



Lawyer Misconduct and Sanctions

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Abstract

This article deals with issues relating to lawyer misconduct and possible litigation sanctions under Rule 11 of the *Federal Rules of Civil Procedure* relating to filing of a lawsuit that is frivolous or in “bad faith,” and to actions that may be taken against an attorney for misconduct under the *Model Rules for Lawyer Disciplinary Enforcement*, either in the course of representation of a client or more generally in the attorney’s practice of law. This is the fourth in a series of articles relating to the “lawyer client relationship.” *

Keywords: Misconduct; sanctions; election fraud; disbarment; aggravating and mitigating factors

INTRODUCTION: THE CONTEXT

Two types of attorney sanctions may be identified in the context of litigation: sanctions against a lawyer for filing a case essentially in “bad faith” or one that is “frivolous,” resulting in the award of costs incurred in defending a suit, and actions which may be taken against a lawyer for misconduct in the course of a representation of a client or more generally in the attorney’s practice of law pursuant to the *Model Rules for Lawyer Disciplinary Enforcement*. *Litigation sanctions* may be awarded pursuant to the *Federal Rules of Civil Procedure*, more specifically Rule 11 (Cohen, 2008; Holloman & Hall, 2018).

Crist (2022) Writes:

“A lawyer may file a request for sanctions in response to a frivolous lawsuit. A frivolous lawsuit is defined as a complaint that has no legal merit. Sanctions for frivolous actions include payment of the opposing party’s costs and attorney’s fees.”

“Sanction, another form of discipline, occurs in the context of litigation. In Federal court, a violation of Rule 11 of the Federal Rules of Civil Procedure occurs when an attorney knowingly presents to the court a pleading, written motion, or other paper for an improper purpose.”

The text of Rule 11 is especially expositive.

Rule 11 – Signing Pleadings, Motions, and Other Papers

(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 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.

A second type of sanctions may be characterized as *disciplinary sanctions*. The *Standards for Imposing Lawyer Sanctions* (American Bar Association, 1986) were adopted by the American Bar Association (ABA) in 1986 and were amended in 1992 (Cameron, 1987). "These standards provide a framework to guide the courts and disciplinary agencies, including disciplinary

counsel, in imposing sanctions, thereby providing the flexibility to select the appropriate sanction in each particular case of lawyer misconduct.” Any sanction imposed, however, may depend on the presence of aggravating or mitigating factors.

The *Standards for Imposing Lawyer Sanctions* are designed to provide a “comprehensive system for determining sanctions, permitting flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct.” The application of the Standards are designed to achieve a degree of “consistency in the imposition of lawyer discipline necessary for fairness to the public and the bar.” Gassman and Olivera (2019, p. 34) add: “In the legal profession, the Model Rules of Professional Conduct and any adopted rules or guidelines of civility contain the standards of conduct that attorneys are expected to follow.”

The purposes underlying the regime of lawyer discipline (see Chambliss, 2019) may be summarized as follows:

“The purposes of lawyer sanctions can best be served, and the consistency of those sanctions enhanced, if courts and disciplinary agencies articulate the reasons for the sanctions imposed. Courts perform a valuable service for the legal profession and the public when they issue opinions in lawyer discipline cases that explain the imposition of a specific sanction. Written opinions of the court not only serve to educate members of the profession about ethical behavior, but also provide precedent for subsequent cases.”

Attorney Ira Leesfield (2000) provides a proper context to issues relating to lawyer misconduct when he writes: “[An] increasing number of lawyers equate litigation with war. Trampling the truth, taking no prisoners, scorching the earth—doing anything to win, regardless of the consequences....” Smith (2022) refers to the American legal system often as “trial by combat.”

Perhaps this attitude may be best exemplified in how it has “played out” recently in the American political and legal systems involving disciplinary actions in the form of substantial monetary fines imposed by courts or in the imposition of formidable sanctions imposed by courts after careful consideration by the Bar.

Two examples—one dealing with a lawsuit filed by former President Donald Trump against Hillary Clinton and others, and another involving the alleged Michigan voter fraud cases—offer the backdrop to the discussion of litigation sanctions (see Pennycock & Rand, 2021). A third example, involving former New York City Mayor Rudy Giuliani involves sanctions imposed on an individual attorney for professional misconduct (see Joy & McMunigal, 2022). A fourth example, involving a recent action taken against Trump attorney and confidant John Eastman, provides additional context and indicate the seriousness with which the Bar approaches attorney misconduct.

THE TRUMP SUIT AGAINST HILLARY CLINTON AND OTHERS

What is a frivolous action? Holloman and Hall (2018) write: “A complaint . . . is frivolous where it lacks and arguable basis either in law or fact” (see *Neitzke v. Williams*, 1989). An action is frivolous when either “(1) the factual contentions are clearly baseless, such as when allegations are the product of delusion or fantasy; or (2) the claim is based on an indisputably meritless legal theory” (*Livingston v. Adirondack Beverage Co.*, 1998). A “bad faith claim” is one filed for

an “improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation” (*Morley v. Ciba-Geigy Corp.*, 1995).

Courts have determined that claims are frivolous (Ward, 1991; Mann & Haarlow, 2012; Russell, 2021) or were made “in bad faith” in several situations:

- Where the plaintiff filed a claim based on false allegations;
- Where plaintiff failed to allege facts sufficient to support their claim;
- Where plaintiff filed claims under an inapplicable statute;
- Where plaintiff knew facts that would defeat the claim at the time of filing; or
- Where, in the context of a class action, plaintiff failed to adequately investigate the individual claims to support the class action.

In a 46-page order issued on January 19, 2023, U.S. District Court Judge Donald M. Middlebrooks levied a fine of nearly \$1 million (\$937,989) jointly against former President Donald Trump and his attorney, Alina Habba (Nguyen, 2023), to reimburse legal costs incurred by Hillary Clinton and others who were named as defendants in one of the former President’s failed lawsuits (see *Donald J. Trump v. Hillary R. Clinton, et al.*, 2023). Under Judge Middlebrook’s sanctions order, “Clinton will receive the largest payout from Trump and Habba of all the defendants, nearly \$172,000” (Nava, 2023).

The claims of the former President were detailed in a lawsuit filed against Hillary Clinton, former government officials, and others, including former FBI Director James Comey, and Rep. Adam Schiff (D-Calif.). The former President had filed a lawsuit claiming that in 2016, Mrs. Clinton, who was the Democratic Party’s presidential nominee at the time, and the Democratic National Committee, along with others, had orchestrated a “malicious conspiracy” to investigate his campaign’s ties to Russia, “destroying his life” and attempting to “rig” the election in Clinton’s favor.

“Middlebrooks has determined that the egregious deficiencies of the argument, the public presentations by Trump and his team that the argument was robust and — most importantly — Trump’s pattern of frivolous lawsuits that went unpunished should yield an actual penalty” (Bump, 2023). The judge continued: “A continuing pattern of misuse of the courts by Mr. Trump and his lawyers undermines the rule of law, portrays judges as partisans, and diverts resources from those who have suffered actual legal harm.... Here, we are confronted with a lawsuit that should never have been filed, which was completely frivolous, both factually and legally, and which was brought in bad faith for an improper purpose” (quoted in Bump, 2023).

Perhaps most interestingly, Judge Middlebrooks commented that sanctions against the former President and his attorney were especially appropriate since: “Mr. Trump is a prolific and sophisticated litigant who is repeatedly using the courts to seek revenge on political adversaries. He is the mastermind of strategic abuse of the judicial process, and he cannot be seen as a litigant blindly following the advice of a lawyer. He knew full well the impact of his actions.”

Judge Middlebrooks characterized the basis of the lawsuit as a veritable “shotgun pleading,” loosely aimed at a number of targets, and “amount[ing] to obstruction of justice.” The judge

described having sifted “through the thread of allegations against each defendant only to find they added up to no cognizable claim. And the pleadings were drafted in a way to disguise that fact.” Judge Middleton found that Trump and his attorneys “consistently misrepresented and cherry-picked portions of public reports and filings to support a false factual narrative.”

Even the amended version the lawsuit, Judge Middleton wrote, “is a hodgepodge of disconnected, often immaterial events, followed by an implausible conclusion. This is a deliberate attempt to harass; to tell a story without regard to facts.”

The judge specifically dealt with the former President’s allegations about the “unfairness of the Russia probe” and that the conclusions of special counsel Robert S. Mueller had exonerated him (Hunter & Shannon, 2019). In this regard, Judge Middlebrooks wrote that Trump’s conclusion may be “perhaps acceptable as a cable news talking point,” but is “neither an accurate nor fair reading of the Mueller Report.” The judge reached a similar conclusion for the “dossier” of allegations against Trump, the indictments filed by Special Counsel John Durham which had failed to obtain any guilty verdicts (Weber, 2022), and for Trump’s “looping in” his suspension from Twitter. “The assertion that the Twitter ban was caused by misinformation by Ms. Clinton five years earlier is plainly false,” Judge Middlebrooks wrote.

Bump (2023) argues that “None of this alone would necessarily have led to Trump and Attorney Habba being sanctioned.” However, Middlebrooks noted that the suit was one of several with similar aims: “bolstering Trump’s arguments, whipping up attention and spurring contributions. Lawsuits against CNN, against Twitter, against New York Attorney General Letitia James (D), even against the board that presents the Pulitzer Prize — in these, Middlebrooks saw the same pattern” (quoted in Bump, 2023).

The Michigan Election Fraud Cases

In a series of eight cases, described below, Republican operatives and Trump supporters had challenged the Michigan presidential election victory of Joe Biden (Boucher, Egan, & Hendrickson, 2020). All of the cases were eventually either dismissed or withdrawn, giving rise to the imposition of sanctions against the *attorneys* who brought the legal challenges, “including Trump allies Sidney Powell and Lin Wood (Neidig, 2021) and seven others” (Kraft & Allen, 2021).

- **Stoddard et al. v. City Election Commission et al.**

A Trump election challenger at TCF Center where ballots were being tabulated and a representative of a nonprofit that describes its mission as maintaining “the integrity of electoral processes” argued that Democratic Party inspectors had improperly duplicated ballots and asked the Wayne County Circuit Court to stop the county’s Board of Canvassers from certifying the election results.

Status: Rejected

What The Court Said: “The Court finds that it is mere speculation by plaintiffs that hundreds or thousands of ballots have, in fact, been changed and presumably falsified,” wrote Wayne County Circuit Court Chief Judge Timothy Kenny.

- **Costantino et al v. City of Detroit et al.**

Two Wayne County residents argued that widespread election fraud and misconduct took place at the TCF Center and asked the Wayne County Circuit Court to stop the certification of the county's election results until such time as an audit could be conducted.

Status: Rejected

What The Court Said: "Plaintiffs rely on numerous affidavits from election challengers who paint a picture of sinister fraudulent activities. ... Plaintiffs' interpretation of events is incorrect and not credible." — Wayne County Circuit Court Chief Judge Timothy Kenny.

Both the Michigan Court of Appeals and Michigan Supreme Court refused to reverse the lower court's ruling, and the Wayne County Circuit Court rejected a subsequent request to audit the election results before Michigan's presidential electors convened to cast their votes for Joe Biden.

- **Bally et al v. Whitmer et al.**

In this lawsuit, filed November 11 in the U.S. District Court in Grand Rapids, Lena Bally and three other Michigan voters alleged fraud and asked the court to exclude vote totals from three counties won by President-elect Joe Biden — Wayne, Washtenaw and Ingham — or block the certification of statewide results.

Status: Voluntarily withdrawn November 16 (see Birkle, 2020). U.S. District Judge Janet Neff did not have the opportunity to “weigh in” on this case before it was withdrawn.

- **Donald J. Trump for President, Inc. et al. v. Benson et al.**

The Trump campaign pointed to more than 100 affidavits alleging fraud and misconduct at the TCF Center in Detroit. Trump sought to delay or prevent the certification of votes through the filing of this lawsuit.

Status: Voluntarily withdrawn. The Trump campaign withdrew the lawsuit eight days after filing it, arguing, although incorrectly, that their filing was no longer needed because the Wayne County Board of Canvassers had refused to certify local results. The board did, in fact, certify results; however two commissioners had filed affidavits indicating that they wanted to change their votes and decertify the results.

- **Johnson et al v. Benson et al. (U.S. District Court)**

A lawsuit brought with the assistance of the conservative Thomas More Society alleged that Michigan Secretary of State Jocelyn Benson had overstepped her authority by mailing Michigan voters applications for absentee ballots, and that election misconduct had occurred at the TCF Center in Detroit

Status: Voluntarily withdrawn. The court never got the chance to review the arguments because the suit was withdrawn only three days after it was filed. The allegations essentially relied on the same misleading information presented in other court filings.

- **Johnson et al. v. Benson et al. (Michigan Supreme Court)**

Angelica Johnson and Linda Lee Tarver, both members of Black Voices for Trump, petitioned the state Supreme Court directly on November 26. In addition to seeking a full audit of Michigan's election returns, plaintiffs sought a range of other court actions, including a declaration that Secretary of State Jocelyn Benson had violated their constitutional rights, seizure of ballots, appointment of a special master or the creation of a special legislative committee to investigate claims of fraud, and an injunction preventing Gov. Gretchen Whitmer from certifying Michigan's presidential election results, which had already taken place.

Status: The petition was denied by the Michigan Supreme Court in a 4-3 decision, with dissenting justices indicating that they wanted "additional briefing" and oral arguments before actually deciding the case.

What The Court Said: "I believe it would be irresponsible to continue holding out the possibility of a judicial solution to a dispute that it appears must be resolved politically," stated Justice Elizabeth Clement, in concurring with the majority decision.

- **Leaf et al v. Whitmer et al.**

Controversial Barry County Sheriff Dar Leaf, a vocal Trump supporter, filed suit in the U.S. District Court in Grand Rapids on December 6, alleging fraud and seeking a temporary restraining order directing local clerks not to comply with a routine post-election memorandum from the Secretary of State's Office directing them to delete certain records related to the November 3 vote. Chief District Judge Robert Jonker denied the requested order December 7.

Status: Immediate emergency relief was denied

What The Court Said: "Plaintiffs' applications invite the court to make speculative leaps toward a hazy and nebulous inference that there has been numerous instances of election fraud and that defendants are destroying the evidence. There is simply nothing of record to infer as much, much less conclude that irreparable injury will occur before the defendants can be heard."

Imposing Sanctions

Perhaps the most notorious of the cases was *King et al v. Whitmer et al.*

The so-called Michigan "Kraken" lawsuit was filed by ex-Trump attorney Sidney Powell on behalf of potential Republican delegates to the Electoral College. Relying on conspiracy theories and misinformation, this lawsuit asked the court to force Gov. Gretchen Whitmer to overturn election results and award the state's sixteen electoral votes to Trump. [The BBC (2000) described the meaning behind the use of the term *Kraken* as follows: "Lawyer Sidney Powell - who was until recently part of Donald Trump's legal team and is now acting independently - has described the case she was mounting as a "Kraken" that, when released, would destroy the case for Democrat Joe Biden having won the US presidency" (see also Thomas, 2020).]

U.S. District Judge Linda Parker phrased the question before the Court: "Whether plaintiffs' attorneys engaged in litigation practices that are abusive and, in turn, sanctionable" (p. 2). Judge

Parker described an attorney's "obligation to the judiciary, their profession, and the public" as follows:

- (i) to conduct some degree of due diligence before presenting allegations as truth;
- (ii) to advance only tenable claims; and
- (iii) to proceed with a lawsuit in good faith and based on a proper purpose. Attorneys also have an obligation to dismiss a lawsuit when it becomes clear that the requested relief is unavailable" (p. 2).

Judge Parker stated:

"This lawsuit represents a historic and profound abuse of the judicial process. It is one thing to take on the charge of vindicating rights associated with an allegedly fraudulent election. It is another to take on the charge of deceiving a federal court and the American people into believing that rights were infringed, without regard to whether any laws or rights were in fact violated. This is what happened here. But attorneys cannot exploit their privilege and access to the judicial process to do the same. And when an attorney has done so, sanctions are in order" (p. 1).

Judge Parker "blasted the lawyers for seeking to undermine the election results with baseless claims of systemic election fraud" (Neidig, 2021) in several specific ways:

"the attorneys who filed the instant lawsuit abused the well-established rules applicable to the litigation process by proffering claims not backed by law;

proffering claims not backed by evidence (but instead, speculation, conjecture, and unwarranted suspicion);

proffering factual allegations and claims without engaging in the required prefilings inquiry;

and dragging out these proceedings even after they acknowledged that it was too late to attain the relief sought. And this case was never about fraud—it was about undermining the People's faith in our democracy and debasing the judicial process to do so" (p. 3).

Judge Parker concluded that the court was "duty-bound to grant the motions for sanctions filed by Defendants and Intervenor-Defendants" pursuant to Rule 11 of the Federal Rules of Civil Procedure" under 28 U.S.C. § 1927, and under the court's own "inherent authority" to do so (pp. 4-5). The court also commented that "the conduct of Plaintiffs' counsel, which also constituted violations of the Michigan Rules of Professional Conduct, calls into question their fitness to practice law. This warrants a referral for investigation and possible suspension or disbarment to the appropriate disciplinary authority for every state bar and federal court in which each attorney is admitted" (p. 108).

The Court's Conclusions Relating to the Imposition of Sanctions is Most Expositive:

"This lawsuit should never have been filed. The State Defendants and the Intervenor-Defendants should never have had to defend it. If Plaintiffs' attorneys are not ordered to reimburse the State Defendants and the City for the reasonable fees and costs incurred to defend this action, counsel will not be deterred from continuing to abuse the judicial system to publicize their narrative. Moreover, this Court has found that Plaintiffs' counsel initiated this

litigation for an improper purpose, rendering this the ‘unusual circumstance’ in which awarding attorneys’ fees is warranted” (pp. 107-108).

The implications of these cases, coupled with the actions taken against former mayor Giuliani and the prosed disbarment of attorney John Eastman, are most relevant to the discussion of lawyer misconduct and the imposition of sanctions for such misconduct under the ABA *Standards for Imposing Lawyer Sanctions*, sometimes referred to as the Model Rules.

AN OVERVIEW OF ATTORNEY SANCTIONS

Zacharias (2003, pp. 685-686) stated:

“Professional discipline of lawyers is a form of administrative regulation. It is a follow-up to lawyer licensing-the mechanism by which the initial grant of a license is reevaluated. Sanctions other than disbarment may be imposed through disciplinary proceedings, but these, with few exceptions, are limited to sanctions that are lesser-included forms of punishment and that are designed to shape the individual lawyer's future conduct. For example, lawyer sanctions include suspension, reprimands, and educational requirements. Fines, restitution, and imaginative penalties, such as _entity liability and public service requirements, typically are not within the power of disciplinary agencies to impose.”

In a proceeding dealing with former Nixon Vice President Spiro Agnew, the Court of Appeals of Maryland explained:

“Few vocations offer as great a spectrum for good and honorable works as does the legal profession. The attorney is entrusted with the life savings and investments of his clients. He becomes the guardian of the mentally deficient and potential savior for the accused. He is a fiduciary, a confidant, an advisor, and an advocate. However, the great privilege of serving in all of these capacities does not come without the concomitant responsibilities of truth, candor and honesty. In fact, it can be said that the presence of these virtues in members of the bar comprises a large portion of the fulcrum upon which the scales of justice rest. Consequently, an attorney’s character must remain beyond reproach” (*Maryland State Bar Association v. Agnew*, 1974, p. 814).

The preamble to the American Bar Association (ABA) Model Rules (2023) explains that the “legal profession’s relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct.”

The Model Rules state that “[n]eglect of these responsibilities compromises the independence of the profession and the public interest which it serves.”

“An attorney works within a system of rules that regulates and potentially sanctions them for failure to comply with the standards governing their professional conduct. The primary purposes of disciplinary proceedings are the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession” (California State Bar Association, 2023; see also, e.g., *Gillette v. Edison*, 2009).

In *In re Shepard* (2015, p. 283) the Arkansas Supreme Court noted that “Protection of the public squares with the notion that a license to practice law is neither a right nor an entitlement, but a privilege conferred on the lawyer primarily for the benefit of the public....” And, in *In re Torres* (2015), a New Jersey Court stated that “[t]he attorney disciplinary system is not designed to punish lawyers. Its goals are to protect the public and preserve the public’s confidence in the bar. The imposition of discipline in a particular case, thus, is meant to foster continued faith in the legal profession as a whole.”

Remedies and sanctions for attorney misconduct (see D’Amore, 2021) can be categorized as:

- *Sanctions and remedies for attorney misconduct which are available to public authorities.* Sanctions include professional discipline, potential criminal liability of lawyers who assist their clients in committing criminal acts (Shapiro, 2015), and sanctions imposed for contempt of court. Professional discipline imposed by the relevant state Bar is the most widely applied sanction for attorney misconduct.
- *Sanctions which are available to lawyers' clients.* For example, monetary damages may be awarded for attorney malpractice (Levine, 2021; Sember, 2022), attorney's fee may be forfeited, and the judicial process may result in the nullification of gifts or business transactions that breach a lawyer's fiduciary duty to a client under a theory of undue influence or duress (see Phillips & Wager, 2017).
- *Remedies may also be available to third parties* injured by the misconduct of an attorney undertaken on behalf of a client. Sanctions may include prohibiting an attorney from representing a client in violation of the lawyer's duty to a third party (see *DeBerry v. Summers*, 2013), awarding damages for breach of an obligation the attorney assumes to a non-client, and judicial nullification of settlements or jury verdicts obtained by attorney misconduct.

A DISCUSSION OF THE MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT

The Model Rules underscore the underlying purpose behind the imposition of lawyer discipline and the important distinction between public and private forms of attorney discipline: “Ultimate disposition of lawyer discipline should be public in cases of disbarment, suspension, and reprimand. Only in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer, should private discipline be imposed” (American Bar Association, 2023).

Quoting from the Model Rules, misconduct on the part of an attorney is grounds for one or more of the following sanctions:

1. *Disbarment* by the court.
2. *Suspension* by the court for an appropriate fixed period of time not in excess of three years (see *Guerrero v. United States*, 1999; Paukner, 2020).
3. *Probation* imposed by the court not in excess of two years, or imposed by the board or counsel with the consent of the respondent not in excess of two years; provided, however, that probation may be renewed for an additional [two year] period by consent or after a hearing to determine if there is a continued need for supervision. If the respondent objects to the board or counsel's imposition of probation, the misconduct must either be made the subject of formal charges or a recommendation that probation be imposed must be filed with the court. The conditions of probation should be stated

in writing. Probation shall be used only in cases where there is little likelihood that the respondent will harm the public during the period of rehabilitation and the conditions of probation can be adequately supervised. Probation shall be terminated upon the filing of an affidavit by respondent showing compliance with the conditions and an affidavit by the probation monitor stating that probation is no longer necessary and summarizing the basis for that statement.

4. *Reprimand* by the court or the board. A reprimand shall be in writing and either imposed in person or served upon the respondent by certified mail. A reprimand issued by the court shall be published in the official reports for the guidance of other lawyers. A reprimand imposed by the board shall be published in the journal of the state bar and in a newspaper of general circulation in each judicial district in which the lawyer maintained an office for the practice of law (see Gassman, Olivera, & Kraft, 2020).
5. *Admonition* by disciplinary counsel imposed with the consent of the respondent and the approval of the chair of a hearing committee. An admonition cannot be imposed after formal charges have been issued. Admonitions shall be in writing and served upon the respondent. They constitute private discipline since they are imposed before the filing of formal charges. Only in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer, should an admonition be imposed. A summary of the conduct for which an admonition was imposed may be published in a bar publication for the education of the profession, but the lawyer shall not be identified. An admonition may be used in subsequent proceedings in which the respondent has been found guilty of misconduct as evidence of prior misconduct bearing upon the issue of the sanction to be imposed in the subsequent proceeding (see Carroll, Westenberg, & Masling, 2020).
6. Upon order of the court or the board, or upon stipulation, *restitution* to persons financially injured, disgorgement of all or part of the lawyer's or law firm's fee, and reimbursement to the client security [protection] fund.
7. Upon order of the court or the board, or upon stipulation, *assessment of the costs of the proceedings*, including the costs of investigations, service of process, witness fees, and a court reporter's services, in any case where discipline is imposed or there is a transfer to disability inactive status.
8. *Limitation by the court on the nature or extent of the respondent's future practice"* (emphasis added in the quoted materials).

Written conditions may be attached to an admonition or to a reprimand. The failure to comply with any conditions is itself grounds for reconsideration of the matter and may result in the filing of formal charges against an attorney.

In determining whether or not to impose sanctions for lawyer misconduct, the court or an administrative body (such as a State Bar Association) which has been delegated with the responsibility of dealing with allegations of lawyer misconduct shall consider the following factors:

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

4. the existence of any aggravating or mitigating factors (see generally Pollack & Reiter, 2020).

Lundberg and Schroeder (2019, p. 19) argue that:

“For lawyer discipline to be truly effective, sanctions must be based on clearly developed standards. Inappropriate sanctions can undermine the goals of lawyer discipline: sanctions which are too lenient fail to adequately deter misconduct and thus lower public confidence in the profession; sanctions that are too onerous may impair confidence in the system and deter lawyers from reporting ethical violations on the part of other lawyers. Inconsistent sanctions, either within a jurisdiction or among jurisdictions, cast doubt on the efficiency and the basic fairness of all disciplinary systems.”

In furtherance of this goal, a list of *aggravating and mitigating* circumstances are found in Standard 9. *Aggravating factors* include: prior disciplinary offenses (Reporter, 2015); a dishonest or selfish motive; a pattern of misconduct; multiple offenses (In re Scott M. Holper, 2017); bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency; submission of false evidence, false statements or other deceptive practices during disciplinary process; refusal to acknowledge the wrongful nature of conduct; the vulnerability of a victim; substantial experience in the practice of law; and indifference to making restitution (generally Levin, 1998).

Mitigating factors may include the absence of prior disciplinary record (*contra* Levin, 1998, p. 33); the absence of dishonest or selfish motive; personal or emotional problems; timely good faith effort to make restitution (Longan, 2019, p. 164) or to rectify consequences of misconduct; full and free disclosure to disciplinary board or cooperative attitude toward proceedings (see Levin & Robbennolt, 2021); inexperience in the practice of law (Phillips, 2018); character or reputation; physical or mental disability or impairment (see Reich, 2020; Esquivel, 2020; Yost, 2022); delay in disciplinary proceedings; interim rehabilitation; imposition of other penalties or sanctions; remorse; and remoteness of prior offenses (generally Lundberg & Schroeder, 2019).

It is interesting to note that in general, the disposition of lawyer discipline shall be *public* in cases of disbarment, suspension, probation, and reprimand—but not in any cases involving admonition. In all cases of *public discipline* by the court, the court shall issue a written opinion setting forth its justification for imposing the sanction in that particular case.

Commentary Based on the Model Rules

The Model Rules provide important commentary on the substance of the disciplinary rules. As a general rule, the supreme or highest court of an individual state has the sole authority to license attorneys practicing within their jurisdiction. As a result, even though a form of discipline discussed above has been recommended by a committee or board of a State Bar Association designated to perform such a function, the court (usually the State Supreme Court) has the exclusive responsibility to revoke or suspend the license of an attorney. The *duration of a suspension* is often an issue for the disciplinary board and any decision should reflect the nature and extent of the lawyer's misconduct and any “mitigating or aggravating

circumstances” involved. “Where the misconduct is so severe that even a three-year suspension is not adequate, the lawyer should be disbarred” (ABA Rule 10).

As a general rule, a lawyer should not be suspended for an indefinite period. Any order of suspension should therefore specify the minimum period of time which must elapse before the lawyer may seek reinstatement. Probation is the appropriate sanction when the respondent can continue to perform legal services, but has evidenced problems that require some type of supervision—in many cases, by a senior member of a law firm in which a lawyer is practicing. As noted by the ABA in discussing Rule 10, “Probation should be used only in those cases where there is little likelihood that the respondent will harm the public during the period of rehabilitation and the conditions of probation can be adequately supervised.” Probation may be appropriate in certain cases of temporary or minor disability or impairment (i.e., Yost, 2022), for which the lawyer is capable of being treated without seeking an inactive status with the Bar.

As a practical matter, there may be a limited capacity and resources to effectively supervise a lawyer who has been placed on probation. As a result, probation should not be renewed more than once. Thus, if the disability or impairment cannot be resolved by probation of two years or less, probation may be an inadequate sanction and a suspension from the practice of law may be deemed as more appropriate. However, in exceptional circumstances, probation may be renewed for an additional period of time at the discretion of the disciplinary body.

A reprimand should be imposed only in cases of relatively minor misconduct; however, a reprimand can be imposed only after the filing of formal charges and a hearing. A reprimand is issued in writing and imposed either in person or served upon the respondent by certified mail. A reprimand should be published in the official judicial reports, in the journal of the state bar, and in a newspaper of general circulation in each judicial district in which the lawyer maintained an office for the practice of law as a way of notifying the public that a reprimand has been issued.

An admonition should be in writing and served upon the respondent. An admonition is a form of private discipline since an admonition is imposed before the filing of formal charges against an attorney. An admonition informs the lawyer that his or her conduct is “unethical.” However, in order to deter other lawyers from engaging in such conduct, the Bar association should publish a report describing the *facts* in cases in which an admonition has been imposed, but *omitting the names* of the disciplined lawyers. Although private, an admonition may be admitted as evidence in a subsequent proceeding in which the respondent has been found guilty of misconduct as evidence of prior misconduct bearing upon the issue of the sanction to be imposed in any subsequent proceeding.

Whenever possible, the disciplinary process should facilitate *restitution* to the victims of the respondent's misconduct (*In re Parks*, 2021) without the necessity of requiring victims to institute separate proceedings at their own expense (generally Sember, 2022). If it is feasible to determine the value of the client's loss resulting from the respondent's misconduct, the respondent should be ordered to make restitution in that amount “as promptly as circumstances permit.”

As a mark of its effectiveness, restitution should be made a part of the disciplinary order as a condition of reinstatement of the attorney and the respondent must present proof of restitution as part of any application for reinstatement under Rule 25(I). Interestingly, the failure to comply with the order providing for restitution may itself warrant further discipline. Whenever a respondent is found to have engaged in misconduct warranting the imposition of discipline, the attorney should be required to reimburse the agency for the costs of the proceedings, other than attorney fees.

“RUDY: WE HARDLY KNEW YOU!”

Former New York City Mayor Rudy Giuliani, who served as the personal attorney for former President Donald Trump, was suspended on June 24, 2021, from practicing law in New York State by an appellate court that found he made “demonstrably false and misleading statements” about the 2020 election (see Orden, Stracqualursi, & Polantz, 2021). Moliterno (2021, pp. 416-417) asks: “What law should the New York authorities apply when judging Giuliani’s conduct after the November 2000 election, mainly in Michigan, Georgia, and Pennsylvania (including a court appearance), as he pressed demonstrably false claims about vote fraud?”

Kiely and Farley (2021), in commenting on the underlying facts relating to Giuliani’s suspension, cited the following:

- **Pennsylvania ‘Fraud’ Case Without Evidence of Fraud**

Giuliani’s November 17, 2020, appearance before a Federal court in the matter of *Donald J. Trump for President, Inc. v Boockvar* (2020). At a hearing as a part of series of allegations relating to “nationwide voter fraud” involving “at least 10 other jurisdictions,” U.S. District Judge Matthew Brann asked Giuliani, “So you are alleging fraud?” Giuliani responded, “Yes, your honor.” Judge Brann stated: “Respondent repeatedly represented to the court that his client, the plaintiff, was pursuing a fraud claim, when indisputably it was not.” The court continued, “Respondent’s client had filed an amended complaint before the November 17, 2020, appearance in which the only remaining claim asserted was an equal protection claim, not based on fraud at all.”

In an order dismissing the case, Judge Brann criticized the Trump campaign for seeking to prevent Pennsylvania from certifying its election results without presenting any evidence to support such a “drastic remedy.” The judge wrote:

“One might expect that when seeking such a startling outcome, a plaintiff would come formidably armed with compelling legal arguments and factual proof of rampant corruption. Instead, this Court has been presented with strained legal arguments without merit and speculative accusations, unpled in the operative complaint and unsupported by evidence. In the United States of America, this cannot justify the disenfranchisement of a single voter, let alone all the voters of its sixth most populated state.”

- **Baseless Claim of Underage Voters in Georgia**

The court noted that Giuliani on multiple occasions baselessly claimed on his radio show, “*Chat with the Mayor*,” that there were thousands of underage voters who illegally voted in Georgia — even after the state declared the claim to be false.

“At various times, respondent claimed that 65,000 or 66,000 or 165,00 underage voters illegally voted in the Georgia 2020 election,” the court said in its order. “The Georgia Office of the Secretary of State undertook an investigation of this claim. It compared the list of all of the people who voted in Georgia to their full birthdays. The audit revealed that there were zero (0) underage voters in the 2020 election.”

According to the New York court order, Giuliani repeated this false claim “at least on January 5, January 7, and January 22, 2021,” and again on April 27, which was *after* the Attorney Grievance Committee filed a motion to suspend Giuliani.

- **Unsupported Claims of ‘Illegal Aliens’ Voting in Arizona**

The New York court said Giuliani “made false and misleading statements that ‘illegal aliens’ had voted in Arizona during the 2020 presidential election” — providing estimates at various times that ranged from 32,000 to a “few hundred thousand.” In fact, “These voters are registered to vote in accordance with federal voting rights laws, attesting to their eligibility, including their citizenship, under penalty of perjury.” The court conclude that “It is flat out wrong to say that they are not legal voters.”

- **No Evidence of Dead People Voting in Philadelphia**

The suspension order noted that Giuliani “repeatedly stated that dead people ‘voted’ in Philadelphia in order to discredit the results of the vote in that city. He quantified the amount of dead people who voted at various times as 8,021; while also reporting the number as 30,000.” In an interview on Fox News on November 8, Giuliani called Philadelphia “an epicenter of voter fraud” and stated, “we’re going to be looking at dead persons’ ballots, which may actually be very, very substantial.” However, the Trump campaign never provided any evidence that thousands of ballots were cast by people who had died. The court noted that Giuliani “has not provided this tribunal with any report or the results of any investigation which supports his statements about how many dead voters he claims voted in Philadelphia.”

- **‘Suitcases’ of Ballots in Georgia**

The order of suspension stated that Giuliani “represented that video evidence from security cameras depicted Georgia election officials engaging in the illegal counting of mail-in ballots. ... The gist of his claim was that illegal ballots were being surreptitiously retrieved from suitcases hidden under a table and then tabulated.” However, state officials indicated that the “video showed the supposed ‘suitcases’ were actually standard containers used to secure ballots, and that the ballots in question were opened and prepared for counting earlier in the night in full view of observers.”

- **Dominion Voting System Claims**

Perhaps the most widely publicized charges involved those involving Dominion Voting Systems (Schechter, 2023). The order of suspension found that Giuliani had made “extensive and wide-

ranging claims about Dominion Voting Systems Inc.'s voting machines manipulating the vote tallies to support his narrative that votes were incorrectly reported" in the State of Georgia (Corasaniti, 2021). Former President Trump himself had repeated the conspiracy theory that Dominion Voting Systems had switched "thousands of votes" from him to President-elect Joe Biden. Trump claimed these were cases of outright "theft" not mere "glitches" in the system.

However, the *Cybersecurity and Infrastructure Security Agency*, a part of the Department of Homeland Security, stated: "There is no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised," and described the 2020 election as "the most secure in American history" (Tucker & Bajak, 2020).

Dominion Voting Systems has sued both Giuliani and Sidney Powell, a central figure in the Florida litigation, in 107-page lawsuit alleging defamation. The suit, filed in the Federal District Court in Washington on January 21, 2021, accuses Giuliani of carrying out "a viral disinformation campaign about Dominion" made up of "demonstrably false" allegations, in part to enrich himself through legal fees and his podcast (Quinn, 2021). The suit, seeking damages of more than \$1.3 billion, is based on more than 50 statements Giuliani made at legislative hearings, on Twitter, on his podcast. and in various conservative news media (Corasaniti, 2021).

The appellate court concluded that "there is uncontroverted evidence" that Giuliani "communicated demonstrably false and misleading statements to courts, lawmakers and the public at large in his capacity as lawyer for former President Donald J. Trump and the Trump campaign in connection with Trump's failed effort at reelection in 2020."

The court added that Giuliani's "conduct immediately threatens the public interest and warrants interim suspension from the practice of law" on an emergency basis.

Giuliani's troubles would continue. On December 15, 2022, the disciplinary counsel of the District of Columbia Bar Association called for Giuliani's disbarment after a "preliminary finding" that Giuliani had violated at least one disciplinary rule when "as the attorney for then-President Donald Trump, he pressed a baseless, failed legal challenge to the 2020 election results in Pennsylvania." Noted Phil Fox, a lawyer representing the D.C Bar, "This case., the seriousness of the misconduct, calls for only one sanction and that is the sanction of disbarment" (Stancil, 2022). Giuliani's lawyer was instead seeking either a letter of reprimand or a private admonition as an alternative to disbarment. Fox countered that "I think it was a fundamental harm to the fabric of the country that could well be irreparable" (Katersky, 2022).

Bastow (2022) commented that "The ultimate resolution for Giuliani will take some time. The panel will send its final decision to the DC Bar in the spring, and they will make a recommendation to the DC Court of Appeals. The DC Court of Appeals will then decide whether or not to revoke his license."

The Action Taken Against John Eastman

Although perhaps not as widely known as Giuliani, John Eastman's conduct and public statements relating to the 2020 election have not escaped scrutiny. Eastman is the founding

director of the Center for Constitutional Jurisprudence, a public interest law firm affiliated with the [conservative](#) think tank [Claremont Institute](#). Eastman served as former professor and Dean at the [Chapman University School of Law](#). [Eastman had been a clerk](#) for Judge [J. Michael Luttig](#) at the [United States Court of Appeals for the Fourth Circuit](#), and later served as law clerk to Supreme Court Justice Clarence Thomas.

In a related matter to the 2020 Presidential election, on January 26, 2023, Chief Trial Counsel George Cardona of the California Bar announced the filing of a Notice of Disciplinary Charges (NDC) against Eastman that could result in Eastman's disbarment (State Bar of California (Office of Communications), 2023). The eleven charges arose from allegations that Eastman "engaged in a course of conduct to plan, promote, and assist then-President Trump in executing a strategy, unsupported by facts or law, to overturn the legitimate results of the 2020 presidential election by obstructing the count of electoral votes of certain states" (quoted in Burris, 2023).

The charges include allegations that Eastman made "false and misleading statements" regarding purported election fraud, including statements made on January 6, 2021, at a rally in Washington, D.C., that "contributed to provoking a crowd to assault and breach the Capitol to intimidate then-Vice President Pence and prevent the electoral count from proceeding." Cardona added: "There is nothing more sacrosanct to our American democracy than free and fair elections and the peaceful transfer of power."

The basis of the proposed disbarment is that Eastman had drafted two "legal memos" that laid out strategies to block then-President-elect Joe Biden from taking office by circumventing established procedures for the counting of electoral votes. The NDC alleges that the "strategies proposed by these memos, as well as in remarks Eastman made publicly and privately to President Trump, Vice President Pence, and others, were unsupported by law, based on false and misleading assertions of fact, and designed for the purpose of keeping Trump in office."

In facts eerily similar to the allegations raised against Rudy Giuliani, the NDC also alleges that Eastman ignored these truths when he spoke at the "Save America March" on January 6, 2021, inciting the crowd to take action when, with the intent to convince them that the outcome of the presidential election had been affected by fraud. Eastman maintained that "dead people had voted" in the presidential election, that Dominion voting machines had fraudulently manipulated the election results, and that Vice President Pence "did not deserve" to be in office if he did not delay the counting of electoral votes (State Bar of California, 2023).

The proceedings against Eastman are unusual in the sense of their venue. The State Bar Court of California is the only *independent court in the U.S. dedicated solely to attorney discipline* where discipline matters are investigated and prosecuted by the Office of Chief Trial Attorney or OCTC, acting on behalf of the public. The State Bar Court "oversees disciplinary proceedings and adjudicates charges filed by OCTC." The State Bar Court decides whether OCTC has proved charges of professional misconduct by "clear and convincing evidence" and may recommend that an attorney be suspended or disbarred. If a disciplinary ruling involves disbarment or suspension, the State Bar Court's recommendation is transmitted to the California Supreme Court, which determines whether to impose the recommended discipline (see

<https://www.statebarcourt.ca.gov>).

CONCLUDING COMMENTS AND OBSERVATIONS

An attorney need not be reminded of the serious implications of filing a lawsuit that later may be deemed “frivolous,” or one filed “in bad faith.” In such circumstances, a court may award certain litigation costs against an offending lawyer. In addition, the state bar association may initiate disciplinary proceedings against an attorney who engages in conduct that is “prejudicial to justice” or reflects upon a lawyer’s character, fitness, or ability to engage in the practice of law. The 2020 presidential election is the prism in which courts have both awarded significant litigation costs against both former President Trump and several of his attorneys. In addition, the actions undertaken by two of the former president’s attorneys have resulted in their being called before the Bar Association to account for their conduct, erroneous statements, and unsupported claims. Although actions taken against former Mayor Giuliani and former Dean John Eastman in their capacities as attorneys for former President Trump have yet to be finalized, the seriousness with which investigation have thus far been undertaken, or the actions taken against attorney Alina Habba, point unequivocally to the reality that attorneys who violate the trust placed in them by the system of justice in the United States place both their financial resources, livelihoods, and license to practice law in grave jeopardy.

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