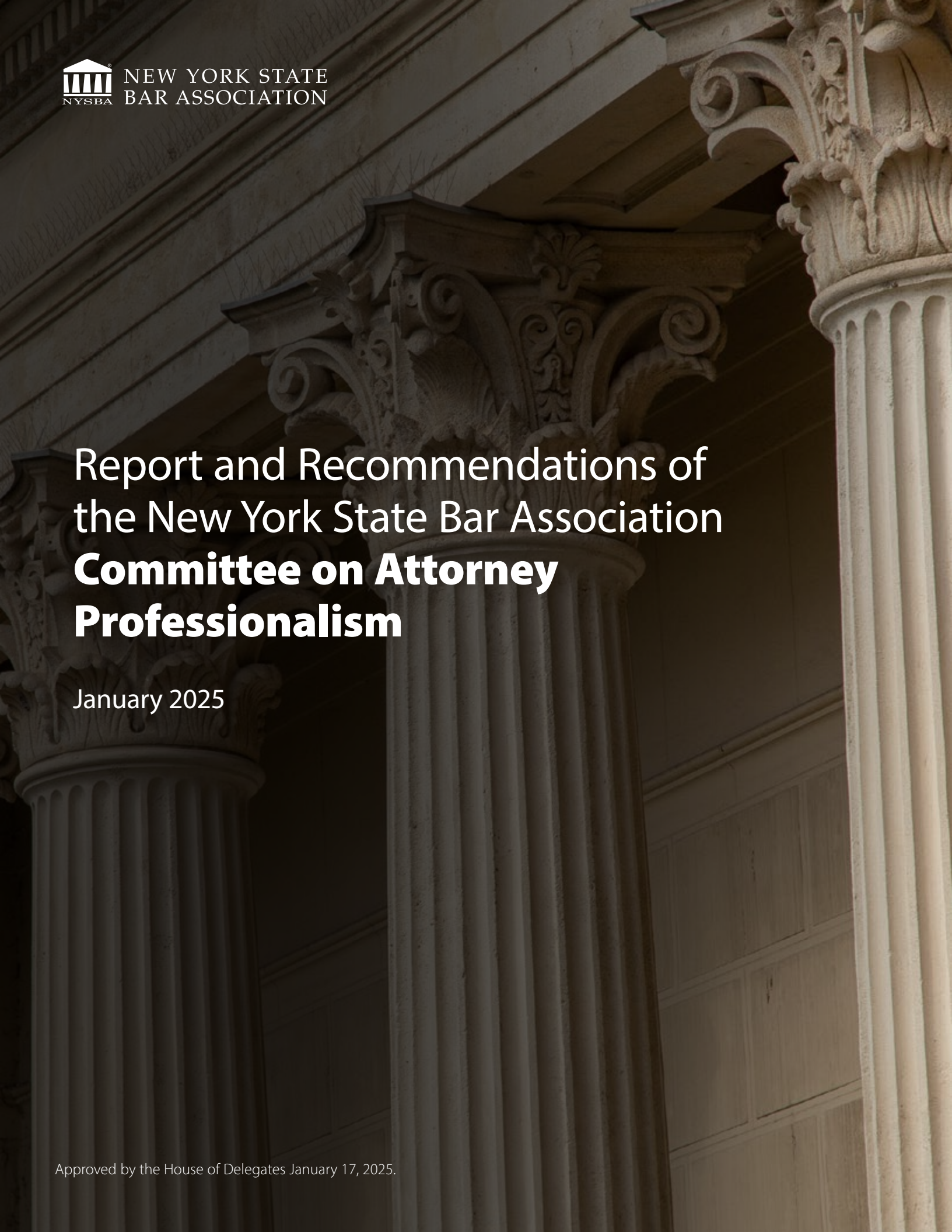

NEW YORK STATE BAR ASSOCIATION

Report and Recommendations of the New York State Bar Association **Committee on Attorney Professionalism**

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NYSBA Committee on Attorney Professionalism

Report by the Committee on Attorney Professionalism: ***How an Attorney's Professional Activities Affect Consideration of the Attorney for Judicial and Political Positions: A Framework for Citizens***

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New York State Bar Association
Committee on Attorney Professionalism

How an Attorney's Professional Activities Affect Consideration of the Attorney for Judicial and Political Positions: A Framework for Citizens

I. *INTRODUCTION*[1]

One of the pillars on which our legal system is built is an unflagging emphasis on access to justice, which necessarily includes representation by counsel. This principle often results in the representation by lawyers of unpopular clients and causes, sometimes even where the lawyers themselves are not supportive of the clients or sympathetic to the causes. There is a concern that the lawyer's role in providing representation to unpopular, sometimes extremely unpopular, clients is sometimes not fully understood.

At the same time, it is also true that lawyers, perhaps even disproportionately relative to people in other walks of life, seek to serve in government, whether in elective office, in appointed roles or on the bench.

The confluence of these two contexts can, particularly in these sometimes tense and strident times, raise, among others, the following issues and questions, which are the subject of this Report:

- Many in the general public do not understand a lawyer's responsibilities and the proper way in which lawyers fit into the legal system. The purpose and thrust of this Report are to increase that understanding, so that an educated citizenry can make informed choices.
    - From the perspective of citizens at large, does a lawyer's representation of unpopular clients have, in practice, any bearing on the lawyer's qualifications and suitability for later work in government?
    - We make no value judgments and provide no commentary here about the appropriateness of the public's consideration of a lawyer's choices regarding whether and how to represent any particular client.
- Conversely, is it appropriate for a lawyer who has some desire to serve later in government in a visible way to tailor or limit representations in order to avoid those

[1] The principal authors of this Report are Robert I. Kantowitz and Andrew L. Oringer; other members of the Committee on Attorney Professionalism made substantive and organizational contributions.

representations that might have a negative reputational impact in the public consciousness?

- We acknowledge the sentiment on the part of some that bar associations and similar groups should not give credence to the proposition that there is ever a basis on which a lawyer should allow such considerations to enter into the determination of what representations to undertake. Nevertheless, we believe that people who have chosen to be lawyers will in fact consider career-based and other personal considerations when deciding on whether to enter any particular controversy or other conflict, and we offer this Report to discuss certain ways in which these considerations might manifest themselves.

II. *GENERAL BASES FOR THIS REPORT*

One of the signal achievements of the American legal profession is that the profession as a whole has been successful in making representation available to everyone who needs it, even the deeply despised, and it is unquestioned that once a lawyer undertakes to represent a client, the lawyer has a duty to do so diligently and competently. This can best be accomplished if those seeking representation have access to, and can choose from among, a wide range of available counsel.[2] If a lawyer's willingness to represent unpopular clients is adversely influenced by concerns about the lawyer's own professional well-being, the commitment of the legal system to its broad mission could be strained.

The issue of the impact that what a lawyer does has on future opportunities is not new, but the issue has arguably taken on increased urgency due to at least two developments.

One key development is the evolution of technology that is different not only in degree but also in kind. The proliferation of data-management and data-retrieval technology has provided an unparalleled and ever-increasing ability for anyone and everyone to find information from the distant past and from nearly forgotten sources and places, and has made it easy to disseminate information and to express opinions. There is virtually instantaneous access to extensive, detailed and often obscure information – not all of which is necessarily true or reliable, or presented in an unbiased and complete way – about events and people, and there is generally a striking preservation of posted information.[3]

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[2] *Cf., e.g., New York Rules of Professional Conduct*, Rule 5.6(a) (prohibiting lawyers from agreeing not to represent clients under certain circumstances), Rule 6.1, Comment [1] (indicating concern about "limit[ing] the freedom of clients to choose a lawyer and limit[ing] the professional autonomy of lawyers").

[3] In the European Union (the "EU") (and in certain countries outside the EU), there is a so-called "right of erasure," pursuant to which a person may require a search engine to remove certain links. The EU Court of Justice ruled, in Case C-507/17, *Google LLC v. Commission nationale de l'informatique et des libertés* (CNIL) (2019), that the right of erasure cannot be applied outside the EU. As a result of this limitation, it is likely that considerable information with serious implications about an individual can still be expected to come to light at any time. Some other countries have similar rules, but in the United States, there is no right to be forgotten, and there is no apparent prospect that there will be.

A second development is the breakdown in traditionally shared viewpoints across many issues, leading to strong and irreconcilable differences among citizens and groups in the United States regarding an ever-increasing number of issues, together with a general and sometimes toxic erosion of civil discourse on political matters. Even in the context of a particular individual's activities, what some observers might view as exemplary conduct others might view as utterly disqualifying, and the criticism that one group might level might be dismissed by another group as political theater.

Together, these developments have resulted in a proliferation of calls that individuals in general, and attorneys in particular, who took on a particular assignment or staked out a position at some time in the past or who once were associated with purportedly bad actors be effectively disqualified taking on future public positions or other positions with educational institutions, interest groups or other high-minded organizations (or even being permitted to take a role in polite society).

Over the past decade or two, there have been several well-publicized incidents involving claims that a particular lawyer who is a candidate for office is unfit by virtue of previous client work.[4]

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[4] It is worth reviewing several examples to get a sense of what kinds of specific charges arise, how they are perceived and what the consequences have been.

In a 2010 race for the New York State Senate, one television advertisement included the following:

> If you are a killer, a drug dealer, a burglar or a scam artist, [my opponent] would like to represent you. [My opponent] makes a living defending the criminals who make our lives worse. . . . We need honest, ethical, respectable leaders in the State Senate. Not lawyers who side with hardened felons.

In reaction, one retired judge pointed out that the Constitution demands that criminal defendants be afforded proper representation and said [Opponent] was only fulfilling his responsibilities as a lawyer in representing them. *See* M. Scheer, *Thompson, Grisanti exchange accusations in Senate race, Niagara Gazette* (Oct. 28, 2010).

In 2014, a number of Democrats in the United States Senate voted not to confirm President Obama's nominee for the Justice Department's Civil Rights Division, who had been the litigation director of the NAACP Legal Defense and Education Fund when it represented the killer of a police officer. One Senator's explanation may be seen as reflecting the conflicting considerations: "I embrace the proposition that an attorney is not responsible for the actions of their [sic] client . . . . [just making sure that there was text between "client" and the final "."] The decades-long public campaign by others, however, [has] shown great disrespect for law enforcement officers and families throughout our region." *See* J. Weissman & M. Shear, *Democrats in Senate Reject Pick by Obama, New York Times* (Mar. 5, 2014).

The public perception of, and reaction to, a lawyer's previous work – both as to which clients that lawyer has represented and as to how that lawyer has represented those clients, including whether the results obtained do or do not square with what members of the public believe is appropriate contemporaneously and in the future – can, justly or unjustly, make it difficult or impossible for the lawyer to obtain a desired position in the future.

The ability of any person, no matter how unpopular, to obtain competent legal representation (whether or not in a litigation setting) is a fundamental cornerstone of our society and the rule of law.[5] Indeed, many lawyers not only accept and respect this principle but personally feel an affirmative responsibility to provide representation to the unpopular and otherwise unrepresented.[6]

However, there are limitations to this principle.

In 2019, a nominee to the federal bench in Michigan asked that his nomination be withdrawn after backlash arising out of his having represented a city that had barred a farm from participating in its farmers' market after the farm owner had said that due to his religious beliefs he would not host same-sex marriage ceremonies. *See* M.N. Burke, *Michigan judicial nominee Bogren withdraws from consideration*, *The Detroit News* (June 11, 2019). (It is worth noting that ultimately the farmer won the case on First Amendment grounds. *Country Mill Farms, LLC v. East Lansing*, No. 1:17-cv-00487-PLM-RSK (W.D.Mich. Dec. 15, 2023) (consent judgment).)

This phenomenon is not new. President Clinton's 1993 nomination of Lani Guinier to be Assistant Attorney General for Civil Rights was derailed in large measure by objections to her approach to the law as expressed in her writings, and the Senate's rejection of President Reagan's 1987 nomination of Robert Bork to the United States Supreme Court was influenced in major part by Bork's legal writings and positions dating back almost a quarter-century. Indeed, the verb "bork" has entered the lexicon as slang meaning, according to the *Oxford English Dictionary*, to "defame or vilify (a person) systematically, esp. in the mass media, usually with the aim of preventing his or her appointment to public office; to obstruct or thwart (a person) in this way."

[5] *New York Rules of Professional Conduct* 1.2(b), Comment [5] states:

> Legal representation should not be denied to any person who is unable to afford legal services, or whose cause is controversial or the subject of popular disapproval.

[6] A famous example in American history was John Adams's representation of the British soldiers who had fired on the crowd in the Boston massacre. Another example was Abe Fortas's willingness to represent an indigent habeas corpus petitioner when the request came to him from Chief Justice Warren, leading to the seminal constitutional ruling guaranteeing counsel in state criminal cases, *Gideon V. Wainwright*, 372 U.S. 335 (1963). *See* Anthony Lewis, GIDEON'S TRUMPET 48 (Vintage ed. 1966).

- For example, as a technical matter, sanctions imposed by the federal government may prohibit a person from doing certain kinds of business; lawyers are not allowed to violate those sanctions or facilitate the violation of the sanctions by the individuals, which can make it impossible for such persons to compensate a lawyer,7 and under such circumstances a lawyer is perfectly well justified in declining to work for no compensation.[8] As a further example, we can imagine circumstances in which an *individual* lawyer might choose not to represent a person whose actions or beliefs the lawyer finds too abhorrent, even though one can posit instances in which the same reluctance of many lawyers to take on a representation could make it difficult as a practical matter for a person to find willing counsel.

- Rule 1.2(b) of our Rules of Professional Conduct makes it clear that a client's views and positions are not generally to be imputed to the client's lawyer.[9] It seems clear that it is rarely ever proper as a matter of legal and ethical rules for a lawyer to be considered unfit for public duty merely because the lawyer represented unpopular or even unquestionably vile client or clientele. That general principle is not unfettered and should not be given greater scope than that to which it is entitled. Thus --

    - Even though lawyers are given great latitude in representing their clients and it is often difficult to decide where competent and diligent representation[10] ends and misconduct begins, there are limits on what a lawyer may or may not do in

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[7] *See Luis v. United States*, 578 U.S. 5 (2016). The Supreme Court acknowledged that "tainted" assets can be frozen even if that has the effect of making it impossible to pay a lawyer but held that assets unconnected with a crime cannot be frozen despite government's interest in maximizing recovery.

[8] *But see* Part V-B-1-d & note 20 *infra*.

[9] *New York Rules of Professional Conduct*, Rule 1.2(b) states:

> A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

See also Comment [5], note 5 *supra*.

[10] The traditional term "zealous" has been replaced in the *New York Rules of Professional Conduct* with "competent" and "diligent." Rules 1.7(b)(1) (Conflict of Interest: Current Clients) and 1.18(d)(3) (Duties to Prospective Clients) refer to "competent and diligent representation," while Rule 1.1(a) (Competence) refers to "competent representation." In this Report, we do not address the degree to which the substantive nature of the expectation and obligation may have changed.

representing a client. For example, attorney misconduct, such as filing frivolous lawsuits[11] or using the courts to harass opponents, is not condoned.[12]

- Although lawyers understand that representing an unpopular client is not an endorsement of that client or that client's positions, the converse is not necessarily true; lawyers can and often do seek to represent persons and causes that comport with their own viewpoints, and unlike the English barrister,[13] the US lawyer usually has complete discretion as to what to undertake to do. Accordingly, it can be willful blindness not to inquire regarding the lawyer's own positions and viewpoints.

- More importantly than the distinctions and nuances that the bar sees concerning this issue, we also recognize that the bar has no control over the general public or how members of the public perceive matters or act on them. The bar does, however, have an interest in educating the public regarding and attempting to bring about an understanding of this basic principle of legal representation, even if, as Alexander Hamilton wrote in a different context, "this is a thing more ardently to be wished than seriously to be expected."[14] Therefore, we believe that it is appropriate to lay out some of the considerations that should go into examining and evaluating a lawyer's corpus of work whenever a question arises as to whether what the lawyer has done in the past may be relevant to fitness for an office of public trust. We also believe that it is appropriate to discuss certain pressures that may in fact be on lawyers as they decide which project to, or, not to pursue and accept.

III. *SCOPE OF THIS REPORT*

This Report addresses the relationship between legal work and later political activity. After engaging in private practice and other advocacy pursuits, a lawyer may choose to seek elective office, a role in the judiciary, or other public service.

This Report does not address broader employment or reputational issues that may plague lawyers who served in, or represented, an unpopular Administration or who represent clients in certain industries. Thus, we will not be addressing situations in which a law firm has pressed a lawyer to resign because that lawyer has represented or seeks to represent clients that other clients of the firm find objectionable, nor will we address the potential that law students who have disrupted speakers at law schools may find themselves identified as having done so and denied certain employment opportunities.

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[11] *See* Federal Rules of Civil Procedure 11(b).

[12] *See, e.g.*, *New York Rules of Professional Conduct*, Rules 1.16, 8.4.

[13] *See Bar Standards Handbook*, Rule C29 (2023) ("cab rank rule").

[14] *Federalist 1* (1787).

This Report is directed to the public in the context of its review and evaluation of client representations and other law-related activities in which a lawyer may have previously engaged prior to pursuing a public service role or position.[15] This Report suggests considerations and factors that may advance the public's review and evaluation of the lawyer, but the Report does not purport to dictate the manner in which the various considerations and factors should be weighed or resolved.

Furthermore, this Report may be useful to attorneys as they practice in the private sector and engage in other advocacy pursuits to consider the impact of representations that they undertake on future endeavors. While this Report may be illustrative for attorneys in this regard, we expressly make no recommendations regarding whether or how lawyers should make decisions regarding client representation or other advocacy work based on these considerations. Lawyers will make their own career decisions, taking into account their own personal deliberations in light of applicable professional obligations. And while we hope that this Report will be constructive in the context of the public's examination of past legal engagements, we do not make any predictions as to how a lawyer's choices may be viewed and do not intend to provide any professional development advice to lawyers.

IV. *OUTLINE OF CONSIDERATIONS*

A. The role of the lawyer in the legal system

B. How to think about this: a qualitative, if not precisely quantitative, approach

1. Type of representation: in what circumstances and in what capacity did the lawyer come to represent the client?
2. What, realistically, was the nature of the lawyer's role and activity?
3. When did the events take place?
4. Nature of the client and the representation
5. What were the alternatives?
6. What actions did the lawyer take in representing the client or clients?
7. Evolving roles over the course of a representation or other project
8. How an association with a particular law firm or lawyer or other association may be perceived

C. Applications to speeches, writings and publications, as distinct from client representations

1. Nature of the writing or other expression
2. What were the legitimate expectations of privacy?

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[15] The activities with which we are concerned do not include activities outside the legal context unless there is a sufficient logical connection between such "general" activities and the lawyer's legal activities to assimilate them to the latter. This is not because general activities are irrelevant or insignificant but because the breadth and variety of such activities and the relevant considerations are far beyond the scope of this Report.

3. Writing may have purely theoretical aspects in a way that client representation does not
4. Lawyers produce professional and academic writing for a variety of different forums
5. Writing includes more than just original compositions

V. *DISCUSSION*

A. *The role of the lawyer in the legal system*

Lawyers represent clients, sometimes very unpopular clients, sometimes clients who may have committed heinous crimes. Indeed, the ability of the disdained to be represented vigorously by counsel is broadly considered to be a *sine qua non* of our legal system. Tracing the important contours of this aspect of our legal system –

- The Sixth Amendment to the Constitution, a core provision of the Bill of Rights ratified in 1791, provides:

  > In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

- This has always been construed to mean, at a minimum, that the government cannot insist that a person defend himself against criminal charges without representation.

- Over the course of the years, the Supreme Court held that the Sixth Amendment also requires that a defendant who cannot afford counsel shall be provided with counsel at the government's expense. In 1963, the Supreme Court extended this requirement to all state criminal cases.[16]

- Class action practice in civil matters has enabled the aggregation of large numbers of plaintiffs so as to make it feasible to pursue certain kinds of claims under circumstances where the small size of the injury to each individual plaintiff would otherwise make it not feasible to pursue cases individually.

- Although the United States is not alone in treating access to justice as a core value, what matters is not what a constitution and the laws say but how the executive operates and what actually can be enforced in the courts and respected by the government.[17] The United States is a world leader in having both robust and

[16] *See* note 5 *supra*.

[17] The 1977 constitution of the Soviet Union, for example, included freedom of speech, freedom of the press, freedom of assembly, freedom of religion, freedom of artistic work, protection of the family, the person and the home, the right to privacy, and rights to work, leisure, healthcare, housing, education, and cultural benefits. It is beyond question that many Soviet citizens found these promises to be illusory in practice. *See* SCALIA SPEAKS 161-64 (C. Scalia & E. Whelan ed. 2017).

independent court systems and a legal profession that aids in translating the concept into reality.

B. *Qualitative v. quantitative approaches*

In light of the foregoing, we are suggesting that, in the context of considering a lawyer for political or judicial positions, the lawyer's prior activities in connection with the representation of clients and prior legal writing and speaking activities be viewed through the lens of the lawyer's professional responsibilities and lawyers' collective role in the legal system. In that spirit, we offer the following factors and proposed guideposts. These are not intended to be exclusive, but rather to elucidate the kinds of issues and considerations that are involved and to stimulate discussion.

We stress that we present these factors and guideposts for anyone who might seek to consider what a lawyer has done in the past when evaluating that lawyer's candidacy for a later role, all in the context of an attorney's role in fostering the public's access to legal representation. As a corollary, we are mindful that these factors will be considered by lawyers in making their own decisions and imagining how those will be viewed and interpreted in the future.

1. *Type of representation*

What were the circumstances and reasons for taking on and conducting the representation, how extensive and central was the representation and what is the particular lawyer's role in how the clients are to be represented and tried?

Examples of questions that one might ask in this context include:

a. Was the client a new client for the representation in question, or was the client a long-standing or other existing client?

b. Did the lawyer have a realistic choice regarding whether to participate? Was the attorney a senior lawyer who fought for and engineered the representation, or was the attorney assigned by a superior to the matter?

c. Did the representation truly originate with the client, or did the lawyer seek out a client to pursue a case, either to advance a legal position or merely to make money (the latter often alleged to be the case in certain class actions where the lawyers get paid legal fees while clients get relatively little of value)?[18]

[18] *See, e.g., Chambers v. Whirlpool Corp.*, 980 F.3d 645 (9th Cir. 2020) (vacating with instructions to reevaluate lawyers' fees).

d. Was the client a pro bono client? Lawyers have a tradition of representing clients who cannot afford to pay for representation.[19] Observers might or might not perceive that pro bono activity is generally aspirational, though in some jurisdictions courts may assert the authority to assign a lawyer to defend a client in a matter regardless of whether the lawyer consents.[20] Some jurisdictions may require lawyers to engage in pro bono activity, and in that case a lawyer's choice of *which* client or clients to represent pro bono speaks to the lawyer's own views and orientation.

e. Taking a role as a public defender is a career choice, but it is an honorable and essential element of our system, and it would be unfair to criticize a lawyer for having undertaken this role. Furthermore, once a lawyer has assumed that role, the lawyer has far less than total discretion in deciding which cases to handle.

2. *The lawyer's specific role*

In thinking about the lawyer's role, it can matter what the lawyer actually did or did not do in any particular retention or other activity. For example:

a. Where on the spectrum were the positions taken by the lawyer on the client's behalf, from clearly meritorious to plausible to far-fetched, or might they even have been frivolous or otherwise brought for improper purposes (regardless of whether the lawyer was actually sanctioned)?[21]

b. Was the attorney advocating strictly for the client's agenda, or can it fairly be said that the attorney was also advocating for the attorney's own agenda? Other extrinsic evidence may bear on this question, including, for example, unrelated publications by the attorney and reported campaign contributions.

c. How visible was the lawyer? Was it a broad role of responsibility on the matter or was the lawyer assigned by a superior to do discrete research?

3. *When did the events take place?*

This point comprehends several considerations, including the following:

a. The age, maturity level and cumulative experience of the lawyer at the time of the particular behavior or statement could be relevant.

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[19] A discussion of the practices and jurisprudence regarding *pro bono* representation in the various states is beyond the scope of this Report.

[20] *See Madden v. Delran*, 126 N.J. 591 (1992). Whether this process may be subject to constitutional challenge is beyond the scope of this Report.

[21] *See* F.R.C.P. 11.

b. One may inquire whether and the degree to which the social and political context in which the events and the lawyer's representation occurred had any bearing on what the lawyer did then and whether the lawyer might have made different choices in other settings or might act differently in today's circumstances.

c. How much time has elapsed since the activity and what else has happened since then might have some bearing. Is a choice that the lawyer made recently identical in impact and relevance to something from decades before?[22]

4. *Nature of the client and the representation*

As we noted at the outset, it is unrealistic to expect that a lawyer's activities and associations will never be used by the public as a proxy for how to predict that lawyer's decisions in a governmental role or in evaluating whether to entrust the lawyer with a public trust.[23] Yet, there are several considerations that reflect who the client is that are to be borne in mind:

a. Most obviously, what was the nature of the accusations against the client and what was the scope of the representation taken on by the lawyer?

i. As noted above, even the most despicable persons accused of the most horrendous crimes or engaging in the most offensive, but legal, behaviors, are entitled to seek competent and diligent representation, regardless of what the lawyer's personal preferences might be. One would hardly expect an organization that claims to stand for the civil rights of the oppressed to represent Nazis, and yet that is exactly what the ACLU famously did in defending their claim to a First Amendment right to march through a Jewish neighborhood with an unusually large number of Holocaust survivors in Skokie, Illinois in 1978.[24]

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[22] This question is not always an easy one. A lawyer may sometimes perform services for client that the lawyer believes have been completed at a particular time – say serving on an advisory board to help an organization set itself up and get started – and then be caught off guard years later by the organization's continuing to publicize of the importance of the lawyer's role in its founding. Or a lawyer may permit a client to list the lawyer's name on what the lawyer believes to be nothing more than an "honorary" list of advisors, and that too can be referenced and exploited.

[23] *See* Michel Paradis & Wells Dixon, "In Defense of Unpopular Clients – And Liberty," *The Wall Street Journal* A17 (Nov. 19, 2020).

[24] *See National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977). In the same vein, one could imagine that the disputes in *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), and *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023), or other clashes between assertions of fundamental constitutional rights, could give rise to similar considerations.

ii. In addition, it can sometimes be forgotten that even an obviously guilty person, aside from having the right to put the state to its burden of proof, may have a legitimate interest in being subject to a just penalty, one that is not disproportionate to the crime. The same can be said with regard to civil cases where one side is clearly in the wrong but the remedy or measure of damages needs to be fairly determined. Statutes and the common law set criteria, boundaries and ranges, but there is a lot of discretion for a judge or a jury, as the case may be, within those bounds.

The manner in which the judicial system functions, and the many different contexts that may apply to the representation, should be taken into account by those seeking to consider the lawyer's prior role.

b. Was the full extent of the client's putative and actual behavior and culpability known to the lawyer when the lawyer agreed to the representation and during the duration of the representation?

c. Conversely, in evaluating a charge that a government lawyer was too harsh or too lenient in a particular case, it should be kept in mind that the government has a legitimate interest in prosecuting crime and civil violations but also has both discretion in deciding when not to prosecute[25] and an overarching obligation to seek justice rather than merely to seek convictions and the largest possible fines and the longest sentences.

5. *What were the alternatives?*

Were there others who could and would have represented the client(s) in question in a sufficiently competent way?

How important, objectively, was it for this lawyer to have taken on the representation? Was it a matter of the client's personal liberty in a criminal trial, defense in a civil trial, acting for the client as a plaintiff in a civil litigation or acting for the client in some other legal or planning capacity?

6. *What actions did the lawyer take in representing the client or clients?*

What, if anything, did the lawyer do or say in representing the client that might be viewed as going beyond what the observer believes a "reasonable lawyer" would or should have done or said in the course of providing competent and diligent representation? There are both objective and subjective guideposts, but there are gray areas: what one lawyer might consider an essential or important fact in a court filing might be seen by others as defamation with a protective veil against suit, and what one lawyer might consider a vigorous pursuit of an aggrieved client might

[25] *Wayte v. United States*, 470 U.S. 598 (1985).

be seen by others as a strategic lawsuit against public participation ("SLAPP") against which legislation has been enacted in a majority of the states.

In addition, where applicable, did the lawyer advance or detract from the good of the profession – and of society – as a whole? Apart from whom the lawyer represented and what the lawyer did or did not achieve for the client(s), what, if anything, did the lawyer bring about in a broader sense? Does a "law and order" advocate hold it against the attorneys in the *Miranda* and *Gideon* cases[26] for having convinced the Supreme Court in those cases to rule as it did? Do elements of the public hold it against the O.J. Simpson legal team for having achieved an acquittal in that case? These are complicated and nuanced issues, but should be considered against the backdrop of the lawyer's commitment to the country's legal system as a whole and to the client in particular.

There is also the legitimate question of the lawyer's precise role regarding any given matter. There is a patent difference between diligently representing a client in an attorney-client relationship and being involved in an underlying criminal or otherwise inappropriate enterprise.[27] Likewise, there are differences among representing an individual, representing an organization that purports to advocate for a particular class of individuals who are not actually the lawyer's clients and representing an organization or "movement" in which one is a member or adherent and believes in its goals and objectives.

7. *Evolving Roles over the Course of a Representation or Other Project*

Because lawyers' careers evolve, they can face multiple and inconsistent criticisms. A prosecutor may later become a white-collar defense attorney. A government regulatory lawyer may later become an attorney for the companies at the heart of governmental and class-action claims. These are common and accepted career developments, just as are movements from the private sector to the public sector. Should these progressions disqualify the lawyer from later activity or otherwise be viewed negatively?

8. *How an association with a particular law firm or lawyer or other association may be perceived*

A law firm may be involved with an unpopular client or sector, and a lawyer at the firm may be tasked with leading or otherwise participating in the advocacy effort. Over the years, there have

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[26] *Miranda v. Arizona*, 384 U. S. 436 (1966) (prior to police interrogation, apprehended criminal suspects must be apprised of their constitutional rights); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right of indigent defendant to have counsel appointed), *supra*.

[27] *See New York Rules of Professional Conduct*, Rule 1.16(c)(2):

> [A] lawyer may withdraw from representing a client when . . . the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent.

been periodic suggestions that law students should to shun certain firms because they tended to be on the "wrong side" of certain societal issues. The unpopularity of a particular lawyer or of whom he represents can even affect others who merely are associated with that lawyer in the same firm.

A related issue is raised by suggestions made by some to law students and young lawyers that they should avoid certain activities and professional affiliations, for fear that they will not be received well by those reviewing the applicants later. We express no view as to the wisdom or practicality of these approaches, but we do note that they may raise real and legitimate practical considerations.

C. *Writings, speeches and other presentations*

The same set of considerations arises in connection with writings that a lawyer has published under circumstances that were not necessarily connected with a client representation.[28] But there are additional considerations as well. Although it is more frequent for a lawyer to face compulsion to take positions not in accord with one's own philosophy and beliefs in the course of representing a client than it is in nonrepresentational settings, nonetheless, there is a long tradition of lawyers' writing articles or other pieces of a legal research nature exploring issues from the standpoint of others and even on a theoretical or intentionally provocative basis.

It is difficult to say that advocacy of positions outside of a client representation has the same core status as actual client representation, but even in these contexts, there can be a variety of relevant considerations regarding such matters.

1. *Nature of the writing or other presentation*

    a. Is a short letter to the editor of a newspaper or other publication – or in an online community – the same as a long and thoroughly developed op-ed or other opinion piece?

    b. Does adding one's signature to an "open letter" or position paper along with multitudes of others necessarily commit the individual to the specifics expressed therein to the same degree as having written a piece oneself?

2. *What were the legitimate expectations of privacy?*

Was the writing intended for public consumption, or did the lawyer intend it to remain anonymous or private or to be seen or heard by only a very small audience of confidants? One might have a greater expectation of privacy in respect of a text message on a telephone, a letter sent to one close friend or a written work shared within a small group than with a letter sent to a Member of Congress, for example, that might turn up later in the public domain.

[28] For example, as noted above, the 1993 nomination of the late Lani Guinier to be Assistant Attorney General for Civil Rights was derailed in large measure by objections to her approach to the law as expressed in her writings.

3. *Writing may have purely theoretical aspects in a way that client representation does not*

If a lawyer produced a research memo for a superior in a firm or a government agency who asked the lawyer to examine one or both sides of an issue, should the lawyer be held responsible for expressing a positive view with respect to a position that he or she now wishes to disavow? Does it matter whether it was clear at the time or became clear subsequently to the production of the memo that the superior was leaning in one direction or another?

4. *Lawyers produce professional and academic writing for a variety of different forums*

Different kinds of professional writing and analysis, for different audiences, might need to be evaluated in different ways.

a. Can written work produced before law school ever be deemed relevant? This might well depend on how sophisticated or extensive the work was and whether it was of a nature similar to legal writing. A college senior sociology thesis that stakes out a particular distinct position might well be relevant, while a doctoral dissertation in mathematics may be expected not to be.

b. Is a paper or law review note that the lawyer wrote while in law school probative? It is not always possible to secure a publication slot for a piece on the subject of one's choice or one expressing a majority view on a particular subject, and many pieces are constrained to examine the pros and cons of all the positions. Conversely, does a student get a pass, so to speak, for using a controversial piece as an understandable and opportunistic way of standing out?

5. *Writing includes more than just original compositions*

To what degree should a lawyer have to answer for short or extensive quotations in material written or compiled by others, for having associated with those particular others in allowing the quotations or for having favorably or unfavorably reviewed the work of others?

VI. *CONCLUSION*

The principal purpose of this Report is to raise awareness among the public as to the critical role that lawyers play in achieving access to justice, even for, and perhaps more critically for, the most unpopular individuals. We recognize that the public may not understand or agree with the proposition to which the legal profession adheres that a lawyer who has represented unpopular clients or causes should not, for that reason alone, be judged unfit for public service. We have attempted to provide an analytical framework and some guideposts for members of the public in connection with the evaluation of a lawyer's prior legal and related activities when the lawyer is later seeking a governmental position or other position of public trust. We have endeavored here to identify relevant considerations, without attempting to resolve how one should or might balance those considerations. We have not attempted to be comprehensive in our identification of relevant factors, but hope that we have highlighted some of the more important considerations

and that this Report will advance informed discussion and polite debate regarding these nuanced and important matters.