THE ETHICS OF TRUMP'S SHADOW LAWYERS?

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INTRODUCTION

The barrage of over sixty failed lawsuits filed by lawyers representing former President Donald Trump and his allies seeking to overturn the 2020 presidential election brought forth numerous calls to sanction these lawyers.[1] Many have urged, appropriately in our view, federal judges who dismissed these suits to impose sanctions for flagrant violations of Rule 11 of the Federal Rules of Civil Procedure.[2] As of November 2021, two federal

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1. *See, e.g.*, Brent Kendall & Alexa Corse, *Trump 2020 Election Lawsuits Lead to Requests to Discipline Lawyers*, WALL STREET J. (May 10, 2021), https://www.wsj.com/articles/trump-2020-election-lawsuits-lead-to-requests-to-discipline-lawyers-11620568801 [https://perma.cc/69SC-5J8Z] (stating that officials sued over the 2020 election are requesting courts to impose sanctions and have filed grievances with lawyer disciplinary bodies); Rebecca Davis O'Brien, *Trump Lawyers Face Rebukes Over Election-Fraud Claims*, WALL STREET J. (Jan. 12, 2021), https://www.wsj.com/articles/trump-lawyers-face-rebukes-over-election-fraud-claims-11610458283 [https://perma.cc/ZQ4Y-K82Z] (reporting that Trump's lawyers are facing calls for court sanctions and professional discipline).

2. Rule 11 provides, in pertinent part:

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

judges have imposed sanctions.[3] One reasoned "[t]hat sanctions are required to deter the filing of frivolous, politically motivated lawsuits such as this in the future and to compensate the Defendants for the unnecessary expenditure of private and public money in defense of a frivolous lawsuit filed without reasonable legal basis and without a reasonable inquiry into the facts."[4] The other judge stated: "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."[5] Other commentators and lawyers call for ethics authorities to impose disciplinary sanctions.[6] So far, Rule 11 and disciplinary sanctions have reached only one of the most public of the pro-Trump lawyers, Rudolph ("Rudy") Giuliani,[7]

> (c) Sanctions.
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> (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.

FED. R. CIV. P. 11.

3. U.S. Magistrate Judge N. Reid Neureiter sanctioned two lawyers challenging the 2020 election and seeking to have the actions of state legislatures, municipalities, and state courts upholding the election results overruled "as unconstitutional and ultra vires, thereby making them legal nullities." O'Rourke v. Dominion Voting Sys. Inc., No. 20-CV-03747-NRN, 2021 WL 3400671, at *3 (D. Colo. Aug. 3, 2021) (granting defendants' motion for sanctions). The court ordered the two lawyers to jointly and severally pay the defendants' reasonable attorney fees. *Id.* at *32. U.S. District Judge Linda Parker ordered the nine lawyers who signed pleadings challenging the results of the Michigan election, which President Biden won by more than 150,000 votes, to pay the State of Michigan's and the City of Detroit's costs to defend against the lawsuit; to receive twelve hours of continuing legal education, six hours of which must focus specifically on election law; and she referred them to their respective bar disciplinary authorities. King v. Whitmer, No. 20-13134, 2021 WL 3771875, at *41 (E.D. Mich. Aug. 25, 2021).

4. *O'Rourke*, 2021 WL 3400671, at *32.

5. *King*, 2021 WL 3771875, at *41.

6. *See, e.g.*, Bruce A. Green, *Selectively Disciplining Advocates*, 54 CONN. L. REV. 151, 154 (2022) (citing to complaints against Rudolph Giuliani, Sidney Powell, and other Trump lawyers filed with bar disciplinary authorities alleging that Trump's lawyers filed multiple frivolous complaints).

7. The Appellate Division of the Supreme Court of the State of New York suspended Giuliani's license to practice law after finding "uncontroverted evidence that respondent [Giuliani] communicated demonstrably false and misleading statements to courts, lawmakers and the public at large" and that his "conduct immediately threatens the public interest and warrants interim suspension from the practice of law, pending further proceedings before the Attorney Grievance Committee." *In re* Giuliani, 197 A.D.3d 1, 4 (N.Y. App. Div. 2021). Pending the resolution of the ethics complaint in New York, the District of Columbia Court of Appeals suspected Giuliani's license to practice law in the District of Columbia. Jaclyn Diaz, *An Appeals Court Has Suspended Rudy Giuliani's Ability to Practice Law in D.C.*, NPR

as well as some of the lawyers who filed and put their names on the complaints initiating the frivolous cases. What about the lawyers behind the scenes, lurking in the shadows?

A hierarchy of lawyers directed and coordinated this barrage of bogus cases. So far, most have evaded accountability. Their ethical liabilities depend in part on their places in this hierarchy. An important point we focus on and emphasize in this Essay is that many of the lawyers on the Trump team faced ethical responsibilities they appear not to have fulfilled arising specifically from their supervisory roles. Though their work may have been out of sight, it should not be out of the minds of state ethics authorities.

Not all the lawyers behind the frivolous lawsuits have remained in the shadows. For example, the *New York Times* reported Kris Kobach, a former Kansas Secretary of State, and Mark Martin, a law school dean and former North Carolina Supreme Court Chief Justice, were behind a groundless complaint that Texas Attorney General Ken Paxton filed in the United States Supreme Court.[8] Neither Kobach's nor Martin's name appears on the pleadings in the lawsuit,[9] but they are reported to have assisted, encouraged, and approved it.[10] Four former Texas State Bar Presidents filed an ethics complaint against Paxton for filing the baseless lawsuit with the Supreme Court.[11] We believe disciplinary counsel in the states where Kobach and Martin are licensed should investigate their roles in this suit.

(July 8, 2021), https://www.npr.org/2021/07/08/1014047881/an-appeals-court-has-suspended-rudy-giulianis-ability-to-practice-law-in-d-c [https://perma.cc/N7S4-RQ9U].

8. Jim Rutenberg et al., *77 Days: Trump's Campaign to Subvert the Election*, N.Y. TIMES (Jan. 31, 2021), https://www.nytimes.com/2021/01/31/us/trump-election-lie.html [https://perma.cc/Y66H-ZTV4]. The lawsuit maintained that Electoral College members from Georgia, Michigan, and Pennsylvania should be replaced by new members chosen by those states' legislatures, which would effectively nullify Biden's win of those electoral votes. *Id.* Mark Martin is the Dean of Regent University School of Law in North Carolina. *Meet Regent Law's Dean, Mark D. Martin, J.D., LL.M.*, REGENT LAW, https://www.regent.edu/school-of-law/faculty-directory/meet-the-dean/ [https://perma.cc/M2HH-6RKA].

9. Only the names of Ken Paxton, Attorney General of Texas; Brent Webster, First Assistant Attorney General of Texas; and Lawrence Joseph, Special Counsel to the Attorney General of Texas, appear on the pleadings. *See, e.g.*, Motion for Leave to File a Bill of Complaint, Texas v. Pennsylvania, 141 S. Ct. 1230 (2020) (No. 22O155), https://www.supremecourt.gov/docket/docketfiles/html/public/22o155.html (last visited Mar. 10, 2022).

10. Rutenberg et al., *supra* note 8.

11. *Texas AG Paxton Faces Another Ethics Complaint for Election Lawsuits*, DEMOCRACY DOCKET (July 26, 2021), https://www.democracydocket.com/alerts/texas-ag-paxton-faces-another-ethics-complaint-for-election-lawsuits/ [https://perma.cc/RA7Q-87WE].

It is obviously important for state bar authorities to investigate the lawyers named on the pleadings for their unethical conduct. In doing so, they should also find and investigate the lawyers behind the scenes who strategized, orchestrated, and directed the frivolous lawsuits. Failing to do so would permit Trump's shadow lawyers to escape liability for their contributory roles in these frivolous lawsuits and enable and encourage them to assist other lawyers in bringing similarly meritless lawsuits in the future whenever a candidate they support loses an election. Summarizing empirical research on lawyer compliance with legal ethics rules, Fred Zacharias observed that "when rule violations that are visible or well-known go unsanctioned, such failure to prosecute undermines the professional standard as a credible threat. It encourages other lawyers to violate the particular standard or the codes as a whole."[12]

We do not examine here some obviously relevant American Bar Association (ABA) Model Rules of Professional Conduct,[13] such as Model Rule 3.1,[14] the ethical analog to Rule 11 prohibiting the filing of meritless lawsuits; Model Rules 3.3(a)(1) and 4.1(a) prohibiting false statements;[15] Model Rule 3.3(b) requiring "reasonable remedial measures" when a lawyer knows "a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct relating to the [adjudicative] proceeding;"[16] and

12. Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 739 (2003).

13. MODEL RULES OF PROF. CONDUCT (AM. BAR ASS'N 1983). We reference the ABA Model Rules of Professional Conduct because every jurisdiction in the United States has adopted the ABA Model Rules of Professional Conduct, usually either verbatim or with some minor changes.

14. Model Rule 3.1 provides:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Id. at r. 3.1.

15. Model Rule 3.3(a)(1) states: "A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." *Id.* at r. 3.3(a)(1). Model Rule 4.1(a) states: "In the course of representing a client a lawyer shall not knowingly: (1) make a false statement of material fact or law to a third person." *Id.* at r. 4.1(a).

16. Model Rule 3.3(b) states: "(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." *Id.* at r. 3.3(b).

Model Rule 8.4(c) banning conduct "involving dishonesty, fraud, deceit, or misrepresentation."[17] These rules have been addressed in editorials,[18] news articles,[19] and pending ethics complaints.[20] Instead, we take a close look at some Model Rules that may not so readily come to mind but are highly relevant to the conduct of Trump's shadow lawyers. To illustrate how these rules operate, we compare them to their perhaps better known and understood counterparts in substantive criminal law.[21]

In Part I of this Essay, we analyze potential ethical liabilities under the Model Rules for supervising lawyers on the Trump legal team. In Part II, we address whether withdrawal after a frivolous suit has been filed provides a defense to ethical liability. Finally, in Part III, we consider the purposes that drive and guide the imposition of lawyer discipline and why they support sanctioning Trump's shadow lawyers. Again, for illustrative purposes, we compare the purposes of professional discipline with the purposes that drive and guide the imposition of criminal punishment.

17. Model Rule 8.4 states: "It is professional misconduct for a lawyer to . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation." *Id.* at r. 8.4(c).

18. Editorial Board, *Trump Attorneys Must Face Discipline: Baseless Lawsuits Are Sabotaging Americans' Faith in the Election System and in Democracy Itself*, BOS. GLOBE (Dec. 10, 2020), https://www.bostonglobe.com/2020/12/10/opinion/trump-attorneys-must-face-disciplinary-action/ [https://perma.cc/T8U2-9K4X]; Michael Hiltzik, *Column: Trump's Election Lawyers Should Be Disbarred*, L.A. TIMES (Dec. 14, 2020), https://www.latimes.com/business/story/2020-12-14/trumps-election-lawyers-should-be-disbarred; Jan Wolfe, *Explainer: Can Trump's Lawyers Be Disciplined for Making False Claims?*, REUTERS (Nov. 25, 2020), https://www.reuters.com/article/us-usa-election-lawyers-sanction-explain/explainer-can-trumps-lawyers-be-disciplined-for-making-false-claims-idUSKBN2851FW [https://perma.cc/C3YV-EDLC].

19. Alison Durkee, *Here Are All the Places Sidney Powell, Lin Wood and Pro-Trump Attorneys Could Also Be Punished for 'Kraken' Lawsuits after Michigan*, FORBES (Aug. 26, 2021), https://www.forbes.com/sites/alisondurkee/2021/08/26/here-are-all-the-places-sidney-powell-lin-wood-and-pro-trump-attorneys-could-also-be-punished-for-kraken-lawsuits-after-michigan-sanctions-ruling/?sh=2b782ea4e1aa; Bradley P. Moss & Joanne Molinaro, *The Sanctioning of Trump's Lawyers Is Exactly What Is Supposed to Happen*, THE ATLANTIC (Aug. 28, 2021), https://www.theatlantic.com/ideas/archive/2021/08/trumps-lawyers-kraken/619915/ [https://perma.cc/WVG7-UUC2].

20. *See supra* note 7 and accompanying text.

21. Fred Zacharias explored the similarities and differences between professional discipline and criminal prosecutions in an article on the purposes of lawyer discipline. Zacharias, *supra* note 12.

I. SHADOW LAWYER ROLES

Many lawyers prepared, filed, vouched and advocated for, and publicized lawsuits now widely accepted as baseless. Some revealed their participation and contributions, placing their names on complaints, appearing in court, and publicly advocating for the suits. They were not alone. Other unnamed lawyers surely participated and contributed as well. State bar ethics authorities should investigate the roles played both by lawyers who were and were not public about their involvement in the baseless lawsuits.

Criminal law has several tools to deal with persons who combine their efforts to commit crimes. The crimes of complicity,[22] conspiracy,[23] and solicitation are examples.[24] Legal ethics rules have analogous provisions dealing with unethical conduct involving more than one lawyer.

Many criminal provisions dealing with group crime impose personal liability based directly on an action or omission of the person found liable. Other criminal provisions create vicarious liability—liability for a crime committed by another person. The Model Rules similarly use both personal liability and vicarious liability to deal with unethical conduct involving more than one lawyer.

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22. The Model Penal Code ("MPC") provides that "[a] person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both." MODEL PENAL CODE § 2.06(1) (AM. L. INST.). Section 2.06 continues that one "is an accomplice of another person in the commission of a crime if: (a) with the purpose of promoting or facilitating the commission of the offense he" solicits, aids, agrees, or attempts to aid the other person in planning or committing the crime. *Id.* § 2.06(3).

23. The MPC states:

> A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he: (a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

Id. at § 5.03(1)(a)-(b).

24. "A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or would establish his complicity in its commission or attempted commission." *Id.* at § 5.02(1).

A. Personal Liability

Model Rule 5.1(b) requires supervising lawyers to "make reasonable efforts to ensure" ethical conduct by lawyers working under them.[25] The sheer number and similarity of these meritless lawsuits is powerful evidence that many lawyers behind the scenes masterminded, engineered, and coordinated the barrage of baseless lawsuits, and in doing so violated Model Rule 5.1(b) by failing to exercise control over lawyers working under their supervision. Such failures by the supervising lawyers constitute personal violations and merit discipline.[26]

Model Rule 8.4(a) provides two additional relevant bases for personal ethical liability. First, it prohibits one lawyer from "assisting or inducing" another lawyer to violate an ethics rule.[27] Second, it forbids a lawyer from violating an ethics rule "through the acts of another."[28] Those on the Trump team who enlisted, assisted, and directed other lawyers in various states to file meritless suits violated both prohibitions. So did partners in firms who assigned other lawyers to participate in and contribute to one of the baseless suits. The higher the lawyer was in the hierarchy of decision-making, the greater the likelihood of their liability.

B. Vicarious Liability

The Model Rules also impose vicarious liability on supervisory lawyers. Just as managers of an illegal drug organization are criminally responsible under the law of conspiracy and complicity for acts by others that they agreed to, encouraged, or directed, supervising lawyers are

25. "A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." MODEL RULES, *supra* note 13, at r. 5.1(b).

26. *See, e.g.*, *In re* Moore, 494 S.E.2d 804, 806–11 (S.C. 1997) (imposing a one-year suspension from the practice of law on a lawyer who, among other ethical violations, turned over all discovery matters to an associate and failed to ensure the associate appropriately responded to discovery requests); *In re* Yacavino, 494 A.2d 801, 803–04 (N.J. 1985) (suspending a lawyer for three years for neglect of client matters and for failing "to ensure 'that all lawyers [in the organization] conform to the Rules of Professional Conduct'").

27. "It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowing assist or induce another to do so, or do so through the acts of another." MODEL RULES, *supra* note 13, at r. 8.4(a).

28. *Id.*

ethically responsible for unethical acts by other lawyers that they agreed to, encouraged, directed, or ratified.

Model Rule 5.1(c) is the key provision here. It creates liability for a supervising lawyer who (1) "orders" or "ratifies" unethical conduct by a supervised lawyer or (2) fails to take "reasonable remedial action" after a subordinate's unethical conduct.[29] This Rule imposes vicarious ethical liability on supervising lawyers, whether they directed a national scheme to file baseless lawsuits or were a partner in a firm participating in a particular bogus suit, so long as the lawyer knowingly supervised others and ordered or ratified unethical conduct by them. It does not matter whether the supervising lawyer was named on the pleadings as counsel or made an appearance in court. Ethics authorities routinely discipline lawyers for ratifying the misconduct of other lawyers[30] or for having knowledge of the misconduct and failing to take reasonable remedial action to avoid or mitigate the consequences of the misconduct.[31]

29. Model Rule 5.1(c) provides:

> (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
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> (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Id. at r. 5.1(c).

30. *See, e.g.*, *In re* Gilly, 976 F. Supp. 2d 471, 477–78 (S.D.N.Y. 2013) (finding that supervising lawyer violated New York Rule of Professional Conduct 5.1(d)(1), the equivalent of Model Rule 5.1(c)(1), by ratifying associate's failure to timely produce documents in discovery); Ky. Bar Ass'n v. Chesley, 393 S.W.3d 584, 599–600 (Ky. 2013) (disciplining lawyer for violating Kentucky Rule 5.1(c)(1) by ratifying and concealing co-counsel's ethics violation).

31. *See, e.g.*, *In re* Conwell, 69 P.2d 589, 592 (Kan. 2003) (disciplining lawyer for violating Kansas Rule 5.1(c)(2) by failing to take remedial action to protect client funds after learning of complaints against law partner); *In re* Marshall, 394 N.W.2d 790, 790–91 (Minn. 1986) (disciplining lawyer for, among other reasons, failing to take reasonable remedial action to avoid or mitigate the consequences of former law partner's misconduct).

II. WITHDRAWAL AS A DEFENSE

In an apparent effort to distance themselves from the bogus barrage, some lawyers have withdrawn from the meritless lawsuits after filing them.[32] Does such withdrawal protect a lawyer from liability for unethical conduct that took place before the withdrawal? Should it?

Criminal law provides some guidance in thinking about withdrawal as a defense. Typically, expressions of regret or remedial steps taken after commission of a crime do not cancel criminal liability.[33] Similarly, a lawyer's withdrawal from a frivolous lawsuit does not extinguish ethical liability,[34] and prevents liability under Rule 11 only if the attorney has withdrawn the challenged pleading or other papers filed with the court within the "safe harbor" provision of Rule 11.[35]

The Model Penal Code (MPC) does recognize an "abandonment" or "renunciation" defense to conspiracy and complicity liability.[36] These

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32. *See, e.g.*, Rachel Abrams et al., *Once Loyal to Trump, Law Firms Pull Back from His Election Fight*, N.Y. TIMES (Nov. 13, 2020), https://www.nytimes.com/2020/11/13/business/porter-wright-trump-pennsylvania.html [https:// perma.cc/U3WJ-K5RW] (reporting that national law firms were withdrawing from the "barrage of litigation to challenge the election results"); Jan Wolfe, *Trump Lawyers Withdraw on Eve of Key Hearing in Pennsylvania Election Case*, REUTERS (Nov. 16, 2020), https://www.reuters.com/article/us-usa-election-lawsuit-pennsylvania/trump-lawyers-withdraw-on-eve-of-key-hearing-in-pennsylvania-election-case-idUSKBN27X04Q [https://perma.cc/G3YU-TJM4] (explaining how lawyers at the Porter Wright law firm withdrew from a case challenging the presidential election results in Pennsylvania).

33. Once a crime is completed, expressions of regret or remedial steps, such as returning stolen property, does not cancel the underlying crime. *See, e.g.*, Evan Tsen Lee, *Cancelling Crime*, 30 CONN. L. REV. 117, 138, 152 (1997) (explaining that regret or attempts to rectify or mitigate the effects of a crime appropriately belong in the sentencing and not guilt phase of a criminal adjudication).

34. Withdrawal from a frivolous lawsuit is not a defense to a violation of Model Rule 3.1. MODEL RULES, *supra* note 13, at r. 3.1.

35. The safe harbor provision of Rule 11 provides that motion for sanctions must be served on the attorney, law firm, or party believed to have violated the rule, but not filed with the court if the challenged pleading or other filing "is withdrawn or appropriately corrected within 21 days after service or within another time the court sets." FED. R. CIV. P. 11(c)(2). If the court on its own initiates a Rule 11 sanction, there is no safe harbor. FED. R. CIV. P. 11(c)(3). S*ee also* 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1337.2 (4th ed. 2021) ("The twenty-one-day safe harbor provision is not applicable, however, when the district judge initiates sanction proceedings on his or her own as permitted by Rule 11(c)(3).").

36. In defining the crime of conspiracy, the MPC states that abandonment of the conspiracy "is presumed if neither the defendant nor anyone with whom he conspired does any overt act in pursuance of the conspiracy during the applicable period of limitation; and . . . if an individual abandons the agreement, the conspiracy is terminated as to him only if and when he advises those with whom he conspired of his abandonment, or he informs the law enforcement authorities of the existence of the conspiracy and his participation therein." MODEL PENAL CODE, *supra* note 22, at § 5.03(7).

provisions, though, make clear that withdrawal without additional remedial measures does not annul liability. An actor must additionally take steps to stop and neutralize what they helped set in motion. The renunciation defense to conspiracy requires that in addition to withdrawing, the actor must thwart the crime.[37] In the complicity context, the MPC requires that the actor "wholly deprives [the actor's prior assistance] of effectiveness" or gives "timely warning to the law enforcement authorities or otherwise makes proper effort to prevent the commission of the offense."[38] These provisions illustrate and exemplify the common sense idea that once a person has set something potentially harmful in motion, the person cannot absolve themselves of responsibility simply by walking away. They must also take effective remedial measures.

The Model Rules do not explicitly set forth an abandonment defense.[39] Rather, the Model Rules indicate more than withdrawal is required of a lawyer in such a situation.[40] Model Rule 1.16(a)(1) states that a lawyer "shall not represent . . . or . . . shall withdraw" from representation if "the representation will result in violation of the rules of professional conduct or other law."[41] The ethical violations resulting from the bogus barrage are plentiful. As stated previously, those include Model Rule 3.1 prohibiting the filing of meritless lawsuits;[42] Model Rules 3.3(a)(1) and 4.1(a) prohibiting false statements;[43] Model Rule 3.3(b) requiring "reasonable remedial measures" when a lawyer knows "a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct relating to the [adjudicative] proceeding;"[44] and Model Rule 8.4(c) banning conduct

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Renunciation of criminal purpose "is an affirmative defense that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose." *Id.* at § 5.03(6).

37. *Id.* at § 5.03(6).

38. *Id.* at § 2.06(6).

39. There is nothing in any of the Model Rules that states that abandoning or discontinuing a violation of a Rule is a defense to having violated a Model Rule in the first place. *See generally* MODEL RULES, *supra* note 13.

40. "(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of the client if: (1) the representation will result in violation of the rules of professional conduct or other law." *Id.* at r. 1.16(a)(1).

41. *Id.*

42. *See supra* note 14 and accompanying text.

43. *See supra* note 15 and accompanying text.

44. *See supra* note 16 and accompanying text.

"involving dishonesty, fraud, deceit, or misrepresentation."[45] Likely or possible violations of "other law" are also numerous, such as violations of Rule 11,[46] state election laws,[47] the Voting Rights Act,[48] and the Constitution.[49]

Withdrawal was certainly necessary under Rule 1.16. In fact, this rule prohibited the Trump lawyers from taking on these representations in the first place, because representation that results in the violation of ethics rules or law is prohibited.[50] And Model Rule 3.3(b) required remedial action. It provides that a lawyer who "knows that a person . . . is engaging . . . in . . . fraudulent conduct related to the proceeding . . . shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."[51] In our view, the appropriate remedial measures would have included disclosure to the court of the lack of any basis in law or fact to challenge the election in order to protect the judicial process from continuing fraudulent conduct.

While both withdrawal and remedial action were required, in our view neither is sufficient under the Model Rules to cancel liability for prior unethical conduct because of the purposes of professional discipline, as

45. *See supra* note 17 and accompanying text.

46. *See supra* note 2 and accompanying text.

47. Trump's call to the Georgia Secretary of State threatening him if he did not find additional pro-Trump votes may have violated Georgia's election laws. Eric Lipton, *Trump Call to Georgia Official Might Violate State and Federal Law*, N.Y. TIMES (Jan. 3, 2021), https://www.nytimes.com/2021/01/03/us/politics/trump-call-georgia.html [https://perma.cc/MPG3-25FZ]. The Brookings Institution analyzed Trump's actions and concluded that he is "at substantial risk of possible state charges predicated on multiple crimes . . . [including] criminal solicitation to commit election fraud; intentional interference with performance of election duties; conspiracy to commit election fraud; criminal solicitation; and state RICO violations." NORMAN EISEN ET AL., FULTON COUNTY, GEORGIA'S TRUMP INVESTIGATION: AN ANALYSIS OF THE REPORTED FACTS AND APPLICABLE LAW 6 (2021). If any of Trump's lawyers had advised or assisted him with making the threat, then they too may have violated the state law.

48. A former Justice Department Inspector General believes that Trump's call to the Georgia Secretary of State violated Federal election law. Lipton, *supra* note 47, and accompanying text. If any of Trump's lawyers had advised or assisted him with making the threat, then they too would have violated any federal election law that Trump violated.

49. It is unclear if Trump's lawyers violated the Constitution, but Garrett Epps, a constitutional scholar, characterized what they did as "a coordinated attempt to murder the American system of government," and Nancy Pelosi stated that the Trump's lawyers sought to "subvert the Constitution and undermine public trust in our sacred democratic institutions." Hiltzik, *supra* note 18, and accompanying text.

50. *See supra* note 40 and accompanying text.

51. MODEL RULES, *supra* note 13, at r. 3.3(b).

discussed below. Rather, withdrawal and remedial action, if taken, are only relevant in assessing proper disciplinary sanctions.

III. POSSIBLE SANCTIONS

In this section, we consider the purposes that drive and guide the imposition of ethical discipline and conclude that each strongly supports imposition of discipline on Trump's shadow lawyers. We begin by examining the *ABA Standards for Imposing Lawyer Sanctions*.[52] We then look by way of analogy at the purposes that drive and guide criminal punishment to help illustrate and clarify our arguments.

A. Purpose of and Framework for Imposing Lawyer Sanctions

Lawyer discipline is usually viewed as being imposed "to protect the public."[53] But, as Fred Zacharias effectively argued, characterizing lawyer discipline in this way is overly simplistic and conceals other functions that lawyer discipline serves including: "punishing a miscreant lawyer for past misconduct; . . . deterring future misconduct by the lawyer; . . . deterring future misconduct by other lawyers; . . . [and] enhancing the image of the profession and the way the profession practices law."[54]

Disciplinary authorities, including the highest courts in each jurisdiction ultimately responsible for sanctioning ethical violations, consider the following factors in deciding whether a sanction should be imposed and, if so, what sanction:

1. What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system, or the profession?)
2. What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?)

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52. "The purpose of lawyer disciplinary proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession." STANDARDS FOR IMPOSING LAWYER SANCTIONS 7 (AM. BAR ASS'N 1992), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/sanction_standards.pdf (last visited Mar. 10, 2022).

53. *Id.*

54. Zacharias, *supra* note 12, at 698.

3. What was the extent of the actual or potential injury caused by the lawyer's misconduct? (Was there a serious or potentially serious injury?) and
4. Are there any aggravating or mitigating circumstances?[55]

Trump's shadow lawyers, as well as those who publicly participated in the frivolous election lawsuits, violated their duties to the public, the legal system, and the profession. As the *Standards for Imposing Sanctions* explain:

> In addition to duties owed to clients, the lawyer also owes duties to the general public. Members of the public are entitled to be able to trust lawyers to protect their property, liberty, and their lives. The community expects lawyers to exhibit the highest standards of honesty and integrity, and lawyers have a duty not to engage in conduct involving dishonesty, fraud, or interference with the administration of justice . . . .
>
> Lawyers also owe duties to the legal system. Lawyers are officers of the court, and must abide by the rules of substance and procedure which shape the administration of justice. Lawyers must always operate within the bounds of the law, and cannot create or use false evidence, or engage in any other illegal or improper conduct . . . .
>
> Finally, lawyers owe duties to the legal profession. Unlike the obligations mentioned above, these duties are not inherent in the relationship between the professional and the community. These duties do not concern the lawyer's basic responsibilities in representing clients, serving as an officer of the court, or maintaining the public trust, but include other duties relating to the profession.[56]

Rather than instill trust in the rule of law, Trump's lawyers undermined public trust in the rule of law and the legitimacy of the election process that lies at the heart of democracy. They advanced a false narrative that there

55. STANDARDS FOR IMPOSING LAWYER SANCTIONS, *supra* note 52, at 4–5.
56. *Id.* at 5.

was fraud in the presidential election process and did so by engaging in improper conduct.

In the next sections, we examine aggravating and mitigating factors used by both the *Standards for Imposing Lawyer Sanctions* and the criminal law in assessing and imposing professional discipline and criminal punishment.

B. Acceptance of Responsibility?

Judges routinely consider a defendant's acceptance of responsibility and candor in acknowledging wrongdoing when assessing appropriate criminal punishment. Similarly, a mitigating factor in lawyer disciplinary proceedings is "remorse,"[57] and an aggravating factor is "refusal to acknowledge the wrongful nature of conduct."[58]

We are not aware of any lawyers, from the top to the bottom of the hierarchy of Trump lawyers, who have acknowledged their wrongdoing, the lack of evidence of voter fraud, or the lack of legal merit of the Trump lawsuits. Nor have any, to our knowledge, accepted responsibility for engineering and carrying out the bogus barrage. Rather, they have been silent or defiant. Some have continued in brazen behavior that flaunts ethics rules. For example, Rudy Giuliani has maintained that "[i]t's not my job in a fast-moving case to go out and investigate every piece of evidence that's given to me," and Sidney Powell, another of Trump's lawyers, did not think correcting false statements she made was important.[59] The refusal of Trump's lawyers to admit their wrongdoing and show remorse should weigh heavily against them in the disciplinary process.

57. *Id.* at 18.

58. *Id.* at 17.

59. Peter Wade, *'Not My Job': Rudy Giuliani Admits He Didn't Bother to Vet Ludicrous Election Fraud Claims*, ROLLING STONE (Nov. 5, 2021, 10:28 AM), https://www.rollingstone.com/politics/politics-news/rudy-giuliani-sidney-powell-depositio-dominion-voter-fraud-1253689/ [https://perma.cc/W2EP-9RYU].

C. Deterrence

Ethics authorities can protect the public by deterring unethical conduct. The words deterrence and terror derive from the same Latin verb meaning "to frighten or terrify."[60] Deterrence in both the professional discipline and criminal contexts seeks to reduce unethical conduct and crime through, in Jeremy Bentham's words, "intimidation or terror."[61] State high courts often cite deterrence of the disciplined lawyer, which the criminal law refers to as "specific" deterrence, and deterrence of other lawyers, which the criminal law refers to as "general" deterrence, when imposing discipline.[62]

In our view, it is unlikely that ethical sanctions would specifically deter lawyers such as Rudy Giuliani or Sidney Powell from making false statements and committing other future violations. But sanctioning even some of the Trump lawyers would provide an example likely to generally deter other lawyers, especially younger ones, from emulating their behavior. When state high courts reject the recommendation of a private reprimand as too lenient a sanction, they often state they must impose a public sanction "severe enough to deter other attorneys who might be prone to engage in similar conduct."[63] This is a powerful reason to impose serious sanctions

60. "The word *deter* is rooted in fear. It was borrowed into English around the mid-16th century from the Latin verb *deterrēre*, which in turn was formed by combining *de-*, meaning 'from' or 'away,' with *terrēre*, meaning 'to frighten.'" *Deter*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/deter [https:/perma.cc/GR3B-7HY8].

61. Jeremy Bentham argued that there are three ways to prevent crime: take away the physical ability to violate the law, remove the desire violate the law, or make the individual afraid to violate the law. Bentham explained, "In the first case, there is physical incapacity; in the second, a moral reformation; in the third, there is intimidation or terror of the law." JEREMY BENTHAM, *Punishment and Deterrence*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY & POLICY 53–54 (Andrew von Hirsch & Andrew Ashworth eds., 2d ed. 1998)

62. *See, e.g.*, *In re* Scholl, 25 P.3d 710, 715 (Ariz. 2001) ("The purpose of professional discipline is twofold: (1) to protect the public, the legal profession, and the justice system, and (2) to deter others from engaging in misconduct."); *In re* Lassen, 672 A.2d 988, 994 (Del. 1996) (stating that imposing a sanction "would serve all of the purposes of lawyer discipline by protecting the interests of the public, deterring the errant lawyer and others from engaging in similar conduct in the future, and preserving confidence in the legal system"); Iowa Sup. Ct. Att'y Disciplinary Bd. v. Buchanan, 757 N.W.2d 251, 256 (Iowa 2008) (stating that the purpose of lawyer discipline includes protecting the public, deterring other lawyers from engaging in similar conduct, and maintaining the reputation of the legal profession).

63. Fla. Bar v. Adorno, 60 So. 3d 1016, 1035 (Fla. 2011); *see also Buchanan*, 757 N.W.2d at 256 ("Therefore, the issuance of a private admonition for an ethical infraction does not deter other attorneys from engaging in similar misconduct. Moreover, the failure to impose discipline for an ethical violation diminishes the reputation of the bar as a whole because it sends a message that attorneys may shirk their ethical responsibilities with impunity.").

such as disbarment or suspension from the practice of law on Trump's lawyers, especially those whose unethical conduct was outrageous and notorious.

D. Blameworthiness

Blameworthiness has long played a role in the imposition of criminal punishment. Blameworthiness is typically assessed in proportion to the culpability of an actor's mental state. Similarly, disciplinary authorities and courts consider a lawyer's mental state and whether the lawyer acted intentionally, knowingly, or negligently, in assessing the severity of ethical sanction.[64] Many of the lawyers who perpetrated the bogus barrage clearly had blameworthy mental states. Many, if not most, of Trump's lawyers, for example, must have known there was no supporting evidence of voter fraud. If not, they were certainly reckless regarding the truth. Rudy Giuliani and Sidney Powell have admitted that either they did not check or think it was important to correct false allegations.[65] Even negligence regarding the truth can be sufficient to warrant ethical sanction.[66] In addition, many of the Trump lawyers also apparently acted with the illicit purposes of subverting a valid election and amplifying the corrosive impact of false claims by simply repeating and publicizing them.[67] Blameworthiness, like deterrence, indicates serious sanctions are appropriate.

E. Incapacitation

Another way ethical discipline protects the public is by incapacitating unethical lawyers—eliminating their capacity and opportunity to cause harm. Although ethical sanctions would not incapacitate lawyers such as

64. STANDARDS FOR IMPOSING LAWYER SANCTIONS, *supra* note 52, at 4–5.

65. *See supra* note 59 and accompanying text.

66. In lawyer discipline, "[t]he least culpable mental state is negligence, when a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." STANDARDS FOR IMPOSING LAWYER SANCTIONS, *supra* note 52, at 6. When a lawyer is negligent and violates an ethical obligation, a sanction may be imposed. *See, e.g.*, *In re* Pryor, 864 So. 2d 157, 165 (La. 2004) (suspending lawyer's license to practice law for negligent misconduct resulting from poor office management skills).

67. *See, e.g.*, Wade, *supra* note 59 (stating that Sidney Powell did not think it important to correct false statements that she made).

Giuliani, Powell, or other high-profile offenders the way a prison sentence incapacitates a criminal, they could lose their capacity to act as lawyers. They would not be able to file bogus suits, appear in court, or represent anyone. Though not completely eliminated, their ability to draw attention to themselves by professing to speak about the law with authority and to influence young lawyers who might view them as role models would be reduced if it was widely known they had lost their licenses to practice law. Thus, disbarment and suspension serve the overarching purpose of lawyer discipline by protecting the public through incapacitation.

CONCLUSION

Some legal ethics experts have expressed the view that, while many ethics rules have been violated through the barrage of bogus pro-Trump lawsuits, it is doubtful disciplinary authorities will act,[68] as disciplinary authorities often fail to act if they fear such action may be viewed as "political."[69] If ethics authorities do fail to discipline Trump's lawyers due to such fear, such inaction would be badly misguided. The lawyers who made, promoted, and enabled the baseless claims of voter fraud in more than sixty lawsuits should face discipline as much as, and perhaps more than, any other lawyer, for a number of reasons.

In addition to the sheer number of violations and violators, these lawyers disregarded their oaths to uphold the Constitution and the rule of law by misusing judicial processes to attempt to overturn a valid election.[70] Precisely because they are sworn to uphold the rule of law, they attempted to give, and in the eyes of some *did* give, a false patina of legitimacy to meritless claims. Treating such conduct as "political" and thus exempt from

68. *See, e.g.*, Wolfe, *supra* note 18 (quoting legal ethics experts who doubted that Trump's lawyers would be disciplined).

69. "[L]egal experts say attorney discipline is relatively rare, especially in politically charged disputes." *Id.*

70. The ABA model lawyer's oath states, "I will support the Constitution of the United States and the Constitution of the State of . . . ." REP. OF THE THIRTY-THIRD ANN. MEETING OF THE A.B.A. (1908) at 585. As Leslie Levin points out, only the oaths in Connecticut, Massachusetts, and New Hampshire do not require admitted lawyers to support the Constitution of the United States. Leslie C. Levin, *"This Is Not Normal": The Role of Lawyer Organizations in Protecting Constitutional Norms and Values*, 69 WASH. U. J.L. & POL'Y 173 (2022). Levin notes that several states also require lawyers to defend the constitution. *Id.* at 174–75.

sanction would prevent ethics rules from operating in a context in which they are critically important: the protection of our constitutional democracy.

Two particular points bear repeating in regard to *who* should sanction the Trump lawyers, whether or not they operated in the shadows or openly, and whether such sanctions should be public. First, ethical sanctions should be imposed by ethics authorities regardless of whether federal trial judges have or have not imposed Rule 11 sanctions. Some might argue Trump's lawyers need not be ethically disciplined if they received Rule 11 sanctions. While Rule 11 sanctions, if severe enough, doubtless provide a strong deterrent due to both their monetary and reputational impact, they are unlikely to be adequate for several reasons. Though a federal trial judge may be able to revoke a flagrantly unethical lawyer's admission to practice before that court, such judges are not able to incapacitate such a lawyer by suspending or revoking the lawyer's license to practice law no matter how clearly the lawyer's misconduct warrants suspension or revocation. Only state ethics authorities can protect the public, our justice system, and our system of government by incapacitating dangerous lawyers. In addition, although the ethical and Rule 11 prohibitions against filing meritless suits overlap, the many other ethical rules applicable to the conduct of the Trump lawyers go well beyond what Rule 11 prohibits. Only state ethics authorities can enforce these ethics rules.

Second, it is important that Trump's lawyers be publicly sanctioned due to the egregious and flagrant nature of their misconduct. A lawyer who has been sanctioned under Rule 11 rarely receives public ethical discipline.[71] Those who do receive public ethical discipline for violating the ethical prohibitions on frivolous lawsuits analogous to Rule 11 are usually only the most egregious offenders.[72] Private ethical discipline for the Trump lawyers, in our view, would be seriously misguided.

The frivolous lawsuits seeking to reverse the will of the American people in the 2020 election fueled a lie that continues to resonate in some quarters that the election was stolen. As the sanction order from a Colorado lawsuit stated, the lawyers repeated "in publicly filed documents the inflammatory, indisputably damaging, and potentially violence-provoking

71. Peter A. Joy, *The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers*, 37 LOY. L.A. L. REV. 765, 815 (2004).

72. *Id.*

assertions about the election having been rigged or stolen."[73] In imposing monetary sanctions of over $186,000 to compensate the defendants for attorneys' fees, the federal judge in Colorado stated he took "into account the risk that this substantial sanction might chill zealous advocacy for potentially legitimate claims."[74] He concluded "that the repetition of defamatory and potentially dangerous unverified allegations is the kind of 'advocacy' that needs to be chilled."[75]

Failure to impose public ethical discipline on lawyers who engaged in so flagrantly making and repeatedly promoting false accusations about election fraud would send a false message that there is no ethical dimension to egregious misconduct engaged in by a lawyer representing a political candidate, campaign, or their proxies. In failing to act, ethics authorities would set a dangerous precedent that would encourage such meritless cases in the future whenever a political sore loser or their supporters dislike the outcome of a valid election. To return to our criminal law analogy one final time, if prosecutors and police announced they would no longer enforce criminal law, it would invite lawlessness and chaos. The same is true if ethics authorities are unwilling to enforce ethics rules against the Trump lawyers.

73. O'Rourke v. Dominion Voting Sys. Inc., No. 20-CV-03747-NRN, 2021 WL 3400671, at *23 (D. Colo. Aug. 3, 2021).

74. O'Rourke v. Dominion Voting Sys. Inc., No. 20-CV-03747-NRN, 2021 WL 5449070, at *9 (D. Colo. Nov. 22, 2021) (specifying the amount of sanction award against plaintiffs' counsel).

75. *Id.*