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The Kraken's Wake: Disciplinary Issues for Lawyers Involved in Voter Fraud Claims and Capitol Insurrection

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5255 North Federal Highway, Suite 100, Boca Raton, FL 33487
Phone 561-241-1919

The Kraken's Wake:

Disciplinary Issues for Lawyers Involved in Voter Fraud Claims and Capitol Insurrection

By Jonathan Friedler and Mark Dubois

jfriedler@geraghtybonnano.com / markdubois@geraghtybonnano.com

Geraghty & Bonnano, LLC

38 Granite Street

New London, CT 06320

(860) 447-8077

Presenters: Jonathan Friedler

- Jonathan Friedler is an attorney at Geraghty & Bonnano, LLC in New London, Connecticut. In addition to his litigation practice, he regularly represents lawyers in ethics/ attorney discipline matters throughout the State of Connecticut, including claims regarding conflicts, privilege, IOLTA/ file management, unauthorized practice of law, attorney advertising, and attorney competence. He represents his attorney clients before local panels, at Statewide Grievance Committee hearings, and in presentment hearings in the Connecticut Superior Court. Attorney Friedler is active in the Young Lawyer's Section of the Connecticut Bar Association: In 2018, he was the YLS Executive Committee Chair of Professional Responsibility and Ethics, and he has served as the YLS Executive Committee Director for Non-CLE Events since 2019. He received the YLS Rookie of the Year award in 2019, and Star of the Year Award in 2020.

Presenters: Mark Dubois

- Mark Dubois is of-counsel with the New London firm of Geraghty & Bonnano. He has practiced law for over 40 years. He is a retired assistant clinical professor of law at the University of Connecticut School of Law. He was Connecticut's first Chief Disciplinary Counsel from 2003 until 2011. In his career, Attorney Dubois has prosecuted and defended thousands of claims of attorney misconduct and malpractice. He has also served as an expert witness on matters of privilege, ethics and malpractice. He is co-author of *Connecticut Legal Ethics and Malpractice*, the only book devoted to the topic of attorney ethics in Connecticut. He is a contributor to the *Connecticut Law Tribune* where he wrote the *Ethics Matters* column for over 7 years. He taught legal ethics at the University of Connecticut School of Law and at Quinnipiac University School of Law where he was Distinguished Practitioner in Residence in 2011. He has lectured in Connecticut and nationally on attorney ethics and has given or participated in over 100 presentations and symposia on attorney ethics and malpractice.
- Attorney Dubois was board certified in civil trial advocacy by the National Board of Legal Specialty Certification for over 20 years. He is former president of the Connecticut Bar Association. He is the 2019 recipient of the Connecticut Bar Association's Edward Hennessey award for career professionalism, the Quintin Johnstone Service to the Profession Award in 2012 and the American Board of Trial Advocacy, Connecticut Chapter, annual award in 2007

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A Higher Standard for lawyers

- "Of all classes and professions, the lawyer is most sacredly bound to uphold the laws." Ex Parte Wall, 107 U.S. 265, 274 (1883).
  - Wall involved an attorney who had “engage[d] in and with an unlawful, tumultuous, and riotous gathering [. . .] advising and encouraging thereto, take from the jail of Hillsborough County, and hang by the neck until he was dead, one John, [. . .] thereby showing such an utter disregard and contempt for the law which, as a sworn attorney, he was bound to support.”

Issues for Discussion

- Kraken litigation and voter fraud claims: background and players
- Governing Authorities
- Standing
- Ethical rules implicated by conduct
- Status of disciplinary action against Kraken Lawyers and other consequences
- Concerns and considerations

Kraken litigation and voter fraud claims: background and players

- Prior to the 2020, conspiracy theories to the effect that a computer program would switch votes from Trump to Biden began to circulate. They were spread by, amongst others, including right-wing conspiracy groups, Attorney Sidney Powell.
- Following the election, Trump sought to challenge the results by undermining their legitimacy. He created a legal team consisting of Attorneys Rudy Giuliani, Joseph DiGenova, Victoria Toensing, Jenna Ellis, and Sidney Powell.
- Trump's legal team commenced to file multiple lawsuits in several states throughout the country. The objective was to prevent those states from certifying their election results. The claims ran the gamut of voting irregularity allegations, from vote harvesting, illegal votes, machine errors, late-counted votes, voter fraud, manipulated results, official misconduct, etc.

- After separating from the Trump team, Powell filed federal lawsuits in Wisconsin, Arizona, Georgia and Michigan, seeking to decertify election results in those states.
  - Bowyer, et al. v. Ducey, et. Al., No. CV-20-02321-PHX-DJH (AZ)
  - Feehan v. Wisconsin Elections Commission, et al., No 20-CV-1771-pp (Wisconsin)
  - King, et al. v. Whitmer, et al., CV No. 20-13134 (Michigan)
  - Pearson, et al. v. Kemp, et al.,

- On January 6, 2021, Giuliani attended a rally in protest of the election results. He repeated conspiracy theories regarding voter fraud. Some take the position that his speech was inflammatory and encouraged Trump supporters to storm the U.S. Capitol in the riot that resulted in five deaths.

- Attorney Eric Kaardal commenced an action, Wisconsin Voters Alliance, Et. Al. v. Pence Et Al, seeking to invalidate votes and prevent Congress from declaing Joe Biden the President.

- All of the Kraken federal cases have been dismissed. Over 50 challenges in state courts around the country have also been dismissed. The bases for dismissal included improper venue (some cases were brought in Federal Court and should have been in State Court), lack of standing, mootness, and laches. The theories on which they are based have been debunked.

- Efforts are being undertaken by Kraken Defendants, attorneys and concerned citizens to impose discipline on the attorneys that facilitated claims of voter fraud.

Governing Authorities

- In what states are the lawyers subject to discipline?
  - State where conduct occurred
    - Disciplinary Authority
    - Rule 11
  - State of licensure

Standing

- There are two standing questions at play here: standing of the Plaintiffs in the Kraken litigation to prosecute claims of voter fraud, and standing of the complainants that seek to impose discipline on lawyers that promoted voter fraud claims.

Standing for Kraken Plaintiffs

- It is noteworthy that virtually all of the federal suits filed by Powell were dismissed for lack of standing.
  - King v. Whitmer, "Plaintiffs have failed to show that their injury can be redressed by the relief they seek and thus possess no standing to pursue their equal protection claim." (denying request for emergency order). Complaint voluntarily withdrawn to avoid Rule 11 sanctions.
  - Feehan v. Wisconsin Elections Commission, "This court has found that the plaintiff does not have Article III standing."
  - Bowyer, et al. v. Ducey, et al., "Plaintiffs have not established they can personally bring suit, and therefore, they do not have standing to bring Count One."
- State court challenges resolved similarly.

- Where a plaintiff lacks standing to raise an issue, then the court never reaches the bona fides of the matter.

- Here, the fact that 60 or so of these lawsuits were dismissed on the basis of standing demonstrates that no standing exists for these plaintiffs, and to allege otherwise is to take a frivolous position.

- To assert that a plaintiff has standing in these circumstances constitutes a Rule 3.1 violation, as that rule prevents a lawyer from bringing a claim in which there is no basis in law or fact to do so.

Standing for Complainants grieving Kraken Lawyers

- Although most of the rules of professional conduct govern the conduct of an attorney as it relates to his/ her relationship with a client, there is no standing requirement to file a disciplinary complaint. These complaints can be filed by anyone.
- Some suggest that prosecuting false claims with the objective to overturn election results is a violation of Rule 4.4, which concerns an attorney's obligation to respect the rights of third parties. Like millions of voters.
- Rule 8.3 (Reporting Professional Misconduct). Lawyers who have filed their own ethics complaints point to rule 8.3, and posit that it is their duty to report the conduct of these lawyers.

Ethical rules implicated by conduct: Overview

- Rule 3.1 (Meritorious Claims and Contentions)
- Rule 3.3 (Candor Toward the Tribunal)
- Rule 4.1 (Truthfulness in Statements to Others)
- Rule 4.4 (Respect for Rights of Third Persons)
- Rule 8.1 (Bar Admission and Disciplinary Matters)
- Rule 8.3 (Reporting Professional Misconduct)
- Rule 8.4 (Misconduct)
- FRCP Rule 11

Rule 3.1: Meritorious Claims and Contentions

- A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law [. . .]

Commentary to Rule 3.1:

- The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure.
- The filing of an action or defense [. . .] is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions [. . .]

- A strict application of Rule 3.1 could subject an attorney to discipline for asserting a claim s/he believes to lack a good faith basis in fact or law. However, the commentary to the rule contemplates that information may become available during discovery. Lawyer's that are disciplined under this rule tend to be those that continue to prosecute meritless claims after they have been shown to lack merit.

- Ex: Brunswick v. Statewide Grievance Committee, 934 A.2d 244, 284 Conn. 929 (2007).
  - Lawyer was found to have violated Rule 3.1 in advocating the claim that his client's arbitral award was the result of fraud. At the time of the hearing, Attorney Brunswick had obtained no evidence to support his claims. Rather than conceding this point, upon the court's direct inquiry, he maintained the allegations.

FCRP Rule 11

- Similarly prohibits the pursuit of meritless claims.

- Provides a mechanism for sanctioning lawyers who bring frivolous claims and pursue claims without any evidence.
  - Rule 11(c)

- Note that Rule 11 gives a lawyer a reasonable opportunity to respond and/ or withdraw the claims.
  - Rule 11(c)(2) – A motion for sanctions shall not be filed or presented to the court if the challenged claim or contention is withdrawn or appropriately corrected within 21 days.

Voter fraud claims that implicate Rule 3.1

- The standing issue. Over 60 cases dismissed for lack of standing, a threshold issue to bring a claim in the first place.

- The allegations of voting irregularities are were debunked.

Rule 3.3: Candor Toward the Tribunal

- (a) A lawyer shall not knowingly:
  - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer [. . .] or
  - (3) offer evidence that the lawyer knows to be false.
    - This includes an obligation to withdraw evidence that is later discovered to be false.
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Commentary to Rule 3.3

- As officers of the court, lawyers must avoid conduct that undermines the integrity of the adjudicative process. "Performance of th[e lawyer's duties . . .] is qualified by the advocate's duty of candor to the tribunal. [. . . T]he lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.
- "An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein."
  - A lawyer still has a duty under 3.1 to diligently research the matter before filing claim.

Claims that Implicate Rule 3.3

- Kraken lawyers represented they had evidence, never produced.

- Misrepresenting the pedigree of witnesses/ evidence.
  - For example, Lin Wood proffered a witness he described as a former U.S. Military Intelligence Expert, who had neither completed training nor was an intelligence analyst.

Rule 4.1: Truthfulness in Statements to Others

- In the course of representing a client a lawyer shall not knowingly:
  - (a) make a false statement of material fact or law to a third person; or
  - (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.
- Commentary to Rule 4.1:
  - Lawyer must be truthful, but has no affirmative duty to inform an opposing party of relevant facts.
  - Misrepresentations may occur when the lawyer adopts/ incorporates a statement the lawyer knows the be false, makes a partially true but misleading statement/ omission.
  - The rule concerns statements made *in the course of representing a client*, but remember: Rule 8.4 serves as a catch-all, and attorneys may be subject to discipline for dishonest conduct that does not occur in the course of representing a client.

Claims that Implicate Rule 4.1

- Advocates seeking discipline against lawyers that pursued voter fraud claims aver that the claims were based on conspiracy theories and lies.

Rule 4.4: Respect for Rights of Third Persons

- (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person. [. . .]
- Commentary to Rule 4.4
  - Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons.
  - The commentary to the rule points out that it is impossible to catalogue the myriad of ways in which a lawyer advocating for a client may violate this rule. Subsection (b) and the commentary talks about that situation where a document is sent in error to an attorney by an opposing party…

Claims that implicate Rule 4.4

- Some have claimed that the conduct of the attorneys that have propagated claims of voter fraud has sought to disenfranchise millions of voters who participated in a fair election. They aver that the foregoing reflects a disregard for their rights.
  - On February 1, 2021, Michigan's Governor, Attorney General, and Secretary of State, lodged an ethics complaint against Powell before the Texas Chief Disciplinary Counsel, seeking her disbarment. In their complaint, they state that Powell's abused her privilege to practice law by filing baseless lawsuits which sought to disenfranchise Michigan voters during the most recent presidential election.
    - https://www.michigan.gov/documents/ag/Powell_atty_complaint_-_signed_714982_7.pdf
  - One Michigan voter, Adam Reddick, an attorney himself, filed a grievance against Sidney Powell, who sought to reverse the election results in the federal district in which he lived.
    - https://www.mlive.com/news/saginaw-bay-city/2020/12/michigan-man-files-complaint-against-trump-attorney-sidney-powell-over-frivolous-kraken-lawsuit.html

Rule 8.1: Bar Admission and Disciplinary Matters

- An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:
  - (a) knowingly make a false statement of material fact; or
  - (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

- Rule 8.1 will require that disciplinary respondents respond truthfully to investigation into their alleged misconduct… or subject them to discipline for failing to do so.d

- This rule permits disciplinary authorities to interpose interrogatories and request documents in the course of the investigation. It is a violation to fail to comply.

Rule 8.3: Reporting Professional Misconduct

- (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
- (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.
- (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Commentary to Rule 8.3

- “Substantial” in (a) refers to the seriousness of the possible offense.

- The legal profession is self-regulating, hence this rule.

- The rule does not override a lawyer’s obligations under Rule 1.6 (Confidentiality of Information). Indeed, the commentary notes that reporting is not required if it would involve a violation of Rule 1.6.

- As the commentary provides, many jurisdictions used to obligate lawyers to report every violation of the rules, and subjected an attorney who failed to do so to discipline under this rule. That result was unworkable. The Rule is aimed at “those offenses that a self–regulating profession must vigorously endeavor to prevent.

- Reports of misconduct should be made to the applicable disciplinary agency.

- As you can imagine, a number of lawyers who have filed such complaints point to this rule, averring that it is their ethical duty to report the conduct of the Kraken attorneys.
  - Lawyers Defending American Democracy ("LDAD") cite to this rule in their January 20, 2021 grievance complaint against Rudy Giuliani.
    - https://secureservercdn.net/166.62.112.150/mz5.6ab.myftpupload.com/wp-content/uploads/2021/01/No-Form-2021-01-21-LDAD-Attorney-Grievance-Committee-Complaint.pdf

Rule 8.4: Misconduct

- It is professional misconduct for a lawyer to:
  - (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
  - (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
  - (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
  - (d) engage in conduct that is prejudicial to the administration of justice;
  - (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
  - (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
  - (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules

Commentary to Rule 8.4

- No Scienter requirement

Claims that implicate Rule 8.4

- Rule 8.4 is often referred to as a catch-all rule.

- Most of the rules govern the conduct of an attorney in his/ her relations with a client, or in relation to others and the court in the context of representing a client. The reach of 8.4 is broader and attaches to conduct of lawyers that go beyond their role as an attorney.

- Those seeking to impose discipline on the Kraken lawyers aver that the rhetoric they advanced was divisive, encouraged violence, undermined the faith in the electoral system. The fact that this was done by attorneys, who are charged with upholding the law, makes the conduct more egregious.

FRCP Rule 11

- (b) REPRESENTATIONS TO THE COURT. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
  - (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
  - (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
  - (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; ***and***
  - (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Claims that implicate FRCP Rule 11

- Court after court commented on how these cases were filed without a shred of evidence, notwithstanding claims that evidence of voter fraud existed.

- The City of Detroit intervened in the King v. Whitmer case, seeking to impose discipline and Rule 11 sanction on Powell and other attorneys for the plaintiffs.
  - Among Lin Wood and Sidney Powell's defenses include that they did not sign the complaint, ironically, a Rule 11 violation.
  - The King matter was voluntarily withdrawn by the Plaintiffs, following motions for Rule 11 sanctions.

- Notably, several courts have ordered attorneys prosecuting such claims to show cause why the conduct does not violate Rule 11.

Status of disciplinary action against Kraken Attorneys

- Current efforts and progress
- Likely outcome
- Other consequences…

Current efforts for discipline

- On February 1, 2021, Michigan's Governor, Attorney General, and Secretary of State, lodged an ethics complaint against Powell before the Texas Chief Disciplinary Counsel, seeking her disbarment. In their complaint, they state that Powell's abused her privilege to practice law by filing baseless lawsuits which sought to disenfranchise Michigan voters during the most recent presidential election.
  - https://www.michigan.gov/documents/ag/Powell_atty_complaint_-_signed_714982_7.pdf

- In their letter, they allege the King v. Whitmer case "cast unwarranted doubt on the results of Michigan's free and fair elections," and gave credence to already debunked conspiracy theories. They cite the harm that can result to the public's faith in the legal system when attorneys use that system to propagate lies.. They posit that the harm is greater when it is a lawyer engaging in this type of conduct, and that the public should be able to expect that when an attorney makes a public statement/ signs a complaint, the allegations are at a minimum rooted in a good faith belief as to their truth.

- Lawyers Defending American Democracy (LDAD), commenced an ethics complaint against Rudy Giuliani in New York. The complaint alleges that "Giuliani's [conduct] deserves heightened scrutiny and sanctions because his intent and purpose was to undermine the most fundamental of the rights protected by the constitution and the right preservative of all other constitutional rights: the right to vote."
  - https://secureservercdn.net/166.62.112.150/mz5.6ab.myftpupload.com/wp-content/uploads/2021/01/No-Form-2021-01-21-LDAD-Attorney-Grievance-Committee-Complaint.pdf
- Misconduct cited in the ethics complaint against Giuliani includes advancing frivolous claims in court, as well as statements he made to the public which they claim "encouraged anger, division, and violence through false assertions." It also includes his pre-election statements regarding voter-fraud.

- The Georgia state bar initiated a 1,667 page disciplinary complaint against Trump attorney, Lin Wood, indicating that Attorney Wood may have violated Rules 1.1, 1.2, 3.1, 3.3, 4.1 and 4.4, as well as Bar Rule 4-104.

Other Consequences for lawyers that supported conspiracy theories

- Litigation
  - Dominion Voting Systems has commenced a defamation action against Powell. The Complaint seeks $1.3 Billion in damages.

- Private conduct
  - Paul Davis, a Texas lawyer, was fired from his job as Associate General Counsel with Goosehead Insurance after posting images of himself at the Capitol on January 6th.
    - Incidentally, he has filed a lawsuit in the Western District of Texas, which echoes the clams of his litigation predecessors. It remains to be seen whether the same will result in public discipline as well.

- As the Wall case – decided in 1883 – would suggest, holding lawyers accountable for their conduct, even outside the courtroom, is not a new concept.
- Nor is it one that is construed strictly against members of a particular political persuasion. For example…

Uhlfelder v. Desantis

- Florida District Court of Appeal, First District, Case No. 1D20-1178
- Attorney Daniel Uhlfelder gained notoriety by dressing as the grim reaper and frequenting Florida beaches last year. His goal was to draw attention to the high death toll caused by Covid-19, and what he alleged was the Governor, Ron DeSantis', poor way of handling it.
- He took his efforts a step further by suing DeSantis, seeking to force him to issue statewide stay-at-home orders and close Florida beaches during the pandemic. The trial court determined that the issue was a non-justiciable political one. Uhlfelder appealed.
- The District Court of Appeal, First District, summarily affirmed.
- On February 5, 2021, it referred Uhlfelder's conduct to the Florida Bar to consider whether Uhlfelder, *and his counsel*, violated the Rules Regulating the Florida Bar by taking the appeal.

Uhlfelder v. Desantis, continued

- In its Feb. 5th order, the Court held that by filing his appeal, Uhlfelder's conduct did not comport with the foundational expectation of professionalism and candor to the court under Florida's Rule 4-3.1, which prohibits an attorney from making frivolous claims.
- "There was no good faith legal argument to support a claim for such relief in the trial court, and there was certainly no good faith basis to argue legal error on appeal. Appellant and his counsel undoubtedly used this court merely as a stage from which to act out their version of political theater. This was unprofessional and an abuse of the judicial process."
- The order suggested that Uhlfelder's conduct violated Florida's Rule 4-8.2 and 4-8.4.

Concerns and considerations

- Unpopular speech v. punishable conduct
- Chilling effect on valid election fraud claims
- Limited Precedent
- Politicization of the legal battle

103 Conn.App. 601
Appellate Court of Connecticut.

Max F. BRUNSWICK
v.
STATEWIDE GRIEVANCE COMMITTEE.

No. 27629.
|
Argued Dec. 5, 2006.
|
Decided Sept. 4, 2007.

Synopsis

Background: Attorney sought judicial review of decision of the Statewide Grievance Committee reprimanding him for violations of the Rules of Professional Conduct. The Superior Court, judicial district of Hartford, Anthony V. DeMayo, judge trial referee, Keller, J., affirmed. Attorney appealed.

Holdings: The Appellate Court, Gruendel, J., held that:

[1] attorney lacked a good faith basis to maintain his claim of partiality of the arbitrators that warranted reprimand as attorney discipline, and

[2] attorney lacked a good faith basis to maintain claim of fraud, corruption, or undue influence that warranted imposition of reprimand as attorney discipline.

Affirmed.

Flynn, C.J., concurred in the result and filed opinion.

Procedural Posture(s): On Appeal.

West Headnotes (17)

[1] **Attorneys and Legal Services** ⇐ Degree of proof

In initially determining whether an attorney has violated the Rules of Professional Conduct, the applicable standard of proof in an attorney disciplinary proceeding is clear and convincing evidence.

7 Cases that cite this headnote

[2] **Attorneys and Legal Services** ⇐ Purpose of proceedings in general

Attorney disciplinary proceedings are for the purpose of preserving the courts from the official ministration of persons unfit to practice in them.

[3] **Attorneys and Legal Services** ⇐ Privileges, duties, and liabilities of attorneys in general

Attorneys and Legal Services ⇐ Disposition and Punishment; Sanctions

An attorney's admission to practice as an officer of the court in the administration of justice is upon the implied condition that his continued enjoyment of the right conferred is dependent upon his remaining a fit and safe person to exercise it, so that when he, by misconduct in any capacity, discloses that he has become or is an unfit or unsafe person to be entrusted with the responsibilities and obligations of an attorney, his right to continue in the enjoyment of his professional privilege may and ought to be declared forfeited.

[4] **Attorneys and Legal Services** ⇐ Power to regulate and control in general

Attorneys and Legal Services ⇐ Courts and judges in general

State judges possess the inherent authority to regulate attorney conduct and to discipline the members of the bar.

[5] **Attorneys and Legal Services** ⇐ Delegation of powers

In exercising the responsibility to regulate attorney conduct and to discipline members of the bar, state judges have empowered the Statewide Grievance Committee to file presentments in Superior Court seeking judicial

sanctions against those claimed to be guilty of misconduct, and in carrying out these responsibilities, the committee acts as an arm of the court.

[6] **Attorneys and Legal Services** ⇐ Courts and judges in general

It is the Superior Court's inherent supervisory authority over attorney conduct that vests in it jurisdiction to review an order of the Statewide Grievance Committee.

1 Cases that cite this headnote

[7] **Attorneys and Legal Services** ⇐ Courts and judges in general

Attorneys and Legal Services ⇐ Purpose of proceedings in general

Statutes governing attorney grievance proceedings provide methods of procedure that complement, but do not confine, a court's inherent power to discipline its officers.

[8] **Attorneys and Legal Services** ⇐ Scope, Standard, and Extent of Review

Judicial review of the Statewide Grievance Committee's decision to reprimand an attorney, like judicial review of an agency determination under Uniform Administrative Procedure Act (UAPA), is limited, both with respect to the committee's factual findings and its determination regarding the suitability of a reprimand as the sanction to be imposed. Practice Book 1998, § 2–38(f).

1 Cases that cite this headnote

[9] **Attorneys and Legal Services** ⇐ Scope, Standard, and Extent of Review

Appellate review of an attorney disciplinary proceeding is deferential. Practice Book 1998, § 2–38(f).

[10] **Attorneys and Legal Services** ⇐ Power to Review; Jurisdiction

Attorneys and Legal Services ⇐ Scope, Standard, and Extent of Review

The applicable standard of appellate review of an attorney disciplinary proceeding, while deferential, cannot unduly restrict a reviewing court's inherent power to inquire into the conduct of their own officers, and to discipline them for misconduct. Practice Book 1998, § 2–38(f).

2 Cases that cite this headnote

[11] **Appeal and Error** ⇐ What constitutes clear error

Appeal and Error ⇐ Definite or firm conviction of mistake

The clearly erroneous standard of review provides that a court's determination is clearly erroneous only in cases in which the record contains no evidence to support it, or in cases in which there is evidence, but the reviewing court is left with the definite and firm conviction that a mistake has been made.

22 Cases that cite this headnote

[12] **Administrative Law and Procedure** ⇐ Substantial evidence

Under the substantial evidence standard, a reviewing court must take into account that there is contradictory evidence in the record, but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

4 Cases that cite this headnote

[13] **Administrative Law and Procedure** ⇐ Substantial evidence

The substantial evidence standard imposes an important limitation on the power of the courts to overturn a decision of an administrative agency, and provides a more restrictive standard of review than the clearly erroneous standard of review.

13 Cases that cite this headnote

[14] **Attorneys and Legal Services** ⇐ Scope, Standard, and Extent of Review

The clearly erroneous standard is the preferable standard of review in attorney grievance appeals, as the court retains its inherent authority over the discipline of its officers in those instances when, despite the evidence in the record, it nevertheless is left with a definite and firm conviction that a mistake has been made. Practice Book 1998, § 2–38(f).

21 Cases that cite this headnote

[15] **Attorneys and Legal Services** ⇐ Meritorious claims and contentions

A claim or defense made by an attorney is frivolous, and subject to discipline, (a) if maintained primarily for the purpose of harassing or maliciously injuring a person, (b) if the lawyer is unable either to make a good faith argument on the merits of the action, or (c) if the lawyer is unable to support the action taken by a good faith argument for an extension, modification or reversal of existing law. Rules of Prof.Conduct, Rule 3.1.

5 Cases that cite this headnote

[16] **Attorneys and Legal Services** ⇐ Impartiality and decorum of tribunal

Attorneys and Legal Services ⇐ Public Reprimand, Censure, or Admonition

Attorney lacked a good faith basis to maintain his allegation of evident partiality or corruption on the part of the arbitrators in motion to vacate the arbitration award, which warranted imposition of reprimand against attorney by the Statewide Grievance Committee, even though the opposing counsel's affidavit of attorney fees detailed a prearbitration conference with one of the arbitrators, where opposing counsel denied that the noted conference ever occurred during hearing, and attorney persisted in alleging partiality or corruption of the arbitrators without any further evidence in support of his claim. Rules of Prof.Conduct, Rule 3.1.

[17] **Attorneys and Legal Services** ⇐ Meritorious claims and contentions

Attorneys and Legal Services ⇐ Public Reprimand, Censure, or Admonition

Attorney lacked a good faith basis to maintain allegation of fraud, corruption, or undue influence made in motion to vacate arbitration award, which warranted reprimand as attorney discipline for frivolous claim, even though his client's out-of-court statement that her former attorney had received money from the opposing party warranted including the allegation in the motion papers, where client refused to provide an affidavit in support of the allegation for the hearing on the motion, and attorney failed to withdraw the claim. C.G.S.A. § 52–418; Rules of Prof.Conduct, Rule 3.1.

3 Cases that cite this headnote

Attorneys and Law Firms

**322 Roger J. Frechette, New Haven, for the appellant (plaintiff).

Cathy A. Dowd, assistant bar counsel, for the appellee (defendant).

FLYNN, C.J., and McLACHLAN and Gruendel, Js.

Opinion

GRUENDEL, J.

*602 Rule 3.1 of the Rules of Professional Conduct requires in relevant part that attorneys in our state "shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law...." [1] The defendant, the statewide grievance committee, reprimanded the plaintiff attorney, Max F. Brunswick, for violating that rule in the course of his representation of a client in an arbitration

proceeding. Pursuant to Practice Book § 2–38, the plaintiff filed a petition for judicial review with the Superior Court, which dismissed the appeal. The plaintiff now challenges the propriety of that determination. We affirm the judgment of the Superior Court.

The record discloses the following facts. The plaintiff is an attorney licensed to practice law in Connecticut who represented a client in an arbitration proceeding. On January 11, 2002, an award adverse to the plaintiff's client entered.[2] On January 15, 2002, the plaintiff filed *603 a motion to vacate the arbitration award that alleged, inter alia, that the arbitration award was procured by corruption, fraud, undue means or evident partiality on the part of the arbitrators.[3] The court, *Hon. Anthony* **323 *V. DeMayo,* judge trial referee, held a hearing on the motion to vacate on February 4 and 6, 2002, at the conclusion of which it denied the motion and issued sanctions against the plaintiff and his client for making allegations without reasonable cause.[4] The court thereafter referred the matter to the defendant to investigate *604 a possible violation of the Rules of Professional Conduct.[5]

On December 2, 2003, the New Haven judicial district grievance panel filed a decision in which it found probable cause to believe that the plaintiff had violated rules 8.4(3), 3.3(a) and 3.1 of the Rules of Professional Conduct. A three person reviewing committee subsequently conducted a hearing on the matter. In its decision, the committee found the following facts by clear and convincing evidence: "The [plaintiff] offered no evidence on the allegation relating to fraud, corruption or undue influence. The [plaintiff's] only evidence of partiality on the part of the arbitrator(s) was a fee bill from the attorney for [John L. Orsini, whose demand against the plaintiff's client was being arbitrated], which reflected a conference with the arbitrator selected by [Orsini] prior to the commencement of evidence in the arbitration. Much of the hearing before Judge DeMayo concerned another issue raised by the [plaintiff] regarding the denial of a continuance request during the arbitration. The [plaintiff] never withdrew or modified any of the allegations in the motion to vacate. In response to direct inquiries from Judge DeMayo as to the evidential basis for the allegations of fraud, corruption or undue influence, the [plaintiff] only stated that he had not yet gotten to that part of the matter. At the conclusion of the hearing on the motion to vacate, Judge DeMayo denied the motion and issued sanctions against the [plaintiff] and his client for making allegations without reasonable cause in violation of Practice Book § 10–5."

The reviewing committee found by clear and convincing evidence that the plaintiff violated rule 3.1 in two *605 ways. It stated: "The allegation of fraud, corruption or undue influence in procuring the arbitration award was clearly frivolous, as the [plaintiff] had no evidence to support the allegation. With nothing more to go on than his client's statement ... and with no evidence to offer in court, the [plaintiff] should have withdrawn the allegation. Certainly, by the time of the hearing on the motion to vacate, the [plaintiff] knew that he had no evidence to offer, and no way to prove, the charges he had made of serious misconduct by the arbitrators since he did not have an affidavit to support the allegation. Instead of conceding this upon direct inquiry from the court, the [plaintiff] continued to maintain the allegation despite the absence of any evidence to support **324 it." The reviewing committee further found that "the allegation of evident partiality or corruption on the part of the arbitrator(s) also violated rule 3.1.... The record reflects that the only evidence presented by the [plaintiff] regarding this allegation was the fee bill from [Orsini's] attorney charging for a conference with the arbitrator [Orsini] selected. We find that this evidence, in and of itself, does not support a good faith claim of partiality on the part of the arbitrator, since there was no evidence regarding the substance of this conference."

Upon the plaintiff's request for review, the defendant affirmed the decision of the reviewing committee. The defendant concurred with the reviewing committee's findings that the plaintiff's allegation relating to fraud, corruption or undue influence and his allegation of evident partiality or corruption on the part of the arbitrators constituted violations of rule 3.1. With regard to the first allegation, the defendant stated: "The evidence in the record establishes that the only evidence the [plaintiff] had ... was his client's statement. Although the [plaintiff] initially may have had a good faith basis to make the allegation in the motion [to vacate the *606 arbitration award], he certainly did not have a good faith basis to maintain the allegation before the court once his client refused to supply an affidavit in support of the statement." The defendant therefore concluded that the plaintiff's violations of rule 3.1 warranted a reprimand.

Pursuant to Practice Book § 2–38, the plaintiff filed a petition for judicial review with the Superior Court. In its March 22, 2006 memorandum of decision, the court found substantial

evidence to support the findings of the review committee and the conclusion that the plaintiff violated rule 3.1. It therefore dismissed the plaintiff's appeal. From that judgment, the plaintiff now appeals to this court.

I

STANDARD OF REVIEW

[1] Before considering the plaintiff's particular claims, we address the standard of review applicable to such grievance appeals. The plaintiff argues that the proper standard by which to evaluate the defendant's finding that he violated rule 3.1 is the clearly erroneous standard. Conversely, the defendant maintains that the applicable standard is the substantial evidence test. [6] A review of the case law reveals a degree of confusion as to the appropriate standard, therefore warranting closer examination. [7]

**325 [2] [3] *607 Attorney disciplinary proceedings are "for the purpose of preserving the courts from the official ministration of persons unfit to practise in them." *Ex parte Wall,* 107 U.S. 265, 288, 2 S.Ct. 569, 27 L.Ed. 552 (1883). As our Supreme Court explained nearly one century ago, "[a]n attorney at law admitted to practice ... as an officer of the court in the administration of justice, is continually accountable to it for the manner in which he exercises the privilege which has been accorded him. His admission is upon the implied condition that his continued enjoyment of the right conferred is dependent upon his remaining a fit and safe person to exercise it, so that when he, by misconduct in any capacity, discloses that he has become or is an unfit or unsafe person to be entrusted with the responsibilities and obligations of an attorney, his right to continue in the enjoyment of his professional privilege may and ought to be declared forfeited. As important as it is that an attorney be competent to deal with the oftentimes intricate matters which may be entrusted to him, it is infinitely more so that he be upright and trustworthy." *In re Peck,* 88 Conn. 447, 450, 91 A. 274 (1914).

[4] [5] [6] In Connecticut, our judges possess the "inherent authority to regulate attorney conduct and to discipline the members of the bar." *Heslin v. Connecticut Law Clinic of Trantolo & Trantolo,* 190 Conn. 510, 523, 461 A.2d 938 (1983). They "can and ought to be [held responsible] for the fitness of those who enjoy the privileges of the legal profession under their authority and sanction." *In re Peck,* supra, 88 Conn. at 451, 91 A. 274. Accordingly, in *608 exercising that responsibility, our judges "have empowered the [defendant] to file presentments in Superior Court seeking judicial sanctions against those claimed to be guilty of misconduct.... In carrying out these responsibilities, [the defendant acts] as an arm of the court." (Citation omitted; internal quotation marks omitted.) *Sobocinski v. Statewide Grievance Committee,* 215 Conn. 517, 526, 576 A.2d 532 (1990). Likewise, it is the Superior Court's inherent supervisory authority over attorney conduct that vests in it jurisdiction to review an order of the defendant. *Pinsky v. Statewide Grievance Committee,* 216 Conn. 228, 232, 578 A.2d 1075 (1990).

[7] Attorney grievance proceedings are governed by the General Statutes and the rules of practice. See General Statutes § 51–90 et seq.; Practice Book § 2–29 et seq. Those provisions provide methods of procedure that complement, but do not confine, a court's inherent power to discipline its officers. *Pinsky v. Statewide Grievance Committee,* supra, 216 Conn. at 233, 578 A.2d 1075; *In re Peck,* supra, 88 Conn. at 457, 91 A. 274.

Adopted by the judges of this state, our rules of practice expressly consider the standard of review appropriate to an appeal from the decision of the defendant. They nevertheless provide little clarity to the clouded question before us. Practice Book § 2–38(f) provides: "Upon appeal, the court shall not substitute its judgment for that of the [defendant] or reviewing committee as to the weight of the evidence on questions of fact. The court shall affirm the decision of the [defendant] unless the court finds that substantial rights of the respondent have been prejudiced because the [defendant's] findings, inferences, conclusions, or decisions are: (1) in violation of constitutional, rules of practice or statutory provisions; (2) in excess of the authority of the [defendant]; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous **326 *609 in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, rescind the action of the [defendant] or take such other action as may be necessary. For purposes of further appeal, the action taken by the superior court hereunder is

a final judgment." That rule contains multiple, seemingly interchangeable, standards of review. Under Practice Book § 2–38(f), a court reviewing an order of the defendant finding a violation of rule 3.1, for instance, could evaluate that finding under the clearly erroneous standard *or* the abuse of discretion standard. [8]

[8] Notably, the standard articulated in Practice Book § 2–38(f) "tracks the language of the corresponding provision of the Uniform Administrative Procedure Act [UAPA], General Statutes § 4–183(j)...." *Shelton v. Statewide Grievance Committee,* 277 Conn. 99, 108, n. 7, 890 A.2d 104 (2006). Indeed, "judicial review of [the defendant's] decision to reprimand an attorney, like judicial review of an agency determination under UAPA, is limited, both with respect to the [defendant's] factual findings and its determination regarding the suitability of a reprimand as the sanction to be imposed.... Such deferential judicial review reflects the view of the rulemaking authorities that the [defendant] and its subcommittees are to play an integral role in the attorney grievance process." (Citations omitted.) *Johnson v. Statewide Grievance Committee,* 248 Conn. 87, 100–101, 726 A.2d 1154 (1999). At the same time, the defendant patently is not an administrative agency as defined ***610** in General Statutes § 4–166(1) of our UAPA. *Sobocinski v. Statewide Grievance Committee,* supra, 215 Conn. at 526, 576 A.2d 532. Our Supreme Court has held that the defendant "is not a body in which the legislature has reposed general powers of administration of a particular state program with which it has been given statutory authority to act for the state in the implementation of that program." Id. Rather, the defendant remains "an arm of the court...." (Internal quotation marks omitted.) Id.

[9] **[10]** In light of the foregoing, two principles emerge. First, appellate review of an attorney disciplinary proceeding is deferential. See *Johnson v. Statewide Grievance Committee,* supra, 248 Conn. at 101, 726 A.2d 1154; *Weiss v. Statewide Grievance Committee,* 227 Conn. 802, 811, 633 A.2d 282 (1993) ("[a]lthough the [defendant] is not an administrative agency ... the court's review of its conclusions is similar to the review afforded to an administrative agency decision" [citation omitted]). Likewise, the standards enumerated in Practice Book § 2–38(f) all are characterized by a degree of deference. The second principle stems from the defendant's unique status as an arm of the court. As a result, the applicable standard of appellate review, while deferential, cannot unduly restrict a reviewing court's inherent power "to inquire into the conduct of their own officers, and to discipline them for misconduct." *In re Peck,* supra, 88 Conn. at 457, 91 A. 274.

****327** The parties to the present appeal disagree as to the applicable deferential standard of review by which to evaluate the finding that the plaintiff violated rule 3.1. The plaintiff claims it is the clearly erroneous standard, while the defendant insists the applicable standard is the substantial evidence test. In separate appeals decided last year, our Supreme Court applied both standards. [9]

***611** In *Shelton v. Statewide Grievance Committee,* supra, 277 Conn. at 109, 890 A.2d 104, the court framed the applicable standard of review as follows: "[O]ur review of the [defendant's] decision is confined to determining whether it was supported by substantial evidence." The substantial evidence standard applied in *Shelton* has been described as a test that "is highly deferential and permits less judicial scrutiny than a clearly erroneous or weight of the evidence standard of review." (Internal quotation marks omitted.) *New England Cable Television Assn., Inc. v. Dept. of Public Utility Control,* 247 Conn. 95, 118, 717 A.2d 1276 (1998). Plainly, then, substantial evidence and clearly erroneous are not synonymous standards. [10] See *Dickinson v. Zurko,* 527 U.S. 150, 153, 119 S.Ct. 1816, 144 L.Ed.2d 143 (1999) (clearly erroneous standard stricter than substantial evidence standard); *Case v. Morrisette,* 475 F.2d 1300, 1307 n. 35 (D.C.Cir.1973) (substantial evidence and clearly erroneous not synonymous); *W.R.B. Corp. v. Geer,* 313 F.2d 750, 753 (5th Cir.1963) (same), cert. denied, 379 U.S. 841, 85 S.Ct. 78, 13 L.Ed.2d 47 (1964). One week after *Shelton* was decided, the court published *Notopoulos v. Statewide Grievance Committee,* 277 Conn. 218, 890 A.2d 509, cert. denied, 549 U.S. 823, 127 S.Ct. 157, 166 L.Ed.2d 39 (2006). Like *Shelton*, *Notopoulos* arose from the defendant's finding of a violation of the Rules of Professional Conduct. In *Notopoulos,* however, the standard of review applied was whether "the [defendant's] finding [was] clearly erroneous." Id., at 226, 890 A.2d 509.

[11] **[12]** **[13]** The distinction between the clearly erroneous and substantial evidence standards is not an academic one. ***612** The clearly erroneous standard of review provides that "[a] court's determination is clearly

erroneous only in cases in which the record contains no evidence to support it, or in cases in which there is evidence, but the reviewing court is left with the definite and firm conviction that a mistake has been made." (Internal quotation marks omitted.) *Considine v. Waterbury,* 279 Conn. 830, 858, 905 A.2d 70 (2006); see also *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948). The substantial evidence standard is even more deferential. Under the substantial evidence standard, a "reviewing court must take into account [that there is] contradictory evidence in the record ... but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence...." (Internal ****328** quotation marks omitted.) *Tarullo v. Inland Wetlands & Watercourses Commission,* 263 Conn. 572, 584, 821 A.2d 734 (2003). Significantly, substantial evidence is something *less* than the weight of the evidence.[11] *Rogers v. Board of Education,* 252 Conn. 753, 768, 749 A.2d 1173 (2000). The substantial evidence standard "imposes an important limitation on the power of the courts to overturn a decision of an administrative agency ... and [provides] a more restrictive standard of review than ... [the] clearly erroneous [standard of review]." (Internal quotation marks omitted.) *Sweetman v. State Elections Enforcement Commission,* 249 Conn. 296, 331, 732 A.2d 144 (1999).

[14] ***613** Under the clearly erroneous standard, a reviewing court retains authority to reverse a determination that finds some support in the record if it has a definite and firm conviction that a mistake has been made. No comparable exception exists under the substantial evidence standard.[12] Yet, it is that exception—that rare circumstance where, despite the evidence in the record, a reviewing court nevertheless is left with a definite and firm conviction that a mistake has been made—which preserves and vindicates the court's inherent authority to discipline its officers. For that reason, the clearly erroneous standard, itself very deferential, is the preferable standard of review in attorney grievance appeals.

That conclusion finds further support in the plain language of Practice Book § 2–38(f), which indicates that, in attorney grievance appeals, substantial evidence review itself is subject to a clearly erroneous consideration. Section 2–38(f) provides in relevant part that a reviewing court "shall affirm the decision of the [defendant] unless the court finds that substantial rights of the respondent have been prejudiced because the [defendant's] findings, inferences, conclusions, or decisions are ... (5) *clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record....* " (Emphasis added.) That provision suggests that the ultimate determination is whether a given ***614** finding is clearly erroneous, as informed by the substantial evidence in the record. A court reviewing an attorney disciplinary proceeding, therefore, retains its inherent authority over the discipline of its officers in those instances when, despite the evidence in the record, it nevertheless is left with a definite and firm conviction that a mistake has been made.[13] With that standard ****329** in mind, we turn to the plaintiff's claims.

II

THE DEFENDANT'S FINDING

The plaintiff claims that the defendant's finding that he violated rule 3.1 in two distinct ways is clearly erroneous. We address each finding in turn.

A

[15] We consider first the defendant's finding that the plaintiff's allegation of evident partiality or corruption on the part of the arbitrators violated rule 3.1. Rule 3.1 requires in relevant part that attorneys "shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous...." In *Texaco, Inc. v. Golart,* 206 Conn. 454, 538 A.2d 1017 (1988), our Supreme Court adopted the test for frivolousness set forth in the comment to rule 3.1. Accordingly, a claim or defense is frivolous (a) if maintained primarily for the purpose of harassing or maliciously injuring a person, (b) if the lawyer is unable either to make a good faith argument on the merits of the action, or (c) if the lawyer is unable to support the action taken by a good faith argument for an extension, modification or reversal of existing law. Id., at 464, 538 A.2d 1017. In *Schoonmaker v. Lawrence Brunoli, Inc.,* 265 Conn. 210, 255, 828 A.2d 64 (2003), the court ***615** indicated that the test is an objective one.[14] Accord 2 G. Hazard & W. Hodes, The Law of Lawyering (3d Ed. Sup.2007) § 27.12 ("[r]ule

3.1 adopts an objective as opposed to a subjective standard"); J. MacFarlane, "Frivolous Conduct Under Model Rule of Professional Conduct 3.1," 21 J. Legal Prof. 231 (1997) (same); 2 Restatement (Third), Law Governing Lawyers § 110, comment (d), p. 172 (2000) ("frivolous position is one that a lawyer of ordinary competence would recognize as so lacking in merit that there is no substantial possibility that the tribunal would accept it"). On appeal, the defendant contends that a reasonable lawyer could not make a good faith allegation of evident partiality or corruption on the part of the arbitrators in the present case.

At the hearing on the motion to vacate the arbitration award, the plaintiff introduced into evidence the affidavit of attorney's fees from Vincent McManus, Jr., the attorney for Orsini, the plaintiff in the underlying arbitration. That document contained a charge for a one and one-half hour conference with an arbitrator prior to the commencement of the arbitration proceedings. The plaintiff informed the court that the document related to the third allegation of the motion to vacate regarding partiality on the part of the arbitrators.[15] The *616 plaintiff subsequently asked **330 the arbitrator in question, attorney J. Michael Sulzbach, whether the one and one-half hour conference ever occurred. Sulzbach testified that it did not. Following that single question, the plaintiff stated, "That's all I have." Opposing counsel at that point interjected: "That's it? That's the only question he was asked? This is the corruption?" The plaintiff then opined to the court: "The point of my argument is not that the conversation occurred, but that Mr. McManus billed for it to his client, and then submitted the bill with his application for attorney's fees to impose that charge on us. And if he claims that it occurred, and he billed for it, then it's our argument that he should be estopped from claiming that it did not occur. *The argument is not that it occurred.*" (Emphasis added.) The plaintiff later reiterated that sentiment, stating that "I didn't say [McManus] spoke to [Sulzbach]. I never claimed that. I claimed he billed an hour and one half speaking to him."

The plaintiff presented no evidence in support of his allegation that "[t]here has been evident partiality or corruption on the part of an arbitrator or arbitrators in violation of [General Statutes] § 52–418(a)(2)" other than the aforementioned affidavit of attorney's fees. Although all three arbitrators were compelled to testify at the hearing, the plaintiff asked them no questions concerning his allegation of evident partiality or corruption.[16] Following a hearing, the reviewing committee concluded that the plaintiff lacked a good faith basis *617 for his allegation. It stated: "The record reflects that the only evidence presented by the [plaintiff] regarding this allegation was the fee bill from [McManus] charging for a conference with the arbitrator [Orsini] selected. We find that this evidence, in and of itself, does not support a good faith claim of partiality on the part of the arbitrator, since there was no evidence regarding the substance of this conference."

The first question to be decided is whether, armed with the affidavit of attorney's fees concerning the conference with Sulzbach, the filing of the plaintiff's motion to vacate the arbitration award violated rule 3.1. We conclude that it did not. The commentary to rule 3.1 provides in relevant part that "[t]he filing of an action ... for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery." Attorneys in Connecticut are not required, at the time a pleading is filed, to substantiate the allegations contained therein with evidentiary support. Practice Book § 10–1 requires only that each pleading "contain a plain and concise statement of the material facts on which the pleader relies, but not of the evidence by which they are to be proved...." In light of the conference with the arbitrator detailed in the affidavit of attorney's fees, a reasonable lawyer could maintain a good faith allegation of partiality or corruption on the part of an arbitrator.

[16] That determination does not end our inquiry. The defendant contends that the stricture of rule 3.1 is not limited to pleadings. We agree. Rule 3.1 proscribes **331 not only the commencement of a frivolous proceeding, but also the assertion of frivolous issues therein. By its plain language, it prohibits an attorney from asserting or controverting at any time in the course of a given proceeding a claim on which the attorney is unable to maintain a good faith argument on the merits. See *618 Annotated Model Rules of Professional Conduct (4th Ed.1999) p. 301 (rule 3.1 prohibits "frivolous or baseless conduct in the course of litigation"). It is axiomatic that, when an attorney continues to pursue a legal claim at trial, that attorney is asserting a legal claim. We see no practical reason why the requirement of rule 3.1 should be confined to the pleading stage of the proceedings, particularly when the rule itself contains no such restriction.[17] Moreover, our analysis is informed by rule 3.4 of the Rules of Professional Conduct, which provides in relevant part that "[a] lawyer shall not ... (5)[i]n trial, allude

to any matter that ... will not be supported by admissible evidence...."

We find instructive the decision of the Supreme Court of Missouri in [1] *In re Caranchini,* 956 S.W.2d 910 (Mo.1997) (en banc), cert. denied, 524 U.S. 940, 118 S.Ct. 2347, 141 L.Ed.2d 717 (1998). Sitting en banc, that court held that "[a] claim is not frivolous merely because the facts have not first been fully substantiated.... However, continuing to pursue a claim once it becomes apparent that there is no factual basis to support that claim is clearly contrary to the requirements of the rule." (Citation omitted; internal quotation marks omitted.) [2] Id., at 916. The court concluded, stating that "[b]y pursuing [the client's] slander claim even after it became apparent that there was no factual basis for that claim, [the attorney] violated [Missouri's version of [3] rule 3.1]." [4] Id.; see also Lawyers Manual on Professional Conduct, § 61–106 ("even if a claim or contention was not frivolous at the outset, the lawyer may not stick to that position once it becomes apparent that there is no factual basis for it"). The Supreme Court of Indiana reached a similar result in *Kahn v. Cundiff,* 543 N.E.2d 627 (Ind.1989). It stated: "Commencing an action against a particular party will less often be frivolous, ***619** unreasonable, or groundless than continuing to litigate the same action. Because of the system of notice pleading and pre-trial discovery, commencement of an action may often be justified on relatively insubstantial grounds. Thorough representation will sometimes require a lawyer to proceed against some parties solely for the purpose of investigation through pre-trial discovery. In such cases, counsel is expected to determine expeditiously the propriety of continuing such action and to dismiss promptly claims found to be frivolous, unreasonable, or groundless." Id., at 629. Accordingly, we conclude that [5] rule 3.1 prohibits an attorney from asserting at any time a claim on which the attorney reasonably is unable to maintain a good faith argument on the merits.

The present case involves such a situation. At the hearing on the plaintiff's motion to vacate, Sulzbach testified that the one and one-half hour conference noted in McManus' affidavit never occurred. Even more significantly, the plaintiff represented to the court that he was *not* alleging that the conference occurred. That admission is remarkable. If it was undisputed at the hearing that the alleged one and one-half hour conference between McManus and Sulzbach never transpired, it defies logic to nevertheless maintain that ****332** an affidavit referencing that conference evinces partiality or corruption on the part of an arbitrator. Without any other evidence, a reasonable attorney would not have persisted with an allegation of partiality or corruption. Indeed, a critical variable in the frivolousness calculus is the evidentiary support of a given allegation. In *Schoonmaker v. Lawrence Brunoli, Inc.,* supra, 265 Conn. at 255, 828 A.2d 64, the court concluded that certain claims were frivolous "because they were not supported by a scintilla of evidence." (Internal quotation marks omitted.) See also *Western United Realty, Inc. v. Isaacs,* 679 P.2d 1063, 1069 (Colo.1984) ("a claim or ***620** defense is groundless if the allegations in the complaint ... are not supported by any credible evidence at trial"); *Kahn v. Cundiff,* 533 N.E.2d 164, 171 (Ind.App.1989) (claim frivolous "if no facts exist which support the legal claim relied on and presented"), aff'd, 543 N.E.2d 627 (Ind.1989); cf. *Tautic v. Pattillo,* 41 Conn.Supp. 169, 173, 561 A.2d 988 (1988) ("case maintained solely on the basis of mere speculation is one that is maintained in bad faith, and where such a claim is pursued through time consuming litigation, or never is investigated minimally to determine its merits, a finding of bad faith is all but mandatory" [internal quotation marks omitted]). Likewise, rule 11 of the Federal Rules of Civil Procedure, the federal counterpart to rule 3. 1, focuses on the existence of evidence, providing that "the allegations and other factual contentions have evidentiary support" or, if identified, the allegations are "likely to have evidentiary support" after a reasonable opportunity for further investigation or discovery. [18] Fed.R.Civ.P. 11(b)(3).

We are mindful that "[a]dministration and interpretation of prohibitions against frivolous litigation should be tempered by concern to avoid over-enforcement." 2 Restatement (Third), supra, at § 110, comment (b), p. 171. For that reason, "[t]ribunals usually sanction only extreme abuse." Id. [6] Rule 3.1 should be applied cautiously in light of its potential for chilling legitimate but difficult advocacy. [19] "Danger exists that courts or ***621** disciplinary authorities might punish as frivolous or dilatory conduct that is the result of simple negligent error that was perceived as deliberate misconduct or deliberate indifference to the circumstances. Punishment should be imposed only if the lawyer *persists* in the error...." (Emphasis in original.) 2 G. Hazard & W. Hodes, supra, at § 27.12. It is not that the plaintiff alleged partiality or corruption consistent with § 52–418 in the ****333** motion to vacate, [20] but rather that he persisted in that allegation despite having not a scintilla of evidence to support it. For that reason,

we agree that the plaintiff lacked a good faith basis to maintain his allegation of evident partiality or corruption on the part of the arbitrators.

B

We next consider the defendant's finding that the plaintiff's allegation of fraud, corruption or undue influence in procuring the arbitration award violated rule 3.1. The plaintiff presented no evidence in support of that allegation at the hearing on the motion to vacate the arbitration award.

[17] The sole basis for the plaintiff's allegation of fraud, corruption or undue influence was an out-of-court statement of his client. As the reviewing committee stated: "In his testimony before this reviewing committee, the [plaintiff] stated that the charges of fraud, corruption or undue influence stemmed from a comment by his client, who claimed to have been told, by a staff person in the office of her former counsel, that the former *622 counsel had received money from [Orsini]. The [plaintiff] stated that he informed his client that he would need an affidavit to support these allegations. The client initially indicated that she would obtain such an affidavit, but never did. The [plaintiff] testified that since he had only thirty days to file the motion to vacate, he decided to include the allegations even without the affidavit. The [plaintiff] subpoenaed the former counsel to the hearing on the motion to vacate, but without an affidavit the [plaintiff] did not go forward on the issue. The [plaintiff] further testified that his client refused to authorize the [plaintiff] to withdraw the allegations."

As in part II A, there is little doubt that the plaintiff possessed a good faith basis to allege fraud, corruption or undue influence in procuring the arbitration in the motion to vacate the arbitration award.[21] In its memorandum of decision, the defendant conceded as much, noting that "the [plaintiff] initially may have had a good faith basis to make the allegation in the motion...." The defendant nevertheless found that the plaintiff "certainly did not have a good faith basis to maintain the allegation before the court once his client refused to supply an affidavit in support of the statement." The dispositive issue, then, is whether it may be said that a reasonable lawyer clearly would have ceased to pursue the fraud, corruption or undue influence allegation at trial when the client refused to provide an affidavit. The answer is yes.

Although the plaintiff initially was entitled to rely on his client's representation that she would furnish an affidavit in alleging fraud, corruption or undue influence in the motion to vacate, his obligation as an officer of the court required him to reconsider that allegation when his client subsequently refused to do so. Without *623 that affidavit, the allegation was rendered baseless.[22] The plaintiff testified before the reviewing committee that he informed his client that he could not proceed on the allegation without the affidavit. That testimony confirms that the plaintiff, at the time of trial, was aware that he lacked a **334 good faith basis to continue to pursue the allegation.

The plaintiff further testified that his client refused to authorize him to withdraw the allegation.[23] That is no excuse for his continued pursuit of the allegation. The commentary to rule 1.2(a) of the Rules of Professional Conduct (2002) states in relevant part that "a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so."[24] When an attorney is aware that a good faith basis is lacking, his duty as a minister of justice every time must trump a client's desire to continue an untenable allegation.

At the time of the hearing, the plaintiff's client refused to furnish an affidavit in support of her allegation. As the plaintiff then informed her and later acknowledged *624 in his testimony before the reviewing committee, he knew he could not reasonably proceed on the allegation that the arbitration award was procured by corruption, fraud or undue means without that affidavit. At that juncture, his conduct in continuing the allegation ran afoul of the stricture of rule 3.1.

III

CONCLUSION

The record before us contains ample support for the defendant's finding that the plaintiff violated rule 3.1 by persisting in the allegations that the arbitration award was procured by corruption, fraud or undue means and that evident partiality or corruption on the part of an arbitrator or arbitrators existed once he knew that he had no evidence to support those allegations at trial. Moreover, we are not left with a definite and firm conviction that a mistake has been

made. We therefore conclude that the defendant's finding that the plaintiff violated rule 3.1 is not clearly erroneous.

The judgment is affirmed.

In this opinion McLACHLAN, J., concurred.

FLYNN, C. J., concurring.

I respectfully concur in the result reached, but write separately because I do not concur with some of the reasoning of the grievance panel or of the trial court that heard the motion to vacate the arbitration award and, instead, would affirm on a narrower ground.

This case stems from a motion to vacate an arbitration award following a serious allegation made to the client of the plaintiff, Max F. Brunswick. The plaintiff testified before the reviewing committee of the defendant, the statewide grievance committee, that the allegation in his motion to vacate, which stated, inter alia, *625 that the award was procured by corruption, fraud or undue means, was based on information **335 provided to him by his client. The plaintiff testified that his client, the defendant in the underlying arbitration proceeding, had advised him that a secretary in her predecessor attorney's office had told her that her former attorney had received money from the arbitration plaintiff in the arbitration proceeding. The secretary, who allegedly provided this information, left that employment and left the state, and, therefore, could not be found to testify or furnish an affidavit requested by the plaintiff to support the allegation. The plaintiff's client also was concerned about a fee bill from Vincent McManus, Jr., the attorney for the arbitration plaintiff, that reflected a one and one-half hour conference with the arbitrator selected by the arbitration plaintiff that purportedly had occurred prior to the commencement of evidence in the arbitration. Although the amount and the time billed was related to requesting the arbitrator to sit on the case, it was argued that the one and one-half hours billed far exceeded the reasonable time such request would require, thereby suggesting an inference that the merits of the case may have been discussed. [1]

Jurisdictionally, the plaintiff had only thirty days within which to move to set aside the arbitration award. See General Statutes § 52–420(b); [2] see also *Wu v. Chang*, 264 Conn. 307, 312, 823 A.2d 1197 (2003) (if motion to vacate arbitration award not filed within thirty day time limit, court does not have subject matter jurisdiction over motion); *626 *Middlesex Ins. Co. v. Castellano*, 225 Conn. 339, 344, 623 A.2d 55 (1993) (same). The practicing lawyer must file the motion to vacate within the very short time window of § 52–420(b) or his client's motion will be barred.

I agree with the majority's conclusion in part II A, that attorneys in Connecticut are not required, at the time a pleading is filed, to substantiate fully the allegations contained therein with evidentiary support. However, I would go further and hold that it was not improper and did not violate rule 3.1 of the Rules of Professional Conduct for the plaintiff to track the language of the provisions of General Statutes § 52–418(a) in the allegations contained in the motion to vacate. In denying the motion to vacate, the court seemed concerned that the plaintiff tracked the language of the entire statute, § 52–418, including corruption, fraud, undue means, partiality or corruption, arbitrator's refusal to postpone or hear evidence and exceeding of powers or imperfect execution of them. This is not improper and has been the common practice of lawyers, who understand that they cannot later prove what they have not pleaded. I disagree with the holding of the reviewing committee that the allegation of fraud, corruption or undue influence was "clearly frivolous...." The commentary to rule 3.1 provides that "[t]he filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery." Additionally, plaintiffs are permitted to plead inconsistent yet otherwise valid causes of actions together in the same complaint, thereby allowing plaintiffs to pursue alternative remedies or theories of relief. See Practice Book § 10–25; **336 *Dreier v. Upjohn Co.*, 196 Conn. 242, 245, 492 A.2d 164 (1985); *Veits v. Hartford*, 134 Conn. 428, 433–34, 58 A.2d 389 (1948). I do not consider pleading in the alternative to be "frivolous."

*627 I next address part II B of the majority opinion, which concerns the plaintiff's continued pursuit of the allegations contained within the motion to vacate when his client could not supply the affidavit he requested. The defendant found that the plaintiff certainly did not have a good faith basis to maintain the allegation before the court once his client refused to supply an affidavit in support of the statement. I disagree. I find nothing in the record to support the finding that the client refused to supply such an affidavit. Instead, the evidence was that the plaintiff's client would attempt to obtain an affidavit

from her prior attorney's former secretary who had personal knowledge but had left the state. An attorney, in pursuing a claim under § 52–418(a) to vacate an arbitration award due to fraud, corruption or undue influence, would not need to obtain an affidavit from his or her client before bringing an action at law or proceeding to trial. If the legislature had intended to require that such an affidavit be sworn to by the movant seeking to vacate an arbitration award, it knew how to enact such a requirement.[3] There is no affidavit requirement to be found in the General Statutes or in the rules of practice.

In the broader picture, imposing an affidavit requirement in like instances would change the practice of law. For example, there are many situations in which *628 attorneys commence proceedings without corroborating proof of a client's allegations. See, e.g., *State v. Dabkowski*, 199 Conn. 193, 200, 506 A.2d 118 (1986) (in 1974, legislature repealed General Statutes § 53a68, thereby eliminating requirement of corroboration to sustain conviction in particular sexual offenses); *Dombrowski v. Dombrowski*, 169 Conn. 85, 87–88, 362 A.2d 907 (1975) ("[w]hen there is evidence which is believed by the court, which is sufficient to establish intolerable cruelty, a party is not precluded from a judgment dissolving the marriage because the evidence lacks corroboration"). To require verified complaints, supporting affidavits or corroborative evidence to bring or to pursue a claim in instances where there is no such requirement imposed by rule or statute, would deprive certain persons of access to Connecticut courts. This would be contrary to the letter and spirit of article 1, § 10, of the constitution of Connecticut, which provides: "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

The plaintiff's testimony before the reviewing committee indicated that he told his client that he would need an affidavit to support the client's allegations of fraud, corruption or undue influence. The plaintiff discussed obtaining an affidavit, but **337 one was not required by law in order to bring the motion to vacate. Because such an affidavit was neither required by statute or rule, it became a red herring in this disciplinary proceeding.

I, nevertheless, would affirm the judgment on a more narrow ground. During the December 4, 2003 hearing before the reviewing committee, the plaintiff conceded that his client had advised him at one point that she did not want to go forward with the charges underlying the motion to vacate at the hearing "because she didn't have any proof to back it up." At that point, the plaintiff *629 no longer was faced with a situation in which a necessary witness for his client had left the state and the client wanted to continue to move to vacate. At that juncture, the plaintiff no longer had potentially diverging responsibilities as an advocate for his client and as an officer of the court. Rather, he had an obligation to his client not to proceed with a claim that she did not want to continue to be brought, and he had an obligation to the court under rule 3.1 not to continue to argue the motion to vacate when his client believed she could not get the proof needed to support her allegations. His continuing to proceed, despite his client's desire not to go forward, supports the affirmance of the judgment of the trial court.

Accordingly, I concur in the result.

All Citations

103 Conn.App. 601, 931 A.2d 319

Footnotes

1 Subsequent to the referral of the plaintiff, Max F. Brunswick, to the defendant statewide grievance committee, rule 3.1 was amended effective January 1, 2007, to add the language, "in law and fact." Because that amendment had no effect on these proceedings, we refer in this opinion to the current revision of rule 3.1.

2 The arbitration proceeding concerned disputes arising from a lease between John L. Orsini and the plaintiff's client, Interiors of Yesterday, LLC. In its decision, the arbitration panel stated that "the hearing consisted of eleven hearing days, eighty exhibits including dozens of subexhibits.... The arbitrators found the testimony of [Interiors of Yesterday, LLC, principal], Kathleen Tarro, to be prevaricated and without credibility.... The

arbitrators also found the conduct of the case by [Tarro] was driven purely by a desire to delay the proceeding and was not based upon any meritorious defense. Having heard all of the testimony, reviewed all of the evidence and read all of the briefs, we find in favor of [Orsini] in the amount of $110,000 and award him that sum."

3 The plaintiff's motion to vacate the arbitration stated: "Pursuant to [General Statutes] § 52–414(d) and [General Statutes] § 52–418(a) ... the defendant respectfully moves to vacate the award of the arbitrators for the following reasons:

"(1) The arbitrators never took an oath to hear and examine the matter in controversy faithfully and fairly, and to make a just award according to the best of their understanding, as required by § 52–414(d)....

"(2) The award was procured by corruption, fraud or undue means in violation of § 52–418(a)(1)....

"(3) There has been evident partiality or corruption on the part of an arbitrator or arbitrators in violation of § 52–418(a)(2)....

"(4) The arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy, or of other actions by which the rights of the defendant have been prejudiced, in violation of § 52–418(a)(3) ....

"(5) The arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

"Wherefore, the defendant respectfully moves to vacate the award of the arbitrators."

4 Practice Book § 10–5, titled "Untrue Allegations or Denials," provides in relevant part: "Any allegation or denial made without reasonable cause and found untrue shall subject the party pleading the same to the payment of such reasonable expenses, to be taxed by the judicial authority, as may have been necessarily incurred by the other party by reason of such untrue pleading; provided that no expenses for counsel fees shall be taxed exceeding $500 for any one offense. Such expenses shall be taxed against the offending party whether that party prevails in the action or not...."

5 The court's referral stated in relevant part that "[t]he court gave [the plaintiff] several opportunities to withdraw the allegations of fraud and corruption but he insisted on going forward. He never took steps to support the allegations and the court secured the presence of the arbitrators so they could be questioned. Once the arbitrators were present, [the plaintiff] had no questions for them relating to the allegations."

6 It is undisputed that, in initially determining whether an attorney has violated the Rules of Professional Conduct, the applicable standard of proof in an attorney disciplinary proceeding is clear and convincing evidence. See *Statewide Grievance Committee v. Presnick*, 215 Conn. 162, 171–72, 575 A.2d 210 (1990). The parties contest the standard applicable to an appellate challenge to the defendant's determination that a violation transpired.

7 Standards of appellate review have been described as "the limits of review, or the extent to which, and the manner by which, a court of review will scrutinize the findings of fact, conclusions of law, or rulings of a trial court." R. Maloy, "Standards of Review–Just a Tip of the Icicle," 77 U. Det. Mercy L.Rev. 603, 604 (2000). On that point, the Supreme Court of Pennsylvania noted an important distinction: "Scope of review and standard of review are often—albeit erroneously—used interchangeably. The two terms carry distinct meanings and should not be substituted for one another. Scope of review refers to the confines within which an appellate court must conduct its examination.... In other words, it refers to the matters (or what) the appellate court is permitted to examine. In contrast, standard of review refers to the manner in which (or how) the examination is conducted." (Citation omitted; internal quotation marks omitted.) *Morrison v. Dept. of Public Welfare*, 538 Pa. 122, 131, 646 A.2d 565 (1994).

8 Missing from Practice Book § 2–38(f) is the plenary standard, which is synonymous with de novo review. See *Ammirata v. Zoning Board of Appeals*, 264 Conn. 737, 746, n. 13, 826 A.2d 170 (2003). In *Pinsky v. Statewide Grievance Committee*, supra, 216 Conn. at 234–35, 578 A.2d 1075, our Supreme Court held that plenary review of grievance appeals is inappropriate. Its omission from Practice Book § 2–38(f), therefore, hardly is surprising.

9 Subsequent to oral argument before this court, our Supreme Court decided *Statewide Grievance Committee v. Burton,* 282 Conn. 1, 917 A.2d 966 (2007). The sole question presented in that appeal was "whether a trial court has subject matter jurisdiction to adjudicate a presentment complaint ... alleging professional misconduct by an attorney who already has been disbarred from the practice of law for unrelated misconduct that occurred subsequent to the events alleged in the presentment." Id., at 2–3, 917 A.2d 966. Because it did not concern the underlying grievance determination, that decision is inapposite to the present case.

10 Under either standard, of course, a reviewing court may reverse a determination that misapplies the applicable law.

11 The term "substantial evidence" appears to be something of a misnomer. A court's finding is clearly erroneous "when it is not supported by *any evidence* in the record...." (Emphasis added.) *Hartford Electric Supply Co. v. Allen–Bradley Co.,* 250 Conn. 334, 345–46, 736 A.2d 824 (1999). If the substantial evidence test "permits less judicial scrutiny" than the clearly erroneous standard of review; *New England Cable Television Assn., Inc. v. Dept. of Public Utility Control,* supra, 247 Conn. at 118, 717 A.2d 1276; query how much evidence actually is required to satisfy that highly deferential standard.

12 Both the clearly erroneous and substantial evidence standards are highly deferential. The only practical difference between the two is the "definite and firm conviction that a mistake has been made" exception. In light of the fact that the defendant is an arm of the court, which retains an inherent authority over the discipline of its officers, we see no reason why that exception should not apply to review of attorney disciplinary proceedings. To the contrary, great is the potential harm in the instance in which, under the substantial evidence test, a reviewing court is left with a definite and firm conviction that a mistake has been made but nevertheless is compelled to affirm because the determination is supported by evidence in the record.

13 In its most recent decision involving an attorney grievance appeal, our Supreme Court applied the clearly erroneous standard of review. See *Notopoulos v. Statewide Grievance Committee,* supra, 277 Conn. at 226, 890 A.2d 509.

14 The plaintiff relies on the decision of our Supreme Court in *Engelke v. Wheatley,* 148 Conn. 398, 171 A.2d 402 (1961), to support his contention that the appropriate test is a subjective one. He misreads that precedent, which states that "counsel ... should not make a claim of error of this type unless, as an officer of the court, he both actually and reasonably believes that the finding in question was made without evidence. If such a claim is made recklessly or without an actual and reasonable belief that it is factually true, it would be good ground for disciplinary measures." Id., at 411, 171 A.2d 402. As a reasonableness standard signifies an objective test, *Engelke* thus comports with the Supreme Court's later invocations of an objective test to evaluate allegedly frivolous claims.

15 The plaintiff stated: "Partiality, number three, on the part of an arbitrator by having an hour and one-half conversation with him before the hearing, which he billed for."

16 At the conclusion of the first day of the motion to vacate hearing, the court told the plaintiff that "[t]here hasn't been any evidence today to support the [allegations of] corruption, fraud or undue means, partiality and corruption, misconduct or any of this. What do we do with this? ... Your burden is to put evidence on as to these items.... I'm going to order [the arbitrators] to be here Wednesday morning at 9:30, and you had better be prepared to prove these allegations with them present.... I want to hear the evidence to support allegations against three members of the bar in a pleading in this court."

17 We note that rule 3.1 is titled "Meritorious Claims and Contentions," not "Meritorious Pleadings."

18 Rule 3.1 and rule 11 use a similar frivolousness standard, and both apply the standard objectively. J. MacFarlane, supra, at 21 J. Legal Prof. 233.

19 We recognize an attorney's competing responsibilities as advocate of the client and officer of the court. As one commentator observed, however, "when [the attorney's] duties to his client conflict with his duties as an

officer of the court to further the administration of justice, the private duty must yield to the public duty." W. Cann, "Frivolous Lawsuits—the Lawyer's Duty to Say 'No'," 52 U. Colo. L.Rev. 367,375 (1981). Our law long has held that an attorney is "a minister of justice." *Cole v. Myers*, 128 Conn. 223, 230, 21 A.2d 396 (1941). As such, "[a]n attorney ... is responsible for the purity and fairness of all his dealings in court." *Cunningham v. Fair Haven & Westville R. Co.*, 72 Conn. 244, 252, 43 A. 1047 (1899).

We further appreciate the difficulty that may attach to a determination of precisely when a good faith basis no longer exists to maintain a particular claim. At the same time, when it may be said that a reasonable lawyer clearly would not persist in pursuing a claim that lacked any good faith basis, rule 3.1 is implicated. A primary indication of when that point arrives is when the absence of any evidentiary support whatsoever for the claim becomes evident.

20 See footnote 2 of this opinion.

21 It is undisputed that the allegations contained in the motion to vacate mirrored the provisions of § 52–418(a).

22 Although the plaintiff was free to subpoena the staff person to substantiate his client's assertion, he did not do so. That decision is perplexing in light of the plaintiff's admission that he could not proceed on the allegation without the staff person's affidavit.

23 At the hearing before the reviewing committee, the plaintiff was asked why he elected not to withdraw the allegation during the hearing on the motion to vacate. Although he claims in his appellate brief that he "had to protect his client by at least holding the option of filing a motion to open the judgment if, in fact, she was able to receive the affidavit after [the hearing concluded]," the plaintiff did not raise that claim before the reviewing committee.

24 "[T]he lawyer must not be permitted to say that he is only an advocate, that he is only doing his job. He must not be allowed to simply close his eyes and state that he is not morally or ethically responsible for the bringing of a frivolous suit or for the imposition of unjust expense on another. An action should not be [maintained] simply to gratify the inclination of a litigious person." (Internal quotation marks omitted.) W. Cann, "Frivolous Lawsuits—the Lawyer's Duty to Say 'No'," 52 U. Colo. L.Rev. 367,375 (1981).

1 The arbitrator selected by the arbitration plaintiff testified at the hearing on the motion to vacate the arbitration award that he did not have a one and one-half hour conversation with McManus before the arbitration proceedings began.

2 General Statutes § 52–420(b) provides that "[n] o motion to vacate, modify or correct an award may be made after thirty days from the notice of the award to the party to the arbitration who makes the motion."

3 See, e.g., General Statutes § 52–190a (requires good faith certificate to be filed with complaint or initial pleading in medical malpractice action); General Statutes § 52–278c(a)(2) (requires individuals seeking prejudgment remedy to include affidavit along with unsigned writ, summons and complaint and application); General Statutes § 52–471(b) (no injunction may be issued unless facts stated in application are verified by oath of plaintiff or some competent witness); see also *Fedus v. Planning & Zoning Commission*, 278 Conn. 751, 770–71 n. 17, 900 A.2d 1 (2006) (noting that legislature knows how to enact legislation consistent with its intent). Judges of the Superior Court, as rule makers also can impose affidavit requirements but did not do so in this instance. See, e.g., Practice Book § 1–23 (motion to disqualify judicial authority shall be in writing and accompanied by affidavit).

End of Document

January 20, 2021

Attorney Grievance Committee
Supreme Court of the State of New York
Appellate Division, First Judicial Department
180 Maiden Lane
New York, New York 10038
(212) 401-0800
Email: AD1-AGC-newcomplaints@nycourts.gov

Re: Professional Responsibility Investigation of Rudolph W. Giuliani, Registration No. 1080498

Dear Members of the Committee:

Lawyers Defending American Democracy ("LDAD") is a non-profit, non-partisan organization the purpose of which is to foster adherence to the rule of law. LDAD's open letters and statements calling for accountability on the part of public officials have garnered the support of 6,000 lawyers across the country, including many in New York.[1] LDAD and the undersigned attorneys file this ethics complaint against Rudolph W. Giuliani because Mr. Giuliani has violated multiple provisions of the New York Rules of Professional Conduct while representing former President Donald Trump and the Trump Campaign.

This complaint is about law, not politics. Lawyers have every right to represent their clients zealously and to engage in political speech. But they cross ethical boundaries—which are equally boundaries of New York law—when they invoke and abuse the judicial process, lie to third parties in the course of representing clients, or engage in conduct involving dishonesty, fraud, deceit, or misrepresentation in or out of court.

By these standards, Mr. Giuliani's conduct should be investigated, and he should be sanctioned immediately while the Committee investigates. As lead counsel for Mr. Trump in all election matters, Mr. Giuliani has spearheaded a nationwide public campaign to convince the public and the courts of massive voter fraud and a stolen presidential election. Mr. Giuliani personally advanced and argued claims in court that were frivolous and had no reasonable purpose other than to fuel the extrajudicial campaign of falsehoods.

Mr. Giuliani knew that his claims of widespread election fraud were false. Federal, state, and local officials who had first-hand knowledge or had conducted factual investigations unanimously agreed that there was no widespread fraud that would cast doubt on the election of then-Vice President Joseph Biden. Judges uniformly rejected the lawsuits brought by the Trump Campaign, finding claims of widespread fraud to be unsupported. When Mr. Giuliani was at greatest risk of personal court sanction, under questioning by a federal judge during oral argument in Pennsylvania, he disavowed claiming "fraud" in any respect but insisted nonetheless that state election officials should be enjoined from certifying presidential election results.

[1] We are distributing this complaint publicly and will advise the Committee promptly of the names of additional lawyers who join it.

Mr. Giuliani's flagrant and persistent lying deserves heightened scrutiny and sanctions because his intent and purpose was to undermine the most fundamental of the rights protected by the Constitution and the right preservative of all other constitutional rights: the right to vote. On January 6, Mr. Giuliani exhorted the crowd poised to march to the U.S. Capitol to engage in "trial by combat" because he "staked his reputation" that they would find election "criminality" there. The former Associate Attorney General of the United States and United States Attorney for the Southern District of New York knew what he was doing when he encouraged anger, division, and violence through false assertions. Mr. Giuliani has also achieved his object of undermining what the then-federal Chief of the Cybersecurity and Infrastructure Security Agency called "the most secure [election] in U.S. history." According to polling, 70 percent of Republicans in the United States disbelieve that the election was free and fair and 52 percent believe Mr. Trump to have been the rightful winner.

A lawyer who lies to the public and abuses the court system to undermine democracy and the rule of law is not fit to practice law. *See N.Y. Rules of Prof. Conduct* 8.4(h) (prohibiting lawyer from engaging in any conduct "that adversely reflects" on his fitness as a lawyer). Other lawyers observed ethical obligations by stepping back from representing Mr. Trump and his Campaign; Mr. Giuliani not only lent his stature and status as a lawyer to the venture but shows no inclination to stop lying. As recently as January 16, it was reported that Mr. Giuliani planned to continue to claim publicly that the claim of widespread voter fraud is true.

Given Mr. Giuliani's continuing attacks on the Republic, we also request that the Committee consider exercising its authority to impose interim suspension. 22 NYCRR § 1240.9. The Committee already has "uncontroverted evidence of professional misconduct" because Mr. Giuliani has committed his violations in the public eye. Prompt action by the Committee is here both a matter of protecting the Constitution and the public peace.

Mr. Giuliani swore when he became a New York lawyer to "support the Constitution of the United States" and to "faithfully discharge the duties of the office of attorney and counselor at law." Mr. Giuliani has profoundly violated that oath. We detail below the campaign of falsehoods that Mr. Giuliani orchestrated and then describe multiple ongoing violations of the New York Rules that show Mr. Giuliani to be unworthy of the privilege of practicing law.

I. The Lawyer's Duties To Act Honestly and Respect the Legal System and To Report Other Lawyers Who Do Not.

The New York Rules of Professional Conduct (hereinafter, "Rules" or "Rule") embody the "general rule that lawyers may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation." *See, e.g., N.Y. Rules of Prof. Conduct* (2020) (hereinafter, "*N.Y. Rules*"), Rule 8.4(c).[2]

Further, whether acting as an advocate or advisor, a lawyer has a duty to respect the law and to conduct himself or herself in a way that encourages others to do so. A lawyer is "an officer of the legal system," who "has a duty to uphold the legal process; to demonstrate respect for the legal system; to seek improvement of the law; and to promote access to the legal system

[2] The N.Y. Rules are codified at 22 NYCRR § 1200 et seq.

and the administration of justice." *N.Y. Rules*, Preamble [1]. For lawyers to promote respect for law and courts is important because "in a constitutional democracy, legal institutions depend on popular participation and support to maintain their authority." *Id.*

While "[e]very lawyer is responsible for observance of the Rules," each is also supposed to "aid in securing their observance by other lawyers." *N.Y. Rules,* Preamble [5]. When a lawyer becomes aware of another lawyer's violation of the Rules that "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness," he or she is obligated to make a report to an authority empowered to investigate or act. *N.Y. Rules,* Rule 8.3(a).

The filing of this complaint is informed by the obligations Rule 8.3(a).

II. The Conduct of Rudolph Giuliani.

A. As National Counsel for President Trump and the Trump Campaign, Giuliani Knowingly Propagated a False Narrative of Election Fraud.

Mr. Giuliani knowingly propagated a false narrative of election fraud to de-legitimize then-Vice President Biden's presidential victory and to undermine public confidence in the national electoral process. Prior to the election, Mr. Giuliani was the personal attorney and longtime advisor to the President. Like President Trump, Mr. Giuliani claimed even before the November election that widespread fraud would occur in the upcoming election, *see* Appendix A[3] tweets dated September 24, 2020 and October 5, 2020, and the President made it known that Mr. Giuliani would manage any post-election litigation. Shortly after the election, Mr. Trump officially designated Mr. Giuliani as his lead counsel in all of his campaign's post-election legal challenges. Mr. Giuliani's efforts on behalf of the President and his campaign involved multiple fronts:

First, Mr. Giuliani made false statements of massive election fraud through weekly YouTube videos, press conferences, press interviews, and social media messages.

Second, Mr. Giuliani managed and participated in baseless litigation in state and federal courts seeking to invalidate millions of votes in battleground states.

Third, Mr. Giuliani gave testimony and made further false statements before state legislators in the battleground states in formal and informal hearings, followed by public and private efforts to induce state legislators to attempt to certify alternative slates of electors.

Fourth, Mr. Giuliani attempted to use the false narrative of voter fraud to persuade the public that Vice President Pence should unconstitutionally reject state certified elector votes for President-Elect Biden, pursuant to the Twelfth Amendment and the Electoral Count Act of 1878.

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[3] We have provided as Appendix A just a partial compilation, in chronological order, of Mr. Giuliani's reported statements alleging election fraud, as well as links to his Common Sense YouTube videos, press conferences, appearances before legislative committees, and social media messages.

We summarize key aspects of each of these aspects of Mr. Giuliani's conduct to provide the context for a discussion of the Rules that Mr. Giuliani knowingly violated.

B. Mr. Giuliani's public statements setting forth a false election fraud narrative.

Mr. Giuliani grounded his public and nearly daily statements about the election on a core assertion of widespread fraud—a "pattern" of coordinated fraud, detectable across the contested states -- that demonstrated the election result to be unreliable. *See generally* Appendix A.

Ballot counting ended in early November with no reports of widespread or coordinated fraud. On November 12, Christopher Krebs, head of the U.S. Cybersecurity and Infrastructure Security Agency, announced that the "November 3rd election was the most secure in American history. . . . There is no evidence that any voting system deleted or lost votes or changed votes or was in any way compromised." On December 1, Attorney General Barr announced that the Department of Justice has "not seen fraud on a scale that could have effected a different outcome in the election." By December 8, each state had duly certified electors with President-Elect Biden securing a clear majority of 306 electoral votes.

In the face of these definitive findings, and the absence of any evidence of widespread fraud, Mr. Giuliani began asserting, soon after Election Day, a "massive" and outcome-changing fraud, as he had before the election even began.

On November 7, at a press conference convened at Four Seasons Landscaping in Philadelphia, Mr. Giuliani insinuated that only voter fraud manufactured by "the Democratic machine" of Philadelphia could have accounted for the erasing of Mr. Trump's initial lead of 800,000 votes in the state. He claimed that "not a single [mail-in] ballot was inspected as the law required."

At a press conference on November 19 at RNC headquarters in Washington, D.C., Mr. Giuliani claimed the election had been stolen. He discussed "fraudulent ballots," elaborating that "[w]e cannot allow these crooks...to steal an election from the American people...The people who did this have committed one of the worst crimes that I've ever seen...They have trashed...dishonored...destroyed the right to vote in their greed for power and money. And there is no doubt about it." Mr. Giuliani claimed that there was even a "pattern" of coordinated fraud. He said, "it's not a single voter fraud in one state. This pattern repeats itself in a number of states. Almost exactly the same pattern . . ."

Similarly, Mr. Giuliani recorded YouTube videos throughout November to further his false election fraud narrative, for example, stating in his November 13th video, that "there are thousands of pieces of evidence of hard fraud." Beginning in December, as described in Section II.A.3 below, Mr. Giuliani made false statements to state legislatures, at meetings convened by state legislators, and in related press statements.

Mr. Giuliani emphasized in making his claims of fraud that he was acting as a lawyer for President Trump, who likewise claimed the election had been stolen from him. *E.g.*, Mr. Giuliani's Statement on December 2, 2020 before the Michigan State House Oversight Committee.

1. The litigation campaign to invalidate tens of millions of votes.

Mr. Giuliani initiated or managed the numerous election-related lawsuits on behalf of the Trump Campaign and of individuals and surrogates acting on the President's behalf. There is an extensive public record of Mr. Giuliani's conduct. The pleadings, oral arguments, and court decisions in "major cases" in the multiple state and federal jurisdictions have been exhaustively catalogued by the Moritz College of Law, Ohio State University, and are available here. Over 60 lawsuits were filed challenging the election results. With one minor exception not involving voter fraud, the lower and appellate courts rejected and dismissed every case.

Many of these cases shared two striking similarities. The suits asked courts to invalidate the votes of many, if not all, voters in a state. But they did so on the basis of minor procedural or administrative irregularities in mail-in balloting procedures, observer access, or the like. The complaints (and supporting affidavits) did not go beyond alleging speculation that pervasive fraud may have occurred.

The courts uniformly and emphatically dismissed the fraud allegations as unsupported by proof. For example, a federal court in Arizona ruled, "Plaintiffs have not moved the needle for their fraud theory from conceivable to plausible, which they must do to state a claim." Decision and Order Dismissing Complaint, *Bowyer v. Ducey*, No. CV-20-02321-DJH at 27(D. Ariz., Dec. 9, 2020). A Nevada court stated that the campaign "did not prove under any standard of proof that illegal votes were cast and counted, or legal votes were not counted at all . . . in an amount sufficient to raise a reasonable doubt as to the outcome of the election." Decision and Order Dismissing Statement of Contest, *Law v. Whitmer*, No. 20 OC 00163 1B at 29-30 (D. Nev. Dec. 4, 2020). A Michigan court concluded that suggestions of fraud were "speculative" as well as "incorrect and not credible." Decision and Order Dismissing Complaint, *Costantino v. City of Detroit*, No. 20-014780-AW at 6, 13(3d Jud. Cir. Mi., Nov. 13, 2020).

As to Mr. Giuliani's claims that the factual allegations somehow justified the request to invalidate millions of votes in various states (and particularly in Democratic-leaning cities with large minority populations), courts emphasized that his requests to disenfranchise so many voters were legally "extraordinary", *Trump v Wisconsin Elections Commn.*, 20-CV-1785-BHL, 2020 WL 7318940, at *1, 22 (ED Wis Dec. 12, 2020), *aff'd*, 983 F3d 919 (7th Cir 2020). One federal district judge stated the impossibility of any court to address Mr. Giuliani's requested remedy: "Federal judges do not appoint the president in this country. One wonders why the plaintiffs came to federal court and asked a federal judge to do so." *Feehan v Wisconsin Elections Commn.*, 20-CV-1771-PP, 2020 WL 7250219, at *1 (ED Wis Dec. 9, 2020).

As the cases he was coordinating were decided against plaintiffs, in decisions issued by judges appointed by both Republicans and Democrats, Mr. Giuliani continued to claim fraud. At his November 19 press conference in Washington, D.C., Mr. Giuliani stated that "This is a plan...They [Democrats] do the same thing in exactly the same way in 10 big Democrat-controlled...crooked cit[ies]...They picked the places where...judges would just dismiss it. Because judges are appointed politically and too many of them are hacks." Mr. Giuliani projected onto the courts his own tactic of fabricating facts. For instance, on December 4, Mr. Giuliani stated during a Fox News interview that a Nevada judge who had dismissed one of the Trump Campaign's election cases had "created a fantasy out of the law."

2. Mr. Giuliani's false December communications with state legislators and at state legislatures.

Mr. Giuliani opened another front of his campaign of false election claims in December. He deployed his election fraud strategy to convince Republican legislators in battleground states to certify Trump electors, rather than Biden electors. When those states correctly certified their votes for then Vice-President Biden, Mr. Giuliani then sought to obtain unofficial Trump elector slates from those states. He succeeded in Georgia, Pennsylvania, Michigan, Wisconsin, and Nevada.

In a nationwide "tour" of appearances in state legislatures or hosted by state legislators, and including while under oath, Mr. Giuliani repeated his allegations of a nationwide pattern of urban election fraud. Summaries of Mr. Giuliani's legislative appearances are also listed in Appendix A. Mr. Giuliani then used these legislative appearances as fodder for additional press statements, YouTube videos, and social media posts.

A prominent example of Mr. Giuliani's proffer of false evidence occurred on December 3, when he appeared for seven hours at a committee hearing of the Georgia State Senate. By this time, it was widely commented that there was no substantiation of Mr. Trump's and Mr. Giuliani's assertions of massive fraud. Mr. Giuliani repeated those claims and seized on a 90-second clip of surveillance footage from Fulton County's tabulation center set up at State Farm Arena. According to Mr. Giuliani, the 1.5 minute video, which was culled from hours of footage, showed election workers pulling suitcases of ballots from underneath a table for counting in secret, after Republican monitors were told to go home. The next day, Giuliani aired his weekly YouTube video with extensive discussion of the video that he described as showing Democrats "caught red-handed" in voting fraud.

Within days, Georgia election officials and all major media outlets, after viewing the surveillance footage in full and obtaining information from election officials, dismissed the edited video as demonstrably false. Because it was false, they declined to repeat Mr. Giuliani's claims by further covering them. By that time, however, the video had gone viral, airing repeatedly on social media and opinion radio and television shows sympathetic to Mr. Trump. So far as we have been able to determine, Mr. Giuliani neither disavowed it nor acknowledged its falsity. To the contrary, he continued in subsequent legislative appearances in other states, including Missouri, to describe "indisputable evidence of fraud captured on videotape." He continued touting the video on social media. *See* Appendix A, tweet dated January 4, 2021. Predictably, the video has achieved iconic status among Mr. Trump and his supporters as "evidence" of the massive fraud that Mr. Giuliani scripted.

The campaign of Mr. Giuliani, President Trump, and their allies to undermine public confidence in the election appears to have been extremely successful. Polling organizations report that 70 percent of Republican voters believe the election was not "free and fair."

3. Mr. Giuliani's effort on January 6 to overturn the election in Congress and his encouragement of "trial by combat" at the U.S. Capitol.

Mr. Giuliani continued his efforts by directing his attention to the U.S. Congress. In the weeks prior to count of electoral votes by a Joint Session of Congress as prescribed by the Electoral Count Act, Mr. Giuliani was a leading voice that then Vice President Michael Pence could reject the votes of the electors from the six most-contested states, thereby enabling the House of Representatives to select the President.

As the New York Times reported, "Mr. Trump, listening to the advice of allies like Rudolph W. Giuliani, his personal lawyer, has been convinced that the vice president could do his bidding" during the vote counting process. In an interview, Mr. Giuliani explained that, at the joint session of Congress on January 6, Vice President Pence "could say, '. . .the election was conducted illegally in these six states. Therefore, I'm throwing their votes out, they're not certified . . . that would leave Trump at 233, and that would put Biden at 230, nobody has a majority." Mr. Giuliani thus again grounded his legal position solely in his false narrative of "a massive fraud."

He also advanced an absurd constitutional argument, *i.e.*, that the Vice President could reject electoral votes certified in accord with processes decreed by state legislatures under Article II, section 1, and second-guess duly constituted state electoral authorities, a position completely rejected by the Electoral Commission of 1877.

After conferring with legal scholars, Mr. Pence categorically rejected Mr. Giuliani's bid to have him unilaterally discard duly certified elector votes. On January 6, he confirmed the election of President Biden before a joint session of Congress, but only after the violent insurrection at the U.S. Capitol. In remarks that built to a crescendo of exhorting the crowd at the rally to reverse the election and to march on the Capitol, Mr. Giuliani reprised tropes of election fraud that dovetailed with President Trump refrains. Mr. Trump stated, "These people are not going to take it any longer . . . All of us here today do not want to see our election victory stolen . . . . Our country has had enough. . . We will stop the steal. . . . And we fight. We fight like hell." Mr. Giuliani's more concise exhortation was for Trump supporters to engage in "trial by combat. . . . I'm willing to stake my reputation, the President is willing to stake his reputation, on the fact that we're going to find criminality there."

C. As Lead Counsel in *Trump v. Boockvar* in Pennsylvania, Mr. Giuliani Advanced Arguments in Court Without Any Basis in Law or Fact.

1. While continuing to assert publicly that a pervasive fraud had been perpetrated, Mr. Giuliani disclaimed in court that he was alleging fraud.

Mr. Giuliani personally directed the litigation in *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-CV-02078-MWB (M.D. Pa.), filed on behalf of the Trump Campaign and two Pennsylvania voters. He appeared in the case on November 17, 2020, after original counsel from Porter, Wright, Morris & Arthur, LLP withdrew, followed several days later by the

withdrawal of several successor counsel as well. Mr. Giuliani entered his appearance on the morning that the presiding judge, the Honorable Matthew W. Brann, had scheduled oral argument on defendants' motion to dismiss the first amended complaint.

In telling contrast to his public narrative of pervasive and coordinated fraud, Mr. Giuliani's federal complaint did *not* allege fraud. Plaintiffs in *Boockvar* filed two complaints and proposed a third. The First Amended Complaint was operative when Mr. Giuliani argued alleged two constitutional claims, one based in the Equal Protection Clause and the other based in the Electors and Elections Clauses. The gravamen of that complaint was that it violated federal law for the state of Pennsylvania to allow its counties to decide for themselves whether to allow notice-and-cure for ballots mailed in and found to have procedural deficiencies (like missing signatures). Plaintiffs also alleged that some counties had placed unlawful restrictions on election observers.

The original complaint and a Second Amended Complaint that Plaintiffs sought leave to file alleged additional legal claims that were also based on purported differences or defects in county election procedures—not fraud.

Despite the narrowness of his complaint's allegations, Mr. Giuliani asked the court to order broad relief like in other state and federal litigation he was managing. The suit asked the court to enjoin Boockvar, the Secretary of the Commonwealth of Pennsylvania, and the other defendants, from "certifying the results of the 2020 General Election in Pennsylvania on a Commonwealth-wide basis." *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-CV-02078, 2020 WL 6821992, at *7 (M.D. Pa. Nov. 21, 2020), aff'd sub nom. *Donald J. Trump for President, Inc. v. Sec'y of Pennsylvania*, 830 F. App'x 377 (3d Cir. 2020). The complaint sought alternatively an order declaring "that the results of the 2020 presidential general election are defective and providing for the Pennsylvania General Assembly to choose Pennsylvania's electors."

At oral argument, Mr. Giuliani asserted in his introductory remarks that the "best description" of what plaintiffs were alleging was a "widespread nationwide voter fraud … this is a case that is repeated in at least 10 other jurisdictions." Under questioning by Judge Brann, however, he quickly acknowledged that the complaint "doesn't plead fraud" and affirmed, "This is not a fraud case."

2. The District Court dismissed the first amended complaint because it was unsupported factually and legally and Third Circuit found that amendment would be futile.

Within ten days of the oral argument before Judge Brann, Plaintiffs had lost in the District Court and Third Circuit. Judge Brann dismissed the First Amended Complaint and denied leave to further amend because amendment would unduly delay resolution of the issues, given that Pennsylvania was due to certify its results on November 23. 2020 WL 6821992, at *14. The only issue Plaintiffs appealed was whether leave to amend was properly denied; without holding oral argument, the Court of Appeals determined that on any standard of review the district court should be affirmed because amendment would be inequitable and futile. 830 Fed. App'x. at 386.

While both courts afforded full and generous process—deciding alternate procedural and merits arguments and even "piec[ing] together" arguments Plaintiffs had failed to properly raise together, 2020 WL 6821992, at *7—each made clear that there was no merit whatever to the legal claims presented under the Equal Protection Clause, nor were the issues remotely close.

Most fundamentally, each court commented repeatedly that the relief sought by Plaintiffs—the disenfranchisement of almost seven million Pennsylvania voters, and the invalidating of all down-ballot votes as well—was insupportable, even assuming for argument's sake the validity of Plaintiffs' factual claims.

Judge Brann's Memorandum Opinion stated at the outset that the court had been "unable to find any case in which a plaintiff has sought such a drastic remedy in the contest of an election, in terms of the sheer volume of votes asked to be invalidated." 2020 WL 6821992, at *1. The Court wrote that instead of the "compelling legal arguments and factual proof" one would expect to support such a "drastic" remedy and "startling outcome," it had been presented with "strained legal arguments without merit and speculative accusations, unpled in the operative complaint and unsupported with evidence." *Id.* at *1. Moreover, the preferred remedy for an Equal Protection Clause violation, the Court stated, was to "level up"—*i.e.* to ask for Plaintiffs' votes to be counted. *Id.* at *12. Instead, Plaintiffs had sought not only to "level down"—to *not* count the votes of millions—but to affirmatively violate the constitutional rights of those millions by taking away the fundamental right to vote. *Id.* at *13.

The Court of Appeals was, if anything, more trenchant about the utter lack of merit in the suit, saying that even amendment to add multiple other constitutional claims would be futile. The Court's opinion began:

> Free, fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here.

830 Fed. App'x. at 381.

Like the District Court, the appeals court deemed the requested relief "grossly disproportionate to the procedural challenges raised." *Id.* at 382. It called the proposed relief "drastic and unprecedented," noting that "tossing out millions of mail-in ballots" would "disenfranchis[e] a huge swath of the electorate and upset[] all down ballot races too." *Id.*

The Third Circuit repeatedly referenced Mr. Giuliani's concession that the case was *not* a fraud case, explaining the legal significance. It stated, "Pennsylvania law...favors counting votes as long as there is no fraud." *Id.* Yet in the suit "[t]here is no allegation of fraud (let alone proof) to justify" the "breathtaking" proposed relief of "harming millions of voters." *Id.* at 388, 390. Instead the Campaign had alleged "modest" numbers of ballots potentially affected by the alleged procedural violations, which "will not move the needle," given the certified margin of Mr. Biden's victory of over 80,000 votes. *Id.* at 390.

The Third Circuit also noted clear defects in the suit beyond the many identified by the District Court. It stated that "most of the claims in the Second Amended Complaint boil down to issues of state law," many of which the Trump Campaign "has already litigated and lost," and

now sought improperly to "collaterally attack," *Id.* at 381, 387. The basic foundation of an Equal Protection claim was absent because the complaint "never alleges that anyone treated the Trump Campaign or Trump votes worse than it treated the Biden Campaign or Biden votes." *Id.* at 381.

The appellate court concluded that any further litigation of the claims was "futile":

> [T]he Campaign cannot win this lawsuit. It conceded it is not alleging election fraud. It has already raised and lost most of these state law issues, and it cannot relitigate them here. It cites no federal authority regulating poll watchers or notice and cure. It alleges no specific discrimination. And it does not contest that it lacks standing under the Elections and Electors Clauses. These claims cannot succeed.

Id. at 389.

The Court affirmed the denial of leave to amend, denied the requested injunction pending appeal, and ordered the mandate to issue immediately. *Id.* at 391.

III. The Grievance Committee Should Investigate Mr. Giuliani's Conduct and Impose Sanctions, Including Interim Suspension.

A. Violations of multiple New York Rules are clear from the public record.

Mr. Giuliani's conduct—in public and before the courts—warrants a full investigation by the Grievance Committee and interim suspension. *E.g.*, *In re Perchekly*, 149 A.D.3d 17, 19-21 (1st Dep't 2017) (interim suspension granted upon receipt of evidence that attorney's misappropriation of client funds "threaten[ed] the public interest."). We review the specific Rules that Mr. Giuliani has violated.

1. Mr. Giuliani's conduct violated Rule 3.1 – "Non-Meritorious Claims and Contentions."

Rule 3.1 states in pertinent part as follows:

> (a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. . . .
>
> b) A lawyer's conduct is "frivolous" for purposes of this Rule if:
>
> (1) A lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such a claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;

(2) The conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely to harass or maliciously injure another; or

(3) The lawyer knowingly asserts material factual statements that are false.

The foundational principle behind Rule 3.1 is that a lawyer has "a duty not to abuse legal procedure," *N.Y. Rules*, R.3.1 cmt. 1, and should withdraw from the representation at the point when he or she is asked to advance frivolous claims. The word "proceeding" in the phrase "bring a proceeding" includes federal and state proceedings, and "encompasses lawsuits, motions, hearings, [and] arbitration." Roy D. Simon, Jr., *Simon's N.Y. Rules of Prof. Conduct Annot.*, § 3.1:3 (2020) (hereinafter, "*Simon's*"). To "assert or controvert" an issue within a "proceeding" also has a broad meaning—specifically, to "advance[] or oppose[] specific issues within a proceeding." *Id.*

Here, the Committee need go no further than *Boockvar*, which Mr. Giuliani personally led and argued, to find violations of Rule 3.1. The Third Circuit found the suit "futile," even in the form of Mr. Giuliani's proposed broadest complaint. Most dispositive is that both the trial and appellate courts found no facts or law supported the "breathtaking" and "drastic" relief sought—the disenfranchisement of millions of voters, even as to down-ballot races.

There is ample proof that Mr. Giuliani advanced these claims "knowing"[4] that they were unsupported, even by any good-faith argument for an extension in the law. The District Court in *Boockvar* pointedly noted that *the very design* of the complaint showed a mindful effort to evade "controlling" precedent. It stated that "[t]his claim, like Frankenstein's monster, has been haphazardly stitched together from two distinct theories in an attempt to avoid controlling precedent." 2020 WL 6821992, at *4-5, (noting that it was "not lost on the Court" that "Plaintiffs are trying to mix-and-match claims to bypass contrary precedent.").

This is conduct in which no ethical lawyer should engage. But additional "circumstances," also noted by the district court and Third Circuit, demonstrate that Mr. Giuliani well knew that he was advancing frivolous claims. These include:

- That multiple other lawyers had withdrawn and were withdrawing from representing Plaintiffs;
- That the federal claims were "repackaged" failed state claims that sought to circumvent prior decisions upholding Pennsylvania voting and ballot counting procedures;

[4] Under Rule 1.0, "'Knowingly,' 'known,' 'know,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."

- That Plaintiffs' Equal Protection claim failed to allege any disparate treatment and that Plaintiffs' defense of that claim consisted of a single paragraph in briefing;

- That the relief sought bore no *logical*—much less legal—relation to the procedural defects alleged, which taken together could not have "moved the needle" of the election results. 830 Fed. App'x. 377 at 390; 2020 WL 6821992, at *12 (plaintiffs sought "a remedy *unhinged from* the underlying right being asserted") (emphasis supplied).

Far from arguing for a non-frivolous extension of the law, Mr. Giuliani "cite[d] no authority" for the remedy of barring Pennsylvania from certifying its results. 830 Fed. App'x. at 388. It is hornbook election law that election outcomes only get overturned when plaintiffs allege and prove defects sufficient to change the result. *See, e.g., Bognet v. Secretary Commonwealth of Pennsylvania,* 980 F.3d 336, 351 (3d Cir. 2020); *Sibley v. Alexander*, 916 F. Supp. 2d 58, 62 (D.D.C. 2013). And as both the district and appeals court stated, and even a non-lawyer would recognize, "levelling down" was patently not the way to vindicate Plaintiffs' purported rights, and would instead have resulted in the court-ordered violation of the constitutional rights of the millions whose votes Plaintiffs proposed to take away.

Mr. Giuliani's admission that the *Boockvar* suit did not allege fraud left the suit without a basis in fact as well as in law. And again, Mr. Giuliani knew this was the case. Mr. Giuliani admitted that that there was no plausible theory of fraud to allege—or he obviously would have alleged it. Second, as the Third Circuit explained, it was axiomatic that without such widespread fraud there was no possibility of the "invalidate-the-election" remedy which Mr. Giuliani improperly sought via blocking the certification of the election results.

The *Boockvar* suit was "frivolous" within the meaning of Rule 3.1 also because it "had no reasonable purpose other than to delay or prolong the resolution of litigation, within the meaning of Rule 3.2."[5] Like the other failing cases Mr. Giuliani coordinated, he brought *Boockvar* not to win the litigation or to press in good faith for a change in law. Rather, Mr. Giuliani and the Trump Campaign mounted the litigation blitz to mislead and confuse the public into thinking there might be "legal" reasons the election result was invalid. In *Boockvar* as in many of the other election cases, the Trump Campaign sued late—*not* when the purportedly defective election procedures were implemented, but only after the counting was underway (or over). While claiming urgency and burdening courts, Plaintiffs then sought to buy time by amending and re-amending equally meritless complaints.

The reason even the unbroken string of dozens of losses did not alter plaintiffs' course—unlike in good-faith litigation—was that the very pendency of cases before the courts enabled Mr. Trump and Mr. Giuliani to claim that they were pursing "legal" rights, as they repeatedly did. It is a credit to the courts that the judges carefully and expeditiously gave full consideration to the election cases. The courts' attention does not change, however, that Trump Campaign and Mr. Giuliani brought to those courts claims and arguments that were legally and factually baseless. Having exploited the legitimacy of the court system for their own deceitful ends, they

[5] Rule 3.2 states that "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense."

now have turned the corner into using the totally forcordained litigation losses to generate further "outrage" about a purely fictional "fraud." This is conduct as far from "demonstrate[ing] respect for the legal system" or helping to "maintain [the] authority" of the legal system, *N.Y. Rules,* Preamble [1], as one can imagine.

The seriousness and grave consequences of Mr. Giuliani's frivolous litigation campaign to de-legitimize the presidential election exponentially exceeds the abuse of legal procedure which has historically warranted sanctions.[6] For the foregoing reasons, there is more than substantial basis to conclude Mr. Giuliani knowingly violated Rule 3.1.

2. Mr. Giuliani's conduct violated Rule 4.1 – "Truthfulness" in Statements to Others.

Rule 4.1 states that "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person." The rule is not limited to statements made in court.

Mr. Giuliani's repeated out-of-court assertions of widespread or "pervasive" or "coordinated" fraud, sufficient to warrant overturning the results of the presidential election, violated this rule (and others, as is discussed below).

Compelling proof of Mr. Giuliani's knowledge of the falsity of his massive fraud narrative is his unambiguous disavowal of any fraud when responding to Judge Brann's questioning in *Boockvar*, where Mr. Giuliani also signed the pleadings. When the potential of a court-imposed sanction was most immediate, *see* Fed. R. Civ. P. 11, and thus his personal interests most at risk, Mr. Giuliani denied asserting fraud, in sharp contrast to what he was saying in public. The about-face showed that Mr. Giuliani was well aware of the falsity of his public fraud claims.

Mr. Giuliani's "tell," however, only reinforces the obvious. Since states first completed ballot counting, it was apparent that no widespread fraud had occurred and that there was no "stolen" election. Nonetheless, Mr. Giuliani has been espousing the same "widespread fraud" myth from before the election until today, despite escalating contrary facts:

- On Election Day, Twitter began tagging President Trump's tweets about the election returns in Pennsylvania as "potentially misleading claims about an election."
- After Election Day, the states with close election results completed counting ballots and conducted required recounts required by law. None turned up outcome-altering fraud.

[6] New York has adopted an objective, "reasonable attorney" test for frivolousness. *Principe v. Assay Partners*, 154 Misc. 2d 702, 708 (Sup. Ct. New York Cnty. 1992). New York Lawyers have been sanctioned for filing frivolous pleadings. *See, e.g., In re Khoudary*, 124 A.D.3d 154 (1st Dep't. 2014) (two-year suspension); *In re Chiofalo*, 78 A.D.3d 9, 11 (1st Dep't. 2010) (two-year suspension).

- On November 12, Christopher Krebs announced the election was "the most secure in American history." (President Trump subsequently fired him).

- On November 11 & 13, the law firms Porter Wright and Snell & Willmer withdrew from representing the Trump Campaign in campaign litigation in Pennsylvania and Arizona, respectively.

- On November 16, attorneys Linda Kerns, John Scott, and Douglas Bryan Hughes sought to withdraw from representing Plaintiffs in the *Boockvar* litigation, and by that day the Trump Campaign had lost at least six election suits just in Pennsylvania.

- On December 1, then-Attorney General Barr denied that there was any fraud on a scale that affected the outcome of the election.

- By December 8, all states had all certified their results.

- On December 11, the Supreme Court dismissed the petition filed by the Attorney General of Texas against the four states in which President Biden had narrowly prevailed, on standing grounds.

- On December 15, Senate Majority Leader Mitch McConnell acknowledged President-Elect Biden's victory.

- On January 5, media reported that Vice President Pence had told Mr. Trump at lunch on January 4, after obtaining legal advice, that he had no authority not to certify the election results.

- By January 6, the Trump Campaign had lost over 50 lawsuits challenging election procedures and election results.

- On January 8, Twitter and other social media sites suspended Mr. Trump's accounts.

In other words, if Mr. Giuliani ever believed that the election was undermined by massive fraud (even hypothetically), he cannot have honestly maintained that belief throughout the time he spread his false statements. Either from the outset or as he continued claiming widespread election fraud, Mr. Giuliani understood the claim was baseless. Yet, he has doubled and tripled down on his public message, including when he encouraged the crowd at the U.S. Capitol to engage in "trial by combat" because he was willing to stake his reputation on "finding criminality."

That Mr. Giuliani has "knowingly made false statements" is also evidenced by his inability to adduce proof of widespread fraud and his willingness to lie that he had found "evidence." Mr. Giuliani seized, for example, on the 90-second video clip of footage from Fulton County's tabulation center to fill an evidentiary void that by that time had become glaring. He repeated that the tape was "indisputable" evidence of fraud even after election officials explained that the video showed ordinary ballot counting and the media had stopped disseminating his false claims. Mr. Giuliani was, as he often reminds his audiences, an

experienced fraud prosecutor. It beggars belief to think that Mr. Giuliani thought that the excerpted and facially benign video was "indisputable" in proving fraud, or evidence of any value at all. Rather, he used his status as a nationally known lawyer and former federal prosecutor to wrongly imbue the video with a significance he knew it did not have.

There was also no legal foundation for Mr. Giuliani's assertion that Mr. Pence was constitutionally empowered to reject state certified electoral votes at the Joint Session of Congress. Article II, section 1 of the Constitution entrusts exclusively to the states power to select presidential electors. Under the Electoral Count Act, 3 U.S.C. §5, state certified electoral votes following resolution of disputes six days before the convocation of the Electoral College in the 50 States and the District of Columbia (*i.e.*, December 8, 2020 for the 2020 presidential election) are conclusive on the Joint Session of Congress counting the electoral votes. Moreover, the Electoral Commission of 1877 held that state certified electors by duly constituted state authorities are binding in the counting of electoral votes. There is no non-frivolous argument that the Vice President is constitutionally empowered to hijack the authority of the States and the District of Columbia to decide whether or not to accept State and D.C-certified electoral results.

Rule 4.1 demands truth while representing a client.[7] It is difficult to imagine a knowing falsehood of greater significance than an attorney lending his credentials to help a President make the false claim that an election was stolen from him or asserting without any basis that the Vice President has constitutional power to decide the outcome of a presidential race at odds with the electors' choice.

3. Mr. Giuliani's conduct violated Rule 4.4 (a) – "Respect for Rights of Third Persons."

Subsection (a) of Rule 4.4(a), entitled "Respect for Rights of Third Persons," states:

> In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person or use methods of obtaining evidence that violate the rights of such a person.

Rule 4.4(a) applies to "every matter in which a lawyer represents a client." *Simon's*, § 4.4:4. A "third person" means "any person except the lawyer and the client." *Id.*, § 4.4:2.

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[7] In *Gentile v. State Bar of* Nevada, 501 U.S. 1030 (1991), the Supreme Court struck down a state disciplinary rule deemed void for vagueness because it contained words like "general" and "elaboration," *id.* at 1077. The majority in *Gentile*, however, held that but for the vagueness it would have been permissible to discipline the lawyer for making public pretrial comments about a single case, where they were "substantially likely to have a materially prejudicial effect" on a proceeding. *Id.* at 1076. The highest courts of two states have considered statements by a lawyer made in the course of campaigning and concluded that rights to free speech give way to disciplinary rules prohibiting lawyers from making known falsehoods or misrepresentations. *See State v. Russell*, 610 P.2d 1122, 1124 (1980); *In re Discipline of Hafter*, 381 P.3d 623 at *2 (2012) (unpublished disposition) (cert. denied Nevada 11-16-2012 U.S. Sup. Ct. Actions 9 (2012)).

First, Mr. Giuliani's prosecution of the *Boockvar* litigation violated Rule 4.4(a), as well as Rule 3.1. As the decisions in *Boockvar* noted, to harm third party voters was the express intent of the *Boockvar* case. *E.g.*, 830 Fed. App'x. at 390 ("Granting relief would harm millions of Pennsylvania voters too."). To overturn the results of the presidential election, or block the seating of President Biden, without proof or even an allegation of fraud, would *necessarily* disenfranchise the tens of millions of Americans who voted for President Biden. It is hard to imagine a more substantial harm that a lawyer might attempt to inflict.

Second, Mr. Giuliani's false public claims of widespread fraud equally failed to respect the rights of third persons, in violation of the Rule. *See Simon's*, § 4.4:4 (Rule 4.4(a) "is not limited to the litigation context."). The purpose of the public campaign is the same as the *Boockvar* litigation: to disenfranchise tens of millions of voters.

Further, the "means" in the case of the public campaign included known false assertions of "massive," coordinated fraud. That claim can have had no substantial purpose other than to harm third persons. Mr. Trump and Mr. Giuliani portray Mr. Trump as a victim. But the allegations of a "stolen" election or "criminality" necessarily, and without any basis, accuse others of being fraudsters, crooks, and thieves, while stealing the election from Mr. Biden and Vice President Kamala Harris.

Nor have the many victimized by Mr. Giuliani's false claims of fraud suffered merely theoretical harm. Election officials in Georgia understandably resorted to recording calls with the President and another of his counsel, Cleta Mitchell, to protect themselves from expected strong-arming and lying on the part of the President. State officials have implored Mr. Trump to stop claiming fraud, including for the reason that low-level election workers have received death threats. Manufacturers of voting machines have had to sue to protect their name. Members of Congress have crouched under furniture in the U.S. Capitol while rioters overwhelmed and attacked police after President Trump and Mr. Giuliani told them that a stolen election should be redressed with "combat."

Mr. Giuliani's campaign to deceive has also harmed the nation and communities that comprise our nation by relying on racist tropes and rhetoric. Mr. Giuliani singled out cities and districts in which minority voters predominate as those most rife with election fraud. When Mr. Giuliani made statements that a coordinated fraud "specifically focused on big cities" that are . . . "controlled by Democrats" and "have a long history of corruption," or that "for the last 60 years," Philadelphia has "cheated in just about every election. You could say the same thing about Detroit," he was inviting voters to be deemed criminals based on race, not on evidence. Mr. Giuliani urged the public to believe that election fraud occurred because cities with large minority populations, and their leadership, have long histories of cheating and corruption and should not be believed to be capable of acting otherwise. This is the infliction of harm by most offensive and damaging "means."

The substantial—indeed, necessary—ends of the means used by Mr. Giuliani to represent Mr. Trump and his campaign should be investigated and sanctioned.

4. Mr. Giuliani's conduct violated Rule 8.4(c)–"Misconduct – Conduct Involving Dishonesty."

Rule 8.4, which prohibits "Misconduct," states in subsection (c) that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The terms "fraud" or "fraudulent" denote "conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive." *N.Y. Rules*, R.1.0(i).

Rule 8.4(c) "encompasses every kind of dishonesty, fraud, deceit, or misrepresentation, whether inside or outside law practice and whether civil or criminal." *Simon's*, § 8.4:15. Here, as discussed above, Mr. Giuliani engaged in "conduct involving" dishonesty—knowingly making false public statements of widespread election fraud—with the demonstrated purpose of deceiving voters and the public generally. Mr. Giuliani's conduct was also plainly deliberate—he chose to propagate false claims of massive election fraud and has done so repeatedly and with great elaboration. *See, e.g., Matter of Posner*, 127 A.D.3d 129, 134 (2d Dep't 2015) ("even in the absence of venal intent, 'knowing and purposeful' conduct constitutes dishonesty, fraud, deceit, or misrepresentation"); *Peters v. Committee on Grievances for District Court*, 748 F.3d 456, 461-62 (2d Cir. 2014) (deliberate choice to obtain additional transcripts, after being ordered to surrender them because possession violated Confidentiality Order, supported finding of conduct involving dishonesty, fraud, deceit, or misrepresentation).

As discussed above, Mr. Giuliani's false statements of widespread election fraud appear to have been successful in helping to convince 70% of Republicans that the election was not free and fair. Mr. Giuliani's months-long course of dishonest conduct has thus been epically consequential.

"Nothing erodes the public trust in the profession more than a belief that lawyers are active co-conspirators with their clients in defrauding the public." *Simon's*, § 1.2:21. Mr. Giuliani should face the consequences of his deliberate decision to help Mr. Trump lie and destabilize the nation.

B. Mr. Giuliani has violated Rule 8.4(h) by engaging in conduct that adversely reflects on his fitness to practice law and his ongoing conduct merits interim suspension.

1. Mr. Giuliani's dishonest attacks on the rule of law are the most serious violations of the Rules possible.

Rule 8.4, the catch-all provision of the rule prohibiting "Misconduct," makes clear that a lawyer shall not "engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer." This rule was carried into the Rules from the New York Code of Professional Responsibility. *See* N.Y. Disciplinary Rule 1-102(A)(7). It has been upheld and applied to the conduct of making false public statements. *E.g., In re Holtzman*, 78 N.Y.2d 184, 184 (1991). The conduct need not be "prejudicial to the administration of justice." *Compare N.Y. Rules*, R. 8.4(d) (prohibiting such conduct).

As demonstrated above, the publicly available evidence that Mr. Giuliani engaged in the most serious possible violation of the Rules is compelling. Knowing that he had no factual

justification, Mr. Giuliani sought to invalidate millions of votes. The right to vote is fundamental and preserves all other rights in the U.S. Constitution. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). The Elections and Electors Clauses of the Constitution are in a special category of indispensable elements of our form of government. As such, for a lawyer to violate the Rules by making false claims designed to de-legitimize the vote must be taken much more seriously than a lawyer having brought a baseless slip-and-fall suit or having obtained evidence by creating a social media account under a false name. Ethical violations that undermine the bedrock rights of citizens cry out for investigation.

Mr. Giuliani also sought to undermine the rule of law by cynically abusing the authority of the law and the courts. As the Preamble to the Rules states, the Rules exist in part because Americans participate in a "constitutional democracy" that relies on legal institutions enjoying and requiring public support. A lawyer's duty is to preserve and promote faith in the law and the legal system. Mr. Giuliani's conduct of bringing frivolous cases, solely as grist for the mill of a false campaign to convince voters that a presidential election was stolen, disgraces the profession.

2. The Committee should suspend Mr. Giuliani's license while it investigates.

This Committee has the authority to suspend Mr. Giuliani's license on an interim basis. 22 NYCRR § 1240.9.

Even as this complaint is being submitted, violence fed by Mr. Giuliani's attack on democracy is eroding the rule of law. The inauguration of an American President will take place while places of lawful government are fortified and defended by National Guardsmen and police. Far from stepping back from the lies he has spread on Mr. Trump's behalf, Mr. Giuliani, even in recent days, has repeated and amplified them. Safeguarding the rule of law through enforcement of ethical standards is this body's paramount responsibility. The Committee should not permit Mr. Giuliani to continue to use his professional stature and his bar license to tear apart the social fabric of this country, and threaten public safety, while it investigates. The violations are too clear, and there is too much is at stake.

Conclusion

The Committee should investigate Mr. Giuliani for violating his oath to uphold the U.S. Constitution and multiple Rules of Professional Conduct, and should suspend his license in the interim while it does so.

Respectfully Submitted,

Lawyers Defending American Democracy, Inc.

By: /s/
Scott Harshbarger, Chairman
Former National President of Common Cause and two-term Attorney General of Massachusetts

Christine H. Chung
Former Chief of Criminal Appeals, Southern District of New York; Former Partner, Selendy & Gay PLLC and Quinn Emanuel Urquhart & Sullivan LLP; Former Senior Trial Lawyer, International Criminal Court

Bruce Fein
Former Deputy Associate Attorney General

Neil Goteiner
Partner, Farella, Braun + Martel, LLP

John T. Montgomery
Retired partner, Ropes & Gray; former First Assistant Attorney General of Massachusetts

Claire Johnson
Associate, Farella, Braun + Martel, LLP

Dennis Aftergut
Of Counsel at Renne Public Law Group; former federal prosecutor and San Francisco Chief Assistant City Attorney

Evan Falchuk
Former independent gubernatorial candidate for Massachusett

Nicholas Fels
Retired partner, Covington & Burling LLP

Eugene R. Fidell
Senior Research Scholar, Yale Law School, and counsel, Feldesman Tucker Leifer Fidell LLP

Fred M. Lowenfels
General Counsel Emeritus at Trammo, Inc.

Stanley J. Marcuss
Former Counsel to the U.S. Senate's International Finance Subcommittee; former Senior Deputy Assistant Secretary in the U.S. Commerce Department; former partner, Milbank, Tweed, Hadley & McCloy; former Senior Fellow at Harvard's Kennedy School; retired partner, Bryan Cave Leighton Paisner

James F. McHugh
Former Associate Justice, Massachusetts Appeals Court

Thomas Mela
Retired Managing Attorney of the Massachusetts Advocates for Children

Cheryl Niro
Past President, Illinois State Bar Association. Former Partner, Quinlan & Carroll, Ltd.

Gershon M. (Gary) Ratner
Co-founder, LDAD; Founder & Executive Director, Citizens for Effective Schools; former Associate General Counsel for Litigation, U.S. Department of Housing & Urban Development; former Associate Director for Litigation, Greater Boston Legal Services

Lauren Stiller Rikleen
President, Rikleen Institute for Strategic Leadership

Estelle H. Rogers
Retired Voting Rights Attorney

Neal Sonnett
Former Assistant U.S. Attorney and Chief, Criminal Division, Southern District of Florida

Lucien Wulsin
Founder and retired Executive Director, Insure the Uninsured Project

Thelton Henderson
Senior U.S. District Judge for the Northern District of California (inactive)

Marilyn Hall Patel
Former U.S. District Judge for the Northern District of California

H. Lee Sarokin
Former Judge for the U.S. Court of Appeals for the Third Circuit

James Shannon
Former Attorney General of Massachusetts and former member of the U.S House of Representatives

Fern M. Smith
Former U.S. District Judge for the Northern District of California

Grant Woods
Former Attorney General of Arizona

Former Assistant U.S. Attorneys (S.D.N.Y.)
Neil Binder

Ira H. Block

Jennifer K. Brown

Michael R. Bromwich
Former Inspector General, Department of Justice

William E. Craco

Edward T. Ferguson

Kay Gardiner

Steven M. Haber

Nicole LaBarbera
Former Deputy Chief, Criminal Division

Richard W. Mark

Ping C. Moy

Danya R. Perry
Former Deputy Chief of the Criminal Division

Edward Scarvalone

Gideon A. Schor
Chief Appellate Attorney, Civil Division

Wendy H. Schwartz
Former Deputy Chief, Civil Division

Peter C. Sprung

Katherine Staton

Chad Vignola

** Affiliations of signers are for identification purposes only

STATE OF MICHIGAN
JOCELYN BENSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

To: Office of the Chief Disciplinary Counsel, State Bar of Texas
From: Jocelyn Benson, Michigan Secretary of State
Date: February 1, 2021
Re: Sidney Powell (16209700) Grievance

Attachment to Grievance Form – Section IV, Question 3

The highest court in the land has recognized that "[o]f all classes and professions, the lawyer is most sacredly bound to uphold the laws." *Ex parte Wall*, 107 U.S. 265, 274 (1883). Texas's highest state court has spoken in that same vein, recognizing that attorneys have an "obligation to maintain confidence in our judicial system," that they " 'should use the law's procedure's only for legitimate purposes,' " and that they are required to " 'maintain the highest standards of ethical conduct' through representation." *Nath v. Texas Children's Hosp.*, 446 S.W.3d 355, 367 (Tex. 2014) (quoting Tex. Disc. R. of Prof. Conduct ¶¶ 1, 4). Texas courts recognize that "[a] lawyer assumes a position of responsibility to the law itself," and that lawyers are "charged with obedience to the laws of this State and of the United States," as well as "with the responsibility to maintain due respect for the judicial system and its rules of law." *Muniz v. State*, 575 S.W.2d 408, 411 (Tex. App.—Corpus Christi 1978).

As the words of these courts demonstrate, a license to practice law is more than just permission to practice one's chosen profession. It is a grave responsibility—one that requires attorneys to use the immense power of the law only within the confines of the highest ethical standards. An attorney who misuses that power can imperil fortunes, endanger liberties, and jeopardize lives. And as an officer of the court, an attorney who abuses the court system places in peril the very administration of justice that we cherish and depend on.

Texas attorney Sidney Powell (16209700) is such an attorney. She did not just tiptoe near a precarious ethical line—she outright crossed it. By filing a frivolous lawsuit based on false statements and by brazenly attempting to disenfranchise Michigan voters during the recent presidential election, she engaged in grave attorney misconduct.

Michigan's Attorney General, Secretary of State, and Governor therefore write jointly to ask you to hold Ms. Powell accountable to the attorney oath and ethical rules (particularly Rules 3.01, 3.03(a)(1) and 3.03(a)(3) of the Texas Disciplinary Rules of Professional Conduct) that govern her conduct. The Attorney General cares deeply about protecting the administration of justice and sending an important message about appropriate attorney conduct. The Secretary of State in her role as chief elections officer is equally concerned about protecting the voter franchise and the integrity of elections. And the Governor is the chief executive of the state, constitutionally charged with ensuring that the laws are faithfully executed. We urge you to find that Ms. Powell has abused her privilege to practice law and to impose the harshest sanctions available. Nothing short of permanent disbarment would be appropriate under these circumstances. Nor could any lesser sanction cleanse the taint that Ms. Powell brings to the Texas Bar by her continued association with it.

On November 25, 2020, Ms. Powell signed a complaint in the United States District Court for the Eastern District of Michigan seeking to overturn the results of the 2020 presidential election in Michigan and disenfranchise the more than 5.4 million Michiganders who voted in that election. (*King, et al. v. Whitmer*, E.D. Mich. No. 2:20-cv-13134.) The factual allegations made in support of the complaint were outrageous and patently false, and the legal arguments advanced were frivolous. The complaint's complete lack of merit caused federal Judge Linda V. Parker to deny the plaintiffs' motion for a temporary restraining order, and in doing so, to say the following: "[T]his lawsuit seems to be less about achieving the relief Plaintiffs seek—as much of that relief is beyond the power of this Court—and more about the impact of their allegations on People's faith in the democratic process and their trust in our government." ___ F Supp. 3d ___; 2020 WL 7134198, at *13.

Although Ms. Powell's attempt inevitably failed, it served a second, more sinister purpose—one that is not easily remedied, even by the court's dismissal of baseless legal claims: it cast unwarranted doubt on the results of Michigan's free and fair elections. Indeed, it undermined the faith of millions of Americans in our democracy and the legitimacy of our President. As a direct result of Ms. Powell's efforts and the allied efforts of other unethical attorneys, the unhinged conspiracy theories and untrue statements surrounding the 2020 presidential election gained a patina of unearned respectability.

It is not unheard of for lay individuals who are disappointed by the result of the election to claim that the election is "rigged" and the winner illegitimate. Those claims might even have some limited, negative impact. But when untruths of that nature are spread in courts of law by licensed attorneys, the impact and the resultant harm are exponentially greater.

Here, a direct line can be drawn from the fabrications of Ms. Powell and her associates to the unprecedented insurrection at the Capitol Building in Washington D.C. on January 6 that sought to topple our national government. Every election

results in millions of voters disappointed that their preferred candidate lost. But what made this year's presidential transition so volatile and violent were the false accusations of widespread election fraud that spurred on many disappointed Trump voters into believing that the election was tainted and the result was illegitimate. And because those untruths were spread by attorneys, not just by a candidate or a candidate's supporters, they won particular credence. Thankfully, they did not culminate in the dismantling of our national government. But they did force Congress to delay the certification, cause serious property damage, and contribute to the death of seven people, including two U.S. Capitol Police officers and a D.C. Police officer. And regrettably, they end our nation's 220-year uninterrupted streak of peaceful transfers of presidential power.

And why did the imprimatur of licensed attorneys such as Ms. Powell lend credence to these false allegations? Because the public knows that attorneys are bound by both oath and ethical rules. Therefore, the public presumes that attorneys possess the character and fitness necessary to practice law. Accordingly, the public should be able to expect that when an attorney makes a public statement or signs a complaint, that attorney's factual allegations are either true or rooted in a good-faith belief as to their truth. And the public ought to be able to expect that the attorney's legal claims are at least colorable, if not meritorious. Neither of those were true with respect to Ms. Powell. Her factual allegations were false and her claims were not colorable. She violated both her oath and the ethical rules by which she is bound.

Texas attorneys swear an oath to "support the Constitutions of the United States, and of" Texas, to "honestly demean [themselves] in the practice of law," and to "conduct themselves with integrity and civility in dealing and communicating with the court and all parties." In filing the *King* complaint, Ms. Powell did not honestly demean herself, nor did she conduct herself with integrity, as she sought to mislead a federal judge through false statements.

Ms. Powell also violated multiple ethical rules when she filed that complaint. To begin, she violated **Rule 3.01 of the Texas Disciplinary Rules of Professional Conduct.** That rule provides that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous." Ms. Powell violated Rule 3.01 when she signed the frivolous *King* complaint and submitted it to the court. The district court's denial of the plaintiffs' motion for a preliminary judgment, 2020 WL 7134198, was sweeping in its scope and eliminated all possible contention that the claims had any colorable value. The district court held that the claims violated the Eleventh Amendment, *id.* at *5, that they were moot, *id.*, that they were barred by laches, *id.* at *7, that the plaintiffs lacked standing, *id.* at *9–11, and that the claims were utterly meritless, *id.* at *11–13. With respect to the merits, the court held that the claims the plaintiffs sought to raise under the Elections and Electors Clause were only "state law claims disguised as federal

claims," *id.* at *11, and noted that plaintiffs did not cite a single case supporting the theory that the federal court could review them, *id.* at *12. And as for the claims under the Equal Protection Clause, the court noted that the plaintiffs provided "nothing but speculation and conjecture" in support, and that the factual allegations raised, as weak as they were, were also completely disconnected from their claim for relief. *Id.* at *12.

Again, it is worth recalling Judge Parker's assessment that the complaint had been filed not to achieve relief but to undermine the "People's faith in the democratic process and their trust in our government." *Id* at *13. This is not only an ethically improper reason to file a lawsuit, but under these circumstances, a dangerous one.

There was no non-frivolous basis for the complaint she filed on November 25, 2020, and Ms. Powell violated Rule 3.01 when she filed it.

Ms. Powell also violated **Rule 3.03(a)(1) of the Texas Disciplinary Rules of Professional Conduct,** which provides that "[a] lawyer shall not knowingly make a false statement of material fact or law to a tribunal[,]" and **Rule 3.03(a)(5)**, which provides that "[a] lawyer shall not offer or use evidence that the lawyer knows to be false." The complaint she filed in *King* violated these rules because it was based on reams of known falsehoods intended to deceive the courts and overturn a free and fair election.

For example, Ms. Powell and her team submitted a pseudonymous affidavit from one "Spyder," who falsely claimed to be a military intelligence analyst. Fortunately, through the incompetence of Ms. Powell's team, "Spyder's" name was revealed, and it was learned that he was no intelligence analyst at all, but instead a former soldier who was dismissed from military intelligence training.

Ms. Powell and her team also submitted the affidavit of Russell Ramsland, who made numerous false statements about the election. Ramsland blamed Dominion voting machines for an error in the election results in Antrim County, Michigan, even though it is known that the error in that county (which was found and corrected) was not a result of software error or fraud, but rather, simple human error. Ramsland also made false statements about turnout rates in certain Michigan communities, claiming for example a 781.91% turnout rate in North Muskegon, where the actual turnout rate was 78%, and 460.51% in Zeeland Charter Township, where the actual rate was 80%.

Also attached to the complaint as a declaration was a bizarre piece of short fiction (again, with the author's name redacted) that attempted to establish that the use of Dominion software is necessarily fraudulent because Smartmatic (a Dominion competitor) was allegedly involved in rigging elections for Hugo Chavez and Nicolas Maduro in Venezuela, and because Smartmatic and Dominion have previously done business. Dominion has filed a defamation lawsuit against Ms. Powell, personally, alleging that these and other statements that she made in *King* lawsuit, in other

lawsuits in other states, and in public statements are untrue and defamatory. Although that lawsuit has yet to be resolved, the salient point is that she signed the *King* complaint without ensuring that the complaint's factual contentions about Dominion had evidentiary support or would likely have evidentiary support after further investigation or discovery.

Ms. Powell also alleged that Republican challengers were denied access to a location where votes were being counted in Wayne County, that there was supposedly improper "pre-dating" of absentee ballots, and that ballots were being counted multiple times—all the while knowing that these were false statements because they had already been debunked in a previous lawsuit, *Constantino v. Detroit*, in our state court.

When Ms. Powell took *King*, along with a similar lawsuit from Georgia, to the United States Supreme Court, the plaintiffs filed a motion to consolidate those cases with each other and with two similar cases from Arizona and Wisconsin. That motion contained another serious lie: that there were "competing slates of electors from the four states at issue in the four cases"; i.e., Michigan, Georgia, Arizona, and Wisconsin, as well as from three other states. (Mot. to Consol. at 4.) The motion told the Court, "On December 14, 2020, pursuant to the requirements of applicable state laws and the Electoral Count Act[,] the **Michigan** Republican slate of Presidential Electors attempted to meet inside the State Capitol and cast their votes for President and Vice President but were denied entry by law enforcement[.]" (*Id.* at 3.) This was a half-truth at best—it is true that the unsuccessful candidates for Republican presidential elector attempted to enter the Capitol in Lansing to cast their votes. But it is not true that these individuals were "the Michigan Republican slate of Presidential Electors," because there is no such thing. Only one slate of presidential electors won the 2020 election in Michigan, and it was not the Republican slate. It was also false to say that these losing candidates met pursuant to the requirements of any state or federal law. There is no law that requires the losing candidates for presidential elector to do anything.

But the lies got worse from there—the motion also claimed that there were competing slates of electors and that the losing slates "have received the endorsement of the legislatures in each of these States[.]" (Mot. to Consol. at 4.) There was *nothing* true about this statement, which was intended to establish that there was in fact some viable controversy about the election results in Michigan and the other states, when in reality there was none. The Michigan Legislature (led, it bears mentioning, by Republicans) respected the will of Michigan's voters and did nothing to endorse the fraudulent "competing slate" of Republican pretenders. The motion contained more lies: that in the lower courts the plaintiffs had "laid out extensive evidence of massive election fraud and other illegal conduct," that "fact and expert witnesses presented sworn and unrebutted testimony establishing that tens of thousands of illegal ballots were counted in favor of candidate Biden," and that, in *King* and in the other cases, "the District Courts failed to grapple with, or

even to examine with care, these showings." (Mot. to Consol. at 4–5.) All false, and Ms. Powell knew it.

All of these false statements helped fuel the fire of the dangerous conspiracy theories that have undermined faith in the 2020 election. No responsible attorney would have spread these untruths, much less submit them to a court of law. Ms. Powell violated Rules 3.03(a)(1) and (5) when she did so.

Lastly, Ms. Powell violated **Rule 8.04 of the Texas Disciplinary Rules of Professional Conduct.** That rule provides in part that "a lawyer shall not: (1) violate these rules, . . . [or] (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]" The dishonest and disgraceful litigation described above violated these rules. Ms. Powell brought frivolous claims that were barred by constitutional, statutory, and equitable defenses, and that were supported by false statements and wild speculation.

In sum, Ms. Powell has abused the trust the State Bar of Texas placed in her. She filed a complaint based on falsehoods, used her law license in an attempt to disenfranchise Michigan voters and undermine the faith of the public in the legitimacy of the recent presidential election, and lent credence to untruths that led to violence and unrest. In doing so, she violated both her attorney oath and the rules of professional conduct that govern the practice of law. "Lawyers . . . owe to the courts duties of scrupulous honesty, forthrightness, and the highest degree of ethical conduct." *In re J.B.K.*, 931 S.W.2d 581, 583 (Tex. App.—El Paso 1996); *accord Texas-Ohio Gas, Inc. v. Mecom*, 28 S.W.3d 129, 145 (Tex.App.—Texarkana 2000) It is beyond all peradventure that Ms. Powell has failed to live up to those high standards; her ethical violations bring disrepute on all attorneys, jeopardize the public's confidence in the State Bar and the legal system, and compromise an important foundation of our civil society and the very bulwark of our democratic institutions. Her violations are irredeemable because, as Justice Frankfurter so eloquently stated in his concurrence in *Schware v. Board of Bar Exam. of New Mexico*, 353 U.S. 232 (1957), "[i]t is a fair characterization of the lawyer's responsibility in our society that he stands 'as a shield,' to quote Devlin, J., in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character.' "

Ms. Powell is unfit to practice law and should be disbarred.

The highest court in the land has recognized that "[o]f all classes and professions, the lawyer is most sacredly bound to uphold the laws." *Ex parte Wall*, 107 U.S. 265, 274 (1883). Texas's highest state court has spoken in that same vein, recognizing that attorneys have an "obligation to maintain confidence in our judicial system," that they " 'should use the law's procedure's only for legitimate purposes,' " and that they are required to " 'maintain the highest standards of ethical conduct' through representation." *Nath v. Texas Children's Hosp.*, 446 S.W.3d 355, 367 (Tex. 2014) (quoting Tex. Disc. R. of Prof. Conduct ¶¶ 1, 4). Texas courts recognize that "[a] lawyer assumes a position of responsibility to the law itself," and that lawyers are "charged with obedience to the laws of this State and of the United States," as well as "with the responsibility to maintain due respect for the judicial system and its rules of law." *Muniz v. State*, 575 S.W.2d 408, 411 (Tex. App.—Corpus Christi 1978).

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Texas attorneys swear an oath to "support the Constitutions of the United States, and of" Texas, to "honestly demean [themselves] in the practice of law," and to "conduct themselves with integrity and civility in dealing and communicating with the court and all parties." In filing the *King* complaint, Ms. Powell did not honestly demean herself, nor did she conduct herself with integrity, as she sought to mislead a federal judge through false statements.

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But the lies got worse from there—the motion also claimed that there were competing slates of electors and that the losing slates "have received the endorsement of the legislatures in each of these States[.]" (Mot. to Consol. at 4.) There was *nothing* true about this statement, which was intended to establish that there was in fact some viable controversy about the election results in Michigan and the other states, when in reality there was none. The Michigan Legislature (led, it bears mentioning, by Republicans) respected the will of Michigan's voters and did nothing to endorse the fraudulent "competing slate" of Republican pretenders. The motion contained more lies: that in the lower courts the plaintiffs had "laid out extensive evidence of massive election fraud and other illegal conduct," that "fact and expert witnesses presented sworn and unrebutted testimony establishing that tens of thousands of illegal ballots were counted in favor of candidate Biden," and that, in *King* and in the other cases, "the District Courts failed to grapple with, or even to examine with care, these showings." (Mot. to Consol. at 4–5.) All false, and Ms. Powell knew it.

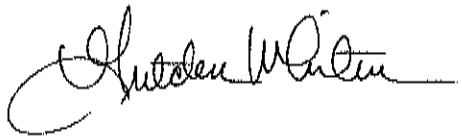
All of these false statements helped fuel the fire of the dangerous conspiracy theories that have undermined faith in the 2020 election. No responsible attorney would have spread these untruths, much less submit them to a court of law. Ms. Powell violated Rules 3.03(a)(1) and (5) when she did so.

Lastly, Ms. Powell violated **Rule 8.04 of the Texas Disciplinary Rules of Professional Conduct.** That rule provides in part that "a lawyer shall not: (1) violate these rules, . . . [or] (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]" The dishonest and disgraceful litigation described above violated these rules. Ms. Powell brought frivolous claims that were barred by constitutional, statutory, and equitable defenses, and that were supported by false statements and wild speculation.

In sum, Ms. Powell has abused the trust the State Bar of Texas placed in her. She filed a complaint based on falsehoods, used her law license in an attempt to disenfranchise Michigan voters and undermine the faith of the public in the legitimacy of the recent presidential election, and lent credence to untruths that led to violence and unrest. In doing so, she violated both her attorney oath and the rules of professional conduct that govern the practice of law. "Lawyers . . . owe to the courts duties of scrupulous honesty, forthrightness, and the highest degree of ethical conduct." *In re J.B.K.*, 931 S.W.2d 581, 583 (Tex. App.—El Paso 1996); *accord Texas-Ohio Gas, Inc. v. Mecom*, 28 S.W.3d 129, 145 (Tex.App.—Texarkana 2000) It is beyond all peradventure that Ms. Powell has failed to live up to those high standards; her ethical violations bring disrepute on all attorneys, jeopardize the public's confidence in the State Bar and the legal system, and compromise an important foundation of our civil society and the very bulwark of our democratic institutions. Her violations are irredeemable because, as Justice Frankfurter so eloquently stated in his concurrence in *Schware v. Board of Bar Exam. of New Mexico*, 353 U.S. 232 (1957), "[i]t is a fair characterization of the lawyer's responsibility in our society that he stands 'as a shield,' to quote Devlin, J., in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character.' "

Ms. Powell is unfit to practice law and should be disbarred.

Respectfully submitted,



Gretchen Whitmer

Governor of the State of Michigan

The highest court in the land has recognized that "[o]f all classes and professions, the lawyer is most sacredly bound to uphold the laws." *Ex parte Wall*, 107 U.S. 265, 274 (1883). Texas's highest state court has spoken in that same vein, recognizing that attorneys have an "obligation to maintain confidence in our judicial system," that they " 'should use the law's procedure's only for legitimate purposes,' " and that they are required to " 'maintain the highest standards of ethical conduct' through representation." *Nath v. Texas Children's Hosp.*, 446 S.W.3d 355, 367 (Tex. 2014) (quoting Tex. Disc. R. of Prof. Conduct ¶¶ 1, 4). Texas courts recognize that "[a] lawyer assumes a position of responsibility to the law itself," and that lawyers are "charged with obedience to the laws of this State and of the United States," as well as "with the responsibility to maintain due respect for the judicial system and its rules of law." *Muniz v. State*, 575 S.W.2d 408, 411 (Tex. App.—Corpus Christi 1978).

As the words of these courts demonstrate, a license to practice law is more than just permission to practice one's chosen profession. It is a grave responsibility—one that requires attorneys to use the immense power of the law only within the confines of the highest ethical standards. An attorney who misuses that power can imperil fortunes, endanger liberties, and jeopardize lives. And as an officer of the court, an attorney who abuses the court system places in peril the very administration of justice that we cherish and depend on.

Texas attorney Sidney Powell (16209700) is such an attorney. She did not just tiptoe near a precarious ethical line—she outright crossed it. By filing a frivolous lawsuit based on false statements and by brazenly attempting to disenfranchise Michigan voters during the recent presidential election, she engaged in grave attorney misconduct.

Michigan's Attorney General, Secretary of State, and Governor therefore write jointly to ask you to hold Ms. Powell accountable to the attorney oath and ethical rules (particularly Rules 3.01, 3.03(a)(1) and 3.03(a)(3) of the Texas Disciplinary Rules of Professional Conduct) that govern her conduct. The Attorney General cares deeply about protecting the administration of justice and sending an important message about appropriate attorney conduct. The Secretary of State in her role as chief elections officer is equally concerned about protecting the voter franchise and the integrity of elections. And the Governor is the chief executive of the state, constitutionally charged with ensuring that the laws are faithfully executed. We urge you to find that Ms. Powell has abused her privilege to practice law and to impose the harshest sanctions available. Nothing short of permanent disbarment would be appropriate under these circumstances. Nor could any lesser sanction cleanse the taint that Ms. Powell brings to the Texas Bar by her continued association with it.

On November 25, 2020, Ms. Powell signed a complaint in the United States District Court for the Eastern District of Michigan seeking to overturn the results of the 2020 presidential election in Michigan and disenfranchise the more than 5.4 million Michiganders who voted in that election. (*King, et al. v. Whitmer*, E.D. Mich. No. 2:20-cv-13134.) The factual allegations made in support of the complaint were outrageous and patently false, and the legal arguments advanced were frivolous. The complaint's complete lack of merit caused federal Judge Linda V. Parker to deny the plaintiffs' motion for a temporary restraining order, and in doing so, to say the following: "[T]his lawsuit seems to be less about achieving the relief Plaintiffs seek—as much of that relief is beyond the power of this Court—and more about the impact of their allegations on People's faith in the democratic process and their trust in our government." ___ F Supp. 3d ___; 2020 WL 7134198, at *13.

Although Ms. Powell's attempt inevitably failed, it served a second, more sinister purpose—one that is not easily remedied, even by the court's dismissal of baseless legal claims: it cast unwarranted doubt on the results of Michigan's free and fair elections. Indeed, it undermined the faith of millions of Americans in our democracy and the legitimacy of our President. As a direct result of Ms. Powell's efforts and the allied efforts of other unethical attorneys, the unhinged conspiracy theories and untrue statements surrounding the 2020 presidential election gained a patina of unearned respectability.

It is not unheard of for lay individuals who are disappointed by the result of the election to claim that the election is "rigged" and the winner illegitimate. Those claims might even have some limited, negative impact. But when untruths of that nature are spread in courts of law by licensed attorneys, the impact and the resultant harm are exponentially greater.

Here, a direct line can be drawn from the fabrications of Ms. Powell and her associates to the unprecedented insurrection at the Capitol Building in Washington D.C. on January 6 that sought to topple our national government. Every election results in millions of voters disappointed that their preferred candidate lost. But what made this year's presidential transition so volatile and violent were the false accusations of widespread election fraud that spurred on many disappointed Trump voters into believing that the election was tainted and the result was illegitimate. And because those untruths were spread by attorneys, not just by a candidate or a candidate's supporters, they won particular credence. Thankfully, they did not culminate in the dismantling of our national government. But they did force Congress to delay the certification, cause serious property damage, and contribute to the death of seven people, including two U.S. Capitol Police officers and a D.C. Police officer. And regrettably, they end our nation's 220-year uninterrupted streak of peaceful transfers of presidential power.

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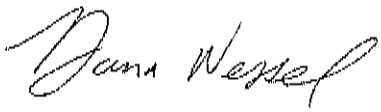

Dana Nessel

Attorney General of the State of Michigan