

Matthew G. Kaiser, Chair
Board on Professional Responsibility
430 E Street, NW
Suite 138
Washington, DC 20001

June 17, 2021

Re: Request for Oversight of the Office of Disciplinary Counsel

Dear Mr. Kaiser:

We write to request that the Board on Professional Responsibility (the “Board”) exercise its oversight authority over the Office of Disciplinary Counsel (the “ODC”) with respect to its rejection of a detailed ethics complaint filed against then Attorney General William Barr in July, 2020 (the “Complaint”), as supplemented by a further submission in May, 2021 (the “Supplement”). The Complaint was submitted by four former presidents of the District of Columbia Bar and many other distinguished members of the D.C. Bar. In its response to the Complaint, the ODC declined to “intervene” because the alleged ethical violations concerned a public figure and involved conduct that was the subject of public discussion, and because the complaint was submitted by members of the Bar who lacked personal knowledge of the underlying facts.¹

This rejection of the Complaint apparently reflects a policy of the ODC with respect to certain complaints of misconduct against public figures, namely to “not intervene in matters that are currently and publicly being discussed in the national political arena.” This policy of non-intervention, however, is flatly contrary to the dictates of Rule XI which provides that the ODC has the “power and duty . . . to investigate all matters involving alleged misconduct by an attorney . . . which may come to the attention of Disciplinary Counsel or the Board from any source whatsoever, where the apparent facts, if true, may warrant discipline.” Rule XI therefore does not permit the ODC to treat a good faith complaint about unethical conduct as an improper request for “intervention” in a public matter, nor to justify the rejection on the other grounds provided to us. Beyond violating Rule XI, the ODC policy undermines the necessary confidence of the Bar and the public in the integrity of the disciplinary process governing our profession.

We respectfully request the Board to declare the policy invalid and order the ODC to reconsider the Complaint and the Supplement against former Attorney General Barr. We set forth additional background and our support for our request in more detail below.

The Complaint and the Supplement

The Complaint filed on July 22, 2020, is a comprehensive 37 page “bill of particulars” concerning Mr. Barr’s actions on four matters during his tenure as Attorney General. It is available [here](#). The Complaint was signed by 27 members of the D.C. Bar, and before

¹ It bears mention that our request to the Board comes amidst a series of even more recent revelations about the conduct of Mr. Barr and the Department of Justice, including the [opinion](#) by Judge Amy Berman Jackson, which we discussed in our Supplement, as well as [subpoenas](#) to members of Congress, the media, and even White House counsel. These developments each provide yet further grounds for review by the ODC of lawyer misconduct beyond the matters addressed in the Complaint.

submitting the Complaint to the ODC, we consulted with prominent ethics experts on the merits of our analysis of the applicable ethical rules.

The Complaint describes in detail a pattern of conduct by Mr. Barr, during his tenure as Attorney General, placing the then President's personal and political interests ahead of his ethical duty to represent the interests of the United States in dispensing evenhanded justice under the rule of law and upholding the Constitution. The four specific claims set forth in the Complaint are that Mr. Barr:

(i) misled Congress and the public by asserting that the Mueller Report did not contain sufficient evidence to establish that President Trump committed the crime of "obstruction of justice" in violation of [D.C. Bar Rule 8.4\(c\)](#);

(ii) misrepresented the determination by the Department of Justice Inspector General that the FBI had a proper basis for launching its 2016 counterintelligence investigation of Russian interference in the 2016 campaign, also in violation of Rule 8.4(c);

(iii) issued harmful and gratuitous public prejudgments of FBI personnel during a pending criminal investigation he was overseeing in which they were potential defendants – seriously interfering with the administration of justice in violation of [Rule 8.4\(d\)](#); and

(iv) forcibly dispersed constitutionally protected peaceful protests at Lafayette Square on June 1, 2020 in violation of [Rules 1.3](#) and [1.7\(b\)\(4\)](#), the oath under [D.C. Bar Rule XI](#), and the First and Fourth Amendments of the Constitution.

On May 14, 2021, we filed a Supplement to the Complaint, available [here](#), signed by the original signers (with one exception) and several other prominent members of the Bar. The Supplement was prompted by the May 3 decision of Judge Amy Berman Jackson in *CREW v. DOJ* setting forth detailed findings that Mr. Barr misled Congress, the court, and the public concerning the Mueller Report. Judge Jackson thus became the second federal judge, following Judge Reggie Walton (as discussed in our original letter), to directly question and criticize the misrepresentations and lack of candor of the Attorney General, and her findings directly supported aspects of the Complaint.

Unquestionably, the Complaint and its Supplement set forth evidence of serious violations of the Rules of Professional Responsibility that merit investigation by the ODC.

The Improper ODC Rejection of the Complaint

Following the submission of our Supplement, we learned that the ODC had earlier informed our lead signer by letter transmitted by email that a "full investigation will not be opened" concerning the Complaint.² The [letter](#), dated August 4, 2020, explained *inter alia* that

² The rejection letter, dated August 14, 2020, was transmitted by email to the lead signer of the Complaint, but the sender of the email was identified not as the ODC, but only as "files@sendthisfile.com." Given this nondescript address, the email was treated as junk by the lead signer, and the signers of the Complaint did not become aware of the ODC rejection or the policy until several weeks ago.

Your complaint *lacks personal knowledge* of the facts or allegations concerning Mr. Barr. In general, *this Office will not intervene in matters that are currently and publicly being discussed in the national political arena.* Therefore, although we appreciate the information you provided, *a full investigation will not be opened* based on your complaint. (Emphasis supplied)

On June 15, 2021, we received a perfunctory response from the ODC to the Supplement to the Complaint that “our decisions are final and not subject to further review.” The ODC thus declined to “reopen this matter” because “there are no new facts” despite the extensive findings by Judge Jackson concerning Mr. Barr. A copy is attached.

The Rules Violated by the ODC Response

The policy set forth in the letter rejecting the Complaint, and confirmed in the response to the Supplement, violates the mandate to Disciplinary Counsel set forth in [Rule XI](#), which includes the following relevant provisions:

Section 2. Grounds for Discipline

(a) Duty of attorneys. The license to practice law in the District of Columbia is a continuing proclamation by this Court that the holder is fit to be entrusted with professional and judicial matters, and to aid in the administration of justice as an attorney and an officer of the Court. It is the duty of every recipient of that privilege at all times and in all conduct, both professional and personal, to conform to the standards imposed upon members of the Bar as conditions for the privilege to practice law.

(b) Misconduct. Acts or omissions by an attorney, individually or in concert with any other person or persons, which violate the attorney's oath of office or the rules or code of professional conduct currently in effect in the District of Columbia shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney- client relationship.

Section 6. Disciplinary Counsel

(a) Powers and duties. Disciplinary Counsel shall have the power and duty:

...

(2) To investigate *all matters* involving alleged misconduct by an attorney subject to the disciplinary jurisdiction of this Court, which may come to the attention of Disciplinary Counsel or the Board *from any source whatsoever*, where the apparent facts, if true, may warrant discipline. (Emphasis added)

Thus, Rule XI plainly defines the obligations of the ODC in response to a serious complaint of misconduct by a member of the Bar. Under Section 6, the ODC has a “duty” to consider and investigate “all matters involving alleged misconduct which may come to [its] attention from any source whatsoever.” There is no exception for matters called to the ODC’s

attention by someone who does not have “personal knowledge” of the matters at issue. Nor is there any exception for “matters that are currently and publicly being discussed in the national political arena.”

Quite to the contrary, Rule XI treats all members of the Bar under the same exacting ethical standards, and when a credible violation of those standards of conduct is alleged, Section 6(a)(2) mandates that the ODC “consider and investigate any alleged ground for discipline”. Thus, there is no justification for the ODC to treat the Complaint as a request for “intervention” in a public matter or for dismissing the significance of the claims because the signers lack “personal knowledge” of the facts. Indeed, under this policy, a serious complaint about lawyer misconduct referred to the ODC by a legislative committee, an administrative agency, or the Department of Justice also would be summarily dismissed.

Yet, the Complaint was no more and no less than a request for adherence by the ODC to Rule XI with respect to serious allegations of misconduct by Mr. Barr that, in our view and that of ethics experts, violated ethical standards of our profession. In this instance, the conduct occurred largely in plain sight, and in any event, credible information from any source triggers the ODC obligation to consider and investigate a complaint.

Likewise, there is no place under Rule XI for the opaque statement by the ODC that “no full investigation will be opened based on your complaint.” This concluding statement in the ODC response fails to appreciate that the signers expected, and were entitled to, a high level of confidence that the ODC would treat the Complaint in a manner faithful to its obligations under Rule XI. Instead, the ODC response undermined any reasonable assurance we could have had that the allegations meticulously detailed in the Complaint would be duly considered by the ODC. In addition, the critical response contained in the [National Law Journal](#) on June 10 to the disclosure of the rejection of the Complaint suggests that the ODC response has eroded public confidence as well in the disciplinary system.

Gross misconduct by members of the Bar – be they private attorneys or the Attorney General of the United States – seriously stains the reputation of the legal profession with the general public, and also, no doubt, tempts other lawyers to skirt ethical boundaries. Even worse, the aroma of a special immunity to protect lawyers in the political class from having to conform to the Code of Professional Responsibility is even more corrosive and should be unacceptable to the Board.

The ODC “non-intervention” policy at issue, as well as its policy not to docket certain plainly meritorious complaints, stands on no better footing than the policy overruled by the Court of Appeals in [Matter of Williams, 513 A.2d 793 \(D.C. 1986\)](#). There, the Court disapproved the Board’s dismissal of certain charges as untimely pursuant to its policy guaranteeing the respondent a speedy trial. The Court declared the Board’s application of the policy to be contrary to its duty to consider and investigate any ground for discipline in furtherance of the purpose of the system of attorney discipline. It pointed out that it had given the Board “the power and the duty . . . [t]o consider and investigate any alleged ground for discipline or alleged incapacity of any attorney called to its attention, or upon its own motion, and to take such action with respect thereto as shall be appropriate to effect the purposes of these disciplinary rules.” Id. at 795 (emphasis added.) The linchpin of the decision was the Court’s determination

that the interests supporting the speedy trial policy were insufficient to justify dismissal of attorney misconduct charges because that result did not “further the purposes of our system of attorney discipline.” *Id.* Certainly, the same analysis applies to the “non-intervention” and non-docketing policies applied to the Complaint and the Supplement here.

The June 11 Letter by Hamilton Fox

We are aware that Hamilton Fox of the ODC sent a letter dated June 11, 2021 responding to a communication from attorney Alan Roth, a member of the Bar who was not a signatory to the Complaint or the Supplement. In a June 4, 2021 letter, Mr. Roth protested the ODC’s rejection of the Complaint against Mr. Barr, as reported by the media. Copies of these letters are attached.

In the letter, Mr. Fox distinguishes between docketing a complaint – which he says ODC will not do when the complainant lacks personal knowledge or when the complaint names a public figure at least regarding a matter of current discussion in the national political arena – and undertaking to investigate which he says ODC may do even in cases where the complainant lacks personal knowledge including when the person named is a public figure. The letter is notable, however, for the absence of any effort to disavow the “non-intervention” policy applied specifically to the Complaint against Mr. Barr – simply because the allegations involve a public official concerning matters of discussion in the national political arena. Nor does Mr. Fox explain or justify the rejection by his office of the information and analysis contained in the Complaint simply because the signers lacked personal knowledge of the underlying facts.

Regarding the issue of personal knowledge, the ODC’s position seems diametrically opposed to the well-established rules of evidence whereby courts, state and federal, accept indisputable facts established in the public record. The Complaint was replete with such facts. In any event, if personal knowledge were needed, we had it. For example, like millions of Americans, we were first-hand witnesses to Mr. Barr’s March 2019 televised press conference on the Mueller investigation, and Barr’s accompanying 4-page letter to Congress, that District Court Judge Walton found “misleading” in his March 5, 2020, opinion, cited in our Complaint. Importantly, the Complaint included a point-by-point refutation of Mr. Barr’s [televised and recorded Senate testimony](#). No eyewitness testimony can be more reliable. The legal analysis based on that evidence showed how he misrepresented the criminal law in defending his decision. Misrepresenting the law violates D.C. Bar Rule of Professional Responsibility [8.4\(c\)](#).

Turning to the critical issue of complaints involving matters in the national political arena, the ODC policy not to intervene with respect to such matters is inconsistent with the disciplinary rules as interpreted by the Court of Appeals. In *Williams, supra*, 513 A. 2d at 796, the Court states:

The Disciplinary Rules state the minimum level of conduct below which *no lawyer* can fall without being subject to disciplinary action. Within the framework of fair trial, the Disciplinary Rules should be *uniformly applied to all lawyers*, regardless of the nature of their professional activities.” (Emphasis in original, citation omitted.)

There is no excuse for overprotecting such lawyers at the expense of the ODC's duty to the public, particularly given the far more extensive damage to the public that unethical government lawyers in powerful posts can do. As the Court of Appeals stated in [*In re Abrams*, 689 A.2d 6 \(1997\)](#):

Disciplinary sanctions are designed to maintain the integrity of the profession, to protect the public and the courts, and to deter other attorneys from engaging in similar misconduct.

Beyond the blatant abdication of its duty under Rule XI, which the Board must correct, the ODC has further undermined the purposes of Rule XI through its communications with the signers. The August 4, 2020 letter to us from the ODC and Mr. Fox's June 11, 2021 letter to Mr. Roth convey to the public that lawyers operating in the national political arena are treated differently from other lawyers, and that the ODC is abdicating any responsibility to administer justice impartially.³ This strikes the balance between protecting innocent public lawyers and accountability wholly in one direction. It is the wrong direction and should also be forcefully reversed by the Board.

Our Request for Oversight to the Board

For the reasons set forth in this letter, we urge the Board to exercise its supervisory authority over the ODC under Rule XI, Section 4(e)(2). Under the Rule, the Board itself is duty-bound "[t]o consider and investigate any alleged ground for discipline or alleged incapacity of any attorney called to its attention, or upon its own motion, and to take such action with respect thereto as shall be appropriate to effect the purposes of this rule." Specifically, the undersigned request the Board to:

- (i) declare that the ODC non-intervention policy on misconduct allegations against public figures on matters subject to public discussion in the national political arena violates Rule XI;
- (ii) declare the ODC policy of rejecting information concerning alleged misconduct from complainants who lack personal knowledge of the alleged facts is invalid under Rule XI;
- (iii) direct the ODC to reconsider the Complaint and the Supplement under Rule XI, Section 6(a)(2) without reliance on the invalid policies originally applied to the Complaint and Supplement, and
- (iv) direct the ODC to confirm to the signers that the ODC has reconsidered the Complaint and Supplement consistent with the obligations imposed upon it by the Court of Appeals in Rule XI.

³ Lawyers are in the business of making distinctions between claims with and without apparent merit. Only the former are to be investigated. That evidently is what New York's Grievance Committee for the First Department of the Supreme Court does by considering all complaints. It certainly does not refuse to "docket" complaints, such as the recent complaints against Rudy Giuliani, because the complaints are based on public information in matters being debated in the public square.

Respectfully submitted,

Gershon (Gary) Ratner, Co-Founder, Lawyers Defending American Democracy, Former HUD Associate General Counsel for Litigation

Dori Bernstein, Retired Director, Supreme Court Institute, Georgetown Univ. Law Center, Former appellate attorney, Office of General Counsel, U.S. Equal Employment Opportunity Commission

Charles R. Both, Law Offices of Charles R. Both

John C. Brittain, Olie W. Rauh Professor of Law University of the District of Columbia David A. Clarke School of Law

Katherine S. Broderick, Dean Emerita and Joseph L. Rauh, Jr. Chair of Social Justice, University of the District of Columbia David A. Clarke School of Law

Susan Carle, Professor of Ethics Law and Vice-Dean, American University, Editor of *Lawyers' Ethics and the Pursuit of Social Justice* (NYU Press 2005)

Angela J. Davis, Distinguished Professor of Law Criminal Justice Ethics and Criminal Law and Procedure American University, Author of *Arbitrary Justice: The Power of the American Prosecutor* (Oxford University Press, 2007)

Ruthanne M. Deutsch, Partner, Deutsch Hunt PLLC

Daniel B. Edelman, Senior Counsel, Katz Marshall & Banks LLP

Ambassador Norman Eisen (ret.)

Nicholas Fels, Former Partner, (retired) Covington & Burling, Lawyers Defending American Democracy Steering Committee

Andrea C. Ferster, Former DC Bar President Law, Offices of Andrea C. Ferster

Marc Fleischaker, Former DC Bar Foundation President, Chair Emeritus Arent Fox

Michael S. Frisch, Georgetown University Law Center Ethics Counsel and Adjunct Professor, Senior Assistant and Assistant Bar Counsel (now Disciplinary Counsel) to the DC Court of Appeals (1984 - 2001)

Richard B. Herzog, Senior Counsel, Harkins Cunningham LLP; former Deputy Director for Policy, Economic Regulatory Administration, Department of Energy; former Assistant Director for National Advertising, Bureau of Consumer Protection, Federal Trade Commission

Debra S. Katz, Partner, Katz Marshall & Banks LLP

Philip Allen Lacovara, Former D.C. Bar President, Former Deputy Solicitor General, Former Counsel to the Watergate Special Prosecutor

Simon Lazarus, Former Associate Director, White House Domestic Policy Staff (1977-81), Former Senior Counsel, Constitutional Accountability Center

Ariel Levinson-Waldman, Former Chief Oversight Counsel, U.S. Department of Labor, Former Senior Counsel to the Attorney General for the District of Columbia, Former Assistant Counsel, U.S. House of Representatives

William L. Robinson, Founding Dean and Emeritus Distinguished Professor of Law, UDC David Clarke School of Law, Former Associate General Counsel for Litigation, EEOC.

Stephen A. Saltzburg, Wallace and Beverley Woodbury University Professor of Law, The George Washington University, Former Deputy Assistant Attorney General, Criminal Division

Joseph Sellers, Former President, Washington Council of Lawyers, Former Co-Chair, Subcommittee on Race & Ethnicity, D.C. Circuit Task Force on Gender, Race and Ethnic Bias

Abbe Smith, Professor of Law, Georgetown University Law Center, Author of Understanding Lawyers' Ethics (with Monroe H. Freedman) (5th Ed., Carolina Press, 2016), and Editor of Lawyers' Ethics (with Freedman & Woolley) (Routledge, 2016)

Marna S. Tucker, Former President, D.C. Bar, Former Member, Board on Professional Responsibility, Former Chair, ABA Standing Committee on Professional Discipline, Senior Partner, Feldesman Tucker Leifer Fidell, LLP

Melvin White, Former DC Bar' President, Member/Barrister - Edward Bennett Williams Inn of Court 1991-2018, Attorney in private practice

Bruce Wolff, Former Manatt Phelps & Phillips partner (retired), Former Deputy Assistant Secretary for Legislation, HEW

cc: Hamilton Fox III
Office of Disciplinary Counsel
515 Fifth Street, N.W.
Building A, Room 117
Washington, DC 20001