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Andrew M. Perlman

Suffolk University, aperlman@suffolk.edu

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The Legal Ethics of Lying about American Democracy

Andrew M. Perlman

Numerous lawyers contributed to the disinformation campaign that led to the storming of the U.S. Capitol on January 6, 2021. Some of the lawyers filed lawsuits that questioned the legitimacy of the presidential election, while others spread falsehoods while acting as legislators or in similar high profile roles. This chapter explores the potential disciplinary consequences of their behavior and the larger implications of their conduct for American democracy.

One theme of this chapter is that, when lawyers make claims about elections, the consequences of misinformation are severe and threaten to undermine trust in our democratic institutions. Given the stakes, the legal profession should apply well-established procedures and rules to discipline lawyers who cross ethical lines in the context of election-related litigation. In contrast, discipline is far more complex, both legally and politically, for lawyers who serve in public roles and do not represent clients, such as lawyer-legislators who lied about the election. Instead of seeking to discipline these lawyers with traditional sanctions, the profession should speak with one voice and across the political spectrum to condemn them for lying about core features of our democracy.

The risks here are enormous. Lawyers play a critical role in supporting and lending legitimacy to bedrock political institutions, such as the judiciary and the electoral system. When lawyers lie or offer misleading information about those institutions, they create an existential threat to democracy itself. The disciplinary system can help to encourage appropriate behavior at the margins, but even with these professional guardrails, it is an open question whether lawyers will exercise the kind of professional integrity that democratic institutions need.

I. The Legal Profession's Contributions to Social Progress and Dysfunction

Throughout history, the legal profession has contributed to some of the world's greatest social achievements. Lawyers have established enduring democracies, extended civil rights, expanded opportunities for the underrepresented, and advanced the rule of law. They also have offered voices for the voiceless, provided access to legal services for those unable to afford them, and generally ensured the proper functioning of numerous essential political institutions.

At the same time, lawyers have contributed to a wide range of scandals and disgraces, both while representing clients and serving in nonrepresentational public roles (e.g., elected officials and advisors to political leaders). To take a particularly horrific non-U.S. example, lawyers played a significant role in Nazi Germany's development and

implementation of the laws that led to the Holocaust.¹ Within the U.S., lawyers have engaged in many instances of shameful (albeit obviously less heinous) behavior. For example, not only was President Richard Nixon himself a lawyer, but many of the high-level public officials who participated in the Watergate scandal were lawyers as well.² The earlier Teapot Dome scandal, which saw the first instance of a former Cabinet secretary go to prison, featured a lawyer. And President Bill Clinton, who was impeached for lying under oath during another prominent American scandal, was a lawyer.

Other examples, both recent and most distant, are plentiful, but the point is that lawyers are often at the center of society's greatest social achievements and failures. The rest of this chapter focuses on the latter and specifically on whether discipline is appropriate for lawyers who contributed to a social disgrace that has profound implications for the survival of American democracy: the spreading of misinformation that led to the seditious storming of the U.S. Capitol on January 6, 2021.

II. Lawyer Discipline and the 2020 Election

The American system of lawyer discipline treats misconduct (such as making false statements) differently depending on whether lawyers are acting within their professional roles or in other contexts. The ABA Model Rules of Professional Conduct, which have been adopted in significant part in every U.S. jurisdiction, clearly apply to lawyers while they are representing clients. The rules, however, offer only a few options for disciplining lawyers in nonrepresentative public roles (LINPRs), such as lawyers who serve as elected officials. When assessing whether lawyers should be disciplined, it can be helpful to consider four possible categories of behavior.

Possible Bases for Lawyer Discipline

	Conduct is Unlawful ³	Conduct is Lawful ⁴
Conduct occurs while the lawyer is acting in a representational role	The rules of professional conduct apply to the behavior.	The rules of professional conduct apply to the behavior.
Conduct occurs while the lawyer is acting in a	A limited number of rules of professional conduct apply to	?

¹ See, e.g., Cynthia Fountaine, *Complicity in the Perversion of Justice: The Role of Lawyers in Ending the Rule of Law in the Third Reich*, 10 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 198 (2020).

² See, e.g., Mark Curriden, *The Lawyers of Watergate: How a '3rd-Rate Burglary' Provoked New Standards for Lawyer Ethics*, ABA J. (Jun. 1, 2012, 10:20 a.m.), https://www.abajournal.com/magazine/article/the_lawyers_of_watergate_how_a_3rd-rate_burglary_provoked_new_standards.

³ "Unlawful" means that the conduct either constitutes a crime or violates a civil law, rule or regulation other than the applicable rules of professional conduct.

⁴ "Lawful" means that it is not a crime and does not constitute a crime or violate a civil law, rule, or regulation other than the rules of professional conduct.

nonrepresentational role	the behavior, typically Rules 8.4(b) and (c).	
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The goal of this chapter is not to assess whether discipline is appropriate for any particular lawyer. Rather, the goal is to offer a framework for understanding the possible bases for discipline and explain when discipline would be appropriate.

A. Disciplining Lawyers for Conduct in a Representational Role

The top row of the table concerns behavior that occurs while lawyers are representing clients. In that context, it is uncontroversial that lawyers are subject to discipline for their unlawful behavior (the middle of the upper row) and for conduct that is otherwise lawful but violates the applicable rules of professional conduct (the upper-right corner). The only question in these contexts is whether the behavior actually violates well-established rules.

1. Alleged Unlawful Conduct in the 2020 Election Litigation

The lawyers who filed lawsuits challenging the results of the 2020 presidential election were acting in their role as lawyers and had to comply with the applicable rules of civil procedure (among other legal standards) when filing documents in court. Those rules require lawyers to certify that the factual allegations in their court documents have evidentiary support or are likely to have evidentiary support after an opportunity for investigation or discovery.⁵ Lawyers also must not use their filings for any improper purpose, such as to harass or cause unnecessary delay.⁶ If a lawyer's factual contentions fail to comply with this requirement, the lawyer can be subject to sanctions under the rules of civil procedure as well as discipline under the rules of professional conduct.⁷

Several lawyers have been accused of violating these standards. For instance, Sidney Powell joined several other lawyers in filing lawsuits around the country that alleged massive election fraud and related conspiracies. A disciplinary complaint against the lawyers claims that many of their allegations lacked evidentiary support and were unlikely ever to have any.⁸ As an example, it has been argued that Powell failed to have sufficient support for the provocative claim that Dominion Voting Systems, Inc. (the company that provided voting systems and services in dozens of states) was “founded by foreign oligarchs and dictators to ensure computerized ballot-stuffing

⁵ See, e.g., FED. R. CIV. P. 11(b)(3).

⁶ See, e.g., FED. R. CIV. P. 11(b)(1).

⁷ See MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2013) (prohibiting lawyers from initiating proceedings “unless there is a basis in law and fact for doing so...”).

⁸ The City of Detroit's Motion for Sanctions, for Disciplinary Action, for Disbarment & for Referral to State Bar Disciplinary Bodies, King v. Whitmer, Civil Case No. 2:20-cv-13134 (E.D. Mich. Jan.5, 2021), ECF No. 78,

<https://www.courtlistener.com/recap/gov.uscourts.mied.350905/gov.uscourts.mied.350905.78.0.pdf> (providing overview of numerous statements alleged to be false in Michigan case).

and vote manipulation to whatever level was needed to make certain Venezuelan dictator Hugo Chávez never lost another election.”⁹

Several related allegations rested on the opinion of an anonymous “U.S. Military Intelligence expert,” who asserted (for instance) that Dominion “allowed foreign adversaries to access data and intentionally provided access to Dominion’s infrastructure in order to monitor and manipulate elections, including the most recent one in 2020.”¹⁰ That expert, however, may never have served in military intelligence and supposedly did not pass the entry-level training course in that area.¹¹

In August 2021, a Michigan court imposed sanctions against Powell and eight other lawyers as a result of their filings in that state.¹² In a 110-page opinion that catalogued the lawyers’ failings, the court ordered that the lawyers pay the fees and costs incurred by the defendants in the case and complete continuing legal education courses in the areas of election law and pleadings standards. The court also referred the lawyers to the authorities responsible for disciplining lawyers in both Michigan and the other states where the lawyers were licensed to practice.

Lawyers typically deserve some leeway when filing cases involving matters of great public importance, such as election-related litigation, but courts should not hesitate to discipline lawyers who cross legal and ethical lines, especially when their allegations threaten trust in our democracy. Here, the lawyers’ claims were widely reported and contributed to the false belief among President Trump’s supporters that the election was stolen and illegitimate. Although these conspiracy theories were already circulating on social media and elsewhere, the lawyers added their professional credibility to the theories by placing them in court filings. In doing so, they gave the public an additional reason to believe that the claims might be true. As the court said in sanctioning Powell and her colleagues, “[T]his case was never about fraud—it was about undermining the People’s faith in our democracy and debasing the judicial process to do so.”¹³

Other lawyers have been similarly accused of making misleading allegations about the election and undermining trust in the outcome. For instance, a group of state attorneys general asked the United States Supreme Court for leave to file a Bill of Complaint in which they asserted that “[t]he probability of former Vice President Biden winning the popular vote in the four Defendant States—Georgia, Michigan,

⁹ Complaint for Declaratory, Emergency, & Permanent Injunctive Relief, *King v. Whitmer*, Civil Case No. 20-13134 (E.D. Mich. Aug. 25, 2021) at 3.

¹⁰ *See id.* ¶ 74.

¹¹ Emma Brown, Aaron Davis & Alice Crites, *Sidney Powell’s Secret ‘Military Intelligence Expert,’ Key to Fraud Claims in Election Lawsuits, Never Worked in Military Intelligence*, WASH. POST (Dec. 11, 2020 at 6:29 p.m.), https://www.washingtonpost.com/investigations/sidney-powell-spider-spyder-witness/2020/12/11/0cd567e6-3b2a-11eb-98c4-25dc9f4987e8_story.html.

¹² *King v. Whitmer*, Civil Case No. 20-13134 (E.D. Mich. Aug. 25, 2021), https://www.michigan.gov/documents/ag/172_opinion_order_King_733786_7.pdf.

¹³ *Id.* at 3.

Pennsylvania, and Wisconsin—independently given President Trump’s early lead in those States as of 3 a.m. on November 4, 2020, is less than one in a quadrillion, or 1 in 1,000,000,000,000,000.”¹⁴

This allegation by prominent lawyers received considerable public attention. For instance, President Trump’s senior advisor and former press secretary Kayleigh McEnany repeated the statistical claim on Fox News.¹⁵ (Notably, McEnany also happens to be a lawyer.) The claim reinforced the belief among many supporters of President Trump that he could not have lost the election. As with Powell, the lawyers lent their professional credibility to the idea that the election was stolen.

The problem is that the statistical assertion was largely based on a declaration (a legal statement created by a supposed expert at the request of the lawyers) that rested on two obviously flawed assumptions. First, the declaration compared voting patterns from the 2016 and 2020 presidential elections and appeared to assume that the percentage of voters supporting Hillary Clinton and Joe Biden should have been the same in both elections. For instance, in Georgia, the expert concluded that “the increase of Biden over Clinton is statistically incredible if the outcomes were based on similar populations of voters supporting the two Democrat candidates.”¹⁶ In other words, if the same percentage of the electorate in Georgia favored Biden and Clinton, there is no way that Biden could have won. This assertion is true as far as it goes – Donald Trump would clearly have prevailed if the electorate voted for Biden and Clinton in the same percentages in both elections. But the whole point of an election is to give people an opportunity to change their minds or to vote when they did not do so in a previous election.

The second problem with the expert declaration is that it assumed that the ballots included the same proportion of votes for Biden as Trump, both before and after 3:00 a.m. on the morning after the election. The expert explained that he “compared and tested the significance of the change in tabulated ballots earlier in the reporting to subsequent tabulations. For both comparisons [he] determined the likelihood that the samples of the outcomes for the ... two tabulation periods were similar and randomly drawn from the same population.”¹⁷ This analysis also was flawed because the ballots counted later in the reporting period were primarily absentee ballots, and those votes were not expected to be “similar.” They were expected to favor Biden because

¹⁴ Motion for Expediated Consideration of the Motion for Leave to File a Bill of Complaint & for Expedition of Any Plenary Consideration of the Matter on the Pleadings if Plaintiffs’ Forthcoming Motion for Interim Relief is Not Granted, *Texas v. Pennsylvania*, No. 20A at 8, (U.S. Dec. 7, 2021), https://www.supremecourt.gov/DocketPDF/22/22O155/163048/20201208132827887_TX-v-State-ExpedMot%202020-12-07%20FINAL.pdf [hereinafter *Motion for Leave*].

¹⁵ Phillip Bump, *Trump’s Effort to Retain Power Is Powered by Inaccurate and Nonsensical Jargon*, WASH. POST (Dec. 10, 2020 at 1:53 p.m.), <https://www.washingtonpost.com/politics/2020/12/10/trumps-effort-retain-power-is-powered-by-inaccurate-nonsensical-jargon/>.

¹⁶ *Motion for Leave*, *supra* note 14, ¶ 13.

¹⁷ *Id.* ¶ 7.

Republican voters reported that they were considerably more likely to vote in person on election day.¹⁸

Again, the goal of this chapter is not to determine whether any particular lawyer who engaged in post-election litigation crossed ethical or legal lines. Instead, the goal is to describe where those lines are and explain why lawyers who cross them should be disciplined. Specifically, false contentions in this arena risk contributing to distrust about an existentially important feature of our democracy and stoking the kind of fervor that resulted in the storming of the Capitol. As noted earlier, lawyers deserve deference when litigating high-stakes public issues, but they must be held accountable if they engage in unlawful conduct, especially when the consequences of the conduct threaten the institutions that make the rule of law possible.

2. Lawful, but Potentially Unethical, Conduct Related to the 2020 Election

Lawyers are also subject to discipline for misconduct that is otherwise lawful but occurs while representing a client (i.e., the upper-right corner of Table 1). For instance, while representing President Trump's legal interests (i.e., while acting in their roles as lawyers), Sidney Powell, Rudy Giuliani, and John Eastman made numerous comments outside of court, such as at press conferences, on social media, and on television, that some have alleged were knowingly false but did not necessarily violate any law or rule outside of the rules of professional conduct.

With regard to Powell, she asserted that Dominion had provided a "back door" that allowed officials to "take a certain percentage of votes from President Trump and flip them to President Biden."¹⁹ She went on to claim that the software was designed "to rig elections" and that this was a "massive criminal voter fraud."²⁰ She also suggested that state officials got kickbacks and bribes to install these systems.²¹

In response to a subsequent defamation suit by Dominion, Powell's counsel suggested

¹⁸ Phillip Bump, *Trump's Effort to Steal the Election Comes Down to Some Utterly Ridiculous Statistical Claims*, WASH. POST (Dec. 9, 2020 at 2:49 p.m.), <https://www.washingtonpost.com/politics/2020/12/09/trumps-effort-steal-election-comes-down-some-utterly-ridiculous-statistical-claims/>; see also Eric Litke, *Fact Check: Statistical Analysis Supporting Pro-Trump Supreme Court Case is 'Ludicrous'*, USA TODAY (Dec. 10, 2020 at 4:30 p.m.), <https://www.usatoday.com/story/news/factcheck/2020/12/10/fact-check-ludicrous-statistical-analysis-supporting-pro-trump-case/3877743001/> (explaining the spurious nature of the statistical claims).

¹⁹ Aaron Blake, *Lou Dobbs, and The Most Problematic Claims Trump Allies Made About Voting Machines*, WASH. POST (Feb. 6, 2021 at 8:24 a.m.), <https://www.washingtonpost.com/politics/2021/02/05/most-legally-problematic-claims-trumps-allies-made-about-voting-machines/>

²⁰ Complaint & Demand for Jury Trial at 78, *King v. Whitmer*, Civil Case No. 20-13134 (E.D. Mich. Jan. 8, 2021), https://www.michigan.gov/documents/ag/118_Defs_Whitmer.Bensons_mtn_for_lv_for_supp_briefing_721667_7.pdf.

²¹ *Id.* ¶ 181(g).

that many of Powell’s public statements in connection with the case were not intended to be statements of fact and should not have been taken seriously.²² Specifically, her lawyers argued that, “even assuming, *arguendo*, that each of the statements alleged in [Dominion’s] Complaint could be proved true or false, no reasonable person would conclude that the statements were truly statements of fact.”²³

Similarly, in a recent order suspending Rudy Giuliani from practice, a New York court concluded that he made numerous knowingly false statements, including:

- “false statements that there were 600,000 to 700,000 fabricated mail-in ballots [in Pennsylvania], which were never sent to voters in advance of the election”²⁴
- false statements “that dead people ‘voted’ in Philadelphia in order to discredit the results of the vote in that city”²⁵
- “numerous false and misleading statements regarding the Georgia presidential election results,”²⁶ such as false statements related to voting by underage voters, felons, and dead people and false statements concerning Dominion and illegal vote counting²⁷ and
- numerous false statements about illegal voting by undocumented residents of Arizona²⁸

In various other interviews, Giuliani suggested (as Powell did) that Dominion had manipulated the election. For example, he said that “this company [Dominion] has tried-and-true methods for fixing elections by calling a halt to the voting when you’re running too far behind. They have done that in prior elections.”²⁹

Another lawyer – Professor John Eastman of Chapman University’s Fowler School of Law (a former dean of that school) – made similar remarks while representing President Trump’s legal interests. At the January 6, 2021 rally immediately before the seditious storming of the Capitol, Professor Eastman said:

We know there was fraud, traditional fraud that occurred. We know that dead people voted. But we now know because we caught it live last time in real time how the machines contributed to that fraud....They put those ballots in a secret folder in the machines, sitting there waiting until they know how many they need. And then the machine, after the close of polls, we now know who’s voted

²² Memorandum of Law in Support of Defendant’s Motion to Dismiss at 32, *U.S. Dominion. v. Powell*, Civ. Action No. 1:21-cv-00040-CJN, (U.S.D.C. Mar. 22, 2021), https://storage.courtlistener.com/recap/gov.uscourts.dcd.225699/gov.uscourts.dcd.225699.22.2_3.pdf.

²³ *Id.* at 27.

²⁴ *Id.* at 10.

²⁵ *Id.* at 14.

²⁶ *Id.* at 16.

²⁷ *Id.* at 17-21.

²⁸ *Id.* 22-25.

²⁹ Glenn Kessler, *Giuliani’s Fantasy Parade of False Voter-Fraud Claims*, WASH. POST (Nov. 16, 2020 at 3:00 a.m.), <https://www.washingtonpost.com/politics/2020/11/16/giulianis-fantasy-parade-false-voter-fraud-claims/>.

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and who hasn't. I can now match those unvoted ballots with an unvoted voter, and put them together in the machine....We saw it happen in real time last night [in the context of the Georgia Senate runoff on January 5, 2021], and it happened on November 3rd as well.³⁰

The comments by Eastman, Giuliani, and Powell did not violate the rules of civil procedure because they were not made in the form of court filings. When such statements are made to the press and the public, however, those statements potentially violate Model Rule 4.1(a). That Rule provides that, in the course of representing a client, a lawyer shall not make “a false statement of material fact or law to a third person.” Arguably, the public is a “third person” for purposes of the rule. Indeed, the New York court that suspended Giuliani from practice cited Rule 4.1(a) and Giuliani's out-of-court statements to the public as one of the primary bases for the suspension.³¹

There is some debate about whether Rule 4.1(a) can be constitutionally applied to a lawyer's knowingly false statements in the public domain, even when those statements are made in the context of the lawyer's ongoing representation of a client.³² Public statements trigger First Amendment protections, and the Constitution offers considerable freedom to comment (even falsely) on public matters. On the other hand, the United States Supreme Court has upheld various kinds of restrictions on a lawyer's expression that would otherwise run afoul of the First Amendment, especially when lawyers are acting within their professional roles (e.g., statements to judges or to parties in litigation).³³ In fact, the Court has suggested that lawyers can be disciplined for statements to the press under limited

³⁰ *Clip of John Eastman and Rudy Giuliani at the Rally on Electoral Vote Certification*, at 6:13–8:00 (Jan. 6, 2021), C-SPAN, <https://www.c-span.org/video/?c4933578/user-clip-rudy-giuliani-professor-john-eastman>. Professor Eastman also has been accused of engaging in other conduct that could be construed as “lawful but potentially unethical.” For instance, Professor Eastman offered advice to President Trump and Vice President Pence concerning the Vice President's authority to overturn the outcome of the election. Memorandum from John Eastman on the Electoral Count Act to the White House (Dec. 2020), <https://s3.documentcloud.org/documents/21066248/eastman-memo.pdf>. Some have argued that the advice was unethical because Eastman knew it was unlawful. Letter from Ambassador Norman Eisen (ret.), U.S. Democracy Ctr., et al. to George S. Cardona, Off. of Chief Trial Couns., State Bar of Ca., Concerning a Request for the Investigation of John C. Eastman (Oct. 4, 2021), <https://statesuniteddemocracy.org/wp-content/uploads/2021/10/10.4.21-FINAL-Eastman-Cover-Letter-Memorandum.pdf>. Model Rule 1.2(d) prohibits lawyers from “assist[ing] a client...in conduct that the lawyer knows is criminal or fraudulent.”

³¹ *In re Rudolph W. Giuliani*, No. 2021-00506, slip op. at 14-25 (N.Y. Sup. Ct. App. Div. filed May 3, 2021), [http://www.nycourts.gov/courts/ad1/calendar/List_Word/2021/06_Jun/24/PDF/Matter%20of%20Giuliani%20\(2021-00506\)%20PC.pdf](http://www.nycourts.gov/courts/ad1/calendar/List_Word/2021/06_Jun/24/PDF/Matter%20of%20Giuliani%20(2021-00506)%20PC.pdf)

³² Bruce Green & Rebecca Roiphe, *As the Giuliani Case Goes Forward, Courts Should Think Deeply About the First Amendment*, WASH. POST (July 6, 2021 at 5:32 p.m.), <https://www.washingtonpost.com/opinions/2021/06/25/suspend-giulianis-law-license-dont-chill-free-speech/>.

³³ See generally Rodney A. Smolla, *Regulating the Speech of Judges and Lawyers: The First Amendment and the Soul of the Profession*, 66 FLA. L. REV. 961 (2014).

circumstances.³⁴ The precise line, however, between First Amendment freedoms and the legal profession's ability to regulate lawyer speech in a case like this one remains unclear.

Again, the point here is not to offer an assessment of whether Eastman, Giuliani, Powell or any other lawyer involved in election-related litigation should ultimately be disciplined for their out-of-court statements. In ordinary circumstances, the profession should hesitate to discipline lawyers for discussing matters of great public interest, including (and perhaps especially) with the press. But given the institutional stakes here and assuming the constitutionality of the basis for discipline, the profession should not be reluctant to impose discipline when lawyers knowingly or recklessly spread misinformation in the course of litigation that undermines the legitimacy of our democracy.

To be clear, most of the lawyers who represented President Trump did not engage in such behavior. Many of the president's lawyers litigated claims on his behalf without making any problematic assertions or factual contentions, either in court documents, in providing legal advice to the president, or in statements to the public. In fact, some lawyers for the president withdrew from representing him, presumably because they ultimately determined that their claims were inconsistent with their ethical and other legal obligations. The point is that the mere representation of President Trump in the context of the post-election litigation was not itself ethically or legally problematic.

Our legal system actually benefits enormously when lawyers take on difficult, unpopular, and questionable claims, even claims that the lawyers themselves do not believe will or should ultimately prevail. If claims and factual contentions in highly contentious matters satisfy ethical and procedural requirements, society benefits from a full airing of the best arguments that can be made on each party's behalf. In the particular case of the post-election litigation, the public benefited from knowing that judges (several of whom were appointed by President Trump) rejected the president's election-related fraud claims. If judges had not had the opportunity to rule on those claims, some members of the public may have had additional reasons to question the legitimacy of the election's outcome.

That said, there is an important line between, on the one hand, taking on unpopular or challenging cases to ensure a fair hearing and, on the other hand, making allegations about core features of our democracy that are either knowingly false or are unlikely ever to have evidentiary support. Some of President Trump's lawyers appeared to conclude that this line had been crossed and admirably withdrew. Moreover, some lawyers in the administration who were serving in lawyerly roles (but did not represent President Trump personally) reportedly pushed back on efforts

³⁴ *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1074 (1991) (explaining that "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press").

to peddle false narratives to the public.³⁵ In other words, there were many lawyers who worked in the administration or represented President Trump personally who fulfilled their legal and ethical responsibilities. A small number of lawyers, however, can do substantial damage, and the profession should not hesitate to discipline them when they engage in misconduct.

B. Disciplining Lawyers for Conduct in Nonrepresentational Roles

The more difficult cases, both legally and politically, are those that fall in the bottom row of the table. In that context, lawyers are acting in nonrepresentational roles, and the basis for discipline is more limited. This is by design. For the most part, the rules of professional conduct address behavior that tends to be problematic only in the particular context of lawyering, such as matters relating to advertising, conflicts of interest, and conversations with represented parties. There is usually no reason to apply those rules to lawyers when they are acting outside of their professional roles. Another reason to limit the scope of the rules is that conduct occurring outside of the professional role is typically irrelevant when assessing whether someone has the competence and character to practice law.

There are, however, two important exceptions. One is when a lawyer engages in misconduct that is so egregious that we question the lawyer's fitness and character for law practice. Model Rule 8.4(b) provides that “[i]t is professional misconduct for a lawyer to...commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects....”

A related provision allows for discipline when lawyers engage in significant instances of dishonesty. Specifically, Model Rule 8.4(c), provides that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation....” As with Model Rule 8.4(b), the thought here is that LINPRs may engage in conduct that is so lacking in integrity that we may not be able to trust them to perform their professional duties.

1. Disciplining the lawbreaking LINPR

The clearest case for disciplining lawyers for conduct occurring outside their professional roles is when they engage in unlawful conduct (the middle of the bottom row of the table). Consider, for example, the Watergate lawyers. Several of them broke the law while acting outside of their representational roles, such as by engaging in “campaign finance fraud, obstruction of justice, lying to federal agents and Congress, and conspiring to violate the constitutional rights of citizens.”³⁶ Discipline, including disbarment, was appropriate even though some (but not all) of the lawyers

³⁵ George T. Conway III, *America Owes Thanks to Trump's Lawyers — Even William Barr*, WASH. POST (Jun. 28, 2021 at 2:46 p.m.), <https://www.washingtonpost.com/opinions/2021/06/28/george-conway-trump-barr-lawyers/>.

³⁶ Curriden, *supra* note 2.

were acting outside of their representational roles when they broke the law.³⁷

Disciplining lawyers for this kind of unlawful, nonrepresentational conduct makes good sense. After all, if a lawyer breaks the law in a way that reflects on that lawyer's trustworthiness and character or if the lawyer otherwise engages in unlawful conduct involving dishonesty, fraud, deceit or misrepresentation, there should be a mechanism for discipline and disbarment.

2. Disciplining the law-abiding LINPR

The bottom right corner of the table is the most fraught and controversial. In this context, lawyers are not only acting outside of their capacity as lawyers, but they are engaging in conduct that is, by definition, otherwise lawful.

Consider the statements of a number of high-profile lawyers who claimed that the 2020 presidential election was fraudulent, stolen, or otherwise illegitimate.

- Congressman Mo Brooks said that “this is the worst election theft in the history of the United States.”³⁸
- Congressman Louie Gohmert claimed that there was “massive multi-state electoral fraud committed on Biden’s behalf that changed electoral results in Arizona and in other states such as Georgia, Michigan, Pennsylvania and Wisconsin.”³⁹
- U.S. Senator Lindsey Graham told Fox News’s Sean Hannity that “Philadelphia elections are crooked as a snake...Why are they shutting people out? Because they don’t want people to see what they’re doing.”⁴⁰
- In a letter to the U.S. Attorney General, a group of 37 House members (some of whom were lawyers) said that “there are a number of anomalies, statistical improbabilities and accusations of fraud that bring the election results in several states into question.”⁴¹
- U.S. Senator Tom Cotton alleged that poll watchers were impermissibly prohibited from observing the counting of ballots, and he went on to claim that

³⁷ Kathleen Clark, *The Legacy of Watergate for Legal Ethics Instruction*, 51 HASTINGS L. J. 673 (2000).

³⁸ Celine Castronuovo & Juliegrace Brufke, *Mo Brooks Planning to Challenge Electoral College Votes*, HILL (DEC. 2, 2020 AT 4:25 P.M.), <https://thehill.com/homenews/house/528446-mo-brooks-planning-to-challenge-electoral-college-votes>.

³⁹ Chris Canipe & Jason Lange, *The Republicans Who Voted To Overturn the Election*, REUTERS (Feb. 4, 2021), <https://graphics.reuters.com/USA-TRUMP/LAWMAKERS/xegpbedzdvq/>.

⁴⁰ Katie Shepard, *GOP Splits Over Trump’s False Election Claims, Unfounded Fraud Allegations*, WASH. POST (Nov. 6, 2020 at 10:09 a.m.), <https://www.washingtonpost.com/nation/2020/11/06/republicans-split-trump-election-fraud/>.

⁴¹ Letter from Michael Cloud et al., U.S. House of Representatives, to William Barr (Dec. 1, 2020)

https://allen.house.gov/uploadedfiles/12.1.20_election_integrity_letter_to_attorney_general_barr.pdf.

Draft: This piece will appear as a chapter in Beyond Imagination? The January 6 Insurrection (forthcoming West Academic Publishing 2022), a book co-written by 14 law school deans.

“Democrats will try to steal this election.”⁴²

- Eleven U.S. Senators, four of whom were lawyers (Ted Cruz, John Kennedy, Cynthia Lummis, and Bill Hagerty), asserted in a joint statement that, “[b]y any measure, the allegations of fraud and irregularities in the 2020 election exceed any in our lifetimes.”⁴³
- U.S. Senator Josh Hawley claimed that some states, particularly Pennsylvania, had “failed to follow their own election laws,” even though multiple courts had already rejected that claim. Hawley was also the first Senator to say that he would challenge the election results based on the allegations of fraud.
- Kayleigh McEnany, in addition to embracing the frivolous statistical claim referenced earlier, also accused Democrats of “welcoming” fraud and illegal voting.”⁴⁴

Assuming for the sake of discussion that these lawyers made statements that they knew or should have known were either false or misleading, can they be disciplined?

The law on this question is remarkably unclear. One scholar recently observed that “there is scant authority about the ethical obligations of government lawyers outside the traditional settings of the practice of law and whether, and to what extent, ethics rules apply to the many lawyers who work in government”⁴⁵ Some scholars have argued that the ethics rules should be applied to law-abiding LINPRs and have even gone so far as to file disciplinary charges against one.⁴⁶ Other scholars have rejected this idea.⁴⁷

There are several possible legal bases for discipline in this context, but they are ultimately quite thin. One option can be found in Comment [6] to the Preamble to the Model Rules, which says that:

⁴² Michael Crowley, *Trump’s False Election Fraud Claims Split Republicans*, N.Y. TIMES (Nov. 6, 2020), <https://www.nytimes.com/2020/11/06/us/politics/trump-election-republicans.html>.

⁴³ Joint Statement from Senators Cruz, Johnson, Lankford, Daines, Kennedy, Blackburn, Braun, Senators-Elect Lummis, Marshall, Hagerty, Tuberville, U.S. Senator for Texas Ted Cruz (Jan. 2, 2021), https://www.cruz.senate.gov/?p=press_release&id=5541. Unlike the other statements, this one was at least carefully crafted to focus on the unprecedented nature of the “allegations” rather than to assert badly that fraud had occurred. Nevertheless, the statement misleadingly implies that the election was fraudulent.

⁴⁴ Morgan Chalfant, *Fox Cuts Away from McEnany Press Conference*, HILL (Nov. 9, 2020 at 5:49 p.m.), <https://thehill.com/homenews/media/525205-fox-cuts-away-from-mcenany-press-conference>.

⁴⁵ Ellen Yaroshefsky, *Regulation of Lawyers in Government Beyond the Representation Role*, 33 NOTRE DAME J. L. ETHICS & PUB. POL’Y 151, 162 (2019).

⁴⁶ Letter from Abbe Smith, Professor of Law, Georgetown Law, to Off. of Disciplinary Couns. Dist. of Columbia Ct. of Appeals (Feb. 20, 2017), <https://s3.documentcloud.org/documents/3474086/Read-the-misconduct-complaint-sent-by-law.pdf>.

⁴⁷ See, e.g., Steven Lubet, *In Defense of Kellyanne Conway*, SLATE (Feb. 27, 2017 at 9:22 a.m.), <https://slate.com/news-and-politics/2017/02/the-misconduct-complaint-against-kellyanne-conway-is-dangerously-misguided.html>.

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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 popular participation and support to maintain their authority....⁴⁸

The Preamble, however, does not provide a basis for discipline. It speaks only to what lawyers should strive to achieve, not what is prohibited for purposes of punishment.

Another option is Model Rule 8.4(c), which (as noted earlier) provides that “[i]t is professional misconduct for a lawyer to... engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” This language implies that LINPRs can be disciplined for dishonesty that is otherwise lawful. Comment [2], however, elaborates on the meaning of Model Rule 8.4(c) and refers to the need to discipline lawyers for “illegal conduct,” strongly implying that lawful conduct should not be a basis for discipline.

Comment [7] suggests a similar conclusion. That Comment says that “[l]awyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers.” The Comment’s reference to “legal responsibilities” once again implies that the Rule is not intended to reach a LINPR’s entirely lawful behavior. In addition, the reference in the subsequent sentence to an “abuse of public office” appears to amplify the prior sentence’s point about “legal responsibilities” and suggests that Model Rule 8.4(c) is not intended to be a basis for disciplining LINPRs for otherwise lawful conduct.

There are nevertheless a handful of cases where courts have disciplined lawyers for nonrepresentational conduct that is otherwise lawful. For example, a few older cases involved the discipline of lawyers who made knowingly false statements during political campaigns,⁴⁹ and there are more recent cases involving lawyers or prospective lawyers who (lawfully) expressed racist or similarly pernicious views.⁵⁰ Although it is debatable whether these cases would be resolved the same way today,⁵¹ there is at least some precedent and scholarly commentary supporting the idea that LINPRs can be disciplined for conduct that is otherwise lawful.

⁴⁸ MODEL RULES OF PROF. CONDUCT, Preamble (AM. BAR ASS’N 2013).

⁴⁹ See, e.g., *State v. Russell*, 610 P.2d 1122 (Kan. 1980), *cert denied* 449 U.S. 983 (1980); *Neb. State Bar Ass’n v. Michaelis*, 316 N.W.2d 46 (Neb. 1982), *cert. denied*, 459 U.S. 804 (1982); *In re Baker*, 542 P.2d 701 (Kan. 1975).

⁵⁰ See, e.g., Jana DiCosmo, *Racism in the Legal Profession: A Racist Lawyer is an Incompetent Lawyer*, N.L.G. REVIEW <https://www.nlg.org/nlg-review/article/racism-in-the-legal-profession-a-racist-lawyer-is-an-incompetent-lawyer/>.

⁵¹ MODEL RULES OF PROF. CONDUCT r. 8.4(d) (AM. BAR ASS’N 2013). Rule 8.4(d) makes it professional misconduct to engage in harassment or discrimination “related to the practice of law,” so it does not appear that the rule would currently support discipline over a lawyer who made discriminatory comments outside the practice of law. *Id.*

In sum, there is disagreement about the extent to which LINPRs can be disciplined for lawful conduct, such as the expression of knowingly false statements about an election. The disagreement about the current state of the law, however, masks a more fundamental question: *should* LINPR's be disciplined for otherwise lawful behavior?

III. Possible Approaches to the Lying LINRP

The legal profession can address lying LINPRs in at least two ways that are not mutually exclusive: (1) develop a rule or clarifying comment that would expressly allow for the discipline of LINPRs when they make knowingly false statements concerning matters of great public importance and (2) publicly shame LINPRs for those statements. For the reasons offered below, the profession should rely only on the latter approach.

A. A Disciplinary Solution

One possibility is to discipline LINPRs for lying about central features of our democracy. One argument for doing so is that LINPRs are in a position to do more harm to our governing institutions than the typical public official who lies. Specifically, a LINPR's claims about those institutions are more likely to be taken seriously by non-experts and given more credence precisely because LINPRs are lawyers. A second reason for disciplining the lying LINPR is to take a principled stand against socially corrosive falsehoods. Namely, we should expect lawyers to rise above our society's increasing willingness to embrace and spread baseless conspiracy theories.

For these consequentialist and principled reasons, one could imagine a narrowly tailored rule or clarifying comment that makes clear that LINPRs have an obligation to avoid knowingly false statements on matters about which lawyers should have a special duty, such as those involving elections, the electoral system, and the judiciary. Here is one possible formulation of such a Rule:

A lawyer serving as a public official shall not knowingly make a false statement about democratic institutions, elections, or the judiciary, even when the lawyer is acting outside of the representation of a client.

The particulars of the rule are less important than the overall idea that discipline could be targeted to reach LINPRs who engage in socially destructive (but otherwise lawful) conduct outside of the representation of a client.

Putting aside any First Amendment objections to this approach (which are likely to be considerable),⁵² attempts to discipline LINPRs for knowingly false statements have a few serious problems. First, the consequentialist argument (i.e., that LINPRs may do particular harm because of their status as lawyers) is debatable. The reality

⁵² See Yaroshefsky, *supra* note 45, at 169-72 (summarizing opposing arguments).

is that most of the public is not particularly aware of which politicians have a license to practice law.

Second, any rule that targets public officials for their comments creates a risk that the disciplinary process will be used in politically motivated ways. Nearly every lawyer-politician could at some point be found to violate a rule that prohibits public officials from making knowingly false statements about democratic institutions, elections, or the judiciary. Politicians in both major parties are notorious for such statements, and turning those falsities into potential disciplinary offenses would open the door to politically motivated disciplinary proceedings.

For instance, 11 Republican U.S. Senators asserted that the “allegations of fraud and irregularities in the 2020 election exceed any in our lifetimes.” Did this statement cross the line? On the one hand, the “allegations of fraud” did, indeed, “exceed any in our lifetimes,” so the statement is true as written. On the other hand, the clear intent of the statement was to imply that the Senators believed that the election was fraudulent. Although the statement was morally reprehensible, efforts to discipline the Senators for these statements would open the door to disciplinary proceedings against Democratic legislators for making similarly misleading statements in the future. A damaging politicization of the disciplinary process would be inevitable.⁵³

A third and related problem is that a LINPR rule could put the legal profession in the untenable position of having to resolve the truth of contentious political disagreements. Bar disciplinary authorities would be asked to parse the public statements, tweets, news conferences, media interviews, etc., of politician-lawyers to determine whether their comments were knowingly false and, if so, whether they involved matters that were sufficiently related to core democratic institutions to warrant discipline. Such determinations are unlikely to be resolved in a way that would be generally accepted within the politically diverse legal profession.

Another problem is that disciplinary proceedings against LINPRs for lawful conduct would only heighten the sense that already exists in some quarters that the legal profession has a political bias. As dangerous as it is for LINPRs to make false claims about democratic institutions, it may be more dangerous for the legal profession itself to be viewed as taking sides in partisan disagreements involving lawful public statements. Whatever remaining credibility lawyers have in the public’s eye would be jeopardized if the legal profession began to arbitrate the truthfulness of highly politicized statements by public figures.

A final problem is that the rule could make lawyers reluctant to serve as LINPRs in the first place. There are a great many political matters that involve the judiciary, elections, and democratic institutions. Given the inevitable exaggerations and truth shading that are commonplace in those arenas, lawyers may make the reasonable

⁵³ See generally James Moliterno, *Politically Motivated Bar Discipline*, 83 WASH. U. L. Q. 725 (2005) (reviewing the history of politically motivated efforts to discipline lawyers).

calculation that becoming a LINPR presents too great a risk to their professional livelihood. The result is unlikely to be more honesty in politics; the result is that the dishonesty will simply occur among legislators who are not licensed to practice law. Rather than the disinformation from lawyer-legislators, we will simply have more lying legislators who are not lawyers. Not only will we gain nothing in terms of political honesty, but we will lose out on the longstanding benefits that lawyers bring to our political institutions.

In sum, it seems wise to limit discipline under Model Rule 8.4(c) to those circumstances where a LINPR has engaged in conduct that is unlawful. At the same time, it is important to acknowledge that lying LINPRs present a real threat to American democracy, and we should try to hold LINPRs accountable for their mendacity.

B. Public Condemnation

The absence of a disciplinary solution does not mean that the profession has no recourse when LINPRs spread knowingly false information about critical features of our democracy and judicial system. Another option exists: public condemnation.

Shortly after the attack on the Capitol on January 6, 2021, the overwhelming majority of the nation's law school deans issued the joint statement printed in the introduction to this book. Reflecting the views of politically diverse deans at a cross-section of public and private law schools from around the country, the statement denounced the role that lawyers played in fomenting the unrest that led to the seditious attack. Other groups issued conceptually similar statements around the same time.⁵⁴

One benefit of such statements is that we can set a high threshold of bipartisanship before issuing them. For example, there were earlier discussions among the deans about a possible joint statement, but there was inadequate consensus at the time to release one. By waiting until we had a very strong consensus among deans with different political viewpoints, we were able to ensure that the moment was the right one and that the statement would not reasonably be perceived as political posturing. In contrast, a disciplinary process typically involves only a small number of people, making it more susceptible to partisan sentiments.

Such statements are an important articulation of ideals, but their value should not be overstated. The reality is that they do not provide much of a disincentive to LINPRs or others. In some instances, the condemned LINPRs might even use such statements as a badge of honor, arguing to supporters that the condemnation proves

⁵⁴ Valerie Strauss, *Thousands of Law School Alumni and Students push for Disbarment of Sens. Hawley and Cruz*, WASH. POST (Jan. 10, 2021 at 11:54 a.m.), <https://www.washingtonpost.com/education/2021/01/10/thousands-law-school-alumni-students-push-disbarment-sens-hawley-cruz/>.

the LINPR's anti-elitist bona fides. (For that matter, professional discipline could be used similarly.) In other words, the prospect of condemnation or discipline might not be a deterrent to a populist-minded LINPR. It could be an incentive.

At the same time, saying and doing nothing is problematic as well. The legal profession should not remain silent while its prominent members spread misinformation about existentially important democratic institutions. Doing so risks a decline into nihilism for both the profession and the nation. Condemnation may not have much of a practical impact, but it is a critical statement of ideals.

The unfortunate reality is that the legal profession has little power to address the lawful yet socially corrosive efforts of its own members. Discipline is unlikely to be effective and could undermine the legal profession's claim to political neutrality. Condemnation offers a useful statement of values, but it is also unlikely to alter behavior and may even have the perverse effect of bolstering support for populist LINPRs who spread misinformation.

IV. Conclusion

To protect our democratic institutions, there is difficult work to be done that transcends any question of lawyer discipline or professional integrity. An effective salve for the steadily declining state of our democracy will require a wide range of efforts, from more effective civics education (see chapter __) and bold election reforms (see chapter __) to more effective leadership training of future lawyers (see chapter __) and addressing systemic inequalities that are fueling animosity towards elites and established institutions.

As much as we will need these wide-ranging approaches to salvage our democracy, we must acknowledge the critical role that lawyer will have to play in those efforts. When they lie about core political institutions, the risks to democracy are significant and real. The storming of the Capitol is a notable example, perhaps even the canary in the coal mine, of what can happen when lawyers lend their professional credentials to conspiracy theories. Our nation was originally founded by lawyers, and lawyers continue to have the power and credibility to ensure our democracy's survival. The jury is out on whether we are up to the task.