowledge and explain their discretionary decisions, either in individual cases or in the aggregate, they would almost certainly make better decisions. It would be harder to adopt illegitimate decision-making criteria if authorities had to publicly disclose and justify their criteria, and, once principled criteria were expressly adopted, they would be more likely to be employed. This is especially true if decisions in individual cases were acknowledged so that observers could make their own judgments about whether the charging decisions accorded with published principles. All of this would help allay suspicions that the disciplinary authorities are generally under-charging or that they are sometimes overcharging because of political bias, public pressure, or other illegitimate considerations. The public and profession might not agree with every decision. But greater assurance that decisions are not made arbitrarily or politically would likely boost public confidence in the regulatory process.

¹⁹⁷ See, e.g., Brent Kendall & Alexa Corse, *Trump 2020 Election Lawsuits Lead to Requests to Discipline Lawyers*, WALL ST. J. (May 9, 2021, 10:00 AM), <https://www.wsj.com/articles/trump-2020-election-lawsuits-lead-to-requests-to-discipline-lawyers-11620568801> (describing complaints submitted to disciplinary authorities against plaintiffs' lawyers in unsuccessful election challenges).

Finally, transparency would promote public discussion of how advocates should behave, thereby fostering a better-informed citizenry and ultimately greater public accountability for disciplinary prosecutors and courts that delegate authority to them. Consider the post-election litigation one last time. One question upon which the disciplinary charging decision may turn is whether, assuming these lawsuits were frivolous, the lawyers' conduct in filing them was more culpable than that of other lawyers who file frivolous pleadings. That may depend, to some extent, on the facts of each individual case. But it also inescapably raises the question of the motivation behind the lawsuits. Was it worse to bring the cases in support of a political cause than to bring a frivolous lawsuit for a plaintiff's personal gain? It is not inherently wrong to bring litigation to support a political cause. That is, in fact, common. There is a substantial body of literature recognizing how litigation may support a political or social movement.¹⁹⁸ Of course, it would be absurd to analogize the post-election litigation to civil rights litigation. But, assuming that the lawyers in these cases were not seeking to promote a violent overthrow of government, was it more blameworthy to support efforts to influence Congress and state officials to change the election results than, say, to promote a contentious civil-rights cause? Public officials in charge of lawyer discipline, and courts overseeing them, may decline to entertain this sort of question, deciding it is better left to the political process. Alternatively, they may conclude that the anti-democratic nature of the post-election efforts was indisputable, and so obviously culpable, especially for a lawyer, that it can be identified as an aggravating factor. In an ideal world, disciplinary authorities might analyze these questions themselves and also invite the public and the profession to consider them.

CONCLUSION

The public would be enlightened if it were privy to the Arizona, District of Columbia, Georgia, Michigan, New York, and Texas disciplinary authorities' internal deliberations over whether to bring charges against lawyers for filing frivolous post-election lawsuits.¹⁹⁹ There are many possible considerations, some legitimate and some not, on both sides of the question. The public would be interested to learn whether disciplinary authorities are making considered, responsible, and disinterested judgments

¹⁹⁸ See, e.g., Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1663 (“The coordination of legal and political strategies to advance social movements has a history that stretches far before *Brown*, revealing how movements—both with and without power—have long turned to law as a form of politics by other means.”).

¹⁹⁹ See *supra* notes 4–8 and accompanying text (noting complaints filed against lawyers for filing frivolous election challenges). See also *Attorneys' General and Congressional Representatives' Unethical Behavior*, LAWS. DEFENDING AM. DEMOCRACY (Dec. 14, 2020), <https://ldad.org/letters-briefs/ag-paxton> (calling on state disciplinary authorities to investigate public officials for allegedly filing a frivolous petition in the U.S. Supreme Court).

in cases like these. Any decisions would be controversial. Declining to bring charges, perhaps on the view that these cases should be treated no differently from others where lawyers file frivolous court papers, would disappoint those who want to see the lawyers punished. Bringing charges, perhaps on the view that the post-election challenges were particularly egregious, ill-motivated abuses of the litigation process, would disappoint those who continue to believe baseless claims that the presidential election was stolen. The rationales for the discretionary decisions would be analyzed, critiqued, and challenged. Robust public debate about how the disciplinary process makes judgments about lawyers' misconduct would promote a better understanding of the process and a better-informed view of how well the process works to protect the public.

However, there will be no flies on the wall because, even in states where the process is most transparent, disciplinary prosecutors' discretionary decision-making is publicly inaccessible. The opacity of the disciplinary process magnifies problems posed by disciplinary discretion, particularly in cases of advocacy misconduct, such as when lawyers advance frivolous positions in court. Although allegations of overzealous advocacy are commonly raised in litigation, disciplinary authorities rarely charge advocates who violate disciplinary rules by overzealously pursuing their clients' objectives. Their practice is to rely on judges to address misconduct allegations in litigation where they are, or could be, raised. This practice raises the questions of: whether the disciplinary codes are overbroad in incorporating rarely enforced advocacy rules; whether advocates are under-regulated when their misconduct is overlooked by the disciplinary process; and whether advocates are being regulated arbitrarily and unfairly when, as may become true of Giuliani, Powell, and others, they are singled out for discipline. Because of the lack of transparency, these questions, although important, are rarely discussed and are not easily answered. Perhaps that will change. When charges against these lawyers emerge, or fail to emerge, from state disciplinary processes, the overdue public discussion of state disciplinary processes may be sparked. Perhaps the very idea of disciplinary discretion will, as it should, be questioned.

Meanwhile, to promote public and professional accountability, disciplinary prosecutors should reveal more of their inner processes. Disciplinary authorities could reveal far more while still preserving the confidentiality of individual lawyers' cases. Disciplinary authorities could disclose the considerations that go into their charging decisions, including decisions to decline to charge, and disclose how those considerations are generally weighed in the context of different types of cases.²⁰⁰ Just as disciplinary authorities' annual reports now provide aggregate and

²⁰⁰ For a study of criminal prosecutors' statements accompanying their decisions to decline to bring charges, see generally Jessica A. Roth, *Prosecutorial Declination Statements*, 110 J. CRIM. L. & CRIMINOLOGY 477 (2020).

anonymized information focusing on case outcomes, they can provide aggregated data about charging decisions and anonymized examples of how charging decisions are made in individual cases. Greater transparency will encourage more thoughtful and principled decision-making. It will also foster greater public and professional understanding and discussion. The disciplinary process's opacity erodes public confidence in the law as a self-regulating profession, as the public reaction to the disciplinary outcomes in the cases of the lawyers who challenged the 2020 presidential election may come to prove.