

District of Columbia Court of Appeals
Board on Professional Responsibility
Office of Disciplinary Counsel

In the Matter of

MICHAEL JAY ELLIS,
JOHN EISENBERG, and
DONALD F. MCGAHN II,

Members of the Bar of the District of Columbia.

Disciplinary Complaint

Introduction and summary	1
The respondents	1
The violations.....	1
The relevant facts	3
A. Michael Ellis’s service as general counsel for the House Intelligence Committee	3
B. Mr. Ellis’s hiring by the Office of White House Counsel	4
C. Messrs. Eisenberg and McGahn’s supervisory and/or managerial roles	6
D. President Trump’s accusation that former President Obama had him wiretapped	6
E. Rep. Nunes’s apparent collusion with the White House	8
F. The involvement of Messrs. Ellis and Eisenberg in the provision of intelligence information to Chairman Nunes.....	9
G. The role of the Office of White House Counsel as to the House Committee’s investigation	11
Discussion	13
I. The violations by Mr. Ellis.....	13
A. Mr. Ellis’s violation of RPC 1.9 and 1.11(a).....	13
1. Rule 1.11(a): “Revolving-door” conflicts	13
2. Rule 1.9: Former-client conflicts	16
3. The issue of waiver	18
B. Mr. Ellis’s possible violation of RPC 8.4.....	18
II. The possible violations of RPC 8.4 by Mr. Eisenberg	19
III. The possible violations of RPC 5.1 by Mr. Eisenberg and/or Mr. McGahn	19
A. RPC 5.1(a): Duties of managerial attorneys generally	19
B. RPC 5.1(b): Duties of attorneys having direct supervisory responsibility over other attorneys	20
C. RPC 5.1(c): Vicarious responsibility for another attorney’s violation.....	21
Conclusion	21

This disciplinary complaint is asserted by Neal Goldfarb against Michael Jay Ellis, John Eisenberg, and Donald F. McGahn II all of whom are members of the District of Columbia bar.

Introduction and summary

The respondents

Messrs. Ellis, Eisenberg, McGahn are part of the legal staff of the Trump White House. The mailing address for each of them is as follows:

The White House
1600 Pennsylvania Ave., N.W.
Washington, D.C. 20500

Mr. McGahn is White House Counsel, and as such he is the head of the Office of White House Counsel and is President Trump's chief legal advisor.

Messrs. Ellis and Eisenberg hold multiple White House positions:

- They are part of the Office of White House Counsel. Mr. Eisenberg is Deputy Counsel for the President for National Security Affairs, and Mr. Ellis is Senior Associate Counsel to the President.
- They also hold positions on the staff of the National Security Council. Mr. Eisenberg is National Security Council Legal Advisor and Mr. Ellis is Deputy National Security Council Legal Advisor.
- Finally, both Mr. Ellis and Mr. Eisenberg hold positions as assistants to the president. Mr. Ellis is Special Assistant to the President and Mr. Eisenberg is Deputy Assistant to the President.

Immediately before Mr. Ellis joined the White House staff, he served as general counsel to the House Permanent Select Committee on Intelligence ("the Committee," "the House Committee," or "the House Intelligence Committee").

The violations

At issue in this complaint is conduct by the respondents that relates to the actions of Rep. Devin Nunes, chairman of the House Intelligence Committee, as a de facto surrogate of President Trump.

The conduct at issue relates to Rep. Nunes's contention that communications of U.S. citizens involved in the Trump transition had been incidentally collected as part of federal surveillance activities. That contention was part of an effort to justify President Trump's accusation that former President Obama had tapped his phones. However, Rep. Nunes turned out to have been acting in concert with the White House, and his statements were based on information that had been provided by (or at least with the assistance of) staffers at the White House.

Among those staffers, according to reports by the *New York Times* and *Washington Post*, were respondents Michael Ellis and John Eisenberg. At issue in this complaint are the roles played by Mr. Ellis and Mr. Eisenberg in the provision of the intelligence information to Rep. Nunes. Also at issue

are the acts (and failures to act) of Mr. McGahn and Mr. Eisenberg in their capacities as managerial or supervisory members of the White House staff.

This complaint focuses primarily on Mr. Ellis. The principal allegation against him is that he violated RPC 1.9 (governing “revolving-door” conflicts) and RPC 1.11(a) (governing former-client conflicts) by working on a matter in his current position at the White House that is the same as, or substantially related to, a matter in which he participated personally and substantially in his previous position as general counsel to the House of Representatives Permanent Select Committee on Intelligence immediately before he began working at the White House.

In particular, Mr. Ellis’s actions in connection with the disclosure of intelligence information to Rep. Nunes were substantially related to the subject matter of the Committee’s investigation into the Russian interference in the 2016 presidential campaign, into possible collusion with Russia by persons associated with the Trump campaign, and in to possible government surveillance of persons associated with the Trump campaign. In addition, Mr. Ellis’s actions were substantially related to the investigation itself, and were adverse to the Committee’s interests.

In addition to violating RPC 1.9 and 1.11(a), Mr. Ellis’s conduct may have involved dishonesty, fraud, deceit, or misrepresentation, in violation of RPC 8.4(c), or may have seriously interfered with the administration of justice (namely, the House Committee’s investigation), in violation of RPC 8.4(d). I say that his conduct “may have” violated those rules because the information I am aware of is not sufficient to support a conclusion one way or the other. However, this is an issue that warrants investigation.

Mr. Eisenberg may have similarly violated RPC 8.4. Like Mr. Ellis, he was reportedly involved in the provision of intelligence information to Rep. Nunes. And as is the case with Mr. Ellis, the information that I am aware of raises, but does not answer, the question whether Mr. Eisenberg violated Rule 8.4.

Finally, Mr. Eisenberg and/or Mr. McGahn may have violated their obligations under RPC 5.1 as attorneys who had managerial or supervisory authority over Mr. Ellis.

A few general points about this complaint should be noted up front.

First, I have no personal knowledge of the relevant facts, and the complaint is therefore based entirely on publicly available information. That information has come almost entirely from what is described these days as the mainstream media and from liberal-leaning media outlets that are critical of President Trump and his administration. The sources I have cited are, I believe, generally more reliable than Fox News and the other members of the conservative media. (As far as I know, there are no media outlets covering politics that are completely neutral with respect to President Trump, but I don’t think that reliability always requires neutrality.)

Second, even if one disagrees with the viewpoint of those critical of President Trump, that viewpoint is independently relevant. Although the Rules of Professional Conduct generally do not incorporate the “appearance of impropriety” standard, the revolving-door rule represents an exception. As is noted in the comments to that rule, the rule “carries forward a policy of avoiding

both actual impropriety and the appearance of impropriety that is expressed in the federal conflict-of-interest statutes and was expressed in the former Code of Professional Responsibility.”¹ Therefore, In considering whether Mr. Ellis’s conduct creates such an appearance, it is reasonable to rely on the facts as reported by news outlets that are widely read and generally regarded as reliable.

Third, I recognize that this complaint is probably longer and more detailed than most complaints submitted to the Board. That unusual length and detail reflects the fact that the complaint itself is out of the ordinary, in its subject matter and public importance, in the complexity of the issues, and in the wide range of circumstances that are relevant to inquiry that the Office will have to conduct. The amount of detail that is provided, as well as the fairly extensive citation of sources, represents an attempt to provide a roadmap that will assist the Office of Disciplinary Counsel in its screening and investigation process.

The relevant facts

A. Michael Ellis’s service as general counsel for the House Intelligence Committee

As the members of the Office of Disciplinary Counsel are undoubtedly aware, there are a number of separate investigations into Russian interference with the 2016 presidential election and possible collusion with Russia by members of the Trump campaign (and subsequently by members of the Trump transition team). Among those investigations is the one being conducted by the House Intelligence Committee, which is chaired by Rep. Devin Nunes. After Donald Trump’s victory in the 2016 election, Chairman Nunes served on the executive committee of the Trump transition team.²

One of the attorneys named in this complaint, Michael Ellis, was the House Committee’s general counsel from January 2016 through February 2017.³ That time period included the beginning of the Committee’s investigation; on January 25, 2017, Chairman Nunes and Ranking Member Adam Schiff released a joint statement indicating that the investigation was already underway.⁴ That statement described the issues that were the subject of the investigation; they included whether the

1. RPC 1.11, Comment 5.

2. Trump-Pence Transition Team, *President-Elect Donald J. Trump Announces New Executive Committee Members And Staff Leadership Positions Serving On Presidential Transition Team* (Dec. 15, 2016), <http://tinyurl.com/ktcq4s>.

3. LinkedIn profile of “Michael E.,” <http://tinyurl.com/lx6crb2> (accessed April 8, 2017). Although the profile does not include Mr. Ellis’s last name, the biographical details it lists match those provided in the White House press release that announced Mr. Ellis’s appointment to his current position. See White House, Office of the Press Secretary, *President Donald J. Trump Announces Key Additions to the Office of the White House Counsel* (March 7, 2017), <http://tinyurl.com/lpp78m3>.

4. House Permanent Select Committee on Intelligence, Press Release, *Joint Statement on Progress of Bi-partisan HPSCI Inquiry into Russian Active Measures* (Jan. 25, 2017), <http://tinyurl.com/mpkewux>.

Russian activities included “links between Russia and individuals associated with political campaigns or any other U.S. Persons” and how the U.S. government responded to Russia’s actions. Although I am unaware of any public information as to whether Mr. Ellis had by this point done any work relating to the investigation, it is reasonable to believe that given his position as the Committee’s general counsel, Mr. Ellis had in fact been personally and substantially involved in such work. This investigation was, after all, probably the most important issue that was before the Committee.

For the same reason, it is reasonable to believe that Mr. Ellis continued to do work relating to the investigation throughout the remainder of his time at the Committee. On March 1, the Committee announced that the Chairman and Ranking Member had agreed on a “detailed, six-page scoping document” specifying the investigation’s parameters.⁵ The press release said that the scoping document itself was classified, but it summarized the general areas of inquiry, which included the two issues that are described above. Although Mr. Ellis had apparently left the Committee staff by the time this press release was issued (according to his LinkedIn profile, he worked at the Committee through February), he had most likely been personally and substantially involved in the framing and drafting of the scoping document, as well as other issues relating to the investigation.

B. Mr. Ellis’s hiring by the Office of White House Counsel

Mr. Ellis’s service as general counsel of the House Committee ended sometime in February 2017,⁶ and on March 7 the White House announced that he had joined the Office of White House Counsel.⁷

That job change was unusual, considering that the Committee’s investigation threatens the interests of President Trump and several of his senior staffers. The president himself is at a minimum a potential subject of the investigation, as are several present and former members of his senior staff, including the president’s son-in-law Jared Kushner, fired-National-Security-Advisor Michael Flynn, and strategist-and-campaign-CEO Steven Bannon.⁸ Also within the likely scope of the investigation

5. House Permanent Select Committee on Intelligence, Press Release, *Intelligence Committee Chairman, Ranking Member Establish Parameters for Russia Investigation* (March 1, 2017), <http://tinyurl.com/kgqu649>.

6. LinkedIn profile of “Michael E.,” <http://tinyurl.com/lx6crb2> (accessed April 8, 2017). See note 3, above.

7. White House, Office of the Press Secretary, *President Donald J. Trump Announces Key Additions to the Office of the White House Counsel* (March 7, 2017), <http://tinyurl.com/lpp78m3>.

8. See, generally, e.g., Rep. Eric Swallwell, *Russia: Trump & His Team’s Ties*, <http://tinyurl.com/gl7vj5c>; Luke Harding et al., *British spies were first to spot Trump team’s links with Russia*, *The Guardian* (April 13, 2017), <http://tinyurl.com/mz3zsxm>; Josh Marshall, *Piecing Together More Details on Trump and Russia*, *Talking Points Memo* (April 13, 2017), <http://tinyurl.com/l87qdqa>; Bonnie Berkowitz, *Here’s what we know so far about Team Trump’s ties to Russian interests*, *Washington Post* (March 31, 2017; updated April 11, 2017), <http://tinyurl.com/kaobet3>; Steven Harper, *A Timeline: Russia and President*

are (among others) Attorney General Jeff Sessions, whose confirmation-hearing testimony was less than fully forthcoming about his contacts with the Russian ambassador;⁹ former Trump campaign manager Paul Manafort, who was paid millions of dollars for consulting work for the benefit of the Putin regime;¹⁰ and former Trump campaign advisor Carter Page, who was reportedly the target of surveillance under the Foreign Intelligence Surveillance Act based on evidence that he was operating as a Russian agent.¹¹ The investigation's scrutiny will in all likelihood also be attracted to the fact that President Trump has a long history of business dealings with Russian businessmen, some of

Trump, Moyers & Co. (April 10, 2017), <http://tinyurl.com/h2bqpeo>; Zeeshan Aleem, *The Trump-Russia allegations sound incriminating. But would any of them be illegal?*, Vox (April 5, 2017), <http://tinyurl.com/mx4z5uw>; Michael Crowley, *All of Trump's Russia Ties*, in *7 Charts*, Politico Magazine (March/April 2017), <http://tinyurl.com/h7tt65z> (accessed April 14, 2017); David French, *A Beginner's Guide to the Trump/Russia Controversy*, National Review Online (March 31, 2017), <http://tinyurl.com/ltp5ppd>; Del Quentin Wilber & Angelica Quintero, *Trump's team: A network of ties to Russia*, Los Angeles Times (March 30, 2017), <http://tinyurl.com/l6b4dny>; Hannah Levintova, *The Long, Twisted, and Bizarre History of the Trump-Russia Scandal*, Mother Jones (Mar. 24, 2017), <http://tinyurl.com/mvm4xwx>.

9. See, e.g., Robert Farley, *Did Sessions 'Lie'?*, FactCheck.Org (March 2, 2017), <http://tinyurl.com/jyjewx2>; Adam Entous et al., *Sessions met with Russian envoy twice last year; encounters he later did not disclose*, Washington Post (March 1, 2017), <http://tinyurl.com/ltggb7b>.
10. Jeff Horwitz & Chad Day, *Before Trump job, Manafort worked to aid Putin*, Associated Press (March 22, 2017), <https://tinyurl.com/n43963v>; Eliza Relman & Natasha Bertrand, *Paul Manafort is now at the center of the Trump-Russia investigation — here's what you need to know about him*, Business Insider (Mar. 24, 2017), <https://tinyurl.com/m3la3os>. Regarding other activities raising questions about Manafort's ties to Russia, see, e.g., Tim Mak, *Congressman Investigating Trump Goes to Russia's Money Laundromat, Cyprus*, The Daily Beast (April 14, 2017), <http://tinyurl.com/k2lkm6k>; Jack Gillum et al., *US probe of ex-Trump aide extends to Cyprus*, Associated Press (Mar. 23, 2017), <http://tinyurl.com/m3yudwc>.

A legal ethics complaint has been filed against Manafort in Connecticut, where he is admitted to practice law. It is available at <http://tinyurl.com/kxofldz>. See Chris White, *Ethics Complaint Alleges 'Reasonable Grounds to Believe Paul Manafort Engaged in Racketeering'*, Law Newz (April 18, 2017), <http://tinyurl.com/mlncpsc>.

11. Matthew Rosenberg & Matt Apuzzo, *Court Approved Wiretap on Trump Campaign Aide Over Russia Ties*, New York Times (April 12, 2017), <http://tinyurl.com/kbf3lav>; Ellen Nakashima et al., *FBI obtained FISA warrant to monitor Trump adviser Carter Page*, Washington Post, (April 11, 2017), <http://tinyurl.com/n8yu7es>. For additional background information, see, e.g., Scott Shane et al., *Trump Adviser's Visit to Moscow Got the F.B.I.'s Attention*, New York Times (April 19, 2017), <http://tinyurl.com/n4yu3s6>; Kevin G. Hall, *Why did FBI suspect Trump campaign adviser was a foreign agent?*, McClatchy News (April 14, 2017), <http://tinyurl.com/mxrehpm>.

whom are alleged to have had ties to organized crime.¹² So it is hardly surprising that in the five weeks before the Committee's March 20 hearing and Rep. Nunes's March 22 press conference, President Trump repeatedly denounced the allegations of his campaign's ties to Russia as "fake news."¹³ And as discussed below, he subsequently tried to divert attention from the Russia scandal by making baseless charges that the Obama administration had conducted improper surveillance of his campaign.

C. Messrs. Eisenberg and McGahn's supervisory and/or managerial roles

According to the *Washington Post*, Mr. Ellis reported to both Mr. Eisenberg and Mr. McGahn.¹⁴ That dual-reporting structure probably reflects the fact that Mr. Ellis and Mr. Eisenberg were on the staff of both the White House Counsel's Office and the National Security Council. As part of the White House Counsel's Office, Mr. Eisenberg was Deputy Counsel for the President for National Security Affairs and Mr. Ellis was Senior Associate Counsel to the President; as part of the NSC staff, Mr. Eisenberg was National Security Council Legal Advisor and Mr. Ellis was Deputy National Security Council Legal Advisor.¹⁵ So it is likely that when Mr. Ellis wore his Office-of-White-House-Counsel hat, he reported to Mr. McGahn and that when he wore his NSC hat, he reported to Mr. Eisenberg.

D. President Trump's accusation that former President Obama had him wiretapped

The announcement of Mr. Ellis's new position was made three days after President Trump had touched off a firestorm of criticism with a series of Tweets accusing former President Obama of

12. See, e.g., Oren Dorell, *Trump's business network reached alleged Russian mobsters*, USA Today (March 28, 2017), <http://tinyurl.com/m45rw9c>; Martin Longman, *Trump's SoHo Project, the Mob, and Russian Intelligence*, Washington Monthly (Feb. 20, 2017), <http://tinyurl.com/mxjgfu9>; Michael Rothfeld & Alexandra Berzon, *Donald Trump and the Mob*, Wall Street Journal (Sept. 1, 2016), <http://tinyurl.com/zzhg3gv>.

13. E.g., Louis Nelson, *Trump: Everyone knows Russia allegations are 'fake news,'* Politico (March 20, 2017), <http://tinyurl.com/k7unyl9>; Rebecca Savransky, *Trump: 'Russia talk is FAKE NEWS put out by the Dems, and played up by the media,'* The Hill (Feb. 26, 2017), <http://tinyurl.com/hmmxybe>; Tom McCarthy, *'Russia is fake news': Trump decries reports of pre-election communication*, The Guardian (Feb. 16, 2017), <http://tinyurl.com/grr25fr>.

14. Greg Miller & Karen DeYoung, *Three White House officials tied to files shared with House intelligence chairman*, Washington Post (March 30, 2017), <http://tinyurl.com/lb4t2qz>.

15. Trump-Pence Transition Team, *President-Elect Donald J. Trump Announces New Executive Committee Members And Staff Leadership Positions Serving On Presidential Transition Team* (Dec. 15, 2016), <http://tinyurl.com/ktcoq4s>.

having wiretapped him during the presidential campaign.¹⁶ That accusation was within the scope of the House Committee's investigation, or at least substantially related to matters within the scope of the investigation. So, too, was the broader issue of any surveillance during the Obama administration that may have resulted in the collection (whether incidental or otherwise) of communications by or about members of the Trump campaign or the Trump transition team.

These conclusions are compelled by the actions of the White House and Chairman Nunes in the days immediately following President Trump's tweets. On March 5, press secretary Sean Spicer released a statement (via Twitter, appropriately) saying, "President Donald J. Trump is requesting that as part of their investigation into Russian activity, the congressional intelligence committees exercise their oversight authority to determine whether executive branch investigative powers were abused in 2016."¹⁷ The obvious implication was that the alleged wiretapping had been conducted in connection with the Russia investigation during the campaign.

That same day, a statement by Rep. Nunes made it clear that the wiretapping allegation fell within the scope of the Committee's investigation:

One of the focus points of the House Intelligence Committee's investigation is the U.S. government's response to actions taken by Russian intelligence agents during the presidential campaign. As such, the Committee will make inquiries into whether the government was conducting surveillance activities on any political party's campaign officials or surrogates, and we will continue to investigate this issue if the evidence warrants it.¹⁸

Rep. Nunes made a similar statement during his opening remarks at the Committee's public hearing on March 20:

I hope today's hearing will shed light on three important focus points of the committee's investigation on Russia active measures. First,....

Number two, were the communications of officials or associates of any campaign subject to any kind of improper surveillance? The intelligence community has—has extremely strict procedures for handling information pertaining to any U.S. citizens who are subject even to incidental surveillance. And this committee wants to ensure all surveillance activities have followed all relevant laws, rules and regulations. *Let me be clear, I've been saying this for several weeks. We know there was not a*

16. See, e.g., Veronica Stracqualursi & Adam Kelsey, *A timeline of President Trump's unsubstantiated wiretapping claims* (Apr 6, 2017), Philip Rucker et al., *Trump, citing no evidence, accuses Obama of 'Nixon/Watergate' plot to wiretap Trump Tower* (March 4, 2017)

17. Esme Cribb, *White House Calls For Congress To Investigate Trump's Wiretap Claims*, Talking Points Memo (March 5, 2017), <http://tinyurl.com/k72tmkb>.

18. House Permanent Select Committee on Intelligence, Press Release, *Nunes Statement on Surveillance of Political Campaigns* (March 5, 2017), <http://tinyurl.com/gthzsoj>.

*physical wiretap of Trump Tower. However, it's still possible that other surveillance activities were used against President's Trump and his associates.*¹⁹

At the hearing, both FBI director James Comey testified that neither the FBI nor the Justice Department as a whole had any information supporting President Trump's accusation against former President Obama. Similarly, National Security Agency director Admiral Michael Rogers testified that there was no basis for White House's claim a few days earlier that the alleged wiretapping had been carried out by British Intelligence.²⁰

E. Rep. Nunes's apparent collusion with the White House

On March 22, two days after the House Intelligence Committee's hearing, Rep. Nunes held an unexpected press conference, at which he announced that he had been shown evidence that "on numerous occasions, the Intelligence Community incidentally collected information about U.S. citizens involved in the Trump transition."²¹ He said that he had informed House Speaker Paul Ryan of the information and would be going to the White House "to share what I know with the President." Rep. Nunes did in fact go to the White House, where he apparently met with President Trump.²² Later that day, President Trump said that as a result of the information, he felt "somewhat" vindicated with respect to his wiretapping accusations.²³

Despite having shared the information with Speaker Ryan and having announced his intention to share it with President Trump (one of the subjects of the Committee's investigation), Rep. Nunes had not disclosed the information to anyone else on the Committee, not even its Ranking Member, Rep. Adam Schiff.²⁴ That failure was sharply criticized by Rep. Schiff,²⁵ and Rep. Nunes was widely (and

19. *Full transcript: FBI Director James Comey testifies on Russian interference in 2016 election*, Washington Post (March 20, 2017) (emphasis added; paragraph breaks modified), <http://tinyurl.com/mduzz37>.

20. *Id.* Regarding the White House's accusation, see, e.g., Peter Baker & Steven Erlanger, *Trump Offers No Apology for Claim on British Spying*, New York Times (March 7, 2017), <http://tinyurl.com/mrn76h9>.

21. Matthew Rosenberg et al., *Monitoring May Have 'Incidentally' Picked Up Trump Aides, House Member Says*, New York Times (March 22, 2017), <http://tinyurl.com/macvfot>; Greg Miller et al., *House Intelligence chair says Trump campaign officials were ensnared in surveillance operations*, Washington Post (March 22, 2017), <http://tinyurl.com/lw6w6kq>; Steven Collinson et al., *House Intel chairman: Trump's personal communications may have been collected*, CNN (March 22, 2017), <http://tinyurl.com/nye5mlp>; House Permanent Select Committee on Intelligence, Press Release, *Chairman Nunes Comments on Incidental Collection of Trump Associates* (March 22, 2017), <http://tinyurl.com/k2b9gz3>.

22. See, e.g., news media sources cited in note 21, above.

23. See, e.g., news media sources cited in note 21, above.

24. E.g., Matthew Rosenberg et al., *Monitoring May Have 'Incidentally' Picked Up Trump Aides, House Member Says*, New York Times (March 22, 2017), <http://tinyurl.com/macvfot>; Steven Collinson et al.,

reasonably) seen as carrying water for President Trump. In particular, he was seen as assisting the President in his efforts to distract attention from the Committee's investigation, and possibly even to disrupt the investigation.²⁶ In taking those actions, Rep. Nunes was acting outside his appropriate role as chairman of the House Intelligence Committee.

F. The involvement of Messrs. Ellis and Eisenberg in the provision of intelligence information to Rep. Nunes

It has been reported (without denial by Rep. Nunes or the White House) that the information that Rep. Nunes received, and that he made a great show of presenting to President Trump, had been provided to him *by the White House*.²⁷ And according to reports in the *New York Times* and the

House Intel chairman: Trump's personal communications may have been collected, CNN (March 22, 2017), <http://tinyurl.com/nye5mlp>.

25. See, e.g., news media sources cited in note 21, above.

26. See, e.g., Russell Berman, *The Swift Fall of Devin Nunes*, The Atlantic (April 6, 2017), <http://tinyurl.com/lf5y4je>; Jason Easley, *Trump Devastated As Adam Schiff Says Devin Nunes Never Derailed The Russia Investigation*, PoliticsUSA (April 6, 2017), <http://tinyurl.com/lboz47q>; Ashley Parker, *Top Democrat accuses White House of trying to distract from Russia probe*, Chicago Tribune, <http://tinyurl.com/mrwvov6>; John Amato, *Shep Smith: Chairman Nunes Is A 'Weapon Of Mass Distraction'*, Crooks and Liars (March 31, 2017), <http://tinyurl.com/m3n8ave>.

The *New Yorker's* Ryan Lizza has written, "The evidence is now clear that the White House and Devin Nunes, the chairman of the House Intelligence Committee, have worked together to halt what was previously billed as a sweeping investigation of Russian interference in last year's election." Ryan Lizza, *How the White House and Republicans Blew Up the House Russia Investigation*, The New Yorker (March 28, 2017), <http://tinyurl.com/m9ee9lm>.

See also, e.g., Yochi Dreazen, *Devin Nunes's botched effort to scuttle the Trump/Russia investigation, explained*, Vox (Mar. 29, 2017), <http://tinyurl.com/knkgn27>; Greg Miller & Karoun Demirjian, *Chairman and partisan: The dual roles of Devin Nunes raise questions about House investigation*, Washington Post (March 26, 2017), <http://tinyurl.com/lts6m8>; Matt Flegenheimer & Emmarie Huettelman, *In Washington's Daily Trump Wars, Devin Nunes Becomes a Human Shield*, New York Times (March 24, 2017), <http://tinyurl.com/jvnzjkd>.

27. Matthew Rosenberg et al., *2 White House Officials Helped Give Nunes Intelligence Reports*, New York Times (March 30, 2017), <http://tinyurl.com/kkqbnbx>; Greg Miller & Karen DeYoung, *Three White House officials tied to files shared with House intelligence chairman*, Washington Post (March 30, 2017), <http://tinyurl.com/lb4t2qz>.

Washington *Post*, one of the people who was involved in giving Rep. Nunes the information in question was Michael Ellis—the primary subject of this complaint.²⁸

A pair of White House officials helped provide Representative Devin Nunes of California, a Republican and the chairman of the House Intelligence Committee, with the intelligence reports that showed that President Trump and his associates were incidentally swept up in foreign surveillance by American spy agencies.

...

Since disclosing the existence of the intelligence reports, Mr. Nunes has refused to identify his sources, saying he needed to protect them so others would feel safe going to the committee with sensitive information. In his public comments, he has described his sources as whistle-blowers trying to expose wrongdoing at great risk to themselves.

That does not appear to be the case. *Several current American officials identified the White House officials as Ezra Cohen-Watnick, the senior director for intelligence at the National Security Council, and Michael Ellis, a lawyer who works on national security issues at the White House Counsel's Office and was previously counsel to Mr. Nunes's committee.* Though neither has been accused of breaking any laws, they do appear to have sought to use intelligence to advance the political goals of the Trump administration.

Given that Mr. Ellis had an existing relationship with Rep. Nunes due to his service as the House Committee's general counsel, it was most likely Mr. Ellis who acted as the White House's point of contact with Rep. Nunes. And in fact, *New York Times* reporter Maggie Haberman has said that it was Ellis who showed the information to Nunes.²⁹

Mr. Ellis's involvement in the provision of the information to Rep. Nunes was confirmed by Fox News, which is hardly a source hostile to the White House.³⁰ As noted above, neither Rep. Nunes nor

28. See sources cited in note 27, above. *See also, e.g.,* Zack Beauchamp, *Devin Nunes's wiretapping claims came from his former lawyer and a 30-year-old Trump aide*, Vox (March 30, 2017), <http://tinyurl.com/luc9d5l>.

29. Maggie Haberman (@maggieNYT), Twitter (March 30, 2017, 10:42 a.m.), <https://twitter.com/maggieNYT/status/847504242478796800>.

30. Transcript and video, *Fox News confirms WH officials shared intel with Nunes*, Fox News (March 30, 2017), <http://tinyurl.com/mgb5ufc>.

A different report several days later on *Fox & Friends* purported to challenge one aspect of the *New York Times* story, but in fact the two stories are consistent with one another. According to the *Fox & Friends* report, the *Times* had been wrong in “insinuating” that it had been Messrs. Ellis and Cohen-Watnick who had made Rep. Nunes aware of the information in question. Video, *Sources: Trump, associates surveilled for up to year*, Fox News (April 3, 2017) (portion of video beginning at 3:20), <http://tinyurl.com/mpfwuvk>. However, the Fox reporter's description essentially confirmed the *Times's*

the White House has denied the *New York Times* report or suggested that Mr. Ellis was acting without the knowledge and permission of those above him on the White House staff.

In addition to Mr. Ellis, a second White House lawyer has been named as having been involved in the disclosure to Rep. Nunes. That lawyer is John Eisenberg, whose involvement was reported by the *Washington Post*.³¹ The *Post*'s story stated that after Mr. Cohen-Watnick "assembl[ed] reports that showed that Trump campaign officials were mentioned or inadvertently monitored by U.S. spy agencies targeting foreign individuals," he "took the matter to the top lawyer for the National Security Council, John Eisenberg."³² The story does not say what Mr. Eisenberg did with the reports, but it says that Mr. Ellis reports to Mr. Eisenberg, and also that both Mr. Ellis and Mr. Eisenberg report to Mr. McGahn.³³

G. The role of the Office of White House Counsel as to the House Committee's investigation

In thinking about the issues raised by this complaint, it may become necessary to consider what role the Office of White House Counsel has been playing with respect to the House Committee's investigation. In theory, the function of the Office of White House Counsel is to represent the president in his or her official capacity, not to act as personal defense counsel for the individual who

report that Ellis and Cohen-Watnick had "helped provide Representative Devin Nunes of California, a Republican and the chairman of the House Intelligence Committee, with the intelligence reports":

The *New York Times* report, which got wide coverage, was pretty much wrong when it came to naming those two sources, the two people at the White House, as being basically—insinuating that that's how Devin Nunes learned of this story.

Our sources tell us those two guys basically got him access, that he had somebody else leak to him—at least two people according to the Congressmen himself—and that these two people [presumably referring to Ellis and Cohen-Watnick] helped him basically get onto the White House grounds or helped facilitate him getting to a secure location to see the information. [*Id.*]

While I believe that the *New York Times* is a more reliable source of information than Fox News, and therefore do not suggest that the *Fox & Friends* account of Mr. Ellis's role should be accepted, both reports support the conclusion that Mr. Ellis was involved in some significant way in the provision of the intelligence information to Rep. Nunes.

31. Greg Miller & Karen DeYoung, *Three White House officials tied to files shared with House intelligence chairman*, *Washington Post* (March 30, 2017), <http://tinyurl.com/lb4t2qz>.

32. *Id.*

33. *Id.*

happens to be the president.³⁴ The House Committee's investigation has so far concerned events that predated President Trump's inauguration and that therefore relate primarily, and perhaps exclusively, to his personal interests (albeit his personal *political* interests).

As a result, one could argue that the Office's function here should not be to protect those personal interests. However, there is not always a clear line between a president's individual interests and his interests as chief executive,³⁵ and many people believe that President Trump has been trying to erase the line entirely.

However, regardless of what one thinks the role of White House Counsel's Office *should* be, the inquiry for purposes of this complaint must focus on what its role with respect to the Committee's investigation *has actually been*. And on that score, it appears from the available evidence that (even apart from the actions of Mr. Ellis and Mr. Epstein) the Office has been acting to support President Trump's personal political interests.³⁶

34. See generally Maryanne Borrelli et al., *The White House Counsel's Office*, 31 Presidential Studies Q. 561 (2001); Jennifer Wang, *Raising the Stakes at the White House: Legal and Ethical Duties of the White House Counsel*, 8 Geo. J. Legal Ethics 115 (1994).

35. See, e.g., Ronald D. Rotunda, *Independent Counsel and the Charges of Leaking: A Brief Case Study*, 68 Fordham L. Rev. 869, 881–82 (1999).

36. This conclusion is based on the letter sent by Mr. McGahn to Rep. Nunes and Ranking Member Schiff on March 30, 2017 (available at <http://tinyurl.com/ktfcp55>), transmitting copies of what were apparently the same documents that had been surreptitiously provided to Rep. Nunes. Although the documents had been given or shown to Rep. Nunes before his press conference on March 22, Mr. McGahn did not send his letter, or otherwise say anything about the documents to the House Committee, until Mr. Ellis and Mr. Cohen-Watnick had been outed as having been involved in providing the documents to Rep. Nunes. E.g., David S. Cloud, *White House appears to be the source of Nunes' surveillance claims*, Los Angeles Times (March 30, 2017), <https://tinyurl.com/kh35lb2>. That timing raises obvious question about Mr. McGahn's good faith.

Moreover, the letter appears to buy into the White House's position that members of the Trump transition team had been subjected to improper surveillance practices. It coyly describes the documents as being "responsive to [the Committee's] March 15, 2017 letter to intelligence agencies seeking 'documents necessary to determine whether information collected on U.S. persons was mishandled and leaked.'" But after the documents were reviewed by members of the House Committee, members from both parties concluded that they showed that nothing inappropriate had happened. See Ken Dilanian, *Susan Rice Did Nothing Wrong, Say Both Dems and Republicans*, NBC News (April 17, 2017), <http://tinyurl.com/mnkhfft>; Jim Sciutto et al., *Classified docs contradict Nunes surveillance claims, GOP and Dem sources say*, CNN (April 12, 2017), <https://tinyurl.com/lgen2lg>. A recent article in the *New Yorker* describes the allegations about the documents as "a series of lies to manufacture a fake scandal." Ryan Lizza, *The Continuing Fallout from Trump and Nunes's Fake Scandal*, The New Yorker (April 18, 2017),

Also supporting the conclusion that Mr. McGahn's letter is intended to promote Pres. Trump's personal interests is the letter's encouragement of a legislative investigation into the actions of a previous

Discussion

I. The violations by Mr. Ellis

A. Mr. Ellis's violation of RPC 1.9 and 1.11(a)

Both RPC 1.9 and RPC 1.11(a) restrict lawyers' professional activities after leaving a prior job. Rule 1.9 is the general rule regarding former-client conflicts of interest, while Rule 1.11 sets out a special restrictions applicable to lawyers who leave government positions. Both rules apply to Mr. Ellis, and both were violated by his conduct.

1. Rule 1.11(a): "Revolving-door" conflicts

I will begin with Rule 1.11(a), since it is the more specific provision. It states that a lawyer "shall not accept other employment in connection with a matter which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as a public officer or employee." (Unlike Rule 1.9, the application of Rule 1.11 does not depend on the lawyer's subsequent work being adverse to their former employer.)

Rule 1.11 applies "to any matter involving a specific party or parties"³⁷ as opposed to "[t]he making of rules of general applicability and the establishment of general policy."³⁸ And as is indicated by Comment 10 to the rule, the rule's restrictions apply to a government attorney who moves from one governmental agency to another (although in such a case the restrictions may be waived by the agency by which the attorney was previously employed). In addition, Comment 2 states that Rule 1.11 applies in addition to the restrictions of Rule 1.9 (discussed below).

The publicly-reported facts suggest that Mr. Ellis has violated Rule 1.11(a).

First, the matters at issue involve specific parties: the persons associated with the Trump campaign and/or transition team who are the subjects (or potential subjects) of the House Commit-

administration. Given that the unmasking requests disclosed by the documents were reportedly made by President Obama's National Security Advisor, Susan Rice, the letter amounted to a request for legislative oversight of actions taken by senior White House staff. That seems inconsistent with any concern with protecting the institutional interests of the presidency.

Finally, one can reasonably conclude that when Mr. McGahn described the documents at issue as having been found "in the ordinary course of business," he was being disingenuous. As stated by Josh Marshall of *Talking Points Memo*, that claim "sounds improbable unless Cohen-Watnick's ordinary business was sifting through highly classified material looking for stuff to defend Trump's inane tweets." Josh Marshall, *The Gravity Is Strong* # 3, *Talking Points Memo* (March 31, 2017), <https://tinyurl.com/mhxepn9>. (Mr. Marshall was referring to a statement by Press Secretary Sean Spicer that was to the same effect as the statement by Mr. McGahn.)

37. RPC 1.11(g).

38. RPC 1.11, Comment 3.

tee's investigation; the persons associated with the Trump campaign whose communications were recorded or otherwise captured as part of the FBI's investigation of Russian interference in the election; and the law-enforcement and intelligence officers who participated in the FBI's investigation.

Second, for the reasons previously discussed, it is reasonable to conclude that Mr. Ellis was personally and substantially involved in the House Committee's investigation while he served as the Committee's general counsel.

Third, the relevant actions by Mr. Ellis after he joined the White House staff related to a matter that was the same as, or substantially related to the matters within the scope of the House Committee's investigation.

As described in published reports, Mr. Ellis was involved in providing Rep. Nunes with information about alleged surveillance by the Obama administration of persons associated with the Trump campaign or transition team. That action is squarely within the scope of the House Committee's investigation as described by Rep. Nunes on the day after President Trump's "wiretapping" tweets,³⁹ during his opening statement at the Committee's hearing on March 20,⁴⁰ and at the impromptu news conference on March 22 in which he announced his receipt of the information at issue and his intention to provide it to President Trump.⁴¹

As is explained by Comment 4 to RPC 1.11 for purposes of determining whether one matter is the same as, or substantially related to, the Rule incorporates the methodology set out by the Court of Appeals's decision in *Brown v. District of Columbia Board of Zoning Adjustment*.⁴² If the "factual contexts" of the two matters "overlap in such a way that a reasonable person could infer that the former government attorney may have had access to information legally relevant to, or otherwise useful in, the subsequent representation,...the complainant will have established a prima facie showing that the transactions are substantially related."⁴³ Note that the question is not whether the attorney actually had access to such information, but whether he or she "may have had" such access.

39. See text at note 18, above.

40. See text at note 19, above.

41. House Permanent Select Committee on Intelligence, Press Release, *Chairman Nunes Comments on Incidental Collection of Trump Associates* (March 22, 2017), <http://tinyurl.com/k2b9gz3> (paragraph breaks and bullets omitted; punctuation added; initial caps changed to lower case):

The House Intelligence Committee will thoroughly investigate this surveillance and its subsequent dissemination to determine: who was aware of it; why it was not disclosed to Congress; who requested and authorized the additional unmasking; whether anyone directed the intelligence community to focus on Trump associates; and whether any laws, regulations, or procedures were violated.

42. 486 A.2d 37 (D.C. 1984) (en banc).

43. 486 A.2d at 49–50.

And to make such a showing, the complainant “need not specify any particular information or material believed to be relevant to both of the related transactions.”⁴⁴

If a *prima facie* case has been made, the burden shifts to the attorney, “who must rebut complainant’s showing by demonstrating that he or she could not have gained access to information during the first representation that might be useful in the later representation.”⁴⁵ At this stage, too, the question is not whether the lawyer in fact received information in the first matter that might be useful in the second.⁴⁶ Rather, the inquiry focuses entirely on the nature and extent of the overlap between the two matters: “[T]he former government attorney must produce evidence elaborating on the nature of the two matters so as to make it ‘clearly discernible’ that the issues involved are unrelated and that the court should not infer the existence of useful government-developed information.”⁴⁷ If the lawyer fails to carry that burden, they can avoid disqualification only if they were not personally and substantially involved in the first matter.⁴⁸

It is highly likely that while Mr. Ellis served as the House Committee’s general counsel, he had access to all information that the Committee received in its investigation, and that such information would be useful in representing the White House. After all, people who were senior members of the Trump campaign and the Trump transition team, and who now work at the White House, are subjects or potential subjects of the Committee’s investigation. In addition, Mr. Ellis might have had access to information about any federal surveillance activities that may have resulted in the collection of communications by President Trump or by campaign and/or transition staffers. So if one credits the publicly-reported information, there appears to be *prima facie* evidence that Mr. Ellis violated RPC 1.11(a).

One final point about Rule 1.11 and its application to the facts here. As has been noted, the rule is intended to prevent not only actual impropriety, but also the appearance of impropriety.⁴⁹ In considering whether Mr. Ellis’s conduct created such an appearance, his conduct must be considered in light of the conduct of Rep. Nunes. There is a strong basis for concluding that Rep. Nunes acted improperly. Despite his having been on President Trump’s transition team, he did not recuse himself from participating in the investigation until April, when he himself became the subject of an ethics

44. 486 A.2d at 50 n.17.

45. 486 A.2d at 50.

46. 486 A.2d at 50.

47. 486 A.2d at 50 n.18.

48. *Id.*

49. RPC 1.11, Comment 5.

investigation.⁵⁰ And at the same time that he was leading the investigation, he was actively coordinating with the White House in a joint effort to defend President Trump's personal interests. Moreover, he did so by means of actions that were seemingly calculated to undermine the Committee's investigation: he failed to consult with anyone else on the Committee, or even inform them, before making his March 22 disclosures, and he unilaterally canceled the public hearing that had been scheduled for March 28, at which testimony was expected from former Acting Attorney General Sally Yates, former Director of National Intelligence James Clapper, and former CIA Director John Brennan.⁵¹ Multiple commentators have concluded that Rep. Nunes's purpose was in fact to disrupt the investigation.⁵² There is therefore no doubt but that Rep. Nunes's actions created at least an appearance of impropriety. And because of Mr. Ellis's actions in concert with Rep. Nunes, and his prior relationship with Rep. Nunes while serving as the House Committee's general counsel, that appearance extends to him as well.

2. Rule 1.9: Former-client conflicts

RPC 1.9 is the general rule governing representations adverse to a former client. It prohibits lawyers who have formerly represented a client in a matter from "thereafter represent[ing] another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent."

50. Regarding Rep. Nunes's participation in the transition team, see sources cited in note 2. Regarding his belated recusal, see, e.g., Karoun Dimirjian, *House Intelligence Chairman Devin Nunes recuses himself from Russia probe*, Washington Post (April 6, 2017), <https://tinyurl.com/lxurkdx>.

51. Regarding the failure to inform anyone else on the Committee or obtain their consent, see the sources cited in note 24, above. Regarding the cancellation of the hearing, see, e.g., Allegra Kirkland, *Schiff: Nunes Canceled Open Intel Hearing To 'Choke Off Public Info'*, Talking Points Memo (March 24, 2017), <https://tinyurl.com/mjltl3s>.

There is also the question whether Rep. Nunes played any role in getting Mr. Ellis hired by the White House. It has been reported (by sources outside the mainstream media) that Mr. Ellis was recommended for the position by Rep. Nunes. E.g., Louise Mensch, *Did Nunes Leak FISA Warrant Info via White House Lawyer Michael Ellis?*, Patribotics (March 27, 2017), <http://tinyurl.com/m85do6y>.

52. E.g., Yochi Dreazen, *Devin Nunes's botched effort to scuttle the Trump/Russia investigation, explained*, Vox (Mar. 29, 2017), <http://tinyurl.com/knkg27>; Ryan Lizza, *How the White House and Republicans Blew Up the House Russia Investigation*, The New Yorker (March 28, 2017), <http://tinyurl.com/m9ee9lm>; Greg Miller & Karoun Demirjian, *Chairman and partisan: The dual roles of Devin Nunes raise questions about House investigation*, Washington Post (March 26, 2017), <http://tinyurl.com/lts6m8>; Matt Flegenheimer & Emmarie Huettelman, *In Washington's Daily Trump Wars, Devin Nunes Becomes a Human Shield*, New York Times (March 24, 2017), <http://tinyurl.com/jvnzjkd>.

As noted above, the comments to RPC 1.11 indicate that in cases where the latter rule applies, it applies in addition to RPC 1.9, not in place of it.⁵³ However, Comment 4 to RPC 1.9 states, “The question of whether a lawyer is personally disqualified from representation in any matter on account of successive government and private employment is governed by Rule 1.11 rather than by Rule 1.9.” While that seems to be inconsistent with the comment to Rule 1.11, the apparent conflict is irrelevant here. The comment to Rule 1.9 relates by its own terms to cases involving “successive government and private employment[.]” This is not such a case.

The standard governing disqualification under Rule 1.9 is similar to the standard under 1.11. Both rules prohibit representation in matters that are the same as, or substantially related to, a matter handled by the lawyer in their prior employment, and the determination whether the two matters are the same or substantially related is the same under each rule.⁵⁴ The rules differ in two respects, however. Unlike Rule 1.11, Rule 1.9 is not limited to prior matters in which the lawyer was involved personally and substantially or that involved specific parties, but it *is* limited to cases in which the lawyer’s new representation is materially adverse to the interests of the former client.

Thus, the discussion above regarding Rule 1.11 establishes that the two matters at issue are the same as one another or substantially related to one another. The only additional question is whether the White House’s interests regarding the House Committee’s investigation are adverse to those of the Committee.

The question answers itself. Among the issues the Committee is investigating is whether members of the Trump campaign and/or transition team colluded with a hostile foreign power. The investigation carries the potential to undermine the legitimacy of President Trump’s election and to lead to his impeachment. The Ranking Member of the House Committee has said that there is more than circumstantial evidence of collusion between Russia and the Trump campaign.⁵⁵ Another member of the House Committee, who has seen at least some of the classified evidence, has said that there may well be criminal consequences: “I wouldn’t be surprised, after all of this is said and done, that some people end up in jail.”⁵⁶ The allegations underlying the investigation are widely regarded as creating a major scandal, and it may turn out to be the most serious scandal in U.S. history. And the party line from the White House is that the scandal is a hoax.⁵⁷

53. RPC 1.11, Comment 2.

54. Compare RPC 1.9, Comment 2 (incorporating by reference the standard set out in *Brown v. District of Columbia Board of Zoning Adjustment*, *supra*) with RPC 1.11, Comment 4 (same).

55. Kailani Koenig, Schiff: ‘More Than Circumstantial Evidence’ Trump Associates Colluded With Russia, NBC News (March 22, 2017),

56. Christina Prignano, House Intelligence Democrat predicts Trump associates will go to jail, Boston Globe (April 4, 2017) (quoting Rep. Joaquin Castro), <http://tinyurl.com/kuzaktg>.

57. Rebecca Morin, Trump tweets: ‘Russia story is a hoax,’ Politico (March 27, 2017), <http://tinyurl.com/lpl5lzx>.

The White House's interests are also adverse to those of the Committee with respect to the investigation of allegedly improper surveillance and allegedly improper disclosure of intelligence information. Although the White House supports that aspect of the investigation, it is using the issue to distract from the more important aspect: the investigation into possible collusion with Russia.⁵⁸ The White House is using the Committee's chairman as its de facto surrogate, thereby contributing to discord among the Committee members and interfering with the conduct of the investigation. And this adversity is not mitigated by the fact that the Chairman (who has recently stepped down from leading the investigation) was more interested in defending the president than in investigating him. The Chairman's conduct in this regard amounted to a clear conflict of his institutional duties to the Committee, the House of Representatives, and Congress as a whole. His conduct and intentions therefore cannot be imputed to the Committee.

3. The issue of waiver

Conduct by a lawyer that would otherwise violate Rule 1.9 is permitted if the prior client waives the conflict after appropriate disclosure by the lawyer. Waiver can similarly excuse a violation of Rule 1.11, but only where (as here) the lawyer moves from one government agency to another, rather than from the government to the private sector.⁵⁹

I am unaware of any facts suggesting that Mr. Ellis's conflicts were waived. Because it is the lawyer's burden to show that any conflict was waived by the affected client after informed consent,⁶⁰ the waiver issue need not be considered in deciding whether this complaint should be docketed. However, I will briefly note that if Mr. Ellis is called on to respond to the complaint and if he asserts that the conflicts were waived, he should be required to show more than unilateral action on the part of Rep. Nunes. As noted above, Rep. Nunes's actions here have been adverse to the Committee's interests and were taken without the knowledge or consent of anyone else on the Committee. Those actions have therefore been highly irregular and have exceeded the scope of his authority. If Mr. Ellis asserts that his conflicts were waived, he should be required to prove that the purported waiver was validly granted and is enforceable against the Committee.

B. Mr. Ellis's possible violation of RPC 8.4

The possibility exists that in addition to violating Rules 1.9 and 1.11, Mr. Ellis violated Rules 8.4(c), 8.4(d), or both. Rule 8.4(c) declares that it constitutes professional misconduct for a lawyer to

58. See, e.g., the sources cited in note 26, above.

59. RPC 1.11, Comment 10.

60. *In re Evans*, 902 A.2d 56, 65 (D.C. 2006); *Griva v. Davison*, 637 A.2d 830, 845 (D.C. 1994); RPC 1.7, Comment 28.

engage in “conduct involving dishonesty, fraud, deceit, or misrepresentation,” and rule 8.4(d) does the same with respect to “conduct that seriously interferes with the administration of justice.”

I describe Mr. Ellis’s conduct as only possibly violating these rules because I do not know the details of specifically what he did, or of what he knew about what Rep. Nunes intended to do with the information he was given. It seems to me that without that information, it is not possible to determine whether Mr. Ellis violated either of the rules. However, the issue is obviously an important one, and it would be appropriate question for the Office to investigate.

II. The possible violations of RPC 8.4 by Mr. Eisenberg

What I have said about Mr. Ellis’s possible violation of RPC 8.4 applies equally to Mr. Eisenberg. He may have violated that rule, but determining whether he did so will require information that is unavailable to me. If the Office undertakes to investigate whether Mr. Ellis violated RPC 8.4, it would make sense for it to investigate whether Mr. Eisenberg did so as well.

III. The possible violations of RPC 5.1 by Mr. Eisenberg and/or Mr. McGahn

Mr. Eisenberg and/or Mr. McGahn may have violated their responsibilities under RPC 5.1 as managerial or supervisory attorneys. Rule 5.1 provides as follows:

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm or government agency, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm or agency conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer’s violation of the Rules of Professional Conduct if:

(1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) The lawyer has direct supervisory authority over the other lawyer or is a partner or has comparable managerial authority in the law firm or government agency in which the other lawyer practices, and knows or reasonably should know of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

A. RPC 5.1(a): Duties of managerial attorneys generally

Among those to whom Rule 5.1(a) applies are government “who individually or together with other lawyers possesses comparable managerial authority [to law firm partners.]” Mr. McGahn clearly comes within the scope of this provision: he is White House Counsel and as such is in charge

of the Office of White House Counsel. Mr. Eisenberg also had supervisory and managerial authority: the Washington Post described him as the “top lawyer” for the National Security Council and as Mr. Ellis’s supervisor.⁶¹ That probably means that he had managerial authority comparable to that of a law-firm partner, but without additional information one cannot be certain.

Rule 5.1(a) requires lawyers within its scope to “make reasonable efforts to ensure that the [office] has in effect measures giving reasonable assurance that all lawyers in the firm or agency conform to the Rules of Professional Conduct.” In the present context, that duty required that Mr. McGahn and Mr. Eisenberg to take reasonable steps to ensure that Mr. Ellis was screened from any work relating to the House Committee’s investigation. At a minimum, the necessary steps would have included (1) making sure that Mr. Ellis and others in the office understood that he was not to do any work relating to the investigation, (2) making sure that everyone in the office understood that Mr. Ellis was not to participate in any discussions regarding the investigation or receive any communications about the investigation, and (3) making sure that everyone in the office understood that Mr. Ellis was not to have access to any documents or other information that was prepared or obtained in connection with the investigation.

It is unclear at this point whether any of these steps were taken, and if so, which ones. If adequate screening was not put into place, Mr. McGahn violated Rule 5.1(a) (as did Mr. Eisenberg if he was subject to the rule).⁶²

B. RPC 5.1(b): Duties of attorneys having direct supervisory responsibility over other attorneys

Rule 5.1(b) applies to lawyers “having direct supervisory authority over another lawyer,” and it requires such lawyers to “make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.”

As is discussed above (on page 6), it appears that Mr. Ellis was directly supervised by Mr. McGahn with respect to matters involving the White House Counsel’s Office, and by Mr. Eisenberg with regard to NSC matters. Mr. Ellis’s actions here most likely implicated both of these roles.

The inference that his role at the NSC was implicated is supported by the fact that the information at issue was found by Mr. Cohen-Watnik (an NSC employee), who brought it to Mr. Eisenberg. And the inference that Mr. Ellis’s role at the White House Counsel’s Office was implicated is supported by the fact that dealing with a Congressional investigation is more likely to be within the

61. Greg Miller & Karen DeYoung, *Three White House officials tied to files shared with House intelligence chairman*, Washington Post (March 30, 2017), <http://tinyurl.com/lb4t2qz>.

62. I will not address any issues that might be raised by work relating to the House Committee investigation that was performed by White House attorneys other than Mr. Ellis. *See generally* RPC 1.11(c)-(f) & Comments 7–9.

purview of that office than of the NSC. On this view, the supervisory duties of both Mr. Eisenberg and Mr. McGahn were triggered.

Of course, even if their respective duties were triggered, the question would remain whether they took whatever action might have been appropriate to satisfy those duties. Unfortunately, I don't have access to the information would provide the answer to that question.

C. RPC 5.1(c): Vicarious responsibility for another attorney's violation

Finally, Mr. Eisenberg or Mr. McGahn (or both) would be vicariously responsible for Mr. Ellis's violations if either of the following conditions existed:

1. If they ordered Mr. Ellis to take the actions in question or ratified Mr. Ellis's conduct, having knowledge of the specific conduct;⁶³ or
2. If they—
 - a. had (i) direct supervisory authority over Mr. Ellis or (ii) managerial authority comparable to that of a partner in a law firm, and
 - b. knew or reasonably should have known of Mr. Ellis's conduct at a time when its consequences could have been avoided or mitigated but failed to take reasonable remedial action.⁶⁴

Although I do not have access to information indicating whether any of these conditions is satisfied, I believe that further investigation is warranted.

Conclusion

The facts that have been set out are more than enough for the Office to open an investigation into whether Mr. Ellis violated the revolving-door and former-client conflict rules (RPC 1.9 and 1.11). The available facts relevant to the other possible violations is admittedly more limited. But assuming that the Office opens an investigation into the principal allegations against Mr. Ellis, it would make sense for that investigation to include the other issues that this complaint raises.

I HEREBY CERTIFY that to the best of my knowledge, information, and belief, the statements in this complaint are true.

April 25, 2017.

Neal Goldfarb

[REDACTED]

[REDACTED]

[REDACTED]

63. RPC 5.1(c)(1).

64. RPC 5.1(c)(2).