Curriculum for Legal Ethics Classes on the Duties of Lawyers Involved in Challenges to Elections[1]

INTRODUCTION

The participation of lawyers in efforts to overturn the results of the 2020 Presidential election has introduced a new topic in teaching legal ethics: the connection between the American Bar Association's Model Rules of Professional Conduct ("Rules") and the protection of American elections. Lawyers who advised former President Trump or his Presidential campaign after the election made meritless arguments in court and false statements to the media and in speeches before thousands of protesters at the "Save America" rally at the Ellipse on January 6th. They developed and acted on a legal theory that advocated overturning the results of the election, which led to the attack on the Capitol on January 6th. At the same time, several lawyers firmly opposed these efforts, fulfilled and went beyond their ethical duties, and helped protect American democracy.

Law students should understand the ethical rules that lawyers violated when they attempted to overturn the election to guide their own actions and to assess the actions of other lawyers who may in future elections ignore their ethical duties and once again attempt to overturn the results of an election. In the same way that the participation of lawyers in Watergate motivated the American Bar Association to require law schools to teach legal ethics, the participation of lawyers in the attempt to overturn the 2020 Presidential election should motivate legal ethics professors to teach this subject in class.

This memorandum provides legal ethics professors with a roadmap and materials to help teach one or two classes on four of the lawyers who tried to overturn the election and the Rules they may have violated. Although there is no Rule that relates directly to elections or our democratic system of government, the Rules do require lawyers to: (i) be competent in their representation; (ii) exercise independent professional judgment; (iii) refrain from pursuing frivolous lawsuits and making meritless claims in litigation; (iv) not make false statements of fact or law to a tribunal or third persons; (v) not assist a client in conduct the lawyer knows is criminal or fraudulent; and (vi) not engage in conduct involving fraud, deceit or misrepresentation or that is prejudicial to the administration of justice. If Trump's lawyers had complied with their ethical duties, the Capitol most likely would not have been attacked. The same ethical duties will apply to lawyers who challenge the results of future elections.

The outline focuses on the lawsuits, speeches, memoranda and actions of Rudolph Giuliani, Jeffrey Clark, Kenneth Chesebro and John Eastman. Discussing all four lawyers will likely require four hours of class time. If you want to devote one two-hour class to this subject, you can discuss the actions and ethical issues with respect to two of the lawyers. Chesebro and

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Eastman fit well together because they developed the dual slate of electors theory and the argument that Vice President Pence had the constitutional authority to resolve disputes between competing slates of electors. To help students assess which ethical Rules Chesebro and Eastman may have violated, students should understand their legal arguments with respect to the Electoral Count Act of 1887 and the 12th Amendment to the U.S. Constitution, and the flaws in their arguments. There is a lot of material to cover with respect to Chesebro and Eastman, so you may want to devote three hours to them and one hour to Giuliani or Clark. Or you can discuss the ethical issues relating to the actions of Giuliani and Clark in a two-hour class. Ideally, you would devote two, two-hour classes to this subject: two hours on Chesebro and Eastman and two hours on Giuliani and Clark.

This outline includes the following components:

(i) sources that provide an overview of events relating to the role of lawyers who tried to overturn the 2020 election (Part I);

(ii) suggested student reading assignments to help them prepare for one or two classes on the subject, depending on how much time you want to devote to this subject (Part II);

(iii) a short chronology of findings that there was no fraud in the 2020 election (Part III); and

(iv) questions you can ask students about whether Trump's lawyers violated the Rules and suggested answers to many of those questions (Part IV).

Appendix A contains separate chronologies for Giuliani, Clark, Chesebro and Eastman. The chronologies outline a detailed narrative with respect to each of these lawyers and provide context and background information. The chronologies also look at the actions of lawyers who refused to accede to pressure from Trump's lawyers to overturn the results of the election. Former Acting Attorney General Jeffrey Rosen, former Deputy Attorney General Richard Donoghue and former Vice President Pence's counsel Gregory Jacob complied with their ethical duties and, in doing so, prevented a democratic election from being overturned. Teaching students about lawyers who *complied* with their ethical duties is no less important than teaching students about lawyers who *violated* their ethical duties. I prepared the chronologies for law professors, but you are welcome to share them with your students.

Appendix B contains the Rules and Comments that may apply to the lawyers who attempted to overturn the 2020 election and lawyers who may attempt to overturn future elections, including Comments [1], [6] and [13] to the Preamble, and Rules 1.1, 1.2(d), 1.3, 1.4(b), 2.1, 3.1, 3.3(a), 3.9, 4.1(a), 4.4(a), 5.2(a), 5.3(c)(1), 8.3(a), 8.4(a)-(d) and 8.5.

The questions in the outline will help students understand that it may be difficult to determine in future elections when a lawyer crosses an ethical boundary in this context. For example, do the Rules impose limitations on a lawyer's First Amendment rights and, if so, what are those limitations? Should a lawyer who makes a false statement in an attempt to overturn an election be held to a higher ethical standard or a more severe sanction than would otherwise apply? Does a lawyer violate the Rules if the lawyer develops an implausible legal theory and

writes it up in a memo? Does a lawyer who drafts a letter containing false statements that is never sent violate the Rules? What if the letter, had it been sent, could have triggered a constitutional crisis? What are the limits on a lawyer's duty to provide zealous representation if the lawyer's advocacy threatens democracy? Does a lawyer violate their ethical duties if they make a false statement before thousands of people based on theories provided by third parties? To what extent must a lawyer investigate the truth of theories or statements provided by third parties before the lawyer can ethically repeat them? Can a lawyer file a bar complaint if the lawyer doesn't have personal knowledge that the lawyer who is the subject of the bar complaint violated the Rules? Definitive answers to some of these questions will have to await the outcome of disciplinary proceedings brought against the four lawyers as well as other lawyers who violated their ethical duties in attempting to overturn the election. Disciplinary rulings will establish legal standards which will hopefully constrain lawyers from unethical conduct in future elections.

Disciplinary proceedings against Giuliani, Clark, Chesebro and Eastman were triggered mostly by ethics complaints filed by legal advocacy groups, including Lawyers Defending American Democracy ("LDAD"). LDAD's bar complaints against these lawyers as well as other lawyers who allegedly violated their ethical duties in attempting to overturn the 2020 election are available on LDAD's website at https://ldad.org/letters-briefs.

I. SOURCES THAT PROVIDE AN OVERVIEW OF EVENTS

There are two very good sources that provide an historical narrative on the attempt by lawyers to overturn the election: The House of Representatives *Final Report of the Select Committee to Investigate the January 6th Attack on the United States Capitol,* Dec. 22, 2022 ("January 6th Report"), Chapter 3 "Fake Electors and the 'President of the Senate Strategy'", Chapter 4, "'Just Call It Corrupt and Leave the Rest to Me'", and Chapter 5 "'A Coup in Search of a Legal Theory'" (a total of 90 pages not including footnotes) https://www.govinfo.gov/app/details/GPO-J6-REPORT/context; and *U.S. v. Trump*, Grand Jury Indictment, U.S. District Court for the District of Columbia, (Aug. 1, 2023) ("Federal Indictment") (45 pages), https://www.justice.gov/storage/US_v_Trump_23_cr_257.pdf. Although both sources provide a sweeping account of key events, the January 6th Report is much more engaging.[2] Although it would be preferable to assign students Chapters 3-5 of the January 6th Report, it is not essential to cover this subject. The essential readings are the assignments in Part II below.

II. SUGGESTED STUDENT READING ASSIGNMENTS

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[2] The Georgia Superior Court, Fulton County Indictment, dated Aug. 14, 2023 ("Georgia Indictment") also provides a comprehensive historical narrative but is less readable and best used as a source of specific factual allegations against Giuliani, Clark, Chesebro and Eastman. https://d3i6fh83elv35t.cloudfront.net/static/2023/08/CRIMINAL-INDICTMENT-Trump-Fulton-County-GA.pdf (98 pages).

To help students analyze the ethical issues, the following materials can be assigned for each of the lawyers you choose to discuss:

Giuliani:

- *Matter of Giuliani*, 146 N.Y.S. 3d 266 (App. Div. 2021);
- Giuliani's speech at the "Save America Rally" on January 6, 2020, https://www.c-span.org/video/?507744-1/trumps-jan-6-rally-speech) at 2:19-2:24;
- *In the Matter of Rudolph Giuliani*, D.C. Board on Professional Responsibility, Board Docket No. 22-BD-027 ("*In re Giuliani*"), https://www.dcbar.org/Attorney-Discipline/Disciplinary-Decisions/Disciplinary-Case?docketno=22-BD-027.[3]

Clark:

- Draft letter written by Jeffrey Clark to Acting Attorney General Jeffrey Rosen and Deputy Attorney General Richard Donoghue, dated December 28, 2020 ("Proof of Concept" letter) https://www.documentcloud.org/documents/21087991-jeffrey-clark-draft-letter;
- In the Matter of Jeffrey B. Clark, D.C. Board on Professional Responsibility, Specification of Charges, dated July 19, 2022, https://www.documentcloud.org/documents/22111902-jeffrey-clark-Links to an external site; and
- In the Matter of Jeffrey B. Clark, D.C. Board on Professional Responsibility, Answer of Respondent, dated September 8, 2022, https://www.dcbar.org/ServeFile/GetDisciplinaryActionFile?fileName=2022-09-01AnswerClark.pdf.

[3] The DC Board's opinion is mostly focused on whether Giuliani's notice and cure and observational boundary arguments in *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899 (M.D. Pa. 2020), *aff'd*, 830 Fed. Appx. 377 (3rd Cir. 2020) violated Rule 3.1. The case is particularly instructive in the Board's analysis of why disbarment is the appropriate sanction. See *In re Giuliani* at 50-63.

Chesebro and Eastman:[4]

- Legal memos written by Kenneth Chesebro, dated November 18, December 6, 9 and 13, 2020, https://www.politico.com/news/2023/08/09/ken-chesebro-memos-trump-coconspirator-00110458;

- Legal memos written by John Eastman on December 23, 2020, https://policymemos.hks.harvard.edu/files/policymemos/files/9_22_21_memo_trump_lawyer_to_vp_pence_overturn_election.pdf?m=163251075 and January 3, 2021 https://www.documentcloud.org/documents/21066947-jan-3-memo-on-jan-6-scenario;

- False Elector Certificates, https://www.archives.gov/foia/2020-presidential-election-unofficial-certificates;

- Emails exchanged between John Eastman and Vice President Pence's legal counsel, Gregory Jacob on January 6, 2021 https://www.washingtonpost.com/politics/2022/03/03/heated-jan-6-email-exchange-between-trumps-pences-lawyers-annotated/;

- Eastman's speech at the "Save America Rally" on January 6, 2020, https://www.c-span.org/video/?507744-1/trumps-jan-6-rally-speech at 2:24 to 2:27;

- Gregory Jacob memos to Vice President Pence, dated December 8, 2020, https://www.govinfo.gov/content/pkg/GPO-J6-DOC-CTRL0000050681/pdf/GPO-J6-DOC-CTRL0000050681.pdf and January 5, 2021, https://www.documentcloud.org/documents/22058340-greg-jacob-jan-5-memo; and

[4] I suggest you read but not necessarily assign to students the following additional material with respect to the dual set of electors theory developed by Chesebro and Eastman: Sections 5-11 and 15 of the Electoral Count Act (before it was amended in 2022), 3 U.S.C. § 1 *et seq*. The Act as it stood in 2020 and 2021 is Exhibit A to the Wisconsin Criminal Complaint filed against Chesebro and others, dated June 4, 2024. https://www.doj.state.wi.us/sites/default/files/news-media/6.4.24_Chesebro_Criminal_Complaint.PDF; *Eastman v. Thompson*, 594 F. Supp. 3d 1156 (C.D. Cal. 2022). The 2022 amendments to the Electoral Count Act are at Consolidated Appropriations Act of 2023, Pub. L. No. 117-328 (December 29, 2022) 136 Stat. 4459, 5233-5241; and Testimony of Gregory Jacob and Judge J. Michael Luttig at the House of Representatives Hearing Before The Select Committee To Investigate The January 6th Attack On The Capitol, House of Representatives, June 16, 2022, https://www.govinfo.gov/content/pkg/CHRG-117hhrg49351/pdf/CHRG-117hhrg49351.pdf.

- Vice President Pence's letter to Congress, dated January 6, 2021, https://www.cnn.com/2021/01/06/politics/pence-trump-electoral-college-letter/index.html.

III. CHRONOLOGY OF FINDINGS THAT THERE WAS NO FRAUD IN THE 2020 ELECTION

- November 3, 2020 – date of the 2020 Presidential election;

- On November 12, 2020, the U.S. Cybersecurity and Infrastructure Security Agency issued the following statement:

> The November 3rd election was the most secure in American history. Right now, across the country, election officials are reviewing and double checking the entire election process prior to finalizing the result.
>
> When states have close election results, many will recount ballots. All of the states with close results in the 2020 presidential race have paper records of each vote, allowing the ability to go back and count each ballot if necessary. This is an added benefit for security and resilience. This process allows for the identification and correction of any mistakes or errors. **There is no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised.**
>
> Other security measures like pre-election testing, state certification of voting equipment, and the U.S. Election Assistance Commission's (EAC) certification of voting requirements help to build additional confidence in the voting systems used in 2020.
>
> While we know there are many unfounded claims and opportunities for misinformation about the process of our elections, we can assure you we have the utmost confidence in the security and integrity of our elections, and you should too. When you have questions, turn to election officials as trusted voices as they administer elections.

Joint Statement from Elections Infrastructure Government Coordinating Council & The Election Infrastructure Sector Coordinating Executive Committees" *U.S. Cybersecurity and Infrastructure Security Agency*, Nov. 12, 2020 (emphasis in the original), https://www.cisa.gov/news-events/news/joint-statement-elections-infrastructure-government-coordinating-council-election.

- The Department of Justice conducted several criminal investigations into allegations of election fraud and irregularities. The investigations were conducted primarily at the local level by the FBI, U.S. Attorney's Offices and the Public Integrity Section of the Criminal Division of the Department of Justice. Associate Deputy General Richard Donoghue monitored these investigations and kept the Deputy Attorney General, Jeffrey Rosen and

the Attorney General, William Barr, regularly informed on the status of the investigations. *In the Matter of Jeffrey B. Clark*, Specification of Charges, D.C. Office of Disciplinary Counsel, dated June 29, 2022 ("*In re Clark*, Specification of Charges") at ¶¶ 2-4, https://www.documentcloud.org/documents/22111902-jeffrey-clark-specification-of-charges-from-dc-bar.

- On November 13, 2020, 16 Assistant U.S. Attorneys assigned by the Department of Justice to monitor for malfeasance in the election sent a letter to Attorney General Barr stating that they had not seen evidence of any "substantial anomalies" in the election. M. Zapotosky and T. Hamburger, "Federal Prosecutors Assigned to Monitor Election Malfeasance Tell Barr They See No Evidence of Substantial Irregularities", *Washington Post*, Nov. 13, 2020, https://www.washingtonpost.com/national-security/william-barr-election-memo/2020/11/13/6ed06d20-25e4-11eb-a688-5298ad5d580a_story.html;

- On November 20, 2020, Georgia Secretary of State Brad Raffensberger certified the results of the Presidential election with Biden receiving 12,670 more votes than Trump. Georgia Secretary of State Brad Raffensberger, "November 3, 2020 General Election", https://results.enr.clarityelections.com/GA/105369/web.264614/#/summary. The certification was made after Mr. Raffensperger ordered a full hand count of the 5 million ballots cast in Georgia. The audit showed no significant difference from the original electronic tally. Stanley Dunlap, "Georgia Secretary of State Certifies Election Results for Biden Win", *Georgia Recorder*, Nov. 20, 2020, https://georgiarecorder.com/2020/11/20/georgia-secretary-of-state-certifies-election-results-for-biden-win/;

- On December 1, 2020, Attorney General Barr announced in an interview with Michael Balsamo in an Associated Press report that "[t]o date, we have not seen fraud on a scale that could have effected a different outcome in the election." January 6th Report at 377;

- By December 8, 2020, every State and the District of Columbia had certified their electors. Liz Stark and Ethan Cohen "All 50 States and DC Have Now Certified Their Presidential Election Results", *CNN Politics,* Dec. 9, 2020, https://www.cnn.com/2020/12/09/politics/2020-election-results-certified/index.html;

- As of January 6, 2021, 61 of the 62 lawsuits filed challenging the Presidential election on the grounds of fraud, 61 had been dismissed for lack of evidence or lack of standing. The only successful lawsuit for the Trump campaign was in Pennsylvania but it did not affect the outcome. January 6th Report at 210; W. Cummings, J. Garrison & J. Sergent, "By The Numbers: President Donald Trump's Failed Efforts to Overturn the Election" *USA TODAY*, Jan. 6, 2021, https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/; see also, *Eastman v. Thompson*, 594 F. Supp. 3d 1156, 1169

(C.D. Cal. 2022) ("By early January, more than sixty court cases alleging fraud had been dismissed for lack of evidence or lack of standing.").

IV. QUESTIONS FOR CLASS DISCUSSION

A. RUDOLPH GIULIANI

Question: Giuliani made false statements at press conferences, to Pennsylvania State Senate Committee, to a Michigan House Oversight Committee, the Georgia State Senate Judiciary Committee, the Georgia House of Representative's committee and on podcasts. His false statements included:

- As many as 30,000 dead people voted in Philadelphia;
- In Pennsylvania, more absentee ballots were counted than were sent out before the election;
- Thousands of illegal aliens voted in Arizona;
- Dominion Voting System's voting machines manipulated vote tallies in Georgia;
- Videos from security cameras showed illegal counting of mail-in ballots in Georgia;
- Up to 165,000 underage voters voted in Georgia; and
- At least 2,500 felons voted in Georgia.

- Did he violate any of the Rules?

Suggested Answer: Yes - Rules 3.3(a)(1), 3.9, 4.1(a) and 8.4(c).

Question: Rule 4.1(a) requires that the lawyer not "knowingly" "make a false statement". Rule 8.4(c) states that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Does Rule 8.4(c) require that Giuliani actually knew that his statements were untrue?

Suggested Answer: Yes. The Court in *Matter of Giuliani,* 146 N.Y.S. 3d at 271 held that the Rules "only proscribe false and misleading statements that are knowingly made" and that a violation of Rule 8.4(c) must be knowing. Also, Rule 1.0(f) defines "knows" as "actual knowledge or the fact in question".

Question: Giuliani defended his false statements by claiming that he relied on the statements and affidavits of others. What is the basis for concluding that he knew that the above statements were false?

Suggested Answer: Knowledge "may be inferred from circumstances." Rule 1.0(f). The vast majority of Giuliani's statements were made after November 12, 2020, when the U.S. Cybersecurity and Infrastructure Security Agency announced that "there is no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised." Many of Giuliani's statements were made after December 1, 2020, when former Attorney General Barr announced that "[t]o date, we have not seen fraud on a scale that could have effected a different outcome in the election." Knowledge of these

announcements can be imputed to Giuliani. These facts, together with Giuliani's failure to provide any proof of election fraud, establish that he knew that his fraud claims were false.

Question: Giuliani argued a fraud claim in his oral argument in *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899 (M.D. Pa. 2020), *aff'd*, 830 Fed. Appx. 377 (3rd Cir. 2020), when, in fact, he had withdrawn fraud claims when he filed an amended complaint before his oral argument. "Fraud was the crown of his personal argument before the court that day." *Matter of Giuliani*, 146 N.Y.S. 3d at 273. When the court in *Boockvar* pointed Giuliani to the amended complaint, he acknowledged at page 188 of the transcript that it didn't allege fraud. Did he violate any of the Rules?

Suggested Answer: Yes. Rules 3.3(a)(1), 4.1(a) and 8.4(c).

The fact that Giuliani corrected his misstatement that his amended complaint did not allege fraud did not cure his violation of the duty prescribed by Rule 3.3(a)(1) not to make a false statement of fact or law to a tribunal. While the Rule requires that a lawyer "correct a statement of material fact or law previously made to the tribunal", this is a remedial measure that assumes the lawyer believed that his or her initial statement was true. Further, as noted by the Court in *Matter of Giuliani*, the court's phone line to the hearing was open to as many as 8,000 journalists and other members of the public and at least 3,700 people had dialed in at the outset of the argument. Given that audience, Giuliani should have been careful and accurate in his statements in Court and not "persisted in making wide ranging conclusory claims of fraud in Pennsylvania elections and other jurisdictions allegedly occurring over a period of many years." *Matter of Giuliani*, 146 N.Y.S. 3d at 273.

Additionally, Giuliani's false statements violated Rules 4.1(a) and 8.4(c), which do not have a cure provision.

Question: Did Giuliani violate the Rules at a presentation to the Judiciary Committee of the Georgia State Senate on December 3, 2020 when his "agent" falsely claimed that more than 10,000 dead people voted in Georgia; played a video recording of ballot-counting; "insinuated that it showed election workers counting 'suitcases' of illegal ballots"; and encouraged legislators to decertify the state's legitimate electors based on "false allegations of election fraud"? Federal Indictment at ¶ 21(a) and (b).

Suggested Answer: Probably. For one thing, the acts of an agent acting with the scope of his or her authority can be imputed to the principal. For another, Rule 5.3(c)(1) states that a lawyer "shall be responsible for conduct" of a person "retained by or associated with a lawyer" if the lawyer "has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." See also Rule 5.3 Comment [3] ("When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions

appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.").

Question: Did Giuliani violate Rule 4.4(a) when he appeared before a Georgia House of Representative's Committee, identified two election workers by name, "baselessly accused them of 'quite obviously surreptitiously passing around USB ports as if they are vials of heroin or cocaine,' and suggested they were criminals whose 'places of work, their homes, should have been searched for evidence of ballots, the evidence of USB ports, for evidence of voter fraud.' Thereafter, the two election workers received numerous death threats." Federal Indictment at ¶ 26. The election workers subsequently brought a defamation action against Giuliani and were awarded $148 million in damages. https://www.pbs.org/newshour/politics/jury-awards-148-million-in-damages-to-georgia-election-workers-over-rudy-giulianis-2020-vote-lies.

Suggested Answer: Probably. Since Giuliani's objective in making these accusations was presumably to build support for his baseless election fraud claims and the appointment of a dual slate of electors, there was no legitimate "substantial purpose" that might justify "subordinat[ing] the interests of others to those of the client." Rule 4.4(a). Consequently, Giuliani's accusations against the election workers had "no substantial purpose other than to embarrass, delay, or burden a third person."

Question: From a legal ethics standpoint, does it matter whether Giuliani made false statements in court, to state legislative committees, in his speech at the January 6th rally at the Ellipse, or on radio or a podcast?

Suggested Answer: It mostly doesn't matter. A lawyer in court (Rule 3.3(a)(1)), a lawyer communicating with a third person (Rule 4.1(a)), and a lawyer speaking before a legislative body (Rule 3.9) must not make a false statement of fact or law. All three Rules require that the lawyer knew that his or her statement was false. The only difference is that Rule 4.1(a) requires that the false statement is "material" in order to violate the Rule. A statement is "material" "if it could or would influence the hearer." Ellen J. Bennett, Helen W. Gunnarsson and Nancy G. Kisicki, "Annotated Model Rules of Professional Conduct" at 486 (ABA 10th ed. 2023).

Because lawyers are officers of the court, they must "avoid conduct that undermines the integrity of the adjudicative process." Rule 3.3 Comment [2]. Arguably, this puts a greater duty on lawyers to speak truthfully in court than when they make statements out of court. On the other hand, the impact of a lawyer's out-of-court statement made on radio or a podcast can be much greater because there is a much larger audience. So, lawyers have a high duty to speak truthfully both in court and outside of court. See Renee K. Jefferson, "Lawyer Lies and Political Speech", *The Yale Law Journal Forum*, 114, 115 (Oct. 24, 2021): "Lawyer lies about the outcome of a valid election, whether told in chambers or in a press conference, risk causing unique, devastating harm to our

democratic form of government and should not be tolerated by members of our profession."

Note that Rule 4.1(a) prohibits a "false statement of material fact or law to **a third person**." Giuliani's false statements were made on radio shows, podcasts and in a speech at the "Save America" rally at the Ellipse, which were probably heard by thousands of people. Nevertheless, the New York Supreme Court held that Giuliani's false statements made on radio, podcasts violated Rule 4.1(a).

Question: Do Giuliani's First Amendment rights take precedence over his ethical duties under the Rules? Or are his First Amendment rights limited by his ethical duties?

Suggested Answer: In *Matter of Giuliani*, 146 N.Y.S. 3d 2 at 270, the New York Supreme Court held that a lawyer's First Amendment rights are limited by the lawyer's duty to the public. The New York court relied on *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1056 (1991), which held:

> It is long recognized that "speech by an attorney is subject to great regulation that speech by others . . . As officers of the court, attorneys are 'an intimate and trusted and essential part of the machinery of justice" [and] are perceived by the public to be in a position of knowledge, and therefore, "a crucial source of information and opinion." (Quoting *Gentile*). This weighty responsibility is reflected in the "ultimate purpose of disciplinary proceedings [which] is to protect the public in its reliance upon the integrity and responsibility of the legal profession." (Citation omitted.)

There isn't a bright line that defines what limitations the Rules impose on a lawyer's First Amendment rights. See Renee K. Jefferson, "Lawyer Lies and Political Speech," *The Yale Law Journal Forum* at 135 (Oct. 24, 2021) ("The application of First Amendment protections to lawyer speech is notoriously elusive."). There are risks in restricting a lawyer's First Amendment rights with respect to speech relating to an election. What if there are legitimate grounds for challenging the results of an election? And what standard should be applied to determine if the lawyer's election challenge has merit? [5] However, a lawyer's First Amendment rights should not take precedence over his or her ethical duties under the Rules.

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[5] The California State Bar Court drew some ethical lines drawn around a lawyer's First Amendment rights in *In re Eastman*, Decision and Order of Involuntary Inactive Enrollment, dated March 27, 2024, Case No. SBC-23-O-30029-YDR ("*In re Eastman*"), 75-81 https://statesuniteddemocracy.org/wp-content/uploads/2024/03/Eastman-Decision.pdf. See Appendix "A" for a discussion of the Court's decision.

Question: Rule 3.6(a) imposes limits on a lawyer's First Amendment rights by prohibiting the lawyer from making extrajudicial statements that "have a substantial likelihood of materially prejudicing an adjudicative proceeding." Should the Rules also limit a lawyer's First Amendment rights with respect to speech that prejudices the results of a fair and free election?

Suggested Answer: Revising the Rules to limit a lawyer's First Amendment rights with respect to elections could open the door to unreasonable restrictions on speech. It could also risk exposing many lawyers to unjustified ethics violations and disciplinary actions. It is best to let courts decide on a case-by-case basis whether a lawyer's ethical duties take precedence over their First Amendment rights.

Question: What about Giuliani's duty under Rule 1.3 Comment [1] to "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."? Doesn't that duty insulate him from allegations that he violated Rule 3.1 or 4.1(a)?

Suggested Answer: No. Giuliani's duties under Rule 1.3 are constrained by his ethical duties under other Rules. A lawyer's duty to be a zealous advocate doesn't permit the lawyer to make false statements of fact or law.

Question: Does Giuliani have a good argument that because of lack of time he wasn't able to verify his fraud allegations?

Suggested Answer: No. The Rules don't make such an exception. Under Rule 1.1, a lawyer has the duty to be thorough and reasonably prepared. RPC 1.1 Comment [3] notes that "[e]ven in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest."

Comment [5] notes that "[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem. . . The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence."

Question: Was the D.C. Board On Professional Responsibility right to recommend that Giuliani be disbarred for violating Rule 3.1 when in his complaint in the *Boockvar* case he alleged, without factual support, that mail-in ballots should not be counted because they could not be closely observed (his observational barrier claim), and which, had his argument been accepted, would have resulted in hundreds of thousands of votes not being counted?

Suggested Answer: Yes, as the Board points out, in analyzing an appropriate sanction, one of the factors is the seriousness of the conduct. Giuliani sought to deprive citizens of a fundamental right: "'N]o right is more precious in a free country than that of having a

voice in the election of those who make the law under which, as good citizens, we must live.'" The Board's recommendation is supported by its focus on "the need to maintain the integrity of the legal profession, and deter the respondent and other attorneys from engaging in similar misconduct." *In re Giuliani* at 57 and 61.

Question: What statements in Giuliani's speech on January 6th violated his ethical duties?

Suggested Answer:

- The dual elector plan is "perfectly legal."
- The Vice President can cast [the Electoral Counting Act] aside";
- "[The Vice President] can decide on the validity of these crooked ballots";
- "[Voting] machines that are crooked, the ballots that are fraudulent";
- "Crooked dominion machines";
- "This election was stolen in seven states".

Question: Should Giuliani's conduct be held to greater scrutiny and more severe sanctions when in his speech at the rally at the Ellipse before reportedly over 100,000 people he said:

> Over the next 10 days, we get to see the machines that are crooked, the ballots that are fraudulent, and if we're wrong, we will be made fools of. But if we're right, a lot of them will go to jail. Let's have 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.
>
> . . .
>
> This has been a year in which they have invaded our freedom of speech, our freedom of religion, our freedom to move, our freedom to live. I'll be darned if they're going to take away our free and fair vote. And we're going to fight to the very end to make sure that doesn't happen.

Suggested Answer: Yes. The court in *Matter of Giuliani*, 146 N.Y.S. 3d at 283 provides the rationale:

> This country is being torn apart by continued attacks on the legitimacy of the 2020 election and of our current president, Joseph R. Biden. The hallmark of our democracy is predicated on free and fair elections. False statements intended to foment a loss of confidence in our elections and resulting loss of confidence in government generally damage the proper functioning of a free society. When those false statements are made by an attorney, it also erodes the public's confidence in the integrity of attorneys admitted to our bar and damages the profession's role as a crucial source of reliable information. It tarnishes the

> reputation of the entire legal profession and its mandate to act as a trusted and essential part of the machinery of justice. **Where, as here, the false statements are being made by respondent, acting with the authority of being an attorney, and using his large megaphone, the harm is magnified. One only has to look at the ongoing present public discord over the 2020 election, which erupted into violence, insurrection and death on January 6, 2021 at the U.S. Capitol, to understand the extent of the damage that can be done when the public is misled by false information about the elections**. . . . This event only emphasizes the larger point that the broad dissemination of false statements, casting doubt on the legitimacy of thousands of validly cast votes, is corrosive to the public's trust in our most important democratic institutions. (Emphasis added.)

Question: Did Giuliani's statements "Let's have trial by combat" and "we're going to fight to the very end to make sure that doesn't happen" violate his ethical duties?

Suggested Answer: Possibly. These statements arguably violated U.S.C. § 1512(c)(2), which criminalizes the obstruction or attempted obstruction of an official proceeding – here, the Joint Session of Congress to count electoral votes. Giuliani's words can reasonably be interpreted as intended to urge the crowd at the January 6th rally to stop Vice President Pence from counting electoral votes and declaring the election in favor of Biden. For an analysis of the elements of this statute, see *Eastman v. Thompson*, 594 F. Supp. 3d at 1189-1193.

B. JEFFREY CLARK

Question: Did Clark's Proof of Concept letter violate any of the Rules?

Suggested Answer: Yes. Rules 1.1, 1.2(d), 8.4(a), (b), (c) and possibly 8.4(d).

Clark violated Rule 1.1 because his draft letter was based on legal research Clark had another lawyer in the Justice Department do the morning of the same day that Clark drafted the letter. It is inconceivable that the legal research on an issue of this complexity and magnitude could have been competently done in several hours. Consequently, the legal analysis in Clark's letter failed to provide "competent representation."

Clark violated Rule 1.2(d) because the letter he drafted, purportedly on behalf his client, the Department of Justice, contained statements that Clark knew were false and therefore he violated his duty not to "counsel a client to engage, or assist a client, in conduct" that he knew was "fraudulent."

Clark violated Rule 8.4(a), which states that it is professional misconduct for a lawyer to "knowingly assist or induce" a lawyer to violate the Rules. Clark violated this Rule because he asked and later tried to pressure Rosen and Donoghue to sign and send a letter

that Clark knew contained false statements. Rosen and Donoghue would have violated the Rules if they signed and sent the letter.

Clark may also have violated Rule 8.4(b). Clark is charged in Georgia with committing the crime of false statements and writings by stating in the Proof of Concept letter that the Department of Justice had "identified significant concerns that may have impacted the outcome of the election in multiple States, including the State of Georgia." Georgia Indictment at Count 22. If Clark is convicted or pleads guilty to this crime, he likely violated Rule 8.4(b) because his crime "reflects adversely" on his "fitness as a lawyer." Rule 8.4 Comment [2] notes that offenses involving dishonesty or serious interference with the administration of justice are in that category.

Clark likely violated Rule 8.4(c) because the Proof of Concept letter contained false statements. Rule 8.4(c) prohibits a lawyer from "engaging in conduct involving dishonesty, fraud, deceit or misrepresentation." Rule 1.0 defines "fraud" as "conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction." The Rules don't define "dishonesty," "fraud" or "misrepresentation." Local law is the source for the meaning of these terms.

The D.C. Court of Appeals provided guidance under D.C. law on the meaning of Rule 8.4(c) in *In re Ekekwe-Kaufman*, 210 A.3d 775, 795-96 (D.C. 2019):

> The concepts of dishonesty, fraud, and misrepresentation each have a distinct meaning, though they overlap in certain respects. Dishonesty is the most general of the violations. It includes "not only fraudulent, deceitful or misrepresentative conduct, but also 'conduct evincing a lack of honesty, probity or integrity in principle; a lack of fairness and straightforwardness.'" *In re Samad*, 51 A.3d 486, 496 (D.C. 2012) (quoting *In re Shorter*, 570 A.2d 760, 767-68 (D.C. 1990)). Fraud and misrepresentation are more specific and require "active deception or positive falsehood." *In re Shorter*, 570 A.2d at 768. Fraud "embraces all the multifarious means . . . resorted to by one individual to gain advantage over another by false suggestions or by suppression of the truth," *In re Austin*, 858 A.2d 969, 976 (D.C. 2004) (quoting Shorter, 570 A.2d at 767 n.12), and, unlike dishonesty, requires a showing of intent to defraud or deceive. In re *Romansky*, 825 A.2d 311, 315 (D.C. 2003). Misrepresentation, finally, is an untrue or incorrect representation, statement, or account. *In re Shorter*, 570 A.2d at 767 n.12.

Applying *In re Ekekwe-Kauffman*, Clark's Proof of Concept letter contained the dishonest statement and misrepresentation that the Department of Justice had "identified significant concerns that may have impacted the outcome of the election in multiple States, including the State of Georgia". Arguably, the statement that "in Georgia and several other States, both a slate of electors supporting Joseph R. Biden, Jr., and a separate slate of electors supporting Donald J. Trump, gathered on [December 14, 2020] at the proper location to cast their ballots, and that both sets of those ballots have been transmitted to Washington, D.C., to be opened by Vice President Pence" was also

dishonest and a misrepresentation because it strongly implied there were two competing slates of electors when, in fact, there was only one slate of legitimate electors.

Clark may also have violated Rule 8.4(d). On November 20, 2020, the Georgia Secretary of State had certified the results of the election with Biden receiving 12,670 more votes than Trump. Clark's "Proof of Concept" letter was "prejudicial to the administration of justice" because of the impact it would have had, if sent, on the certification of the results of the election. Almost certainly, the letter would have resulted in litigation challenging Georgia's certification of the election results. On the other hand, to violate Rule 8.4(d), a lawyer must "engage in conduct that seriously interferes with the administration of justice." Since the Proof of Concept letter was never is sent, there was no actual interference in the administration of justice, so the argument that Clark violated this Rule is weak.

Question: Does the fact that the Proof of Concept letter was never signed and sent avoid a violation of Rule 8.4?

Suggested Answer: No in part and possibly yes in part. The letter contained false statements and therefore violated Rule 8.4(c) and arguably was a crime that reflected adversely on Clark's honesty in violation of Rule 8.4(b). It also violated Rule 8.4(a) whether or not it was sent. However, Rule 8.4(d) states that it is misconduct to "engage in conduct **that is prejudicial to the administration of justice**." Since the letter was never signed or sent, there was no prejudice to the administration of justice.

Question: Did Clark have a higher duty because he was a public official who held a high position in the Department of Justice?

Suggested Answer: Possibly. See, e.g., *Lawyer Disciplinary Bd. v. Clifton*, 236 W.Va. 362, 378 (W.Va. 2015) ("Ethical violations by a lawyer holding a public office are viewed as more egregious because of the betrayal of the public office attached to the office.").

Question: Did the Department of Justice lawyer who, at Clark's direction, did the legal research for the Proof of Concept letter violate the Rules?

Suggested Answer: Possibly. The D.C. Office of Disciplinary Counsel Specification of Charges states at Paragraph 12 that Clark asked "a senior counsel in the Civil Division, to research the authority of state legislatures to send unauthorized slate of electors to Congress" and that "Respondent used this research to write a draft letter, referred to as the 'Proof of Concept' letter." Rule 5.2(a) states that a "lawyer is bound by the Rules of Professional Conduct notwithstanding the lawyer acted at the direction of another person." We don't have the lawyer's memo, but given that he researched and wrote it the same day, it is hard to imagine he did a thorough legal analysis and therefore he may have violated Rule 1.1. He may also have violated Rule 2.1, which requires that a lawyer "exercise independent judgment and render[ed] candid advice."

Question: Is there merit to Clark's defense that the disciplinary action against him is improper because it was brought as a result of an ethics complaint filed by Senator Dick Durbin who did not have personal knowledge of the facts alleged in Disciplinary Counsel's Specification of Charges? Clark argues that it is the D.C. Bar's "longstanding policy to not process complaints lacking in personal knowledge." Clark Answer, Aff. Defense 50.

Suggested Answer: No. While Rule 8.3(b) requires that a lawyer has an *obligation* to file a bar complaint if the lawyer "knows that another lawyer has committed a violation of the Rules of Professional Conduct . . .", and "knows" is defined as "actual knowledge" (Rule 1.0(f)), the Rules don't preclude a lawyer from filing a bar complaint if the lawyer doesn't have actual knowledge that another lawyer violated the Rules. The fact that D.C. Bar policy may, in the past, have required actual knowledge, should not constrain the D.C. Bar from acting on a meritorious bar complaint made by a lawyer who lacks personal knowledge of the matters alleged in the bar complaint so long as the bar complaint doesn't violate the Rules.

Question: What about Clark's arguments that he did not violate Rules 8.4(a) and (c) or Rule 2.1 because the Proof of Concept letter proposed findings, determinations and policy that could not have been operative without the approval of his superiors? Clark Answer, Aff. Defenses 27 and 28.

Suggested Answer: The Proof of Concept letter contains false factual statements that would still be false if the letter had been approved by Clark's superiors. Approval of the letter would not validate the statement that the Department of Justice had "identified significant concerns that may have impacted the outcome of the election in multiple States, including the State of Georgia" or the statement that the Department found "troubling the current posture of a pending lawsuit in Fulton County and the "litigation's sluggish pace".

Question: What about Clark's argument that the above statements in the Proof of Concept letter were statements of opinion which cannot be proved false?

Suggested Answer: This is a weak argument. The statements were factual in nature and demonstrably false.

Question: What about Clark's argument that a reasonable lawyer in the Department of Justice could have a formed a good-faith belief that further investigation into the election was required because there were "significant bodies of information irregularities available before January 3, 2021 . . . [and] significant new bodies of information developed after January 3, 2021" which, together, "reinforce the reasonableness of Respondent's alleged actions." Clark Answer, Aff. Defense 34.

<u>Suggested Answer</u>: The January 6th Report answers this question by pointing to the fact that Attorney General Barr instructed Department of Justice and FBI personnel to "pursue substantial allegations for voting and vote tabulation irregularities prior to the certification of elections in your jurisdiction in certain cases", and that Barr "had ordered unprecedented investigations into the many specious claims of voter fraud." January 6th Report at 374 and 382. In addition, on November 12, 2020, the U.S. Cybersecurity and Infrastructure Security Agency issued a statement that "The November 3rd election was the most secure in American history." Clark's argument that evidence of voting irregularities emerged after January 3, 2021 fails because he wrote the Proof of Concept letter before January 3rd.

C. KENNETH CHESEBRO

<u>Question</u>: Did Chesebro's November 18, 2020 memo violate any of the Rules?

<u>Suggested Answer</u>: Probably not, but arguably Rules 1.1, 1.4(b) and 2.1.

<u>Question</u>: Did Chesebro's December 6, 2020 memo violate any of the Rules?

<u>Suggested Answer</u>: Yes. Rules 1.1, 1.2(d), 1.4(b), 2.1, and 8.4(a)-(d).[6]

<u>Question</u>: From an ethical standpoint, what differentiates Chesebro's November 18th memo from his December 6th memo?

<u>Suggested Answer</u>: Chesebro's November 18th memo is largely an analysis and argument concerning the deadline for when Wisconsin electors must meet and the date by when they must be certified and alleged historical support for allowing two sets of electors based on how Hawaii handled electoral votes in 1960. Chesebro recommended a course of action that assumed there would be a court decision or state legislative action before January 6th to resolve election disputes. The memo also acknowledged the need for more research. The memo was written before Wisconsin certified Biden's electors.

In sharp contrast, Chesebro's December 6th memo recommended a strategy for overturning the results of the election based on a flawed legal theory. His recommendation that each of the six States have an alternative set of electors that could be counted by Vice President Pence on January 6th conflicted with the Electoral Count Act and was designed to unlawfully prevent Biden from getting 270 electoral votes. The Electoral Count Act requires that in

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[6] A disciplinary action is pending against Chesebro in New York. In *Matter of Soto*, 985 N.Y.S. 2d 292, 293 (N.Y. Sup. Ct. App. Div.), the New York Supreme Court, Appellate Division, held that a lawyer who made a false statement to the Board of Elections violated Rule 8.4(d) because "such conduct has a sufficient nexus to the justice system and/or undermines public confidence in lawyers as officers of the court."

order for a slate of electors to be legitimate (i) each State must issue a "certificate of ascertainment" and send it to the Archivist of the United States and to the electors who were appointed (Section 6); and (ii) the electors who received a certificate of ascertainment, must attach it to a certificate of their votes (Section 9). Chesebro's alternate slates of electors could not be valid because they would not and did not receive certificates of ascertainment issued by their State and could not attach it to a certificate of their votes.[7]

Section 6 of the Electoral Count Act states:

> **CREDENTIALS OF ELECTORS; TRANSMISSION TO ARCHIVIST OF THE UNITED STATES AND TO CONGRESS; PUBLIC INSPECTION**
>
> It shall be the duty of the executives of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Archivist of the United States a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are required by section 7 of this title to meet, six duplicate-originals of the same certificate under the seal of the State . . .

Section 9 of the Electoral Count Act states:

> **CERTIFICATES OF VOTES FOR PRESIDENT AND VICE PRESIDENT**
> The electors shall make and sign six certificates of all the votes given by them, each of which certificates shall contain two distinct lists, one of the votes for President and the other of the votes for Vice President, and shall annex to each of the certificates one of the lists of the electors which shall have been furnished to them by direction of the executive of the State.

Chesebro's memo admits that the Trump electors would not be able to attach their State's certificate of ascertainment to the certificate of their votes but dismisses the concern arguing without legal support that this defect can be cured if the alternate electors receive certificates of ascertainment before January 6th.

There was also no legal basis for his recommendation that Vice President Pence state that "the Framers of the Constitution intended and expected, and consistent with precedent from the first 70 years of our nation's history, [that] Vice President Pence, presiding over the joint

[7] The State Bar Court of California debunks the dual slates of electors theory in *In Re Eastman* at 39-42.

session, takes the position that it is his constitutional power and or historical precedent give him the authority count electoral votes and that anything in the Electoral Count Act to the contrary is unconstitutional."

Additionally, Chesebro's recommendation that alternative slates of electors sign "certificates" of their votes exposed him and the alternate electors to liability for falsely certifying that the Republican electors were the lawful electors for each of the battleground states.

Chesebro may also have committed a criminal offense based on Judge Carter's analysis in *Eastman v. Thompson*, 594 F. Supp. 3d 1156, 1197 (C.D. Cal. 2022). Judge Carter held that Chesebro's December 13, 2020 memo "likely furthered the crimes of obstruction of an official proceeding and conspiracy to defraud the United States, [and therefore] it is subject to the crime-fraud exception."

Question: Did Chesebro's December 9, 2020 memo violate any of the Rules?

Suggested Answer: Yes. Rules 1.1, 1.2(d), 1.4(b), 2.1, and 8.4(a)-(d). See above answer concerning Chesebro's December 6th memo.

Question: Did Chesebro's December 13, 2020 memo violate any of the Rules?

Suggested Answer: Yes. Rules 1.1, 1.2(d), 1.4(b), 2.1 and 8.4(a)-(d). The memo makes the meritless assertion that the Vice President has the "constitutional responsibility" to make judgments about what to do if there are conflicting electoral votes; alleges without support that there is "evidence of abuses in the election and canvassing"; and proposes a strategy to overturn the results of the election by recommending that votes from states where there are dual sets of electors not be counted. See *Eastman v. Thompson et al.*, 594 F. Supp. 3d at 196-197.

Question: Is Chesebro's contention in his December 13th memo that having a "defensible claim" that the President is in charge of counting electoral votes, including "making judgments about what to do if there are conflicting votes", a sufficient legal standard to avoid violating the Rules in the context of a presidential election?

Suggested Answer: No. Chesebro's strategy attempted to overturn a democratic election, so the stakes were exceedingly high. Further, his recommendation is based on the false claim of "abuses in the election and canvassing." Since he admits that he "hasn't delved into the historical record," he has no basis for contending that he has a "defensible claim."

Question: Did Chesebro violate any of the Rules when he drafted and sent to Republican electors in battleground States (i) a memorandum that stated that electoral votes were being sent to the President of the Senate, U.S. Archivist, Georgia Secretary of State and Chief

Judge of the U.S. District Court of the Northern District of Georgia pursuant to Section 11 of the Electoral Count Act; and (ii) a "certificate of the votes of the 2020 electors from Georgia" stating that the signatories were "duly elected and qualified Electors of the President and Vice President of the United States"?

Suggested Answer: Yes. Rules 1.2(d), 4.1(a) and 8.4(a)-(d). Chesebro pled guilty to Count 15 in the Georgia Indictment which charged him with conspiring to knowingly file, enter and record an electoral certificate that falsely stated that the electors were the "duly and qualified Electors for President and Vice President of the United States of America from the State of Georgia". Republican electors from several states have also been indicted.

Question: At what points did Chesebro cross ethical boundaries and violate his ethical duties?

Suggested Answer: There were two critical steps that Chesebro took that crossed ethical lines: First, he moved from a legal analysis in his memo of November 18th to a plan of action in his December 6th memo to violate the Electoral Count Act and "prevent Biden from amassing 270 electoral votes" based on false claims of "electoral abuses" with no supporting legal analysis or factual support. Second, drafting and sending to Republican electors in battleground States false electoral certificates which misrepresented that the electors were "duly elected and qualified" was not only a false statement, but it put the electors and himself in legal jeopardy. C. Galliher and N. Eisen, "Democracy on the Ballot – Will False Electors Be Investigated", *Brookings*, Dec. 12, 2022, https://www.brookings.edu/articles/democracy-on-the-ballot-will-false-electors-be-investigated/; L. Gibbons, "Sixteen Michigan Trump loyalists face felonies in 'False Elector' Scheme", *Bridge Michigan*, July 18, 2023, https://www.bridgemi.com/michigan-government/sixteen-michigan-trump-loyalists-face-felonies-false-elector-scheme

Question: In his speech at the "Save America" rally, Trump urged the protestors to walk to the Capitol and urge Pence to "[do] the right thing" and for Republicans to "take back our country" based on a legal theory that Chesebro developed. The result was the attack on the Capitol. Is the attack on the Capitol relevant in analyzing Chesebro's violation of his ethical obligations?

Suggested Answer: Yes. There is a link between Chesebro's false elector theory and the attack on the Capitol. While Chesebro did not speak at the "Save America" rally or urge Trump supporters to march to or attack the Capitol, he developed a legal theory that was used as a justification for the attack on the Capitol. The ethics analysis should take this into account by strictly scrutinizing Chesebro's alleged ethics violations and by imposing a sanction that takes the attack on the Capitol into account. A lawyer should not develop a legal theory and recommend a course of action to overturn an election without taking into consideration how his legal theory might be used.

The Preamble to the Rules imposes duties on lawyers that are relevant in analyzing a legal theory that was designed to overturn the results of the election:

- Comment [1] states that a lawyer is a "public citizen having special responsibility for the quality of justice."
- Comment [6] state that "a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on public participation and support to maintain their authority."; and
- Comment [13] states that "Lawyers play a vital role in the preservation of society."

Chesebro's legal theory and advice were contrary to his duties as a public citizen and important factors in analyzing whether he violated his ethical duties.

D. JOHN EASTMAN

<u>Question</u>: What State Bar Rules apply to Eastman's conduct?

<u>Suggested Answer</u>: Eastman is a member of the California bar and therefore it has jurisdiction over his conduct. Rule 8.5(a) (disciplinary authority). Under Rule 8.5(b) (choice of law), the Rules of the jurisdiction where his conduct occurred apply, but "if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to his conduct." Since "the predominant effect" of Eastman's conduct was in Washington, D.C., the Rules of the D.C. Bar should apply.[8]

<u>Question</u>: What are the ethical problems with Eastman's December 23 and January 3rd memos?

<u>Suggested Answer</u>:

- The December 23rd memo fails to provide legal support for the assertion that Section 15 of the Electoral Count Act is unconstitutional;

[8] Note that D.C.'s choice of law Rule is different than the ABA Model Rule. D.C. Rule 8.5(b)(ii) states:

> If the lawyer is licensed to practice in this and another jurisdiction, the Rules to be applied shall be the Rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if the particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the Rules of that jurisdiction shall be applied to that conduct.

Nevertheless, since the "predominant effect" of Eastman's actions were in Washington, D.C., the D.C. Bar's Rules should apply.

- The false statement in the December 23, 2020 memo that "7 states have transmitted dual slates of electors to the President of the Senate" even though Eastman knew that each of those States had submitted certificates establishing that Biden's electors had been appointed, and that none of the Republican alternative slates of electors had been certified and therefore were invalid;
- The false statement in the December 23, 2020 memo that "[t]here is very solid legal authority, and historical precedent, for the view that the President of the Senate does the counting, including the resolution of disputed electoral votes . . . and all the Members of Congress can do is watch." The testimony of Gregory Jacob and Judge Luttig before the House January 6th Committee establish there wasn't "solid legal authority" for Eastman's opinion that the Vice President had the authority to resolve disputes about electoral votes;
- His recommendation that Pence state during the joint session of Congress on January 6th that "there are no electors that can be deemed validly appointed in those States." In fact, there were validly appointed electors in all seven States;
- The false statement in the January 3 memo that there was "outright fraud (both traditional ballot stuffing, and electronic manipulation of voting tabulation machines).";
- The January 3rd memo purports to justify the appointment of dual slates of electors because of the "illegal actions by state and local officials" that are described in his memo. With respect to three of the states (Georgia, Pennsylvania and Wisconsin), his memo relies on allegations made in lawsuits that were filed shortly before the date of his memo, not judicial findings of fraud or other illegal actions. As to the other States, he makes allegations but provides no proof of fraud or illegality;
- The January 3rd memo provides no legal support for the argument that Section 15 of the Electoral Count Act is illegal and yet recommends that Pence ignore it and count Republican electoral votes in clear violation of Section 15; and
- The false statement in the January 3rd memo that "this Election was Stolen by a strategic Democrat plan to systematically flout existing election laws for partisan advantage."

Question: Is the fact that Eastman was an expert in constitutional law relevant to the ethics analysis?

Suggested Answer: Yes.

Eastman's knowledge of constitutional law informs the analysis of whether he violated Rule 4.1(a) which requires that a false statement of material fact or law be made "knowingly." In *In re Eastman* at 89, the California State Bar Court held that "[a]s a constitutional expert, Eastman knew that the only slates of electors which Vice President Pence could lawfully consider, were those included in the certificates of ascertainment executed by the governor of each state" and that "he also knew that there was no

constitutional provision permitting counting of uncertified, unascertained dual slates of electors."

<u>Question</u>: Did Eastman violate RPC 1.2(d), which requires that a lawyer "not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent"?

<u>Suggested Answer</u>: Probably. Trump has been charged criminally with obstructing a federal proceeding and other offences. At his January 4th meeting with Pence and Eastman and in his speech at the "Save America" rally, Trump advocated that Pence refuse to certify legitimate electoral votes from battleground states based on Eastman's legal advice.

In *Eastman v. Thompson*, 594 F. Supp. 3d 1156, 1195 (C.D. Cal. 2022), U.S. federal district Judge David Carter held in ruling on whether Eastman had to produce his emails, that the crime-fraud exception to the attorney-client privilege applied because it was more likely than not that Trump and Eastman had dishonestly conspired to obstruct the Joint Session of Congress on January 6, 2021.

<u>Question</u>: Did Eastman's December 23rd and January 3rd memos violate Rules 1.1, 1.4(b) and 2.1?

<u>Suggested Answer</u>: Yes. The ethics analysis requires a careful evaluation of the merits of Eastman's legal advice. Rule 1.1 Comment [5] states that [c]ompetent handling of a particular problem includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures of competent practitioners." And Rule 1.4 Comment [5] states that "[t]he client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued . . ." Rule 2.1 Comment [1] requires that a lawyer give their client "straightforward advice expressing the lawyer's honest assessment." Eastman's memos failed to meet those standards.

Eastman contended in his defense of the California State Bar disciplinary charges that there is scholarly support for his theory that Section 15 of the Electoral Count Act is unconstitutional pursuant to the Twelfth Amendment: "Numerous prominent constitutional scholars have either contended that the Constitution provides such authority to the Vice President or acknowledged the plausibility of the argument." *In Re John Eastman*, Answer to Notice of Disciplinary Charges, dated Feb. 15, 2023 at ¶¶ 6 and 18.

The California State Bar Count in *In re Eastman* determined that the legal analysis in Eastman's memos was deeply flawed:

> Eastman, as a constitutional scholar, understood that alternate, contingent or "dual" slates of *non-certified* electors would carry no import on January 6 during the counting of electoral votes. Eastman knew that there was no constitutionally mandated provision allowing for any non-certified, non-ascertained "dual" or

> “contingent” slates to be considered in conjunction with the voting or counting of presidential electoral votes.
>
> . . .
>
> In the memos, Eastman also stated, falsely, that *“[t]here is very solid legal authority and historical precedent*, for the view that the President of the Senate does the counting, including the resolution of disputed electoral votes (as Adams and Jefferson did while Vice President, regarding their own election as President), and all the Members of Congress can do is watch.” (*Id*. at p. 3, italics added.) However, as Eastman knew before, during and subsequent to the time that he drafted and advocated implementation of certain of the January 6th scenarios, there was no *solid* legal authority regarding this issue and the only legal authority upon which he relied in drafting the memo consisted of four law review articles.

Id. at 40 and 47.

<u>Question</u>: Did Eastman’s memo violate any other Rules?

<u>Suggested Answer</u>: Yes. 8.4(c). In its decision, the California State Bar Court held that Eastman knew that the dual slate of electors theory in his memos was false:

> The evidence shows that Eastman’s “dual slates of electors” statement was false and misleading. Eastman knew that there were no legitimate dual slates of electors in the seven contested states because the Trump electors lacked certification and could not be legally considered on January 6, 2021. Moreover, Eastman was aware that Vice President Pence lacked the authority to decide which slate of electors would be counted because his sole responsibility was simply to open the ballots. Yet, Eastman used the false assertion concerning dual slates of electors to provide an alternative strategy for Vice President Pence to declare President Trump as the winner of the 2020 presidential election. The two-page memo was designed to provide legal support and convince Vice President Pence to carry out that strategy.

Id. at 88-89.

<u>Question</u>: Could Eastman have written his memos in compliance with his ethical obligations and still made the same recommendation that Pence announce at the joint session of Congress on January 6th that there were no electors validly appointed in the seven battleground States where there were dual sets of electors, count the electoral votes without including electors from those States and declare Trump re-elected as President?

<u>Suggested Answer</u>: No. Eastman’s recommendations were without merit and therefore violated 1.1 and 1.4(b) and, because they were based on the false factual assumption of election fraud and false legal arguments, violated Rule 8.4(c).

Question: Did Eastman violate his ethical duties at his meeting on January 4th with Trump, Pence, and Jacob where he allegedly asked Pence to reject legitimate electors from seven States or, alternatively, send the question of which slate was legitimate to State legislatures, and at his meeting on January 5th with Gregory Jacob and Pence's Chief of Staff when he allegedly advocated that Pence reject electors from those States?

Suggested Answer: Yes. Eastman violated Rule 1.2(d) because his advice assisted his client, Trump, in "conduct that the lawyer knows is criminal or fraudulent" and because the action he urged Pence to take was based on false factual and legal assumptions in violation of Rules 4.1(a) and 8.4(c).

Question: Did Eastman's speech at the "Save America" rally violate any of the Rules?

Suggested Answer: Yes. He made false statements that violated Rules 4.1(a) and 8.4(c). His false statements included:

- State election officials "ignored or violated" state law;
- "We know there was fraud, traditional fraud that occurred";
- "We know that dead people voted";
- "[W]e now know because we caught it live last time in real time, how the machines contributed to that fraud."
- Election officials "were unloading the ballots from that secret folder, matching them to the unvoted voter, and voila, we have enough votes to barely get over the finish line."

In addition, Eastman violated Rule 1.2(d). Trump relied on Eastman's speech when he urged protestors to take aggressive action at the Capitol for which he has been criminally charged.

Question: Eastman contends that in his speech at the Ellipse on January 6th he was exercising his First Amendment right to speak as a private citizen and not as counsel to Trump. "Trump didn't ask me to do that. I wasn't there as a lawyer. There as a private citizen. I thought as a citizen that we needed to speak out" about alleged election irregularities. https://news.bloomberglaw.com/litigation/eastman-claims-constitutional-cover-for-jan-6-rally-remarks.

What do you think about this argument?

Suggested Answer: His argument has no merit. Giuliani spoke immediately before and Trump spoke immediately after Eastman spoke and it was clear that Eastman was speaking as Trump's lawyer. Giuliani stated that "Every single thing that has been outlined as the plan for today is perfectly legal. I have Professor Eastman here with me to say a few words about that." Trump confirmed Eastman's legal role when he stated that "John is one of the most brilliant lawyers in the country, and he looked at this and he said, 'What an absolute disgrace that this can be happening to our Constitution.'"

Question: What limitations does the First Amendment put on a lawyer's freedom of expression?

Suggested Answer: While there isn't a bright line test that applies in all cases, the State Bar Court provided guidance in holding that the First Amendment does not protect a lawyer who makes "knowing or reckless false statements of fact of law" or to speech that is "employed as a tool in the commission of a crime." *In re Eastman* at 79.

Question: Is the fact that there were many thousands of attendees at the rally relevant to the ethics analysis?

Suggested Answer: Yes. Eastman's speech at the rally provided, at least in part, the motivation for the attack on the Capitol in order to overturn a legitimate election. Model Rule 10.C of the ABA's *Model Rules For Disciplinary Enforcement* identifies several factors that should be considered in imposing a sanction on a lawyer who violates the Rules:

> (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession;
> (2) whether the lawyer acted intentionally, knowingly, or negligently;
> (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and
> (4) the existence of any aggravating or mitigating factors.

https://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement/. Eastman's speech violated his duties to the public, the legal system and his profession. But note that the California State Bar Court dismissed for lack of evidence that Eastman's false statements at the rally "contributed to provoking the crowd to assault and breach the Capitol . . . In re Eastman at 108-110.

Question: Let's assume that Eastman honestly believed there was fraud in the 2020 election. This was one of Eastman's defenses in responding to the California State Bar's disciplinary charges. See Respondent John Charles Eastman's Answer to Notice of Disciplinary Charges, February 15, 2023 at ¶ 3 (disputing Barr's statement there was no evidence of widespread or illegality that could have affected the outcome of the election "given the extensive evidence of illegality and/or fraud known at the time – and much of which has subsequently been confirmed").
https://assets.bwbx.io/documents/users/iqjWHBFdfxIU/roYJ.nA25g7g/v0

Does that change the ethics analysis?

Suggested Answer: Doubtful. His allegations of fraud may still violate Rules 4.1(a) and 8.4(c). The ethics analysis on this point requires analyzing the merits of Eastman's claim there was election fraud and the basis for not crediting as true the findings of the Department of Justice that there was no fraud or illegality. If his sources are weak and he

doesn't have a reasonable basis for challenging the findings of the Department of Justice, then Eastman's knowledge can be "inferred from the circumstances." Rule 1.1(f). The same analysis applies to his speech at the January 6th rally. In addition, Rule 4.1 Comment [1] makes the important point that "[m]isrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements." Eastman's speech failed to point out there was evidence that there was no fraud or illegality, and he thereby made a "false statement of material fact." The State Bar Court noted that as to Eastman's statements that Dominion voting machines were used to manipulate the election result, he failed "to vet" the theories and credentials of the people who provided him with these claims. *In re Eastman* at 102.

E. THE LAWYERS WHO SAID "NO"

<u>Question</u>: Department of Justice lawyers Jeffrey Rosen and Richard Donoghue refused to sign Clark's "Proof of Concept" letter which recommended that the Georgia General Assembly investigate alleged election irregularities and select one of the slates of electors who voted on December 14th.. Vice President Pence's legal counsel Gregory Jaccob refused to follow Eastman's request that he advise Pence to reject legitimate electors from seven battleground States or send the question of which slates was legitimate to State legislatures. Was their refusal based on an ethical duty?

<u>Suggested Answer</u>: Yes, in part. Their actions complied with Rules 1.1, 1.4(b) and 2.1. But complying with their ethical duties was likely not the only reason for their refusal to act as requested by Clark and Eastman. They surely understood that complying with Clark's and Eastman's requests could result in overturning the results of a democratic election and imperil American democracy. Lawyers do not have an ethical duty under the Rules to protect the integrity of elections. Nevertheless, in refusing Clark's and Eastman's requests, they protected the results of the election.

<u>Question</u>: Did Rosen, Donoghue and Jacob have an ethical duty to report Clark and Eastman to bar authorities?

<u>Suggested Answer</u>: No. Rule 8.3(c) states that a lawyer does not have a duty to report another lawyer's violation of the Rules if it would require the disclosure of confidential information protected by Rule 1.6. Rule 8.3 Comment [2] states:

> A report about misconduct is not required where it would involve violation of Rule 1.6.

Rule 1.6 directs, subject to several inapplicable exceptions, that a lawyer "shall not reveal information relating to the representation of a client unless the client gives informed consent." None of the exceptions in Rule 1.6 apply. Rosen, Donoghue and Jacob would have violated their duty of confidentiality if they filed bar complaints based on Clark's Proof of Concept letter and Eastman's recommendations.

Question: Did lawyers who were not bound by a duty of confidentiality or the attorney-client privilege have an ethical duty to report Giuliani, Chesebro, Eastman and Clark to bar authorities pursuant to Rule 8.3(a)?

Suggested Answer: There are three issues to consider:

(i) Did Giuliani, Clark, Chesebro and Eastman violate the Rules?
(ii) If so, does their violation raise "a substantial question" as to their "honesty, trustworthiness or fitness as a lawyer";
(iii) Does the lawyer who is considering reporting their conduct "know" that the answer to (i) and (ii) is yes?

The answer to (i) is yes.

Rule 8.3 Comment [3] explains what is meant by "substantial" in the context of "honesty, trustworthiness or fitness as a lawyer":

> This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to protect. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.

Given the serious nature of Rule violations by Giuliani, Clark, Chesebro and Eastman, the answer to (ii) is yes.

The issue as to (iii) is what level of knowledge is required by this Rule? Lawyers who learned about what Giuliani, Chesebro, Eastman and Clark did from newspapers and other public sources did not have an ethical duty to file a bar complaint against them because they did not have actual knowledge of their misconduct. *See, e.g.*, D.C. Ethics Opinion 246 (Oct. 18, 1994) ("[W]e believe Rule 8.3(a) should be read to require a lawyer to report misconduct only if she has a clear belief that misconduct has occurred, and possesses actual knowledge of the pertinent facts."); New York State Bar Ethics Op. 854 (March 11, 2011) (Rule 8.3(a) requires "'actual knowledge' or a 'clear belief' as to the pertinent facts, i.e., more than a 'mere suspicion' or a 'reasonable belief'").

But the fact that a lawyer doesn't have an ethical duty to report alleged Rule violations does not mean that a lawyer cannot file a bar complaint so long as the lawyer is not violating an ethical duty in doing so. Lawyers in legal advocacy groups such as Lawyers Defending American Democracy, The 65 Project and United States Democracy Center filed bar complaints against Giuliani, Chesebro, Eastman and Clark without having an ethical obligation to do so and without violating their ethical duties.

F. GENERAL QUESTIONS

- Are the Rules deficient with respect to lawyers who attempt to overturn the results of a free and fair election?

- Should there be a Rule that makes it unethical to challenge an election unless there is reasonable basis for doing so? What are the risks and benefits of such a Rule?

- Should the Rules be revised to impose limitations on First Amendment rights when a lawyer makes statements in the media or a speech that threaten to undermine a free and fair election? Or should the relationship between the Rules and the First Amendment be left to the courts to resolve in specific cases?

- Giuliani, Clark, Chesebro and Eastman are intelligent and experienced lawyers who know the Rules of Professional Conduct. Why do you think they crossed ethical boundaries in their advice and actions with respect to the election?

- If Trump is re-elected in 2024, his "allies are planning to systematically install more aggressive and ideologically aligned legal gatekeepers who will be more likely to bless contentious actions." Jonathan Swan, Maggie Haberman and Charlie Savage, "How Trump and His Allies Plan to Wield Power in 2025", *New York Times*, Nov. 16, 2023, https://www.nytimes.com/article/trump-2025-second-term.html. If this happens, what should lawyers do? What will you do?