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Duty to Uphold the Constitution

and Laws and the Lawyer's Oath (Ethics)

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Jeff Michalowski, Edward McIntyre

San Diego County Bar Association Ethics Committee

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Duty to Uphold the Constitution and Laws and the Lawyer's Oath (Ethics)

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United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title III. Pleadings and Motions

Federal Rules of Civil Procedure Rule 11

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

Currentness

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name--or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) ***In General.*** If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) ***Motion for Sanctions.*** A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be

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presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) ***On the Court's Initiative.*** On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) ***Nature of a Sanction.*** A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) ***Limitations on Monetary Sanctions.*** The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) ***Requirements for an Order.*** An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

CREDIT(S)

(Amended April 28, 1983, effective August 1, 1983; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

This is substantially the content of [former] Equity Rules 24 (Signature of Counsel) and 21 (Scandal and Impertinence) consolidated and unified. Compare former Equity Rule 36 (Officers Before Whom Pleadings Verified). Compare to similar purposes, *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r. 4, and *Great Australian Gold Mining Co. v. Martin,* L.R. 5 Ch.Div. 1, 10 (1877). Subscription of pleadings is required in many codes. 2 Minn.Stat. (Mason, 1927) § 9265; N.Y.R.C.P. (1937) Rule 91; 2 N.D.Comp.Laws Ann. (1913) § 7455.

This rule expressly continues any statute which requires a pleading to be verified or accompanied by an affidavit, such as: U.S.C., Title 28:

§ 381 [former] (Preliminary injunctions and temporary restraining orders)

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§ 762 [now 1402] (Suit against the United States)

U.S.C., Title 28, § 829 [now 1927] (Costs; attorney liable for, when) is unaffected by this rule.

For complaints which must be verified under these rules, see Rules 23(b) (Secondary Action by Shareholders) and 65 (Injunctions).

For abolition of former rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances, see 12 P.S.Pa. § 1222; for the rule in equity itself, see *Greenfield v. Blumenthal,* C.C.A.3, 1934, 69 F.2d 294.

1983 Amendment

Since its original promulgation, Rule 11 has provided for the striking of pleadings and the imposition of disciplinary sanctions to check abuses in the signing of pleadings. Its provisions have always applied to motions and other papers by virtue of incorporation by reference in Rule 7(b)(2). The amendment and the addition of Rule 7(b)(3) expressly confirms this applicability.

Experience shows that in practice Rule 11 has not been effective in deterring abuses. See 6 Wright & Miller, *Federal Practice and Procedure: Civil* § 1334 (1971). There has been considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions. See Rodes, Ripple & Mooney, *Sanctions Imposable for Violations of the Federal Rules of Civil Procedure* 64-65, Federal Judicial Center (1981). The new language is intended to reduce the reluctance of courts to impose sanctions, see Moore, *Federal Practice* ¶ 7.05, at 1547, by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions.

The amended rule attempts to deal with the problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation. See, e.g., *Roadway Express, Inc. v. Piper,* 447 U.S. 752 (1980); *Hall v. Cole,* 412 U.S. 1, 5 (1973). Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.

The expanded nature of the lawyer's certification in the fifth sentence of amended Rule 11 recognizes that the litigation process may be abused for purposes other than delay. See, e.g., *Browning Debenture Holders' Committee v. DASA Corp.,* 560 F.2d 1078 (2d Cir.1977).

The words “good ground to support” the pleading in the original rule were interpreted to have both factual and legal elements. See, e.g., *Heart Disease Research Foundation v. General Motors Corp.,* 15 Fed.R.Serv.2d 1517, 1519 (S.D.N.Y.1972). They have been replaced by a standard of conduct that is more focused.

The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances. See *Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n,* 365 F.Supp. 975 (E.D.Pa.1973). This standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation. See *Nemeroff v. Abelson,* 620 F.2d 339 (2d Cir.1980).

The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to

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the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

The rule does not require a party or an attorney to disclose privileged communications or work product in order to show that the signing of the pleading, motion, or other paper is substantially justified. The provisions of Rule 26(c), including appropriate orders after *in camera* inspection by the court, remain available to protect a party claiming privilege or work product protection.

Amended Rule 11 continues to apply to anyone who signs a pleading, motion, or other paper. Although the standard is the same for unrepresented parties, who are obliged themselves to sign the pleadings, the court has sufficient discretion to take account of the special circumstances that often arise in *pro se* situations. See *Haines v. Kerner*, 404 U.S. 519 (1972).

The provision in the original rule for striking pleadings and motions as sham and false has been deleted. The passage has rarely been utilized, and decisions thereunder have tended to confuse the issue of attorney honesty with the merits of the action. See generally Risinger, *Honesty in Pleading and its Enforcement: Some "Striking" Problems with Fed.R.Civ.P. 11,* 61 Minn.L.Rev. 1 (1976). Motions under this provision generally present issues better dealt with under Rules 8, 12, or 56. See *Murchison v. Kirby,* 27 F.R.D. 14 (S.D.N.Y.1961); 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1334 (1969).

The former reference to the inclusion of scandalous or indecent matter, which is itself strong indication that an improper purpose underlies the pleading, motion, or other paper, also has been deleted as unnecessary. Such matter may be stricken under Rule 12(f) as well as dealt with under the more general language of amended Rule 11.

The text of the amended rule seeks to dispel apprehensions that efforts to obtain enforcement will be fruitless by insuring that the rule will be applied when properly invoked. The word "sanctions" in the caption, for example, stresses a deterrent orientation in dealing with improper pleadings, motions or other papers. This corresponds to the approach in imposing sanctions for discovery abuses. See *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639 (1976) (per curiam). And the words "shall impose" in the last sentence focus the court's attention on the need to impose sanctions for pleading and motion abuses. The court, however, retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted.

The references in the former text to wilfulness as a prerequisite to disciplinary action has been deleted. However, in considering the nature and severity of the sanctions to be imposed, the court should take account of the state of the attorney's or party's actual or presumed knowledge when the pleading or other paper was signed. Thus, for example, when a party is not represented by counsel, the absence of legal advice is an appropriate factor to be considered.

Courts currently appear to believe they may impose sanctions on their own motion. See *North American Trading Corp. v. Zale Corp.,* 73 F.R.D. 293 (S.D.N.Y.1979). Authority to do so has been made explicit in order to overcome the traditional reluctance of courts to intervene unless requested by one of the parties. The detection and punishment of a violation of the signing requirement, encouraged by the amended rule, is part of the court's responsibility for securing the system's effective operation.

If the duty imposed by the rule is violated, the court should have the discretion to impose sanctions on either the attorney, the party the signing attorney represents, or both, or on an unrepresented party who signed the pleading, and the new rule so provides. Although Rule 11 has been silent on the point, courts have claimed the power to impose sanctions on an attorney personally, either by imposing costs or employing the contempt technique. See 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1334 (1969); 2A Moore, *Federal Practice* ¶ 11.02, at 2104 n. 8. This power has been used infrequently. The amended rule should eliminate any doubt as to the propriety of assessing sanctions against the attorney.

Even though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client. See *Browning Debenture Holders' Committee v. DASA Corp.,* supra. This modification brings

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Rule 11 in line with practice under Rule 37, which allows sanctions for abuses during discovery to be imposed upon the party, the attorney, or both.

A party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so. The time when sanctions are to be imposed rests in the discretion of the trial judge. However, it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation, and in the case of motions at the time when the motion is decided or shortly thereafter. The procedure obviously must comport with due process requirements. The particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration. In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary.

To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record. Thus, discovery should be conducted only by leave of the court, and then only in extraordinary circumstances.

Although the encompassing reference to “other papers” in new Rule 11 literally includes discovery papers, the certification requirement in that context is governed by proposed new Rule 26(g). Discovery motions, however, fall within the ambit of Rule 11.

1987 Amendment

The amendments are technical. No substantive change is intended.

1993 Amendment

Purpose of revision. This revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule. For empirical examination of experience under the 1983 rule, see, *e.g.,* New York State Bar Committee on Federal Courts, *Sanctions and Attorneys' Fees* (1987); T. Willging, *The Rule 11 Sanctioning Process* (1989); American Judicature Society, *Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* (S. Burbank ed., 1989); E. Wiggins, T. Willging, and D. Stienstra, *Report on Rule 11* (Federal Judicial Center 1991). For book-length analyses of the case law, see G. Joseph, *Sanctions: The Federal Law of Litigation Abuse* (1989); J. Solovy, *The Federal Law of Sanctions* (1991); G. Vairo, *Rule 11 Sanctions: Case Law Perspectives and Preventive Measures* (1991).

The rule retains the principle that attorneys and pro se litigants have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1. The revision broadens the scope of this obligation, but places greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court. New subdivision (d) removes from the ambit of this rule all discovery requests, responses, objections, and motions subject to the provisions of Rule 26 through 37.

Subdivision (a). Retained in this subdivision are the provisions requiring signatures on pleadings, written motions, and other papers. Unsigned papers are to be received by the Clerk, but then are to be stricken if the omission of the signature is not corrected promptly after being called to the attention of the attorney or pro se litigant. Correction can be made by signing the paper on file or by submitting a duplicate that contains the signature. A court may require by local rule that papers contain additional identifying information regarding the parties or attorneys, such as telephone numbers to facilitate facsimile transmissions, though, as for omission of a signature, the paper should not be rejected for failure to provide such information.

The sentence in the former rule relating to the effect of answers under oath is no longer needed and has been eliminated. The provision in the former rule that signing a paper constitutes a certificate that it has been read by the signer also has been eliminated as unnecessary. The obligations imposed under subdivision (b) obviously require that a pleading, written motion, or other paper be read before it is filed or submitted to the court.

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Subdivisions (b) and (c). These subdivisions restate the provisions requiring attorneys and pro se litigants to conduct a reasonable inquiry into the law and facts before signing pleadings, written motions, and other documents, and prescribing sanctions for violation of these obligations. The revision in part expands the responsibilities of litigants to the court, while providing greater constraints and flexibility in dealing with infractions of the rule. The rule continues to require litigants to "stop-and-think" before initially making legal or factual contentions. It also, however, emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer tenable and by generally providing protection against sanctions if they withdraw or correct contentions after a potential violation is called to their attention.

The rule applies only to assertions contained in papers filed with or submitted to the court. It does not cover matters arising for the first time during oral presentations to the court, when counsel may make statements that would not have been made if there had been more time for study and reflection. However, a litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit. For example, an attorney who during a pretrial conference insists on a claim or defense should be viewed as "presenting to the court" that contention and would be subject to the obligations of subdivision (b) measured as of that time. Similarly, if after a notice of removal is filed, a party urges in federal court the allegations of a pleading filed in state court (whether as claims, defenses, or in disputes regarding removal or remand), it would be viewed as "presenting"--and hence certifying to the district court under Rule 11--those allegations.

The certification with respect to allegations and other factual contentions is revised in recognition that sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation. Tolerance of factual contentions in initial pleadings by plaintiffs or defendants when specifically identified as made on information and belief does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances; it is not a license to join parties, make claims, or present defenses without any factual basis or justification. Moreover, if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that contention. Subdivision (b) does not require a formal amendment to pleadings for which evidentiary support is not obtained, but rather calls upon a litigant not thereafter to advocate such claims or defenses.

The certification is that there is (or likely will be) "evidentiary support" for the allegation, not that the party will prevail with respect to its contention regarding the fact. That summary judgment is rendered against a party does not necessarily mean, for purposes of this certification, that it had no evidentiary support for its position. On the other hand, if a party has evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have sufficient "evidentiary support" for purposes of Rule 11.

Denials of factual contentions involve somewhat different considerations. Often, of course, a denial is premised upon the existence of evidence contradicting the alleged fact. At other times a denial is permissible because, after an appropriate investigation, a party has no information concerning the matter or, indeed, has a reasonable basis for doubting the credibility of the only evidence relevant to the matter. A party should not deny an allegation it knows to be true; but it is not required, simply because it lacks contradictory evidence, to admit an allegation that it believes is not true.

The changes in subdivisions (b)(3) and (b)(4) will serve to equalize the burden of the rule upon plaintiffs and defendants, who under Rule 8(b) are in effect allowed to deny allegations by stating that from their initial investigation they lack sufficient information to form a belief as to the truth of the allegation. If, after further investigation or discovery, a denial is no longer warranted, the defendant should not continue to insist on that denial. While sometimes helpful, formal amendment of the pleadings to withdraw an allegation or denial is not required by subdivision (b).

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Arguments for extensions, modifications, or reversals of existing law or for creation of new law do not violate subdivision (b)(2) provided they are "nonfrivolous." This establishes an objective standard, intended to eliminate any "empty-head pure-heart" justification for patently frivolous arguments. However, the extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles, or through consultation with other attorneys should certainly be taken into account in determining whether paragraph (2) has been violated. Although arguments for a change of law are not required to be specifically so identified, a contention that is so identified should be viewed with greater tolerance under the rule.

The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc. *See Manual for Complex Litigation, Second,* § 42.3. The rule does not attempt to enumerate the factors a court should consider in deciding whether to impose a sanction or what sanctions would be appropriate in the circumstances; but, for emphasis, it does specifically note that a sanction may be nonmonetary as well as monetary. Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants: all of these may in a particular case be proper considerations. The court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.

Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty. However, under unusual circumstances, particularly for (b)(1) violations, deterrence may be ineffective unless the sanction not only requires the person violating the rule to make a monetary payment, but also directs that some or all of this payment be made to those injured by the violation. Accordingly, the rule authorizes the court, if requested in a motion and if so warranted, to award attorney's fees to another party. Any such award to another party, however, should not exceed the expenses and attorneys' fees for the services directly and unavoidably caused by the violation of the certification requirement. If, for example, a wholly unsupportable count were included in a multi-count complaint or counterclaim for the purpose of needlessly increasing the cost of litigation to an impecunious adversary, any award of expenses should be limited to those directly caused by inclusion of the improper count, and not those resulting from the filing of the complaint or answer itself. The award should not provide compensation for services that could have been avoided by an earlier disclosure of evidence or an earlier challenge to the groundless claims or defenses. Moreover, partial reimbursement of fees may constitute a sufficient deterrent with respect to violations by persons having modest financial resources. In cases brought under statutes providing for fees to be awarded to prevailing parties, the court should not employ cost-shifting under this rule in a manner that would be inconsistent with the standards that govern the statutory award of fees, such as stated in *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412 (1978).

The sanction should be imposed on the persons--whether attorneys, law firms, or parties--who have violated the rule or who may be determined to be responsible for the violation. The person signing, filing, submitting, or advocating a document has a nondelegable responsibility to the court, and in most situations is the person to be sanctioned for a violation. Absent exceptional circumstances, a law firm is to be held also responsible when, as a result of a motion under subdivision (c)(1)(A), one of its partners, associates, or employees is determined to have violated the rule. Since such a motion may be filed only if the offending paper is not withdrawn or corrected within 21 days after service of the motion, it is appropriate that the law firm ordinarily be viewed as jointly responsible under established principles of agency. This provision is designed to remove the restrictions of the former rule. *Cf. Pavelic & LeFlore v. Marvel Entertainment Group,* 493 U.S. 120 (1989) (1983 version of Rule 11 does not permit sanctions against law firm of attorney signing groundless complaint).

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The revision permits the court to consider whether other attorneys in the firm, co-counsel, other law firms, or the party itself should be held accountable for their part in causing a violation. When appropriate, the court can make an additional inquiry in order to determine whether the sanction should be imposed on such persons, firms, or parties either in addition to or, in unusual circumstances, instead of the person actually making the presentation to the court. For example, such an inquiry may be appropriate in cases involving governmental agencies or other institutional parties that frequently impose substantial restrictions on the discretion of individual attorneys employed by it.

Sanctions that involve monetary awards (such as a fine or an award of attorney's fees) may not be imposed on a represented party for causing a violation of subdivision (b)(2), involving frivolous contentions of law. Monetary responsibility for such violations is more properly placed solely on the party's attorneys. With this limitation, the rule should not be subject to attack under the Rules Enabling Act. See *Willy v. Coastal Corp.,* 503 U.S. 131 (1992); *Business Guides, Inc. v. Chromatic Communications Enter. Inc.,* 498 U.S. 533 (1991). This restriction does not limit the court's power to impose sanctions or remedial orders that may have collateral financial consequences upon a party, such as dismissal of a claim, preclusion of a defense, or preparation of amended pleadings.

Explicit provision is made for litigants to be provided notice of the alleged violation and an opportunity to respond before sanctions are imposed. Whether the matter should be decided solely on the basis of written submissions or should be scheduled for oral argument (or, indeed, for evidentiary presentation) will depend on the circumstances. If the court imposes a sanction, it must, unless waived, indicate its reasons in a written order or on the record; the court should not ordinarily have to explain its denial of a motion for sanctions. Whether a violation has occurred and what sanctions, if any, to impose for a violation are matters committed to the discretion of the trial court; accordingly, as under current law, the standard for appellate review of these decisions will be for abuse of discretion. *See Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384 (1990) (noting, however, that an abuse would be established if the court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence).

The revision leaves for resolution on a case-by-case basis, considering the particular circumstances involved, the question as to when a motion for violation of Rule 11 should be served and when, if filed, it should be decided. Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely. In other circumstances, it should not be served until the other party has had a reasonable opportunity for discovery. Given the "safe harbor" provisions discussed below, a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention).

Rule 11 motions should not be made or threatened for minor, inconsequential violations of the standards prescribed by subdivision (b). They should not be employed as a discovery device or to test the legal sufficiency or efficacy of allegations in the pleadings; other motions are available for those purposes. Nor should Rule 11 motions be prepared to emphasize the merits of a party's position, to exact an unjust settlement, to intimidate an adversary into withdrawing contentions that are fairly debatable, to increase the costs of litigation, to create a conflict of interest between attorney and client, or to seek disclosure of matters otherwise protected by the attorney-client privilege or the work-product doctrine. As under the prior rule, the court may defer its ruling (or its decision as to the identity of the persons to be sanctioned) until final resolution of the case in order to avoid immediate conflicts of interest and to reduce the disruption created if a disclosure of attorney-client communications is needed to determine whether a violation occurred or to identify the person responsible for the violation.

The rule provides that requests for sanctions must be made as a separate motion, *i.e.,* not simply included as an additional prayer for relief contained in another motion. The motion for sanctions is not, however, to be filed until at least 21 days (or such other period as the court may set) after being served. If, during this period, the alleged violation is corrected, as by withdrawing (whether formally or informally) some allegation or contention, the motion should not be filed with the court. These provisions are intended to provide a type of "safe harbor" against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation. Under the former rule, parties were sometimes

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reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11; under the revision, the timely withdrawal of a contention will protect a party against a motion for sanctions.

To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the "safe harbor" period begins to run only upon service of the motion. In most cases, however, counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion.

As under former Rule 11, the filing of a motion for sanctions is itself subject to the requirements of the rule and can lead to sanctions. However, service of a cross motion under Rule 11 should rarely be needed since under the revision the court may award to the person who prevails on a motion under Rule 11--whether the movant or the target of the motion--reasonable expenses, including attorney's fees, incurred in presenting or opposing the motion.

The power of the court to act on its own initiative is retained, but with the condition that this be done through a show cause order. This procedure provides the person with notice and an opportunity to respond. The revision provides that a monetary sanction imposed after a court-initiated show cause order be limited to a penalty payable to the court and that it be imposed only if the show cause order is issued before any voluntary dismissal or an agreement of the parties to settle the claims made by or against the litigant. Parties settling a case should not be subsequently faced with an unexpected order from the court leading to monetary sanctions that might have affected their willingness to settle or voluntarily dismiss a case. Since show cause orders will ordinarily be issued only in situations that are akin to a contempt of court, the rule does not provide a "safe harbor" to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court's own initiative. Such corrective action, however, should be taken into account in deciding what--if any--sanction to impose if, after consideration of the litigant's response, the court concludes that a violation has occurred.

Subdivision (d). Rules 26(g) and 37 establish certification standards and sanctions that apply to discovery disclosures, requests, responses, objections, and motions. It is appropriate that Rules 26 through 37, which are specially designed for the discovery process, govern such documents and conduct rather than the more general provisions of Rule 11. Subdivision (d) has been added to accomplish this result.

Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions. It does not supplant statutes permitting awards of attorney's fees to prevailing parties or alter the principles governing such awards. It does not inhibit the court in punishing for contempt, in exercising its inherent powers, or in imposing sanctions, awarding expenses, or directing remedial action authorized under other rules or under 28 U.S.C. § 1927. *See Chambers v. NASCO,* 501 U.S. 32 (1991). Chambers cautions, however, against reliance upon inherent powers if appropriate sanctions can be imposed under provisions such as Rule 11, and the procedures specified in Rule 11--notice, opportunity to respond, and findings--should ordinarily be employed when imposing a sanction under the court's inherent powers. Finally, it should be noted that Rule 11 does not preclude a party from initiating an independent action for malicious prosecution or abuse of process.

2007 Amendment

The language of Rule 11 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Providing an e-mail address is useful, but does not of itself signify consent to filing or service by e-mail.

Notes of Decisions (2943)

Fed. Rules Civ. Proc. Rule 11, 28 U.S.C.A., FRCP Rule 11

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY KING, MARIAN ELLEN SHERIDAN, JOHN EARL HAGGARD, CHARLES JAMES RITCHARD, JAMES DAVID HOOPER and DAREN WADE RUBINGH, Plaintiffs, v. GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan, JOCELYN BENSON, in her official capacity as Michigan Secretary of State and the Michigan BOARD OF STATE CANVASSERS, Defendants and CITY OF DETROIT, DEMOCRATIC NATIONAL COMMITTEE and MICHIGAN DEMOCRATIC PARTY, Intervenor-Defendants.	No. 2:20-cv-13134 Hon. Linda V. Parker

THE CITY OF DETROIT'S MOTION FOR SANCTIONS, FOR DISCIPLINARY ACTION, FOR DISBARMENT REFERRAL AND FOR REFERRAL TO STATE BAR DISCIPLINARY BODIES

Intervenor-Defendant City of Detroit (the "City"), by and through counsel, respectfully moves for sanctions against Plaintiffs and their counsel pursuant to

Federal Rule of Civil Procedure 11. The City further moves for disciplinary action and referrals to be initiated against counsel.

The undersigned counsel certifies that counsel communicated in writing with opposing counsel, explaining the nature of the relief to be sought by way of this motion and seeking concurrence in the relief; opposing counsel thereafter denied concurrence. Such concurrence was sought on December 15, 2020 and January 5, 2021.

The City also served Plaintiffs with a Motion for Sanctions under Fed. R. Civ. P. 11 on December 15, 2020. Plaintiffs did not withdraw or correct any of the false factual allegations and frivolous legal theories in their pleadings during the 21 day "safe harbor" period.[1] Thus, this Motion is timely.

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[1] No lawyer for the Plaintiffs responded to the email message forwarding the Rule 11 motion. Instead, at least two of their attorneys made public statements, with military analogies and references to opposing counsel as "the enemy." According to the news website Law and Crime, Plaintiffs' counsel, Sidney Powell, when asked about the proposed Rule 11 motion, "replied cryptically: 'We are clearly over the target.'" Ex. 1. Similarly, Plaintiffs' counsel, L. Lin Wood, posted the following on his Twitter account on December 17, 2020:

> When you get falsely accused by the likes of David Fink & Marc Elias of Perkins Coie (The Hillary Clinton Firm) in a propaganda rag like Law & Crime, you smile because you know you are over the target & the enemy is running scared!

L. Lin Wood (@llinwood), Twitter (Dec. 17, 2020). Perhaps the lack of civility is related to counsels' failure to apply for admission to the Eastern District of Michigan's bar. at least they would have been compelled to review and affirm their commitment to our court's Civility Principles.

This Motion is supported by the accompanying Brief.

Sanctions Pursuant to Fed. R. Civ. P. 11(b)(1)

1. Sanctions should be imposed under Fed. R. Civ. P. 11(b)(1) when a pleading or other filing is presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.

2. Sanctions pursuant to the sub-rule should be imposed against Plaintiffs and their counsel because they initiated the instant suit for improper purposes, including harassing the City and frivolously undermining "People's faith in the democratic process and their trust in our government." Opinion and Order Denying Plaintiffs' "Emergency Motion for Declaratory, Emergency, and Permanent Injunctive Relief," ECF No. 62, PageID.3329-30.

3. Plaintiffs and their counsel understood that the mere filing of a suit (no matter how frivolous) could, without any evidence, raise doubts in the minds of millions of Americans about the legitimacy of the 2020 presidential election. As this Court noted, "Plaintiffs ask th[e] Court to ignore the orderly statutory scheme established to challenge elections and to ignore the will of millions of voters." *Id.* PageID.3330.

4. The Complaints (ECF Nos. 1 and 6), Emergency Motion for Declaratory, Emergency, and Permanent Injunctive Relief and Memorandum in

Support Thereof (ECF No. 7), and Emergency Motion to Seal (ECF No. 8) were devoid of merit and thus could only have been filed for improper purposes.

Sanctions Pursuant to Fed. R. Civ. P. 11(b)(2)

5. Sanctions under Fed. R. Civ. P. 11(b)(2) are appropriately entered where the claims, defenses, and other legal contentions are not warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law.

6. Sanctions pursuant to Rule 11(b)(2) should be imposed against counsel for Plaintiffs because the causes of action asserted in the Complaints (ECF Nos. 1 and 6), Emergency Motion for Declaratory, Emergency, and Permanent Injunctive Relief and Memorandum in Support Thereof (ECF No. 7), and Emergency Motion to Seal (ECF No. 8) were frivolous and legally deficient under existing law and because Plaintiffs failed to present any non-frivolous arguments to extend, modify, or reverse existing law.

7. The majority of Plaintiffs' claims were moot. As this Court noted, "[t]he time has passed to provide most of the relief Plaintiffs request in their Amended Complaint; the remaining relief is beyond the power of any court. For these reasons, this matter is moot." ECF No. 62, PageID.3307.

8. Plaintiffs' claims were also barred by laches because "they waited too long to knock on the Court's door." *Id.* at PageID.3310. Indeed, "Plaintiffs showed

no diligence in asserting the claims at bar." *Id.* at PageID.3311. This delay prejudiced the City. *Id.* at PageID.3313.

9. Plaintiffs lacked standing to pursue their claims. *Id.* at PageID.3317-3324.

10. Plaintiffs' claim for violation of the Elections and Electors Clauses is frivolous. As this Court held, "Plaintiffs ask the Court to find that any alleged deviation from state election law amounts to a modification of state election law and opens the door to federal review. Plaintiffs cite to no case – and this Court found none – supporting such an expansive approach." *Id.* at PageID.3325.

11. Plaintiffs' due process and equal protection clause claims are also baseless. With regard to the due process claim, this Court held that "Plaintiffs do not pair [the due process claim] with anything the Court could construe as a developed argument. The Court finds it unnecessary, therefore, to further discuss the due process claim." *Id.* at PageID.3317. As to the equal protection claim, this Court stated that "[w]ith nothing but speculation and conjecture that votes for President Trump were destroyed, discarded or switched to votes for Vice President Biden, Plaintiffs' equal protection claim fails." *Id.* at PageID.3328.

12. For each of Plaintiffs' claims, Plaintiffs did not identify valid legal theories and the controlling law contradicted the claims. The claims were not

warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law.

13. Plaintiffs' Emergency Motion for Declaratory, Emergency, and Permanent Injunctive Relief and Memorandum in Support Thereof (ECF No. 7) was without any legal basis because, as described above, the underlying claims are baseless, and the requests for relief were frivolous.

14. Plaintiffs' Emergency Motion to Seal (ECF No. 8) was without any legal basis because Plaintiffs seek to anonymously file supposed evidence of a broad conspiracy to steal the 2020 presidential election without providing any authority whatsoever to attempt to meet their heavy burden to justify the sealed filing of these documents.

Sanctions Pursuant to Fed. R. Civ. P. 11(b)(3)

15. Sanctions can be imposed under Fed. R. Civ. P. 11(b)(3) where factual contentions do not have evidentiary support or will likely not have evidentiary support after a reasonable opportunity for further investigation or discovery.

16. Sanctions should be entered against Plaintiffs and their counsel pursuant to Fed. R. Civ. P. 11(b)(3) because the factual contentions raised in the complaints and motions were false.

17. The key "factual" allegations from the supposed fact witnesses, some of whom attempt to cloak their identities while attacking democracy, have been

debunked. The allegations about supposed fraud in the processing and tabulation of absentee ballots by the City at the TCF Center have been rejected by every court which has considered them. If any of the claims in this lawsuit had merit, that would have been demonstrated in those cases. The City refers the Court to its Response to Plaintiffs' Emergency Motion for Declaratory, Emergency, and Permanent Injunctive Relief for a detailed debunking of Plaintiffs' baseless factual contentions. ECF No. 39, PageID.2808-2933.

Disciplinary Proceedings

18. E. D. Mich. LR 83.22 authorizes the Court to levy punishments other than suspension or disbarment on a practicing attorney whose conduct has violated the Rules of Professional Conduct, the Local Rules, the Federal Rules of Civil or Bankruptcy Procedure, orders of the Court, or who has engaged in conduct considered to be "unbecoming of a member of the bar of this court."

19. The Rule also authorizes the Court to refer counsel to the Chief Judge of this District for disbarment or suspension proceedings.

20. And, the Rule authorizes the Court to refer counsel to the Michigan Attorney Discipline Board and to the disciplinary authorities of counsels' home jurisdictions for purposes of disciplinary proceedings.

WHEREFORE, for the foregoing reasons and the reason stated in the accompanying brief, the City of Detroit respectfully requests that this Court enter an Order:

(a) Imposing monetary sanctions against Plaintiffs and their counsel in an amount determined by this Court to be sufficient to deter future misconduct (such amount should be, at the least, the amount that Plaintiffs' counsel have collected in their fundraising campaigns, directly or through entities they own or control, for their challenges to the 2020 election);

(b) Requiring Plaintiffs and their counsel to pay all costs and attorney fees incurred by the City in relation to this matter (as well as costs and fees incurred by all other Defendants);

(c) Requiring Plaintiffs and/or their counsel to post a bond of $100,000 prior to the filing of any appeal of this action (and to maintain their present appeal);

(d) Requiring Plaintiffs and their counsel to post a bond of $100,000 prior to filing, in any court, an action against the City, or any other governmental entity or their employees, relating to or arising from the facts alleged in this matter;

(e) Requiring Plaintiffs to post a substantial bond, in an amount determined by the Court, prior to filing an action in the Eastern District of Michigan;

(f) Requiring Plaintiffs and their counsel to obtain certification from a magistrate judge that the proposed claims are not frivolous or asserted for an

improper purpose, before filing an action in the Eastern District of Michigan (and, if the magistrate determines that the proposed claims are frivolous or asserted for an improper purpose, requiring the plaintiff[s] to post a bond before filing the proposed action in an amount the magistrate determines is sufficient to protect the defendant[s]);

(g) Requiring Plaintiffs and their counsel to certify, via affidavit, under penalty of perjury, that they have paid all amounts required to fully satisfy any non-appealable orders for sanctions entered by any court, prior to filing an action in the Eastern District of Michigan;

(h) Barring Plaintiffs' counsel from practicing law in the Eastern District of Michigan (after the issuance of a show cause order);

(i) Referring Plaintiffs' counsel to the Chief Judge of this District for initiation of disbarment proceedings;

(j) Referring all Plaintiffs' counsel to the Michigan Attorney Grievance Commission (and also to the disciplinary authorities of their home jurisdictions, including: Sidney Powell to the Michigan Bar and to the Texas bar; L. Lin Wood to the Michigan Bar and to the Georgia bar; Greg Rohl to the Michigan bar; Emily Newman to the Michigan Bar and to the Virginia bar; Julia Haller to the Michigan Bar and to the Washington D.C. bar; Brandon Johnson to the Michigan Bar and to

the Washington D.C. bar; Scott Hagerstrom to the Michigan bar; Howard Kleinhendler to the Michigan Bar and to the New York bar); and,

(k) Granting any other relief that the Court deems just or equitable.

January 5, 2021

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY KING, MARIAN ELLEN SHERIDAN, JOHN EARL HAGGARD, CHARLES JAMES RITCHARD, JAMES DAVID HOOPER and DAREN WADE RUBINGH, Plaintiffs, v. GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan, JOCELYN BENSON, in her official capacity as Michigan Secretary of State and the Michigan BOARD OF STATE CANVASSERS, Defendants.	No. 2:20-cv-13134 Hon. Linda V. Parker

BRIEF IN SUPPORT OF
THE CITY OF DETROIT'S MOTION FOR SANCTIONS, FOR DISCIPLINARY ACTION, FOR DISBARMENT REFERRAL AND FOR REFERRAL TO STATE BAR DISCIPLINARY BODIES

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STATEMENT OF THE ISSUES PRESENTED

I. Should the Court sanction Plaintiffs and their counsel pursuant to Fed. R. Civ. P. 11?

The City answers: "Yes."

II. Should the Court discipline Plaintiffs' counsel, refer them to the Chief Judge of this District for disbarment proceedings and refer them to the Michigan Attorney Grievance Commission and their home state bars for disciplinary proceedings?

The City answers: "Yes."

CONTROLLING OR MOST APPROPRIATE AUTHORITIES

Fed. R. Civ. P. 11(b)(1)

Fed. R. Civ. P. 11(b)(2)

Fed. R. Civ. P. 11(b)(3)

E. D. Mich. LR 83.22

Bowyer v. Ducey, CV-20-02321, 2020 WL 7238261 (D. Ariz. Dec. 9, 2020)

Costantino v. Detroit, Opinion and Order, Wayne County Circuit Court Case No. 20-014780-AW (Nov. 13, 2020)

Ex parte Young, 209 U.S. 123 (1908)

King v. Whitmer, No. CV 20-13134, 2020 WL 7134198 (E.D. Mich. Dec. 7, 2020)

Mann v. G & G Mfg., Inc., 900 F.2d 953 (6th Cir. 1990)

INTRODUCTION

This Court has already concluded that Plaintiffs present "nothing but speculation and conjecture" and that "this lawsuit seems to be less about achieving the relief Plaintiffs seek—as much of that relief is beyond the power of this Court—and more about the impact of their allegations on People's faith in the democratic process and their trust in our government." *King v. Whitmer*, No. CV 20-13134, 2020 WL 7134198, at *13 (E.D. Mich. Dec. 7, 2020). Now, it is time for Plaintiffs and their counsel to answer for that misconduct.

It is indelibly clear that this lawsuit was filed for an improper purpose, and the failure to dismiss or amend the Complaint after service of a Rule 11 motion warrants the strongest possible sanctions. There are so many objectively false allegations in the Complaint that it is not possible to address all of them in a single brief. This brief will address some of the more extreme examples.

For instance, Plaintiffs claim that their self-proclaimed experts include a military intelligence analyst, but when they accidentally disclosed his name, the "expert" was revealed to have washed out of the training course for military intelligence. Plaintiffs' counsel did not redact the information to "protect" the "informant," they did so to hide their fraud on the court.[2]

[2] In addition to this case, Plaintiffs' attorneys filed three other remarkably similar, and similarly frivolous, "release the kraken" lawsuits. The requested relief

Plaintiffs' "expert" reports are rife with misstatements of Michigan law and election procedures. Those reports lack the simplest foundation of technical expertise, fail to use even elementary statistical methods and reach conclusions that lack any persuasive value. But, those unscientific conclusions, based upon false premises and faulty techniques are presented here as though they embody the uncontroverted truth.

Plaintiffs have no apparent interest in the accuracy of their allegations and there is no innocent explanation for the numerous misrepresentations. They claim that turnout in some jurisdictions in the State exceeded 100%, even up to 781.91%, with turnout for Detroit at 139.29%. *See* Ramsland Aff., ECF No. 6-24, PageID.1574. But they had to know that claim was false; the actual results were readily available at the time Plaintiffs and their "experts" made the claim, and show turnout well below 100%, including in Detroit at 50.88%. Ex. 2.[3]

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was quickly denied or the case was dismissed for each. *See Feehan v. Wisconsin Elections Comm'n*, No. 20-CV-1771, 2020 WL 7250219 (E.D. Wis. Dec. 9, 2020); *Bowyer v. Ducey*, CV-20-02321, 2020 WL 7238261 (D. Ariz. Dec. 9, 2020); and *Pearson v. Kemp*, No. 1:20-cv-4809 (N.D. Ga. Dec. 7, 2020) (Ex. 3).

[3] Plaintiffs made the same claim about Michigan in the lawsuit they filed in Georgia, but apparently because the "expert" confused the postal code abbreviation for Minnesota with that of Michigan, used Minnesota jurisdictions to make the argument that turnout exceeded 100%. Ex. 4. The fact that Plaintiffs' counsel discovered the error regarding postal abbreviations (after it was widely mocked in the media), but then proceeded to make the same false claim here, substituting Michigan jurisdictions, shows that the point was to make the claim, not to present the truth. As stated by the district court in the Arizona "kraken" lawsuit when

Meanwhile, President Trump continues to use these lawsuits in his desperate campaign to thwart the will of the voters. On January 2, 2021, during a call with Georgia's Secretary of State, Brad Raffensperger, in which the President is heard attempting to extort Secretary Raffensperger into committing election fraud, Trump trotted out the same hoary canards as the Plaintiffs falsely argue to this Court:

> I mean there's turmoil in Georgia and other places. You're not the only one, I mean, we have other states that I believe will be flipping to us very shortly. And this is something that — you know, as an example, I think it in Detroit, I think there's a section, a good section of your state actually, which we're not sure so we're not going to report it yet. But in Detroit, we had, I think it was, 139 percent of the people voted. That's not too good.

See Ex. 5, pp. 3-4 (Transcript of January 2, 2021 Telephone Call, as transcribed for the Washington Post).[4]

The City gave Plaintiffs and their counsel the opportunity to retract their lies and baseless legal claims, and they have refused. The extent of the factual and legal errors in this Complaint would warrant sanctions under any circumstances, but here the Court's processes are being perverted to undermine our democracy and to upset

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dismissing the claims, and as equally applicable here, "[t]he various affidavits and expert reports are largely based on anonymous witnesses, hearsay, and irrelevant analysis of unrelated elections." *Bowyer v. Ducey*, No. CV-20-02321, 2020 WL 7238261, at *13 (D. Ariz. Dec. 9, 2020).

[4] President Trump also continues to use this lawsuit (and the suits filed in other swing states which voted for President-Elect Biden) to fundraise. As of early December 2020, Trump had reportedly raised $207.5 million in post-election fundraising. Ex. 6.

the peaceful transition of power. The Plaintiffs and all of their attorneys deserve the harshest sanctions this Court is empowered to order.

ARGUMENT

I. Rule 11 Standards

Sanctions under Fed. R. Civ. P. 11(b)(1) are appropriate when a pleading or other filing is presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation. Fed. R. Civ. P. 11(b)(1). Sanctions under Fed. R. Civ. P. 11(b)(2) are appropriate where the claims, defenses, and other legal contentions of the offending party are not warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law. Fed. R. Civ. P. 11(b)(2). Sanctions are appropriate under Fed. R. Civ. P. 11(b)(3) where factual contentions do not have evidentiary support or will likely not have evidentiary support after a reasonable opportunity for further investigation or discovery.[5]

To determine whether a party's pleading is frivolous or was filed for an improper purpose, courts use an objective standard of reasonableness under the circumstances and then weigh the evidence to determine if the pleadings, motions or

[5] Monetary sanctions cannot be imposed against a represented party for violation of Fed. R. Civ. P. 11(b)(2). *See* Fed. R. Civ. P. 11(c)(5). Thus, the City requests non-monetary sanctions, as identified below, against Plaintiffs for violation of 11(b)(2) and monetary and non-monetary sanctions against counsel.

papers are well-grounded in facts or warranted by existing law. *Mann v. G &G Mfg., Inc.*, 900 F.2d 953 (6th Cir. 1990).[6]

II. The Complaint was Filed for an Improper Purpose

It is clear that this lawsuit was not filed for any purpose consistent with the Federal Rules of Civil Procedure. This Court has already addressed many of the reasons that the Plaintiffs "are far from likely to succeed in this matter." *King*, 2020 WL 7134198, at *13. The claims are barred by Eleventh Amendment Immunity; the claims are barred by mootness and laches; Plaintiffs lack standing; and, even if Plaintiffs could show a violation of state law, they have not offered a colorable claim under federal statutory or constitutional law. To make matters worse, Plaintiffs were always aware that their Complaint was deficient; no other inference can be drawn from their failure to serve the Defendants before this Court issued its December 1, 2020, text-only order.[7]

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[6] Moreover, for the purposes of Rule 11 sanctions, a showing of "good faith," is not sufficient to avoid sanctions. *INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc.*, 815 F.2d 391 (6th Cir. 1987).

[7] A similar circumstance was noted on January 4, 2021, in a ruling by the United States District Court for the District of Columbia, addressing another groundless Trump election lawsuit:

> [Plaintiffs'] failure to make any effort to serve or formally notify any Defendant — even after a reminder by the Court in its Minute Order — renders it difficult to believe that the suit is meant seriously. Courts are not instruments through which parties engage in such gamesmanship or symbolic political gestures. As a result, at the conclusion of this litigation, the Court will determine whether to issue an order to show

This lawsuit is the quintessential example of a case filed for an improper purpose. As this Court concluded, in denying preliminary relief:

> this lawsuit seems to be less about achieving the relief Plaintiffs seek—as much of that is beyond the power of this Court—and more about the impact of their allegations on People's faith in the democratic process and their trust in our government.

King, at *13. Plaintiffs' counsel have not hidden their contempt for our courts and for our democracy. Plaintiffs' counsel Sidney Powell claims that courts have rejected the election lawsuits, "because the corruption goes deep and wide."[8] She re-tweets calls to impose martial law, to "suspend the December Electoral College vote," and to "set up Military Tribunals immediately." @sidneypowell1, Twitter (Nov. 30, 2020). Her co-counsel, L. Lin Wood, unabashedly expresses his contempt for our democratic processes and openly promotes a military coup:

> Georgia, Michigan, Arizona, Nevada, Wisconsin, Minnesota & Pennsylvania are states in which martial law should be imposed & machines/ballots seized. 7 states under martial law. 43 states not under martial law. I like those numbers. Do it @realDonaldTrump! Nation supports you. (@llinwood, Twitter (Dec. 20, 2020)).
>
> Patriots are praying tonight that @realDonaldTrump will impose martial law in disputed states, seize voting machines for forensic

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> cause why this matter should not be referred to its Committee on Grievances for potential discipline of Plaintiffs' counsel.

Wisconsin Voters Alliance v. Pence, No. 1:20-cv-03791 (D.C. Jan. 4, 2021) (Ex. 7).

[8] Quote from video interview of Sidney Powell, promoted on her twitter account at https://twitter.com/AKA_RealDirty/status/1338401580299681793.

> examination, & appoint @SidneyPowell as special counsel to investigate election fraud. (Dec. 19, 2020).
>
> When arrests for treason begin, put Chief Justice John Roberts, VP Mike Pence @VP @Mike_Pence, & Mitch McConnell @senatemajldr at top of list. (Jan. 1, 2021).
>
> If Pence is arrested, @SecPompeo will save the election. Pence will be in jail awaiting trial for treason. He will face execution by firing squad. He is a coward & will sing like a bird & confess ALL. (Jan. 1, 2021).[9]

These are the lawyers who are trying to use this Court's processes to validate their conspiracy theories and to support their goal of overturning the will of the people in a free and fair election. They were given an opportunity to dismiss or amend their Complaint, but they chose to continue to use this case to spread their false messages.

Those false messages are not the result of occasional errors or careless editing. Those false messages are deliberately advanced by these attorneys to support their goals of undermining our democracy. Like Sidney Powell, L. Lin Wood, is a QAnon disciple.[10] He recently stated:

> This country's going to be shocked when they find the truth about who's been occupying the Oval Office for some periods of years. They're going to be shocked at the level of pedophilia. They are going

[9] While Mr. Wood's wrath was initially focused on Democrats, he has shifted to attacking Republican officials (and judges and justices who he views as Republican) for their perceived disloyalty to Trump and refusal to abuse the Constitution.

[10] A judge in Delaware is currently considering revoking Mr. Wood's right to practice in Delaware, where he is currently representing former Trump adviser Carter Page, based on his conduct in suits challenging the results of the general election as a plaintiff in Georgia and as counsel in Wisconsin. Ex. 8.

> to be shocked at what I believe is going to be a revelation in terms of people who are engaged in Satanic worship."[11]

A review of Mr. Wood's Twitter account reveals a dark strain of paranoia—the same strain which infects this lawsuit.

Mr. Wood repeatedly makes false allegations about the 2020 election, the most secure in our country's history.[12] The following is a sampling of his tweets:

> There should be NO Electoral College vote in any state today. Fraud is rampant in all state elections. If U.S. Supreme Court does not have courage to act, I believe our President @realDonaldTrump has the courage. (Dec. 14, 2020).

> We The People must now launch massive campaign to prevent our state electors from EVER casting vote in Electoral College for Joe Biden & Kamala Harris. Unless you want them to vote for Communism. In that event, get out of our country & go enjoy your life in Communist China. (Dec. 20, 2020).

> Joe Biden & Kamala Harris are Communists by either ideology, corruptness or extortion. Still want your state electors to vote for Biden on 1/6? Want Communism & tyranny or a free America where you can enjoy life, liberty & pursuit of happiness? (Dec. 20, 2020).

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[11] https://welovetrump.com/2020/11/23/lin-wood-americans-will-be-shocked-at-level-of-pedophilia-satanic-worship-occupying-oval-office-for-years-before-trump/.

[12] The November 2020 general election was declared by the federal government to be the most secure in the nation's history. *See* Joint Statement from Elections Infrastructure Government Coordinating Council & The Election Infrastructure Sector Coordinating Executive Committees ("CISA"), issued Nov 12, 2020 ("The November 3rd election was the most secure in American history.") (Ex. 9). The CISA statement further concluded "[t]here is no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised." *Id.* Five days after this statement was released, Chris Krebs, director of CISA, was terminated by presidential tweet.

When courts refuse to accept his invitation to disregard the fundamental tenets of our democracy, he blames corruption and communism in the judiciary:

> Attempted theft of Presidential election will NOT stand. Not on our watch, Patriots. Communists & Communist sympathizers have infiltrated our judicial system, including lawyers & judges in Georgia. (Dec. 23, 2020).
>
> Communism has infiltrated ALL levels of our government, including our judiciary. Communism infiltrates by ideology, by corruption/money & by extortion. (Dec. 20, 2020).
>
> Too many of us have been asleep at switch in the past. … We believed too many of our judges. Many are corrupt & traitors. (Dec. 19, 2020).
>
> Some state & federal lower court rulings to date are troubling. Courage lacking in some members of judiciary. (Dec. 10, 2020).
>
> We CANNOT trust courts to save our freedom. They are IGNORING massive evidence of fraud & unlawful election procedures. (Dec. 13, 2020).
>
> We have had reports of judges & their families being threatened. This would certainly explain some of the bizarre rulings by lower courts that have refused to even mention the overwhelming evidence of fraud in cases filed by @SidneyPowell. (Dec. 14, 2020).

When, the Supreme Court denied *certiorari* in Texas's lawsuit against the "swing states" which voted for Joe Biden,[13] and when the Supreme Court took no action on the nonsensical direct appeal in this case, Mr. Wood displayed his utter contempt for that institution:

> It is time for Chief Justice John Roberts to resign, admit his corruption & ask for forgiveness. Roberts has betrayed his sacred oath office. He

[13] *Texas v. Pennsylvania*, No. 155 ORIG., 2020 WL 7296814 (U.S. Dec. 11, 2020).

> has betrayed his country. He has betrayed We The People. (Dec. 19, 2020).
>
> I think many are today learning why SCOTUS is rejecting petitions seeking FAIR review. Roberts & Breyer are "anti-Trumpers" They should resign immediately. CJ Roberts has other reasons to resign. He is a disgrace to office & to country. (Dec. 17, 2020).
>
> Corruption & deceit have reached most powerful office in our country - the Chief Justice of U.S. Supreme Court. This is a sad day for our country but a day on which we must wake up & face the truth. Roberts is reason that SCOTUS has not acted on election cases. (Dec. 17, 2020).
>
> Justice John Roberts is corrupt & should resign immediately. Justice Stephen Breyer should also resign immediately. (Dec. 17, 2020).
>
> I am disappointed. I thought Justices Roberts & Breyer would avoid public scandal & simply resign. Only a fool wants their dirty laundry aired in public. Maybe I should consider filing a formal motion for recusal & hang their laundry on the clothesline to be exposed to sunlight? (Jan. 2, 2021).

This is the same L. Lin Wood who appears on the pleadings of this case, but who has apparently chosen not to be sworn into the bar for the Eastern District of Michigan and to affirm our Civility Principles.

Sidney Powell—who President Trump has reportedly considered appointing as "special counsel," who apparently has the ear of the President and who has advocated for martial law—is less prolific on Twitter but shares Mr. Wood's perspective. She has tweeted that "[t]his 'election' was stolen from the voters in a massive fraud." @sidneypowell1, Twitter (Jan. 2, 2021). And, like Mr. Wood, she channels 19502 McCarthy paranoia, seeing communists around every electoral

corner, stating "[i]t is impossible not to see the fraud here unless one is a communist or part of it or part of the coup." @sidneypowell1, Twitter (Jan. 2, 2021).[14]

As poorly presented as their pleadings were, as careless as they were in vetting their allegations and expert reports, and as detached as their claims are from the law and reality, the Plaintiffs and their counsel were provided 21 days to take corrective action. So, 21 days before filing this motion, the City gave Plaintiffs an opportunity to withdraw or amend their contemptuous pleadings. Rather than withdraw or amend their Complaint, they chose to stand firm with their objectively false claims, ridiculously incompetent expert reports and patently unsupportable arguments.

Why was this Complaint not dismissed or amended? Surely, in light of this Court's December 7, 2020, Opinion and Order, Plaintiffs cannot be expecting to obtain judicial relief. Then, what purpose can this lawsuit serve? The answer to that question goes to the heart of Rule 11. Much can be inferred from Plaintiffs' actions. Initially, this was one of several lawsuits used to support calls for state legislatures to reject the will of the voters, to ignore the statutory process for selecting presidential electors, and to instead elect a slate of Trump electors (six of whom are Plaintiffs in this case). When the Michigan Legislature did not attempt to select a

[14] Perhaps her motivation is less paranoid and more venal. The front page of her website, "defendingtherepublic.org," has a prominently placed "contribute here" form, soliciting donations for her "Legal Defense Fund for Defending the American Republic."

slate of electors inconsistent with the will of the voters, despite the personal demands of the President of the United States, who summoned their leaders to the White House, this lawsuit took on a different meaning. It was then used to support arguments for the United States Congress to reject the Michigan electors on January 6, 2021. On Saturday, January 2, 2021, false claims made by "experts" in this case were cited by Donald Trump in his apparent attempt to extort Georgia Secretary of State Brad Raffensperger. And, most ominously, these claims are referenced and repeated by L. Lin Wood and others in support of martial law.

Irrespective of these attempts to overturn our democratic processes, the continued pendency of this lawsuit accomplishes exactly the harm addressed by this Court in its December 7, 2021, Opinion and Order. By undermining "People's faith in the democratic process and their trust in our government," this lawsuit is being used to delegitimize the presidency of Joe Biden.

While the First Amendment may protect the right of political fanatics to spew their lies and unhinged conspiracy theories, it does not grant anyone a license to abuse our courts for purposes which are antithetical to our democracy and to our judicial system. Plaintiffs and their counsel cannot be allowed to use the court system to undermine the constitutional and statutory process by which we select our leaders.

III. The Factual Assertions in the Complaint Were Frivolous and Based on Assertions Which Had Been Rejected by Michigan Courts

The Complaint in this matter relies heavily on affidavits submitted in *Costantino v. Detroit*, Wayne County Circuit Court Case No. 20-014780-AW. The Plaintiffs here either incorporate the affidavits into their allegations or attach them as exhibits to their Complaint.

A. Allegations Regarding Republican Challengers

The Complaint repeatedly asserts that Republican challengers were not given "meaningful" access to the ballot processing and tabulation at the Absent Voter Counting Board located in Hall E of the TCF Center. First Amended Complaint ("Compl.") at ¶¶ 13, 42, 47, 57, 59-61. This claim was disproven long before Plaintiffs raised it here. As Judge Kenny concluded in *Costantino*, while six feet of separation was necessary for health reasons, "a large monitor was at the table where individuals could maintain a safe distance from poll workers to see what exactly was being performed." *Costantino v. Detroit*, Opinion and Order, Wayne County Circuit Court Case No. 20-014780-AW (Nov. 13, 2020) (Ex. 10). This had been proven with photographic evidence. *See, e.g.*, Ex. 11 (Nov. 11, 2020 Affidavit of Christopher Thomas at last page). And, prior to the filing of this case, the Michigan Supreme Court had already rejected the application for appeal from the trial court's ruling, deeming the same claims unworthy of injunctive relief. *See Costantino v Detroit*, No. 162245, 2020 WL 6882586 (Mich. Nov. 23, 2020).

Similarly, the Complaint repeats the false claim that Republican challengers were exclusively barred from entering the TCF Center. Compl. ¶¶ 62-63. Judge Kenny rejected this claim, finding that there was a short period of time, where Republican *and* Democratic challengers were "prohibited from reentering the room because the maximum occupancy of the room had taken place." *Costantino* Opinion, at *8. As stated by the court, "[g]iven the COVID-19 concerns, no additional individuals could be allowed into the counting area ... Democratic party challenger David Jaffe and special consultant Christopher Thomas in their affidavits both attest to the fact that neither Republican nor Democratic challengers were allowed back in during the early afternoon of November 4th as efforts were made to avoid overcrowding." *Id.*

B. Allegations of "Pre-Dating"

Plaintiffs' allegations of "pre-dating" were also based on claims initially submitted and rejected in *Costantino*. Compl. ¶¶ 88 and 90.

The claims come from Jessy Jacob, a furloughed City employee, with no known prior election experience, who was assigned to the Department of Elections on a short-term basis. Ex. 12 (Affidavit of Daniel Baxter, ¶ 7). Her claim regarding pre-dating is demonstrably false because all absentee ballots she handled at the TCF Center had been received by 8:00 p.m. on November 3, 2020. For a small number of ballots, election workers at the TCF Center were directed to enter the date the

ballots were received into the computer system, as stamped on the envelope. Ex. 11. Ms. Jacob was simply marking the date the ballot had been received. *Id*. Thus, as explained by the court in Costantino, "[a]s to the allegation of 'pre-dating' ballots, Mr. Thomas explains that this action completed a data field inadvertently left blank during the initial absentee ballot verification process." *Costantino* Opinion, *4. As the court noted, "[t]he entries reflected the date the City received the absentee ballot." *Id.*

C. Allegations Regarding Ballots Supposedly Counted More than Once

Plaintiffs claim challengers observed ballots repeatedly run through tabulation machines, including "a stack of about fifty ballots being fed multiple times into a ballot scanner counting machine." Compl. ¶ 94. This allegation primarily comes from Melissa Carone, a contractor working for Dominion, who claimed that stacks of 50 ballots were fed through tabulators as many as eight times. Exh. 5 to Compl., ¶¶ 4-5.[15] The allegation was obviously false when it was first raised by Carone in *Costantino*. Whatever Carone and other challengers think they saw, ballots cannot be counted in that manner. If they were correct, hundreds of extra votes would show up in numerous precinct (or absent voter counting boards). This would obviously be

[15] The Complaint states that "[p]erhaps the most probative evidence comes from Melissa Carone …." Compl. ¶ 84.

caught very quickly on site during the tabulation process or soon thereafter during the County and State canvasses. Ex. 13 (Thomas Dec. 10, 2020 Aff. ¶¶ 18-20).

But, by the time the Plaintiffs here latched onto the absurd allegation, it had already been conclusively disproven by the Wayne County canvass. Detroit had 501 precincts and 134 absent voter counting boards. Less than 36% of the total were out of balance. *Id*. ¶ 12. A counting board is out of balance if there are: (1) more ballots than voters or (2) more voters than ballots. In total 591 voters and ballots account for the imbalances. *Id.* When voters and ballots are separated in Detroit there are 148 more names than ballots—out of 174,384 votes there are 148 more names in the poll books than there are ballots. *Id.* The fact that there were more names than ballots shows that ballots were not counted more than once. The total imbalance was .0008 (eight ten-thousandths of a 1%). *Id.* Of the 94 Detroit out of balance counting boards, there were 87 with an imbalance of 11 or fewer voters/ballots; within those 87 counting boards, 48 were imbalanced by 3 or fewer voters/ballots. *Id.* There were seven counting boards with higher imbalances that range from 13 more ballots to 71 fewer voters. *Id.* This minimal level of imbalance conclusively demonstrated that the allegation was false, weeks before Plaintiffs filed this case.

D. Allegations Regarding Tabulating Machines

Perhaps the most baseless of Plaintiffs' allegations is a conspiracy theory about Dominion vote tabulators. Plaintiffs in the first election cases initially cited

two instances of errors—one in Antrim County and one in Oakland County (Rochester Hills) to insinuate that the tabulating system used in many counties was flawed. Certainly understanding the weakness of the initial theory, Plaintiffs here wove in a nonsensical tale that a theoretical software weakness upended Michigan's election results. This Court readily recognized that the claims could not hold up.

The Michigan Department of State released a statement titled "Isolated User Error in Antrim County Does Not Affect Election Results, Has no Impact on Other Counties or States," explaining what happened in Antrim County. Ex. 14. The statement explains that the "error in reporting unofficial results in Antrim County Michigan was the result of a user error that was quickly identified and corrected; did not affect the way ballots were actually tabulated; and would have been identified in the county canvass before official results were reported even if it had not been identified earlier." *Id*. Essentially, the County installed an update on certain tabulators, but not others. *Id*. The tabulators worked correctly, but when they communicated back to the County, the discrepancy in the software versions led to a discrepancy in the reporting. *Id*. This was quickly discovered and would certainly have been uncovered in the post-election canvass. *Id*. In fact, the integrity of the vote in Antrim County was conclusively proven by the recent audit of the paper ballots.

The Republican clerk of Rochester County, Tina Barton, discredited the allegations of fraud in that City. Officials realized they had mistakenly counted votes

from Rochester Hills twice, according to the Michigan Department of State. Oakland County used software from a company called Hart InterCivic, not Dominion, though the software was not at fault. Ms. Barton stated in a video she posted online: "As a Republican, I am disturbed that this is intentionally being mischaracterized to undermine the election process …. This was an isolated mistake that was quickly rectified." Ex. 15.[16] Plaintiffs knew all of this before they filed this lawsuit.[17]

E. The Declarations and Analyses "Supporting" the Complaint Were Full of Intentional Lies

The Complaint also relies heavily on "expert" declarations and affidavits, many heavily redacted. As the district court held in *Bowyer*, "the 'expert reports'

[16] An audit of the paper ballots in Antrim County conclusively demonstrated that the claim was false. The official tally was only off by 11 net votes. Ex. 16.

[17] The Plaintiffs here added in a string of falsehoods about Dominion software. The district court in Bowyer addressed those claims head on: "The Complaint is equally void of plausible allegations that Dominion voting machines were actually hacked or compromised in Arizona during the 2020 General Election. […] These concerns and stated vulnerabilities, however, do not sufficiently allege that any voting machine used in Arizona was in fact hacked or compromised in the 2020 General Election." *Bowyer v. Ducey*, No. CV-20-02321, 2020 WL 7238261, at *14 (D. Ariz. Dec. 9, 2020). Just like here, "what is present is a lengthy collection of phrases beginning with the words 'could have, possibly, might,' and 'may have.'" *Id.* Ramsland, similar to his claims here, "asserts there was 'an improbable, and *possibly impossible* spike in processed votes' in Maricopa and Pima Counties at 8:46 p.m. on November 3, 2020 … [however, the defendant] points to a much more likely plausible explanation: because Arizona begins processing early ballots before the election, the spike represented a normal accounting of the early ballot totals from Maricopa and Pima Counties, which were reported shortly after in-person voting closed." *Id.* "Plaintiffs have not moved the needle for their fraud theory from conceivable to plausible, which they must do to state a claim under Federal pleading standards." *Id.*

reach implausible conclusions, often because they are derived from wholly unreliable sources." *See Bowyer v. Ducey*, No. CV-20-02321, 2020 WL 7238261, at *14 (D. Ariz. Dec. 9, 2020).

From the outset, the "Michigan 2020 Voting Analysis Report" appended to the Amended Complaint departs from any rational statistical analysis. PageID.1771-1801. Stanley Young identifies nine counties as "outliers," because those counties reported larger increases in Democratic votes for President. PageID.1776. His analysis, however, is based entirely on raw vote totals with no consideration of percentage changes. Not surprisingly, eight of the nine counties he identifies are among the nine counties with the largest voting age population. Much of the remaining analysis by Young and the other experts focuses on these counties, which are allegedly "outliers."

This sloppy analysis is followed by "another anomaly that indicates suspicious results." His "anomaly" is nothing more than the fact that President Trump did not do as well with "mail-in votes" as he did with election day votes. PageID.1777. Of course, that was widely expected and understood, for an election in which President Trump discouraged absentee voting and Democrats promoted it.

Revealing an almost incomprehensible ignorance of Michigan election law for supposed "experts," Dr. Quinnell, together with Dr. Young, offer the finding that in two Michigan counties (Wayne and Oakland) demonstrate "excessive vote in

favor of Biden often in excess of new Democrat registrations." PageID.1778. Apparently, none of the experts, none of the Plaintiffs and none of the Plaintiffs' attorneys are aware that Michigan does not have party registration.

1. Spyder/Spider

Plaintiffs' "experts" rely on the partially redacted declaration of "Spider" or "Spyder," who Plaintiffs identify as "a former US Military Intelligence expert" and a "former electronic intelligence analyst with 305th Military Intelligence" Compl. ¶¶ 17, 161. But this was a lie *by Plaintiffs' counsel*. Plaintiffs did not properly redact the declarant's name when they filed the same affidavit in a different court, and it was publicly disclosed that the declarant's name was Joshua Merritt. While in the Army, Merritt enrolled in a training program at the 305th Military Intelligence Battalion, the unit he cites in his declaration, but he never completed the entry-level training course. A spokeswoman for the U.S. Army Intelligence Center of Excellence, which includes the battalion, stated "[h]e kept washing out of courses … [h]e's not an intelligence analyst." Ex. 17. According to the Washington Post, "Merritt blamed 'clerks' for Powell's legal team, who he said wrote the sentence [and] said he had not read it carefully before he signed his name swearing it was true. *Id.* He stated that "My original paperwork that I sent in didn't say that." *Id.* He later stated that "he had decided to remove himself from the legal effort altogether" (which has not happened). *Id.*

It is a near certainty that if Plaintiffs are compelled to publicly file unredacted declarations and affidavits, as they should be, numerous other redacted names and assertions will reveal that the redactions were made to keep the public from discovering more fraud perpetrated on this Court.

2. Russell James Ramsland, Jr.

Plaintiffs' "expert" Russell James Ramsland Jr. extrapolates large vote discrepancies from the Antrim County error in reporting early *unofficial* results. In doing so, he intentionally ignores the Secretary of State's report or simply does not do his homework. Ramsland reports "In Michigan we have seen reports of 6,000 votes in Antrim County that were switched from Donald Trump to Joe Biden *and were only discoverable through a hand counted manual recount*." Ramsland Affidavit ¶10; emphasis added. But, there were no hand recounts in Michigan as of that date.[18] The Secretary of State report is not even discussed. Incredibly, Ramsland has since doubled down on his perjury, after gaining access to a voting machine in Antrim County. He now claims, in support for the request for Certiorari to the Supreme Court in this action, that "[w]e observed an error rate of 68.05%" which

[18] Plaintiffs, who include six nominees to be Trump electors, including the Republican County Chair for Antrim County, the Republican County Chair of Oceana County and the Chair of the Wayne County Eleventh Congressional District, as well as their attorneys, should also know that when the expert report was prepared there had been no hand recount in Antrim County. An actual hand recount did occur at a later time, and that recount confirmed the accuracy of the official results, within 11 votes.

"demonstrated a significant and fatal error in security and election integrity." Although the basis for the percentage is unclear, the Antrim County clerk stated that "the 68% error rate reported by Ramsland may be related to [the] original error updating the ballot information." Ex. 18. The clerk of the Republican-heavy County said: "[t]he equipment is great — it's good equipment … [i]t's just that we didn't know what we needed to do (to properly update ballot information) … [w]e needed to be trained on the equipment that we have." *Id.* The claim was also proven to be false by the hand recount audit of the paper ballots in Antrim County, which added 11 net votes to the tally, not the 15,000 predicted by Ramsland. Ex. 16.

Ramsland makes the claim that turnout throughout the state was statistically improbable; but as discussed above, he bases this on fabricated statistics. He claims turnout of 781.91% in North Muskegon, where the publicly-available official results were known, as of election night, to be approximately 78%. Ex. 2. He claims turnout of 460.51% (or, elsewhere on the same chart, 90.59%) in Zeeland Charter Township, where it was already known to be 80%. *Id*. The *only* result out of 19 (not including the duplicates) that Ramsland got right was for Grand Island Township, with a turnout of 96.77%, comprised of 30 out of the township's 31 registered voters. *Id.*[19]

[19] Ramsland also claims it was "suspicious" that Biden's share of the vote increased as absentee ballots were tabulated. But, that suspicion require Ramsland to close his eyes to the incontrovertible fact that for the 2020 general election, absentee ballots favored Biden throughout the country, even in the deep red state of

President Trump repeated this blatantly false claim in his tape-recorded January 2, 2021 telephone conversation with Brad Raffensperger. Ex. 5.

Similarly, Ramsland relies upon the affidavit of Mellissa Carone in support of his claim that "ballots can be run through again effectively duplicating them." Ramsland Affidavit; Compl. Exh. 24 at ¶13. It is understandable that inexperienced challengers and Ms. Carone (who was a service contractor with no election experience) with conspiratorial mindsets might not understand that there are safeguards in place to prevent double counting of ballots in this way, but that does not excuse Plaintiffs' "experts," who choose to rely on these false claims, even after the official canvass had conclusively disproven the allegations.[20]

3. William Briggs/Matt Braynard

Plaintiffs rely on an "analysis" by William M. Briggs of "survey" results apparently posted in a tweet by Matt Braynard. Braynard's survey was submitted in

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Tennessee. https://tennesseestar.com/2020/11/05/republicans-dominate-the-2020-tennessee-election-cycle/.

[20] Emblematic of Plaintiffs' contempt for facts is another "expert" report that was filed with the original Complaint in this case, but not submitted with the Amended Complaint. Paragraph 18 of the original Complaint introduced "Expert Navid Kashaverez-Nia" and alleged that "[h]e concludes that hundreds of thousands of votes that were cast for President Trump in the 2020 general election were transferred to former Vice-President Biden." Notably, the "expert" relied on a finding that in "Edison County, MI, Vice President Biden received more than 100% of the votes.…" There is no Edison County in Michigan (or anywhere in the United States). The fabrication was only removed after it was discovered and reported by the news media.

a different case (*Johnson v. Secy of State*, Michigan Supreme Court Original Case No. 162286),[21] so its underlying falsehoods have been exposed. Braynard misrepresents Michigan election laws, and completely disregards standard analytical procedures to reach his contrived conclusions. He refers to voters who have "indefinitely confined status," something which has never existed in our state. He refers to individuals "who the State's database identifies as applying for *and the State sending an absentee ballot*," when, in Michigan, absentee ballots are never sent by the State. He refers repeatedly to "early voters," when Michigan has absentee voters, but, unlike some other states, has never allowed "early voting." He apparently believes (incorrectly) that every time a voter's residence changes before election day that voter is disenfranchised. Mr. Thomas addresses these factual and legal errors in the attached Affidavit. Ex. 13.

The disturbing inadequacy of Braynard's survey is also explained in the affidavit of Dr. Charles Stewart III, the Kenan Sahin Distinguished Professor of Political Science at the Massachusetts Institute of Technology. Dr. Stewart's credentials are impeccable and directly applicable to the subject matter. Ex. 20

[21] The "survey" as submitted in *Johnson* is attached here as Ex. 19. The request for relief was denied by the Supreme Court *Johnson*. *See Johnson v. Secy of State*, No. 162286, 2020 WL 7251084 (Mich. Dec. 9, 2020).

(Affidavit of Charles Stewart II) (originally submitted in *Johnson*).[22] At the request of the City of Detroit, Dr. Stewart reviewed the Braynard survey and came to the unqualified opinion that "Mr. Braynard's conclusions are without merit." (*Id.* ¶10). He explains the basis for his opinion in clear and understandable detail.

Briggs' analysis of Braynard's report estimate that "29,611 to 36,529 ballots out of the total 139,190 unreturned ballots (21.27% - 26.24%) were recorded for voters who had not requested them." Braynard says 834 people agreed to answer the question of whether they requested an absentee ballot. But he does not report how many respondents did not answer. More to the point, he does not explain how he confirms that these respondents understood what it meant for them to "request" an absentee ballot. Some might have gone to their local clerk's office to vote, where they signed a form, received a ballot and voted, without realizing that that form is an absentee ballot "request." Braynard concludes that certain people who failed to return a ballot never requested that ballot. But he does not address the possibility that the very people (139,190 out of more than 3.5 million) who would neglect to return a ballot would likely be those who might forget that they had requested one.

Braynard offers a baffling array of inconsistent numbers. On Page 8 of his report, he refers to "96,771 individuals who the State's database identifies as having

[22] Dr. Stewart is uniquely suited to address these issues. He is a member of the Caltech/MIT Voting Technology Project and the founding director of the MIT Election Data and Science Lab.

not returned an absentee ballot," when for his first two opinions that number is 139,190. On page 8, he reports a percentage of 15.37% not having mailed back their ballots, but on page 5 he identifies that percentage as 22.95%. Then, the actual numbers of individuals answering the question in that manner, described on page 8 (241 out of 740), would establish a percentage of 32.56%. If this were not sloppy enough, at the top of page 9, he reports, with no explanation "Based on these results, 47.52% of our sample of these absentee voters in the State did not request an absentee ballot." Even if his percentages were completely off and inconsistent, the data would be meaningless. Braynard ignores Michigan election procedures when he declares that there is evidence of illegal activity because some voters are identified in the State's database as having not returned an absentee ballot when those voters "did in fact mail back an absentee ballot…." But, when millions of citizens voted absentee, some of those mailed ballots were not received by election day. He also does not consider the possibility of a voter either not remembering accurately or not reporting accurately whether a ballot was mailed.[23]

Braynards' analysis of address changes is equally invalid. He misrepresents how change of address notifications work. It is not at all uncommon for one person

[23] A slightly modified version of the Briggs/Braynard analysis was rejected by the *Bowyer* court. *Bowyer*, 2020 WL 7238261, at *14 ("The sheer unreliability of the information underlying Mr. Briggs' 'analysis' of Mr. Braynard's 'data' cannot plausibly serve as a basis to overturn a presidential election, much less support plausible fraud claims against these Defendants.").

to move and file a change of address that appears to affect more household members, or a person might file a change of address for convenience during a temporary period away from home, without changing their legal residence. Stewart Aff ¶ 21. Every year, tens of thousands of Michigan voters spend long periods of time in other states (e.g., Florida or Arizona) without changing their permanent residence or voting address. Clerks have procedures in place to address these issues. Even voters who do make a permanent move can vote at their prior residence for sixty days if they do not register to vote at their new address.[24]

IV. Plaintiffs' Legal Theories Were Frivolous

Rule 11 places the failure to plead colorable legal theories squarely on the attorney making the claim. In addition to pleading false allegations, this lawsuit has always been legally dubious.

[24] It is not possible that these experts were simply negligent. They consistently ignore the obvious explanations for their so-called anomalies. For instance, Bouchard intentionally ignores the fact that unofficial results are released on a rolling basis, i.e. in "data dumps" accounting for hours of tabulation, to claim it was somehow anomalous for there to be large increases in the number of votes between data releases. Quinnell ignores the fact that voter turnout and preferences will change between elections based on the identities of the candidates, when he claims it was somehow anomalous for turnout to have increased for the 2020 election and for Biden to have picked up votes in suburban areas (a phenomenon seen throughout the country). He also ignores the well-known fact that urban core precincts in this country are strongholds for the Democratic Party, when he claims there was something anomalous about the fact that such precincts in Detroit strongly favored Biden. Many of these issues are addressed in the responses, and supporting exhibits, to Plaintiffs' Motion for Temporary Restraining Order. ECF Nos. 31, 36 and 39.

First, even if there had been a semblance of truth to any of Plaintiffs' allegations, the lawsuit would still have been frivolous because the relief requested could, in no way, be supported by the claims. As this Court stated, the relief Plaintiffs seek is to "disenfranchise the votes of the more than 5.5 million Michigan citizens who, with dignity, hope, and a promise of a voice, participated in the 2020 General Election." *King*, 2020 WL 7134198, at *1. Nothing Plaintiffs allege—or could allege—could lead to the "stunning" and "breathtaking" relief sought. *See, e.g.*, *Id.* (Stating Plaintiffs "seek relief that is stunning in its scope and breathtaking in its reach.")

Second, there has never been a colorable basis for Plaintiffs' attorneys to assert that the Plaintiffs had standing. The Complaint does not allege that Plaintiffs were denied the right to vote—an injury which would be particularized to the individual Plaintiffs—it alleges Plaintiffs' votes were diluted. As numerous courts have concluded, a dilution theory does not satisfy the Article III requirements of causation and "injury in fact." *See, e.g.*, *Georgia Republican Party v. Secy of State of Georgia*, No. 20-14741, 2020 WL 7488181 (11th Cir. Dec. 21, 2020); *Bognet v. Secy Commonwealth of Pennsylvania*, 980 F.3d 336 (3rd Cir. Nov. 13, 2020).

Importantly, as this Court concluded, even if Plaintiffs had met those two elements, the Plaintiffs would still not meet the redressability element, because "an order de-certifying the votes of approximately 2.8 million people would not reverse

the dilution of Plaintiffs' vote." *King*, 2020 WL 7134198, at *9. Counsel for Plaintiffs knew, or should have known, that their clients did not have Article III standing.

Third, there was never a legitimate basis to believe the lawsuit could proceed in the face Eleventh Amendment immunity. The one possibly applicable exception, *Ex Parte Young*, "does not apply, however, to *state law* claims against state officials, regardless of the relief sought." *King*, at *4 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) and *Ex Parte Young*, 209 U.S. 123 (1908)). As this Court noted, the issue has been long settled by the Supreme Court. *See Pennhurst*, at 106. And, with respect to the § 1983 claim, before this lawsuit was filed "the Michigan Board of State Canvassers had already certified the election results and Governor Whitmer had transmitted the State's slate of electors to the United States Archivist … [therefore] [t]here is no continuing violation to enjoin." *King*, at *5.

Fourth, there was never a basis to believe this case was not moot as of the date it was filed. As this Court stated, "[t]he Michigan Election Code sets forth detailed procedures for challenging an election, including deadlines for doing so … Plaintiffs did not avail themselves of the remedies established by the Michigan legislature." *Id.*, at *6. The deadline to pursue any such remedies had passed by the time the Complaint was filed, therefore, "[a]ny avenue for this Court to provide meaningful relief" was foreclosed from the start. *Id.*

Fifth, there was no reason for Plaintiffs' counsel to believe the case would not be barred by laches. As this Court concluded, the relief sought was barred by laches because "Plaintiffs could have lodged their constitutional challenges much sooner than they did, and certainly not three weeks after Election Day and one week after certification of almost three million votes." *Id.*, at *7.

Sixth, there was no reason to believe that alleging violations of the Michigan Election Code could support a claim for violation of the Elections & Electors Clauses. As this Court concluded, "Plaintiffs cite to no case—and this Court found none—supporting such an expansive approach." *Id.*, at *12.

Seventh, there was no basis to believe that the allegations could support an equal protection claim. The equal protection claim "is not supported by any allegation that Defendants' alleged schemes caused votes for President Trump to be changed to votes for Vice President Biden" with "the closest Plaintiffs get" being a statement by one affiant stating "I *believe* some of these workers were changing votes that had been cast for Donald Trump ..." *Id.* (citing to record). Similarly, "[t]he closest Plaintiffs get to alleging that election machines and software changed votes for President Trump to Vice President Biden in Wayne County is an amalgamation of theories, conjecture, and speculation that such alterations were *possible*." *Id.* (citing to record). It was patently obvious from the day this lawsuit was filed, that "[w]ith nothing but speculation and conjecture that votes for President Trump were

destroyed, discarded or switched to votes for Vice President Biden, Plaintiffs' equal protection claim fails." *Id.*, at *13 (citation omitted).

V. The Sanctions Which Should be Imposed Pursuant to Rule 11

This lawsuit, and the lawsuits filed in the other states, are not just damaging to our democratic experiment, they are also deeply corrosive to the judicial process itself. When determining what sanctions are appropriate, the Court should consider the nature of each violation, the circumstances in which it was committed, the circumstances of the individuals to be sanctioned, the circumstances of the parties who were adversely affected by the sanctionable conduct, and those sanctioning measures that would suffice to deter that individual from similar violations in the future. *Orlett v. Cincinnati Microwave, Inc.*, 954 F.2d 414 (6th Cir. 1992). Moreover, when considering the type of sanctions to impose, the Court should be mindful that the primary purpose of Rule 11 is to deter future, similar actions by the sanctioned party. *Mann*, 900 F.2d at 962.

Accordingly, this Court should impose monetary sanctions against Plaintiffs and their counsel in an amount sufficient to deter future misconduct. *See, e.g., INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc.*, 815 F.2d 391, 401 (6th Cir. 1987) (courts have wide discretion in determining amount of monetary sanctions necessary to deter future conduct). Here, an appropriate sanction amount is, at the least, the amount that Plaintiffs' counsel have collected in their fundraising

campaign, directly or through entities they own or control, for their challenges to the 2020 election. They should not be allowed to profit from their misconduct.

It is also appropriate for Plaintiffs and their counsel to pay all costs and attorney fees incurred by Defendants. *See, e.g.*, *id.*; *see also Roberson v. Norfolk Southern Railway Co.*, 2020 WL 4726937, at *7 (E.D. Mich. Aug. 14, 2020) (awarding costs incurred by Defendant as a sanction against Plaintiff and Plaintiff's counsel for filing frivolous claims unsupported by law). In *Stephenson v. Central Michigan University*, No. 12-10261, 2013 WL 306514, at *14 (E.D. Mich. Jan. 25, 2013), attorney fees and costs were awarded as sanctions after the plaintiff's refusal to withdraw her frivolous claims during the 21-day safe harbor period provided by Rule 11. Sanctions were warranted because the plaintiff "brought a frivolous lawsuit which lacked evidentiary support, and continued to pursue her claims once the lack of support was evident …." *Id*. The same applies here. Plaintiffs' claims were frivolous from the start, yet they refused to withdraw them when provided the opportunity. As a result, Defendants should be reimbursed for their attorney fees and costs.

Plaintiffs should also be required to post a bond of $100,000 to maintain their present (frivolous) appeal and for each additional appeal in this action. *See, e.g.*, *SLS v. Detroit Public Schools*, No. 08-14615, 2012 WL 3489653, at *1 (E.D. Mich. Aug. 15, 2012) (requiring the plaintiff to file $300,000.00 security bond).

To protect against their future filing of frivolous lawsuits in this District, Plaintiffs and their counsel should be required to obtain pre-clearance by a magistrate judge of any proposed lawsuit. If the magistrate determines that the proposed claims are frivolous or asserted for an improper purpose, the plaintiff[s] would be required to post a bond before filing the proposed action in an amount the magistrate determines is sufficient to protect the defendant[s]. *See, e.g.*, *Feathers v Chevron U.S.A., Inc*., 141 F.3d 26, 269 (6th Cir. 1998) ("There is nothing unusual about imposing prefiling restrictions in matters with a history of repetitive or vexatious litigation."); *see also, Ortman v. Thomas*, 99 F.3d 807, 811 (6th Cir. 1996) (permanently enjoining plaintiff from filing action based on particular factual or legal claims without first obtaining certification from a United States Magistrate that the claim is not frivolous).

Much of this brief addresses attorney misconduct, but this is the rare case where the Plaintiffs themselves deserve severe sanctions. Each plaintiff in this case is an experienced Michigan politician; each plaintiff was selected as a candidate to serve as a Trump elector; and, each plaintiff had to know that the Complaint is rife with false allegations. None of the Plaintiffs had any legitimate basis to believe any of the factual assertions in the Complaint, yet they signed on. And, indeed, they signed on to claims they had to know were false, including the numerous claims by their supposed experts.

The Plaintiffs know that Michigan does not have party registration. They know that Michigan does not have "early voting." They know that the nine counties identified as "outliers" because of larger raw vote shifts are simply some of the largest counties in the State. They know that the State does not mail ballots to voters. They know that it is common in Michigan for voters to vote absentee by appearing at the clerk's office, signing an application, receiving a ballot and returning it, all on the same day. They know that some absentee ballots are mailed by voters but received too late to be counted. They know that counting fifty ballots eight or ten times (as alleged by Mellissa Carone) would be found and corrected at multiple stages of the tabulation and canvassing process. They know that there could not have been a hand recount in Antrim County before the lawsuit was filed. They know that absentee ballots took longer to tabulate than in-person ballots and that Biden supporters were more likely to vote absentee than Trump supporters. And, these experienced Michigan politicians know that their "experts" based their findings on disregarding all of these facts.

In a case of this magnitude, intended to upend the election of the President of the United States, the Plaintiffs owed this Court the highest degree of due diligence before filing suit. Instead, there are only two possibilities—these six Plaintiffs did not read the Complaint and the expert reports supporting it; or, they did read the Complaint and the faulty expert reports and did not care that false representations

were being made to this Court. Either way, this case cries out for sanctions to deter this behavior in the future.

VI. Plaintiffs' Counsel Should also be Disciplined and Referred to the Chief Judge for Disbarment

In addressing attorney misconduct, the most important sanction here is not a Rule 11 sanction, but a disciplinary action pursuant to the Local Rules. The message must be sent that the Eastern District of Michigan does not tolerate frivolous lawsuits. The out of state attorneys appearing on the pleadings for the Plaintiffs never sought admission to the Eastern District of Michigan and never affirmed their acceptance of our Civility Principles. They have demonstrated their unwillingness to be guided by those principles, and they should be barred from returning to our courts.

E. D. Mich. LR 83.20(a)(1) defines "practice in this court," to include: "appear in, commence, conduct, prosecute, or defend the action or proceeding; appear in open court; sign a paper; participate in a pretrial conference; represent a client at a deposition; or otherwise practice in this court or before an officer of this court."[25] "When misconduct or allegations of misconduct that, if substantiated, would warrant

[25] The Rule requires that a "person practicing in this court must know these rules, including the provisions for sanctions for violating the rules." Under 83.20(j) an attorney "who practices in this court" is subject to the Michigan Rules of Professional Conduct, "and consents to the jurisdiction of this court and the Michigan Attorney Grievance Commission and Michigan Attorney Discipline Board for purposes of disciplinary proceedings."

discipline of an attorney" who is a member of the bar or has "practiced in this court" come to the attention of a judicial officer by complaint or otherwise, the judicial officer may refer the matter to: (1) the Michigan Attorney Grievance Commission, (2) another disciplinary authority that has jurisdiction over the attorney, or (3) the chief district judge for institution of disciplinary proceedings ..." LR 83.22.

This case clearly warrants the full imposition of each disciplinary option in the Local Rules. This Court should enter an Order requiring Plaintiffs' to show cause why they should not be disciplined. LR 83.22(d) authorizes the Court to levy punishments other than suspension or disbarment on a practicing attorney whose conduct has violated the Rules of Professional Conduct, the Local Rules, the Federal Rules of Civil or Bankruptcy Procedure, orders of the Court, or who has engaged in conduct considered to be "unbecoming of a member of the bar of this court." In *Holling v. U.S.*, 934 F. Supp. 251 (E.D. Mich. 1996), this Court levied monetary sanctions and a formal reprimand against counsel for raising frivolous arguments. "Enforcing Rule 11 is the judge's duty, albeit unpleasant. A judge would do a disservice by shying away from administering criticism … where called for." *Id.*, at 253 n. 6 (quoting *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 878 (5th Cir. 1988)). The conduct of Plaintiffs' counsel in knowingly asserting false and frivolous claims while seeking relief with massive implications for our democracy warrants the strongest possible disciplinary action.

The Court should refer Plaintiffs' counsel to the Chief Judge of this District for disbarment proceedings and to their state bars for disciplinary actions. It appears that only one of the Plaintiffs' attorneys in the case—Greg Rohl—is admitted to practice in this District; he should be barred from further practice in the District.[26] The other attorneys should be prohibited from obtaining admission to this District or practicing in it in any manner, including, where, as here, they do not seek formal admission, but sign the pleadings.

All Plaintiffs' attorneys should also be referred for disciplinary proceedings to the Michigan Attorney Grievance Commission as well as to the disciplinary authorities in their home states (Sidney Powell, Texas; L. Lin Wood, Georgia; Emily

[26] Greg Rohl is the one attorney for Plaintiffs currently admitted to the Eastern District of Michigan. He has previously been sanctioned for filing a case which was deemed "frivolous from its inception" and ordered to pay over $200,000 in costs and attorney fees. *See DeGeorge v. Warheit*, 276 Mich. App. 587, 589, 741 N.W.2d 384 (2007). He was then held in criminal contempt and sentenced to jail—affirmed by the Court of Appeals—for attempting to transfer assets to evade payment. *Id.* The Court of Appeals noted that a bankruptcy court had concluded that Rohl "intended to hinder, delay and defraud … and create a sham transaction to prevent [a creditor] from reaching Rohl's interest in his law firm through the appointment of a receiver." *Id.* at 590. Rohl was also suspended by the Michigan Attorney Discipline Board in 2016 based on his convictions for disorderly conduct, in violation of M.C.L. § 750.1671F, "telecommunications service - malicious use, in violation of M.C.L. § 750.540E" and based on his admissions to at least two additional allegations of professional misconduct. Ex. 21. Those prior sanctions and disciplines were insufficient to discourage Mr. Rohl from filing the case at bar, leaving this Court with only one way to stop his behavior—he should be barred from practice in the Eastern District of Michigan.

Newman, Virginia; Julia Hallller, D.C.; Brandon Johnson, D.C.; Howard Kleinhendler, New York). Those authorities can determine the appropriate response.

It is only by responding with the harshest possible discipline that these attorneys and those who would follow in their footsteps will learn to respect the integrity of the court system.

CONCLUSION

WHEREFORE, for the foregoing reasons, the City of Detroit respectfully requests that this Court enter an Order sanctioning Plaintiffs and their counsel and initiating disciplinary proceedings in the manner identified in the Motion.

January 5, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 5, 2021, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification of such filing to all attorneys of record registered for electronic filing.

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY KING, MARIAN SHERIDAN,
JOHN HAGGARD, CHARLES RITCHARD,
JAMES HOOPER, DAREN RUBINGH,

Plaintiffs,

v.

GRETCHEN WHITMER, in her official capacity as the Governor of the State of Michigan, JOCELYN BENSON, in her official capacity as Michigan Secretary of State and the Michigan BOARD OF STATE CANVASSERS,

Defendants,

and

CITY OF DETROIT, DEMOCRATIC NATIONAL COMMITTEE and MICHIGAN DEMOCRATIC PARTY,
Intervenor-Defendants.

Defendant.

CASE NO. 2:20-cv-13134

Hon. Linda V. Parker

Mag. R. Steven Whalen

PLAINTIFFS' OPPOSITION TO THE CITY OF DETROIT'S MOTION FOR SANCTIONS, FOR DISCIPLINARY ACTION, FOR DISBARMENT REFERRAL AND FOR REFERRAL TO STATE BAR DISCIPLINARY BODIES AND TO THE DEFENDANTS WHITMER AND BENSON'S CONCURRENCE IN CITY OF DETROIT'S MOTION FOR SANCTIONS

The City of Detroit's Motion for Sanctions, for Disciplinary Action, for Disbarment Referral And for Referral To State Bar Disciplinary Bodies is baseless, procedurally improper, and is an attempt to create a dangerous precedent that could dissuade future civil rights and voting rights plaintiffs from bringing their disputes to court. It should be denied, and the City of Detroit should be ordered to pay Plaintiffs' fees and costs incurred in opposing the motion.

Issue Presented

Whether Plaintiffs and their' counsel should be sanctioned under Rule 11, Plaintiffs' counsel disbarred or referred to State Bar Disciplinary Bodies: No.

Controlling Authority

Cases

Beverly v. Sherman, No. 2:19-CV-11473, WL 2556674 (E.D. Mich. May 20, 2020)

DeBauche v. Trani, 191 F.3d 499 (4th Cir.1999)

FM Indus. v. Citicorp Credit Servs., 614 F.3d 335 (7th Cir. 2010) (*citing Claiborne v. Wisdom*, 414 F.3d 715 (7th Cir. 2005)

In re Ruben, 825 F.2d 977 (6th Cir. 1987)

Jensen v. Phillips Screw Co., 546 F.3d 59 (1st Cir. 2008).

Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 45(2011) (*citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570(2007).

Matter of Yagman, 796 F.2d 1165 (9th Cir. 1986)

MEMC Elec. Mat'ls, Inc. v. Mitsubishi Mat'ls Silicone Corp., 420 F.3d 1369 (Fed.Cir.2005)

Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater, 465 F.3d 642 (6th Cir. 2006)

Ridder v. City of Springfield, 109 F.3d 298 (6th Cir. 1997)

Steinert v. Winn Group, Inc., 440 F.3d 1214 (10th Cir.2006)

Thurmond v. Wayne Cnty. Sheriff Dept., 564 F. App'x 823 (6th Cir. 2014)

United States v. Ross, 535 F.2d 346

Young v. Smith, 269 F. Supp. 3d 251 (3d Cir. 2017)

Statutes & Court Rules

28 U.S.C. § 1927

Fed. R. Civ. P. 54(d)(2)

MCLS § 168.726

Introduction

Defendants do not allege specific deficiencies in pleadings; instead they attack the credibility of evidence attached to the complaint, whether by Declaration or Affidavit – despite the Plaintiffs submitting evidence for nearly every paragraph in the Amended Complaint, with over 200 affidavits and declarations, and never having an evidentiary hearing.

Election integrity should be a non-partisan issue. In late December of 2019, three Democrat Senators, Warren, Klobuchar, Wyden and House Member Mark Pocan wrote about their 'particularized concerns that secretive & "*trouble -plagued companies*"' "*have long skimped on security in favor of convenience*," in the context of how they described the voting machine systems that three large vendors – Election Systems & Software,

Dominion Voting Systems, & Hart InterCivic – collectively provide voting machines & software that facilitate voting for over 90% of all eligible voters in the U.S." (*See* Am. Compl. at p. 59, par. G, citing Ex. 16).

Defendants' Motion reeks of political smear tactic and promotes a one-sided political viewpoint, rather than seeking to uphold any professional standards governing lawyers. Actually, it is the conduct of Defendants and their counsel that violates the code of legal ethics. The City's request for sanctions must be denied, for multiple reasons explained in the Brief in Support below, filed pursuant to Local Rule 7.1(d)(1)(A). The State Defendants' passing request for "sanctions and/or costs and fees" is procedurally improper, as it was not made by motion with a supporting as required under Local Rule 7.1(b) and 7.1(d)(1)(A), and likewise must be denied.

Procedural background

On January 5, 2021, the City moved for sanctions under Rule 11, as well as for the extraordinary remedy of the disbarment of SEVEN attorneys, and their referral to state bars for disciplinary action. The City had previously moved for sanctions under 28 U.S.C. § 1927 ("Section 1927"),. (See ECF 70 and 73). On January 14, 2021, the State Defendants filed a Consent to the City's motion stating that they reserve the right to file their own motion for sanction at a future date. ECF ___. The "Consent" is not a recognizable motion and adds nothing to the motion presented by the City.

On November 25, 2020, Plaintiffs filed their Complaint. [ECF 1]. Plaintiffs amended their complaint on November 29th and also filed a motion for a TRO [ECF

6, 7]. Since its initial filings, Plaintiffs have taken every reasonable measure to expedite this proceeding and to terminate the proceeding once their claims were no longer viable. In their November 29, 2020 "Emergency Motion for Declaratory, Emergency, and Permanent Injunctive Relief" ("TRO Motion"), ECF No. 7, Plaintiffs requested an expedited briefing schedule, which the Court granted. ECF No. 24. On December 7, 2020, without oral argument, and based solely on the initial pleadings and responses, the Court denied the TRO Motion (See ECF No. 62). Plaintiffs promptly appealed to the Sixth Circuit and to the US Supreme Court. [ECF Nos. 64 and 68].

On December 22, 2020, with these appeals pending, the State Defendants and Intervenors moved to dismiss the Amended Complaint. [ECF Nos. 70, 72, 73] On January 6, 2021, the US Congress "certified the election", rendering Plaintiffs' claims moot. On January 14, 2020 Plaintiffs voluntary dismissed the Amended Complaint for all Defendants and Defendant/Intervenors other than Mr. Davis. On January 17, 2021 regarding Intervenor Defendant Davis, Plaintiffs moved for voluntary dismissal ECF No. 86-92.

LEGAL ARGUMENT

I. The Requests for Rule 11 Sanctions Fail for Procedural Reasons.

The City's Motion for both Rule 11 sanctions and for disbarment of attorneys and their referral to state bar associations for disciplinary action is procedurally improper because it violates the requirement that a Rule 11 sanctions motion "must be

made separately from ***any other motion***," Fed. R. Civ. P. Rule 11(c)(2) (emphasis added). The City has not cited any provision of the Federal Rules of Civil Procedure or Local Rules authorizing such a bundling or multiple types of sanctionable relief. The City intervened in this suit solely for the purpose of seeking sanctions—an action itself improper. It filed its specious motion in its own improper effort to promote its own agenda with the media and to distract from explosive evidence of voter fraud. Its motion is far more of a crafted smear to injure the standing and reputation of the Plaintiffs' attorneys than one to uphold any professional standards. Indeed, the City violated the very standards it purported to uphold by filing its spurious motion. There is no legal or factual basis for this Court to grant the City's requested relief. Accordingly, because the City has submitted one motion for Rule 11 sanctions and other types of punitive non-Rule 11 relief, the entire motion must be denied. *See, e.g.*, *Dolinka Vannoord & Co. v. Oppenheimer & Co.,* 891 F. Supp. 1244, 1252 (W.D. Mich. 1995) (sanctions denied for failure to comply with separate Rule 11 motion requirement; "In any event, due to the uncertainty of Michigan law on the key issues in this case … sanctions would [have] be[en] inappropriate."); *Peloza v. Capistrano United Sch. Dist.,* 37 F.3d 517, 524 (9th Cir. 1994) (reversing sanctions award of $32,000 and finding First Amendment claims non-frivolous because plaintiff raised important questions of first impression), *cert. denied*, 515 U.S. 1173 (1995); *Milwaukee Concrete Studios, Ltd. v. Field Mfg. Co.*, 8 F.3d 441 (7th Cir. 1993) (vacating sanctions because case involved issues of first impression); *United States v. Alexander*, 981 F.2d 250, 253 (5th Cir. 1993) (vacating

imposition of sanctions; case presented novel issues and party's argument was plausible); *Clancy v. Mobil Oil Corp.,* 906 F. Supp. 42, 50 (D. Mass. 1995) ("In light of the lack of clearly defined First Circuit precedent in this area, plaintiffs' argument … is not entirely unfounded. … Plaintiffs' arguments therefore fall outside the reach of Rule 11."); *Fowler v. Towse*, 900 F. Supp. 454, 461 (S.D. Fla. 1995) (sanctions denied for non-frivolous argument on novel issue).

Secondly, the City's motion must be denied as to all attorneys who did not actually appear or sign any pleadings in this matter. Rule 11 is concerned with the signing of frivolous pleadings and other papers. *Oliveri v. Thompson*, 803 F.2d 1265, 1274 (2nd Cir. 1986). It may not be invoked against attorneys whose names appear on a pleading but who have not signed the pleading or otherwise formally appeared in the action. *In re Ruben*, 825 F.2d 977, 984, (6th Cir. 1987).

Indeed, "[w]here plaintiff signed filed papers, but the attorney's name appeared on papers only in typewritten form, sanctions cannot be imposed on attorney since Rule 11 focuses only on individual who signed document in question. *White v. American Airlines, Inc.*, 915 F.2d 1414, 17 Fed. R. Serv. 3d (Callaghan) 1199, 6 I.E.R. Cas. (BNA) 1086, 116 Lab. Cas. (CCH) ¶56400, 1990 U.S. App. LEXIS 17201 (10th Cir. 1990). Typewritten name is not signature for purpose of Rule 11, and therefore senior partner of law firm which represented defendants and whose name was typed on pleadings but who did not personally sign them is not subject to Rule 11 sanctions. *Giebelhaus v. Spindrift Yachts*, 938 F.2d 962, 91 Cal. Daily Op. Service 5352, 91 D.A.R.

8248, 19 Fed. R. Serv. 3d (Callaghan) 1364, 1991 U.S. App. LEXIS 14212 (9th Cir. 1991)."

Id. *See also* Commentary, USCS Fed Rules Civ Proc R 11.

The Sixth Circuit in *In re Ruben* cited to *Oliveri v. Thompson*, 803 F.2d 1265, 1274 (2nd Cir. 1986) which held that:

> Rule 11, requires that "every pleading, motion, and other paper of a party represented by an attorney shall be signed" by the attorney. It then provides that:
>
> the signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> Fed. R. Civ. P. 11.
>
> …From this language it is apparent that a sanction for attorneys' fees may be imposed either on the attorney who signs a paper, or on the party he represents, or on both. The key to rule 11 lies in the certification flowing from the signature to a pleading, motion, or other paper in a lawsuit. While a continuing prohibition against dilatory litigation is imposed by § 1927, *see Roadway Express*, 447 U.S. at 757; *Browning Debenture Holders' Committee*, 560 F.2d at 1088, rule 11, by contrast, deals with the signing of particular papers in violation of the implicit certification invoked by the signature.
>
> Rule 11 applies only to the initial signing of a "pleading, motion, or other paper". Limiting the application of Rule 11 to testing the attorney's conduct at the time a paper is signed is virtually mandated by the plain language of the rule. Entitled "Signing of Pleadings, Motions, and Other Papers; Sanctions", the rule refers repeatedly to the signing of papers; its central feature is the certification established by the signature.

Oliveri v. Thompson, 803 F.2d 1265, 1274 (2nd Cir. 1986)

For this reason alone, the City's motion against all counsel other than local counsel, must be denied. The only signator or appearance made in the short life of this case has been by Plaintiffs' local counsel. No other counsel signed any pleadings. Indeed, the City recognizes that E. D. Mich. LR 83.20(a)(1) defines "practice in this court," to include: "appear in, commence, conduct, prosecute, or defend the action or proceeding; appear in open court; sign a paper; participate in a pretrial conference; represent a client at a deposition; or otherwise practice in this court or before an officer of this court." (See ECF 78, p. 37). None of that applies to any of Plaintiffs' non-local counsel.

II. Rule 11(c)(2)'s Safe Harbor Notice Requirement and Plaintiff's Voluntary Dismissal of Complaint within 21 Days.

As a preliminary matter, Rule 11(c)(2) sets forth that:

> (2) Motion for Sanctions. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

USCS Fed Rules Civ Proc R 11.

The City' Rule 11 motion claims regarding frivolous legal claims and unsupported factual allegations must be dismissed for failure to provide 21-days' notice and opportunity for response under Rule 11(c)(2). Plaintiffs moved to voluntarily dismiss this case (and thereby withdraw all pleadings) on January 14, 2021. The City

served a copy of notice of an anticipated Motion on Plaintiffs' counsel on December 15, 2020. That "notice" makes only conclusory statements and blanket assertions regarding the alleged violations of Rule 11 and fails altogether to "describe the specific conduct that allegedly violates Rule 11(b)." *Id.* Further, it fails to identify any specific factual allegation or witness that lacks evidentiary support. Instead, it is only in the accompanying Brief, filed on January 5, 2021, that the City first identifies the "specific conduct" that allegedly violates Rule 11. For r example, the Motion contains only a single sentence identifying specific contested factual allegations, ECF No. 78 at vii, while the Brief spends 13 pages.

In *Hadges & Kunstler v. Yonkers Racing Corp.,* 48 F.3d 1320, 1327-28 (2d Cir. 1995) the Second Circuit commented on the amendment, as follows:

> Of particular relevance here, the 1993 amendment establishes a "safe harbor" of 21 days during which factual or legal contentions may be withdrawn or appropriately corrected in order to avoid sanction. Fed. R. Civ. P. 11(c)(1)(A).
> *Photocircuits Corp. v. Marathon Agents*, 162 F.R.D. 449, 451, (E.D. N.Y. 1995)

In addition, as the court in *Cromwell v. Cummings*, *supra*, 65 Cal. App. 4th Supp. 10, recognized, "[a]pplication of the doctrine of substantial compliance would be inconsistent with the plain language of the 'safe harbor' provision, which has been strictly construed as an absolute perquisite to an award of sanctions under revised rule 11 of the Federal Rules of Civil Procedure (28 U.S.C). *Barnes v. Department of Corrections*, 74 Cal. App. 4th 126, 135-136, 87 Cal. Rptr. 2d 594, 602, (Ca. App. 1999)(*Citing Ridder*

v. City of Springfield, supra, 109 F.3d at p. 296.)" (*Id.* at p. Supp. 15.) Indeed, the Advisory Committee Notes to rule 11 state: "To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, **the revision provides that the 'safe harbor' period begins to run only upon *service of the motion***. In most cases however, *counsel should be expected to give informal notice* to the other party, whether in person or by a telephone call or *letter*, of a potential violation before proceeding to prepare and serve a Rule 11 motion." (Fed. Rules Civ. Proc., Rule 11, 28 U.S.C.A., *supra*, Advisory Com. Notes, 1993 amendments, p. 284, italics added.)

This Court must, at a minimum, deny the Motion with respect to any argument, claim or contention first described in the City's Brief, as protected under the Rule 11(c)(2) safe harbor, and should deny the Motion as a whole based on the City's filing of the Motion on January 5th, 2020, because Defendants' filed dismissals to this Court for all parties on January 14, 2020, and regarding Intervenor Defendant Davis on January 17th, 2020.

As explained above, Plaintiffs promptly moved to voluntarily dismiss this case in its entirety, including pending appeals, within the 21-day notice period of the filing of the motion on January 5, 2020, (See ECF 78) and (ECF 86-92).

III. Rule 11(b)(1): The Complaint Was Properly Filed with Proper Purpose

A. Plaintiffs Did Not Seek to Harass the City

Even if the City's Motion were not procedurally barred, Plaintiffs and their counsel have not violated Rule 11. Rule 11 provides that "sanctions may be imposed if a reasonable inquiry discloses [that a] pleading, motion, or paper is (1) not well grounded in fact, (2) not warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, or (3) interposed for any improper purpose such as harassment or delay." *Sony/ATV Music Publ'g LLC v. 1729172 Ont., Inc.*, 2018 U.S. Dist. LEXIS 140856, *36-37, 2018 WL 4007537, (*citing Merritt v. Int'l Ass'n of Machinists & Aerospace Workers*, 613 F.3d 609, 626 (6th Cir. 2010) (citation omitted).... 'In order for conduct to be considered so "unreasonable" as to warrant sanctions, that conduct must be "relatively egregious."' *Id.* (*citing Fulmer v. MPW Indus. Servs., Inc.*, 2006 U.S. Dist. LEXIS 42038, 2006 WL 1722433 at *5 (M.D. Tenn. June 21, 2006) (Trauger, J.).

"'A district court abuses its discretion if it bases its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence.'" *Shirvell v. Gordon*, 602 Fed. Appx. 601, 604 (6th Cir. 2015) (*citing Merritt v. Int'l Ass'n of Machinists and Aerospace Workers*, 613 F.3d 609, 619 (6th Cir. 2010) (quoting *Brown v. Raymond Corp.*, 432 F.3d 640, 647 (6th Cir. 2005)).

Plaintiffs did not file for "any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase cost of litigation." Fed. R. Civ. P. Rule 11(b)(1). First, the City of Detroit was an intervenor in this proceeding, not a defendant; nor was the City of Detroit a necessary party. Plaintiffs did not seek any

relief from the City of Detroit, or its officials or employees. The City voluntarily intervened purportedly to "protect its reputation" and its own perception of election integrity. *See* ECF No. 5 at 4. But the City was not accused of conducting elections improperly. It does not conduct elections for the President of the United States. States, through their counties, do. So while Detroit sits in Wayne County, and allegations were made concerning fraudulent election activity in that county, the City of Detroit has no role in the matter, and it should not have intervened.

Apart from its serial motions for sanctions, the City of Detroit has not made any unique legal arguments, but simply parroted the same arguments made by Defendants and other intervenors. Accordingly, Plaintiffs cannot be deemed to have filed for purposes of harassing the City, and in fact, opposed the City's intervention. *See* ECF No. 5 at 1.

B. Public Statements and Tweets By Co-Counsel Do Not Demonstrate That Plaintiffs or Counsel Had Improper Purpose but State Defendants' Statements Call into Question the Propriety of Defendants' Purpose.

The City's speculative attribution of an improper motive attributable to Plaintiffs' counsel because of the media appearances of Lin Wood and Sidney Powell do not implicate Rule 11(b)(1), as neither Mr. Wood nor Ms. Powell was a signer to the pleadings. The tweets referenced in the City of Detroit's outlandish character assassination of plaintiffs' counsel have nothing to do with the merits of the suit, the claims set forth in this Court, or the evidence provided by plaintiffs' counsel in support

of their claims. Put frankly, they are entirely irrelevant to a Rule 11 consideration, particularly because no signer was the author or instigator of this media content. The actual signers of the pleading did not produce the tweets, reference the tweets, or retweet the tweets and have not been accused of making improper media appearances.

The Fourth Circuit in *In re Kunstler* held that any improper purpose must be "derived from the motive of the *signer* in pursuing the suit." 914 F.2d 505, 518–19 (4th Cir. 1990) (emphasis added). A Court may consider a *signer's* subjective beliefs in the purpose analysis, solely if they so clearly demonstrate the signer knew the motion was baseless, and despite this knowledge, proceeded to file. *Id* at 519. Otherwise, the Court must judge the conduct of counsel under an objective standard of reasonableness. *Id.* at 518. Any evidence that cannot be viewed by a court without fear of misinterpretation, or that involves difficult determinations of credibility, is not objective for purposes of a Rule 11(b)(1) analysis. *Id.* at 519. Because neither Mr. Wood nor Ms. Powell were signers to the pleading, this Court may not assess their subjective beliefs in the improper purpose analysis; and there is not even a viable inference that local counsel had any improper purpose.

Even if the Court were to improperly consider the tweets, an evidentiary hearing would be required to assess the veracity of the media statements and their role in impacting the signer's decision to file the suit. As "determinations of credibility are best made after an evidentiary hearing," and because these media statements are the opinions of attorneys who did not sign the pleading, this Court cannot assume improper purpose

from extrajudicial statements that are not objective, nor were made by the signer. *Id.* at 519-20. Plaintiffs' counsel welcomes the opportunity to participate in an evidentiary hearing to consider the credibility of the evidence presented before this Court.

The State Defendants address Sidney Powell's tweets regarding election integrity issues and concerns about getting an opportunity to be heard in court in their Motion for Sanctions. (See ECF No. 78, pp. 6, 10). Defendants cite tweets alleging that "those false messages are deliberately advanced by these attorneys to support their goals of undermining our democracy" but by threatening plaintiffs and counsel over messages, Defendants undermine the Due Process Clause of the Constitution, "No person shall...be deprived of life, liberty, or property, without due process of law..." Defendants, however, have instead put out ,media headlines and talking points and messages *under the official color of law* to attempt punish Ms. Powell or other counsel over messages on election integrity or the lack thereof - while they had not yet filed or put Plaintiffs on notice of a Rule 11(c)(2) Motion for Sanctions, and appear to be working with one political party rather than from a position of neutrality incumbent on official government actors.

On December 22, 2020, the Michigan Attorney General is quoted in public statements on making assertions that, under color of law, she will seek to get counsel disbarred, where she is using her public office and appears that it is coordinated with DNC Counsel's statements from December 15, 2020.

On December 15, 2002, the City emailed a notice of its intent to file sanctions motions, purportedly to provide "notice to correct" under Rule 11 - but that December 15th notice appears instead to be coordinated with public statements put out that same day by both the Michigan Attorney General and counsel for the DNC. Specifically, they commented on the need to ensure Plaintiffs' and Plaintiffs' counsel "*pay a price*" for filing election integrity cases. "It's time for this nonsense to end," the City's lawyer **David Fink** told Law & Crime in a phone interview. "The lawyers filing these frivolous cases that undermine democracy **must pay a price**," Fink added.

Indeed, even before the City's motion had been filed, it was tweeted out by **Marc Elias**, an attorney from the Washington-based firm Perkins Coie who has regularly intervened in these cases on behalf of the Democratic Party and the Biden campaign.[1]

But that's not all. Not to be undone by counsel for the City and the DNC, the Michigan Attorney General made the following slanderous and outrageous official statement concerning the filings in this case in which her office appears as counsel of record for the State Defendants:

> "These are *flagrant lies* that Ms. Powell is submitting to, of all places, the United States Supreme Court in some cases. It's disturbing and it undermines our entire profession, and she has to be held accountable,"

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[1] *Detroit Is Trying to Get Sidney Powell Fined, Banned from Court, and Referred to the Bar for Filing the 'Kraken', lawandcrime.com, by Adam Klasfeld, December 15, 2020*https://lawandcrime.com/2020-election/detroit-is-trying-to-get-sidney-powell-fined-banned-from-court-and-referred-to-the-bar-for-filing-the-kraken/*)*

> Nessel told Detroit reporters. "We'd be asking there be action taken against her law license including potential disbarment."[2]

It appears that their primary motivation in seeking to intervene in this case was to file serial sanctions motions and to defend its reputation, a purpose that has been held to be an impermissible and not to provide standing for filing Rule 11 sanctions. *See, e.g., New York News, Inc. v. Kheel*, 972 F.3d 482, 488 (2d Cir. 1992) (finding aggrieved non-party lacked standing to file Rule 11 motion for purportedly baseless allegations in plaintiffs' complaint).Accordingly, there is no basis for this Court to apply Rule 11 sanctions to non-counsel of record for public statements made. On the contrary, it is defense counsel whose motives for bringing the instant motion and whose

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[2] Michigan Attorney General Wants to Disbar Sidney Powell, Pro-Trump Attorneys: Michigan is moving to disbar Sidney Powell and other pro-Trump attorneys for the work exposing credible accusations of voter fraud. The National File, By Frankie Stockes by Frankie Stockes December 26, 2020.

https://nationalfile.com/michigan-attorney-general-wants-to-disbar-sidney-powell-pro-trump-attorneys/; see also "The Democratic attorney general also plans to pursue court costs and fees and to file complaints with the attorney grievance commission, Nessel told reporters Tuesday." Sanctions sought against lawyers who pushed to overturn Michigan's election, the Detroit News, by Beth LeBlanc and Craign Mauger, December 22, 2020

https://www.detroitnews.com/story/news/local/michigan/2020/12/22/nessel-seek-sanctions-against-lawyers-challenging-election-results/4009929001/

The Motor City's motion asks a federal judge to fine the lawyers, ban them from practicing in the Eastern District in Michigan and refer them to the Wolverine State's bar for grievance proceedings.)

contrary, it is the public statements made by counsel for the City of Detroit and the State of Michigan, under color or law, which should be closely scrutinized.

C. Plaintiffs Have Not Caused Unnecessary Delay or to Unnecessarily Increased Costs

Plaintiffs have taken every reasonable measure to expedite this proceeding and to terminate the proceeding once their claims were no longer viable while seeking relief for their clients. In their November 29, 2020 "Emergency Motion for Declaratory, Emergency, and Permanent Injunctive Relief" ("TRO Motion"), ECF No. 7, Plaintiffs requested an expedited briefing schedule, and agreed to forego an evidentiary hearing and discovery specifically because of the time pressure on the relevance of the claims related to election fraud which by their very nature are challenging to bring because of the short time available to file suit. This Court granted the request for expedited briefing, ECF No. 24, and based solely on the initial pleadings and responses, dismissed the TRO Motion a mere eight days later on December 7, 2020. (See ECF No. 62). Further, thereafter Plaintiffs expeditiously moved for voluntary dismissal of the November 29, 2020 Amended Complaint, ECF No. 6, because the relief requested in the Amended Complaint appears to now have become moot.

Plaintiffs moved as expeditiously as possible, while acting in the best interests of their clients, from the outset through the termination of this proceeding, it is the City that seeks to prolong this proceeding with meritless claims for sanctions, supported

solely by incendiary accusations and ad hominem attacks on Plaintiffs' counsel and willful misrepresentations of Plaintiffs' claims and motives.

V. Rule 11(b)(2), (b)(3): Plaintiffs Legal Claims Had Evidentiary Support and Were Not Frivolous

The commentary applicable to determining Rule 3.1. Meritorious Claims and Contentions explains:

> The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good-faith arguments in support of their clients' positions.

MRPC 3.1. 'As amended, the rule "stresses the need for some pre-filing inquiry into both the facts and the law to satisfy the affirmative duty imposed." *Merritt v. Int'l Ass'n of Machinists & Aero. Workers*, 613 F.3d 609, 626 (6th Cir. 2010), (*citing Id.* (*citing* Fed. R. Civ. P. 11 advisory committee's note to the 1983 amendment); *see also Century Prods., Inc. v. Sutter*, 837 F.2d 247, 250 (6th Cir. 1988)).

Rule 11 is "not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories," and "[t]he court is expected to avoid using the wisdom of hindsight and should test the signer's conduct" based on what was "reasonable to believe" at the time of filing. *INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc.*, 815 F.2d 391, 401 (6th Cir. 1987), *cert. denied*, 484 U.S. 927 (1987). (quoting Fed. R. Civ. P. Rule 11. Notes of Advisory Committee on Rules -- 1983

Amendment). Plaintiffs' central claim -- whether Presidential Electors had standing to bring federal constitutional claims under the Electors Clause and other constitutional provisions -- a was a novel claim for which there was no controlling authority in the Sixth Circuit, but for which there was support in other circuits.

As the Supreme Court has observed in a similar statute providing for recovery of attorney's fees for frivolous claims:

> [I]t is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic would discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success.

Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421-22 (1978). The Supreme Court affirmed the denial of attorney's fees where, as here, the defendant prevailed on "an issue of first impression requiring judicial resolution." *Id.* (internal quotations omitted). "If the area of law is considered complex and uncertain, however, Rule 11 sanctions are rarely granted …" *Balfour Guthrie, Inc. v. Hunter Marine Transport, Inc.*, 118 F.R.D. 66, 74 (M.D. Tenn. 1987) (*citing Vatican Shrimp Co. v. Solis*, 820 F.2d 674, 681 (5th Cir. 1987)).

A. Plaintiffs Had Reasonable Basis for Legal Claims

1. Standing

Plaintiffs' central claim was that the Michigan Presidential Elector Plaintiffs had standing to file claims for violation of the Electors Clause, as well as standing to bring

Equal Protection and Due Process claims and under the Fourteenth Amendment as candidates for office and as voters. While the court found that Plaintiffs' claims lacked standing, the fact is Plaintiffs made a good faith legal argument under Article III, § 2, of the U.S. Constitution which provides that,

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority[.]"

"It is clear that the cause of action is one which 'arises under' the Federal Constitution." *Baker v. Carr*, 369 U.S. 186, 199 (1962) (A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally; or by a refusal to count votes from arbitrarily selected precincts, or by a stuffing of the ballot box.).

These claims were not frivolous as they had support in other circuits, and there was not at the time of filing, any controlling authority in the Sixth Circuit. Instead, there was a circuit split on the elector standing. Plaintiffs relied on a very recent case where the Eighth Circuit interpreted the presidential elector provisions of Minnesota law that were nearly identical to Michigan's electoral law as giving electors standing, as candidates for office, under the Electors Clause to challenge state law violations. *Carson v. Simon*, 978 F.3d 1051, 1057 (8th Cir. 2020) (affirming that Presidential Electors have Article III and prudential standing to challenge actions of Secretary of State in

implementing or modifying State election laws). In that case, the Eighth Circuit Presidential Electors "have a cognizable interest in ensuring that the final vote tally reflects the legally valid votes cast," as "[a]n inaccurate vote tally is a concrete and particularized injury to candidates such as the Electors." The Third Circuit, in a case dealing with a failed congressional candidate, not a Presidential elector, reached a different conclusion in *Bognet v. Secy Commonwealth of Pa.*, 980 F.3d 336 (3d Cir. 2020).

The existence of a circuit split on candidate standing demonstrates that Plaintiffs and counsel had a reasonable basis for their claims and that their position was not frivolous. In fact, the existence of a circuit split can defeat a motion for sanctions even if the position taken runs counter to current controlling authority. *See, e.g., Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 154-56 (4th Cir. 2002) (vacating district court order imposing Rule 11 sanctions where other circuits had taken legal position contrary to controlling Fourth Circuit precedent). Here, by contrast, there was no controlling Sixth Circuit or Supreme Court authority on elector standing.

2. The Eleventh Amendment.

The Supreme Court has held that "[i]t is clear … that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S. Ct. 900, 908, 79 L. Ed. 2d 67 (1984). However, "[w]hen the suit is brought only against state officials, a question arises as to whether that suit is a suit against the State itself." *Id.* at 101.

This Court determined that Plaintiffs' claims against Governor Whitmer and Secretary of State Benson were "suit[s] against state officials when 'the state is the real, substantial party in interest.'" Dkt. 62, pp. 8-9. Plaintiffs respectfully disagree with that conclusion. Their Complaint alleges *ultra vires* executive conduct in violation of state law. Plaintiffs' cause of action is premised on the fact that Defendants Whitmer and Benson have acted inconsistently with state and federal law. Accordingly, in Plaintiffs' view, the state is not the real party in interest. If it were, then no citizen could ever maintain a cause action against a state defendant. Ultimately, the point is that the resolution of this issue is fact-intensive, not "clear."

3. Laches.

Laches is an equitable doctrine that is necessarily fact-dependent. After a diligent search, Plaintiffs have been unable to locate any analogous case in which a court imposed sanctions on a plaintiff for bringing a claim that the court subsequently deemed barred by laches.

In the instant case, most of Defendants' conduct did not become apparent until Election Day. Thereafter, Plaintiffs diligently collected dozens of affidavits and drafted a seventy-five page initial complaint detailing each of its claims. Plaintiffs filed their Complaint a mere two days after the Michigan Board of State Canvassers certified the election results. Plaintiffs had a reasonable argument for the roughly twenty-one day delay between Election Day and the filing of this Complaint. As such, sanctions would be grossly inappropriate on this basis.

4. Mootness.

Plaintiffs and this Court disagreed on the question of whether or not the relief Plaintiffs sought was moot. The Court essentially concluded that it did not have the power to "decertify" election results once those results had been certified by the Governor. In delivering its reasons, the Court did not cite any controlling case law in support because this is a novel area. (*See* ECF No. 62, Court Op. and Order) However, in their complaint to the US Supreme Court on December 7, 2020, the state of Texas, joined by 18 other state attorney generals, believed a federal court did have the authority to decertify or otherwise invalidate certified state elections results. (See Plaintiffs' Brief in Opposition to 1927 Sanctions] Accordingly, Plaintiffs' reasonable arguments in support of their entitlement to relief cannot be sanctionable on this basis.

B. Dismissal on Equitable Grounds Should Not Be Basis for Sanctions

Equitable remedies allow that "substantial justice may be attained in particular cases where the prescribed or customary forms of ordinary law seem to be inadequate." 27A Am. Jur. 2d Equity § 1 (*citing Securities and Exchange Com'n v. U.S. Realty & Imp. Co.,* 310 U.S. 434, 60 S. Ct. 1044, 84 L. Ed. 1293 (1940)). By its very nature, equitable claims are heavily fact and circumstance dependent and a particularly bad fit for sanctions when relief is denied. Litigants must know that they can come to court seeking out of the box equitable remedies in unusual disputes, without fear of sanctions. While equitable defenses, such as latches or mootness, may foreclose relief given a particular

fact pattern it is particularly unlikely that the relief requested is factually or legally baseless because of the purposefully flexible nature of equity.

C. Dismissal for Failure to Adequately Plead Claims Is Not Basis for Sanctions.

While the Court's rationale for dismissing Plaintiffs' Equal Protection and Due Process claims appears to be that the Court accepted the claims of the City and other parties that Plaintiffs' either failed to adequately plead these claims or to allege facts that, if true, would have stated a claim for relief. *See* ECF No. 62 at 33-34. "Although a legal claim might be so inartfully pled that it cannot survive a motion to dismiss, such a flaw will not in itself support Rule 11 sanction--only the lack ***any*** legal or factual basis is sanctionable." *Hunter*, 281 F.3d at 153 (emphasis added). *See also id.* ("Creative claims, coupled even with ambiguous or inconsequential facts, may merit dismissal, but not punishment") (internal quotations omitted). A district court, however, should not impose sanctions so as to chill creativity or stifle enthusiasm or advocacy. *See Securities Indus. Ass'n v. Clarke,* 898 F.2d 318, 322 (2d Cir. 1990).

Moreover, plaintiffs and counsel "need not have in hand before filing enough proof to establish the case." *Samuels v. Wilder*, 906 F.2d 272, 274 (2d Cir. 1990). It "requires only an outline of case," and "must not bar the courthouse door to people who have some support for a complaint but need discovery to prove their case …" *Id.* (internal citations and quotations omitted). Here, there is a disagreement about the significance of the facts and testimony supporting Plaintiffs' complaint, particularly with

respect to the allegations of differential weighting of Republican and Democratic votes by Dominion voting machines, discriminatory enforcement (or nonenforcement) of state election laws, and other illegal and discriminatory conduct at the TCF Center described in sworn eyewitness testimony. Plaintiffs alleged that this illegal and unconstitutional conduct did not affect all voters equally, and that it resulted in counting of illegal votes predominantly for Democrats and not counting legal votes for Republican voters. This Court found that Plaintiffs' allegations could not support these claims, and dismissed eyewitness statements in sworn testimony who believed that they observed vote switching or destruction as unsupported, and similar allegations as "theories, conjecture, and speculation that such alterations *were possible*." ECF No. 62 at 34. But these are precisely the types of credibility determinations that could have been made at an evidentiary hearing, and allegations that could have found additional evidentiary support if discovery had been permitted.

The central goal of Rule 11 sanctions is the deterrence of baseless filings and the curbing of abuses. *Photocircuits Corp. v. Marathon Agents*, 162 F.R.D. 449, 451, (1995) (citing *Cooter & Gell v. Hartmarx Corporation,* 496 U.S. 384, 393, 110 S. Ct. 2447, 2454, 110 L. Ed. 2d 359 (1990**)**; *Caisse Nationale De Credit Agricole-CNCA v. Valcorp,* 28 F.3d 259 (2d Cir. 1994); *McMahon v. Shearson/American Express, Inc.,* 896 F.2d 17, 21 (2d Cir. 1990) (Rule 11 was enacted to "discourage dilatory and abusive litigation tactics and eliminate frivolous claims and defenses, thereby speeding up and reducing the costs of the litigation process."). Rule 11 is designed to deter parties from abusing judicial

resources, not from filing complaints. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 411, 110 S. Ct. 2447, 2464, 110 L. Ed. 2d 359, 385, (J. Stevens, 1990).

VI. Rule 11(b)(3): Plaintiffs Factual Allegations Had Evidentiary Support and/or Would Have Support After Further Discovery or Investigation

A. Plaintiffs' Factual Allegations Have Not Been "Debunked."

As an initial matter, the only contested factual allegations that may be before this Court (assuming the Motion is not dismissed as procedurally improper or on other grounds) are those in the Motion served on December 15, 2020, and filed with this Court on January 5, 2021. The only "specific conduct" identified in the Motion are "[t]he allegations about supposed fraud in the processing and tabulation of absentee ballots by the City at the TCF Center," which according to the City, "have been rejected by every court that has considered them," ECF No. 78 at 7, but does not cite to any case where this was "debunked." *Id.* Nor could they because it appears that no court has addressed these factual allegations on the merits or held an evidentiary hearing.

While factual allegations made for the first time in the January 5, 2021 Brief are not properly before this Court for failure to comply with Rule 11(c)(2)'s safe harbor and 21-day notice requirement, Plaintiffs will nevertheless demonstrate that the City of Detroit's claims are without merit. The City of Detroit heavily relies on the Wayne County Circuit Court's opinion and order in *Constantino v. Detroit*, Case No. 20-014780-AW (Nov. 13, 2020), ECF No. 78 at 13-18 ("*Constantino I*"), *aff'd*, 950 N.W.2d 707 (Mich. Nov. 23, 2020) ("*Constantino II*"). There, the circuit court denied a motion for

preliminary injunctive relief that included many of the same factual allegations regarding misconduct at the TCF Center, supported by sworn affidavits from many of the same fact witnesses, as were included in the Complaint, Amended Complaint, and TRO Motion. ECF Nos. 1, 6, 7.

In doing so, the City neglects to mention that the Circuit Court, like this Court, did not conduct an evidentiary hearing. And Defendants fail to point out how it that case substantively differs from the case at bar which addressed a widespread pattern of actual fraud. The City also neglects to mention that three Michigan Supreme Court judges in *Constantino* issued concurring and dissenting opinions finding serious allegations of fraud that needed to be investigated. The Rule 11 Advisory Committee Notes direct district courts to consider minority opinions in determining whether an attorney has conducted a reasonable inquiry as required. Fed. R. Civ. P. Rule 11, Notes of Advisory Committee – 1993 Amendment (directing district courts to take into account "the extent to which a litigant has researched the issues and found some support for its theories even in minority opinions").

Specifically, in his dissenting opinion, Justice Viviano highlighted the fact that the Circuit Court's "credibility determinations were made without the benefit of an evidentiary hearing," which "[o]rdinarily … is required where the conflicting affidavits create factual questions that are material to the trial court's decisions on a motion for preliminary injunction" under Michigan state law. *Constantino II*, 950 N.W.2d at 710 n.2

(Viviano, J. dissenting). In his view, "**[t]he trial court's factual finding have no significance** …" *Id.*, at 710-711 (emphasis added).

Justice Zahra, in a concurring opinion joined by Justice Markman, also disagreed with the Circuit Court's decision not to hold an evidentiary hearing. They also appear to have found the factual allegations of these witnesses to have some merit:

> Nothing said is to diminish the troubling and serious allegations of fraud and irregularities asserted by affiants …, among whom is Ruth Johnson, Michigan's immediate past Secretary of State."

Id. at 708 (Zahra, J., concurring). Justice Zahra therefore urged the Circuit Court to "meaningfully assess plaintiffs' allegations by an evidentiary hearing, particularly with respect to the credibility of the competing affiants ..." *Id.*

A court may, and given the exigencies of time sometimes must, act on motions for preliminary injunctive relief based on "the parties' bare affidavits," *Id.* at 710 (Viviano, J. dissenting), without an evidentiary hearing. However, such purported factual findings cannot be given preclusive effect much less form the basis for finding that factual allegations made in sworn affidavits lacked evidentiary support. Plaintiffs' Amended Complaint presented over 200 sworn fact witness (as well as sworn affidavits from more than a dozen expert witnesses (that were not addressed in *Constantino I* or *Constantino II*), that constitutes more than sufficient evidentiary support to meet the requirements of Rule 11, even before conducting any discovery which likely would have resulted in additional evidence supporting Plaintiffs' allegations.

While district courts are required to articulate a basis for awarding sanctions, nothing requires them to explain their reasons for not ordering sanctions." *Gibson v. Solideal USA*, Inc., 489 Fed. Appx. 24, 32, 2012 FED App. 0740N (6th Cir. 2012) (*cited Runfola & Assocs., Inc. v. Spectrum Reporting II, Inc.*, 88 F.3d 368, 375 (6th Cir. 1996) (addressing a district court's silence on its reason to deny sanctions under its inherent powers); *see also Eaton Aerospace, L.L.C. v. SL Montevideo Tech.*, 129 F. App'x 146, 153 (6th Cir. 2005).

In the event this Court declines to deny the City's Motion and consider imposing Rule 11 sanctions under Rule 11(b)(3) it must first conduct an evidentiary hearing to make credibility determinations for Plaintiffs' witnesses. *See, e.g., Donaldson v. Clark*, 819 F.3d 1551, 1561 (11th Cir. 1987) ("when a court is asked to resolve an issue of credibility ...the risk of an erroneous imposition of sanctions under limited procedures and the probably value of additional hearing are likely to be greater.") A hearing is further required in light of the draconian, punitive, and unprecedented nature of the City of Detroit's proposed sanctions: "[T]he more serious the possible sanction both in absolute size and in relation to actual expenditures, ***the more process that will be due.***" *Id.* (emphasis added). Moreover, "[w]hen, as here, the case was dismissed without a trial, due process may require some kind of hearing." *Davis v. Crush*, 862 F.2d 84, 89 (6th Cir. 1988) (internal quotations omitted).

B. Plaintiffs Provided Adequate Evidentiary Support for Factual Allegations and/or Would Have After Reasonable Opportunity for Further Investigation or Discovery

The standard is more importantly, to survive a motion to dismiss, respondents need only allege "enough facts to state a claim to relief that is plausible on its face." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 45, 131 S. Ct. 1309, 1322, 179 L. Ed. 2d 398, 413, (2011) (*citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Nevertheless, the City begins its motion with language that claims Plaintiffs have "lied," to this court. Such outrageous and unprofessional allegations are entirely unacceptable. The City cannot back up its absurd allegation. Proffering expert reports that are disputed by plaintiffs' experts does not make counsel liars. And, if this were simply the ranting of a third rate five-man Detroit law firm, we would dismiss this behavior as pathetic unprofessionalism. But these are the dirty, media-attention hungry, slanderous and completely out-of-bounds statements by representatives of the City of Detroit. It should not be countenanced by this Court.

Rule 11 specifically says, "(d) *Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.* USCS Fed Rules Civ Proc R 11(d). None of the allegations and evidence proffered by the plaintiffs were allowed to be developed through discovery. None of the defense witnesses or evidence were permitted to be tested through discovery. Awarding Rule 11 sanctions on such a bare record is unprecedented and wrong.

The Amended Complaint presented expert witness testimony demonstrating that several hundred thousand illegal, ineligible, duplicate or purely fictitious votes must be thrown out, in particular:

A. A report from Russell Ramsland, Jr. showing the "physical impossibility" of nearly 385,000 votes injected by four precincts/township on November 4, 2020, that resulted in the counting of nearly 290,000 more ballots processed than available capacity (which is based on statistical analysis that is independent of his analysis of Dominion's flaws), a result which he determined to be "physically impossible" (*see* Ex. 104 ¶14);

B. A report from Dr. Louis Bouchard finding to be "statistically impossible" the widely reported "jump" in Biden's vote tally of 141,257 votes during a single time interval (11:31:48 on November 4), *see* Ex. 110 at 28);

C. A report from Dr. William Briggs, showing that there were approximately 60,000 absentee ballots listed as "unreturned" by voters that either never requested them, or that requested and returned their ballots. (*See* Ex. 101);

D. A report from Dr. Eric Quinell analyzing the anomalous turnout figures in Wayne and Oakland Counties showing that Biden gained nearly 100% and frequently more than 100% of all "new" voters in certain townships/precincts over 2016, and thus indicated that nearly 87,000 anomalous and likely fraudulent votes came from these precincts. (*See* Ex. 102);

E. A report from Dr. Stanley Young that looked at the entire State of Michigan and identified nine "outlier" counties that had both significantly increased turnout in 2020 vs. 2016 almost all of which went to Biden totaling over 190,000 suspect "excess" Biden votes (whereas turnout in Michigan's 74 other counties was flat). (*See* Ex. 110);

F. A report from Robert Wilgus analyzing the absentee ballot data that identified a number of significant anomalies, in particular, 224,525 absentee ballot applications that were both sent and returned on the same day, 288,783 absentee ballots that were sent and returned on the same day, and 78,312 that had the same date for all (*i.e.*, the absentee application was sent/returned on same day as the absentee ballot itself was sent/returned), as well as an

> additional 217,271 ballots for which there was no return date (*i.e.*, consistent with eyewitness testimony described in Section II below). (*See* Ex. 110);
>
> G. A report from Thomas Davis showing that in 2020 for larger Michigan counties like Monroe and Oakland Counties, that not only was there a higher percentage of Democrat than Republican absentee voters in every single one of hundreds of precinct, but that the Democrat advantage (*i.e.*, the difference in the percentage of Democrat vs. Republican absentee voter) was consistent (+25%-30%) and the differences were highly correlated, whereas in 2016 the differences were uncorrelated. (*See* Ex. 110); and
>
> H. A report by an affiant whose name must be redacted to protect his safety who concludes that "the results of the analysis and the pattern seen in the included graph strongly suggest a systemic, system-wide algorithm was enacted by an outside agent, causing the results of Michigan's vote tallies to be inflated by somewhere between three and five point six percentage points. Statistical estimating yields that in Michigan, the best estimate of the number of impacted votes is 162,400. However, a 95% confidence interval calculation yields that as many as 276,080 votes may have been impacted." (*See* Ex. 111 ¶13).

(See ECF 6, Pls. Am. Compl. at par. 16). And Plaintiff's December 4, 2020 response included signed and sworn Rebuttal sworn statements in response to Defendant-Intervenor's response, from Plaintiffs' expert witnesses, Russell Ramsland, William Briggs, Eric Quinell, and expert testimony submitted under seal. (*See* ECF No. 49, Exhs. 1-4).

Young and Quinell

The language invoked by Defendants is largely inappropriate in their attack on Dr. Young and Dr. Quinell. Defendants argue generally and broadly that these highly qualified individuals submitted reports that are "sloppy" and show "incomprehensible ignorance." (See ECF No. 78, p. 19). While Defendants are not examining these

witnesses before a trier of fact they appear instead to seek to prejudice the court with hyperbole, without a counter expert or even a citation to published expert literature. Dr. Quinell holds a Ph.D. in computer arithmetic and is an electrical engineer who works in silicon computation devices and herein opines on a mathematical anomaly. In a reply that was submitted to this court Dr Quinell explained:

> These mathematical anomalous vote gains, until explained and/or investigated are of a large enough quantitative magnitude and consequence that the barrier of speculation should be held to engineering and mathematical standards, not to those of political science and editorial publications.
>
> In statistics, any "new population" may be added and absorbed to the whole- this population seems to have 8,000 voters who didn't appear in 2016 that parachuted in and voted 80 Dem/ 20 Rep – which is in complete opposition to Troy's moderate voting history. In a technique called "resampling", any new population that is added to an existing one is expected to behave and slightly change the behavior of the existing mass, testable by re-simulating the same dataset with the existing distribution mathematical qualities. Resampling in this case puts this new population deep into the tail of its own distribution, indicating again a completely new phenomena that needs explaining. Why would a populous increase its own turnout by 15% over 2016, and 98% of that go to one candidate? Mathematically this behavior is anomalous to its own dataset.
>
> What "literature" exists to explain that absentee ballot requests are a single variable – with a perfect scalar multiple of Democrats above Republicans – with a Pearson coefficient of 0.797? Every precinct where a Republican voted by absentee guaranteed roughly 1.7 Democrats to vote absentee, regardless of precinct. This "national phenomenon" of mathematically non-independent variables is not ubiquitous in all the Michigan counties nor in national data…

(See ECF 49-2, pp. 4-6).

The City's bald and toothless disagreement with the experts cited, would at best become a question for a trial or evidentiary hearing through the cross-examination of a witness. It is not a basis for a Rule 11 motion.

Spyder/Spider

Defendants attack the Declarant known as Spider because they attack his background - despite the fact that they have not deposed him or otherwise examined him. Spider's identity and credentials were required to be withheld. In Plaintiffs' motion to file under seal [ECF No. 8] the reasons were explained. Nevertheless, defendants do not address the substance of Spider's 17-page report filled with analysis and evidence. Instead they simply attack his credentials. This is not a basis upon which to grant a Rule 11 motion.

Russell James Ramsland

Defendants address Russell James Ramsland and allege that "the Secretary of State report is not even discussed." And based on this assumption, and lack of genuine research, Defendants proceed to allege that he makes false claims. (See ECF No. 78, p. 21). Yet, Mr. Ramsland already responded to the same points raised by defendants' expert, Dr. Rodden, and stands by his conclusions. (*See* Ramsland Reply Report, Docket No 49, Ex. 3 at par 6, filed 12/3/2020). He specifically addresses and thoroughly documents the lack of evidence for the Secretary of State's conclusion and summarizes:

> We do not believe that the Secretary of State report addresses this and states the issue at the time was not on the printed totals tape. The Secretary even states "Because the Clerk correctly updated the media drives for the tabulators with changes to races, and because the other tabulators did not have changes to races, all tabulators counted ballots correctly." This is not the case.

(*See Id.* at p. 12).

The report later summarizes:

> If this had been a user setup issue, then the test ballots they run to verify the results they get by comparing them with the test matrix should have caught that. When they made the software change that that used to tabulate the 11/6/20 rerun, there should be a log of the test ballots run through the system and verified against the test matrix. This alone might not show fraud, but it is a crucial part of the software configuration validation process and apparently was not done. We believe to a reasonable degree of professional certainty that this shows fraud and that vote changing at the local tabulator level has occurred due to a software change in all precincts were Dominion software was used in Michigan. This small sample amplified in a large population area would have major results. Without the explanation of why there was a re-tabulation, why the issue of numbers being off to a significant degree when a vote change was noted, and no further investigation occurred – and when 3 ballots were removed from the totals that changed the final outcome of one proposal, constitutes a definitive indication of fraud.

(*See Id.* p. 13).

Mr. Ramsland also addresses the "event" reflected in the data are "4 spikes totaling 384,733 ballots allegedly processed in a combined interval of 2 hour[s] and 38 minutes" for four precincts/townships in four Michigan counties (Wayne, Oakland, Macomb, and Kent). *Id.* Based on Mr. Ramsland's analysis of the voting machines available at the referenced locations, he determined that the maximum processing capability during this period was only 94,867 ballots, so that "there were 289,866 more

ballots processed in the time available for processing in the four precincts/townships, than there was processing capacity." *Id.* This amount alone is **nearly twice the number of ballots by which Biden purportedly leads President Trump** (*i.e.,* 154,188). (See Am. Compl. at pars. 144-145).

Mr. Ramsland further explains in depth in his declaration, which Defendants do not raise or discuss that:

> Mr. Ramsland's analysis of the raw data, which provides **votes counts, rather than just vote shares, in decimal form** provides highly probative evidence that, in his professional opinion, demonstrates that Dominion manipulated votes through the use of an "additive" or "Ranked Choice Voting" algorithm (or what Dominion's user guide refers to as the "RCV Method"). *See id.* at ¶12.[1] Mr. Ramsland presents the following example of this data – taken from "Dominion's direct feed to news outlets" – in the table below. *Id.*

Mr. Ramsland describes how the RCV algorithm can be implemented, and the use of fractional vote counts as evidence, with decimal places, rather than whole numbers, in demonstrating that Dominion did just that to manipulate Michigan votes.

> For instance, blank ballots can be entered into the system and treated as "write-ins." Then the operator can enter an allocation of the write-ins among candidates as he wishes. The final result then awards the winner based on "points" the algorithm in the compute, not actual votes. The fact that we observed raw vote data that includes decimal places suggests strongly that this was, in fact, done. Otherwise, votes would be solely represented as whole numbers. Below is an excerpt from Dominion's

> direct feed to news outlets showing actual calculated votes with decimals. *Id.*[3]

(See ECF 6, Am. Compl. at ¶ ¶ 140-141).

William Briggs / Matt Braynard

Defendants spend the better part of three full pages in this motion for sanctions, disbarment and referral to disciplinary bodies, attacking the credibility of Dr. Briggs, a Ph.D. statistician, with over 100 peer reviewed publications and yet, quite tellingly Defendants did not mention the most pertinent and important part of Dr. Briggs' analysis. (See ECF No. 78 at pp. 39-43). This was the estimate for how many ballots went missing, calculated from answers to the question (in short) "*Did you return your ballot?*" There can be no arguable ambiguity in that question. Dr. Briggs estimated that between about 28 to 35 thousand votes were returned but never recorded in Michigan. This represents significant voter disenfranchisement --which cannot be ignored.

a. Plaintiffs' Counsel Have Not Acted "Unreasonably or Vexatiously," or Engaged in Any Reckless or Intentional Misconduct to Delay or Increase Defendants' Costs.

[3] *See id.* (*quoting* Democracy Suite EMS Results Tally and Reporting User Guide, Chapter 11, Settings 11.2.2., which reads, in part, "RCV METHOD: This will select the specific method of tabulating RCV votes to elect a winner.").

Even assuming *arguendo* that this claim were not barred as a matter of law, the State Defendants failed to allege that any specific conduct by Plaintiffs' counsel, or factual allegation or legal claim in the pleadings, that could qualify as "unreasonabl[e] or vexatious[]," as required under Section 1927, or any specific reckless, bad faith or intentional misconduct required under controlling Sixth Circuit precedent.

Instead, the State Defendants simply make blanket assertions that Plaintiffs' counsel has filed a "frivolous lawsuit" and "raised false allegations and pursued unsupportable legal theories." ECF No. 78 at 44.

Finally, the State Defendants engage in their own unsupported speculation that Plaintiffs' co-counsel filed this lawsuit "hoping not to prevail but to damage democracy," ECF No. 23, a reckless and defamatory claim. This highlights the lack of specificity in these allegations, with a blanket demand against all counsel whereas liability under Rule 11 is direct, and not vicarious.

b. Many other attorneys, witnesses and legislative representatives have raised election integrity issues in the Presidential Election of 2020.

Public reports have also highlighted wide-spread election fraud in the Contested States that prompted competing Electors' slates.[1] In the Navarro report, it is shown that:

At midnight on the evening of November 3, and as illustrated in Table 1, President Trump was ahead by more than 110,000 votes in Wisconsin and more than 290,000 votes in Michigan. In Georgia, his lead was a whopping 356,945; and he led in Pennsylvania by more than half a million votes. By December 7, however, these wide Trump leads would turn into razor thin Biden leads –11,779 votes in Georgia, 20,682 votes in Wisconsin, 81,660 votes in Pennsylvania, and 154,188 votes in Michigan.

Id., Table 1: A Trump Red Tide Turns Biden Blue[4]

> There was an equally interesting story unfolding in Arizona and Nevada. While Joe Biden was ahead in these two additional battleground states on election night –by just over 30,000 votes in Nevada and less than 150,000 votes in Arizona.

Id.

Most recently, an attorney in Catania, Italy, Prof. Alfio D'Urso, testified that the US presidential election results were hacked and changed by foreign actors on November 4, 2020 and that a cyber operator was criminally charged for his role in admitted testimony of switching votes from Donald Trump to Joe Biden:

> **Arturo D'Elia, former head of the IT Department of Leonardo SpA** has been **charged by the public prosecutor of Naples**, Italy for technology / data manipulation and implementation, of viruses in main computers of Leonardo SpA. December 20, 2020. D'Elia has been deposed by the presiding judge in Naples, and in sworn testimony states that on 4 11 20, under instruction and direction of U.S. persons working from the U.S. Embassy in Rome, [he] undertook the **operation to switch data from the U.S. election of 3 Nov. 20 from significant margin of victory for Donald Trump to Joe Biden in a number of states where Joe Biden was losing the vote totals**. Defendant states that he was working in Pascara facility of Leonardo SpA and utilized military grade cyber warfare encryption capabilities to transmit switched votes via military satellite of Fucino Tower to Frankfurt Germany...

This Testimony is available and in an attached written affidavit. (*See* **Exh. B**).

[4] *See* EXH. A, copy of Immaculate Deception, Six Key Dimensions of Election Irregularities, The Navarro Report, *available at:* https://bannonswarroom.com/wp-content/uploads/2020/12/The-Immaculate-Deception-12.15.20-1.pdf

Defendants seek to allege, in a nutshell, that Plaintiffs filed a frivolous claim or it must be false, (similar to a *res ipsa* argument) because CISA issued a statement on November 12, 2020 that "the November 3rd Election was the most secure in American history." (*See* ECF No. 78 at p. 8, f.n. 12). But12 days earlier CISA had issued a joint statement with the FBI, entitled a JOINT CYBERSECURITY ADVISORY ON October 30, 2020 titled:

Iranian Advanced Persistent Threat Actor Identified Obtained Voter Registration Data

> This joint cybersecurity advisory was coauthored by the Cybersecurity and Infrastructure Security Agency (CISA) and the Federal Bureau of Investigation (FBI). **CISA and the FBI are aware of an Iranian advanced persistent threat (APT) actor targeting U.S. state websites to include election websites. CISA and the FBI assess this actor is responsible for the mass dissemination of voter intimidation emails to U.S. citizens and the dissemination of U.S. election-related working on the computers. disinformation in mid-October 2020**.1 (Reference FBI FLASH message ME-000138-TT, disseminated October 29, 2020). Further evaluation by CISA and the FBI has identified the targeting of U.S. state election websites was an intentional effort to influence and interfere with the 2020 U.S. presidential election.

(*See* ECF 6, Pls. Am. Compl. (citing Ex. 18 at 1, CISA and FBI Joint Cyber Security Advisory of October 30, 2020)).

Notably, on January 7, 2021 the Director of National Intelligence issued a report titled, "Views on Intelligence Community Election Security Analysis" which concludes:

> In that same spirit, I am adding my voice in support of the stated minority view – based on all available sources of intelligence, with definitions consistently applied, and reached independent of political considerations or undue pressure – that t**he People's Republic of China sought to**

> **influence the 2020 U.S. federal elections**, and raising the need for the Intelligence Community to address the underlying issues with China reporting outlines above.

(*See* **Exh. C**, Copy of DNI report 01/07/21)

Yet, this appeared as a non-partisan issue back in late December of 2019, when three Democrat Senators, Warren, Klobuchar, Wyden, and House Member Mark Pocan wrote about their ***'particularized concerns that secretive & "trouble -plagued companies***'" "***have long skimped on security in favor of convenience***," in the context of how they described the voting machine systems that three large vendors – Election Systems & Software, Dominion Voting Systems, & Hart InterCivic – collectively provide voting machines & software that facilitate voting for over 90% of all eligible voters in the U.S." (See Am. Compl. At p. 59, pars. G and H). Senator Ron Wyden (D-Oregon) said the findings [insecurity of voting systems] are "*yet another damning indictment of the profiteering election vendors, who care more about the bottom line than protecting our democracy.*" It's also an indictment, he said, "*of the notion that important cybersecurity decisions should be left entirely to county election offices, many of whom do not employ a single cybersecurity specialist.*" (*See Id.*[5]).

Indeed, the House was highly critical of election integrity risks and passed H.R. 2722 on June 27, 2019: *This bill addresses election security through grant programs and requirements for voting systems and paper ballots.*

[5] *Exclusive: Critical U.S. Election Systems Have Been Left Exposed Online Despite Official Denials, Motherboard Tech by Vice, by Kim Zetter, August 8, 2019, https://www.vice.com/en/article/3kxzk9/exclusive-critical-us-election-systems-have-been-left-exposed-online-despite-official-denials*

The bill establishes requirements for voting systems, including that systems (1) use individual, durable, ***voter-verified paper ballots****; (2) make a voter's marked ballot available for inspection and verification by the voter before the vote is cast; (3) ensure that individuals with disabilities are given an equivalent opportunity to vote, including with privacy and independence, in a manner that produces a voter-verified paper ballot; (4) be manufactured in the United States; and (5) meet specified cybersecurity requirements, including* ***the prohibition of the connection of a voting system to the internet.***

(*See* Congress.gov/H.R. 2722).

The Michigan state Senate Oversight Committee held the hearing in or about early December, which included testimony from a former senator with expertise on data and technology who explained that the Voting machines were connected to the internet in Detroit. The witness spoke to the committee under oath about voting by dead people, a truck full of ballots coming into the counting center long after the deadline, and vulnerable voting machines[2]. Further, testimony among others including evidence of voters who voted absentee but had fake addresses or were deceased. *Id.*

> "What I can say for sure, and swear to you here today, is that overall, **8.9% of the 30,000 absentee ballots that we've gone through and investigated, just in the city of Detroit, were unqualified, fraudulent ballots that should have been spoiled**," Schornak said. He extrapolated about how the 30,000 sample could reflect on all of the absentee votes cast. "At the lowest levels, if these percentages carry through, this means of the 172,000 [absentee votes] in the city of Detroit, 1,300 of them could be deceased," he told the senators. "We are investigating it. And another 15,000 could have fraudulent addresses, described as living on vacant lots or [in] burnt-down houses."

The claims of fraud in Michigan have gained widespread attention and attacks on witnesses credibility such as when the Michigan Oversight Committee heard from a witness who was an IT specialist for Dominion Voting Systems and she appeared and

described what she called "complete fraud" at Detroit's TCF Center[3]. She described the same ballots being repeatedly rescanned over and over. *Id.* While she is not an affiant in this case, this reflects Michigan's Oversight Committee took statements from many people because the complaints on the lack of integrity reached far and wide within Michigan and within the Contested States.

More recently, John Lott, Ph.D. recently did a study, first published in late December 2020 and updated January 6, 2021 called "*A Simple Test for the Extent of Vote Fraud with Absentee Ballots in the 2020 Presidential Election: Georgia and Pennsylvania Data.*" (*See* Exh D, copy of Dr. Lott's Study). Dr. Lott's conclusion addresses Michigan and other contested states:

> … The voter turnout rate data provides stronger evidence that there are significant excess votes in Arizona, Michigan, Nevada, and Wisconsin as well. While the problems shown here are large, there are two reasons to believe that they are underestimates: 1) the estimates using precinct level data assume that there is no fraud occurring with in-person voting and 2) the voter turnout estimates do not account for ballots for the opposing candidate that are lost, destroyed, or replaced with ballots filled out for the other candidate.

We highlight the wide-spread complaints of election fraud separate and apart of Plaintiffs' filing and evidence to show that many people have submitted evidence of reports and eye-witness testimony of fraud in the 2020 election.

The State of Texas, along with Alabama, Arizona, Arkansas, Florida, Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Utah and West Virginia, sued

the Defendant states, Michigan, Wisconsin, Georgia and the Commonwealth of Pennsylvania alleging that each of the Defendant states had election irregularities. (*See* Response to 1927 Motion).

c. Moreover, Plaintiffs' Complaint plead facts that the Defendant City does not actually dispute many facts plead in the Complaint.

> The first red flag is the Antrim County, Michigan "glitch" that switched 6,000 Trump ballots to Biden, and that was only discoverable through a manual hand recount. *See supra* Paragraph 94. The "glitch" was later attributed to "clerical error" by Dominion and Antrim Country, presumably because if it were correctly identified as a "glitch", "the system would be required to be 'recertified' according to Dominion officials. This was not done." *(See* Am. Compl. at par. 136*) (citing* Exh. 104, Ramsland Aff. at ¶10. Mr. Ramsland points out that "the problem most likely did occur due to a glitch where an update file did not properly synchronize the ballot barcode generation and reading portions of the system." *Id.* Further, **such a glitch would not be an "isolated error," as it "would cause entire ballot uploads to read as zero in the tabulation batch, which we also observed happening in the data** (provisional ballots were accepted properly but in-person ballots were being rejected (zeroed out and/or changed (flipped))." *Id.* Accordingly, Mr. Ramsland concludes that it is likely that other Michigan counties using Dominion may "have the same problem." *Id. (See* Am. Compl. at par. 136*)*
>
> Tabulator issues and election violations occurred elsewhere in Michigan **reflecting a pattern**, where multiple incidents occurred. In Oakland County, votes flipped a seat to an incumbent Republican, Adam Kochenderfer, from the Democrat challenger when: "***A computer issue in Rochester Hills caused them to send us results for seven precincts as both precinct votes and absentee votes. They should only have been sent to us as absentee votes***," Joe Rozell, Oakland County Director of Elections for the City of Huntington Woods, said.[4] (See Am. Compl. at pars. 131-132). The Oakland County flip of votes becomes significant because it **reflects a second systems error, wherein both favored the Democrats, and precinct votes were sent out to be counted,**

> and they were counted twice as a result until the error was caught on a recount. Precinct votes should never be counted outside of the precinct, and they are required to be sealed in the precinct. See generally, MCLS § 168.726. (*See Id*).

These are just a few of the specific facts cited by Plaintiffs, which are not genuinely disputed, while Defendants cite to the Secretary of State's opinion on a systems error, but Plaintiffs submit with both expert testimony in support, and the undisputed facts that two such incidents of "error" instead reflect evidence **of a pattern of defects** in the voting systems machines of tabulating ballots favoring one candidate not the other. Rather than allowing for a full investigation, these two well documented and known incidents -- which also include the legal violation of counting precinct ballots outside of the precinct, were instead summarily dismissed rather than reviewed substantively. The sheer gravity of those claims, and their implications on the integrity of our electoral system, justified counsel in pursuing every arguably permissible avenue to assist Plaintiffs in seeking redress.

d. The State Defendants Failed to Identify Any "Discrete Acts of Misconduct" That Could Have Caused the City to Incur Any Additional Costs.

As shown above, the City has not identified any "discrete acts of claimed misconduct," *Ruben*, 825 F.2d at 990, much less shown that such purported misconduct "cause[d] additional expenses to" the City." *Id.* at 984. Blanket and defamatory assertions cannot meet this requirement. In any case, all of City's expenses are due to the City's voluntary and unnecessary intervention in this proceeding. The City was not named as a party defendant to this action, but rather requested to intervene on its own

motion following Plaintiffs' filing of the initial complaint. (ECF No. 5). Indeed, neither the City, nor the other intervenors were a party to this action until this Court granted its motion to intervene by order entered December 2, 2020 (ECF No. 28), after Plaintiffs' First Amended Complaint had already been filed. As a result, they do not have standing to make this claim, and even if the City could demonstrate that either the Complaint or the First Amended Complaint's filing satisfied § 1927 (which it cannot), it cannot trace any expense to Plaintiffs' counsel's filing of the complaint. Since the City entered this litigation on its own motion after the action was already instituted, any sanctions must arise out the City's expense resulting from some unreasonable and prolonging conduct occurring on or after the entry of Court's order of December 2, 2020.

Plaintiffs' counsel has not only done nothing to delay this proceeding, they have in fact taken every reasonable measure to expedite, and then to terminate the proceeding once their claims were no longer viable. This Court granted the request for expedited briefing, ECF No. 24, and based solely on the initial pleadings and responses, dismissed the TRO Motion a mere eight days later on December 7, 2020. ECF No. 62. Further, Plaintiffs have expeditiously, and concurrently within the 21 days of the service of the motion herein, moved for voluntary dismissal of the November 29, 2020 Amended Complaint, ECF No. 6.

CONCLUSION

For all the foregoing reasons, the Plaintiffs and their counsel respectfully request that this Honorable Court deny the State Defendants' motions for an award of sanctions and attorneys' fees Rule 11. (ECF 78 and 84). Moreover, the City of Detroit should be ordered to pay Plaintiffs' legal fees for opposing this motion pursuant to Federal Rule of Civil Procedure 11(c)(2).

Respectfully submitted,

/s/ Stefanie Lambert Junttila

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18 U.S. Code CHAPTER 115—TREASON, SEDITION, AND SUBVERSIVE ACTIVITIES
18 U.S. Code § 2384 - Seditious conspiracy
"If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined under this title or imprisoned not more than twenty years, or both."

18 U.S. Code § 2383 - Rebellion or insurrection
"Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States."

Ethics in Brief
Judicial Battles Over the Presidential election: Ethical Constraints Violated?

By Deborah A. Wolfe

"The first thing we do, let's kill all the lawyers." –*Henry VI*, Part 2, Act 4, Scene 2, by Wm. Shakespeare.

Who among us hasn't heard that trope bandied about since the moment we talked about going to law school? However, though many people assume it is a put-down of the legal profession, Shakespeare meant it to be the opposite. The context of the statement, ironically—and chillingly-- is the character Jack Cade attempting to lead a revolution in the kingdom by falsely claiming to be the rightful heir to the throne. Cade is a preening, vain, self-aggrandizing narcissist, claiming that he is "valiant", "able to endure much", and "fearless". The quote above, said by Dick the Butcher, a murderous toady, is in response to Cade's statement: "I thank you good people—there shall be no money; all shall eat and drink on my score, and I will apparel them all in one livery, that they may agree like brothers, *and worship me, their lord*." (Emphasis added.) The equivalent statement of "a chicken in every pot if only you will annoint me King."

Contrary to the way the statement is interpreted by many, it wasn't meant to cast aspersions on our profession, but to bring into clear focus the protective role that lawyers play in society, as the impediment to those who would contemplate revolution and anarchy. In fact, the killing of all the lawyers would be the surest way to clear the path to tyranny. Lawyers are viewed to be the protectors of truth, guardians of the rule of law that stand in the way of Chaos.

In the past weeks, the Attorneys General of several states, repaired to the courts to challenge (and defend) the presidential election results. Were there ethical constraints on them? The answer: yes. In California, attorneys are required by Business & Professions Code section 6067 to swear loyalty to the Constitution. It states: "Every person on his admission **shall** take an oath to support the Constitution of the United States and the Constitution of the State of California, and faithfully to discharge the duties of any attorney at law to the best of his knowledge and ability. A certificate of the oath shall be indorsed upon his license." The oath itself is quite simple and straightforward, and is the same regardless of whether or not one is being sworn in as a U. S. Senator, a judge, or a lawyer:

> "I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God."

Multiple lawsuits have been filed, in numerous states' courts—all by licensed attorneys-- and all have been dismissed based on an absence of evidence and often times demonstrably false claims. Filing and defending a lawsuit without basis in law or fact, is a violation of the Rules of Professional Conduct in every state. See ABA Model Rules of Professional Conduct 3.1, (identical to California's Current Rule 3.1) which could subject the attorney to professional

discipline by the bar of the State in which the attorney is licensed. This Rule in pertinent part, states: "(a) A lawyer **shall not**: … (2) *present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of the existing law*." (Emphasis added.) Many would argue that given this ethical requirement, several States, with Texas leading the charge, were seeking to disenfranchise millions of voters in States in which President-Elect Biden won the popular vote. In its response to Texas's suit to invalidate its election, Pennsylvania's brief states "Texas does not seek to have the Court interpret the Constitution, so much as to disregard it." The brief further states: "The cascading series of compounding defects in Texas's filings is only underscored by the surreal alternate reality that these filings attempt to construct. That alternate reality includes an absurd statistical analysis positing that the possibility of President-Elect Biden winning the election was 'one in a quadrillion.' Bill of complaint at 6. Texas's effort to get this Court to pick the next President has no basis in law or fact. The Court should not abide this seditious abuse of the judicial process, and should send a clear and unmistakable signal that such abuse must never be replicated."

An amicus brief in the Texas lawsuit, filed in the Supreme Court and signed by numerous legal scholars from all over the country, states: "Plaintiff's motions make a mockery of Federalism and separation of powers. It would violate the most fundamental constitutional principles for this Court to serve as the trial court for presidential election disputes." Citing the U. S. Supreme Court case of *Rucho v. Common Cause* 139 S.Ct. 2484 (2019), the brief goes on to state: "What the plaintiff seek[s] is an unprecedented expansion of [federal] judicial power…. The expansion of judicial authority would not be into just any area of controversy but into one of the most intensely partisan aspects of American political life. The intervention would be unlimited in scope and duration—it would recur over and over again around the country with each [presidential election.] Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role." 139 S.Ct. at 2507. U.S. Constitution, Article II, §1, Cl.2; U. S. Constitution Article III, §2; U.S. Constitution Article IV, §1, Cl.3 and Cl. 4.

These filings by attorneys—officers of the court—are argued to be attacks on Constitutional democracy itself, a direct challenge to the separation of powers and individual States' rights, rather than seeking to have the high Court interpret the Constitution.[1] On the other hand, the very fact the court, rather than the streets, are being used to address fundamental constitutional issues arguably is supportive of the litigation, rather than extra- judicial means.

As lawyers, we have a responsibility to live up to the oath we take to preserve, protect and defend the Constitution. We must respect the rights of every individual to freedom of speech and access to the courts; these are rights guaranteed by the Constitution's First Amendment. And paramount even though the many lawsuits involve grave constitutional issues, all attorneys were required to litigate within the bounds of their oaths to uphold the Constitution and Rule 3.1.

[1] All of the briefs addressed to the Supreme Court are readily available to the public, and the writer encourages the readers to read them, and draw their own conclusions as to the intent and veracity thereof.

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Desrochers v. City of San Bernardino, 9th Cir. (Cal.), July 13, 2009

KeyCite Overruling Risk - Negative Treatment
Overruling Risk Pearson v. Callahan, U.S., January 21, 2009

552 F.3d 1062
United States Court of Appeals,
Ninth Circuit.

David ENG, Plaintiff–Appellee,
v.
Steve COOLEY, District Attorney; Steven Sowders, Head Deputy District Attorney; Curt Livesay, former Chief Deputy District Attorney; Anthony Patchett, former Special Assistant to the District Attorney; and Curtis A. Hazell, Assistant District Attorney; in their individual capacities, Defendants–Appellants.

No. 07–56055.
|
Argued and Submitted Nov. 20, 2008.
|
Filed Jan. 14, 2009.

Synopsis

Background: County deputy district attorney filed suit under § 1983 asserting, in addition to a range of state law claims, that district attorney and other county employees had retaliated against him for exercising his First Amendment right to comment on a school project and the leaks to the IRS, and to speak through his attorney to the press. The United States District Court for the Central District of California, Otis D. Wright, II, J., ruled that defendants were not entitled to qualified immunity in their individual capacities with respect to certain of plaintiff's statements, and defendants appealed.

Holdings: The Court of Appeals, Michael Daly Hawkins, Circuit Judge, held that:

[1] public employee properly alleged a violation of his First Amendment rights with respect to both his comments about the leaking of information about school district's lease-purchase agreements to the IRS and his attorney's statements to the press on his behalf, and

[2] public employee's First Amendment interests in his public comments and his attorney's statements to the press on his behalf were clearly established at time of employers' adverse employment actions.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (8)

[1] **Federal Courts** On separate appeal from interlocutory judgment or order

On interlocutory review of the partial denial of qualified immunity in civil rights action, court lacked jurisdiction to address whether plaintiff had third party standing to vindicate the First Amendment rights of his lawyer; appropriate focus of a qualified immunity analysis was the legality of the conduct of the public officials, not their liability to plaintiff. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983.

43 Cases that cite this headnote

[2] **Constitutional Law** Attorneys, Regulation of

Constitutional Law Clients' rights in general

For purposes of First Amendment analysis, when a lawyer speaks on behalf of a client, the lawyer's right to speak is almost always grounded in the rights of the client, rather than any independent rights of the attorney; client's free speech interest in an attorney's speech on the client's behalf necessarily follows from the client's First Amendment right to retain counsel. U.S.C.A. Const.Amend. 1.

5 Cases that cite this headnote

[3] **Attorneys and Legal Services** Rights and interests of client in general

Constitutional Law Clients' rights in general

Client had a First Amendment interest in speech of his attorney, who spoke on client's behalf in his capacity as client's lawyer. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[4] **Constitutional Law** Retaliation in general

Test for resolving public employee's First Amendment retaliation claim requires analysis of five-step series of questions: (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech. U.S.C.A. Const.Amend. 1.

422 Cases that cite this headnote

[5] **Civil Rights** Employment practices

In resolving issue of qualified immunity with respect to public employee's First Amendment retaliation claim, court must assume the truth of the facts as alleged by employee in evaluating whether employee spoke as a private citizen, whether the government's adverse employment action was motivated by the employee's speech, and whether the employee's speech was a but-for cause of the adverse employment action. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983.

349 Cases that cite this headnote

[6] **Constitutional Law** Attorneys, prosecutors, and Attorney General's office

District and Prosecuting Attorneys Appointment

Deputy district attorney properly alleged a violation of his First Amendment rights with respect to both his comments about the leaking of information about school district's lease-purchase agreements to the IRS and his attorney's statements to the press on his behalf; taking deputy district attorney's version of the facts as true, the speech related to matters of public concern, the speech was made in his capacity as a private citizen, the adverse employment actions were motivated by district attorney's speech, employers' interest in regulating deputy district attorney's speech was outweighed by his free speech interest, and deputy district attorney's protected speech was a but-for cause of the adverse employment actions taken against him. U.S.C.A. Const.Amend. 1.

184 Cases that cite this headnote

[7] **Constitutional Law** Matters of public concern

Speech that is relevant to the public's evaluation of the performance of governmental agencies addresses matters of public concern for purposes of First Amendment analysis. U.S.C.A. Const.Amend. 1.

84 Cases that cite this headnote

[8] **Civil Rights** Employment practices

Assuming public employee's version of the facts was true, his First Amendment interests in his public comments about the leaking of information about school district's lease-purchase agreements to the IRS and his attorney's statements to the press on his behalf were clearly established at time of employers' adverse employment actions; therefore, employers' were not entitled to qualified immunity on employee's First Amendment retaliation claims. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983.

40 Cases that cite this headnote

Attorneys and Law Firms

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Appeal from the United States District Court for the Central District of California; Otis D. Wright, II, District Judge, Presiding. D.C. No. CV–05–02686–ODW.

Before: RICHARD D. CUDAHY, * HARRY PREGERSON, and HAWKINS, Circuit Judges.

Opinion

MICHAEL DALY HAWKINS, Circuit Judge:

We must determine whether Steve Cooley, Steven Sowders, Curt Livesay, Anthony Patchett, and Curtis Hazell (collectively, the "Defendants") are entitled in their ***1064** individual capacities to qualified immunity in this § 1983 First Amendment retaliation case. [1] Resolving this question involves, in part, David Eng's claim that he was retaliated against by the Defendants for an interview given by his lawyer on his behalf to the press. Concluding that we lack jurisdiction to address whether Eng has third party standing to vindicate the constitutional rights of his lawyer, but that he may nevertheless claim a personal First Amendment interest in his lawyer's advocacy on his behalf, we affirm the district court's partial denial of qualified immunity.

I. FACTUAL AND PROCEDURAL BACKGROUND

"Assuming that [Eng]'s version of the material facts is correct, as we must in the context of an interlocutory appeal of a qualified immunity decision," *CarePartners, LLC v. Lashway,* 545 F.3d 867, 878 (9th Cir.2008), the record establishes the following.

A. Factual Background

Eng, a Los Angeles County Deputy District Attorney, was assigned to the Belmont Task Force ("Task Force") to investigate allegations of fraud and environmental crimes related to the planning and construction of the Los Angeles Unified School District's Belmont Learning Complex ("Belmont"). The Task Force was established by newly-elected District Attorney Steve Cooley, who had campaigned on a promise to reform the Belmont project. The Task Force was headed by Special Assistant Anthony Patchett, who emphasized from the beginning that the Task Force would deliver "slam dunk" indictments against prominent individuals involved with the Belmont project. Following an extensive seven-month investigation, the Task Force concluded that the building site was and had always been environmentally safe and that no indictments should issue. Hours before the Task Force presented its findings and recommendations to Cooley and his executive staff, Eng briefed Patchett about the report. Patchett threatened Eng with "severe [personal] consequences" if the Task Force did not say what Patchett believed Cooley "wanted to hear." Eng nevertheless presented his report recommending that no criminal charges be brought. Following Eng's discussion of the Task Force's findings, Patchett made his own presentation opposing Eng's report and distributed proposed indictments against several prominent individuals. Cooley's executive staff considered both recommendations and declined to adopt Patchett's.

In the same meeting, the Task Force also discussed a *Los Angeles Times* article reporting that the Los Angeles Unified School District's (the "School District") lease-purchase agreements used to finance the Belmont project were being canceled and that the School District would have to refinance the project at a substantially higher interest rate. According to Eng, the agreements were cancelled because Patchett had improperly leaked to the IRS that the School District had committed fraud in purchasing the Belmont property. ***1065** Eng argued that the lease-purchase agreements had been legal and that Patchett's contrary report to the IRS was "wrong and should be rectified." Cooley, who had become angry with Eng, told him to "shut up."

Over the next several months, Cooley and members of his staff met frequently to discuss "a method of forcing David Eng out of the District Attorney's Office." First, a few months after the presentation, John Zajeck (who replaced Patchett as head of the Task Force) informed Eng that he was under investigation for sexual harassment of a Task Force law clerk with whom Eng had previously engaged in a consensual "private relationship." The relationship was not unusual and was not in violation of any office policy.

Patchett and Zajeck had approached the law clerk earlier to inquire about the relationship. She told the pair that Eng had not sexually harassed her, nor had she told anyone he had. After learning that Zajeck had initiated a sexual harassment investigation against Eng, moreover, she expressly advised the department that Eng had not sexually harassed her. The investigation nevertheless proceeded without the law clerk's knowledge or participation. Eng was told to work from home

until further notice and not permitted to return to work until the following month.

Next, in what Eng asserts was a "clear demotion," Cooley reassigned him to the Pomona Juvenile Division, even though Eng was a senior attorney in the office, and the Juvenile Division is "considered to be the first stop for beginning attorneys." (Eng had served in the Juvenile Division in the mid–1980s.) Eng was also interviewed by three District Attorney investigators regarding the alleged sexual harassment charge. During the interview, the investigators falsely claimed that the law clerk had not disavowed the alleged harassment. No harassment charges were ever brought against Eng.

About five months later, Eng was suspended with pay and instructed not to return to work without further notice, at which time he retained attorney Mark Geragos. Eng was subsequently served with a Notice of Intent to Suspend, which stated that misdemeanor charges had been filed against him for using an office computer to access private information. Head Deputy Steven Sowders subsequently informed Eng that he was being suspended without pay. Eng and Geragos argued that, because the allegations were baseless, his suspension should be with pay. That request was denied. Sowders terminated Eng's pay and benefits and also refused to allow him to "cash out" his vacation time, as was ordinarily allowed.

When the misdemeanor charges against Eng went to trial some two months later, they were dismissed when the only potential witness against Eng invoked his Fifth Amendment right to remain silent, evidently having misused office computers himself. Sowders still refused to allow Eng to return to work. Eng and Geragos appealed to the County Civil Service Commission, which ordered that Eng be allowed to return to work and that his lost pay and benefits be restored. Sowders refused to follow the order and extended Eng's suspension without pay for an additional thirty days.

Around the same time, the *Los Angeles Times* published a prominent article on Eng's case, titled "D.A. Accused of Payback Prosecution." The article, which included an interview with Geragos, detailed Eng's allegations that he had been prosecuted because he refused to file criminal charges against individuals involved in the Belmont School project, and because he complained that it was improper for members of the Task Force to contact the IRS.

***1066** Shortly after the article went to press, Sowders informed Eng and Geragos that Eng would "never be allowed to come back" to the District Attorney's Office and that "they would come up with additional things to charge Eng with so that he would remain on suspension or be terminated." Ironically, the day after the article was published, the District Attorney's office released the final Belmont Report, which mirrored the conclusions originally presented by Eng.

Two weeks after the *Los Angeles Times* article appeared, Sowders met with Eng and served him with a second Notice of Intent to Suspend, realleging the same facts as in the original notice and recounting additional allegations "stemm [ing] from acts which purportedly occurred years prior." During the meeting, Sowders asked Eng why he had allowed Geragos to give an interview to the *Los Angeles Times*. In a subsequent meeting among Eng, Geragos, Sowders, and Chief Deputy District Attorney Curt Livesay, Sowders offered to "resolve matters" if Eng agreed to "tell the *Los Angeles Times* that Geragos's comments were unauthorized and inaccurate, and if he would publicly apologize to Cooley."

Without agreeing to the retraction, Eng returned to work one week later at the Padrinos Juvenile Court. The following week, however, the District Attorney's office issued a second Notice of Suspension without Pay, evidently again ignoring the Civil Service Commission's order and the dismissal of the criminal charges against Eng. In a second hearing before the Civil Service Commission, the Commission resolved all outstanding allegations in Eng's favor, including the sexual harassment charges. Eng later returned to work once again but discovered that he was not receiving full benefits. He has since been passed over for promotion.

B. Procedural Background

Eng filed suit under 42 U.S.C. § 1983 asserting, in addition to a range of state law claims, that the Defendants had retaliated against him for exercising his First Amendment right to comment on the Belmont School Project and the leaks to the IRS, and to speak through his attorney to the press, in violation of the First and Fourteenth Amendments.

Following discovery, the Defendants moved for summary judgment, asserting in part qualified immunity from suit. The district court granted summary judgment with respect to Eng's recommendation that no criminal charges be filed against individuals associated with the Belmont project. According to the court, "Eng was merely fulfilling his job duties when

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he gave his Task Force recommendation," and therefore those statements were "not protected under the First Amendment."

The district court denied the remainder of the Defendants' motion for summary judgment. The court first addressed whether Eng had asserted a constitutional right. With respect to his comments about the leaks to the IRS, it concluded that "there is a genuine factual dispute between the parties as to whether this statement by Eng was made as part of his Task Force duties or as a private citizen speaking on a matter of public concern." With respect to Eng's attorney's interview with the *Los Angeles Times,* the district court concluded that "[t]he attorney made the statements on Eng's behalf, in his role as counsel. Consequently, the two have a sufficiently close relationship that Eng will be able effectively to assert his attorney's rights."

Having "established that Eng has legitimate First Amendment claims with regard to his protected speech," the district court concluded that "First Amendment protection is a clearly established constitutional ***1067** right" and the Defendants therefore were not immune from liability. The Defendants appeal.

II. JURISDICTION AND STANDARD OF REVIEW

We have interlocutory appellate jurisdiction pursuant to 28 U.S.C. § 1291 to review the partial denial of qualified immunity in this 42 U.S.C. § 1983 action. *See Mitchell v. Forsyth,* 472 U.S. 511, 524, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

The district court granted qualified immunity with respect to certain of Eng's statements, which it determined were constitutionally unprotected. Generally, "a challenge to the *grant* of qualified immunity [is] not independently interlocutorily appealable." *Krug v. Lutz,* 329 F.3d 692, 694 (9th Cir.2003) (emphasis added). Although we may take pendant jurisdiction to review a grant of qualified immunity on interlocutory appeal if it is "inextricably entwined" with a denial of qualified immunity, *Watkins v. City of Oakland,* 145 F.3d 1087, 1091 (9th Cir.1998), this is not such a case, nor does Eng argue it is. We therefore lack jurisdiction to review the district court's partial *grant* of qualified immunity and will consider only those statements with respect to which the district court *denied* qualified immunity.

Our interlocutory jurisdiction to review a denial of qualified immunity is limited exclusively to questions of law, which we review de novo. *Lee v. Gregory,* 363 F.3d 931, 932 (9th Cir.2004). A district court's determination that the parties' evidence presents genuine issues of material fact is categorically unreviewable on interlocutory appeal. *Id.* (citing *Mendocino Envtl. Ctr. v. Mendocino County,* 192 F.3d 1283, 1291 (9th Cir.1999)). "Where disputed facts exist, we assume that the version of the material facts asserted by[the] Plaintiff[ ], as the non-moving party, is correct." *KRL v. Estate of Moore,* 512 F.3d 1184, 1189 (9th Cir.2008). We must therefore limit our review to whether the Defendants would be entitled to qualified immunity as a matter of law assuming all factual disputes were resolved in Eng's favor.

III. DISCUSSION

The qualified immunity inquiry involves two sequential questions: (1) "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the[official's] conduct violated a constitutional right?" and (2) "if a violation could be made out on a favorable view of the parties' submissions, ... [was] the right ... clearly established ... in light of the specific context of the case[?]" *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). We address each question in turn.

A. Whether Eng Alleged a Violation of a Constitutional Right

1. Whether Eng May Assert a Claim for his Attorney's Speech

Before addressing whether Eng has demonstrated that the Defendants violated his constitutional rights, we must first decide as a threshold matter whether he has a first person interest, or third-party standing to vindicate Geragos's interest, in Geragos's interview with the *Los Angeles Times.*

Both the parties and the district court frame this question as one of third-party standing. The Defendants argue that Eng cannot pursue a "vicarious" First Amendment retaliation claim for statements made by Geragos because Eng has not demonstrated that Geragos was hindered from protecting his own interests. Eng counters that because Geragos was not himself injured, his ability to protect his own First Amendment interests was indeed hindered because he has no standing to bring his ***1068** own lawsuit. The district court agreed, concluding that "Eng should be granted third-party

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standing to assert a claim based, in part, upon the violation of his attorney's right to free speech."

[1] We lack jurisdiction, however, to consider whether Eng may assert third-party standing to vindicate Geragos's First Amendment interests. Our interlocutory review of the denial of qualified immunity in this case is limited to the narrow question whether the allegations indicate the Defendants violated Eng's clearly established constitutional rights. The question of standing, however, is relevant only to whether Eng may ultimately *recover* for the alleged violation and is collateral to the inquiry whether the violation has been sufficiently plead. *See, e.g., Davis v. Federal Election Comm'n,* 554 U.S. 724, 128 S.Ct. 2759, 2769, 171 L.Ed.2d 737 (2008) (standing is relevant only to "whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed," not to the merits of the underlying claim). Qualified immunity, the Supreme Court has explained, "focuses on *the objective legal reasonableness of an official's acts,*" *Harlow v. Fitzgerald,* 457 U.S. 800, 819, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) (emphasis added), and not on whether the plaintiff may or may not recover for the alleged illegalities.

We therefore agree with the Seventh Circuit that "the appropriate focus in a qualified immunity analysis is the legality of the conduct of the public official, not ... his liability to the ultimate plaintiff." *Triad Associates, Inc. v. Robinson,* 10 F.3d 492, 499 (7th Cir.1993). According to the policies underlying qualified immunity, " '[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate,' " regardless whether " 'the person who suffers injury caused by such conduct may have a cause of action.' " *Id.* at 500 (quoting *Harlow,* 457 U.S. at 821, 102 S.Ct. 2727). Whether Eng has standing to assert Geragos's own First Amendment interests is therefore not before us. [2] In any event, we do not believe Eng need raise a third-party standing claim because we hold that Geragos and Eng each have a first person constitutional interest in Geragos's speech.

[2] It is well settled that when a lawyer speaks on behalf of a client, the lawyer's right to speak "is almost always grounded in the rights of the client, rather than any independent rights of the attorney." *Mezibov v. Allen,* 411 F.3d 712, 718, 720 (6th Cir.2005) (citing *Zal v. Steppe,* 968 F.2d 924, 931 (9th Cir.1992) (Trott, J., concurring)). In *Legal Services Corp. v. Velazquez,* 531 U.S. 533, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001), for example, the Supreme Court considered whether Congress could impose negative conditions on grants to legal services organizations, such as "prevent[ing] an attorney from arguing to a court that [federal welfare laws are] violative of the United States Constitution." *Id.* at 536, 121 S.Ct. 1043. By its terms, the law at issue in that case prevented ***1069** *attorneys* who accepted funding from the Federal Legal Services Corporation ("LSC") from speaking certain words on behalf of their clients. The Supreme Court framed the question presented, however, as whether the law "violates the First Amendment rights of LSC grantees *and their clients.*" *Id.* at 536 (emphasis added).

In invalidating the restrictions, *Velazquez* reasoned that "an LSC-funded attorney speaks on the behalf of the client" and is the client's "speaker." *Id.* at 542, 121 S.Ct. 1043. Just as the government's lawyer must "deliver the government's message," the private citizen's lawyer must deliver the private citizen's message. *Id. Velazquez* therefore suggests that government action seeking to limit an attorney's advocacy "on behalf of" a client implicates the client's, as well as the attorney's, First Amendment interests—the attorney is, after all, the client's speaker hired to deliver the client's message. [3]

This conclusion is a natural corollary of the long-recognized First Amendment right to hire and consult an attorney. *See, e.g., Mothershed v. Justices of the Supreme Court,* 410 F.3d 602, 611 (9th Cir.2005) ("[W]e recognize ... the 'right to hire and consult an attorney is protected by the First Amendment's guarantee of freedom of speech, association and petition.' " (quoting *Denius v. Dunlap,* 209 F.3d 944, 953 (7th Cir.2000))); *DeLoach v. Bevers,* 922 F.2d 618, 620 (10th Cir.1990) ("The right to retain and consult an attorney ... implicates ... clearly established First Amendment rights of association and free speech."). The Tenth Circuit has concluded, for example, "that an individual's First Amendment rights of association and free speech are violated when a police officer retaliates against her for retaining an attorney." *Malik v. Arapahoe County Dep't of Soc. Servs.,* 191 F.3d 1306, 1315 (10th Cir.1999). But the First Amendment's prohibition against state retaliation for *hiring* a lawyer would ring hollow if the state could simply retaliate for the lawyer's *advocacy* on behalf of the client instead. A client's free speech interest in an attorney's speech on the client's behalf therefore necessarily follows from the client's First Amendment right to retain counsel.

The further corollary of that interest, as *Velazquez* recognized, is that "[c]ounsel [must] be free of state control" and unfettered in the exercise of "independent judgment on behalf

of the client." 531 U.S. at 542, 121 S.Ct. 1043 (citing *Polk County v. Dodson,* 454 U.S. 312, 321–22, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981)). In this case, if the state were able to retaliate freely against Eng for statements made by his lawyer on his behalf, lawyers' representation of public-employee-plaintiffs would be chilled, and the state's actions would be "insulat[ed]" from full and open "judicial challenge," thereby "distort[ing] the legal system." *Id.* at 544, 547, 121 S.Ct. 1043. There can be little doubt, then, that " '[s]tate action designed to retaliate against and chill [an attorney's advocacy for his or her client] strikes at the heart of the First Amendment.' " *Soranno's Gasco, Inc. v. Morgan,* 874 F.2d 1310, 1314 (9th Cir.1989) (citation omitted).

[3] Here, the district court concluded that when Geragos spoke to the press about Eng's First Amendment retaliation case, Geragos "made the statements on ***1070** Eng's behalf, in his role as counsel." The Defendants do not dispute this characterization. Because Geragos spoke on Eng's behalf in his capacity as Eng's lawyer, his words were Eng's words as far as the First Amendment is concerned. Eng himself therefore had a personal First Amendment interest in Geragos's speech.

2. The First Amendment Retaliation Test

Having determined that Eng had a personal constitutional interest in his own speech about the leak to the IRS and in Geragos's interview with the *Los Angeles Times,* we turn now to the question whether Eng has alleged a violation of that interest.

It is well settled that the state may not abuse its position as employer to stifle "the First Amendment rights[its employees] would otherwise enjoy as citizens to comment on matters of public interest." *Pickering v. Bd. of Educ.,* 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). Acknowledging the limits on the state's ability to silence its employees, the Supreme Court has explained that "[t]he problem in any case is to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*

[4] In the forty years since *Pickering,* First Amendment retaliation law has evolved dramatically, if sometimes inconsistently. Unraveling *Pickering*'s tangled history reveals a sequential five-step series of questions: (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech. Analysis of these questions, further complicated by restraints on our interlocutory appellate jurisdiction, involves a complex array of factual and legal inquiries requiring detailed explanation.

***First*,** the plaintiff bears the burden of showing that the speech addressed an issue of public concern. *See Connick v. Myers,* 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); *Bauer v. Sampson,* 261 F.3d 775, 784 (9th Cir.2001). "Speech involves a matter of public concern when it can fairly be considered to relate to 'any matter of political, social, or other concern to the community.' " *Johnson v. Multnomah County, Or.,* 48 F.3d 420, 422 (9th Cir.1995) (quoting *Connick,* 461 U.S. at 146, 103 S.Ct. 1684). But "speech that deals with 'individual personnel disputes and grievances' and that would be of 'no relevance to the public's evaluation of the performance of governmental agencies' is generally not of 'public concern.' " *Coszalter v. City of Salem,* 320 F.3d 968, 973 (9th Cir.2003) (quoting *McKinley v. City of Eloy,* 705 F.2d 1110, 1114 (9th Cir.1983)). " 'Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.' " *Johnson,* 48 F.3d at 422 (quoting *Connick,* 461 U.S. at 147–48, 103 S.Ct. 1684).

The public concern inquiry is purely a question of law, which we review de novo. *Berry v. Dept. of Soc. Servs.,* 447 F.3d 642, 648 (9th Cir.2006) (citing *Hyland v. Wonder,* 972 F.2d 1129, 1134 (9th Cir.1992)). If the speech in question does not address a matter of public concern, then the speech ***1071** is unprotected, and qualified immunity should be granted.

***Second*,** the plaintiff bears the burden of showing the speech was spoken in the capacity of a private citizen and not a public employee. *See Garcetti v. Ceballos,* 547 U.S. 410, 421–22, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006); *Posey v. Lake Pend Oreille School Dist. No. 84,* 546 F.3d 1121, 1126–27 (9th Cir.2008). "Statements are made in the speaker's capacity as citizen if the speaker 'had no official duty' to make the questioned statements, or if the speech was not the product of 'performing the tasks the employee was paid to perform.'

" *Posey,* 546 F.3d at 1127 n. 2 (some internal quotations and alterations omitted) (quoting, respectively, *Marable v. Nitchman,* 511 F.3d 924, 932–33 (9th Cir.2007), and *Freitag v. Ayers,* 468 F.3d 528, 544 (9th Cir.2006)).

[5] While "the question of the scope and content of a plaintiff's job responsibilities is a question of fact," the "ultimate constitutional significance of the facts as found" is a question of law. *Id.* at 1129–30. In evaluating whether a plaintiff spoke as a private citizen, we must therefore assume the truth of the facts as alleged by the plaintiff with respect to employment responsibilities. If the allegations demonstrate an official duty to utter the speech at issue, then the speech is unprotected, and qualified immunity should be granted.

***Third*,** the plaintiff bears the burden of showing the state "took adverse employment action ... [and that the] speech was a 'substantial or motivating' factor in the adverse action." *Freitag,* 468 F.3d at 543 (quoting *Coszalter v. City of Salem,* 320 F.3d 968, 973 (9th Cir.2003)); *see also Marable,* 511 F.3d at 930, n. 10 ("It is [the plaintiff]'s burden to show that his constitutionally protected speech was a motivating factor in [the state]'s adverse employment action.").

This third step is purely a question of fact. Once again, in evaluating whether the government's adverse employment action was motivated by the employee's speech, we must assume the truth of the plaintiff's allegations. If the plaintiff does not sufficiently allege that the state retaliated for the employee's exercise of First Amendment rights, there can be no recovery, and qualified immunity should be granted.

***Fourth*,** if the plaintiff has passed the first three steps, the burden shifts to the government to show that "under the balancing test established by [*Pickering*], the [state]'s legitimate administrative interests outweigh the employee's First Amendment rights." *Thomas v. City of Beaverton,* 379 F.3d 802, 808 (9th Cir.2004); *see also CarePartners,* 545 F.3d at 880. This inquiry, known as the *Pickering* balancing test, asks "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Garcetti,* 547 U.S. at 418, 126 S.Ct. 1951. Its qualified restriction of ordinarily protected speech recognizes that "[a] government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations." *Id.*

Although the *Pickering* balancing inquiry is ultimately a legal question, like the private citizen inquiry, its resolution often entails underlying factual disputes. *See, e.g., Rivero v. City & County of San Francisco,* 316 F.3d 857, 865–66 (9th Cir.2002) (determining "the outcome of the *Pickering* balancing test" requires resolving underlying "question[s] of fact"); *Hyland,* 972 F.2d at 1139 ("Application of this balancing test entails" resolution of underlying "factual inquir[ies]"). Thus we must ***1072** once again assume any underlying disputes will be resolved in favor of the plaintiff to determine, as a matter of law, whether the state has "adequate justification" to restrict the employee's speech. If the allegations, viewed in light most favorable to the plaintiff, indicate adequate justification, qualified immunity should be granted.

Fifth and finally, if the government fails the *Pickering* balancing test, it alternatively bears the burden of demonstrating that it "would have reached the same [adverse employment] decision even in the absence of the [employee's] protected conduct." *Thomas,* 379 F.3d at 808 (quoting *Ulrich v. City and County of San Francisco,* 308 F.3d 968, 976–77 (9th Cir.2002)). In other words, it may avoid liability by showing that the employee's protected speech was not a but-for cause of the adverse employment action. *See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). This question relates to, but is distinct from, the plaintiff's burden to show the protected conduct was a substantial or motivating factor. It asks whether the "adverse employment action was based on protected *and* unprotected activities," and if the state "would have taken the adverse action if the proper reason alone had existed." *Knickerbocker v. City of Stockton,* 81 F.3d 907, 911 (9th Cir.1996) (emphasis added).

The *Mt. Healthy* but-for causation inquiry is purely a question of fact. *Wagle v. Murray,* 560 F.2d 401, 403 (9th Cir.1977) (per curiam) ("*Mt. Healthy* indicates the 'trier-of-fact' should determine whether the firing would have occurred without the protected conduct."); *see also Karam v. City of Burbank,* 352 F.3d 1188 (9th Cir.2003). In evaluating whether the employee's speech was a but-for cause of the adverse employment action, we must therefore once again assume the truth of the plaintiff's allegations. Immunity should be granted on this ground only if the state successfully alleges, without dispute by the plaintiff, that it would have made the same employment decisions even absent the questioned speech.

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3. Whether Eng Passes the First Amendment Retaliation Test

[6] Applying this five-step First Amendment retaliation test, we conclude the allegations here demonstrate that Eng's First Amendment rights were violated with respect to both Eng's comments about the leak to the IRS and Geragos's statements on Eng's behalf to the press.

a. Whether Eng's Speech Addressed Matters of Public Concern

The Defendants did not argue below and have not argued on appeal that Eng's statements did not address a matter of public concern. Accordingly, any such argument is waived. *See, e.g., Butler v. Curry,* 528 F.3d 624, 642 (9th Cir.2008) (defendant "waived this argument by failing to raise it either in the district court or in his brief on appeal" (citing *Nw. Acceptance Corp. v. Lynnwood Equip., Inc.,* 841 F.2d 918, 923 (9th Cir.1988))).

In any event, there is little doubt that Eng's speech did address matters of public concern. " '[C]ommunication[s] on matters relating to the functioning of government' ... are matters of inherent public concern." *Johnson v. Multnomah County, Or.,* 48 F.3d 420, 425 (9th Cir.1995) (quoting *McKinley v. City of Eloy,* 705 F.2d 1110, 1114 (9th Cir.1983) (quoting *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 575, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (plurality opinion))). The leaking of information (whether true or false) about the School District's lease-purchase agreements to the IRS was therefore a matter of public concern insofar as it led to ***1073** the need for additional, more expensive financing for the public school complex.

[7] Speech that is " 'relevan[t] to the public's evaluation of the performance of governmental agencies' " also addresses matters of public concern. *Freitag,* 468 F.3d at 545 (quoting *Coszalter v. City of Salem,* 320 F.3d 968, 973–74 (9th Cir.2003)). Here, the leaking of such statements, as well as Geragos's statements to the *Los Angeles Times* regarding the retaliatory prosecution against Eng, were certainly " 'relevan[t] to the public's evaluation of the performance of' " the District Attorney's office. *Freitag,* 468 F.3d at 545 (quoting *Coszalter,* 320 F.3d at 973–74). We therefore conclude Eng's speech addressed matters of public concern.

b. Whether Eng Spoke as a Private Citizen

The Defendants expend great effort arguing that Eng's speech with respect to the IRS leak was "inextricably related to his work," and therefore that his speech was not protected because it was uttered in his capacity as public employee. But the district court determined that there is a genuine factual dispute between the parties regarding whether Eng's speech about the IRS leaks was made as part of his Task Force duties or as a private citizen. The district court's determination that the parties' evidence presents genuine issues of material fact is not reviewable on interlocutory appeal. *Lee,* 363 F.3d at 932. Once again, "[w]here disputed facts exist, ... we can determine whether the denial of qualified immunity was appropriate [only] by assuming that the version of the material facts asserted by the non-moving party is correct." *Jeffers,* 267 F.3d at 903.

Here, there can be no doubt that Eng's version of the facts plausibly indicates he had no official duty to complain about any leak to the IRS or to authorize Geragos to speak to the press about the retaliation being taken against him.

c. Whether the Adverse Employment Action Was Motivated By Eng's Speech

As a threshold matter, we must consider the full range of adverse employment actions alleged in the complaint. Although the Defendants correctly note that the district court determined Eng was barred by the statute of limitations from recovering for any adverse employment actions taken before January 1, 2003,[4] whether any specific acts complained of are time-barred is (like the third-party standing question) collateral to the limited, interlocutory qualified immunity inquiry. Whether a plaintiff brings an action in time to challenge certain conduct is irrelevant, that is, to the logically independent question whether the state violated the plaintiff's clearly established rights. The applicability of the statute of limitations is therefore not before us, and we will consider the full range of adverse employment actions stated in Eng's complaint.

The Defendants do not dispute that the initial investigations and first suspension were motivated by Eng's protected speech. They argue only that Eng's transfer to the juvenile division "was not motived by any subject speech" and that "any argument by [Eng] that the 2003 suspension was ***1074** motivated by his attorney's statements [to the press] was unsupported by the evidence." These assertions ignore, however, that we must assume resolution of the disputed facts in Eng's favor. Eng's account of the meeting with Livesay and Sowders, for example, plainly undermines the Defendants' contrary assertion that the systematic

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investigations, prosecution, suspensions, and demotion of Eng were not motivated by his speech. Eng's further accounts of Cooley's meetings with his staff to discuss "a method of forcing David Eng out of the District Attorney's Office," and Sowders's threats to both Eng and Geragos following publication of the *Los Angeles Times* article, all also indicate that Eng's speech was a "substantial or motivating" factor in the adverse employment action.

d. *Pickering* Balancing

Eng having passed the first three steps of the First Amendment retaliation test, the burdens of evidence and persuasion now shift to the Defendants to show that the balance of interests justified their adverse employment decision. But the Defendants did not argue before the district court, and do not argue before us now, that their interest in regulating Eng's speech was sufficient to outweigh Eng's free speech interest. They have therefore waived this argument. *See, e.g., Butler,* 528 F.3d at 642.

In any event, Eng's allegations show that the District Attorney lacked adequate justification for treating Eng differently from other members of the public. The Defendants have neither alleged nor offered any evidence to support a conclusion that investigating, suspending, prosecuting, or transferring Eng for his speech was "necessary for [the District Attorney's office] to operate efficiently and effectively." *Garcetti,* 547 U.S. at 419, 126 S.Ct. 1951 (citing *Connick,* 461 U.S. at 147, 103 S.Ct. 1684). Rather, viewing the allegations in the light most favorable to Eng, the full range of adverse employment action appears to have been a politically-motivated effort to silence Eng, who stood to embarrass Cooley by undermining a central plank in his campaign platform. On the record before us at this stage in the case, the Defendants have not met their burden under the *Pickering* balancing test.

e. *Mt. Healthy* But–For Causation

Rather than addressing *Pickering,* the Defendants argue that they "would have reached the same [adverse employment] decision even in the absence of [Eng]'s protected conduct." *Thomas,* 379 F.3d at 808 (quoting *Ulrich,* 308 F.3d at 976–77). They assert, for example, that Eng's suspensions would have been approved regardless of his protected speech because they were in fact "due to the information gathered from three separate internal investigations involving separate and independent allegations of misconduct." This argument ignores Eng's allegations that the investigations and apparently baseless charges were *themselves* motivated by his exercise of his First Amendment rights.

The Defendants further assert that Eng's performance on a promotability review undermines a but-for connection between his speech acts and his having been passed over for promotion. But Eng alleges he received a low score on the promotion review in part because his record contained accusations of sexual harassment and misuse of office computers—accusations *themselves* motivated by his exercise of his First Amendment rights.

Taking Eng's version of the facts as true, the Defendants have therefore not met their burden to show that Eng's protected speech was not a but-for cause of the adverse employment actions taken against him. In sum, Eng has properly alleged a violation of his constitutional rights.

***1075 B. Whether Eng's Rights Were Clearly Established**

1. The Clearly–Established Standard

Passing the First Amendment retaliation test is only a plaintiff's first hurdle before defeating a motion for summary judgment on qualified immunity. In addition to showing the violation of a constitutional right, a plaintiff must also demonstrate that the constitutional rights at issue were clearly established at the time of the violation. The "clearly established" requirement "operates 'to ensure that before they are subjected to suit, [government officials] are on notice their conduct is unlawful.' " *Hope v. Pelzer,* 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002) (quoting *Saucier,* 533 U.S. at 206, 121 S.Ct. 2151). For a constitutional right to be clearly established, "its contours 'must be sufficiently clear that a reasonable official would understand that what he is doing violates that right' " at the time of his conduct. *Id.* (citations omitted) (quoting *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). If a plaintiff's constitutional rights were not clearly established at the time of the violation, then qualified immunity should be granted.

2. Whether Eng's Rights Were Clearly Established

a. Eng's Speech about the Leak to the IRS

[8] The Defendants did not argue before the district court, and do not argue before this court now, that Eng's rights were not clearly established with respect to any speech *not*

spoken pursuant to his official employment duties. Relying on *Garcetti* (decided in 2006), the Defendants assert only that "the law was not clearly established [in 2001] as to the nature of First Amendment protection for public employee speech *expressed pursuant to official job duties.*" This observation is beside the point.

Garcetti makes clear that if Eng's comments about the leaks to the IRS *were* spoken pursuant to his official job duties, then he cannot recover regardless of the state of the law in 2001, since there is no private First Amendment interest in "speech that owes its existence to a public employee's professional responsibilities." 547 U.S. at 421, 126 S.Ct. 1951. And if the statements were *not* spoken pursuant to Eng's job duties, the Defendants do not dispute that Eng's free speech interest was clearly established.

Nor could they. *Garcetti* concluded only that "work product" that "owes its existence to [an employee]'s professional responsibilities" is *not* protected by the First Amendment. *Id.* at 422, 126 S.Ct. 1951. (Regulation of such speech "simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.* at 422, 126 S.Ct. 1951.) Prior to *Garcetti,* the Defendants therefore may have been uncertain whether the Task Force report itself was protected, but only insofar as they might reasonably have believed that it *was* protected when in fact it was *not.* There could be no confusion, however, that when Eng "comment[ed] upon matters of public concern" "as a citizen" and *not* pursuant to his job responsibilities, his speech *was* protected by the First Amendment—that rule had long been the law of the land. [5] *See, e.g., Mt. Healthy,* 429 U.S. at 284, 97 S.Ct. 568 (quoting ***1076** *Pickering,* 391 U.S. at 568, 88 S.Ct. 1731). Thus, assuming Eng's version of the facts to be true, he had a clearly established right to comment on the leak to the IRS. [6]

b. Eng's Attorney's Speech to the Press

Geragos's and Eng's respective First Amendment interests in Geragos's speech to the press were also clearly established at the time of the alleged retaliation. The clarity of Geragos's interest in his own speech (regardless of Eng's standing to vindicate that interest) is beyond dispute.

With respect to Eng's personal interest, by 2003, the right to retain and consult an attorney "implicate[d] ... clearly established First Amendment rights of association and free speech." *DeLoach,* 922 F.2d at 620. It was also clearly established that "an individual's First Amendment rights of association and free speech are violated when a police officer retaliates against her for retaining an attorney." *Malik,* 191 F.3d at 1315. An individual's personal First Amendment interest in his or her lawyer's speech on his or her behalf is a natural corollary of the First Amendment right to retain counsel. Any other conclusion would eviscerate that right.

Velazquez had also been decided two years prior to Geragos's interview with the *Los Angeles Times.* That decision recognized that a federal law seeking to prevent lawyers from making certain arguments on behalf of their clients implicated the client's First Amendment rights. As the Sixth Circuit later concluded, "*Velazquez* [did not] recognize a First Amendment right personal to the attorney independent of his client," and lawyers' free speech interests when advocating on behalf of clients "[are] almost always grounded in the rights of the client, rather than any independent rights of the attorney." *Mezibov,* 411 F.3d at 720.

Although we have not previously addressed a case precisely like this one, " 'officials can still be on notice that their conduct violates established law even in novel factual circumstances.' " *Porter v. Bowen,* 496 F.3d 1009, 1026 (9th Cir.2007) (quoting *Hope,* 536 U.S. at 741, 122 S.Ct. 2508); *see also Hope,* 536 U.S. at 741, 122 S.Ct. 2508 ("Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding."). Because this case involved "mere application of settled law to a new factual permutation," *Porter,* 496 F.3d at 1026, we conclude that Eng's personal First Amendment interest in Geragos's speech was clearly established by 2003. *Denius, DeLoach*, and *Velazquez* were sufficient to put the Defendants on notice of the common sense conclusion that the government may not retaliate against a public employee for speech spoken by the employee's lawyer on the employee's behalf.

IV. CONCLUSION

The district court's partial denial of qualified immunity is affirmed in full.

AFFIRMED.

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All Citations

552 F.3d 1062, 28 IER Cases 1139, 09 Cal. Daily Op. Serv.
555, 2009 Daily Journal D.A.R. 664

Footnotes

* The Honorable Richard D. Cudahy, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

1 Eng's complaint also identifies as defendants the County of Los Angeles and the named defendants in their official capacities. Qualified immunity is not available, however, to municipalities or individuals in their official capacities. *See, e.g., Hallstrom v. City of Garden City,* 991 F.2d 1473, 1482 (9th Cir.1993) ("A municipality (and its employees sued in their official capacities) may not assert a qualified immunity defense to liability under Section 1983." (citing *Owen v. City of Independence,* 445 U.S. 622, 638, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980); *Kentucky v. Graham,* 473 U.S. 159, 165–68, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985))). We therefore consider only the individual defendants in their individual capacities in this interlocutory appeal.

2 District courts may, of course, address standing when passing on Rule 12(b)(6) and 56 motions predicated on qualified immunity, but any ruling on such issues will generally be independent of the qualified immunity inquiry itself and cannot be raised on interlocutory appeal. Except in the rare circumstance that the standing decision is "inextricably intertwined" with the qualified immunity decision, *Swint v. Chambers County Com'n,* 514 U.S. 35, 50–51, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995), we may address such matters only on appeals from final judgments. *See Will v. United States,* 389 U.S. 90, 96, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967) ("All our jurisprudence is strongly colored by the notion that appellate review should be postponed, except in certain narrowly defined circumstances, until after final judgment has been rendered by the trial court.").

3 Although both *Velazquez* and *Mezibov* addressed attorneys' representation of their clients in the courtroom, we see no reason to limit recognition of a client's constitutional interest in an attorney's representation to in-court speech only. There can be little doubt that zealous representation extends far beyond the confines of brief-writing, examination of witnesses, and oral argument. This case itself demonstrates that fact.

4 We are skeptical that the district court was correct to apply the "discrete acts" rather than "repeated conduct" analysis to, for example, the ongoing investigations and prosecutions at issue in this case. *See Amtrak v. Morgan,* 536 U.S. 101, 110–21, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) (distinguishing for statute of limitations purposes between "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire" and practices that "cannot be said to occur on any particular day," and instead "occur[ ] over a series of days or perhaps years").

5 Whether it was "clear" that Eng spoke pursuant to his job duties is a question of fact and not law; the only question here is whether Eng's free speech right was "clearly established" as a matter of law, assuming his version of the facts to be true.

6 We have previously characterized the *Pickering* balancing test as "a context-intensive, case-by-case balancing analysis," the outcome of which is rarely clear; thus "the law regarding [First Amendment retaliation] claims will rarely, if ever, be sufficiently 'clearly established' to preclude qualified immunity." *Dible v. City of Chandler,* 515 F.3d 918, 930 (9th Cir.2008) (quoting *Moran v. Washington,* 147 F.3d 839, 847 (9th Cir.1998)). Because the Defendants waived the *Pickering* balancing argument, we need not address whether the Defendants' lack of justification to treat Eng differently was clearly established.

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1997 WL 701350
Review Department of the
State Bar Court of California.

In the Matter of William Robert
ANDERSON, A Member of the State Bar.

No. 89–O–11498.
|
Nov. 6, 1997.

OPINION ON REVIEW

NORIAN, J.

***1** ****778** Respondent William Robert Anderson seeks review of a hearing judge's decision finding that he violated his statutory duty under Business and Professions Code section 6068, subdivision (b) [1] to maintain the respect due to the courts and judicial officers by repeatedly making statements in pleadings and letters that impugned the honesty and integrity of numerous trial and appellate court judges. The hearing judge recommended that respondent be suspended from the practice of law for two years, that execution of that suspension be stayed, and that respondent be placed on probation for one year subject to various conditions, including a sixty-day period of actual suspension.

Respondent acknowledges that he made the alleged statements but asserts on review, as he did in the hearing department, that the statements are truthful and are protected by the First Amendment guarantee of free speech.

There is no question that respondent's statements impugned the integrity and honesty of numerous judges. However, the disposition of this case turns upon the burden of proof in State Bar disciplinary proceedings and, specifically, upon the question of whether respondent bears the burden of proving the truthfulness of his accusations or, conversely, whether the State Bar, through its Office of the Chief Trial Counsel (OCTC), bears the burden of proving their falsity.

We hold that an attorney may be disciplined for making false statements that impugn the honesty or integrity of the court if those statements either are knowingly false or are made with reckless disregard for their truth or falsity. We further hold that OCTC bears the burden of proving the falsity of those statements.

In this case, OCTC failed to introduce any evidence regarding the falsity of respondent's statements. However, in a pre-trial evidentiary ruling, the hearing judge erroneously held that OCTC did not bear the burden of proving that respondent's statements were false. Because the hearing judge's ruling improperly relieved OCTC of its burden of proof, we remand this matter to the hearing department for further proceedings consistent with this opinion.

I. PROCEDURAL HISTORY

The notice to show cause in this proceeding was filed on December 22, 1992. A first amended notice to show cause was subsequently filed on July 13, 1993. Respondent filed timely answers to both notices.

The first amended notice charged respondent with violations of Business and Professions Code section 6068, subdivisions (b) and (f) [2] as a result of 116 separate statements he made in pleadings and documents. These statements impugned the integrity and honesty of the Orange County Superior Court and others.

The hearing judge filed an initial decision on March 24, 1995, and a modified decision on April 27, 1995. The judge found respondent culpable of violating section 6068, subdivision (b), but not section 6068, subdivision (f). Respondent sought review by this court.

II. FACTS

***2** We have independently reviewed the record (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207, 44 Cal.Rptr.2d 620, 900 P.2d 1170) and adopt the hearing judge's findings of fact, which we summarize below.

Respondent was admitted to practice law in California in 1972. He began practicing law in Orange County in 1981.

****779** Michael and Gale Sansone managed and operated the Irvine Health Center (Center), which they jointly leased with others, including Daniel Sigler. The term of the Center's lease extended from March 1983 until April 1988.

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Attorney Jeffrey Walsworth, a friend of Sigler, set up both Kokua Management, Inc., (Kokua) for the Sansones and a professional chiropractic corporation for Michael Sansone. From the latter half of 1983, the Sansones managed the Center through Kokua.

In January 1985, Sigler moved his office out of the Center. The Sansones asserted that Sigler's move breached the terms of the joint lease.

In May 1985, Walsworth filed an action in Orange County Superior Court on behalf of Sigler (the Sigler action) against Gale Sansone and Kokua. Walsworth later added Michael Sansone as a defendant. Respondent represented the Sansones and Kokua.

During the disciplinary proceeding, respondent claimed to have filed a motion in the Sigler action to disqualify Walsworth on the ground that Walsworth had formerly represented the Sansones and Kokua and that the court had denied his motion. Neither the motion nor the court's ruling was offered in evidence in this proceeding.

Respondent also contended during this disciplinary proceeding that Walsworth's complaint and amended complaint in the Sigler action contained many lies and that Walsworth committed perjury by verifying those complaints.

On numerous occasions, the Orange County Superior Court imposed monetary sanctions, which totaled more than $4,500, against respondent and his clients. Respondent argued that Walsworth improperly influenced the court to impose these sanctions in order to "punish" respondent and his clients for their accusations against Walsworth and the court.

During the late 1980's, respondent represented the Sansones and Kokua in various proceedings related to the Sigler action. In July 1987, for example, respondent filed an action (the Sansone action) on their behalf for breach of contract against others involved in the lease of the Center.

In 1988, Walsworth filed motions to disqualify respondent from representing the Sansones and Kokua in the Sigler and Sansone actions. Respondent opposed the motions on the grounds that they were frivolous and were supported by perjurious declarations. The Orange County Superior Court granted both motions.

In May 1989, a federal bankruptcy court issued a memorandum opinion in an adversarial proceeding filed by Gale Sansone. The bankruptcy court awarded her compensatory and punitive damages against Walsworth in the total amount of $35,594.42. Further, the bankruptcy court found that Walsworth had filed cross-complaints in the Sansone action in disrespect for the law and in bad faith and that Walsworth had directly perjured himself at trial in the bankruptcy matter by falsely denying his prior attempt to extort money from Sansone. The bankruptcy court's opinion made no finding regarding the conduct of either the Orange County Superior Court or any of its judicial officers.

***3** In the disciplinary proceeding, respondent asserted that the bankruptcy court's findings about Walsworth substantiated his contention that Walsworth committed perjury earlier by verifying the complaints in the Sigler action.

Respondent made a total of 116 derogatory statements about the Orange County Superior Court and its judicial officers in 17 pleadings and other documents written between 1987 and 1990. During this entire period of time, respondent was representing the Sansones and Kokua in various actions. As the hearing judge found, and as OCTC acknowledges, 16 of these statements were privileged in that they were contained in unpublished letters to the Presiding Judges of the Orange County Superior Court complaining about the alleged misconduct of Orange County judges and commissioners.

The remaining 100 statements formed the basis for the hearing judge's determinations regarding culpability. A declaration that respondent executed in August 1988 reflects the nature of ****780** these statements.[3] According to this declaration, the Orange County Superior Court (1) "repeatedly indicated [[[[its refusal to] recognize and obey the laws of the State of California and the canons of the Code of Judicial Conduct"; (2) knew that Walsworth had "committed the felony of perjury"; (3) "knowingly aid[ed] Walsworth ... in avoiding arrest, trial, conviction, and punishment"; (4) used sanctions to punish "the litigants and attorneys [who revealed] such crimes"; and (5) "on many occasions ... became an accessory to such felonies ...."

Respondent repeated the same, or essentially similar, statements in many documents and pleadings filed in other actions.

During the disciplinary proceeding, respondent was the only witness called by either OCTC or respondent.

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The only documentary evidence introduced by the State Bar was the pleadings and documents in which respondent made his allegations and derogatory statements. Respondent acknowledged having written these pleadings and affirmatively testified that, in his view, each of the statements was true based upon the facts as he knew them at the time the statements were made. Respondent conceded, however, that many of his statements rested upon information he had received from other persons and that he had no personal knowledge about the truth of such information.

The pleadings and documents written by respondent made both general references to the Orange County Superior Court and specific references to particular judges. Each of the pleadings and documents set forth specific facts, incidents, or judicial rulings that respondent claimed supported his conclusion that some of the judges of the Orange County Superior Court had acted "corruptly and unethically." While respondent often made broad general references in these pleadings to the Orange County Superior Court, viewing each of the pleadings in its entirety, it does not appear that respondent was claiming that each and every judge of the Orange County Superior Court was corrupt or improperly protecting Walsworth. In fact, at least two of the pleadings filed by respondent specifically stated that respondent believed that some Orange County judges were honest and would act with integrity. [4] (State Bar exhibits 12 and 13.)

****781** III. DISCUSSION

A. *Section 6068, Subdivision (b)*

***4** Throughout this proceeding, respondent has asserted that his statements about the Orange County Superior Court and others are true and that his statements are protected by the First Amendment. Respondent has also consistently argued throughout this proceeding that OCTC bears the burden of proving his statements are false.

At a status conference conducted on October 8, 1993, the hearing judge indicated that he did not know whether the truth or falsity of the alleged statements was relevant in determining respondent's culpability. In response, deputy trial counsel for OCTC argued that the truth or falsity of the statements is irrelevant for purposes of culpability and that OCTC does not bear the burden of proving the falsity of respondent's statements.

The parties also subsequently submitted written briefs on the issue at the request of the hearing judge. In its Pre–Trial Brief filed on November 5, 1993, OCTC repeated its argument that the truth or falsity of the allegations made by respondent was irrelevant. (OCTC's Pre–Trial Brief, pp. 35–36.)

Thereafter, in a pre-trial evidentiary order filed December 13, 1993, the hearing judge concluded that OCTC did not have the burden of proving the falsity of any of the derogatory statements made by respondent because, on their face, the statements impugned the integrity and honesty of the Orange County Superior Court. Citing the California Supreme Court's opinions in *Lebbos v. State Bar* (1991) 53 Cal.3d 37, 278 Cal.Rptr. 845, 806 P.2d 317 (*Lebbos*) and *Ramirez v. State Bar* (1980) 28 Cal.3d 402, 169 Cal.Rptr. 206, 619 P.2d 399 (*Ramirez*), as well as several cases from other jurisdictions, the hearing judge concluded that respondent had the burden of showing either the truthfulness of the statements or, alternatively, that he had a reasonable factual basis for the statements at the time he made them and that they were, therefore, not made in reckless disregard for the truth.

No evidence was introduced by OCTC to show that any of the statements made by respondent were false. In his modified decision filed April 27, 1995, the hearing judge reiterated his conclusion that OCTC did not have the burden of proving the falsity of respondent's statements and that respondent bore the burden of proving their truthfulness or, alternatively, his reasonable factual basis for them.

The hearing judge did not find any of the respondent's statements to be false. Rather, the judge found that respondent had failed to affirmatively establish that the statements were true or that he had a reasonable basis in fact to support them. As a result, the hearing judge concluded that respondent had violated section 6068, subdivision (b).

However, on May 30, 1995, 33 days after the hearing judge filed his modified decision, the Ninth Circuit Court of Appeals filed its opinion in *Standing Committee v. Yagman* (9th Cir.1995) 55 F.3d 1430 (*Yagman*). In that case, the Ninth Circuit reached the opposite conclusion on the burden of proof issue from that reached by the hearing judge in this case. As explained below, we agree with the Ninth Circuit and, therefore, hold that the hearing judge erred both in his pre-trial order and in his modified decision by concluding that OCTC did not bear the burden of proving that respondent's statements were false.

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***5** Disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment. First Amendment protection survives even when an attorney violates an ethical rule that he or she swore to obey when admitted to the practice of law. (*Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 1054, 111 S.Ct. 2720, 115 L.Ed.2d 888.)

Like all other citizens, attorneys are entitled to the protection of the First Amendment, even as participants in the administration of justice. (*In re R.M.J.* (1982) 455 U.S. 191, 199, 102 S.Ct. 929, 71 L.Ed.2d 64; *Konigsberg v. State Bar* (1957) 353 U.S. 252, 273, 77 S.Ct. 722, 1 L.Ed.2d 810; *Hirschkop v. Snead* (4th Cir.1979) 594 F.2d 356, 366.)

However, attorneys occupy a special status and perform an essential function in the administration of justice. Because attorneys are officers of the court with a special responsibility to protect the administration of justice, courts have recognized the need for the imposition of reasonable speech restrictions upon them. (*Goldfarb v. Virginia State Bar* (1975) 421 U.S. 773, 792, 95 S.Ct. 2004, 44 L.Ed.2d 572.)

****782** A restriction on free speech can survive judicial scrutiny under the First Amendment only if two fundamental conditions are satisfied. First, the limitation must further an important or substantial governmental interest unrelated to the suppression of expression. Second, the restriction must be no greater than is necessary or essential to the protection of the particular governmental interest involved. (*Procunier v. Martinez* (1974) 416 U.S. 396, 413, 94 S.Ct. 1800, 40 L.Ed.2d 224; *Hirschkop v. Snead, supra,* 594 F.2d at p. 363.)

The fundamental state interest in assuring a fair trial has been held to justify restrictions upon attorney comments during pending criminal proceedings where there is a substantial likelihood that the attorney's comments will have a materially prejudicial effect or will interfere with the defendant's right to a fair trial. (*Gentile v. State Bar of Nevada, supra,* 501 U.S. at pp. 1075–1076; *Sheppard v. Maxwell* (1966) 384 U.S. 333, 361–363, 86 S.Ct. 1507, 16 L.Ed.2d 600; *Estes v. State of Texas* (1965) 381 U.S. 532, 540, 85 S.Ct. 1628, 14 L.Ed.2d 543; *Brian W. v. Superior Court* (1978) 20 Cal.3d 618, 624, 143 Cal.Rptr. 717, 574 P.2d 788 (fn.7); *Younger v. Smith* (1973) 30 Cal.App.3d 138, 161–164, 106 Cal.Rptr. 225;.)

Our judicial system also requires that litigants in civil cases be assured the right to a fair trial. (*Hirschkop v. Snead, supra,* 594 F.2d at p. 373; see also *Cox v. State of Louisiana* (1965) 379 U.S. 559, 583, 85 S.Ct. 476, 13 L.Ed.2d 487 (conc. opn. of Black, J.).) Nevertheless, at least two federal circuit courts have held that limitations on First Amendment rights are not necessary to ensure the right to a fair trial in civil cases. (*Hirschkop v. Snead, supra,* 594 F.2d at pp. 373–374; *Chicago Council of Lawyers v. Bauer* (7th Cir.1975) 522 F.2d 242, 258–259; see also *Bernard v. Gulf Oil Co.* (5th Cir.1980) 619 F.2d 459, 474; *Shadid v. Jackson* (E.D.Tex.1981) 521 F.Supp. 85, 87; *In re Hinds* (N.J.1982) 90 N.J. 604, 449 A.2d 483, 499–500.)

The statements which are the subject of this proceeding were made by respondent in pleadings and documents filed in pending civil, rather than criminal, cases. However, even if restrictions can properly be imposed upon an attorney's comments in a pending civil action, respondent was not charged in the notice to show cause with any interference with the administration of justice. Likewise, there is no evidence in the record of this proceeding either that there was a substantial likelihood that respondent's comments had a materially prejudicial effect upon any of the pending civil actions or that they otherwise interfered with the litigants' right to a fair trial.

***6** Notwithstanding the foregoing, criticism by an attorney which amounts to an attack on the honesty, motivation, integrity, or competence of a judge who has the responsibility to administer the law may still be disciplinable under certain circumstances. (*State ex rel. Oklahoma Bar Assn. v. Porter* (Okla.1988) 766 P.2d 958, 965; cf. *U.S. Dist. Court for E.D. of Wash. v. Sandlin* (9th Cir.1993) 12 F.3d 861, 866.)

The identification of dishonest judges and their prompt removal from office promotes a justified public confidence in the judicial system. However, indiscriminate accusations of dishonesty or corruption do not help eliminate such judges from the system. Instead, baseless accusations seriously impair the functioning of the judicial system because few litigants or members of the public can separate accurate from spurious claims of judicial misconduct. (*Matter of Palmisano* (7th Cir.1995) 70 F.3d 483, 487.)

Neither a false statement made knowingly nor a false statement made with reckless disregard of the truth enjoys constitutional protection because there is no constitutional value in such false statements of fact. (*Garrison v. State of Louisiana* (1964) 379 U.S. 64, 75, 85 S.Ct. 209, 13 L.Ed.2d 125; *Ramirez, supra,* 28 Cal.3d at p. 411, 169 Cal.Rptr. 206,

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619 P.2d 399; see also *Keeton v. Hustler Magazine, Inc.* (1984) 465 U.S. 770, 776, 104 S.Ct. 1473, 79 L.Ed.2d 790.)

Rules of professional conduct "that prohibit false statements impugning the integrity of judges ... are not designed to shield judges from unpleasant or offensive criticism, but to preserve public confidence in the fairness and impartiality of our system of justice. [Citations.]" (*Yagman, supra,* 55 F.3d at p. 1437; see also *In re Disciplinary Action Against Graham* (Minn.1990) 453 N.W.2d 313, 322; *State ex rel. Oklahoma Bar Assn. v. Porter, supra,* 766 P.2d at p. 969.) Therefore, when a personal attack is made upon a judge or other court official, such speech is not protected if it consists of false statements made knowingly or with a reckless disregard of the truth. (*Ramirez, supra,* 28 Cal.3d at p. 411, 169 Cal.Rptr. 206, 619 P.2d 399; *Matter of Palmisano, supra,* 70 F.3d at p. 487; ****783** *Idaho State Bar v. Topp* (Idaho 1996) 129 Idaho 414, 925 P.2d 1113, 1116; *State ex rel. Oklahoma Bar Assn. v. Porter, supra,* 766 P.2d at p. 969; *Comm. on Legal Ethics of W. Va. v. Farber* (W.Va.1991) 185 W.Va. 522, 408 S.E.2d 274, 285.)

A statement by an attorney that impugns the honesty or integrity of a judge may not be punished unless that statement is false. Truth is an absolute defense.[5] (*Yagman, supra,* 55 F.3d at p. 1438.) An examination of the disciplinary cases involving attorneys' comments upon the honesty and integrity of judges fully supports this conclusion.

In *Yagman, supra,* the Ninth Circuit considered the discipline imposed upon attorney Yagman for derogatory statements made about a federal district judge. Yagman asserted that the judge had a penchant for sanctioning Jewish lawyers, that the judge had imposed sanctions against Yagman and two other Jewish lawyers, and that these sanctions were evidence of anti-semitism. Yagman also told a newspaper reporter that the judge had been "drunk on the bench." (*Id.,* at p. 1434.) Finally, Yagman submitted an evaluation of the judge to the publisher of the Almanac of the Federal Judiciary in which he described the judge as, among other things, "ignorant, dishonest, ill-tempered, and a bully." He also referred to the judge as a "sub-standard human." (*Id.,* at p. 1434, fn. 4.)

***7** The Ninth Circuit held that Yagman's description of the judge for the Almanac of the Federal Judiciary constituted "rhetorical hyperbole, incapable of being proved true or false." (*Id.,* at p. 1440.) According to the court, Yagman's assertion that the judge's sanctions of Jewish lawyers were evidence of anti-semitism conveyed Yagman's personal belief that the judge was anti-semitic. Such a statement of opinion could "be the basis for sanctions only if it could reasonably be understood as declaring or implying actual facts capable of being proved true or false. [Citations.]" (*Id.,* at pp. 1438–1439.) Further, the court held that Yagman's assertion that the judge had been "drunk on the bench" was a factual statement for which Yagman could be disciplined if evidence showed that the allegation was untrue. (*Id.,* at p. 1441.) Since no evidence was introduced to demonstrate that any of the statements made by Yagman were false, the Ninth Circuit reversed the decision of the district court imposing discipline on Yagman. (*Id.,* at pp. 1441–1442.)

In *Idaho State Bar v. Topp, supra,* 129 Idaho 414, 925 P.2d 1113, the attorney was accused of improperly impugning the integrity of a judge by suggesting to the media that the judge's denial of a county's request for "judicial confirmation" of a proposed multi-million dollar county expenditure "was motivated by political concerns." (*Id.,* at p. 1114.) The Idaho State Bar acknowledged that actual falsity was an essential element of its case. (*Id.,* at p. 1116, fn. 2.) The Idaho Supreme Court concluded that the state bar had established the falsity of Topp's statements because the parties stipulated that, if called to testify, the judge would testify that his decision in the judicial confirmation proceeding was not politically motivated. Since this stipulated testimony was not controverted, the court concluded that it was sufficient to support the conclusion that Topp's statement was false. (*Id.,* at p. 1116.) Determining that Topp had been " 'objectively reckless' in making that statement to the media," the court publicly reprimanded him. (*Id.,* at p. 1117.)

In *State ex rel. Oklahoma Bar Assn. v. Porter, supra,* 766 P.2d 958, an attorney commented to the media that the trial judge who had presided over the criminal trial of his client " 'showed all the signs of being a racist." ' The attorney also stated that he had never tried a case before that judge in which he felt that he had received an impartial trial. As a result of these comments, the attorney was accused of engaging in conduct that was prejudicial to the administration of justice and that adversely reflected upon his fitness to practice law. (*Id.,* at pp. 960–961.)

****784** In analyzing its own prior caselaw, the Oklahoma Supreme Court noted that it has always looked at the nature of the allegations made by the attorney and that it "has carefully avoided censuring attorneys in the absence of a showing of falsity." (*Id.,* at p. 962.) Concluding that the record contained no evidence showing the attorney's statements to be false

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and that, therefore, the statements were protected by the First Amendment, the court stated: "The record is devoid of any attempt to show that the statements complained of are false. In the absence of a showing of falsity the statement must be held to be speech on vital issues of self government protected by the First Amendment.... [[D]iscipline ... is not warranted by virtue of the absence of any showing of falsity." (*Id.,* at p. 969.)

***8** In *Matter of Palmisano, supra,* 70 F.3d at p. 486; *In re Disciplinary Action Against Graham, supra,* 453 N.W.2d at pp. 318–319; *Matter of Holtzman* (N.Y.1991) 78 N.Y.2d 184, 573 N.Y.S.2d 39, 577 N.E.2d 30, 32–33; and *Comm. on Legal Ethics of W. Va. v. Farber, supra,* 408 S.E.2d at pp. 277, 283–285, statements impugning the honesty and integrity of the courts or judicial officers were expressly found to be false.

The California Supreme Court's opinions in *Ramirez, supra,* 28 Cal.3d 402, 169 Cal.Rptr. 206, 619 P.2d 399, and *Lebbos v. State Bar* (1991) 53 Cal.3d 37, 278 Cal.Rptr. 845, 806 P.2d 317, are by no means inconsistent with the conclusion that a statement impugning the honesty or integrity of a judge is not disciplinable unless it is false.

In *Ramirez,* the former State Bar disciplinary board found that an attorney had violated Business and Professions Code section 6068, subdivisions (b), (d), and (f) by " '*falsely* maligning" ' a panel of justices of the Court of Appeal. (*Ramirez, supra,* 28 Cal.3d at p. 404, 169 Cal.Rptr. 206, 619 P.2d 399, emphasis added.) Although the Supreme Court discussed the attorney's failure to conduct any investigation prior to making his allegations and that he had, therefore, acted in reckless disregard for the truth or falsity of his claims, the court accepted the disciplinary board's conclusion that the attorney's statements were false. Addressing the attorney's contention that his statements were protected by the First Amendment, the Supreme Court stated (*Ramirez, supra,* 28 Cal.3d at p. 411, 169 Cal.Rptr. 206, 619 P.2d 399): "The United States Supreme Court, in addressing First Amendment protections of *false* statements made with reckless disregard for the truth, stated that '[c] alculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that might be derived from them is clearly outweighed by the social interest in order and morality ...." *Chaplinsky v. New Hampshire* [1942] 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 .... Hence the *knowingly false* statement and the *false* statement made with reckless disregard of the truth, do not enjoy constitutional protection.' (*Garrison v. Louisiana* (1964) 379 U.S. 64, 75, 85 S.Ct. 209, 13 L.Ed.2d 125 ....) As has been demonstrated, petitioner's several demeaning statements have been made with reckless disregard of the truth." (*Ramirez, supra,* 28 Cal.3d at p. 411, 169 Cal.Rptr. 206, 619 P.2d 399, all emphases added.)

In *Lebbos,* both the State Bar Court hearing panel and the Review Department specifically found many of Lebbos's statements to be false. Lebbos did not dispute the factual findings of either the hearing panel or the Review Department. (*Lebbos, supra,* 53 Cal.3d at p. 44, 278 Cal.Rptr. 845, 806 P.2d 317.) The hearing panel found that Lebbos made knowingly false statements in an effort to disqualify a judge (*id.,* at p. 42, 278 Cal.Rptr. 845, 806 P.2d 317) and that she "wilfully, deceitfully and recklessly" indulged in a series of offensive statements against judges and others and made a number of false statements about them (*id.,* at pp. 42–43, 278 Cal.Rptr. 845, 806 P.2d 317). The Supreme Court also cited the hearing panel's finding that Lebbos had engaged in a " 'constant barrage of calumny[,] deceit[,] and harassment" ' and noted that, in recommending disbarment, the hearing panel found that Lebbos had engaged in multiple acts of moral turpitude, including falsehoods and alterations to court documents. (*Id.,* at pp. 43–44, 278 Cal.Rptr. 845, 806 P.2d 317.)

***9** Moreover, in light of other misconduct warranting disbarment, the Supreme Court found it unnecessary to address Lebbos's First Amendment claims, stating: "Accordingly, we need not examine the fine points of whether counsel has the right to refer to a judge as 'swine' and 'asshole' when speaking to court personnel in the course of their duties, or delve into the interesting question whether petitioner indulged in a reckless, defamatory falsehood in programming her telephone answering machine to inform all callers that opposing counsel were subject to grand jury investigation for fraud or in communicating her view to a judge of the ****785** superior court that another judge 'deliberately set out to bankrupt me out of spite ." ' (*Id.,* at p. 45, 278 Cal.Rptr. 845, 806 P.2d 317.)

In light of the fact that Lebbos did not dispute any of the hearing panel's findings that Lebbos had made false and deceitful statements about judges, coupled with the Supreme Court's conclusion that it was unnecessary to specifically address her First Amendment claims, there is nothing in *Lebbos* to support the conclusion that an attorney can be disciplined for statements that are not shown to be false.

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Finally, we hold that OCTC bears the burden of proving falsity. (Cf. *Yagman, supra,* 55 F.3d at p. 1438; *Idaho State Bar v. Topp, supra,* 925 P.2d at p. 1116; *State ex rel. Oklahoma Bar Assn. v. Porter, supra,* 766 P.2d at p. 969.) This holding is entirely consistent with the principle that, in attorney disciplinary matters, OCTC bears the burden of proving culpability by clear and convincing evidence. (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 213; *McCray v. State Bar* (1985) 38 Cal.3d 257, 263, 211 Cal.Rptr. 691, 696 P.2d 83; *Hildebrand v. State Bar* (1941) 18 Cal.2d 816, 834, 117 P.2d 860; *Golden v. State Bar* (1931) 213 Cal. 237, 247, 2 P.2d 325.)

OCTC failed to sustain its burden of proof in this proceeding. The record is completely devoid of any attempt to show that the statements made by respondent are false. The only documentary evidence introduced by OCTC were the pleadings and documents which contained the derogatory statements. In addition, respondent was the only witness to testify at trial; and he repeatedly asserted that all of his statements were true. Even though the hearing judge rejected respondent's testimony on this point, his rejection of respondent's testimony " 'does not create affirmative evidence to the contrary of that which is discarded.' [Citation.]" (*Edmondson v. State Bar* (1981) 29 Cal.3d 339, 343, 172 Cal.Rptr. 899, 625 P.2d 812; accord *In the Matter of DeMassa* (Review Dept.1991) 1 Cal. State Bar Ct. Rptr. 737, 749.)

Both in his testimony at trial and in at least two of the pleadings that are the subject of this proceeding, respondent acknowledged that he did not believe that each and every judge of the Orange County Superior Court was corrupt or dishonest. Although respondent often made general references to the Orange County Superior Court bench in making his allegations of judicial corruption and unethical conduct, those general references are insufficient by themselves to establish culpability. In the context of the pleadings and documents, each of which sets forth the specific facts and incidents supporting respondent's claims, there is not clear and convincing evidence that respondent intended his references in these pleadings and documents to refer to each and every judge of the Orange County Superior Court.

***10** In summary, there is no evidence in the record to demonstrate that any of respondent's statements are false. A finding of culpability for violation of section 6068, subdivision (b) is not warranted by virtue of the absence of any showing of falsity.

However, in light of the fact that the hearing judge's pretrial order erroneously relieved OCTC of its burden of proof in this matter, we conclude that it is appropriate to remand this matter to the hearing department to allow OCTC an opportunity to prove that respondent's statements were false. [6]

Upon remand, the hearing department should initially address whether some or all of the statements and allegations made by respondent constitute "rhetorical hyperbole" or statements that use language in a "loose, figurative sense." Such statements cannot form the basis for imposition of discipline. (*Yagman, supra,* 55 F.3d at p. 1438; see also, *Old Dominion Br. No. 496, Nat. Ass'n, Letter Car. v. Austin, supra,* 418 U.S. at p. 284.)

****786** Similarly, the hearing department should also initially address whether the statements and allegations made by respondent constitute solely a statement of opinion or, conversely, whether they are statements that are capable of being proved true or false. Statements that are not capable of being proved true or false cannot support the imposition of discipline. Likewise, statements of opinion are not disciplinable unless they imply or are based upon a false assertion of fact. (*Yagman, supra,* 55 F.3d at p. 1438–1440; see also, *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 18–19, 110 S.Ct. 2695, 111 L.Ed.2d 1.)

In the event that OCTC thereafter sustains its burden of demonstrating that one or more of respondent's statements impugning the honesty and integrity of the Orange County Superior Court or its judicial officers were false, OCTC must thereafter prove that the statements were knowingly false or were made with reckless disregard for their truth or falsity.

The determination of whether statements were made with reckless disregard for their truth or falsity is "governed by an objective standard, pursuant to which the court must determine 'what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances.' (*U.S. Dist. Court for E.D. of Wash. v. Sandlin* (9th Cir.1993 12 F.3d 861, 867.) The inquiry focuses on whether the attorney had a reasonable factual basis for making the statements, considering their nature and the context in which they were made. [*Ibid.*]" (*Yagman, supra,* 55 F.3d at p. 1437.)

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B. *Section 6068, Subdivision (f)*

Based on the statements and allegations made in pleadings and other documents, respondent was also charged in the first amended notice to show cause with violations of section 6068, subdivision (f), which requires abstention "from all offensive personality ...." The hearing judge declined to find respondent culpable of violating section 6068, subdivision (f) on the grounds that those charges appeared duplicative of the section 6068, subdivision (b) charges and that OCTC had failed to specify how and why they were not duplicative.

***11** In *U.S. v. Wunsch* (9th Cir.1996) 84 F.3d 1110, 1119 (*Wunsch*), decided more than a year after the hearing judge filed his modified decision, the Ninth Circuit held that section 6068, subdivision (f) is unconstitutionally vague. Because the term " 'offensive personality' could refer to any number of behaviors that many attorneys regularly engage in during the course of their zealous representation of their clients' interests, it would be impossible to know when such behavior would be offensive enough to invoke the statute." (*Id.,* at p. 1119.) In its capacity as an intervenor in *Wunsch,* the State Bar alternatively argued that (a) section 6068, subdivision (f) had been narrowly construed to apply only to conduct that adversely affects the administration of justice (*id.,* at p. 1117) and (b) that the State Bar had adopted an enforcement policy on October 5, 1995, limiting its enforcement of section 6068, subdivision (f) to conduct that adversely affects the administration of justice (*id.,* at p. 1118).

The Ninth Circuit rejected the State Bar's first argument, concluding that no California state law decisions specifically discuss the scope of section 6068, subdivision (f) or explicitly limit its application. (*Ibid.*) Additionally, the Ninth Circuit was unpersuaded by the State Bar's newly-adopted enforcement policy because there was no showing that the policy represents "an authoritative and binding construction of section 6068(f) rather than a mere enforcement strategy ...." (*Ibid.*)

The Board of Governors of the State Bar ultimately determined not to seek en banc review of the Ninth Circuit's opinion in *Wunsch* or to file a petition for writ of certiorari in the United States Supreme Court. Moreover, OCTC subsequently moved to dismiss section 6068, subdivision (f) charges in virtually all of its pending cases.

As indicated above, there is no evidence in the record of this proceeding that the statements which impugned the honesty and integrity of the Orange County Superior Court and its judges and which were made by respondent in various pleadings filed in pending civil actions adversely affected the administration of justice or denied the litigants a fair trial in those cases. Thus, under the State ****787** Bar's own enforcement policy, respondent's conduct has not been shown to violate section 6068, subdivision (f).

Additionally, in light of OCTC's dismissal of section 6068, subdivision (f) charges in other pending proceedings, the failure to also dismiss those charges in this case could give rise to an implication of discriminatory enforcement. (*Id.,* at p. 1119; citing *Gentile v. State Bar of Nevada, supra,* 501 U.S. at p. 1051.)

Therefore, we dismiss with prejudice the section 6068, subdivision (f) charges against respondent.

IV. DISPOSITION

This matter is remanded to the hearing department for further proceedings consistent with this opinion.

OBRIEN, P.J. and STOVITZ, J., We concur.

All Citations

Not Reported in Cal.Rptr.2d, 1997 WL 701350, 97 Cal. Daily Op. Serv. 8572, 3 Cal. State Bar Ct. Rptr. 775, 97 Daily Journal D.A.R. 13,859

Footnotes

1 Unless otherwise specified, all future references to "section" shall be to the Business and Professions Code.

2 Section 6068, subdivision (b) provides that it is the duty of an attorney "[t]o maintain the respect due to the courts of justice and judicial officers."

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Section 6068, subdivision (f) provides, as relevant here, that it is the duty of an attorney "[t]o abstain from all offensive personality ...."

3 The declaration supported a motion which Michael Sansone made in propria persona to disqualify Walsworth in the Sigler action.

4 In the context of his various letters and pleadings, respondent's essential claim appears to be that Walsworth had sufficient influence over a number of the judges of the Orange County Superior Court to ensure that only those judges who were willing to protect Walsworth and to harm respondent's clients were assigned to the Sansones' various actions.

For example, in a July 8, 1988, letter to the presiding judge of the Orange County Superior Court, respondent gave examples of the alleged misconduct of a specific superior court judge and also made general allegations about Walsworth's control over "the court" and its alleged willingness to allow itself to be used by Walsworth. Nevertheless, it is clear that respondent's allegations were not directed at every judge on the court because he also stated as follows: "What the court has done to [the Sansones] is what has convinced them that the court is totally corrupt. I think that is unfortunate. I cannot, though, think of any Orange County Superior Court judge whom I could recommend to them as a judge with integrity. I know that they exist. It is just that I do not know whom I could recommend to them." (State Bar exhibit 5, at p. 2.)

More specifically, in a March 7, 1989, letter to one of the superior court judges who had presided over a portion of at least one of the Sansones' actions, respondent again made references to the allegedly corrupt rulings of specific judges and made general statements regarding the willingness of the Orange County Superior Court to "continue its long established practice of protecting ... Walsworth" and the inability of the Sansones to receive a fair trial. However, respondent did not accuse every judge on the Orange County bench of corruption or misconduct, but alleged that only corrupt judges were assigned to the Sansones' actions, stating: "I know that there must be some honest judges on the bench in the Orange County Superior Court. The problem is that I do not know who they are. The Sansones and I suspect very strongly that whichever judge is assigned any case involving Walsworth will be chosen because of a willingness to continue the court's long established practice of protecting Walsworth and other members of the court." (State Bar exhibit 12, at p. 6.) Likewise, respondent further asserted in his letter that "I do not think that all judges on the Orange County Superior Court should be investigated. I do know that most of those with whom I have had contact should be." (State Bar exhibit 12, at p. 7.)

Finally, in a declaration executed on August 15, 1988, respondent again acknowledged that there are honest judges on the Orange County Superior Court but that those who are in control of the Sansones' actions would continue to protect Walsworth, stating: "While I am certain that there are many fine judges on this court who would unquestionably act with integrity, I do not know who they are. I do not know who to trust on this court. And, I do greatly fear that those who are in control of these various matters will maintain, as they have in the past, unlawful and unethical control over them so as to continue the long established practice of protecting Walsworth and his associates from the consequences of their criminal conduct." (State Bar exhibit 13, at p. 32.)

5 Although addressing the issue of falsity in the context of defamation law, the analysis of the United States Supreme Court, as expressed in *Old Dominion Br. No. 496, Nat. Ass'n, Letter Car. v. Austin* (1974) 418 U.S. 264, 283–284, 94 S.Ct. 2770, 41 L.Ed.2d 745, is applicable in the disciplinary context as well: "Mr. Justice Clark put it quite bluntly: 'the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth.' [Citation.] Before the test of reckless or knowing falsity can be met, there must be a false statement of fact. [[Citation.]"

6 In determining to remand this proceeding to the hearing department, this court does not reach the question of whether the hearing judge's erroneous ruling was invited by OCTC. (See *People v. Lang* (1989) 49 Cal.3d 991, 1031–1032, 264 Cal.Rptr. 386, 782 P.2d 627; *Jentick v. Pacific Gas & Elec. Co.* (1941) 18 Cal.2d 117, 121, 114 P.2d 343; *In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 501, 257 Cal.Rptr. 397.)

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Disagreed With by In re Shearin, Del.Supr., December 22, 2000

55 F.3d 1430
United States Court of Appeals,
Ninth Circuit.

STANDING COMMITTEE ON DISCIPLINE OF the UNITED STATES DISTRICT COURT FOR the CENTRAL DISTRICT OF CALIFORNIA, Plaintiff–Appellee,
v.
Stephen YAGMAN, Defendant–Appellant.

No. 94–55918.
|
Argued and Submitted Nov. 2, 1994.
|
Decided May 30, 1995.

Synopsis
Disciplinary proceedings were brought against attorney who made statements criticizing judge. The United States District Court for the Central District of California, Edward Rafeedie, John Davies and David Williams, JJ., 856 F.Supp. 1384, 856 F.Supp. 1395, held that attorney committed sanctionable misconduct and suspended him from practice in Central District for two years. Attorney appealed. The Court of Appeals, Kozinski, Circuit Judge, held that: (1) makeup of standing committee on discipline, which allegedly included members who had conflicts of interest with attorney, did not deny attorney due process; (2) in determining whether attorney violated disciplinary rule, *Sandlin* "reasonable attorney" standard, rather than *New York Times* subjective malice standard applicable in defamation actions, would be applied; (3) attorney's statements did not violate rule's prohibition against attorneys impugning integrity of court; and (4) attorney's statements did not violate rule's prohibition against attorneys interfering with administration of justice.

Reversed.

Wiggins, Circuit Judge, dissented.

West Headnotes (24)

[1] **Attorneys and Legal Services** Demands for information; discovery and disclosure; subpoenas

District Court lacked authority to dispense with discovery in attorney discipline proceeding; Court could not disregard local rule that made Federal Rules of Civil Procedure, including Rule entitling parties to discovery of relevant matters, applicable to disciplinary proceedings. Fed.Rules Civ.Proc.Rule 26(b), 28 U.S.C.A.; U.S.Dist.Ct.Rules C.D.Cal., Civil Rule 2.6.4.

1 Cases that cite this headnote

[2] **Attorneys and Legal Services** Impartiality or bias of tribunal

Constitutional Law Conduct and discipline

Makeup of standing committee on discipline of federal district court, which allegedly included members who had conflicts of interest with attorney, did not deny attorney due process in disciplinary proceeding arising from attorney's criticism of judge; committee had no authority to impose sanctions, committee merely assisted district court in maintaining attorney discipline by relieving judges of awkward responsibility of serving as both prosecutors and arbiters, and attorney did not allege that members were biased. U.S.C.A. Const.Amends. 5, 14.

3 Cases that cite this headnote

[3] **Attorneys and Legal Services** Persons entitled to exercise power

Constitutional Law Conduct and discipline

Local rule of Central District of California, calling for members of Standing Committee on Discipline to be drawn from Central District Bar, reflected judgment that benefits of having prosecuting attorney composed of peers of attorney subject to disciplinary proceedings outweighed any resulting loss of independence

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resulting from members' familiarity with attorney subject to disciplinary proceedings, and such judgment was not constitutionally defective. U.S.C.A. Const.Amends. 5, 14; U.S.Dist.Ct.Rules C.D.Cal., Civil Rules 2.6.1, 2.6.3.

1 Cases that cite this headnote

[4] **Attorneys and Legal Services** Impartiality and decorum of tribunal

Constitutional Law Statements regarding judge or court officials

Local rule prohibiting conduct that impugned integrity of court was overbroad, for purposes of determining whether it violated free speech guarantees, since it purported to punish a great deal of constitutional speech, including all true statements reflecting adversely on reputation or character of federal judges. U.S.C.A. Const.Amend. 1; U.S.Dist.Ct.Rules C.D.Cal., Civil Rule 2.5.2.

2 Cases that cite this headnote

[5] **Constitutional Law** Prohibition of substantial amount of speech

Substantially overbroad restriction on protected speech will be declared facially invalid unless it is fairly subject to limiting construction. U.S.C.A. Const.Amend. 1.

[6] **Attorneys and Legal Services** Impartiality and decorum of tribunal

In determining what reasonable attorney would do in same or similar circumstances, for purposes of determining whether attorney's statements about judge is violation of ethical standards pursuant to *Sandlin*, inquiry focuses on whether attorney had reasonable factual basis for making statements, considering their nature and context in which they were made; such inquiry may take into account whether attorney pursued readily available avenues of investigation.

9 Cases that cite this headnote

[7] **Attorneys and Legal Services** Extrajudicial statements; trial publicity

In determining whether attorney violated ethical rule by making statements about judge, *Sandlin* "reasonable attorney" standard, rather than *New York Times* subjective malice standard applicable in defamation actions, would be applied; objective malice standard strikes constitutionally permissible balance between attorney's right to criticize judiciary and public's interest in preserving confidence in judicial system. U.S.C.A. Const.Amend. 1; U.S.Dist.Ct.Rules C.D.Cal., Civil Rule 2.5.2.

6 Cases that cite this headnote

[8] **Attorneys and Legal Services** Impartiality and decorum of tribunal

Ethical rules that prohibit attorneys from making false statements impugning integrity of judges are not designed to shield judges from unpleasant or offensive criticism, but to preserve public confidence in fairness and impartiality of judicial system.

11 Cases that cite this headnote

[9] **Attorneys and Legal Services** Impartiality and decorum of tribunal

Attorneys may be sanctioned for impugning integrity of judge or of court only if their statements are false; truth is absolute defense. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[10] **Attorneys and Legal Services** Presumptions, inferences, and burden of proof

In disciplinary action against attorney for impugning integrity of judge or of court, disciplinary body bears burden of proving falsity of attorney's statements.

1 Cases that cite this headnote

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[11] **Attorneys and Legal Services** Impartiality and decorum of tribunal

Constitutional Law Statements regarding judge or court officials

Statements impugning integrity of judge may not be punished unless they are capable of being proved true or false, since statements of opinion are protected by First Amendment unless they imply false assertion of fact. U.S.C.A. Const.Amend. 1; Restatement (Second) of Torts § 566.

23 Cases that cite this headnote

[12] **Attorneys and Legal Services** Impartiality and decorum of tribunal

Constitutional Law Statements regarding judge or court officials

Statements by attorney impugning integrity of judge that at first blush appear to be factual are protected by First Amendment if they cannot reasonably be interpreted as stating actual facts about their target. U.S.C.A. Const.Amend. 1.

11 Cases that cite this headnote

[13] **Attorneys and Legal Services** Impartiality and decorum of tribunal

Statements of rhetorical hyperbole by attorney impugning integrity of judge are not sanctionable; nor are statements that use language in loose, figurative sense.

11 Cases that cite this headnote

[14] **Attorneys and Legal Services** Extrajudicial statements; trial publicity

Attorney's statement, that judge had penchant for sanctioning Jewish lawyers, namely himself and two others, and that attorney found this to be evidence of anti-semitism, did not violate disciplinary rule prohibiting attorneys from impugning integrity of court; expression of opinion that judge was anti-Semitic appeared to disclose all facts on which it was based, and did not imply that there were other, unstated facts supporting that opinion. U.S.C.A. Const.Amend. 1; U.S.Dist.Ct.Rules C.D.Cal., Civil Rule 2.5.2; Restatement (Second) of Torts §§ 566, 566 comment.

8 Cases that cite this headnote

[15] **Libel and Slander** Actionable Words in General

Statement of opinion based on fully disclosed facts can be punished as defamatory only if stated facts themselves are false and demeaning; rationale behind this rule is that, when facts underlying statement of opinion are disclosed, readers will understand that they are getting author's interpretation of facts presented, and they are unlikely to construe statement as insinuating existence of additional, undisclosed facts. U.S.C.A. Const.Amend. 1; Restatement (Second) of Torts § 566 comment.

39 Cases that cite this headnote

[16] **Attorneys and Legal Services** Extrajudicial statements; trial publicity

Attorney's statement, that judge was "dishonest," did not imply facts capable of objective verification, and thus did not violate disciplinary rule prohibiting attorneys from impugning integrity of court; comment was merely statement of rhetorical hyperbole when considered in context of string of colorful adjectives in which it appeared, which adjectives spoke to competence and temperament rather than alleged corruption, and, even if court were to find substantive content in comment, it would at most construe it to refer to intellectual dishonesty, which could not be proved true or false by reference to core of objective evidence. U.S.C.A. Const.Amend. 1; U.S.Dist.Ct.Rules C.D.Cal., Civil Rule 2.5.2.

17 Cases that cite this headnote

[17] **Constitutional Law** Opinion

Statements that could reasonably be understood as imputing specific criminal or other wrongful

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acts are not entitled to constitutional protection merely because they are phrased in form of opinion. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[18] **Attorneys and Legal Services** Extrajudicial statements; trial publicity

Although attorney's alleged statement, that judge was "drunk on the bench," implied actual facts capable of objective verification and thus, if false, could constitute violation of disciplinary rule prohibiting attorneys from impugning integrity of court, where disciplinary committee introduced no evidence to prove that statement was false, attorney thus would not be sanctioned. U.S.C.A. Const.Amend. 1; U.S.Dist.Ct.Rules C.D.Cal., Civil Rule 2.5.2.

2 Cases that cite this headnote

[19] **Attorneys and Legal Services** Conduct as to Courts and Administration of Justice in General

Attorney's statements unrelated to a matter pending before court may be sanctioned only if they pose clear and present danger to administration of justice. U.S.C.A. Const.Amend. 1.

5 Cases that cite this headnote

[20] **Attorneys and Legal Services** Impartiality and decorum of tribunal

Attorney's statements regarding judge, including that judge had penchant for sanctioning Jewish lawyers, that judge was dishonest, and that judge was drunk on the bench, which statements attorney allegedly made in attempt to cause judge to recuse himself in cases where attorney appeared as counsel, were not sanctionable under local rule prohibiting attorneys from interfering with administration of justice; although statements were harsh and intemperate, they could not force disqualification of judge, and possibility of voluntary recusal of judge was not so great as to amount to clear and present danger to administration of justice, inasmuch as public criticism of judges seldom leads to recusal. U.S.C.A. Const.Amend. 1; U.S.Dist.Ct.Rules C.D.Cal., Civil Rule 2.5.2.

8 Cases that cite this headnote

[21] **Attorneys and Legal Services** Conduct as to Courts and Administration of Justice in General

Judge-shopping disrupts proper function of judicial system and may be disciplined under local rule prohibiting attorneys from interfering with administration of justice. U.S.Dist.Ct.Rules C.D.Cal., Civil Rule 2.5.2.

8 Cases that cite this headnote

[22] **Judges** Nature and effect in general

Party cannot force judge to recuse himself by engaging in personal attacks on judge.

17 Cases that cite this headnote

[23] **Judges** Bias and Prejudice

In all but the most extreme circumstances, party seeking recusal of judge must show that judge is or appears to be biased or prejudiced against a party, not counsel.

10 Cases that cite this headnote

[24] **Attorneys and Legal Services** Conduct as to Courts and Administration of Justice in General

Constitutional Law Professional conduct regulations in general

Mere possibility, or even probability, of harm does not amount to the clear and present danger to administration of justice required for attorney to be sanctioned under local rule prohibiting attorneys from interfering with administration of justice; substantive evil must be extremely serious and degree of imminence must be extremely high before utterances can be punished under First Amendment. U.S.C.A.

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Const.Amend. 1; U.S.Dist.Ct.Rules C.D.Cal., Civil Rule 2.5.2.

10 Cases that cite this headnote

Attorneys and Law Firms

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***1433** Ben Margolis, Hugh R. Manes, Los Angeles, CA, for amicus Los Angeles Chapter of the Nat. Lawyers Guild.

Prof. Erwin Chemerinsky, University of Southern Cal. Law Center, Douglas E. Mirell, Los Angeles, Paul L. Hoffman, Gary L. Bostwick, Santa Monica, CA, Michael L. Abrams, Leslie H. Abramson, Scott Altman, E. Thomas Barham, Jr., Michael Bazyler, Thomas E. Beck, Marilyn Bednarski, David A. Binder, Alicia Blanco, Gary L. Blasi, Harland W. Braun, Doreen Braverman, Michael J. Brennan, Jeffrey Brodey, Evan H. Caminker, Robert Carlin, Gerald L. Chaleff, Richard C. Chier, John Wm. Cohn, Sandra Coliver, Donald W. Cook, Roger Cossack, Jeffrey W. Cowan, V. James DeSimone, Roger Jon Diamond, David A. Elden, Susan R. Estrich, Barry A. Fisher, Catherine L. Fisk, Stanley Fleishman, James H. Fosbinder, Frederick D. Friedman, Paul L. Gabbert, Mary Ellen Gale, William J. Genego, Diana Greene Gordon, Jeffrey S. Gordon, Dianna J. Gould–Saltman, Stanley I. Greenberg, Carlton F. Gunn, Kathryn Hirano, Richard G. Hirsch, Robert A. Holtzman, Robert T. Jacobs, Elliott N. Kanter, Steven J. Kaplan, Michael S. Klein, Marvin E. Krakow, Dennis Landin, E. Richard Larson, Karen A. Lash, Joseph P. Lawrence, Leon Letwin, Joel Levine, Raleigh H. Levine, Barrett S. Litt, Karl M. Manheim, Robert F. Mann, Guy R. Mazzeo, Robin Meadow, Carrie J. Menkel–Meadow, Laini Millar–Melnick, Michael R. Mitchell, Hermez Moreno, Michael Nasatir, Robert D. Newman, Jr., Barbara E. O'Connor, Angela E. Oh, Fred Okrand, Robert M. Ornstein, Howard R. Price, Vicki I. Podberesky, Donald M. Re, Irma Rodriguez, Stephen F. Rohde, Richard Alan Rothschild, Alan I. Rubin, D. Kate Rubin, Thomas A. Saenz, Robert Michael Saltzman, Rickard Santwier, Peter A. Schey, Benjamin Schonbrun, Robert A. Schwartz, Gerald V. Scotti, Michael T. Shannon, Janet Schmidt Sherman, Richard G. Sherman, Victor Sherman, Lawrence Solum, Mona C. Soo Hoo, Matthew L. Spitzer, Dan L. Stormer, Marcy Strauss, Michael J. Strumwasser, Barry Tarlow, Maureen Tchakalian, Robert N. Treiman, Eve Triffo, Eugene Volokh, Carol A. Watson, Charles David Weisselberg, Gary C. Williams, Frederic D. Woocher, John Yzurdiaga, Los Angeles, CA, for amicus American Jewish Congress–Pacific Southwest Region, and Article 19.

Appeal from the United States District Court for the Central District of California.

Before: Charles WIGGINS, Alex KOZINSKI and David R. THOMPSON, Circuit Judges.

Opinion

Opinion by Judge KOZINSKI; Dissent by Judge WIGGINS.

KOZINSKI, Circuit Judge.

Never far from the center of controversy, outspoken civil rights lawyer Stephen Yagman was suspended from practice before the United States District Court for the Central District of California for impugning the integrity of the court and interfering with the random selection of judges by making disparaging remarks about a judge of that court. We confront several new issues in reviewing this suspension order.

I

The convoluted history of this case begins in 1991 when Yagman filed a lawsuit pro se against several insurance companies. The case was assigned to Judge Manuel Real, then Chief Judge of the Central District. Yagman promptly sought to disqualify Judge Real on grounds of bias. [1] The disqualification motion was randomly assigned to Judge ***1434** William Keller, who denied it, *Yagman v. Republic Ins.,* 136 F.R.D. 652, 657–58 (C.D.Cal.1991), and sanctioned Yagman for pursuing the matter in an "improper and frivolous manner," *Yagman v. Republic Ins.,* 137 F.R.D. 310, 312 (C.D.Cal.1991). [2]

A few days after Judge Keller's sanctions order, Yagman was quoted as saying that Judge Keller "has a penchant for sanctioning Jewish lawyers: me, David Kenner and Hugh Manes. I find this to be evidence of anti-semitism." Susan Seager, *Judge Sanctions Yagman, Refers Case to State Bar,*

L.A. Daily J., June 6, 1991, at 1. The district court found that Yagman also told the Daily Journal reporter that Judge Keller was "drunk on the bench," although this accusation wasn't published in the article. *See Standing Comm. on Discipline v. Yagman,* 856 F.Supp. 1384, 1386 (C.D.Cal.1994).

Around this time, Yagman received a request from Prentice Hall, publisher of the much-fretted-about Almanac of the Federal Judiciary, [3] for comments in connection with a profile of Judge Keller. Yagman's response was less than complimentary. [4]

A few weeks later, Yagman placed an advertisement (on the stationary of his law firm) in the L.A. Daily Journal, asking lawyers who had been sanctioned by Judge Keller to contact Yagman's office. [5]

Soon after these events, Yagman ran into Robert Steinberg, another attorney who practices in the Central District. According to Steinberg, Yagman told him that, by levelling public criticism at Judge Keller, Yagman hoped to get the judge to recuse himself in future cases. [6] Believing that Yagman was committing misconduct, Steinberg described his conversation with Yagman in a letter to the Standing Committee on Discipline of the U.S. District Court for the Central District of California (the Standing Committee). *See* SER 326.

***1435** A few weeks later, the Standing Committee received a letter from Judge Keller describing Yagman's anti-Semitism charge, his inflammatory statements to Prentice Hall and the newspaper advertisement placed by Yagman's law firm. Judge Keller stated that "Mr. Yagman's campaign of harassment and intimidation challenges the integrity of the judicial system. Moreover, there is clear evidence that Mr. Yagman's attacks upon me are motivated by his desire to create a basis for recusing me in any future proceeding." SER 329–30. Judge Keller suggested that "[t]he Standing Committee on Discipline should take action to protect the Court from further abuse." SER 330.

[1] After investigating the charges in the two letters, the Standing Committee issued a Petition for Issuance of an Order to Show Cause why Yagman should not be suspended from practice or otherwise disciplined. Pursuant to Central District Local Rule 2.6.4, the matter was then assigned to a panel of three Central District judges, which issued an Order to Show Cause and scheduled a hearing. [7] Prior to the hearing, Yagman raised serious First Amendment objections to being disciplined for criticizing Judge Keller. Both sides requested an opportunity to brief the difficult free speech issues presented, but the district court never acted on these requests. The parties thus proceeded at the hearing without knowing the allocation of the burden of proof or the legal standard the court intended to apply. [8]

During the two-day hearing, the Standing Committee and Yagman put on witnesses and introduced exhibits. In a published opinion issued several months after the hearing, the district court held that Yagman had committed sanctionable misconduct, 856 F.Supp. 1384 (C.D.Cal.1994), and suspended him from practice in the Central District for two years, 856 F.Supp. 1395, 1400 (C.D.Cal.1994).

II

The Central District provides a mechanism for judges and others who become aware of attorney misconduct to refer the matter to the Standing Committee, a body of twelve members of the Central District bar. *See* Cent.Dist.Local R. (Civil) 2.6.1, 2.6.3. The Standing Committee reviews the charges and conducts an investigation. If it determines that an attorney deserves discipline, it issues a formal complaint and the case is assigned to a randomly selected panel of three judges. *See* Cent.Dist.Local R. (Civil) 2.6.4. The three-judge panel then holds a hearing on the charges with the committee acting as prosecutor.

[2] Yagman challenges the makeup of the Standing Committee on the ground that several of its members had conflicts of interest that could have influenced their decision to pursue disciplinary action against him. [9] Relying principally on ***1436** *Young v. United States ex rel. Vuitton et Fils S.A.,* 481 U.S. 787, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987), Yagman argues that this denied him due process.

We find *Young* readily distinguishable. The district court there appointed a private attorney to prosecute the defendant for allegedly violating an injunction protecting Vuitton's trademark. The attorney, however, had represented Vuitton in the civil action which resulted in the injunction, and continued to serve as Vuitton's counsel even as he prosecuted the contempt. He was thus representing two clients with potentially conflicting interests: Vuitton and the United States. The Court noted that by doing so, the attorney was violating ethical standards and a federal criminal law, since

he could not "discharge the obligation of undivided loyalty to both clients where both have a direct interest." *Id.* at 805, 107 S.Ct. at 2136. In such situations, the Court concluded, the temptation to use prosecutorial authority to benefit the private client is too great. To avoid such conflicts of interest, the Court held that "counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order." *Id.* at 809, 107 S.Ct. at 2138.

Yagman doesn't contend that any of the Standing Committee lawyers represent Judge Keller (the supposed interested party here), or that Judge Keller stands to benefit from the disciplinary action against Yagman. Nor does he argue that the committee members violated federal law or professional ethical standards. Thus, the concerns undergirding the Court's ruling in *Young* are not implicated. Moreover, even the serious conflict of interest present in *Young* did not result in a denial of due process. [10] Instead, the Court invoked its supervisory authority to prevent federal judges from making appointments that force attorneys to violate federal law and widely accepted ethical standards. *Id.* at 808–09, 107 S.Ct. at 2138–39.

[3] Nor do we find any other support for Yagman's due process claim. The Standing Committee itself has no authority to impose sanctions; whether and to what extent discipline is warranted are matters exclusively within the province of the court. The committee merely assists the district court in maintaining attorney discipline by relieving judges of the awkward responsibility of serving as both prosecutors and arbiters. [11] So long as the judges hearing the misconduct charges are not biased (and Yagman doesn't claim they are), there is no legitimate cause for concern over the composition and partiality of the Standing Committee. *Cf. Wright v. United States,* 732 F.2d 1048, 1058 (2d Cir.1984) (interested prosecutor's handling of criminal investigation and subsequent trial didn't deprive defendant of due process).

III

Local Rule 2.5.2 contains two separate prohibitions. First, it enjoins attorneys from engaging in any conduct that "degrades or impugns the integrity of the Court." Second, it provides that "[n]o attorney shall engage in any conduct which ... interferes with the administration of justice." The district court concluded that Yagman violated both prongs of the rule. 856 F.Supp. at 1385. Because different First Amendment standards apply to these two provisions, we discuss the propriety of the sanction under each of them separately.

A

[4] **[5]** **1.** We begin with the portion of Local Rule 2.5.2 prohibiting any conduct that "impugns the integrity of the Court." As the district court recognized, this provision is ***1437** overbroad because it purports to punish a great deal of constitutionally protected speech, including all true statements reflecting adversely on the reputation or character of federal judges. A substantially overbroad restriction on protected speech will be declared facially invalid unless it is "fairly subject to a limiting construction." *Board of Airport Comm'rs v. Jews for Jesus, Inc.,* 482 U.S. 569, 577, 107 S.Ct. 2568, 2573, 96 L.Ed.2d 500 (1987).

To save the "impugn the integrity" portion of Rule 2.5.2, the district court read into it an "objective" version of the malice standard enunciated in *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Relying on *United States Dist. Ct. v. Sandlin,* 12 F.3d 861 (9th Cir.1993), the court limited Rule 2.5.2 to prohibit only false statements made with either knowledge of their falsity or with reckless disregard as to their truth or falsity, judged from the standpoint of a "reasonable attorney." 856 F.Supp. at 1389–90.

[6] *Sandlin* involved a First Amendment challenge to Washington Rule of Professional Conduct 8.2(a), which provided in part: "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications, integrity, or record of a judge." *Sandlin,* 12 F.3d at 864. Though the language of the rule closely tracked the *New York Times* malice standard, we held that the purely subjective standard applicable in defamation cases is not suited to attorney disciplinary proceedings. *Id.* at 867. Instead, we held that such proceedings are governed by an objective standard, pursuant to which the court must determine "what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances." *Id.* [12] The inquiry focuses on whether the attorney had a reasonable factual basis for making the statements, considering their nature and the context in which they were made. *Id.* [13]

[7] **[8]** Yagman nonetheless urges application of the *New York Times* subjective malice standard in attorney disciplinary proceedings. *Sandlin* stands firmly in the way.

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In *Sandlin,* we held that there are significant differences between the interests served by defamation law and those served by rules of professional ethics. Defamation actions seek to remedy an essentially private wrong by compensating individuals for harm caused to their reputation and standing in the community. Ethical rules that prohibit false statements impugning the integrity of judges, by contrast, are not designed to shield judges from unpleasant or offensive criticism, but to preserve public confidence in the fairness and impartiality of our system of justice. *See In re Terry,* 271 Ind. 499, 394 N.E.2d 94, 95 (1979); *In re Graham,* 453 N.W.2d 313, 322 (Minn.1990).

Though attorneys can play an important role in exposing problems with the judicial system, *see Oklahoma ex rel. Oklahoma Bar Ass'n v. Porter,* 766 P.2d 958, 967 (Okla.1988), *false* statements impugning the integrity ***1438** of a judge erode public confidence without serving to publicize problems that justifiably deserve attention. *Sandlin* held that an objective malice standard strikes a constitutionally permissible balance between an attorney's right to criticize the judiciary and the public's interest in preserving confidence in the judicial system: Lawyers may freely voice criticisms supported by a reasonable factual basis even if they turn out to be mistaken.

[9] **[10]** Attorneys who make statements impugning the integrity of a judge are, however, entitled to other First Amendment protections applicable in the defamation context. To begin with, attorneys may be sanctioned for impugning the integrity of a judge or the court only if their statements are false; truth is an absolute defense. *See Garrison v. Louisiana,* 379 U.S. 64, 74, 85 S.Ct. 209, 215, 13 L.Ed.2d 125 (1964). Moreover, the disciplinary body bears the burden of proving falsity. *See Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 776–77, 106 S.Ct. 1558, 1563–64, 89 L.Ed.2d 783 (1986); *Porter,* 766 P.2d at 969.

[11] **[12]** **[13]** It follows that statements impugning the integrity of a judge may not be punished unless they are capable of being proved true or false; statements of opinion are protected by the First Amendment unless they "imply a false assertion of fact." *See Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 19, 110 S.Ct. 2695, 2706, 111 L.Ed.2d 1 (1990); *Lewis v. Time, Inc.,* 710 F.2d 549, 555 (9th Cir.1983); Restatement (Second) of Torts § 566 (1977) (statement of opinion actionable "only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion"). Even statements that at first blush appear to be factual are protected by the First Amendment if they cannot reasonably be interpreted as stating actual facts about their target. *See Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 50, 108 S.Ct. 876, 879, 99 L.Ed.2d 41 (1988). Thus, statements of "rhetorical hyperbole" aren't sanctionable, nor are statements that use language in a "loose, figurative sense." *See National Ass'n of Letter Carriers v. Austin,* 418 U.S. 264, 284, 94 S.Ct. 2770, 2781, 41 L.Ed.2d 745 (1974) (use of word "traitor" could not be construed as representation of fact); *Greenbelt Coop. Publishing Ass'n v. Bresler,* 398 U.S. 6, 14, 90 S.Ct. 1537, 1541, 26 L.Ed.2d 6 (1970) (use of word "blackmail" could not have been interpreted as charging plaintiff with commission of criminal offense).

With these principles in mind, we examine the statements for which Yagman was disciplined.

[14] **2.** We first consider Yagman's statement in the Daily Journal that Judge Keller "has a penchant for sanctioning Jewish lawyers: me, David Kenner and Hugh Manes. I find this to be evidence of anti-semitism." [14] Though the district court viewed this entirely as an assertion of fact, 856 F.Supp. at 1391, we conclude that the statement contains both an assertion of fact and an expression of opinion.

Yagman's claim that he, Kenner and Manes are all Jewish and were sanctioned by Judge Keller is clearly a factual assertion: The words have specific, well-defined meanings and describe objectively verifiable matters. Nothing about the context in which the words appear suggests the use of loose, figurative language or "rhetorical hyperbole." Thus, had the Standing Committee proved that Yagman, Kenner or Manes were not sanctioned by Judge Keller, or were not Jewish, this assertion might have formed the basis for discipline. The committee, however, didn't claim that Yagman's factual assertion was false, and the district court made no finding to that effect. We proceed, therefore, on the assumption that this portion of Yagman's statement is true.

The remaining portion of Yagman's Daily Journal statement is best characterized as opinion; it conveys Yagman's personal belief that Judge Keller is anti-Semitic. As such, it may be the basis for sanctions only if it could ***1439** reasonably be understood as declaring or implying actual facts capable of being proved true or false. *See Milkovich,* 497 U.S. at 21, 110 S.Ct. at 2707; *Phantom Touring, Inc. v. Affiliated Publications,* 953 F.2d 724, 727 (1st Cir.1992).

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In applying this principle, we are guided by section 566 of the Restatement (Second) of Torts, which distinguishes between two kinds of opinion statements: those based on assumed or expressly stated facts, and those based on implied, undisclosed facts. Restatement (Second) of Torts § 566, cmt. b; *see Lewis,* 710 F.2d at 555 (following the Restatement). [15] The statement, "I think Jones is an alcoholic," for example, is an expression of opinion based on implied facts, *see id.* § 566, cmt. c, illus. 3, because the statement "gives rise to the inference that there are undisclosed facts that justify the forming of the opinion," *id.* § 566, cmt. b. Readers of this statement will reasonably understand the author to be implying he knows facts supporting his view—*e.g.,* that Jones stops at a bar every night after work and has three martinis. If the speaker has no such factual basis for his assertion, the statement is actionable, even though phrased in terms of the author's personal belief. [16]

A statement of opinion based on expressly stated facts, on the other hand, might take the following form: "[Jones] moved in six months ago. He works downtown, and I have seen him during that time only twice, in his backyard around 5:30 seated in a deck chair ... with a drink in his hand. I think he must be an alcoholic." *Id.* § 566, cmt. c, illus. 4. This expression of opinion appears to disclose all the facts on which it is based, and does not imply that there are other, unstated facts supporting the belief that Jones is an alcoholic.

[15] A statement of opinion based on fully disclosed facts can be punished only if the stated facts are themselves false and demeaning. *Lewis,* 710 F.2d at 555–56; Restatement (Second) of Torts § 566, cmt. c ("A simple expression of opinion based on disclosed ... nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is."). The rationale behind this rule is straightforward: When the facts underlying a statement of opinion are disclosed, readers will understand they are getting the author's interpretation of the facts presented; they are therefore unlikely to construe the statement as insinuating the existence of additional, undisclosed facts. *Phantom Touring,* 953 F.2d at 730; *Lewis,* 710 F.2d at 555. Moreover, "an opinion which is unfounded reveals its lack of merit when the opinion-holder discloses the factual basis for the idea"; readers are free to accept or reject the author's opinion based on their own independent evaluation of the facts. *Redco Corp. v. CBS, Inc.,* 758 F.2d 970, 972 (3d Cir.1985); *see also Potomac Valve & Fitting Inc. v. Crawford Fitting Co.,* 829 F.2d 1280, 1290 (4th Cir.1987) ("[T]he statement in question readily appears to be nothing more than the author's personal inference from the test results. The premises are explicit, and the reader is by no means required to share [defendant's] conclusion."). A statement of opinion of this sort doesn't "imply a false assertion of fact," ***1440** *Milkovich,* 497 U.S. at 19, 110 S.Ct. at 2706, and is thus entitled to full constitutional protection.

We applied this principle in *Lewis v. Time, Inc.,* 710 F.2d 549 (9th Cir.1983), where an attorney claimed he had been defamed by an article calling him a "shady practitioner." We held that this expression of opinion was protected by the First Amendment because the article set forth the facts on which the opinion was based: a judgment entered against the attorney for defrauding his clients, and another judgment holding him liable for malpractice. *Id.* at 556. Because the article's factual assertions were accurate, we concluded that the plaintiff's claim was barred: "[W]here a publication sets forth the facts underlying its statement of opinion ... and those facts are true, the Constitution protects that opinion from liability for defamation." *Id.; see also National Ass'n of Gov't Employees,* 396 N.E.2d at 1000; *Rinaldi v. Holt, Rinehart & Winston, Inc.,* 42 N.Y.2d 369, 397 N.Y.S.2d 943, 950, 366 N.E.2d 1299, 1306 (1977).

Yagman's Daily Journal remark is protected by the First Amendment as an expression of opinion based on stated facts. Like the defendant in *Lewis,* Yagman disclosed the basis for his view that Judge Keller is anti-Semitic and has a penchant for sanctioning Jewish lawyers: that he, Kenner and Manes are all Jewish and had been sanctioned by Judge Keller. The statement did not imply the existence of additional, undisclosed facts; it was carefully phrased in terms of an inference drawn from the facts specified rather than a bald accusation of bias against Jews. [17] Readers were "free to form another, perhaps contradictory opinion from the same facts," *Lewis,* 710 F.2d at 555, as no doubt they did.

[16] **[17]** **3.** The district court also disciplined Yagman for alleging that Judge Keller was "dishonest." This remark appears in the letter Yagman sent to Prentice Hall in connection with the profile of Judge Keller in the Almanac of the Federal Judiciary. *See* n. 4 *supra.* The court concluded that this allegation was sanctionable because it "plainly impl[ies] past improprieties." 856 F.Supp. at 1391. Had Yagman accused Judge Keller of taking bribes, we would agree with the district court. Statements that "could reasonably be understood as imputing specific criminal or other wrongful acts" are not entitled to constitutional protection merely

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because they are phrased in the form of an opinion. *Cianci v. New Times Publishing Co.,* 639 F.2d 54, 64 (2d Cir.1980).

When considered in context, however, Yagman's statement cannot reasonably be interpreted as accusing Judge Keller of criminal misconduct. The term "dishonest" was one in a string of colorful adjectives Yagman used to convey the low esteem in which he held Judge Keller. The other terms he used—"ignorant," "ill-tempered," "buffoon," "sub-standard human," "right-wing fanatic," "a bully," "one of the worst judges in the United States"—all speak to competence and temperament rather than corruption; together they convey nothing more substantive than Yagman's contempt for Judge Keller. Viewed in context of these "lusty and imaginative expression[s]," *Letter Carriers,* 418 U.S. at 286, 94 S.Ct. at 2782, the word "dishonest" cannot reasonably be construed as suggesting that Judge Keller had committed specific illegal acts.[18] *See Bresler,* 398 U.S. at 14, 90 S.Ct. at 1541 ("blackmail"). Yagman's remarks are thus statements of rhetorical hyperbole, incapable of being proved true or false. *Cf. In re Erdmann,* 33 N.Y.2d 559, 347 N.Y.S.2d 441, 441, 301 N.E.2d 426, 427 (1973) (reversing sanction against attorney who criticized trial judges for not following the law, and appellate judges for being "the whores who became madams"); ***1441** *State Bar v. Semaan,* 508 S.W.2d 429, 431–32 (Tex.Civ.App.1974) (attorney's observation that judge was "a midget among giants" not sanctionable because it wasn't subject to being proved true or false).

Were we to find any substantive content in Yagman's use of the term "dishonest," we would, at most, construe it to mean "intellectually dishonest"—an accusation that Judge Keller's rulings were overly result-oriented. Intellectual dishonesty is a label lawyers frequently attach to decisions with which they disagree.[19] An allegation that a judge is intellectually dishonest, however, cannot be proved true or false by reference to a "core of objective evidence." *Cf. Milkovich,* 497 U.S. at 21, 110 S.Ct. at 2707; *Rooney,* 912 F.2d at 1055. "[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." *Haynes v. Alfred A. Knopf, Inc.,* 8 F.3d 1222, 1227 (7th Cir.1993). Because Yagman's allegation of "dishonesty" does not imply facts capable of objective verification, it is constitutionally immune from sanctions.

[18] **4.** Finally, the district court found sanctionable Yagman's allegation that Judge Keller was "drunk on the bench." Yagman contends that, like many of the terms he used in his letter to Prentice Hall, this phrase should be viewed as mere "rhetorical hyperbole." The statement wasn't a part of the string of invective in the Prentice Hall letter, however; it was a remark Yagman allegedly made to a newspaper reporter.[20] Yagman identifies nothing relating to the context in which this statement was made that tends to negate the literal meaning of the words he used. We therefore conclude that Yagman's "drunk on the bench" statement could reasonably be interpreted as suggesting that Judge Keller had actually, on at least one occasion, taken the bench while intoxicated. Unlike Yagman's remarks in his letter to Prentice Hall, this statement implies actual facts that are capable of objective verification. For this reason, the statement isn't protected under *Falwell, Bresler* or *Letter Carriers.*

For Yagman's "drunk on the bench" allegation to serve as the basis for sanctions, however, the Standing Committee had to prove that the statement was false. *See Hepps,* 475 U.S. at 776–77, 106 S.Ct. at 1563–64. This it failed to do; indeed, the committee introduced no evidence at all on the point. While we share the district court's inclination to presume, "[i]n the absence of supporting evidence," that the allegation is untrue, 856 F.Supp. at 1391, the fact remains that the Standing Committee bore the burden of proving Yagman had made a statement that falsely impugned the integrity of the court. By presuming falsity, the district court unconstitutionally relieved the Standing Committee of its duty to produce evidence on an element of its case.[21] Without proof of falsity, ***1442** Yagman's "drunk on the bench" allegation, like the statements discussed above, cannot support the imposition of sanctions for impugning the integrity of the court. *See Porter,* 766 P.2d at 969 (dismissing request for sanctions against attorney where no proof of falsity was introduced).

B

As an alternative basis for sanctioning Yagman, the district court concluded that Yagman's statements violated Local Rule 2.5.2's prohibition against engaging in conduct that "interferes with the administration of justice." The court found that Yagman made the statements discussed above in an attempt to "judge-shop"—*i.e.,* to cause Judge Keller to recuse himself in cases where Yagman appeared as counsel.

The Supreme Court has held that speech otherwise entitled to full constitutional protection may nonetheless be sanctioned if it obstructs or prejudices the administration of justice. *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1074–75, 111 S.Ct.

2720, 2744–45, 115 L.Ed.2d 888 (1991); *see Sheppard v. Maxwell,* 384 U.S. 333, 363, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600 (1966). Given the significant burden this rule places on otherwise protected speech, however, the Court has held that prejudice to the administration of justice must be highly likely before speech may be punished.

In a trio of cases involving contempt sanctions imposed against newspapers, the Court articulated the constitutional standard to be applied in this context. Press statements relating to judicial matters may not be restricted, the Court held, unless they pose a "clear and present danger" to the administration of justice. *Craig v. Harney,* 331 U.S. 367, 372, 67 S.Ct. 1249, 1252, 91 L.Ed. 1546 (1947); *Pennekamp v. Florida,* 328 U.S. 331, 348, 66 S.Ct. 1029, 1038, 90 L.Ed. 1295 (1946); *Bridges v. California,* 314 U.S. 252, 260–63, 62 S.Ct. 190, 192–94, 86 L.Ed. 192 (1941). The standard announced in these cases is a demanding one: Statements may be punished only if they "constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." *Craig,* 331 U.S. at 376, 67 S.Ct. at 1255. There was no clear and present danger in these cases, the Court concluded, because any prospect that press criticism might influence a judge's decision was far too remote. In an oft-quoted passage, the Court noted that "the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate." *Id.*

More recently, the Court held that the "clear and present danger" standard does not apply to statements made by lawyers participating in pending cases. *Gentile,* 501 U.S. at 1075, 111 S.Ct. at 2745. In *Gentile,* the Court concluded that lawyers involved in pending cases may be punished if their out-of-court statements pose merely a "substantial likelihood" of materially prejudicing the fairness of the proceeding. *Id.* The Court gave two principal reasons for adopting this lower threshold, one concerned with the identity of the speaker, the other with the timing of the speech. First, the Court noted, lawyers participating in pending cases have "special access to information through discovery and client communications." *Id.* at 1074, 111 S.Ct. at 2744–45. As a result, their statements pose a heightened threat to the fair administration of justice, "since [they] are likely to be received as especially authoritative." *Id.; see also In re Hinds,* 90 N.J. 604, 449 A.2d 483, 496 (1982) (noting that attorneys participating in pending cases "have confidential information and an intimate knowledge of the merits" of an action, and that their views "are invested with particular credibility and weight in light of their positions"). Second, statements made during the pendency of a case are "likely to influence the actual outcome of the trial" or "prejudice the jury venire, even if an untainted panel can ultimately be found." *Gentile,* 501 U.S. at 1075, 111 S.Ct. at 2745. The Court also noted that restricting the speech of lawyers while they are involved in pending cases does not prohibit speech altogether but "merely postpones the attorneys' comments ***1443** until after trial." *Id.* at 1076, 111 S.Ct. at 2745.

The Court cited its celebrated decision in *Sheppard v. Maxwell,* 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), which reversed the conviction of a criminal defendant whose right to a fair trial had been compromised by excessive, prejudicial publicity stemming from the comments of lawyers and others involved in the trial. That decision, the Court noted, had served as a catalyst for reform efforts aimed at curbing press statements by lawyers involved in judicial proceedings. After *Sheppard,* a majority of states enacted rules restricting the rights of lawyers to comment on matters pending before the courts. *Gentile,* 501 U.S. at 1067–68, 111 S.Ct. at 2740–41.

The Court in *Gentile* thus focused on situations where public statements by lawyers impair the "fair trial rights" of litigants, and discussed at some length the strong governmental interest in limiting prejudicial comments in this context. *See id.* at 1068, 111 S.Ct. at 2741. The Court noted, for example, that litigants are entitled to have their cases decided by "impartial jurors ... based on material admitted into evidence before them in a court proceeding." *Id.* at 1070, 111 S.Ct. at 2742. Extrajudicial statements that might prejudice the jury's consideration of the merits "obviously threaten to undermine this basic tenet." *Id.* Moreover, statements likely to prejudice the fairness of proceedings in a particular case impose significant costs on the judicial system: "Even if a fair trial can ultimately be ensured through *voir dire,* change of venue, or some other device, these measures entail serious costs to the system.... The State has a substantial interest in preventing officers of the court, such as lawyers, from imposing such costs on the judicial system and on the litigants." *Id.* at 1075, 111 S.Ct. at 2745.

[19] The special considerations identified by *Gentile* are of limited concern when no case is pending before the court. When lawyers speak out on matters unconnected to a pending case, there is no direct and immediate impact on the fair trial rights of litigants. Information the lawyers impart will not

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be viewed as coming from confidential sources, and will not have a direct impact on a particular jury venire. Moreover, a speech restriction that is not bounded by a particular trial or other judicial proceeding does far more than merely postpone speech; it permanently inhibits what lawyers may say about the court and its judges—whether their statements are true or false.[22] Much speech of public importance—such as testimony at congressional hearings regarding the temperament and competence of judicial nominees—would be permanently chilled if the rule in *Gentile* were extended beyond the confines of a pending matter. We conclude, therefore, that lawyers' statements unrelated to a matter pending before the court may be sanctioned only if they pose a clear and present danger to the administration of justice. *Accord Hinds,* 449 A.2d at 498.

[20] **[21]** The district court found that Yagman's statements interfered with the administration of justice because they were aimed at forcing Judge Keller to recuse himself in cases where Yagman appears as counsel. Judge-shopping doubtless disrupts the proper functioning of the judicial system and may be disciplined. But after conducting an independent examination of the record to ensure that the district court's ruling "does not constitute a forbidden intrusion on the field of free expression," *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502 (1984) (internal quotation marks omitted), we conclude that the sanction imposed here cannot stand.

[22] Yagman's criticism of Judge Keller was harsh and intemperate, and in no way to be condoned. It has long been established, however, that a party cannot force a judge to recuse himself by engaging in personal attacks on the judge: "Nor can that artifice prevail, which insinuates that the decision of this court will be the effect of personal resentment; for, if it could, every man could ***1444** evade the punishment due to his offences, by first pouring a torrent of abuse upon his judges, and then asserting that they act from passion...." *Respublica v. Oswald,* 1 U.S. (1 Dall.) 319, 326, 1 L.Ed. 155 (Pa.1788).[23] Modern courts continue to adhere to this view, and with good reason. *See, e.g., United States v. Studley,* 783 F.2d 934, 939–40 (9th Cir.1986) (litigant's "intemperate and scurrilous attacks" on judge could not compel judge's disqualification); *United States v. Wolfson,* 558 F.2d 59, 62 (2d Cir.1977) (defendant's unfounded charges of misconduct against judge didn't require disqualification, because defendant's remarks "only establish[ed his] feelings towards [the judge], not the reverse").

[23] Criticism from a party's attorney creates an even remoter danger that a judge will disqualify himself because the federal recusal statutes, in all but the most extreme circumstances, require a showing that the judge is (or appears to be) biased or prejudiced against a party, not counsel. *United States v. Burt,* 765 F.2d 1364, 1368 (9th Cir.1985); *see also In re Beard,* 811 F.2d 818, 830 (4th Cir.1987); *Gilbert v. City of Little Rock,* 722 F.2d 1390, 1398–99 (8th Cir.1983). Were it otherwise, courts have cautioned, "[l]awyers, once in a controversy with a judge, would have a license under which the judge would serve at their will," *Davis v. Board of Sch. Comm'rs,* 517 F.2d 1044, 1050 (5th Cir.1975), and any "party wishing to rid himself of the assigned judge would need only hire a lawyer with a certified record of abusive criticisms of that judge," *United States v. Helmsley,* 760 F.Supp. 338, 343 (S.D.N.Y.1991), *aff'd,* 963 F.2d 1522 (2d Cir.1992).

[24] Notwithstanding this well-settled rule, judges occasionally do remove themselves voluntarily from cases as a result of harsh criticism from attorneys.[24] As the district court recognized, then, a lawyer's vociferous criticism of a judge could interfere with the random assignment of judges. But a mere possibility—or even the probability—of harm does not amount to a clear and present danger: "The danger must not be remote or even probable; it must immediately imperil." *Craig,* 331 U.S. at 376, 67 S.Ct. at 1255. The "substantive evil must be extremely serious and the degree of imminence must be extremely high before utterances can be punished" under the First Amendment. *Bridges,* 314 U.S. at 263, 62 S.Ct. at 194.

We conclude that "the danger under this record to fair judicial administration has not the clearness and immediacy necessary to close the door of permissible public comment." *Pennekamp,* 328 U.S. at 350, 66 S.Ct. at 1039. As noted above, firm and long-standing precedent establishes that unflattering remarks like Yagman's cannot force the disqualification of the judge at whom they are aimed. The question remains whether the possibility of voluntary recusal is so great as to amount to a clear and present danger. We believe it is not. Public criticism of judges and the decisions they make is not unusual, *see, e.g.,* n. 19 *supra,* yet this seldom leads to judicial recusal. Judge Real, for example, despite receiving harsh criticism from Yagman, did not recuse himself in *Yagman v. Republic Ins.,* where Yagman was not merely the lawyer but also a party to the ***1445** proceedings.[25] Federal judges are well aware that "[s]ervice as a public official means that one may not be viewed favorably by every member of the public," and that they've been granted "the extraordinary

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protections of life tenure to shield them from such pressures." *In re Bernard,* 31 F.3d 842, 846 n. 8 (9th Cir.1994) (single judge opinion). Because Yagman's statements do not pose a clear and present danger to the proper functioning of the courts, we conclude that the district court erred in sanctioning Yagman for interfering with the administration of justice.

Conclusion

We can't improve on the words of Justice Black in *Bridges,* 314 U.S. at 270–71, 62 S.Ct. at 197–98 (footnote omitted):

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

REVERSED.

WIGGINS, Circuit Judge, dissenting.
I respectfully dissent.

All Citations

55 F.3d 1430, 63 USLW 2773

Footnotes

1 As the basis for this claim, Yagman cited an earlier case where Judge Real had granted a directed verdict against Yagman's clients and thereafter sanctioned Yagman personally in the amount of $250,000. We reversed the sanctions and remanded for reassignment to another judge. *In re Yagman,* 796 F.2d 1165, 1188 (9th Cir.1986). Though we found no evidence that Judge Real harbored any personal animosity toward Yagman, we concluded that reassignment was necessary "to preserve the appearance of justice." *Id.* On remand, Judge Real challenged our authority to reassign the case, and Yagman successfully petitioned for a writ of mandamus. *See Brown v. Baden,* 815 F.2d 575, 576–77 (9th Cir.1987). The matter came to rest when the Supreme Court denied Judge Real's petition for certiorari. *See Real v. Yagman,* 484 U.S. 963, 108 S.Ct. 450, 98 L.Ed.2d 390 (1987).

2 The sanctions order harshly reprimanded Yagman, stating that "neither monetary sanctions nor suspension appear to be effective in deterring Yagman's pestiferous conduct," 137 F.R.D. at 318, and recommended that he be "disciplined appropriately" by the California State Bar, *id.* at 319. On appeal, we affirmed as to disqualification but reversed as to sanctions. *Yagman v. Republic Ins.,* 987 F.2d 622 (9th Cir.1993).

3 The Almanac is a loose-leaf service consisting of profiles of federal judges. Each profile covers the judge's educational and professional background, noteworthy rulings, and anecdotal items of interest. One section—which many judges pretend to ignore but in fact read assiduously—is styled "Lawyers' Evaluation." Perhaps because the comments are published anonymously, they sometimes contain criticism more pungent than judges are accustomed to. Judges who believe the comments do not fairly portray their performance occasionally ask Prentice Hall to seek additional comments; Prentice Hall's letter to Yagman was sent pursuant to such a request. The updated survey indeed produced a more positive—and we believe more accurate—picture of Judge Keller than the original survey. *Compare* 1 Almanac of the Fed.Judiciary 48 (1991–1) *with* 1 Almanac of the Fed.Judiciary 49–50 (1991–2).

4 The portion of the letter relevant here reads as follows:

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> It is outrageous that the Judge wants his profile redone because he thinks it to be inaccurately harsh in portraying him in a poor light. It is an understatement to characterize the Judge as "the worst judge in the central district." It would be fairer to say that he is ignorant, dishonest, ill-tempered, and a bully, and probably is one of the worst judges in the United States. If television cameras ever were permitted in his courtroom, the other federal judges in the Country would be so embarrassed by this buffoon that they would run for cover. One might believe that some of the reason for this sub-standard human is the recent acrimonious divorce through which he recently went: but talking to attorneys who knew him years ago indicates that, if anything, he has mellowed. One other comment: his girlfriend ..., like the Judge, is a right-wing fanatic.

SER 316 (letter dated June 5, 1991). There's no doubt that Yagman wrote this intemperate letter, though the parties disagree about what Yagman did with it. The district court found that Yagman mailed copies both to Prentice Hall and to Judge Keller, 856 F.Supp. at 1386, and we have no basis for rejecting this finding.

5 The full text of the ad reads: "This office is gathering evidence concerning sanctions imposed by U.S. Dist. Judge William D. Keller. It would be appreciated if any attorney who has been sanctioned, or threatened with sanctions, by Judge Keller fill out the form below and mail it to us. Thank you." SER 380. The record does not disclose whether Yagman received any responses.

6 Though Yagman adamantly denies saying this to Steinberg, the district court heard testimony from both lawyers and believed Steinberg. 856 F.Supp. at 1392.

7 The matter had originally been assigned to a panel of three judges from outside the Central District. After Yagman argued that this assignment violated Local Rule 2.6.4, the out-of-district panel referred the matter back to Chief Judge Real. The matter was then assigned to Central District Judges Rafeedie, Davies and Williams, who presided over all further proceedings.

8 Yagman raises other procedural objections to the district court proceedings, among them the lack of any discovery. Though Yagman and the Standing Committee both submitted lengthy discovery requests, the district court denied all discovery without explanation. *See* SER 666, 669. While the district court has broad discretion over discovery matters, the record does not reflect that it exercised that discretion, as it denied all discovery in summary fashion. The court thus appears to have violated Local Rule 2.6.4, which expressly makes the Federal Rules of Civil Procedure applicable to disciplinary proceedings. One of the rules thus made applicable is Fed.R.Civ.P. 26(b), which, subject to some limitations, affords both parties the right to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Because the district court may not disregard the local rules it has promulgated, *see In re Thalheim,* 853 F.2d 383, 386 (5th Cir.1988), it lacked authority to dispense with discovery altogether.

9 The Chairman of the Standing Committee, Donald Smaltz, represented Judge Real in *Real v. Yagman. see* n. 1 *supra,* and is alleged to have close personal ties to the former Chief Judge. In addition, Yagman alleges that several of the other committee members have been either defendants or opposing counsel in actions brought by Yagman's clients.

10 Justice Blackmun alone concluded that appointing an interested party's attorney to prosecute a criminal contempt action violates due process; no other justice would go that far. *See Young,* 481 U.S. at 814–15, 107 S.Ct. at 2141–42 (Blackmun, J., concurring).

11 Given the relatively small size of the Central District bar, it's highly likely that Standing Committee members will have had some dealings (professional or otherwise) with the court's judges, as well as with the attorneys subject to disciplinary proceedings. The rules nonetheless call for the committee to be drawn from the Central District bar, presumably because those lawyers will be familiar with local practices. The rules thus reflect a judgment that the benefits of having a prosecuting authority composed of one's peers outweigh any resulting loss of independence. We see no constitutional defect in this judgment.

12 *Sandlin* is consistent with the decisions of most state courts that have considered this issue. *See, e.g., Ramirez v. State Bar,* 28 Cal.3d 402, 169 Cal.Rptr. 206, 211, 619 P.2d 399, 404 (1980); *In re Terry,* 271 Ind. 499, 394 N.E.2d 94, 95–96 (1979); *Louisiana State Bar Ass'n v. Karst,* 428 So.2d 406, 409 (La.1983); *In re Graham,* 453 N.W.2d 313, 321–22 (Minn.1990); *In re Westfall,* 808 S.W.2d 829, 837 (Mo.1991); *In re Holtzman,* 78 N.Y.2d 184, 573 N.Y.S.2d 39, 43, 577 N.E.2d 30, 34 (1991) (per curiam). *But see State*

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Bar v. Semaan, 508 S.W.2d 429, 432–33 (Tex.Civ.App.1974) (adopting subjective *New York Times* malice standard).

13 This inquiry may take into account whether the attorney pursued readily available avenues of investigation. Sandlin, for example, wrongfully accused a district judge of ordering his court reporter to alter the transcript of court proceedings. Though the judge had agreed to let the reporter be deposed, Sandlin didn't wait to see what the deposition would disclose before making his accusation. Sandlin thus lacked a reasonable factual basis for his accusation because he failed to pursue readily available means of verifying his charge of criminal wrongdoing. 12 F.3d at 867; *see also Ramirez,* 169 Cal.Rptr. at 206, 619 P.2d at 404 (upholding sanction where attorney made false statements about judges based solely on conjecture without investigating whether the allegations were factually substantiated); *Holtzman,* 573 N.Y.S.2d at 41–43, 577 N.E.2d at 32–34 (upholding sanction where attorney falsely accused judge of misconduct during in-chambers meeting before interviewing any of the individuals who were present at the meeting).

14 Yagman made a similar assertion to Prentice Hall, mentioning three incidents in which Jewish lawyers were sanctioned by Judge Keller and alleging these incidents "back[ed] up the claim" that Judge Keller is anti-Semitic. *See* SER 315. Our analysis of this assertion does not differ from that of the Daily Journal remark; we focus on the latter because the district court relied on it in imposing sanctions. 856 F.Supp. at 1391.

15 The Restatement's view has been widely adopted. *See, e.g., Dunn v. Gannett New York Newspapers, Inc.,* 833 F.2d 446, 453 (3d Cir.1987); *Orr v. Argus–Press Co.,* 586 F.2d 1108, 1114–15 (6th Cir.1978); *National Ass'n of Gov't Employees, Inc. v. Central Broadcasting Corp.,* 379 Mass. 220, 396 N.E.2d 996, 1000–01 (1979). Although section 566 was drafted before *Milkovich* clarified the famous dictum in *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 339–40, 94 S.Ct. 2997, 3006–07, 41 L.Ed.2d 789 (1974), nothing in *Milkovich* altered the constitutional principles this section articulates. *Phantom Touring,* 953 F.2d at 731 n. 13; *Lyons v. Globe Newspaper Co.,* 415 Mass. 258, 612 N.E.2d 1158, 1164 (1993); *Gross v. New York Times Co.,* 82 N.Y.2d 146, 603 N.Y.S.2d 813, 818, 623 N.E.2d 1163, 1168 (1993).

16 In *Unelko Corp. v. Rooney,* 912 F.2d 1049 (9th Cir.1990), for example, the defendant stated that plaintiff's product "didn't work," without setting forth the factual basis for his opinion. We held that the defendant could be liable for defamation because his statement implied a specific factual assertion: that the product didn't perform the functions listed on the bottle. *Id.* at 1055; *cf. Milkovich,* 497 U.S. at 5 n. 2, 110 S.Ct. at 2698 n. 2 (defendant failed to disclose factual basis for his view that plaintiff lied at court hearing).

17 Even if Yagman's statement were viewed as a bare allegation of anti-Semitism, it might well qualify for protection under the First Amendment as mere "name-calling." *Cf. Stevens v. Tillman,* 855 F.2d 394, 402 (7th Cir.1988) (allegation that plaintiff was a "racist" held not actionable); *Buckley v. Littell,* 539 F.2d 882, 894 (2d Cir.1976) (allegation that plaintiff was a "fascist" held not actionable); *Ward v. Zelikovsky,* 136 N.J. 516, 643 A.2d 972, 983 (1994) (allegation that plaintiffs "hate Jews" held not actionable).

18 A lawyer accusing a judge of criminal misconduct would use a more pointed term such as "crooked" or "corrupt." *See Rinaldi,* 397 N.Y.S.2d at 951, 366 N.E.2d at 1307 (accusation that judge was "corrupt" not protected because it implied the judge had committed illegal acts).

19 *See, e.g., The Comeback Kids,* The Recorder, Dec. 29, 1994, at 1 ("[Apple Computer's attorney] call[ed] the Ninth Circuit ruling [in *Apple Computer, Inc. v. Microsoft Corp.*] 'intellectually dishonest' and 'extremely detrimental to the business of the United States.' "); Philip Shenon, *Convictions Reversed in Island Slaying,* N.Y. Times, July 21, 1987, at A1 ("[T]he chief prosecutor in the case[ ] said he would challenge the appeals court's decision, which he described as 'intellectually dishonest.' "); Dawn Weyrich, *Affirmative Action Win Surprises Many,* Wash. Times, June 28, 1990, at A1 ("William Bradford Reynolds ... called the ruling [in *Metro Broadcasting, Inc. v. FCC*] 'intellectually dishonest.' 'There is no legal reasoning to justify this decision. Judicial activism has run rampant again,' Mr. Reynolds said.").

20 The primary evidence of this charge consists of testimony from one of Judge Keller's former law clerks. The law clerk testified that a reporter called the chambers seeking comment on Yagman's "drunk on the bench" statement. The witness did not claim he had spoken with the reporter himself; rather, he testified that the reporter spoke to his co-clerk and that he (the witness) happened to be in the room with the co-clerk when

the call came in. *See* ER Tab 32, at 35. The witness did not explain how he came to know what the reporter was saying at the remote end of the telephone line, but presumably he was testifying as to what the co-clerk said the reporter said Yagman said.

21 The effect of this error was exacerbated by the fact that the district court did not advise Yagman until after the hearing that he had to carry the burden on this issue. *See* p. 1435 *supra.* The district court thus not only improperly shifted the burden of proof on a key issue to Yagman, but also denied him fair notice that he was expected to carry this burden at the hearing.

22 Local Rule 2.5.2 does not differentiate between true and false statements. We express no view as to the standard applicable to a narrower rule that punishes only false statements which interfere with the administration of justice.

23 Why, the perceptive reader may wonder, does an opinion of the Pennsylvania Supreme Court appear in the first volume of U.S. Reports? *See* Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy,* 83 Mich.L.Rev. 1291, 1295–96 (1985).

24 Chief Justice Rehnquist, for example, has declined to participate in some cases where James Brosnahan appeared as counsel, leading to speculation that Brosnahan's criticism of the Chief Justice during his 1986 confirmation hearings may have been the reason. *See, e.g.,* Tony Mauro, *The Justices' Imperial Code of Silence,* Legal Times, Feb. 9, 1987, at 9. Similarly, press reports have suggested that Second Circuit Judge John Walker removed himself from post-trial proceedings in the Leona Helmsley case because of harsh criticism he had received during Senate confirmation hearings from Helmsley's counsel, Harvard Law Professor Alan Dershowitz. *See* Tony Mauro, *The Thomas Recusal Question,* Tex.Law., Apr. 19, 1993, at 18. Closer to home, one Central District judge has decided to recuse himself in all cases where Yagman appears as counsel, after Yagman made baseless allegations against the judge. *See Yagman,* 856 F.Supp. at 1393.

25 The district court noted that, after Yagman made the remarks at issue, Judge Keller did disqualify himself in one of Yagman's cases. 856 F.Supp. at 1394 n. 13. Although Judge Keller stated that his recusal was motivated by the fact that he had referred Yagman for discipline rather than by Yagman's criticism, *see id.* at 1387, this is beside the point. Our inquiry focuses on objective probabilities: the extent to which the statements in question would be likely to cause a judge of average fortitude to disqualify himself. As the Court noted in *Pennekamp,* "[t]he law deals in generalities and external standards and cannot depend on the varying degrees of moral courage or stability in the face of criticism which individual judges may possess...." 328 U.S. at 348, 66 S.Ct. at 1038.

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KeyCite Red Flag - Severe Negative Treatment
Order Reversed by Standing Committee on Discipline of U.S. Dist. Court for Cent. Dist. of California v. Yagman, 9th Cir.(Cal.), May 30, 1995

856 F.Supp. 1384
United States District Court,
C.D. California.

STANDING COMMITTEE ON DISCIPLINE OF the UNITED STATES DISTRICT COURT FOR the CENTRAL DISTRICT OF CALIFORNIA, Petitioner,
v.
Stephen YAGMAN, Respondent.

No. CV 94–6448 ER, JGD, DWW.
|
May 18, 1994.

Synopsis
In an attorney disciplinary proceeding, a three-judge panel of the District Court held that: (1) attorney may be sanctioned for impugning integrity of court by reckless speech—statement made without reasonable basis in fact; (2) impugning integrity of court and judge shopping warrants discipline; and (3) imposing discipline for judge shopping does not violate First Amendment.

So ordered.

West Headnotes (10)

[1] **Attorneys and Legal Services** Federal system

Discipline of attorneys for unprofessional conduct is inherent power of district courts.

[2] **Attorneys and Legal Services** Rules governing proceedings

No uniform procedure exists for disciplinary proceedings in federal system, and each district may define rules to be followed.

[3] **Attorneys and Legal Services** Federal system

Attorneys and Legal Services Evidence

Attorney disciplinary proceeding in federal court is not "civil action" or "criminal case" and, therefore, is not subject to Federal Rules of Evidence. Fed.Rules Evid.Rule 1101(b), 28 U.S.C.A.

[4] **Attorneys and Legal Services** Impartiality and decorum of tribunal

Attorney may be sanctioned for impugning integrity of court by reckless speech—statement made without reasonable basis in fact; attorney has obligation to conduct factual inquiry prior to speaking. U.S.Dist.Ct.Rules C.D.Cal., Civil Rule 2.5.2; U.S.C.A. Const.Amend. 1.

[5] **Attorneys and Legal Services** Standards of professional conduct; enforcement; discipline

Constitutional Law Professional conduct regulations in general

Constitutional Law Discipline

Local rule prohibiting attorney conduct which degrades or impugns integrity of court raises overbreadth concerns under First Amendment, since truthful statements that impugn integrity of judge are sanctionable. U.S.Dist.Ct.Rules C.D.Cal., Civil Rule 2.5.2; U.S.C.A. Const.Amend. 1.

[6] **Constitutional Law** Overbreadth in General

Statute is overbroad if, in addition to proscribing activities which constitutionally may be forbidden, it also sweeps within its coverage protected activities. U.S.C.A. Const.Amend. 1.

[7] **Constitutional Law** Statements regarding judge or court officials

Statements accusing judge of being "drunk on the bench," having penchant for sanctioning Jewish lawyers, being anti-Semitic, and being dishonest are not "opinion" and, therefore, are not protected by First Amendment; it is possible to determine empirically whether judge imposes sanctions in disproportionate fashion, charges of drunkenness and dishonesty imply past improprieties, and statements contain provably false factual connotations and are not rhetorical hyperbole. U.S.C.A. Const.Amend. 1; U.S.Dist.Ct.Rules C.D.Cal., Civil Rule 2.5.2.

[8] **Attorneys and Legal Services** Impartiality and decorum of tribunal

Discipline may be imposed for impugning integrity of federal court if there is no objectively reasonable basis for accusations that judge is anti-Semitic, has penchant for sanctioning Jewish lawyers, has been "drunk on the bench," and is dishonest; it does not matter if statements are made in letter to publication that evaluates judges, and anecdotal evidence regarding experiences of several Jewish attorneys is insufficient given gravity of anti-Semitic charge. U.S.Dist.Ct.Rules C.D.Cal., Civil Rule 2.5.2.

1 Cases that cite this headnote

[9] **Attorneys and Legal Services** Impartiality and decorum of tribunal

Attempts to interfere with random assignment of judges, for whatever reason, impugn integrity of district court and subject offending attorney to discipline. U.S.Dist.Ct.Rules C.D.Cal., Civil Rule 2.5.2.

1 Cases that cite this headnote

[10] **Attorneys and Legal Services** Impartiality and decorum of tribunal

Constitutional Law Impartiality; recusal or reassignment

Imposing sanction for judge shopping by interference with random assignment of judges does not violate First Amendment, even though means used involve speech. U.S.Dist.Ct.Rules C.D.Cal., Civil Rule 2.5.2; U.S.C.A. Const.Amend. 1.

Attorneys and Law Firms

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Ramsey Clark, Lawrence W. Schilling, New York City, Marion Yagman, Yagman & Yagman, Venice, CA, for respondent.

Before RAFEEDIE and DAVIES, District Judges, and DAVID W. WILLIAMS, Senior District Judge.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER THEREON

PER CURIAM:

On August 13 and September 10, 1993, this three-judge panel conducted hearings on its Order to Show Cause why Respondent, attorney Stephen Yagman, should not be disciplined pursuant to the Local Rules of the Central District of California. The Panel has reviewed the evidence presented by the parties and the written arguments of counsel. In this order, the Panel finds that the Respondent violated Local Rule 2.5.2 by impunging the integrity of the court and by interfering with the random selection of judges. The Panel defers the determination of the appropriate sanction pending further comment by the parties.

FACTUAL BACKGROUND

On February 4, 1991, Respondent filed a motion to disqualify then-Chief Judge Manuel L. Real in the case of *Yagman v. Republic Insurance,* CV 91–423 R. Respondent was the party plaintiff in that action.

The motion was assigned randomly to Judge William D. Keller. On March 27, 1991, Judge Keller denied the motion. *See Yagman v. Republic Insurance,* 136 F.R.D. 652 (C.D.Cal.1991). Judge Keller then issued an order to show

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cause why Respondent should not be sanctioned. Respondent had failed to bring to Judge Keller's attention the fact that another Court had considered and rejected an earlier attempt by Respondent to disqualify Judge Real. Pet.Ex. 42.

In an order filed May 31, 1991, Judge Keller found Respondent in violation of Fed.R.Civ.P. 11, 18 U.S.C. § 401(3) and the inherent authority of the court. *Yagman v. Republic Insurance,* 137 F.R.D. 310 (C.D.Cal.1991). Judge Keller recommended ***1386** to the State Bar of California that Respondent be disciplined appropriately. [1]

These proceedings arise from the actions taken by Respondent after the issuance of the May 31 order.

In early June, a reporter from the *Los Angeles Daily Journal* telephoned Judge Keller's chambers to report that she had a written statement from Respondent charging Judge Keller with anti-Semitism and with being "drunk on the bench." 8/13/93 Tr. at 35. The reporter inquired whether Judge Keller cared to comment on the allegations.

In the June 6, 1991 edition of the *Los Angeles Daily Journal,* Respondent was quoted as stating that Judge Keller "has a penchant for sanctioning Jewish lawyers: me, David Kenner, and Hugh Manes. I take this to be evidence of anti-Semitism." Pet.Ex. 50.

At about the same time, on June 5, 1991, Respondent wrote to Christine Housen of Prentice Hall legal publishers. Pet.Ex. No. 50. Prentice Hall publishes the Judicial Almanac, a collection of profiles of Federal judges and solicits opinions from practicing attorneys for this purpose. The June 5 letter contained what Respondent called:

> the specifics of Judge Keller's atrocious conduct toward attorneys, virtually all of whom fall into the categories of being attorneys who take positions against the government, two of whom are criminal defense attorneys and two of whom are plaintiff's civil rights lawyers, and three of whom happened to be Jewish, backing up the claim that the Judge is, among other things, quite anti-semitic.

As "evidence" of Judge Keller's bias against Jews, Respondent noted that the judge had sanctioned or sought to sanction two other Jewish attorneys in addition to Respondent himself. *Id.* The letter went on to state:

> It is outrageous that the Judge wants his profile redone because he thinks it to be inaccurately harsh in portraying him in a poor light. It is an understatement to characterize the judge as "the worst judge in the central district." It would be fairer to say that he is ignorant, dishonest, ill-tempered, and a bully, and probably is one of the worst judges in the United States. If television cameras ever were permitted in his courtroom, the other federal judges in the Country would be so embarrassed by this buffoon that they would run for cover. One might believe that some of the reason for this sub-standard human is the recent acrimonious divorce through which he recently went: but talking to attorneys who knew him years ago indicates that, if anything, he has mellowed. One other comment: his girlfriend is, or was, the newly-appointed U.S. Attorney in Los Angeles, Lourdes Baird, who, like the Judge, is a right wing fanatic.

Respondent admits that he typed the June 5 letter personally. 8/13/93 Tr. at 139. The letter was sent to Christine Housen, though Respondent claims that he did not intend or authorize its transmittal, *see* Pet.Ex. 56–E, a claim which the Panel does not believe. On June 6, a copy of the letter was mailed anonymously to Judge Keller in his chambers. Pet.Ex. 56–D. The Panel finds that Respondent was responsible for mailing this letter.

On June 26, 1991, Yagman & Yagman, P.C., Respondent's law firm, published a half-page advertisement in the *Daily Journal* stating: "This office is gathering evidence concerning sanctions imposed by U.S. Dist. Judge William D. Keller. It would be appreciated if any attorney who has been sanctioned, or threatened with sanctions, by Judge Keller fill out the form below and mail it to us. Thank you." Pet.Ex. 56–F.

One month later, on July 30, 1991, Respondent wrote to Judge Keller for purposes of inquiring whether there were "reasonable grounds to file an action against [him] for, *inter alia,* furnishing to the *Daily Journal* a copy of [his] May 31, 1991 order imposing a sanction on Stephen Yagman." Pet.Ex. 51–G.

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At about the same time, in mid-July or early August 1991, Respondent engaged in a ***1387** conversation with fellow attorney Robert Steinberg in a hallway of the United States Courthouse in Los Angeles. Steinberg was upset by the *Daily Journal* article and had met with Judge Keller to discuss the article. 8/13/93 Tr. at 60–61.

Steinberg asked Respondent about the article. He inquired if Respondent really believed that Judge Keller is anti-Semitic. *Id.* at 62. Respondent stated words to the effect of: "Look, there are certain judges I want to be in front of for my Civil Rights cases who are favorable to my view. And I'd like to recuse out the ones who are extremely unfavorable." *Id.* at 62–63. When Steinberg observed that this practice was unethical, Respondent commented that he [Respondent] could "practice law the way he wants to." *Id.* at 63.

On August 3, 1991, Steinberg wrote to the Petitioner, the Standing Committee on Discipline of the United States District Court for the Central District of California, [2] to report the substance of his conversation with Respondent. Pet.Ex. 55.

On September 12, 1991, Judge Keller wrote a letter formally referring Respondent's conduct to the Standing Committee, pursuant to Local Rule 2.6.3.1. Pet.Ex. 56. A week later, Judge Keller recused himself from the case of *Marshall v. Gates,* CV 91–4860, in which Respondent was attorney for the plaintiff, because of his referral of Respondent for discipline. Apparently pleased with this recusal, Respondent told the *Daily Journal:* "It is remarkable that Keller admits his bias against me, and recuses himself, which is great for my client." Pet.Ex. 59.

PROCEDURAL HISTORY

On October 28, 1992, the Standing Committee filed a Petition for Issuance of Order to Show Cause why Respondent should not be suspended from the practice of law, or otherwise disciplined under Local Rule 2.6.

Chief Judge Real referred the matter to Chief Circuit Judge J. Clifford Wallace of the Court of Appeals for the assignment of a panel of federal judges from outside the Central District. Circuit Judges Edward C. Reed, Jr., Samuel P. King, and Samuel Conti were selected to hear the matter. On December 17, 1992, after issuing an Order to Show Cause to Respondent, the Ninth Circuit panel referred the matter back to Chief Judge Real for the designation of a panel of three Central District judges in accordance with Central District Local Rule 2.6.4.

On December 24, 1992, the case was randomly assigned to this Panel for all further proceedings. The Panel reissued the Order to Show Cause and set the matter for hearing on August 13, 1993. Evidentiary hearings were conducted on that date and on September 10, 1993. A third day of hearing, set for December 2, 1993, was cancelled at Respondent's request.

DISCUSSION

The Standing Committee advances two bases for the discipline of Respondent. First, it contends that Respondent's allegations about Judge Keller have degraded and impugned the integrity of the Court in violation of Local Rule 2.5.2. Second, it argues that Respondent's statements were intended to make Judge Keller recuse himself from cases involving the Respondent, thus interfering with the random assignment of judges in violation of Local Rule 2.5.2.

I. The Legal Framework

[1] The discipline of attorneys for unprofessional conduct is an inherent power of the District Courts. *In re Yagman,* 803 F.2d 1085 (9th Cir.1986); *Standing Committee on Discipline v. Ross,* 735 F.2d 1168, 1170 (9th Cir.), *cert. denied, appeal dismissed,* 469 U.S. 1081, 105 S.Ct. 583, 83 L.Ed.2d 694 (1984).

The standard of professional conduct for attorneys practicing in the Central District is set forth in Local Rules 2.5.1 and 2.5.2. Rule 2.5.1 provides:

> ***1388** RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA —STATE BAR ACT—Each attorney shall become familiar with and comply with the standards of professional conduct required of members of the State Bar of California and contained in the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and the decisions of any court applicable hereto. Those

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> statutes, rules and decisions are hereby adopted as the standards of professional conduct in this Court.

Rule 2.5.2, on the other hand, is independent of California law. It provides: "OTHER STANDARDS—No attorney shall engage in any conduct which degrades or impugns the integrity of the Court or in any manner interferes with the administration of justice therein."

A. Standard of Proof

This Panel has located no precedent establishing the standard of proof to be applied in attorney discipline proceedings in this district. It is clear that the standard used in California disciplinary proceedings is clear and convincing evidence, *Arden v. State Bar,* 43 Cal.3d 713, 725, 239 Cal.Rptr. 68, 739 P.2d 1236 (1987), yet the Local Rules do not clearly compel adherence to the state standard of proof, *see* Local Rules 2.5.1 and 2.5.2. The Ninth Circuit recently upheld the use of the clear preponderance standard in the context of an attorney charged with making false and malicious statements regarding a federal judge. *United States District Court v. Sandlin,* 12 F.3d 861, 865 (9th Cir.1993). However, in *Sandlin,* the U.S. District Court for the Eastern District of Washington adopted Washington's disciplinary rules, including the clear preponderance standard. *Id.* at 864–65. The Fifth Circuit has adopted the clear and convincing standard for federal disciplinary proceedings. *In re Medrano,* 956 F.2d 101, 102 (5th Cir.1992); *Matter of Thalheim,* 853 F.2d 383, 389 n. 9 (5th Cir.1988).

Without resolving the question of what minimum standard is required under the Local Rules, the Panel will apply the higher, clear and convincing standard in this proceeding. This standard is appropriate here given the serious nature of the charges against Respondent and the symmetry derived from conformity with California law.

B. Procedural Rules

[2] "The nature of the disciplinary proceeding is neither civil nor criminal, but an investigation into the conduct of the lawyer-respondent." *Standing Committee on Discipline v. Ross,* 735 F.2d 1168, 1170 (9th Cir.1984); *accord Rosenthal v. Justices of the Supreme Court of California,* 910 F.2d 561, 564 (9th Cir.1990). There is no uniform procedure for disciplinary proceedings in the federal system and each district may define the rules to be followed. *Ross,* 735 F.2d at 1170. "At a minimum, however, an attorney subject to discipline is entitled to procedural due process including notice and an opportunity to be heard." *Id.; Rosenthal,* 910 F.2d at 564.

The parties have disputed whether the Federal Rules of Evidence must be followed in this proceeding. The Panel finds that strict adherence to the Federal Rules of Evidence is not required. "The proceedings for such discipline need not comply with all the formalities of process or other trial procedure." *In re Claiborne,* 119 F.2d 647, 650 (1st Cir.1941). California case law holds that "[t]here is no legislative requirement ... that the rules of evidence in the Code of Civil Procedure be applied in disbarment proceedings, although they are frequently invoked to insure a fair hearing.... There is no reason for invoking them, however, if they are not necessary to serve that purpose." *Werner v. State Bar,* 24 Cal.2d 611, 615, 150 P.2d 892 (1944).

[3] The Federal Rules of Evidence do not apply to these proceedings by their own terms. Rule 1101(b) states that the Rules apply to civil actions, criminal cases, contempt proceedings, and bankruptcy proceedings. Since a disciplinary proceeding is "neither civil nor criminal," *Ross,* 735 F.2d at 1170, it is not encompassed by Rule 1101(b).

Nor do the Local Rules of this district require use of the Federal Rules of Evidence. Local Rule 2.6.4 does state that, unless otherwise ***1389** provided, the Federal Rules of Civil Procedure will govern, but the Local Rules are silent as to what evidentiary rules should apply during the adjudication of a disciplinary proceeding.

II. Impugning the Integrity of the Court

Courts have long held that while a lawyer may, in a proper tone and through the appropriate channels, attack the integrity or competence of a court or judge, he may not, by intemperate and unfounded charges, create disrespect or contempt for courts or their decisions, and if he does so he may properly be disciplined. *See* W.E. Shipley, Annotation, *Attorney's Criticism of Judicial Acts as Ground of Disciplinary Action,* 12 A.L.R.3d 1408 (1993); *see, e.g., Ramirez v. State Bar of California,* 28 Cal.3d 402, 169 Cal.Rptr. 206, 619 P.2d 399 (1980); *Peters v. State Bar of California,* 219 Cal. 218, 223, 26 P.2d 19 (1933); *In re Philbrook,* 105 Cal. 471, 38 P. 884 (1895).

The justification for discipline in this context is not the sensibility of the criticized judge but the concern that

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verbal attacks tend to discredit the courts and weaken the effectiveness of the judicial process. In this vein, the Supreme Court has observed that the "judiciary as well as the public is dependent upon professionally ethical conduct of attorneys and thus has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice." *Middlesex County Ethics Comm. v. Garden State Bar Ass'n.,* 457 U.S. 423, 434, 102 S.Ct. 2515, 2522, 73 L.Ed.2d 116 (1982).

In this district, the duty of attorneys with respect to the judiciary is expressed in Local Rule 2.5.2 which provides that "[n]o attorney shall engage in any conduct which degrades or impugns the integrity of the Court...."

A. First Amendment Concerns

The "disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment." *Gentile v. State Bar of Nevada,* 501 U.S. 1030, ——, 111 S.Ct. 2720, 2734, 115 L.Ed.2d 888 (1991) (Kennedy, J., plurality opinion). However, since lawyers are officers of the courts, "they may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech." *Id.* at ——, 111 S.Ct. at 2748 (O'Connor, J., concurring). Thus, a majority of the Supreme Court in *Gentile* agreed that the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that applied to members of the press.

[4] Prior to examining whether Respondent in fact impugned the integrity of the court, the Panel must reach the issue of the propriety of sanctions under the First Amendment. Curiously, while the Standing Committee in its final brief discusses First Amendment principles in detail, the Respondent's treatment of the issue is cursory.

[5] **[6]** Local Rule 2.5.2, on its face, raises overbreadth concerns.[3] A statute is overbroad if, in addition to proscribing activities which constitutionally may be forbidden, it also sweeps within its coverage protected activities. *See, e.g., Board of Airport Commissioners of Los Angeles v. Jews for Jesus,* 482 U.S. 569, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987). Under the broad terms of Rule 2.5.2, truthful statements that impugn the integrity of a judge are sanctionable. Thus, for example, an attorney who accurately reveals a judge's illegal act could be sanctioned. Respondent may nonetheless be sanctioned for impugning the integrity of the court if Local Rule 2.5.2 is given a saving construction. Such a correction is appropriate if there is a "core of easily identifiable and constitutionally proscribable conduct that the statute forbids." *Secretary of State of Maryland v. Joseph H. Munson Co.,* 467 U.S. 947, 965–66, 104 S.Ct. 2839, 2851–52, 81 L.Ed.2d 786 (1984).

The Panel interprets Local Rule 2.5.2 in accord with the standard for defamation actions. Under ***1390** *New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), a public official such as a federal judge may sue for defamation where the speaker acts with "actual malice," that is, with knowledge that his statement was false or with reckless disregard for its truth or falsity.

That Local Rule 2.5.2 is a disciplinary rule, as opposed to a private right of action, is immaterial. The American Bar Association has incorporated the *New York Times* standard in Model Rule of Professional Conduct 8.2, which provides:

> (a) a lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

This construction of Local Rule 2.5.2 is also consistent with California law.[4] Under the State Bar Act, attorneys are required "to maintain the respect due to the courts of justice and judicial officers." Cal.Bus. & Prof.Code § 6068(b).[5] In *Ramirez v. State Bar of California,* 28 Cal.3d 402, 169 Cal.Rptr. 206, 619 P.2d 399 (1980), the California Supreme Court, under several statutory provisions including § 6068(b), sanctioned an attorney who maligned justices of the California Court of Appeal. The Supreme Court rejected the attorney's First Amendment argument, concluding that his "several demeaning statements have been made with reckless disregard of the truth." 28 Cal.3d at 411, 169 Cal.Rptr. 206, 619 P.2d 399.

A modified version of the *New York Times* standard applies in the context of attorney discipline. In the recent case of *United*

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States District Court v. Sandlin, 12 F.3d 861 (9th Cir.1993), the Ninth Circuit considered a disciplinary sanction under Washington Rule of Professional Conduct 8.2, which is identical to ABA Model Rule 8.2. The Court of Appeals stated:

> The Supreme Courts of Missouri and Minnesota have determined that, in light of the compelling interests served by RPC 8.2(a), the standard to be applied is not the subjective one of *New York Times,* but is objective. *[Matter of] Westfall,* 808 S.W.2d [829] at 837 [1991]; *In re Disciplinary Action Against Graham,* 453 N.W.2d 313, 322 (Minn.), *cert. denied,* 498 U.S. 820 [111 S.Ct. 67, 112 L.Ed.2d 41] (1990). We agree. While the language of WSRPC 8.2(a) is consistent with the constitutional limitations placed on defamation actions by *New York Times,* "because of the interest in protecting the public, the administration of justice, and the profession, a purely subjective standard is inappropriate." *Westfall, id.* at 837. Thus, we determine what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances.

Sandlin, 12 F.3d at 867.

Under this objective standard, a statement is reckless if made without any reasonable basis in fact. *Id.* Ignorance is not bliss; an attorney has an obligation to conduct a factual inquiry prior to speaking. *See id.* (without first deposing court reporter, attorney told FBI that judge ordered reporter to alter transcript); *Westfall,* 808 S.W.2d at 838 (without investigation, attorney made publicly televised statement accusing judge of purposefully dishonest conduct); *In the Matter of Elizabeth Holtzman,* 78 N.Y.2d 184, 573 N.Y.S.2d 39, 577 N.E.2d 30 (1991) (prior to obtaining trial minutes and without making any effort to interview witnesses, district attorney accused judge of requiring witness to demonstrate the position she was in when sexually assaulted), *cert. denied,* 502 U.S. 1009, 112 S.Ct. 648, 116 L.Ed.2d 665 (1991).

B. Application of the Sandlin Standard

[7] **[8]** In his statement to the *Daily Journal* and in his June 5 letter to Prentice Hall, Respondent accused Judge Keller of being "drunk on the bench," of being anti-Semitic, of having a "penchant for sanctioning Jewish lawyers," of being "ignorant, dishonest, ill- ***1391** tempered, and a bully," and of being a "substandard human." There is clear and convincing evidence that Respondent made these statements and that they impugn the integrity of the Court.

The charges, in particular the accusations of dishonesty, drunkenness and anti-Semitism, cannot be dismissed as statements of opinion that are protected by the First Amendment. *See Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990); *Unelko Corp. v. Rooney,* 912 F.2d 1049 (9th Cir.1990). [6] They contain provably false factual connotations and are not rhetorical hyperbole. To say that a judge has a penchant for sanctioning Jewish attorneys is a simple and direct accusation of bias. It is provably false since it is possible to determine empirically whether the judge imposes sanctions in a disproportionate fashion. Similarly, the charges of drunkenness and dishonesty plainly imply past improprieties.

Respondent contends that the letter to Prentice Hall cannot form the basis for discipline because it was private and transmitted to a nationally recognized publication that evaluates judges. Respondent's Post–Hearing Brief at 16–17. The characterization of the letter as "private" is factually untrue since it was transmitted to Judge Keller and since it was aimed at influencing Prentice Hall's written evaluation of the judge. More importantly, Respondent cites no authority that supports the blanket privilege he advances. Pursuant to *Milkovich,* if the letter contained provably false factual connotations, they are actionable. [7]

Thus, unless Respondent had an objectively reasonable basis for his accusations against Judge Keller, he is subject to discipline for those statements, including those in the letter to Prentice Hall.

Respondent focuses his defense on the accusation of anti-Semitism. The primary basis for his allegation is anecdotal. Respondent testified that he knows several Jewish attorneys who have been disciplined by Judge Keller. It is beyond question that a reasonable attorney would have conducted a more thorough inquiry before making such a serious charge against a judge. There are hundreds if not thousands of local attorneys who have practiced before Judge Keller. Anecdotal evidence regarding the experiences of several is insufficient given the gravity of the charge.

In addition, Respondent states that his opinion is founded on Judge Keller's use of the term "pestiferous" in reference to Respondent. [8] Respondent reasons that one of the meanings of "pestiferous" is "diseased," and the Nazis applied the term "diseased" to Jews. This argument is as ludicrous as it appears. The word pestiferous has several meanings,

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including "pernicious, troublesome, and annoying," which contain no anti-Semitic connotations whatsoever. [9] The Panel finds no evidence that Judge Keller is in fact anti-Semitic or that Respondent had a reasonable basis for making such accusations.

Respondent has made no effort to explain his accusations that Judge Keller is dishonest or "drunk on the bench." In the absence of supporting evidence, the Panel presumes that these charges are false and that Respondent lacked an objectively reasonable basis for expressing them.

***1392** In sum, the Panel finds that Respondent impugned the integrity of the court and thereby violated Local Rule 2.5.2.

III. Judge Shopping

[9] General Order No. 224, promulgated pursuant to Local Rule 4.1, governs the assignment of cases within this district. In providing for the random assignment of cases, "the General Order evinces a policy of objectivity and fairness in the distribution of all matters." *U.S. v. Flynt,* 756 F.2d 1352, 1355 n. 2 (9th Cir.1985). Attempts to interfere with the random assignment of judges, for whatever reason, threaten the integrity of this Court, and subject the offending attorney to discipline under Local Rule 2.5.2.

By clear and convincing evidence, the Panel finds that Respondent believed Judge Keller to be "unfavorable" for his cases and that Respondent criticized Judge Keller in an effort to force him to recuse himself from future proceedings involving Respondent.

A. The Admission to Steinberg

The strongest proof of Respondent's scheme is his own admission to attorney Robert Steinberg during their conversation at the Courthouse. Both Respondent and Steinberg testified that they discussed which judges are most favorable to plaintiffs in civil rights cases. According to Steinberg, Respondent stated that there are certain judges he preferred for his cases and that he would like to obtain the recusal of the judges who are extremely unfavorable. When Steinberg protested this strategy, Respondent stated that he would practice law the way he wanted. Respondent's desire to judge shop is unmistakably evident in this conversation.

Respondent contends that it was Steinberg, not he, who stated that there were some judges who were more favorable to plaintiffs in civil rights cases, and that Respondent merely agreed with Steinberg. 8/13/93 Tr. 128–129.

Despite Respondent's challenges to Steinberg's credibility, the Panel finds his testimony credible and that his version of the conversation is the more plausible. As an initial matter, the Panel finds no motive for Steinberg to lie. There is no evidence of animosity between Respondent and Steinberg. The two attorneys are not competitors: Steinberg practices criminal defense while Respondent dedicates himself to civil rights actions. Steinberg's version of his encounter with Respondent also is supported by independent evidence of Respondent's intent.

B. Other Evidence that Respondent Was Judge Shopping

First, Respondent's conduct in the days after May 31, 1991 is probative of judge shopping. By his statements to the *Daily Journal* and his half-page advertisement in that publication, Respondent ensured that both Judge Keller and the general public learned of his accusations. Respondent wrote the inflammatory letter of June 5, 1991 to Prentice Hall and sent a copy to Judge Keller. [10] In a subsequent letter written directly to Judge Keller, Respondent threatened the judge with a civil lawsuit unless he explained his conduct. Finally, when Judge Keller recused himself in the case of *Marshall v. Gates,* Yagman candidly enthused that the result was "great" for his client. This series of acts by Respondent evinces a campaign to antagonize Judge Keller and to pressure his recusal.

What Respondent did not do is also significant. A statutory remedy exists for those who believe that a judicial officer has engaged in conduct prejudicial to the administration of justice or that the officer is mentally or physically unfit for duty. *See* 28 U.S.C. § 372(c). While there is no requirement that criticism of judicial officers be channeled through § 372(c), if Respondent had a genuine belief that Judge Keller was not qualified to discharge his obligations, he could have filed a complaint under this section.

Second, Respondent's conduct before May 31, 1991 establishes a prior history of judge shopping.

***1393** On September 14, 1981, Respondent simultaneously filed five substantially similar complaints in this district, and dismissed four of them within 73 minutes after they had been assigned to various judges. The Standing Committee filed a petition for an order to show cause why Respondent should not be disciplined for his conduct. Pet.Ex. 1. That

disciplinary action, *Standing Committee v. Yagman,* CV 82–5412 MML, was resolved by a stipulated settlement. Pet.Ex. 13. Respondent admitted that he had committed acts in violation of Local Rule 2. The stipulation provided that Respondent would be suspended from practice for one month, would pay a $500 fine and would perform twenty-five hours of pro bono service. The Ninth Circuit affirmed the settlement. Pet.Ex. 20.

Following these events, in late 1985, Respondent appeared before Judge Harry L. Hupp in a civil rights case entitled *Heath v. Cast,* CV 84–1397 HLH. Respondent represented plaintiff in that matter and Thomas Feeley was defense counsel. After a three-week trial, the jury returned a defense verdict. Respondent, on behalf of his client, immediately filed a new action against the defendants and their lawyers alleging that in the course of defending *Heath v. Cast* they had deprived the plaintiff of his civil rights and engaged in racketeering, mail fraud and obstruction of justice. In addition, Respondent alleged that Judge Hupp "conspired with the defendants and with their legal counsel to obstruct justice in the federal courts...." [11] The suit against Judge Hupp *et al.* was dismissed upon motion and the dismissal was affirmed on appeal. Judge Hupp recused himself from all post-trial proceedings in *Heath v. Cast* and since then has declined to hear any case involving Respondent. Hupp Declaration, September 20, 1993, at 2.

Whatever Respondent's motivation for making frivolous allegations against Judge Hupp, the incident showed Respondent the power he could wield by charging judges with impropriety in their handling of cases. Respondent found that he could pressure judges to recuse themselves from his cases. [12]

Respondent was also successful in forcing the recusal of Chief Judge Real in the case of *Brown v. Baden,* CV 84–5839–R. In this action, Chief Judge Real granted a directed verdict in favor of the defendants and imposed sanctions against Respondent and his professional corporation.

On appeal, Respondent sought reversal of the directed verdict and sanctions, alleging bias on the part of Chief Judge Real. *In re Yagman,* 796 F.2d 1165 (9th Cir.1986). Respondent claimed that the judge denied the plaintiffs a fair trial due to his "patent hostility" and his "one-sided and arbitrary" conduct. Respondent termed the trial a "judicial mugging" and "tyranny in its worst form," and charged that the judge "exhibited a strong personal bias and prejudice against Stephen Yagman of unmistakable longstanding [sic], and a partiality for the defendants." *Id.* at 1178. Respondent apparently also theorized to the Ninth Circuit that Chief Judge Real had deliberately taken the case from another judge in order to prevent Respondent from testifying against the judicial nomination of one of Chief Judge Real's colleagues. *Id.* at 1179–80.

***1394** Respondent also launched a public attack on Chief Judge Real. In a prepared statement issued to the press, Respondent stated that the judge "consistently has been held in the lowest regard by virtually the entire community since he took the bench," and accused him of suffering from "mental disorders." Pet.Ex. 73.

In its decision, the Ninth Circuit made it clear that there was "no support in the record for the claim that Judge Real was personally biased or prejudiced against Yagman. The invidious motive articulated by Yagman is entirely speculative." *Id.* at 1181. Despite this finding, however, the Court of Appeals disqualified Chief Judge Real from further proceedings. The court explained:

> We do not appreciate nor condone the attorney bickering and misconduct which has pervaded the action and which spawned the district court's ire. Nevertheless, the massive sanction award *and the numerous allegations of bias and overreaching* have combined with this poor lawyering to reach an entirely unfortunate end result: the fragile appearance of justice has taken a beating.

Id. at 1188 (emphasis added).

Once again, Respondent found that allegations of bias could force the removal an unfavorable judge, as long as the allegations were strong enough to "batter" the appearance of justice.

In sum, the testimony of Robert Steinberg combined with Respondent's actions after May 31, 1991 and before, convincingly demonstrate that Respondent sought to force the recusal of Judge Keller in future cases involving Respondent. It is no answer to argue, as Respondent does, that these

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personal attacks are not grounds for recusal. That argument goes to whether Respondent was likely to succeed,[13] not to Respondent's intent in making the allegations. Moreover, the Panel notes that given the disqualification of Chief Judge Real in *Brown v. Baden,* Respondent could believe that his allegations would lead to removal of unfavorable judges, regardless of whether they chose to recuse themselves.

C. First Amendment Issues

[10] The First Amendment is implicated in the judge shopping charge because the means used by Respondent involved verbal expression. However, because the prohibition against judge shopping targets conduct, not expression, the First Amendment is not offended by sanctioning Respondent.

The "authorities make it clear ... that 'it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.' " *Cox v. State of Louisiana,* 379 U.S. 559, 563, 85 S.Ct. 476, 480, 13 L.Ed.2d 487 (1965) (quoting *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 502, 69 S.Ct. 684, 691, 93 L.Ed. 834 (1949)).

State v. Eisenberg, 48 Wis.2d 364, 180 N.W.2d 529 (1970), *cert. denied,* 402 U.S. 987, 91 S.Ct. 1669, 29 L.Ed.2d 153 (1971), is remarkably similar to the case at bar. In that case, the Wisconsin Supreme Court suspended two lawyers who harassed a county judge by: (1) publicly circulating statements that the judge was guilty of criminal conduct for which a warrant would issue unless the judge resigned; (2) taking out newspaper advertisements soliciting complaints against the judge; (3) pressuring the judge to appoint them to an advisory committee concerning the administration of the court; and (4) forcing the judge to publicly read a press release announcing their appointment. *Id.* 180 N.W.2d at 536. The Court rejected the lawyers' First Amendment argument, noting: "Although speech activity is involved, it is intermingled with a course of conduct which is alleged to be unprofessional. The fact that speech is intermingled with conduct does not endow the conduct with constitutional protection where the state can properly regulate the conduct as a whole." *Id.* at 537.

***1395** *CONCLUSION*

It is a rare and unfortunate day when the judges of this district must sanction an attorney for conduct involving criticism of the bench. Robust debate regarding judicial performance is essential to a vital judiciary. If an attorney, after reasonable inquiry, has concerns about a judicial officer's fitness for service, he or she may and should express them publicly. Conversely, baseless factual allegations contribute nothing to judicial accountability and undermine public trust in the courts. In this case, Respondent accused Judge Keller of unfitness, falsely and without foundation, and did so with the specific aim of interfering with the random assignment of judges. Thus, the panel finds that Respondent violated Local Rule 2.5.2 and that some measure of discipline is required.

ORDER

For the reasons set forth above, IT IS HEREBY ORDERED that the parties shall file written briefs with regard to what sanction should be levied, including the question of the criteria that should be considered in determining the sanction. The Standing Committee shall file its brief within fourteen days of the date that this order is served.[14] The Respondent shall file his response within fourteen days after receipt of the Standing Committee's brief.

IT IS FURTHER ORDERED that either party may request an oral hearing on the question of the appropriate sanction by means of an ex parte application to the Panel.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this order on all counsel of record by facsimile and by United States Mail.

All Citations

856 F.Supp. 1384, 39 Fed. R. Evid. Serv. 1147

Footnotes

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1 On appeal, Judge Keller's denial of the disqualification motion was affirmed but the sanctions order was vacated. *Yagman v. Republic Insurance,* 987 F.2d 622 (9th Cir.1993).

2 This body, hereinafter referred to as the "Standing Committee," consists of twelve attorneys who are members of the bar of this district. The function of the Standing Committee is to investigate charges that attorneys have been guilty of unprofessional conduct and, where appropriate, to initiate and prosecute disciplinary proceedings. *See* Local Rule 2.6.

3 *But see Matter of Swan,* 833 F.Supp. 794 (C.D.Cal.1993) (sanctioning attorney under Rule 2.5.2 for sexist statement in letter to another attorney; overbreadth not discussed); *In the Matter of Holtzman,* 78 N.Y.2d 184, 190–91, 573 N.Y.S.2d 39, 577 N.E.2d 30 (1991) ("Broad standards governing professional conduct are permissible and indeed are often necessary.").

4 As noted earlier, Local Rule 2.5.2 is an independent standard of the Central District and the Panel is not bound by California law.

5 This very language is contained in the oath taken by every attorney admitted to the bar of this district.

6 In *Milkovich,* the Supreme Court refused to create a special privilege for statements of opinion in the defamation context on the ground that existing constitutional doctrine adequately secured First Amendment interests. 497 U.S. at 19, 110 S.Ct. at 2706.

7 The only case cited by Respondent, *Botos v. Los Angeles County Bar Association,* 151 Cal.App.3d 1083, 199 Cal.Rptr. 236 (1984), does not support his position. In *Botos,* the court held that the Bar Association could not be liable for defamation as the result of evaluating a candidate for judicial office as "not qualified." The Court emphasized that the evaluation was a statement of opinion, not fact. *Id.* 199 Cal.Rptr. at 240. Here, as noted above, Respondent did not merely offer an opinion.

8 Judge Keller used this term in his May 31, 1991 order referring Respondent to the State Bar for discipline.

9 Respondent's attempt to rationalize his groundless accusation by relying on the term "pestiferous" appears even more absurd when one considers that Respondent himself, in referring to Judge Keller, used the term "sub-standard human."

10 The only reasonable explanation for how the letter reached Judge Keller is that someone in Respondent's office mailed it and it is highly unlikely that the mailing would occur by accident. That Respondent denies sending the letter is self-serving and unpersuasive.

11 Respondent put the allegations against Judge Hupp in a separate averment which he labeled with the word "sealed." However, Respondent never sought a Court order sealing the averment, and so it is a publicly available document.

12 Respondent objects to the consideration of this evidence because the issue was raised by the Panel, not by the Standing Committee, and because the evidence was so remote in time that its consideration would violate Federal Rules of Evidence 403 and 404(b).

The Panel observes that both parties were asked to discuss the Judge Hupp issue, and were given ample time to investigate and brief the issue. Petitioner submitted a brief discussing the incident, along with declarations from Judge Hupp and the defense attorney in *Heath.* Respondent's request for a hearing to cross-examine these declarants was granted, but the hearing was cancelled at Respondent's request.

With respect to the evidentiary objection, the Panel reiterates that the usual evidentiary rules are not enforced as strictly in a disciplinary hearing, and that even if they were, the Panel finds this evidence admissible under both rules.

Finally, the Panel notes that there is ample evidence apart from Judge Hupp's recusal to support the finding of judge shopping.

13 Note: Judge Keller did recuse himself from a later case involving Respondent, *Marshall v. Gates.*

14 The Panel recognizes that the Standing Committee filed a brief on the sanctions question on September 9, 1993. The Standing Committee shall submit a new brief in accord with the factual findings in this order.

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January 20, 2021

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

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

Dear Members of the Committee:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. The Conduct of Rudolph Giuliani.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

830 Fed. App'x. at 381.

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

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

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

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

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

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

Id. at 389.

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

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

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

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

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

Rule 3.1 states in pertinent part as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- On Election Day, Twitter began tagging President Trump's tweets about the election returns in Pennsylvania as "potentially misleading claims about an election."

- After Election Day, the states with close election results completed counting ballots and conducted required recounts required by law. None turned up outcome-altering fraud.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

Respectfully Submitted,

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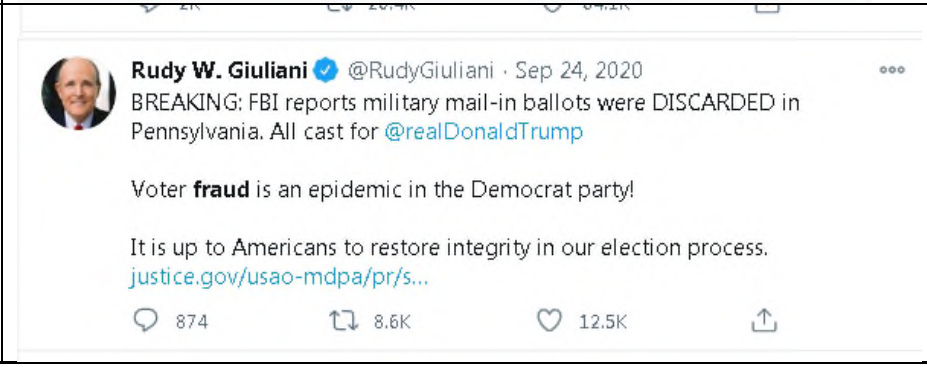
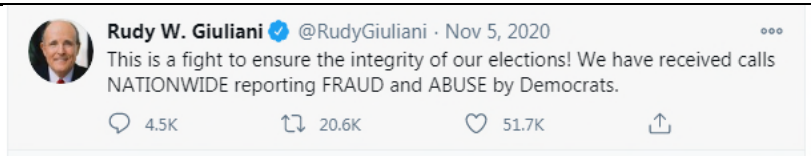
** Affiliations of signers are for identification purposes only

Appendix A- Chronology of Public Statements of Mr. Giuliani

Date	Event	Giuliani Statement	Link
August 17, 2020	False Allegation of Electoral Fraud		https://www.youtube.com/watch?v=vFw6h58O7h8&feature=youtu.be
September 24, 2020	False Allegation of Electoral Fraud		https://twitter.com/rudygiuliani/status/1309214672449679361?lang=en

Date	Event	Giuliani Statement	Link
October 5, 2020	False Allegation of Electoral Fraud		https://twitter.com/rudygiuliani/status/1313132530564988928

Date	Event	Giuliani Statement	Link
October 13, 2020	Giuliani Named as Counsel in Challenges to Election Results	1. Riotta, C. "Giuliani to Potentially Lead Trump's Election Court Battle, Report Says, as He Calls for 'Major Legal Effort.'" *Independent*. (October 13, 2020). As Rudy Giuliani campaigns for Donald Trump across the country, the president is reportedly considering his personal lawyer for a potential disaster-scenario job: overseeing a historic legal battle if the election is contested come November. The former New York City mayor has pushed conspiracy theories about election fraud ever since the 2016 election, when he claimed "dead people usually vote for Democrats" and that the vote was rigged against Mr Trump. Mr Giuliani echoed those comments in an interview with Fox News' Sean Hannity earlier this month, claiming the Democratic Party was getting "dead people" to vote in state elections and adding that any evidence of mail-in voter fraud during the Covid-19 pandemic must be met with a major legal challenge. 2. Suebsang, A. "Trump Taps Rudy Giuliani and Jay Sekulow to Oversee Post-Election Legal Battles." *The Daily Beast*. (October 13, 2020). In recent months, President Donald Trump has spoken directly to his personal lawyer Rudy Giuliani about overseeing a legal fight that could arise from a close or contested 2020 election, two people familiar with the situation tell The Daily Beast. In related conversations with Giuliani and other confidants, Trump has also made clear that he wants Jay Sekulow, another personal attorney to Trump who defended the president during Special Counsel Robert Mueller's two-year investigation, playing a major role if the courts got involved in resolving election disputes. The president has discussed the matter a number of times in recent weeks with Giuliani, who was also involved in the president's debate prep last month. The president wanted his team of lawyers immediately ready to go with a war plan mapped out—as he's continued to insinuate that he will turn to the judicial system to question the validity of numerous mail-in ballots. It is unclear if Trump has talked directly to Sekulow about this, however. And it remains to be seen how large such a legal team would ultimately become. "The president trusts Jay and Rudy, especially if the case should go all the way to the Supreme Court, where Jay has argued many cases. Even though Rudy doesn't have a background in election law, it makes sense that the president would ask him to play the same role that Jim Baker played back in 2000 for George W. Bush." The likelihood that there will be litigation around mail-in balloting has seemed to increase as the election has neared, with the Department of Justice weakening guidelines that discouraged staff from bringing election fraud cases close to Election Day. The expectation in	1. https://www.independent.co.uk/news/world/americas/us-politics/trump-court-battle-election-rudy-giuliani-mail-in-voting-b1013701.html; 2. https://www.thedailybeast.com/trump-taps-rudy-giuliani-and-jay-sekulow-to-oversee-post-election-legal-battles
November 3, 2020	Election Day		

Date	Event	Giuliani Statement	Link
November 5, 2020	False Allegation of Electoral Fraud		https://twitter.com/rudygiuliani/status/1324409285103767552?lang=en
November 7, 2020	Four Seasons Total Landscaping Press Conference: Giuliani Denies Biden Elected and Says Evidence Supports Disqualifying Certain Pennsylvania Ballots	Mulraney, F. "Rudy Giuliani is finally lost for words: Trump's lawyer fumes 'networks don't get to decide elections' as he learns Biden is the winner during…" *Daily Mail*. (November 7, 2020). He was then asked whether the team would be able to change the result as it stands now through the courts. 'Of course!' he claimed. 'Courts set aside elections if they're illegal. 'In this particular case, I don't know if there's enough evidence to set aside the entire election - certainly not across the entire country - maybe in Pennsylvania. 'However, there certainly is enough evidence to disqualify a certain number of ballots,' he alleged. 'The ballots that were not properly inspected should be thrown out and that number of ballots should be taken out of the count. That could affect the election.'	1. https://www.dailymail.co.uk/news/article-8924581/Moment-Rudy-Giuliani-declares-networks-dont-decide-elections-learns-Biden-call.html 2. https://www.youtube.com/watch?v=7QTRO9MG6z8 3. https://www.rev.com/blog/transcripts/rudy-giuliani-trump-campaign-philadelphia-press-conference-november-7

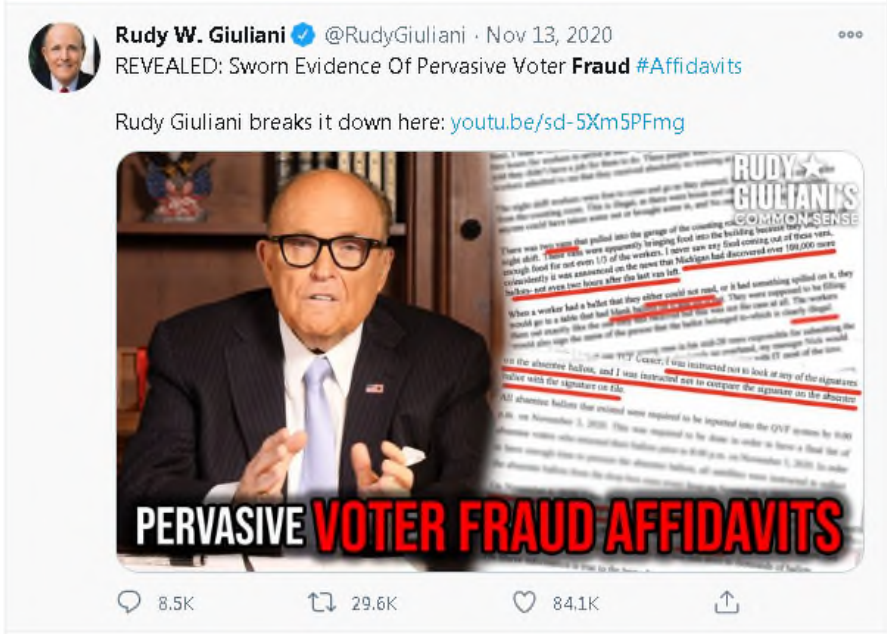
<table>
<tr><th>Date</th><th>Event</th><th>Giuliani Statement</th><th>Link</th></tr>
<tr>
<td>November 9, 2020</td>
<td>Poll Released Showing 70% of Republicans Don’t Believe Election Free and Fair</td>
<td>Kim, C. “Poll: 70% of Republicans Don’t Think Election was Free and Fair.” Politico. (November 9, 2020).
<table>
<tr><td>Poll dates:</td><td>November 6– 9, 2020</td></tr>
<tr><td>Pre-election belief election would be fair</td><td>Democrats: 52%/</td></tr>
<tr><td>Pre-election belief election would not be fair</td><td>Republicans: 35%</td></tr>
<tr><td>Post-election belief in fair election</td><td>Democrats: 90%;</td></tr>
<tr><td>Post-election belief election not fair</td><td>Republicans: 70%</td></tr>
<tr><td>Not fair b/c of mail-in ballots</td><td>78% of belief election not fair</td></tr>
<tr><td>Not fair b/c ballot tampering</td><td>72% of belief election not fair</td></tr>
</table>
“…70 percent of Republicans now say they don’t believe the 2020 election was free and fair, a stark rise from the 35 percent of GOP voters who held similar beliefs before the election. Meanwhile, trust in the election system grew for Democrats, many who took to the streets to celebrate Biden’s victory on Saturday. Ninety percent of Democrats now say the election was free and fair, up from 52 percent before Nov. 3 who thought it would be.

“…Among those who believed that the election wasn’t free and fair, 78 percent believed that mail-in voting led to widespread voter fraud and 72 percent believed that ballots were tampered with… a majority of the people that thought the election was unfair, 84 percent, said it benefited Biden.
Although only 18 percent of Republicans had said the results would be unreliable prior to Election Day, now 64 percent feel the same way following Biden’s victory. By contrast, 86 percent of Democrats say they trust the results….

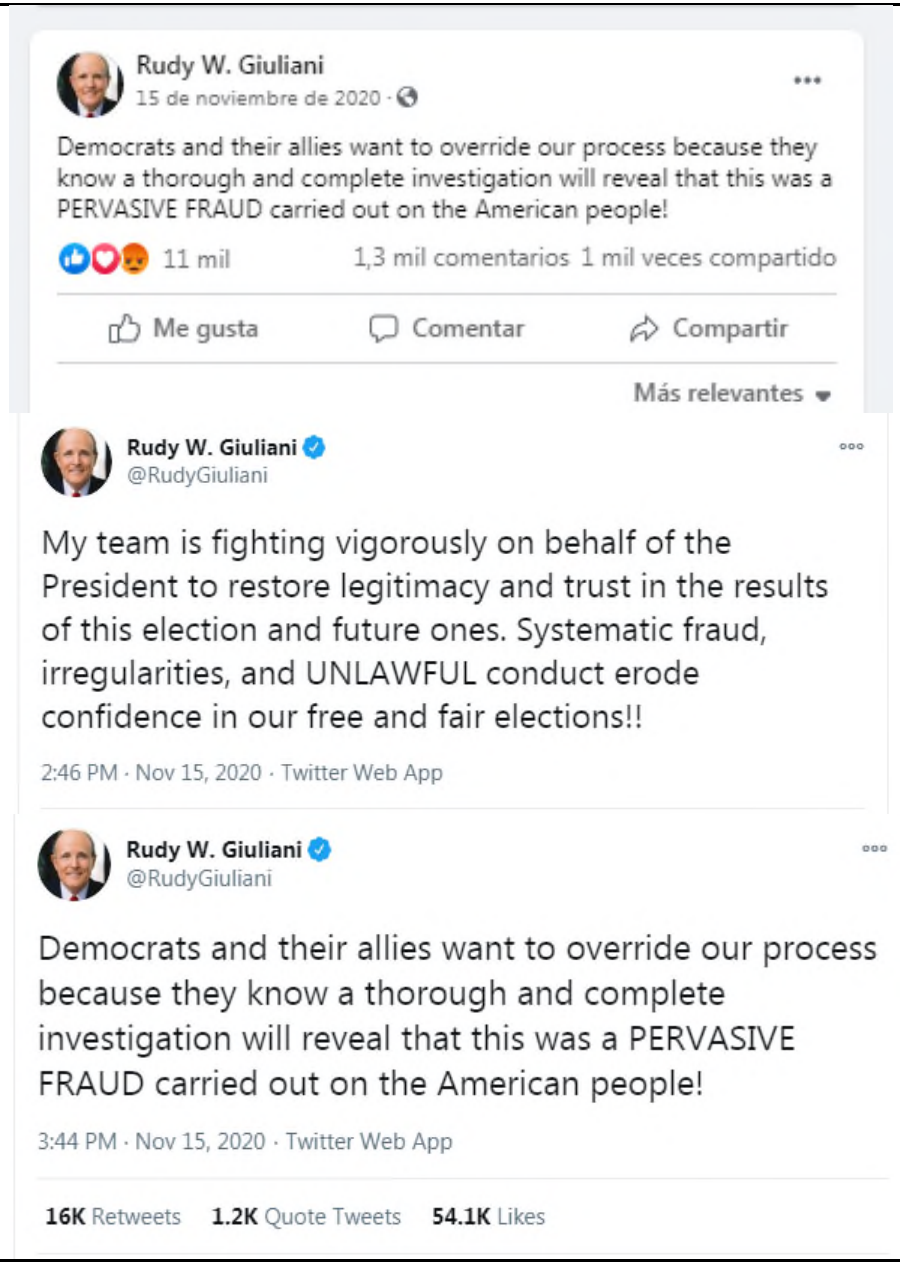
‘…Sixty-two percent of Republicans said the Pennsylvania results would be unreliable, a stark contrast to the 8 percent of Democrats who held the same beliefs….

“Distrust is similarly high in Wisconsin (55 percent), Nevada (54 percent), Georgia (54 percent) and Arizona (52 percent). The</td>
<td>https://www.politico.com/news/2020/11/09/republicans-free-fair-elections-435488</td>
</tr>
</table>

Date	Event	Giuliani Statement	Link
November 12, 2020	Head of the U.S. Cybersecurity and Infrastructure Security Agency Statement Confirms Election Security	The members of the federal government's Election Infrastructure Government Coordinating Council Executive Committee said, "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 elections, 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.**" (emphasis original).	https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election

Date	Event	Giuliani Statement	Link
November 13, 2020	False Allegation of Electoral Fraud	  https://youtu.be/sd-5Xm5PFmg	https://www.youtube.com/watch?v=sd-5Xm5PFmg&t=10s

Date	Event	Giuliani Statement	Link
November 13, 2020	Opinion & Order from the Third Judicial Circuit Court for the County of Wayne	In response to a challenge to Wayne County's (Michigan's) elections, the Court said, " that suggestions of fraud were "speculative" as well as "incorrect and not credible."	https://electioncases.osu.edu/wp-content/uploads/2020/11/Costantino-v-Detroit-Opinion-and-Order.pdf at 1300.

Date	Event	Giuliani Statement	Link
November 15, 2020	False Allegation of Electoral Fraud		1. https://twitter.com/RudyGiuliani/status/1328107210363310081 2. https://twitter.com/RudyGiuliani/status/1328121631798161410

Date	Event	Giuliani Statement	Link
November 16, 2020	President Trump Names Giuliani Lead Counsel in Election Litigation	1. Stracqualursi, V. "Trump puts Giuliani in charge of post-election legal fight after series of losses." *CNN*. (November 16, 2020. President Donald Trump has put his personal lawyer Rudy Giuliani in charge of his campaign's long-shot post-election legal challenges, according to a tweet from the President Saturday night. "I look forward to Mayor Giuliani spearheading the legal effort to defend OUR RIGHT to FREE and FAIR ELECTIONS! Rudy Giuliani, Joseph diGenova, Victoria Toensing, Sidney Powell, and Jenna Ellis, a truly great team, added to our other wonderful lawyers and representatives!" Trump said in the tweet.	https://www.cbs58.com/news/trump-puts-giuliani-in-charge-of-post-election-legal-fight-after-series-of-losses

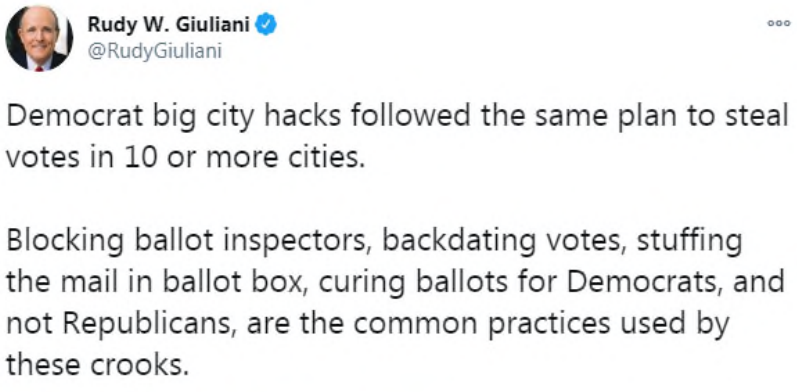
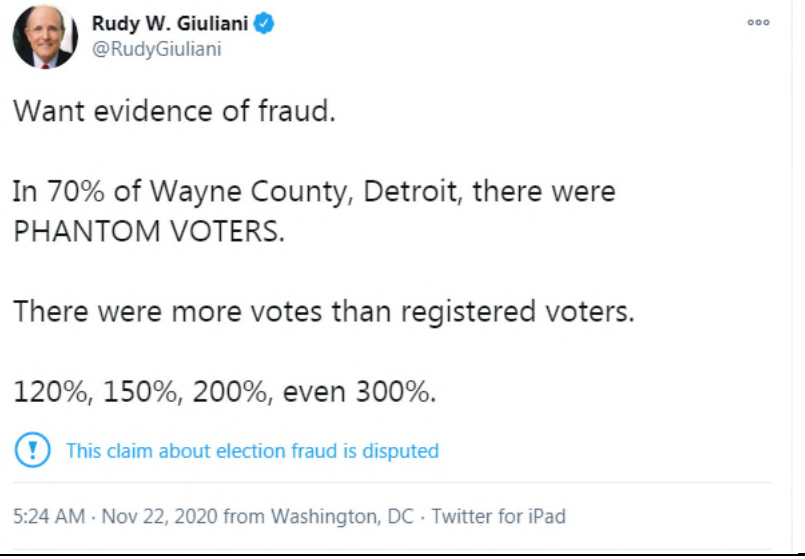
Date	Event	Giuliani Statement	Link
November 17, 2020	Giuliani Admits in Pennsylvania federal court "This is not a fraud case."	1. Megerian, C. "As Trump's election lawsuits fizzle, Giuliani goes to court. It doesn't get better." *LA Times*. (November 17, 2020). "It's a widespread, nationwide voter fraud," Giuliani said. He accused local election officials of being part of a "little mafia" and preventing Republican Party observers from watching ballots being counted. He said only cities "controlled by Democratic machines" had problems, and "you'd have to be a fool to think this is an accident." But under questioning from U.S. District Judge Matthew W. Brann, Giuliani admitted, "This is not a fraud case." Brann did not issue a ruling on Tuesday, but he was openly skeptical of Giuliani's arguments. 2. Lerer, L. "Giuliani in Public: 'It's a Fraud.' Giuliani in Court: 'This is Not a Fraud Case.'" *New York Times*. (November 18, 2020). The clearest tell that Mr. Trump's effort is a security blanket and a prayer strategy is the difference between what Mr. Trump's supporters say in the press and what they say in court. On Nov. 7, the day most media outlets called the race for Joe Biden, Rudy Giuliani stood outside a landscaping business in Philadelphia, making false claims about widespread election malfeasance. "This is a gross miscarriage of the process that would assure that these ballots are not fraudulent," he said. "It's a fraud, an absolute fraud." Under questioning from a federal judge in Pennsylvania on Tuesday, Mr. Giuliani made a different admission: "This is not a fraud case," he said. Since Election Day, the Trump campaign and its allies have filed more than 30 lawsuits that seek to stop the certification of results or have ballots thrown out. None have gotten any real legal traction, as lawyers back away from suggestions that the election was stolen, admit in court that there's no sign of fraud and have their evidence dismissed as unreliable. One minor win in Pennsylvania set aside a relatively small number of ballots that hadn't been counted yet — an inconsequential victory since Mr. Biden had already won the state without them.	1. https://www.latimes.com/politics/story/2020-11-17/trump-election-lawsuits-fizzle-as-giuliani-appears-in-court-for-him 2. https://www.nytimes.com/2020/11/18/us/politics/trump-giuliani-voter-fraud.html 3. https://www.nbcnews.com/politics/donald-trump/rudy-giuliani-baselessly-alleges-centralized-voter-fraud-free-wheeling-news-n1248273 4. https://www.c-span.org/video/?478267-1/pennsylvania-judge-dismisses-trump-campaign-lawsuit-listen-oral-argument (denial of fraud at 2:16:50; 2:42:00)

<table>
<tr><th>Date</th><th>Event</th><th>Giuliani Statement</th><th>Link</th></tr>
<tr>
<td>November 18, 2020</td>
<td>Poll Released Showing 50% of Republicans Believe the Election Was Stolen</td>
<td>Kahn, C. “Half of Republicans Say Biden Won Because of a Rigged Election: Reuters/Ipsos Poll.” Reuters. (November 18, 2020).
<table>
<tr><td>Poll dates:</td><td>November 13 – 17, 2020</td></tr>
<tr><td>Belief in fraudulent, stolen election:</td><td>50% Republicans</td></tr>
<tr><td>Belief Biden won election:</td><td>73% of people polled</td></tr>
<tr><td>Believe Trump won:</td><td>5% people polled</td></tr>
<tr><td>Biden “rightfully won.”</td><td>29% Republicans</td></tr>
<tr><td>Trump “rightfully won:</td><td>52% Republicans</td></tr>
</table>
“About half of all Republicans believe President Donald Trump “rightfully won” the U.S. election but that it was stolen from him by widespread voter fraud that favored Democratic President-elect Joe Biden, according to a new Reuters/Ipsos opinion poll.

Altogether, 73% of those polled agreed that Biden won the election while 5% thought Trump won. But when asked specifically whether Biden had “rightfully won,” Republicans showed they were suspicious about how Biden’s victory was obtained.

Fifty-two percent of Republicans said that Trump “rightfully won,” while only 29% said that Biden had rightfully won…”</td>
<td>https://www.reuters.com/article/us-usa-election-poll/half-of-republicans-say-biden-won-because-of-a-rigged-election-reuters-ipsos-poll-idUSKBN27Y1AJ</td>
</tr>
</table>

Date	Event	Giuliani Statement	Link
November 19, 2020	False Allegation of Electoral Fraud in DC Press Conference	1. **Rudy Giuliani:** (01:19:09) Well, it is about something. Let's go from the big picture to the smaller picture. The most important thing here is that this has been a massive attack on the integrity of the voting system in the greatest democracy on earth. The people who did this have committed one of the worst crimes that I've ever seen or observed. One of the things we're the most proud of in this country is that we've been such a longstanding democracy based on the right to vote. They have trashed the right to vote. They've dishonored the right to vote. They've destroyed the right to vote in their greed for power and money. And there's no doubt about it. This was not an individual idea of 10 or 12 Democrat bosses. This is a plan. You would have to be a fool not to realize that. They do the same thing in exactly the same way in 10 big Democrat controlled, in most cases, crooked city. **Rudy Giuliani:** (01:20:08) And when I say crooked city, go look at how many of their officials have gone to jail in the last 20 or 30 or 40 or 50 or 60 years, that they have dominated and destroyed those cities. They picked the places where they could get away with it. They pick the places where, whether or not Republicans testified to something, judges would just dismiss it. Because judges are appointed politically and too many of them are hacks. They pick places where they could get a sheriff that refused to enforce a court order. When we got a court order that we could be 10 feet closer, our representatives were told, "If you try to do it, I'll arrest you." 2. Timm, J.C. "Rudy Giuliani Baselessly Alleges 'Centralized' Voter Fraud at Free-Wheeling News Conference." *NBC News*. (November 19, 2020). Nov. 19, 2020, 11:26 AM PST / Updated Nov. 19, 2020, 7:24 PM PST By Jane C. Timm President Donald Trump's attorney, Rudy Giuliani, took the president's voter fraud claims even further on Thursday, baselessly alleging during a frenzied news conference that the fraud was nationally coordinated. The president's legal team alleged already debunked claims of voter fraud, baseless allegations of corrupted and hackable voting machines, election interference by foreign communists, and even references to antifa. The former New York City mayor also offered alternative election results for swing states and argued the president had a viable path to a second term. "It's not a singular voter fraud in one state," Giuliani said, speaking at Republican National Committee headquarters in Washington. "This pattern repeats itself in a number of states, almost exactly the same pattern, which any experienced investigator prosecutor, which	1. Transcript of Press Conference: https://www.rev.com/blog/transcripts/rudy-giuliani-trump-campaign-press-conference-transcript-november-19-election-fraud-claims 2. https://www.youtube.com/watch?v=sq7TeUJwQD4 3. https://www.nbcnews.com/politics/donald-trump/rudy-giuliani-baselessly-alleges-centralized-voter-fraud-free-wheeling-news-n1248273 4. https://www.france24.com/en/live-news/20201119-chavez-soros-and-my-cousin-vinny-giuliani-s-wild-vote-fraud-presser

Date	Event	Giuliani Statement	Link
November 21, 2020	*Boockvar* District Court Decision		https://www.pamd.uscourts.gov/sites/pamd/files/20-2078_202.pdf
November 22, 2020	False Allegation of Electoral Fraud	1.  2.  	1. https://twitter.com/RudyGiuliani/status/1330499768641052679 2. https://twitter.com/RudyGiuliani/status/1330502378035027975

Date	Event	Giuliani Statement	Link
November 25, 2020	False Allegations of Electoral Fraud before Pennsylvania Senate Majority Policy Committee	Giuliani says, "This election, the numbers don't add up. Count the honest votes and the winner of this election changes."	Video of hearing: https://policy.pasenategop.com/112520/
November 27, 2020	False Allegation of Electoral Fraud		https://www.youtube.com/watch?v=xqUrkIIK_3s
November 27, 2020	*Boockvar* Third Circuit Opinion		https://www2.ca3.uscourts.gov/opinarch/203371np.pdf

Date	Event	Giuliani Statement	Link
November 30, 2020	False Allegations of Electoral Fraud with Arizona Lawmakers	Giuliani says "Let's say there were 5 million illegal aliens in Arizona. It is beyond credulity that a few hundred thousand didn't vote."  	https://www.youtube.com/watch?v=QfC2T7UpxkI
December 1, 2020	Attorney General Bill Barr Confirms no Widespread Election Fraud	Balsamo, M. "Disputing Trump, Barr says no widespread election fraud." *AP News*. (December 1, 2020). Disputing President Donald Trump's persistent, baseless claims, Attorney General William Barr declared Tuesday the U.S. Justice Department has uncovered no evidence of widespread voter fraud that could change the outcome of the 2020 election.	https://apnews.com/article/barr-no-widespread-election-fraud-b1f1488796c9a98c4b1a9061a6c7f49d

Date	Event	Giuliani Statement	Link
December 2, 2020	False Allegation of Electoral Fraud in hearing before Michigan State House Oversight Committee	Giuliai presented unsworn testimony from witnesses alleging voter fraud in Michigan, including some that had been previously found not credible. 1. Parseghian, A. "Watch: Giuliani pushes Michigan lawmakers to overturn election, questions witnesses during hearing." *Fox 17 Online*. (December 2, 2020). President Trump's Attorney Rudy Giuliani came to Lansing Wednesday, to testify in front of the Michigan House Oversight Committee. Giuliani continues to claim widespread fraud cost Trump the 2020 election and is urging the Legislature to award electors to the president. At the hearing, Rudy Giuliani was the one asking most of the questions of witnesses he brought in, as they laid out allegations of election fraud in Detroit. None of them were under oath. The former New York City Mayor began his testimony by questioning his first witness, city of Detroit Engineer Jessy Jacob. Jacob claimed to have witnessed fraud including that she was ordered to change dates on absentee ballots. "Would you say Jessy that was an experience you never expected? That level of crookedness and dishonesty at the Detroit center for counting votes?" Giuliani questioned. "Yes, the whole city…" she replied before being cut off by Democratic State Rep. Cynthia Johnson, D-Detroit. In a recent lawsuit, Jessy Jacob's sworn affidavit was considered not credible by a Wayne County judge.	1. Video from House Oversight Committee: https://www.house.mi.gov/SharedVideo/PlayVideoArchive.html?video=OVER-120220.mp4 2. https://www.fox17online.com/news/election-2020/giuliani-urges-michigan-lawmakers-to-overturn-election-questions-witnesses-during-hearing

Date	Event	Giuliani Statement	Link
December 3-10, 2020	False Allegations of Georgia Electoral Fraud; including in hearings in the Georgia State Senate and House of Representatives		1. https://twitter.com/RudyGiuliani/status/1334982029117714432 2. https://www.washingtonpost.com/politics/2020/12/04/giuliani-boasts-about-finally-providing-evidence-fraud-which-doesnt-appear-be-evidence-fraud/ 3. https://youtu.be/PchtaUsRH70 4. https://www.gpb.org/news/2020/12/04/fact-checking-rudy-giulianis-grandiose-georgia-election-fraud-claim 5. https://www.washingtonpost.com/politics/2020/12/04/giuliani-boasts-about-finally-providing-evidence-fraud-which-doesnt-appear-be-evidence-fraud/ 6. Video from Senate hearing: https://www.youtube.com/watch?v=Ur4vl5UTN8g&list=PLNiGhWqYcxYtSqok7aytLdFhgUU9ko_Ip 7. Video from House of Representatives hearing: https://livestream.com/accounts/25225474/events/9117221/videos/214677184

Date	Event	Giuliani Statement	Link
December 4, 2020	Order from First Judicial District in the State of Nevada Released	In response to a challenge to Nevada's elections, the Court said, " "did not prove under any standard of proof that illegal votes were cast and counted, or legal votes were not counted at all . . . nor in an amount sufficient to raise a reasonable doubt as to the outcome of the election."	https://electioncases.osu.edu/wp-content/uploads/2020/11/Law-v-Gloria-Order-Granting-Motion-to-Dismiss.pdf at 31
December 5, 2020	Giuliani Announce Plan to Stop State Legislature from Certifying Election Results	Colarossi, N. "Rudy Giuliani Accuses Judge of Creating a 'Fantasy,' Says 'We Don't Need Courts' in Election Fight." *Newsweek.* (December 5, 2020). "The simple fact is, we don't need courts," Giuliani declared. "The United States Constitution gives sole power to the state legislature to decide presidential elections."	1. https://www.newsweek.com/rudy-giuliani-accuses-judge-creating-fantasy-says-we-dont-need-courts-election-fight-1552597 2. https://www.nytimes.com/2020/12/15/technology/fake-dueling-slates-of-electors.html

<table>
<tr><th>Date</th><th>Event</th><th>Giuliani Statement</th><th>Link</th></tr>
<tr>
<td>December 9, 2020</td>
<td>Poll Released Showing Quarter of Republicans Don’t Trust Election Results</td>
<td>Detrow, S., Montanaro, D., Davis, S. “Most Americans Believe the Election Results—Some Don’t.” NPR. (December 9, 2020).
<table>
<tr><td>Poll Date</td><td>December 9, 2020</td></tr>
<tr><td>Trust election results</td><td>60% Americans</td></tr>
<tr><td>Don’t Trust results</td><td>25% Republicans</td></tr>
<tr><td>Believe Trump won:</td><td>5% people polled</td></tr>
<tr><td>Trump should concede</td><td>2/3rd of Americans</td></tr>
<tr><td>Trump should not concede</td><td>4 in 10 Republicans</td></tr>
</table>
“A new NPR/PBS News Hour/Marist survey finds that more than sixty percent of Americans — but just one quarter of Republicans — say they trust the results of the 2020 presidential election.

That comes as President Trump continues to push baseless allegations of electoral fraud as he has for more than a month, even as his lawsuits falter in court. Now, two-thirds of Americans believe that Trump should formally concede to President-elect Joe Biden—a belief shared by fewer than four in ten Republicans.”</td>
<td>https://www.npr.org/2020/12/09/944685514/most-americans-believe-the-election-results-some-dont</td>
</tr>
<tr>
<td>December 9, 2020</td>
<td>Decision and Order from the U.S. District Court for the Eastern District of Wisconsin</td>
<td>In considering a challenge to the certification of Wisconsin election results, the Court said, “Federal judges do not appoint the president in this country. One wonder why the plaintiffs came to federal court and asked a federal judge to do so. After a week of sometimes odd and often harried litigation, the court is no closer to answering the “why.” But this federal court has no authority or jurisdiction to grant the relief the remaining plaintiff seeks.”</td>
<td>https://electioncases.osu.edu/wp-content/uploads/2020/12/Feehan-v-WEC-Doc83.pdf at 2.</td>
</tr>
</table>

<table>
<tr><th>Date</th><th>Event</th><th>Giuliani Statement</th><th>Link</th></tr>
<tr>
<td>December 10, 2020</td>
<td>Poll Released Showing 77% of Republicans Believe There Was Widespread Electoral Fraud</td>
<td>Keating, C. “Quinnipiac Poll: 77% Republicans believe there was widespread fraud in presidential election; 60% overall consider Joe Biden’s victory legitimate.” Hartford Courant. (December 10, 2020).
<table>
<tr><td>Poll Date</td><td>December 10, 2020</td></tr>
<tr><td>Belief widespread election fraud</td><td>77% Republicans</td></tr>
<tr><td>Election legitimate</td><td>60 % All Registered voters</td></tr>
<tr><td>Election not legitimate</td><td>34% All Registered voters</td></tr>
<tr><td>No widespread fraud</td><td>97% Democrats/
62 % Independents</td></tr>
<tr><td>Widespread fraud</td><td>77% Republicans/
35% Independents</td></tr>
</table>
HARTFORD — A new Quinnipiac University poll says 77% of Republicans believe there was widespread voter fraud during the November election between President Donald Trump and Democrat Joe Biden.
In a deeply polarized nation, 60% of registered voters polled believe that Biden’s victory was legitimate, but 34% do not.

The latest national poll by the Hamden-based university shows huge differences in political perceptions by voters, based on their party affiliation. Among Democrats, 97% say there was no widespread fraud in the election, but 77% of Republicans believe there was. Among independents, 62% said there was no widespread fraud and 35% said they believe there was</td>
<td>https://www.courant.com/politics/hc-pol-q-poll-republicans-believe-fraud-20201210-pcie3uqqvrhyvnt7geohhsyepe-story.html</td>
</tr>
</table>

Date	Event	Giuliani Statement	Link
December 12, 2020	Decision and Order from the U.S. District Court for the Eastern District of Wisconsin	In considering a challenge to the certification of Wisconsin election results. the court said, "This is an extraordinary case. A sitting president who did not prevail in his bid for reelection has asked for federal court help in setting aside the popular vote based on disputed issues of election administration, issues he plainly could have raised before the vote occurred. This Court has allowed plaintiff the chance to make his case and he has lost on the merits. In his reply brief, plaintiff "asks that the Rule of Law be followed." (Pl. Br., ECF No. 109.) It has been."	https://electioncases.osu.edu/wp-content/uploads/2020/12/Trump-v-WEC-Doc134.pdf at 22.
December 14, 2020	False Allegation of Fraud Before Missouri State Legislature	1. Keller, R. "After testy debate, Missouri GOP bill casting doubt on Joe Biden's victory likely dead" *The Kansas City Star*. (December 15, 2020). In his testimony, given via video link, Giuliani repeated claims made in other venues, that observers were prevented from watching ballot validation, that large numbers of ballots were surreptitiously added to the count in Georgia and several other claims. "I said the courts have held no hearings," Giuliani said. "They have dismissed the cases that have been brought on procedural grounds, like standing."	1. Video from Hearing: https://sg001-harmony.sliq.net/00325/Harmony/en/PowerBrowser/PowerBrowserV2/20200831/13/2102 (discussion of fraud at minute 5:53:25) 2. https://www.kansascity.com/news/politics-government/article247852575.html
December 21, 2020	Trump Campaign Petitions files Writ of Certiorari in *Boockvar* Litigation		https://www.supremecourt.gov/DocketPDF/20/20-845/164240/20201220131128005_Trump%20v%20Boockvar%20Petition.pdf

Date	Event	Giuliani Statement	Link
December 21, 2020	False Allegation of Fraud	**Rudy W. Giuliani** @RudyGiuliani · Dec 21, 2020 Let's find out,once and for all, did Biden cheat to become President like he cheated to get through law school? PA, Ariz., GA, Michigan and Wisconsin should agree to let us audit the Dominion machines. What are they afraid of, if they didn't cheat? No winner without an audit? 4K 22.6K 72.1K **Rudy W. Giuliani** @RudyGiuliani · Dec 21, 2020 DISCOVERY: A 68% ERROR rate found in votes PROVES intentional fraud! PA, AZ, GA, MI, and WI should agree to let us audit the Dominion machines. If they didn't cheat, what are they afraid of? We MUST have an audit! Rudy Giuliani's analysis HERE: youtu.be/UUtmBrgIC9w  3.3K 17.3K 44.4K	https://twitter.com/RudyGiuliani/status/1341050325751492608

Date	Event	Giuliani Statement	Link
December 31, 2020	False Allegation of Fraud Before Georgia State Senate Subcommittee	Richards, D. "Gov. Kemp Agitated by Giuliani's Testimony, Trump's Tweets." *11 Alive*. (December 31, 2020). ATLANTA — President Donald Trump's lawyer Rudy Giuliani made another appearance at the Georgia State Capitol on Wednesday. By doing so, Giuliani caught the ire of Gov. Brian Kemp, who criticized his testimony and his behavior during a press conference Wednesday afternoon at the State Capitol. Giuliani told a Senate subcommittee he had little use for Georgia's election recounts or election audits. That included an audit by agents of the Georgia Bureau of Investigation, among others, of absentee ballot signatures in Cobb County. The state says the signature audit yielded zero fraudulent signatures. "The recount in Cobb County is a joke. It's an insult," Giuliani declared during the hearing. **RELATED: Secretary of State's office says 'No Fraud' in Cobb County signature audit** "That's a joke," countered Kemp during his press conference a few hours later. "He doesn't know the Georgia Bureau of Investigation very well."  Rudy W. Giuliani @RudyGiuliani · Dec 31, 2020 Brian Kemp's personal attack on me is stupid. His law enforcement agents took pictures with me and appreciate my support. They all think there is something wrong with this guy. He's covering up a massive voter **fraud** in GA to help Democrats. Why? 3.1K 22.8K 75.3K	https://www.11alive.com/article/news/politics/elections/kemp-giuliani/85-185061d6-16b8-4204-bd72-ac3a6d8ccdb1

Date	Event	Giuliani Statement	Link
January 1-6, 2021	Giuliani Maintains Fraud Allegations and Encourages Attendance at the January 6th Protest	 	1. https://www.youtube.com/watch?v=jxubAQe03gY 2. https://www.youtube.com/watch?v=7vRckA6PqGA&feature=youtu.be 3. https://twitter.com/RudyGiuliani/status/1346618559108165633

Date	Event	Giuliani Statement	Link
January 5. 2021	Vice President Pence Informs President Trump he Lacks Power to Block Certification of President-Elect Biden's Electoral College Victory While Giuliani Alleges the Vice President Has Such Power	1. Haberman, M, and Karni, A. "Pence Said to Have Told Trump He Lacks Power to Change Election Result" *New York Times*. (January 7, 2021). Vice President Mike Pence told President Trump on Tuesday that he did not believe he had the power to block congressional certification of Joseph R. Biden Jr.'s victory in the presidential election despite Mr. Trump's baseless insistence that he did, people briefed on the conversation said. 2. Stahl, J. "Can Mike Pence Really OVerturn the Election?" *Slate*. (January 5, 2021). "He could say, 'In these states, the election was conducted illegally in these six states. Therefore, I'm throwing their votes out, they're not certified,' " Giuliani suggested. "That would leave Trump at 233, and that would put Biden at 230, nobody has a majority." If Pence threw out those electoral votes, according to the president's attorney, the House of Representatives would then "automatically" vote to overturn the election and make Trump president, because the vote is conducted by state delegation and Republicans hold the current advantage in that tally.	1. https://www.nytimes.com/2021/01/05/us/politics/pence-trump-election-results.html; 2. https://www.nytimes.com/2021/01/06/us/politics/pence-rejects-trumps-pressure-to-block-certification-saying-he-loves-the-constitution.html; 3. https://www.cnn.com/2021/01/06/politics/pence-trump-electoral-college-letter/index.html 4. https://slate.com/news-and-politics/2021/01/can-mike-pence-overturn-election-trump-electoral-college-count.html

Date	Event	Giuliani Statement	Link
January 6, 2021	Giuliani Attends Rally; Gives Speech Calling for "Trial by Combat"; and Claims Vice President Pence to Block Certification of President-Elect Biden's Electoral Victory; Claims President Trump "Truly Elected President"	**Rudy Giuliani:** (00:09) Hello. Hello everyone. We're here just very briefly to make a very important two points. Number one; 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. He's one of the preeminent constitutional scholars in the United States. It is perfectly appropriate given the questionable constitutionality of the Election Counting Act of 1887 that the Vice President can cast it aside and he can do what a president called Jefferson did when he was Vice President. He can decide on the validity of these crooked ballots, or he can send it back to the legislators, give them five to 10 days to finally finish the work. We now have letters from five legislators begging us to do that. They're asking us. Georgia, Pennsylvania, Arizona, Wisconsin, and one other coming in. **Rudy Giuliani:** (02:43) 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. 1.  	1. Transcript of Speech: https://www.rev.com/blog/transcripts/rudy-giuliani-speech-transcript-at-trumps-washington-d-c-rally-wants-trial-by-combat 2. https://twitter.com/RudyGiuliani/status/1346868458030571521

Date	Event	Giuliani Statement	Link
January 16, 2021	Giuliani Continues to Assert Fraud Claims are "True"	Karl, J. and Steakin, W. "Giuliani says he's working on Trump's impeachment defense, would argue voter fraud claims" *ABC News*. (January 16, 2021). President Donald Trump's personal attorney Rudy Giuliani tells ABC News he's working as part of the president's defense team in his upcoming second impeachment trial -- and that he's prepared to argue that the president's claims of widespread voter fraud did not constitute incitement to violence because the widely-debunked claims are true. "I'm involved right now … that's what I'm working on," Giuliani told ABC News Chief White House Correspondent Jonathan Karl.	https://abcnews.go.com/US/giuliani-working-trumps-impeachment-defense-argue-voter-fraud/story?id=75302032

39814\13886141.1

Regarding Lin Wood's representation of Trump:

Delaware district court judge "The conduct of Mr. Wood, albeit not in my jurisdiction, exhibited a toxic stew of mendacity, prevarication and surprising incompetence," Judge Craig Karsnitz wrote. The judge refused to allow Wood to practice in his jurisdiction.

From the Huffington Post, January 11, 2021:

Thousands Of Lawyers, Law Students Call For Sens. Hawley, Cruz To Be Disbarred
"Senators Hawley and Cruz attacked the foundations of our democracy," a letter declares, citing their role in sparking the Capitol riot.

Thousands of lawyers and law school alumni on Sunday signed an open letter calling for Sens. Josh Hawley (R-Mo.) and Ted Cruz (R-Texas) to be disbarred over their leading roles in the effort to undermine Congress' certification of the Electoral College vote declaring President-elect Joe Biden the winner of the 2020 race.

The two Republican lawmakers were key figures in the effort to halt the certification process last week and, by doing so, support widely debunked claims of rampant voter fraud in an election that saw Biden triumph over President Donald Trump by more than 7 million votes. A pro-Trump mob, inflamed by the president's own statements, stormed the U.S. Capitol in an unprecedented assault on Congress, leading to at least six deaths — four riot participants and two Capitol Police officers.

"In leading the efforts to undermine the peaceful transition of power after a free and fair election, Senators Hawley and Cruz attacked the foundations of our democracy," reads the petition, which as of 10 p.m. Sunday had been signed by more than 5,000 lawyers and law students, as well as more than 1,000 members of the Missouri and Texas bars. "Senators Hawley and Cruz directly incited the January 6th insurrection, repeating dangerous and unsubstantiated statements regarding the election and abetting the lawless behavior of President Trump."

The petition was started by seven Yale law students, and has grown rapidly to include prominent names such as former Sen. Russ Feingold and Harvard professor Laurence Tribe, per The Washington Post.

Hawley is a graduate of Yale Law School and Cruz of Harvard Law School, and both are members in good standing of their respective state bars, as well as the District of Columbia Bar. Both have rejected assertions they contributed to the insurrection. A photo shows Hawley giving rioters a salute with a closed fist.

The senators have faced fierce criticism in recent days from a bipartisan group of lawmakers, as well as calls they resign. On Sunday, Cruz's longtime friend, Chad Sweet, said the man "must be denounced" and said he could no longer support him.

"In particular, I made it clear to Senator Cruz, whom I have known for years, before the Joint Session of Congress, that if he proceeded to object to the Electoral count of the legitimate slates of delegates certified by the States, I could no longer support him," Sweet wrote, saying he had to rise above part "to defend democracy."

From: sgoodman <sgoodman@GOODMANADVOCACY.COM>

Subject: What is Happening Right Now

Date: January 6, 2021 at 1:28:01 PM PST

To: APRL@LISTSERV.APRL.NET

Reply-To: APRL Listserv <APRL@LISTSERV.APRL.NET>

Rudy Giuliani told the rioters that there will be trial by combat before they overran the Capitol. If anyone thinks that's protected speech, I'll eat my hat (or something edible vaguely resembling a hat). Do I think this impacts his right to be a lawyer? You betcha.

Notes for FBA presentation:

The New York Bar association said in a statement that Giuliani's words "quite clearly were intended to encourage Trump supporters unhappy with the election's outcome to take matters into their own hands." The group condemned the violence at the Capitol, calling it "nothing short of an attempted coup, intended to prevent the peaceful transition of power."
"We cannot stand idly by and allow those intent on rending the fabric of our democracy to go unchecked," the organization said in a statement.

6067.

Every person on his admission shall take an oath to support the Constitution of the United States and the Constitution of the State of California, and faithfully to discharge the duties of any attorney at law to the best of his knowledge and ability. A certificate of the oath shall be indorsed upon his license.
(Added by Stats. 1939, Ch. 34.)
6068.

It is the duty of an attorney to do all of the following:
(a) To support the Constitution and laws of the United States and of this state.

6106.

The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.
If the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding is not a condition precedent to disbarment or suspension from practice therefor.
(Added by Stats. 1939, Ch. 34.)
6106.1.

Advocating the overthrow of the Government of the United States or of this State by force, violence, or other unconstitutional means, constitutes a cause for disbarment or suspension.
(Added by Stats. 1951, Ch. 179.)