The Case for Proactive Bar Sanctions to Combat the Next Big Lie

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Some say the job of a lawyer is to lie on behalf of a client. But longstanding ethical canons are clear: lawyers may not promote false statements of fact or law while representing their clients. This basic tenet of professional responsibility helps to preserve the integrity of the legal profession and ensure public confidence in the administration of justice. And if lawyers violate their ethical duties, they are subject to disciplinary proceedings.

The 2020 election tested this system. Attorneys for former President Donald J. Trump made a series of false statements to the public and in court papers that President Joe Biden won the election because of fraud. This narrative became the "Big Lie," and it continues to percolate. Although some lawyers eventually faced professional discipline, disciplinary proceedings took months, and sometimes years, to initiate. During that time, millions of Americans came to believe these falsehoods.

To stop the next big lie in its tracks, this Note argues for a more proactive approach to lawyer regulation. Well-established ethical rules enable bar authorities to begin investigations as soon as lawyers knowingly make materially false statements to third parties or the public. Therefore, this Note argues, not only can bar authorities act, but they must proceed swiftly in cases where false statements have spillover effects beyond the parties to an individual case or transaction. Doing so would erect a wall between the legal profession as a whole and falsehoods promoted by its members, sending a strong deterrent message to would-be liars and maintaining the integrity of the legal profession. Moreover, more aggressive action by ethics counsel would survive First Amendment scrutiny and promote truth-telling in all contexts, not just in political or election cases.

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Introduction

Lawyers rarely win popularity contests.[1] In part, the legal profession's failure to sway public opinion results from lawyers' ethical duty to advocate for their clients irrespective of the heinous, despicable acts they may have committed—even though a lawyer's "representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."[2] Lawyers are not just their clients' representative; they frequently promote their clients'

1. *See, e.g.*, WILLIAM SHAKESPEARE, HENRY VI, PART 2 act 4, sc. 2, l. 75 ("The first thing we do, let's kill all the lawyers."); *Arrested Development: Altar Egos* (Fox television broadcast Mar. 17, 2004) ("These are lawyers. That's Latin for 'liar.'"); Christopher Ryan, *No Longer Perry Mason: How Modern American Television's Portrayal of Attorneys Shifts Public Opinion*, 17 U. DEN. SPORTS & ENT. L.J. 133, 133–34 (2015) ("[I]t is much more difficult to find any evidence of popular opinion showing anything other than contempt for attorneys in general.").

2. MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2020); *id.* r. 1.2(b).

unpopular positions in the public discourse.[3] And often, they embrace the line between truth and fiction.[4]

Enter the "Big Lie"[5] that President Donald J. Trump actually won the 2020 presidential election.[6] The Big Lie derives from voting behavior: a disproportionate number of President Joe Biden's voters utilized mail-in ballots, which were tallied after election-day votes, creating an illusion of a Trump victory that would fade as more ballots were counted.[7] Before, during, and after the 2020 election, President Trump claimed that this voting behavior was instead the product of ballot-stuffing and illegal voting.[8] He now faces criminal charges for conspiring to overturn the election based on false claims of fraud.[9]

Lawyers enabled President Trump to promote these fabrications.[10] Before thousands of Trump supporters stormed the Capitol on January 6,

3. *See, e.g.*, Stephen Jones, *A Lawyer's Ethical Duty to Represent the Unpopular Client*, 1 CHAPMAN L. REV. 105, 116 (1998) (defending a lawyer's ethical duty to protect a criminal defendant's right to a fair trial in the media as the lawyer for Timothy McVeigh, the Oklahoma City bomber).

4. *See, e.g.*, Ken Isaacson, *Free to Fudge the Facts*, N.J. LAW., Dec. 2007, at 28, 29 ("[T]here are cynics who'd even say that lawyers write fiction for a living. We've all heard the complaint that litigation isn't about finding the truth, it's about finding whose version of the truth will prevail.").

5. The term "Big Lie" originated with Adolf Hitler in his infamous book, *Mein Kampf*, accusing Jews of lying about German collapse during World War I. Zachary B. Wolf, *The 5 Key Elements of Trump's Big Lie and How It Came to Be*, CNN (May 19, 2021, 7:17 PM), https://www.cnn.com/2021/05/19/politics/donald-trump-big-lie-explainer/index.html [https://perma.cc/PX53-Q4ZP]. Mindful of this history, this Note uses the term when referring to 2020 election lies because it has been applied widely in this context. *See id.* (describing the term's widespread adoption).

6. *See, e.g.*, Celine Castronuovo, *Biden Says Cruz, Other Republicans Responsible for 'Big Lie' that Fueled Capitol Mob*, THE HILL (Jan. 8, 2021, 7:19 PM), https://thehill.com/homenews/administration/533449-biden-says-cruz-other-republicans-responsible-for-big-lie-that-fueled/ [https://perma.cc/TW29-GM9V] (quoting then-President-elect Biden referring to Trump winning the election as "the big lie"); Brian Stelter, *Experts Warn that Trump's 'Big Lie' Will Outlast His Presidency*, CNN BUSINESS (Jan. 11, 2021, 12:33 AM), https://www.cnn.com/2021/01/11/media/trump-lies-reliable-sources/index.html [https://perma.cc/YU2W-YU7U] (mentioning a historian who referred to the "big lie" that Trump won the election); Melissa Block, *Can the Forces Unleashed by Trump's Big Election Lie Be Undone?*, NPR (Jan. 16, 2021, 5:00 AM), https://www.npr.org/2021/01/16/957291939/can-the-forces-unleashed-by-trumps-big-election-lie-be-undone [https://perma.cc/7NWV-29XV] (discussing the origins of the term "Big Lie" and its application to the 2020 election).

7. H.R. REP. No. 117-663, at 197–98 (2022).

8. *Id.* at 200–03.

9. Indictment at 3, United States v. Trump, No. 1:23-cr-00257-TSC (D.D.C. Aug. 1, 2023), Doc No. 1 [hereinafter DC Indictment]; Indictment at 15, State v. Trump, No. 23SC188947 (Ga. Sup. Ct. Aug. 14, 2023) [hereinafter GA Indictment].

10. *See infra* Part II. Although much of the discourse surrounding former President Trump is political, this Note does not focus on the 2020 election to express a political opinion. Instead, this Note uses recent cases involving the Big Lie and lawyer discipline as a basis for analyzing the current system of professional regulation of lawyers.

2021, Trump's lawyers peddled the Big Lie at his rally on the Ellipse.[11] On national television, Americans saw what appeared to be the culmination of efforts to champion lies to change the ultimate outcome of the election.

The pushback was fierce, especially against the lawyers. In public, these lawyers have faced widespread criticism.[12] In court, many have faced sanctions.[13] Some lawyers even face criminal liability for their roles in spreading the Big Lie.[14]

Yet despite the public repercussions, the Big Lie still percolates. A September 2022 poll found that roughly 1/3 of Americans and 61% of Republicans believe that President Biden won the 2020 election due to voter fraud.[15] As shown, lawyers played a significant role spreading, maintaining, and advancing the Big Lie—even despite facing serious professional repercussions for doing so. And those repercussions took years to develop. Many of the lawyers who spread the Big Lie have exhibited no remorse for their conduct.[16] With systemic doubt sowed, and the election delegitimized,

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11. *See, e.g.*, *Rudy Giuliani Speech Transcript at Trump's Washington, D.C. Rally: Wants 'Trial by Combat'*, REV (Jan. 6, 2021) [hereinafter *Giuliani Transcript*], https://www.rev.com/blog/transcripts/rudy-giuliani-speech-transcript-at-trumps-washington-d-c-rally-wants-trial-by-combat [https://perma.cc/8KQN-2T6D] (quoting Rudy Giuliani, who stated, "Over the next 10 days, we get to see the machines that are crooked, the ballots that are fraudulent, and if we're wrong, we will be made fools of. But if we're right, a lot of them will go to jail. Let's have trial by combat."); *id.* (quoting John Eastman, who asserted, "We know there was fraud, traditional fraud that occurred. We know that dead people voted. But we now know because we caught it live last time in real time, how the machines contributed to that fraud.").

12. *See, e.g.*, Allie Bice, *Christie Says Trump Legal Team 'A National Embarrassment'*, POLITICO (Nov. 22, 2020, 9:30 PM), https://www.politico.com/news/2020/11/22/christie-donald-trump-legal-embarassment-election-439251 [https://perma.cc/45L8-M8QC] (describing Trump supporter Chris Christie's criticism of the Trump election lawyers); Lizzie Widdicombe, *The Motley Crew Leading Trump's Election Challenges*, NEW YORKER (Nov. 21, 2020), https://www.newyorker.com/magazine/2020/11/30/the-motley-crew-leading-trumps-election-challenges [https://perma.cc/AG3C-526Q] ("But the effort—to overturn an election that the candidate lost by nearly six million votes—seems foolhardy.").

13. *See infra* Part II.

14. *See* GA Indictment, *supra* note 9, at 13 (charging Trump and numerous attorneys with racketeering); *see also infra* subpart II(D).

15. Mark Murray, *Poll: 61% of Republicans Still Believe Biden Didn't Win Fair and Square in 2020*, NBC NEWS (Sept. 27, 2022, 11:21 AM), https://www.nbcnews.com/meet-the-press/meetthepressblog/poll-61-republicans-still-believe-biden-didnt-win-fair-square-2020-rcna49630 [https://perma.cc/5NBP-XNUC].

16. *See, e.g.*, Jeremy Roebuck, *Rudy Giuliani Doubles Down on False Pennsylvania Election Fraud Claims in Disciplinary Hearing*, PHILA. INQUIRER (Dec. 5, 2022, 5:35 PM), https://www.inquirer.com/news/rudy-giuliani-dc-disciplinary-board-hearing-bar-pennsylvania-election-20221205.html [https://perma.cc/D24F-TLSA] (describing Rudy Giuliani "doubl[ing] down on his false claims of a stolen election" in D.C. disciplinary proceedings); Danny Hakim & Michael S. Schmidt, *John Eastman Is Unbowed as Investigations Proliferate*, N.Y. TIMES (Jan. 19, 2023), https://www.nytimes.com/2023/01/19/us/politics/john-eastman-investigations.html [https://perma.cc/9QZC-EFWX] (explaining John Eastman's continued belief in voter fraud claims and his argument that he was acting in subjective good faith when advising Trump on them). *But see*

these lawyers arguably accomplished their client's objective to undermine President Biden's victory and undercut his presidency, with some maintaining their law licenses in good standing.[17]

This Note argues for a better approach to lawyer regulation to protect the legal profession as a whole from falsehoods promoted by some of its members. Professional ethics rules provide a strong basis for attorney sanctions the moment an attorney makes a false statement on behalf of a client that has spillover effects beyond that client's immediate or pending proceeding.[18] State bar associations should begin sanctions proceedings as expeditiously as possible to prevent the untruthful assertion from improperly influencing public opinion.[19] As applied to the Big Lie, swift and decisive state bar action would have deterred other attorneys from continuing to peddle falsehoods while also publicly sanctioning the most prominent election liars shortly after the lie left those attorneys' mouths. Because attorney false statements are not protected speech,[20] and because there are few serious, systemic lies, bar authorities have both the capacity and the obligation to act more decisively to uphold the integrity of the legal profession.

This Note proceeds as follows. Part I articulates the procedural and substantive framework for bar sanctions. Part II then illustrates this problem in the context of the Big Lie. Finally, Part III articulates the precise proposal for more proactive lawyer regulation, rebuts prudential and practical criticisms, and defends against First Amendment scrutiny.

I. Framework and Legal Foundation for Bar Sanctions

In this Part, I show that nothing in current ethics rules needs to change to effectuate a more proactive bar sanctions regime. State bar disciplinary proceedings, as well as judicial sanctions procedures, provide a well-established vehicle for sanctioning dishonest lawyers. Longstanding ethics rules prohibit lawyers from lying on behalf of their clients.[21] State bar authorities have all the tools they need to act more decisively; they simply must reach into their toolkit.

Brent D. Griffiths, *Ginni Thomas Told the Jan. 6 Committee She 'Regret' Texting Mark Meadows About a 'Coup' and Pushing Sidney Powell's 'Kraken' Plan*, INSIDER (Dec. 30, 2022, 11:50 AM) https://www.businessinsider.com/ginni-thomas-regret-texts-mark-meadows-coup-january-6-committee-2022-12 [https://perma.cc/2WB6-MYBL] (describing Ginni Thomas's interview with the January 6th Committee, in which she said that she "regret[s]" her texts that contained election falsehoods).

17. *See infra* subparts II(B)–(C).

18. *See infra* subpart I(B).

19. *See infra* Part III.

20. *See infra* notes 209–11 and associated text.

21. *See infra* subpart I(B).

A. Procedure Governing Attorney Sanctions

There are several types of attorney sanctions. The Federal Rules of Civil Procedure contain a bevy of sanctions provisions pertaining to litigation. Specifically, Rule 11 allows courts to impose sanctions for filing papers that are improper, frivolous, or lacking an evidentiary basis.[22] Rule 11's "central purpose" is deterrence and efficient administration of judicial proceedings.[23] Similarly, other discovery provisions authorize sanctions for abusing the discovery process.[24] Additionally, federal courts possess inherent contempt power to sanction abuse of the judicial process.[25] Many state courts possess similar contempt powers.[26]

Conversely, state bar discipline is an administrative measure designed to police all lawyers, not just litigators.[27] State bar discipline serves many purposes related to shielding the public from abuse and preserving the integrity of the legal profession.[28] Traditional goals include protecting the public, safeguarding the administration of justice, and maintaining confidence in the legal profession.[29] Thus, bar authorities may act independent of filings in litigation, such as when a lawyer commits a crime or fails to comply with bar disciplinary authorities.[30]

More fundamentally, though, bar sanctions serve a different purpose than Rule 11 proceedings. Although the purpose of Rule 11 is to promote efficiency and to prevent lawyers from delaying court proceedings with frivolous litigation, state bar discipline is broader, serving to protect the

22. FED. R. CIV. P. 11(b)–(c).

23. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990).

24. *See, e.g.*, FED. R. CIV. P. 26(g)(3) (allowing sanctions for improper certification of initial disclosures); *id.* 30(d)(2) (allowing sanctions for anyone "who impedes, delays, or frustrates" a deposition); *id.* 45(d)(1) (allowing courts to impose sanctions on attorneys who fail to comply with subpoenas); FED. R. APP. P. 38 (authorizing courts to award sanctions for frivolous appeals); 28 U.S.C. § 1927 (allowing courts to impose sanctions for conduct that "unreasonably and vexatiously" adds costs to litigation).

25. Chambers v. NASCO, Inc., 501 U.S. 32, 43–46 (1991).

26. Douglas R. Richmond, *Litigation Sanctions Against Lawyers and Due Process*, 48 FLA. ST. U. L. REV. 945, 945–46 & nn.7–8 (2021).

27. Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 687–88 (2003).

28. *See In re* Ruffalo, 390 U.S. 544, 550 (1968) ("Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer."); Whitney A. McCaslin, Note, *Empowering Ethics Committees*, 9 GEO. J. LEGAL ETHICS 959, 961 (1996) (articulating purposes of attorney discipline).

29. Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 17–18 (1998); ANNOTATED STANDARDS FOR IMPOSING LAW. SANCTIONS 1.1 & annot. at 1, 3, 5 (AM. BAR ASS'N 2019).

30. *See, e.g.*, D.C. Bar Rule XI, § 2(b) (providing grounds for attorney discipline); *see also* Barry R. Temkin, *Deception in Undercover Investigations: Conduct-Based vs. Status-Based Ethical Analysis*, 32 SEATTLE U. L. REV. 123, 147 (2008) (discussing aggressive efforts by Minnesota state ethics prosecutors, or the "lawyer police").

public and the overall legal profession from unethical behavior by lawyers.[31] The two types of sanctions systems operate in parallel to achieve different results.[32] In short, different contexts demand different approaches to lawyer regulation.[33]

In 1989, the ABA adopted the Model Rules for Lawyer Disciplinary Enforcement, which outline the procedures for bar disciplinary proceedings. Under the ABA's guidelines, a multistep process ensues when ethics prosecutors first learn of lawyer misconduct, either from complaints or any other sources—which can include their own observations.[34] Bar authorities may dismiss non-meritorious complaints if they fail to state misconduct; otherwise, disciplinary counsel must conduct an investigation.[35] Before recommending disciplinary action, ethics prosecutors must notify the offending attorney and provide an opportunity to be heard.[36]

Bar authorities may also move the court for an interim suspension in cases posing an "immediate threat to the public and the administration of justice" once authorities have gathered sufficient evidence and made efforts to notify the offending lawyer.[37] Although an interim suspension is a severe step, it is authorized when there is a substantial threat of serious harm—especially widespread public harm.[38] Such swift action is designed to protect the public, particularly from repeat offenders, regardless of the violator's intent.[39]

Formal charges then follow with the state's disciplinary board, which can convene a hearing committee to review evidence in adversarial proceedings akin to a trial.[40] The state disciplinary board can then review the findings and issue a decision, or decline to review the committee's findings

31. *See* MODEL RULES FOR LAW. DISCIPLINARY ENF'T r. 1 cmt. (AM. BAR ASS'N 2002) (arguing that the "highest priority of the judicial branch" should remain "[p]roviding a regulatory system to deter unethical behavior").

32. *See* 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, 814–15 (2004) (articulating differences between Rule 11 proceedings and state bar discipline).

33. *See* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 814–17 (1992) (discussing how the different contexts of legal practice affect the enforcement of legal ethics canons).

34. MODEL RULES FOR LAW. DISCIPLINARY ENF'T r. 11A & cmt. (AM. BAR ASS'N 2002).

35. *Id.*

36. *Id.* r. 11B(2).

37. *Id.* r. 20 & cmt.

38. Arthur F. Greenbaum, *Administrative and Interim Suspensions in the Lawyer Regulatory Process—A Preliminary Inquiry*, 47 AKRON L. REV. 65, 106, 110–11 (2014).

39. *Id.* at 114–15.

40. MODEL RULES FOR LAW. DISCIPLINARY ENF'T r. 11D (AM. BAR ASS'N 2002).

and simply carry out its recommendation.[41] Offending lawyers must have notice and an opportunity to be heard prior to the imposition of sanctions.[42] Courts then have discretion to review the board's decision via appeal.[43]

Bar authorities have wide discretion to decide on appropriate sanctions.[44] Sanctions assume many forms: suspension and disbarment from practice, which are punishments designed to incapacitate lawyers to prevent them from committing future harms; reprimands and admonitions, which are expressions of social condemnation; and probation and mandatory education, which are rehabilitative measures aimed at treating short-term lapses in behavior.[45]

B. Substantive Bases for Attorney Sanctions

There are several theories of liability for lawyers who promote systemic lies. Notably, these theories of liability already exist and do not require promulgation of new rules or percolation in the courts.[46] Instead, they reflect longstanding ethical responsibilities of lawyers to the legal profession. After all, the ABA Model Rules have been adopted in whole or in part by every jurisdiction in the United States.[47] The Model Rules contain several provisions designed to promote the integrity of the profession and provide pathways to liability for misbehaving lawyers.

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41. *Id.* r. 11E. Review is only authorized if (a) the respondent or the disciplinary counsel filed objections or (b) a majority of the full board votes to review the matter. *Id.* If the committee recommended disbarment or suspension and the board declines to review, it must transmit the committee's report to the reviewing court with a statement that the board declined to review the matter. *Id.*

42. *See In re* Ruffalo, 390 U.S. 544, 550 (1968) (recognizing attorneys' right to procedural due process); Richmond, *supra* note 26, at 947–49, 948 nn. 24–28 (collecting cases summarizing due process requirements across jurisdictions).

43. MODEL RULES FOR LAW. DISCIPLINARY ENF'T r. 11F (AM. BAR ASS'N 2002).

44. *See* ANNOTATED STANDARDS FOR IMPOSING LAW. SANCTIONS 1.3 (AM. BAR ASS'N 2019) (stating that the ABA Standards are a "model" that promotes "flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct").

45. Levin, *supra* note 29, at 20–25.

46. Alex Goldstein, Note, *The Attorney's Duty to Democracy: Legal Ethics, Attorney Discipline, and the 2020 Election*, 35 GEO. J. LEGAL ETHICS 737, 764–65 (2022).

47. *See Jurisdictional Rules Comparison Charts*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts [https://perma.cc/QL9H-U2MP]; Renee Knake Jefferson, *Lawyer Lies and Political Speech*, 131 YALE L.J.F. 114, 130 (2021) ("Every jurisdiction has adopted a version of the Model Rules' duty of candor, ban on frivolous litigation, and prohibition against knowingly false statements of material facts to third parties."). For a state-by-state survey of ethics procedure and substantive rules, see generally Debra Moss Curtis, *Attorney Discipline Nationwide: A Comparative Analysis of Process and Statistics*, 35 J. LEGAL PRO. 209 (2011).

1. The Duty of Candor.—Lawyers have a longstanding ethical obligation to tell the truth when conducting business.[48] Today, this obligation takes the form of Model Rule 4.1(a) as the core principle preventing lawyers from making false statements. Adapted in substantially similar form in all jurisdictions, it states: "In the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person."[49] The Restatement (Third) of the Law Governing Lawyers contains similar language: "A lawyer communicating on behalf of a client with a nonclient may not: (1) knowingly make a false statement of material fact or law to the nonclient, [or] (2) make other statements prohibited by law."[50] Breaking down this rule, a lawyer must have (1) knowingly made a (2) material (3) false statement of law or fact (4) to a third person (5) while representing a client.[51]

On its face, Rule 4.1's duty of candor extends to statements made both to third persons and the general public.[52] Thus, the duty of candor encompasses lies made during the course of representing a client—whether made at the negotiating table, the boardroom, or a press conference.[53] The phrase "[i]n the course of representing a client" logically encompasses a variety of advocacy, so attorneys who peddle falsehoods at the request of their clients or to promote their client's case fall within the ambit of the rule. Just because a lawyer lied to the general public does not mean that the lawyer did not "communicat[e] on behalf of a client with a nonclient."[54] Accordingly, the duty of candor provides a broad basis for attorney sanctions.

Lawyers' obligations extend further once proceedings are pending before a tribunal.[55] Model Rule 3.3 prevents a lawyer from "knowingly . . . (1) mak[ing] a false statement of fact or law to a tribunal or fail[ing] to correct a false statement of material fact or law previously made to the tribunal by

48. *See* Raymond J. McKoski, *The Truth Be Told: The Need for a Model Rule Defining a Lawyer's Duty of Candor to a Client*, 99 IOWA L. REV. BULL. 73, 76 (2014) (describing a brief history of the duty of candor).

49. MODEL RULES OF PRO. CONDUCT r. 4.1(a) (AM. BAR ASS'N 2020); *see also Variations of the ABA Model Rules of Professional Conduct: Rule 4.1: Truthfulness in Statements to Others*, AM. BAR ASS'N (Feb. 23, 2022), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-4-1.pdf [https://perma.cc/N78P-2BT2] (illustrating the wide adoption of Model Rule 4.1 verbatim).

50. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 98 (AM. L. INST. 2000).

51. *Id.*; MODEL RULES OF PRO. CONDUCT r. 4.1(a) (AM. BAR ASS'N 2020).

52. McKoski, *supra* note 48, at 76.

53. *See* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: A STUDENT'S GUIDE § 4.1-2, at 903–05 (2013) (explaining that the duty of candor extends to all lies made while representing a client).

54. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 98 (AM. L. INST. 2000).

55. A tribunal includes courts, arbitrations, legislative proceedings, administrative proceedings, or "other bod[ies] acting in an adjudicative capacity." MODEL RULES OF PRO. CONDUCT r. 1.0(m) (AM. BAR ASS'N 2020).

the lawyer."[56] Notably, Model Rule 3.3 omits the materiality requirement for affirmative statements, so any false statement made knowingly to a tribunal provides a basis for sanctions.[57] The purpose of this rule is to prevent lawyers in adversarial proceedings from misleading the tribunal.[58]

To that end, Model Rule 3.6 also provides that a lawyer "shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."[59] The purpose of Rule 3.6 is to balance the right to a fair trial with free speech rights of parties to a judicial proceeding by preventing only lawyers from speaking in a manner that could prejudice the ongoing proceeding.[60] The sanctions are steep: disbarment is the standard for intentionally deceiving the tribunal by making a false statement.[61]

Model Rules 3.3 and 3.6 help to regulate false statements made by lawyers once litigation is ongoing. Almost certainly, the duty of candor to the tribunal, as well as Rule 11, have prevented lawyers from repeating false claims of voter fraud in court documents and proceedings, illustrating their effectiveness.[62] The backstop of Rule 3.6 ensures that lawyers do not prejudice ongoing judicial proceedings by making statements that would taint the jury pool. Although Rule 3.6 does not require statements to be false, widespread election lies could taint a jury—particularly in states like Arizona that lack peremptory strikes[63]—if a judge refuses to excuse a juror who believes falsehoods spread by attorneys through mass media.

2. Reporting Requirements.—As members of a self-regulating profession, lawyers have a duty to report professional misconduct. Model Rule 8.3 embodies that principle: lawyers who know of another lawyer's violation of the rules that "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform

56. MODEL RULES OF PRO. CONDUCT r. 3.3(a) (AM. BAR ASS'N 2020).

57. *Id.*

58. *Id.* cmt. 2.

59. MODEL RULES OF PRO. CONDUCT r. 3.6(a) (AM. BAR ASS'N 2020).

60. *Id.* cmts. 1, 3.

61. ANNOTATED STANDARDS FOR IMPOSING LAW. SANCTIONS 6.11 (AM. BAR ASS'N 2019).

62. *See* Tessa Berenson, *Donald Trump and His Lawyers Are Making Sweeping Allegations of Voter Fraud in Public. In Court, They Say No Such Thing*, TIME (Nov. 20, 2020, 3:13 PM), https://time.com/5914377/donald-trump-no-evidence-fraud/ [https://perma.cc/N28F-X8GK] (describing how Trump attorneys have backed away from their most scurrilous claims of voter fraud in court proceedings).

63. Debra Cassens Weiss, *Some States Seek to Eliminate Racial Bias in Jury Selection with Peremptory-Challenge Changes*, ABA JOURNAL (Dec. 22, 2021, 3:32 PM), https://www.abajournal.com/news/article/some-states-seek-to-eliminate-racial-bias-in-jury-selection-with-peremptory-challenge-changes [https://perma.cc/T8QK-JJ6J].

the appropriate professional authority."[64] That obligation is limited only to serious offenses.[65] The signature case involving the rule, *In re Himmel*,[66] concerned sanctions against a lawyer who failed to report the misconduct of his client, an attorney who illegally misused settlement funds, even though his client instructed him not to file a report.[67] Furthermore, the quantum of evidence necessary to trigger the reporting obligation is significant.[68]

Accordingly, Rule 8.3 is unlikely to provide a firm basis for sanctioning dishonest attorneys. For one, the obligation to report falls on other lawyers, not the lawyer who makes the false statement. Those other lawyers may lack the requisite knowledge of both the false statement itself and what the dishonest lawyer knew. A lawyer does not have any obligation to report another lawyer based on a belief that the lawyer is lying. Instead, that belief must be concrete to trigger the duty to report. And the only other lawyers who would possess the requisite knowledge are likely associates of the dishonest lawyer, so they would otherwise be subject to discipline.[69]

3. Misconduct Rules.—Finally, even though any violation of the rules is sanctionable,[70] additional rules defining professional misconduct provide further avenues for liability. Model Rule 8.4 prohibits lawyers from "(c) engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation; [or] (d) engag[ing] in conduct that is prejudicial to the administration of justice."[71] The conduct covered by Rule 8.4 neither incorporates all criminal conduct nor even requires a crime, as the rule reflects the principle that "a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice."[72] Advocacy on behalf of a client is a type of conduct incorporated by the rule.[73]

64. MODEL RULES OF PRO. CONDUCT r. 8.3(a) (AM. BAR ASS'N 2020); *see also* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 5 (AM. L. INST. 2000) (requiring reporting of conduct "raising a substantial question of the lawyer's honesty or trustworthiness").

65. MODEL RULES OF PRO. CONDUCT r. 8.3 cmt. 3 (AM. BAR ASS'N 2020) ("This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. . . . The term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.").

66. 533 N.E.2d 790 (Ill. 1988).

67. *Id.* at 794–95.

68. Ronald D. Rotunda, *The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of* Himmel, 1988 U. ILL. L. REV. 977, 985–86 (1988).

69. *See infra* note 76.

70. MODEL RULES OF PRO. CONDUCT r. 8.4(a) (AM. BAR ASS'N 2020); ANNOTATED STANDARDS FOR IMPOSING LAW. SANCTIONS 2.1 (AM. BAR ASS'N 2019).

71. MODEL RULES OF PRO. CONDUCT r. 8.4(c)–(d) (AM. BAR ASS'N 2020).

72. *Id.* r. 8.4 cmt. 2.

73. *Id.* cmt. 4.

Additionally, certain sets of lawyers possess heightened ethical duties. A lawyer exercising a public office "assume[s] legal responsibilities going beyond those of other citizens."[74] This provision would apply to officials, both public and private, who misuse their positions of authority by promoting systemic lies. Lawyers also face discipline in any jurisdiction where they provide legal services.[75]

Lastly, Rule 8.4 contains inchoate and accessorial liability.[76] Separately, liability also extends to supervising lawyers[77] and lawyers supervising non-lawyers.[78] Lawyers cannot use surrogates or agents to commit violations of the rules.[79] Combining these provisions, lawyers cannot violate the rules individually, collectively, or through acts of another lawyer, non-lawyer under their supervision, or agent. The broad array of punishable conduct closes loopholes and ensures that lawyers are subject to discipline for their actions, not simply for the identity of the offender.

II. Insufficient Enforcement Shown by Recent Sanctions Proceedings

The aftermath of the Big Lie illustrates the failure of state bar authorities to take decisive action to stop lawyers from spreading falsehoods. In this Part, I show how state bar authorities failed to act swiftly to stop election lies in their tracks, using several of the most prominent Big Lie attorneys as examples.

A. Rudy Giuliani

Rudy Giuliani was once the United States Attorney for the Southern District of New York, the Mayor of New York, and a presidential candidate

74. *Id.* cmt. 7. This heightened duty covers private positions of trust as well, such as "trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization." *Id.*

75. MODEL RULES OF PRO. CONDUCT r. 8.5(a) (AM. BAR ASS'N 2020) ("A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction.").

76. MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS'N 2020) ("It is professional misconduct for a lawyer to . . . (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another[.]").

77. *Id.* r. 5.1(c) (detailing the circumstances under which "[a] lawyer shall be responsible for another lawyer's violation of the Rules," such as when the lawyer "orders" or "ratifies the conduct," or the lawyer has managerial or supervisory authority and "fails to take reasonable remedial action" despite having knowledge of an opportunity to avoid or mitigate the harm).

78. *Id.* r. 5.3 (outlining the circumstances where supervising lawyers are responsible for nonlawyers' conduct).

79. *Id.* r. 8.4 cmt. 1 ("Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf.").

before playing a critical role in spreading the Big Lie.[80] Giuliani became a personal attorney for President Trump, leading his team of attorneys heading into and following the 2020 election.[81] The day after the election, Giuliani tweeted that he was traveling to Philadelphia with Trump's legal team and that there was "[m]assive cheating."[82] At a press conference the following day, Giuliani claimed that mail-in ballots were fraudulent and that the counting of ballots in Philadelphia was illegitimate because elections observers were not granted access as required by law.[83]

These statements by Giuliani were objectively false.[84] Yet Giuliani persisted, reaching an apex at an infamous press conference at Four Seasons Total Landscaping, in which he repeated the lies about voting irregularities, poll watchers being denied entry to ballot-counting locations, and garden-variety voter fraud.[85] Giuliani continued to lead President Trump's legal team in post-election legal challenges to President Biden's victory, culminating in a speech at President Trump's January 6th rally in which he repeated claims about "the machines that are crooked, the ballots that are fraudulent," and the "deliberate[] chang[ing]" of votes by Democrats.[86] He called for a "trial by combat" of claims that President Biden stole the 2020 election at the January 6th rally, after which protestors stormed the Capitol.[87]

Ultimately, on June 24, 2021, a New York court suspended Giuliani's New York law license over his post-election conduct.[88] The court found

80. *Rudy Giuliani Fast Facts*, CNN (Sept. 6, 2023, 2:26 PM), https://www.cnn.com/2013/05/30/us/rudy-giuliani-fast-facts [https://perma.cc/HU3B-2A5G].

81. Archie Bland, *Rudy Giuliani: From Hero of 9/11 to Leader of Trump's Last Stand*, GUARDIAN (Nov. 6, 2020, 10:18 AM), https://www.theguardian.com/us-news/2020/nov/06/rudy-giuliani-from-hero-of-911-to-leader-of-trumps-last-stand [https://perma.cc/Y4DD-2MVR].

82. Rudy W. Giuliani (@RudyGiuliani), TWITTER (Nov. 4, 2020, 6:52 PM), https://twitter.com/RudyGiuliani/status/1324062078731231233 [https://perma.cc/DSZ5-NP6F].

83. Tara Subramaniam & Mark Morales, *Fact Check: Rudy Giuliani and Eric Trump's Press Conference Was Filled with False Claims About Ballots in Pennsylvania*, CNN (Nov. 5, 2020, 2:11 PM), https://www.cnn.com/2020/11/05/politics/eric-rudy-pa-presser-fact-check/index.html [https://perma.cc/8NZ6-83LN].

84. *Id.*

85. Katelyn Burns, *The Trump Legal Team's Failed Four Seasons Press Conference, Explained*, VOX (Nov. 8, 2020, 11:50 AM), https://www.vox.com/policy-and-politics/2020/11/8/21555022/four-seasons-landscaping-trump-giuliani-philadelphia-press-conference [https://perma.cc/J9J7-U6CF].

86. Veronica Stracqualursi, *Trump Puts Giuliani in Charge of Post-Election Legal Fight After Series of Losses*, CNN (Nov. 16, 2020, 9:00 AM), https://www.cnn.com/2020/11/14/politics/rudy-giuliani-trump-lawsuits-2020-election/index.html [https://perma.cc/GA8W-3T8C]; *Giuliani Transcript*, *supra* note 11.

87. *Giuliani Transcript*, *supra* note 11. Giuliani later claimed that he was making a reference to Game of Thrones. Julie Gerstein, *Rudy Giuliani Says His 'Trial by Combat' Comment During Trump's January 6 Rally Was a 'Game of Thrones' Reference, Not a Call to Violence*, INSIDER (Jan. 13, 2021, 6:57 AM), https://www.businessinsider.com/giuliani-claims-trial-by-combat-comment-game-of-thrones-reference-2021-1 [https://perma.cc/P3L9-YYJH].

88. *In re* Giuliani, 197 A.D.3d 1, 1 (N.Y. App. Div. 2021) (per curiam).

violations of New York's version of Model Rules 3.3, 4.1 and 8.4.[89] The court also highlighted that Mr. Giuliani made those statements outside the courtroom.[90] Additionally, the court rejected Giuliani's as-applied First Amendment defense.[91] Separately, Giuliani has disciplinary proceedings pending in Washington, D.C.[92]

Four years after the 2020 election, neither set of proceedings has resulted in disbarment. Only the specter of defamation liability and litigation expense prompted Giuliani to stipulate to defaming two Georgia election workers.[93] Moreover, Giuliani now faces criminal charges for his role in President Trump's criminal conspiracy.[94]

Bar authorities in New York and Washington could have acted more swiftly, even before the Four Seasons Total Landscaping press conference. As discussed in subpart I(A), they could have moved for an interim suspension based on the risk of harm posed by Giuliani's lies violating Rule 4.1—a finding the New York court ultimately made months later.[95] Notably, the court referenced several statements made outside of court, such as unsupported claims that non-citizens voted in Arizona made to Arizona legislators and on his podcast.[96] The lengthy list of falsities also demonstrates that Giuliani's statements in the immediate aftermath of the election were not anomalous but instead represented a pattern of deliberate dishonesty. Waiting months to ultimately issue an interim suspension served primarily to lengthen the judicial opinion. On the other hand, immediate state bar discipline would have erected a wall between Giuliani's statements and the legal profession.

89. *See generally id.* (articulating multiple violations of New York's Rules of Professional Conduct).

90. *Id.* at 9–10.

91. *Id.* at 3.

92. Margaret Hartmann, *Rudy Giuliani's 5 Worst Excuses from His Attorney-Misconduct Hearing*, INTELLIGENCER (Dec. 6, 2022), https://nymag.com/intelligencer/2022/12/rudy-giuliani-dc-law-license-hearing-excuses.html [https://perma.cc/M6Z3-LKKY].

93. Nolo Contendere Stipulation at 1–2, Freeman v. Giuliani, No. 1:21-cv-03354 (BAH) (D.D.C. July 25, 2023); Jaclyn Diaz, *Rudy Giuliani Concedes He Made False Statements Against 2 Georgia Election Workers*, NPR (July 26, 2023, 12:03 PM), https://www.npr.org/2023/07/26/1190173929/rudy-giuliani-georgia-election-workers [https://perma.cc/UT2N-YNWA].

94. GA Indictment, *supra* note 9, at 1; *see also* Adam Rawnsley, *Rudy Giuliani Is Trump's 'Co-Conspirator 1' in Jan. 6 Indictment*, ROLLING STONE (Aug. 1, 2023), https://www.rollingstone.com/politics/politics-features/rudy-giuliani-donald-trump-jan6-indictment-coconspirator-1234799169/ [https://perma.cc/2LPA-EGE6] (naming Giuliani as Co-Conspirator 1 in the DC Indictment).

95. *See* MODEL RULES FOR LAW. DISCIPLINARY ENF'T r. 20B (AM. BAR ASS'N 2002) (describing the process for an immediate interim suspension); *see generally Giuliani*, 197 A.D.3d (listing numerous violations of Rule 4.1).

96. *Giuliani*, 197 A.D.3d at 12–13, 15–16.

B. Sidney Powell

Sidney Powell, a Texas appellate lawyer who gained notoriety for representing Michael Flynn, President Trump's first national security advisor, joined Rudy Giuliani as one of President Trump's attorneys who spread election lies.[97] Powell claimed in an interview on November 8, 2020, that there was an effort to switch votes from Trump to Biden.[98] Then, on November 15, 2020, she asserted that President Trump "won by not just hundreds of thousands of votes, but by millions of votes that were shifted" by voting software "designed to rig elections."[99] Powell refused to provide proof of her allegations, though she affirmed that she "never say[s] anything [she] can't prove."[100] Powell also stated that election software in Dominion voting machines was "created in Venezuela at the direction of Hugo Chavez to make sure he never lost an election."[101] Powell subsequently filed a lawsuit on November 25, 2020, against Michigan Governor Gretchen Whitmer and other state defendants alleging elections fraud.[102] Powell and fellow election deniers described the allegations as a Kraken that, once unleashed, would delegitimize President Biden's victory.[103] Nevertheless, a Michigan federal court subsequently denied the motion for emergency relief, stating that the "lawsuit seems to be less about achieving the relief Plaintiffs seek . . . and more about the impact of their allegations on People's faith in the democratic process and their trust in our government."[104]

The Michigan court subsequently sanctioned Powell and other Trump-adjacent attorneys.[105] The court rejected a First Amendment defense for these attorneys' conduct, instead sanctioning them under Rule 11, 18 U.S.C. § 1927, and the court's inherent authority.[106] Powell, Giuliani, and MyPillow

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97. Jeremy W. Peters & Alan Feuer, *What We Know About Sidney Powell, the Lawyer Behind Wild Voting Conspiracy Theories*, N.Y. TIMES (Dec. 8, 2020), https://www.nytimes.com/article/who-is-sidney-powell.html [https://perma.cc/74P3-DDLV].

98. *Sunday Morning Futures with Maria Bartiromo: Trump Legal Team to File New Ballot Lawsuits* (Fox News television broadcast Nov. 8, 2020), https://www.foxnews.com/video/6208201476001 [https://perma.cc/MTK6-F5B2].

99. *Sunday Morning Futures with Maria Bartiromo: New Trump Lawsuit Targets Voting Machine Firm* (Fox News television broadcast Nov. 15, 2020) (transcript on file with Media Matters for America), https://www.mediamatters.org/media/3919576 [https://perma.cc/33EK-XZGG].

100. *Id.*

101. Ali Swenson, *AP Fact Check: Trump Legal Team's Batch of False Vote Claims*, ASSOCIATED PRESS (Nov. 19, 2020, 10:39 PM), https://apnews.com/article/fact-check-trump-legal-team-false-claims-5abd64917ef8be9e9e2078180973e8b3 [https://perma.cc/B53V-P5R8].

102. King v. Whitmer, 556 F. Supp. 3d 680, 690 (E.D. Mich. 2021).

103. *The Kraken: What Is It and Why Has Trump's Ex-Lawyer Released It?*, BBC NEWS (Nov. 28, 2020), https://www.bbc.com/news/election-us-2020-55090145 [https://perma.cc/8MEQ-R2L3].

104. King v. Whitmer, 505 F. Supp. 3d 720, 739 (E.D. Mich. 2020).

105. King v. Whitmer, 556 F. Supp. 3d 680, 689–90 (E.D. Mich. 2021).

106. *Id.* at 731–32.

CEO Mike Lindell are also facing a multimillion-dollar lawsuit by Dominion Voting Systems, an electronic voting machine supplier, for defamation related to claims by Powell and others that Dominion conspired with Democrats to steal the election.[107] In that litigation, Powell argued that her statements could not be defamatory because "no reasonable person would conclude that the statements were truly statements of fact" because they were made in the context of the "bitter and controversial" 2020 election as "an attorney-advocate for her preferred candidate."[108] On March 1, 2022, the State Bar of Texas pursued disciplinary action against Powell in Texas state court for filing frivolous election litigation in violation of Texas's version of Model Rules 3.1, 3.2, 3.3, and 8.4.[109] A Texas judge granted Powell summary judgment on February 22, 2023, based on defects in the exhibits attached to the Texas Bar's filings.[110]

The Powell proceedings demonstrate the consequences of state bar authorities declining to intervene immediately following systemic elections lies. As soon as November 8, 2020, Sidney Powell could have faced disciplinary proceedings.[111] Swift state bar disciplinary action, such as an interim suspension, would have precluded Powell from filing frivolous litigation, saving courts time and money.[112] A rapid suspension of Powell's law license may also have inhibited her from signing a contract with employees of a forensic data firm, under the guise of pursuing voter fraud on Trump's behalf, to unlawfully tamper with Georgia voting machines—acts that she pled guilty to in October 2023.[113] At the very least, proactive disciplinary action would have likely prompted news outlets discussing

107. *See* US Dominion, Inc. v. Powell, 554 F. Supp. 3d 42, 49–51, 75 (D.D.C. 2021) (dismissing defendants Powell, Giuliani, and MyPillow, Inc.'s motion to dismiss suit). Note that this is a separate legal proceeding from the Dominion lawsuit against Fox News that settled on April 18, 2023. *See* Jeremy W. Peters & Katie Robertson, *Fox Will Pay $787.5 Million to Settle Defamation Suit*, N.Y. TIMES (Apr. 18, 2023), https://www.nytimes.com/2023/04/18/business/media/fox-dominion-defamation-settle.html [https://perma.cc/3YYR-VD7K].

108. Memorandum of Law in Support of Defendants' Motion to Dismiss at 27–29, US Dominion, Inc. v. Powell, 554 F. Supp. 3d 42 (D.D.C. 2021) (No. 1:21-cv-00040-CJN), 2021 WL 4520806.

109. Original Disciplinary Petition at 3–4, Comm'n for Law. Discipline v. Powell, No. DC-22-02562 (116th Dist. Ct., Dallas Cnty. Mar. 1, 2022).

110. Comm'n for Law. Discipline v. Sidney Powell, No. DC-22-02562, slip op. at 3–4 (116th Dist. Ct., Dallas County, Feb. 22, 2023), *appeal docketed*, No. 05-23-00497-cv (Tex. App.—Dallas May 19, 2023).

111. *See supra* note 98 and accompanying text.

112. *See supra* subpart I(A).

113. *See* GA Indictment, *supra* note 9, at 27, 44, 65–67 (describing Powell's role in tampering with voting machines); Kate Brumback, *Sidney Powell Pleads Guilty over Efforts to Overturn Trump's Loss in Georgia and Agrees to Cooperate*, ASSOCIATED PRESS (Oct. 19, 2023, 5:10 PM), https://apnews.com/article/sidney-powell-plea-deal-georgia-election-indictment-ec7dc601ad78d756643aa2544028e9f5 [https://perma.cc/6YGN-B7BV] (describing Powell's guilty plea to multiple Georgia state misdemeanors).

Powell's elections lawsuits to mention pending disciplinary investigation against her. Thus, state bar authorities had the capacity to materially affect the discussion of the Big Lie in the popular discourse.

C. Jenna Ellis

Jenna Ellis was a Trump campaign lawyer who assumed a central role promoting claims of invalid voting.[114] As soon as two days after the election, Ellis claimed that "dead people were receiving ballots" and that Democrats were trying to count illegitimate votes.[115] Ellis continued to make several objectively untrue statements on Twitter and in media appearances, alleging that Hillary Clinton never conceded the 2016 election, that the election was "stolen," and that illegally cast ballots had been counted.[116] A court eventually approved a stipulation between Ellis and Colorado disciplinary authorities agreeing to a public censure for her statements under Colorado's version of Model Rule 8.4.[117] The next day, Ellis claimed vindication, distinguishing between being sanctioned for lies and being sanctioned for misrepresentations, as Colorado's Model Rule 8.4 covers both.[118] Ellis was subsequently indicted for her behind-the-scenes attempt to overturn the 2020 election on January 6th, pleading guilty to a felony false statements count.[119]

Ellis provides a basis for using Model Rule 8.4(c)'s language to cover out-of-court misrepresentations. These misrepresentations—whether or not deemed "lies"—show that the existing rules provide an adequate substantive basis for sanctions. They also show that bar authorities could have acted as soon as the week after the election against Ellis, who by then was already a prominent Trump attorney with appearances on national media.[120] Swifter action would have framed her news appearances in the light of her professional disciplinary proceedings.

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114. Conrad Swanson, *Coloradan Jenna Ellis is Fighting for President Trump on Vote-Counting*, DENVER POST (Nov. 6, 2020, 3:05 PM), https://www.denverpost.com/2020/11/06/colorado-jenna-ellis-trump-election-2020/ [https://perma.cc/7NWC-3WQ6].

115. *Id.*

116. People v. Ellis, 526 P.3d 958, 959–60 (Colo. O.P.D.J. 2023).

117. *Id.*

118. Jenna Ellis (@JennaEllisEsq), TWITTER (Mar. 9, 2023, 7:03 AM), https://twitter.com/JennaEllisEsq/status/1633815849676021760?lang=en [https://perma.cc/C45D-9L4E].

119. GA Indictment, *supra* note 9 at 20–24, 48, 58, 72; Will Weissert & Kate Brumback, *Jenna Ellis Becomes Latest Trump Lawyer to Plead Guilty Over Efforts to Overturn Georgia's Election*, ASSOCIATED PRESS (Oct. 24, 2023, 7:27 PM), https://apnews.com/article/jenna-ellis-plea-deal-georgia-election-case-c4dbacd3e4bbb5415ebd3d42d8fa3128 [https://perma.cc/C3PS-8696].

120. *See supra* note 114 and accompanying text.

D. John Eastman

Attorney John Eastman is a former dean at Chapman University who advised President Trump following the 2020 election.[121] As an adviser, Eastman wrote a memo arguing that Vice President Pence had the ability to challenge the electoral results in his capacity as President of the Senate on January 6, 2021.[122] In his longer memo, Eastman stated that the 2020 election "was Stolen by a strategic Democrat plan to systematically flout existing election laws for partisan advantage."[123] Leading up to January 6th, Eastman appeared on Steve Bannon's podcast, where he promoted election lies.[124] Eastman also publicly advocated for his plan at the January 6th rally.[125]

For his conduct, Eastman faced investigation by the January 6th Select Committee, which referred Eastman to the Department of Justice for criminal prosecution for his role in obstructing the January 6th official proceeding.[126] His lawsuit to quash the Select Committee's subpoena for documents also resulted in a district court largely denying his request and finding "that it is more likely than not that President Trump and Dr. Eastman dishonestly conspired to obstruct" Congress on January 6th.[127] Following backlash, Eastman resigned from his job at Chapman University.[128] Eastman and several of his associates were later indicted for their role trying to overturn the election.[129]

On January 26, 2023—more than two years after the 2020 election and Eastman's role promoting election lies—the State Bar of California filed

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121. Eastman v. Thompson, 594 F. Supp. 3d 1156, 1167 (C.D. Cal. 2022).

122. *Id.* at 1169–70 (describing two memos by Eastman concerning his plan to have Vice President Pence overturn the 2020 election during the January 6th certification of electoral votes and his justification for doing so).

123. *Id.* at 1170.

124. Madeline Peltz, *Leading Up to January 6, Steve Bannon Publicly Bragged About His Behind-the-Scene Role Fomenting the Insurrection*, MEDIA MATTERS (Oct. 29, 2021, 10:25 AM), https://www.mediamatters.org/steve-bannon/leading-january-6-steve-bannon-publicly-bragged-about-his-behind-scene-role-fomenting [https://perma.cc/B5UT-7GTX]; *In re* Eastman, No. SBC-23-O-30029, slip op. at 22 (Cal. St. Bar Ct. Jan. 26, 2023).

125. *Eastman*, 594 F. Supp. 3d at 1171; *see also User Clip: John Eastman at January 6 Rally*, CSPAN (Mar. 24, 2021), https://www.c-span.org/video/?c4953961/user-clip-john-eastman-january-6-rally [https://perma.cc/9KXN-X89Q] (showing Eastman's speech at the rally).

126. SELECT COMM. TO INVESTIGATE THE JAN. 6TH ATTACK ON THE U.S. CAPITOL, INTRODUCTORY MATERIAL TO THE FINAL REPORT OF THE SELECT COMM. 79–80 (2022), https://s3.documentcloud.org/documents/23466430/introductory-material-to-the-final-report-of-the-select-committee.pdf [https://perma.cc/N9V9-GJDW]; *see* 18 U.S.C. § 1512(c) (criminalizing obstruction of an official proceeding).

127. Eastman v. Thompson, 594 F. Supp. 3d 1156, 1195, 1199 (C.D. Cal. 2022).

128. Colleen Flaherty, *Eastman Out*, INSIDE HIGHER ED (Jan. 14, 2021), https://www.insidehighered.com/news/2021/01/15/chapman-professor-who-spoke-jan-6-pro-trump-rally-retires [https://perma.cc/8JJ9-GPM4].

129. *See generally* GA Indictment, *supra* note 9 (describing Eastman's role in the criminal enterprise).

disciplinary charges against Eastman.[130] The California State Bar charged Eastman with violating his duty to support the Constitution and laws of the United States; seeking to mislead a court; and with moral turpitude for promoting election lies as a basis for overturning the 2020 election, for presenting those lies in court, and for misleading the general public.[131] Notably, the California State Bar's allegations encompass non-litigation conduct, referencing his appearances on Steve Bannon's radio program, during which Eastman claimed there was "massive evidence" of absentee-ballot fraud.[132] On March 27, 2024, the California State Bar Court found for the state bar on all but one count of moral turpitude, recommending his disbarment.[133]

Although the California State Bar ultimately acted against Eastman, it did so years after it initially could have. Most of the conduct described in its complaint occurred on or before January 6, 2021.[134] Despite the release of the January 6th Select Committee's final report on December 22, 2022, several of the State Bar's counts rest exclusively on well-known, public conduct, not the report.[135] Even if the State Bar elected to wait until the January 6th Committee finished its report, it still took a month to file charges—several of which could have been primed and ready the moment the report was released. The case of John Eastman further illustrates that state bar authorities *can* act swiftly yet are electing not to do so in cases of paramount public importance, after harm has already spread.[136]

E. Arizona

Despite public pushback, the Big Lie has persisted and even metastasized. No state illustrates the mainstreaming of election lies and the promotion of falsehoods by lawyers better than Arizona following the 2022 midterm elections. Across the top of the ticket, losing candidates claimed election fraud and initiated numerous court proceedings, losing across the

130. Notice of Disciplinary Charges, *In re* Eastman, No. SBC-23-O-30029 (Cal. St. Bar Ct. Jan. 26, 2023).

131. *Id.* at 4, 16, 19–22.

132. *Id.* at 22.

133. *In re* Eastman, No. SBC-23-O-30029, at 1–2 (St. Bar Ct. of Cal. Mar. 27, 2024).

134. *See generally* Notice of Disciplinary Charges, *In re* Eastman, No. SBC-23-O-30029 (Cal. St. Bar Ct. Jan. 26, 2023) (detailing Eastman's conduct).

135. *See, e.g.*, *id.* at 16–19 (describing Eastman's role supporting frivolous litigation in the Supreme Court); *id.* at 22 (describing Eastman's appearance on Bannon's podcast).

136. *See* Quinta Jurecic, *John Eastman and the Limits of Bar Discipline*, LAWFARE (Jan. 31, 2023, 4:00 PM), https://www.lawfareblog.com/john-eastman-and-limits-bar-discipline [https://perma.cc/AW2V-8W2A] (noting that because of the delay, "it's far too late to repair the damage done").

board.[137] Both state and federal courts acted relatively swiftly, sanctioning several attorneys for bad-faith and frivolous challenges. Thus, courts recognize the urgency that ethics prosecutors do not, demonstrating that they have room to act more decisively.

After bringing a pre-election federal lawsuit against several state elections officials challenging the state's vote-counting procedures, gubernatorial candidate Kari Lake lost not only the election, but also her lawsuit.[138] Additionally, her attorneys faced Rule 11 and inherent contempt sanctions, which included payment of Governor Katie Hobbs's attorneys' fees.[139] Less than a month after the 2022 election, the district court issued its sanctions ruling, acknowledging the climate of election falsehoods: "the Court will not condone . . . furthering false narratives that baselessly undermine public trust at a time of increasing disinformation about, and distrust in, the democratic process."[140] The court intended sanctions "to send a message to those who might file similarly baseless suits in the future."[141]

Similarly, on March 1, 2023, an Arizona state court sanctioned Secretary of State candidate Mark Finchem and his attorney for filing a bad-faith, groundless lawsuit, awarding attorneys' fees but declining to award additional penalties.[142] Finchem alleged that voting machines and voting software were improperly certified, illegal votes were cast, and Hobbs (as Secretary of State) engaged in misconduct—all of which the court rejected on December 16, 2022.[143] Though the state court deciding Finchem's election challenge took a little longer, sanctions still resulted.

However, the case of Attorney General candidate Abe Hamadeh further illustrates the need for a more proactive disciplinary approach; Hamadeh is a

137. *See, e.g.*, Lake v. Hobbs, No. CV 2022-095403, slip op. at 10 (Ariz. Super. Ct. Dec. 24, 2022) (rejecting Arizona gubernatorial candidate Kari Lake's election challenge), *aff'd*, 525 P.3d 664 (Ariz. Ct. App. 2023), *vacated in part*, No. CV-23-0046-PR, 2023 WL 7289352 (Ariz. Mar. 22, 2023); Hamadeh v. Mayes, No. CV 2022-015455, slip op. at 2–3 (Ariz. Super. Ct. Nov. 29, 2022) (dismissing Attorney General candidate Abe Hamadeh's pre-canvass election challenge as premature); Finchem v. Fontes, No. CV2022053927, 2022 WL 19079046, at *1, *9 (Ariz. Super. Ct. Dec. 16, 2022) (rejecting Secretary of State candidate Mark Finchem's election challenge).

138. Lake v. Hobbs, 623 F. Supp. 3d 1015, 1020, 1032 (D. Ariz. 2022) (dismissing suit brought months before midterm election preemptively challenging voting systems); *Arizona Governor Election Results 2022: Hobbs Defeats Lake*, NBC NEWS (Nov. 8, 2022), https://www.nbcnews.com/politics/2022-elections/arizona-governor-results [https://perma.cc/3NTN-P7J5].

139. Lake v. Hobbs, 643 F. Supp. 3d 989, 1012 (D. Ariz. 2022), *appeal docketed*, Lake v. Gates, No. 23-16022 (9th Cir. July 24, 2023).

140. *Id.* at 1013.

141. *Id.*

142. Finchem v. Fontes, No. CV-2022-053927, slip op. at 1, 7 (Ariz. Super. Ct. Mar. 1, 2023).

143. Finchem v. Fontes, No. CV2022053927, 2022 WL 19079046, at *1, *3–6 (Ariz. Super. Ct. Dec. 16, 2022).

lawyer—a former prosecutor—who campaigned on 2020 election lies.[144] Hamadeh also filed elections challenges, which were dismissed, with sanctions attaching to one case.[145] Although his pre-election promotion of 2020 election lies arguably provided a basis for bar sanctions,[146] Arizona bar authorities have yet to consider his conduct—even though the trial court specifically found that Hamadeh acted in bad faith when bringing his post-election challenge.[147] Of course, Hamadeh has every right to contest his election loss via the legal process, but under both his ethical obligations as a lawyer and Arizona procedural rules, he must be able to verify his statements.[148] Claims that he believes he will be able to find voter fraud are permissible because they are not demonstrably false; factually and legally insufficient claims are not.[149]

In sum, the Arizona sanctions cases—along with the Trump lawyers' sanctions proceedings years after the fact—show that lawyers continue to percolate election lies, even though state bar disciplinary tools exist to stop them. A different approach is therefore necessary.

144. *See Abraham "Abe" Hamadeh: Attorney General Candidate*, AZ MAGA, https://azmaga.republican/abe-hamadeh/ [https://perma.cc/84ZE-KR5L] (describing Hamadeh's background); Abe Hamadah (@AbrahamHamadeh), TWITTER (May 8, 2022, 1:30 AM), https://twitter.com/AbrahamHamadeh/status/1523475372125261824?s=20&t=96To-HvVnSTol4BL_kEHzA [https://perma.cc/8YRW-3WPK] (vowing to prosecute cases of election fraud if he won the 2022 election). Hamadeh referred to the documentary "2000 Mules," which claimed that President Biden could have won the 2020 election due to 2,000 people stuffing ballot boxes—a set of claims without "plausible evidence of fraud." *Fact Check—Does '2000 Mules' Provide Evidence of Voter Fraud in the 2020 U.S. Presidential Election?*, REUTERS (May 27, 2022, 7:29 AM), https://www.reuters.com/article/factcheck-usa-mules/fact-check-does-2000-mules-provide-evidence-of-voter-fraud-in-the-2020-u-s-presidential-election-idUSL2N2XJ0OQ [https://perma.cc/2CTE-MZQF].

145. Hamadeh v. Mayes, No. CV 2022-015455, slip op. at 2–3 (Ariz. Super. Ct. Nov. 29, 2022); Mast v. Hobbs, No. CV 2023-053465, slip op. at 4–8, 12 (Ariz. Super. Ct. Mar. 28, 2024).

146. *See supra* Part I.

147. Mast v. Hobbs, No. CV 2023-053465, slip op. at 10–12 (Ariz. Super. Ct. Mar. 28, 2024).

148. *See* ARIZ. R. PRO. CONDUCT r. 4.1 ("In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law."); ARIZ. R. CIV. P. 11(b) (modeling FED. R. CIV. P. 11); *see also supra* Part I.

149. *Compare* Jen Fifield, *An Arizona Veteran's Ballot Rejection Story Went Viral. Here's What Really Happened*, TUCSON SENTINEL (Mar. 28, 2023, 10:39 AM), https://www.tucsonsentinel.com/local/report/032723_az_vet_ballot/an-arizona-veterans-ballot-rejection-story-went-viral-heres-what-really-happened/ [https://perma.cc/287H-ME8C] (noting Hamadeh's legal team's plans to find cases of mistaken voter rejection), *with* Gloria Rebecca Gomez, *Hamadeh, Other Plaintiffs, Deserve Fines for Bringing Evidence-Free Election Challenge, AG's Lawyer Says*, AZ MIRROR (Jan. 3, 2023, 7:56 PM), https://www.azmirror.com/blog/abe-hamadeh-other-plaintiffs-deserve-sanctions-and-fines-for-bringing-evidence-free-election-challenge/ [https://perma.cc/AZ6V-9LVX] (noting Attorney General Mayes's motion for sanctions against Hamadeh for frivolous litigation based on election fraud claims that "rested on nothing but air" according to Mayes's attorney).

III. Proactive State Bars in Cases of Spillover

This Note's core proposal is for a more proactive sanctions regime in cases like the Big Lie where lies by lawyers extend beyond the case toward the very structure of the legal system. First, I define the contours of this solution. Next, I articulate how this plan would solve the lying-lawyers problem. I also discuss prudential concerns with my proposal. Finally, I argue that the First Amendment does not prohibit this solution.

A. The Solution

State bar disciplinary organizations should begin sanctions proceedings immediately after a lawyer makes a false statement to the public in a manner that would affect other parties, proceedings, or the general public. As discussed in Part I, state bar associations have a substantive basis in Model Rule 4.1 to sanction a lawyer for lying the moment the lie occurs.[150] They can begin their disciplinary investigation immediately and move swiftly for an interim suspension, which some state courts have granted expeditiously.[151] Criminal conduct is not necessary so long as the false statement threatens harm to the public and adversely reflects on a lawyer's fitness to practice law.[152] Indeed, criminal charges against Trump attorneys took two-and-a-half years to develop, demonstrating the inadequacy of the criminal process as a means of preventing, rather than punishing, the next Big Lie.[153] By framing the problem as an issue of expedience, this Note proposes a call to action for state bar authorities. Adopting a more proactive posture unleashes the legal profession's ethical standards, promoting lawyer disciplinary proceedings at an early stage: before litigation and before the falsehood spreads.

Proactive bar sanctions are not a completely novel concept.[154] For example, the State Bar of California announced an initiative to proactively identify attorneys at risk of misconduct and intervene before those attorneys

150. *See supra* notes 48–54 and accompanying text.

151. *See supra* notes 37–39 and accompanying text; *see, e.g.*, *In re* Fojo, No. LD-2021-0012, 2022 WL 576462, at *1 (N.H. Feb. 25, 2022) (explaining how a lawyer was suspended days after the bar petitioned for an interim suspension); *In re* Johnson, 363 So. 3d 1225, 1227 (La. 2023) (per curiam) (explaining how a lawyer was suspended by the Supreme Court of Washington about a month after the bar moved for an interim suspension). *But see* Off. of Disciplinary Couns. v. Morgan, 839 S.E.2d 145, 154, 157 (W. Va. 2020) (suspending a lawyer five months after filing of a motion for interim suspension).

152. ANNOTATED STANDARDS FOR IMPOSING LAW. SANCTIONS 5.11& annot. at 238–39, 242–43, 255–56 (AM. BAR ASS'N 2019).

153. GA Indictment, *supra* note 9, at 1.

154. *See, e.g.*, Sue Erwin Harper, *Transcript from Professionalism Conference*, 54 S.C. L. REV. 897, 934 (2003) (suggesting that the judiciary take a "more proactive" role "both in dispensing sanctions and then teaching others"); Natasha Minsker, *Prosecutorial Misconduct in Death Penalty Cases*, 45 CAL. W. L. REV. 373, 398 (2009) (suggesting that bar authorities "could take proactive steps to encourage ethical conduct" by prosecutors).

violate disciplinary rules.[155] Other proactive regulation schemes involve education and self-assessment.[156] One scholar has proposed a version of an Australian plan involving collaboration between lawyers and regulators to manage ethical risks.[157] Although these ideas have shown promise in addressing garden-variety ethics violations, they presume good faith on behalf of lawyers and law firms.[158] A lawyer who deliberately spreads falsehoods on behalf of a client to achieve political goals is not a good-faith actor.[159] Accordingly, a collaborative disciplinary approach is unlikely to function when the dishonest lawyer shows no interest whatsoever in being a team player. Bar enforcement, rather than collaboration, is necessary.[160]

Several components of this proposal cabin enforcement to only the most egregious cases of systemic lies. State bar authorities have finite resources.[161] Bringing enforcement actions—particularly at an early juncture—requires a significant expenditure of resources, especially because sanctioned lawyers have a strong incentive to appeal disciplinary orders when their careers are at risk.[162] Accordingly, this proposal articulates several limitations to focus state bar enforcers on meritorious cases and to prevent overreach.

First, bar authorities will be able to identify cases easily because attorneys do not often make public statements on high-profile cases.

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155. Karen Sloan, *California Bar Wants to Get 'Proactive' in Attorney Discipline Cases*, REUTERS (July 25, 2022, 2:43 PM), https://www.reuters.com/legal/legalindustry/california-bar-wants-get-proactive-attorney-discipline-cases-2022-07-25/ [https://perma.cc/4WAD-R8K6].

156. Susan Saab Fortney, *Promoting Public Protection Through an "Attorney Integrity" System: Lessons from the Australian Experience with Proactive Regulation of Lawyers*, PROF. LAW., 2015, at 16, 18.

157. Ted Schneyer, *The Case for Proactive Management-Based Regulation to Improve Professional Self-Regulation for U.S. Lawyers*, 42 HOFSTRA L. REV. 233, 236–37 (2013).

158. *See id.* at 244–49 (discussing empirical results showing significant benefits from proactive self-management programs).

159. *Cf.* Nancy J. Moore, *Mens Rea Standards in Lawyer Disciplinary Codes*, 23 GEO. J. LEGAL ETHICS 1, 18–19 (2010) (noting that courts typically require "at least some indication of fault" before finding a violation of ethics rules).

160. *See* Joyce Gist Lewis & Adam M. Sparks, *In Defense of the Foundation Stone: Deterring Post-Election Abuse of the Legal Process*, 55 GA. L. REV. 1649, 1674–75 (2021) (arguing for more active lawyer self-discipline).

161. *See* Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 696 (1994) (discussing resource constraints preventing more proactive bar investigations); COMM'N OF EVALUATION OF DISCIPLINARY ENF'T, AM. BAR ASS'N, LAWYER REGULATION FOR A NEW CENTURY 69 (1992) (noting that even though most bar agencies have sufficient resources, some are underfunded).

162. *See* Zacharias, *supra* note 27, at 697 n.76 (describing the tradeoffs disciplinary authorities must face when evaluating whether to pursue sanctions); Greenbaum, *supra* note 38, at 115 (explaining how resource constraints influence disciplinary counsel decisions to pursue interim suspensions for public harm); *cf.* Arthur F. Greenbaum, *The Automatic Reporting of Lawyer Misconduct to Disciplinary Authorities: Filling the Reporting Gap*, 73 OHIO ST. L.J. 437, 504–05 (2012) (describing the cost burdens of a proposal for mandatory disciplinary reporting); Robert Anderson IV, *Law, Fact, and Discretion in the Federal Courts: An Empirical Study*, 2012 UTAH L. REV. 1, 25–26 (2012) (comparing the incentive to appeal for civil and criminal litigants).

Moreover, the vast majority of disciplinary actions currently are in response to a privately filed complaint.[163] Although bar authorities do not require a referral to initiate an investigation or disciplinary proceedings, private referrals will undoubtedly continue to play a critical role in directing bar authorities to the most egregious offenders.[164] Additionally, bar authorities would be on higher alert in the months leading up to and following an election, when election lies are most likely to originate. Outside of election season, bar authorities can easily monitor public attorney statements within their jurisdiction. Well-targeted Google alerts would efficiently collect relevant public statements and disseminate them instantaneously for review. Tags on social media websites, such as Twitter, readily indicate relevant keywords. In short, bar enforcers have more than sufficient tools already at their disposal to filter through complaints and identify big liars.

Second, garden-variety falsehoods are unlikely to have substantial spillover effects beyond an individual case. For example, misrepresenting the details of document production or the merits of an individual's claim will not affect any non-parties or the general public. Of course, a false statement on behalf of a client in a specific case could marginally affect discourse about the case, or news coverage if that case is notable. But such falsehoods are not likely to create a substantial spillover effect that alters the broader administration of justice, public perceptions of the legal system, or beliefs about goods or services. Thus, the overwhelming majority of complaints are still likely to be dismissed because they do not fall within the framework of this Note.

Third, the false statements covered by this proposal are likely to be obvious. For instance, fact-checkers responded within days to falsehoods peddled at the Four Seasons Total Landscaping press conference.[165] Those lies were not only obvious but widely covered at the time.[166] But in run-of-the-mill cases, in which the lead lawyer asserts a plainly untrue but less widely discussed proposition, bar authorities can always investigate to seek more information.[167] Indeed, cases of uncertainty merit the most hesitation to

163. *See* Schneyer, *supra* note 157, at 234 (stating that "the disciplinary process has always been reactive" and only triggered in response to complaints).

164. *See, e.g.*, *In re* Schneiderman, 194 A.D.3d 196, 197, 200–01 (2021) (per curiam) (sanctioning the former Attorney General of New York for physically abusing women following a *sua sponte* investigation).

165. *See* Burns, *supra* note 85 (providing evidence negating Giuliani's claims the day after the press conference); *see also* Robert Farley, *Thin Allegations of 'Dead People' Voting*, FACTCHECK.ORG (Nov. 9, 2020), https://www.factcheck.org/2020/11/thin-allegations-of-dead-people-voting/ [https://perma.cc/HEZ4-B67H] (debunking the myth of dead voters two days after the press conference).

166. *E.g.*, Burns, *supra* note 85.

167. *See* MODEL RULES FOR LAW. DISCIPLINARY ENF'T r. 11B (AM. BAR ASS'N 2002) (providing procedure for disciplinary investigations).

avoid tarnishing a lawyer's reputation unfairly, which is why bar authorities must proceed confidentially during investigative stages and can exercise their discretion to take time to verify the untruthfulness of the lawyer's statements.[168]

To that end, bar authorities have flexibility in how they initiate discipline. They could send a private warning, announce a public investigation, or in serious cases, move for an interim suspension.[169] They could refute the false statement directly, or they could appoint investigators to uncover the truth.[170] This Note does not argue for a single type of sanction precisely because sanctions will vary in each individual case.[171] Indeed, bar authorities' discretion is a strength of this approach. Disciplinary counsel can expeditiously begin their investigations without electing to go public, protecting the lawyer's rights until they can prove both in sanctions proceedings and to the general public that the lawyer is a liar. But disciplinary counsel must act; doing nothing enables the unchecked spread of falsehoods and outsources enforcement of legal ethics rules to the general public.

As seen in the aftermath of the Big Lie, state bar authorities are not treating the proliferation of falsehoods by prominent lawyers as a fundamental crisis. Courts, however, are. As the court sanctioning Giuliani recognized, prolific lawyer lying "erodes the public's confidence in the integrity of attorneys admitted to our bar and damages the profession's role as a crucial source of reliable information."[172] It also "tarnishes the reputation of the entire legal profession and its mandate to act as a trusted and essential part of the machinery of justice."[173] Courts that act swiftly in sanctions proceedings are similarly likely to act swiftly when weighing state bar motions for interim suspensions. Therefore, the legal profession does not need to radically redefine its ethical bounds—those bounds are firm and meaningful. Instead, ethics prosecutors need to act expediently to protect the profession. And as shown below, expedience would go a long way to divorcing the legal profession from the dishonest statements of its members.

168. *See id.* r. 16B (requiring confidentiality prior to formal charges in a disciplinary investigation); *id.* r. 16B cmt. (stating that confidentiality "is primarily for the benefit of the respondent, and protects against publicity predicated upon unfounded accusations").

169. *See id.* r. 20B & cmt. (allowing for an interim suspension when there is an immediate threat). Bar authorities must comply with due process. *In re* Ruffalo, 390 U.S. 544, 550 (1968).

170. *See* MODEL RULES FOR LAW. DISCIPLINARY ENF'T r. 16C & cmt. (AM. BAR ASS'N 2002) (stating that proceedings are generally public after formal charges are filed).

171. *See* ANNOTATED STANDARDS FOR IMPOSING LAW. SANCTIONS 3.0 (AM. BAR ASS'N 2019) (providing for a multifactor analysis of the nature of the violation, the lawyer's mental state, the injury done, and aggravating and mitigating factors).

172. *In re Giuliani*, 197 A.D.3d 1, 17 (N.Y. App. Div. 2021) (citations omitted).

173. *Id.*

B. Efficacy and Rebuttal

This Note's proposal is simple, clear, and likely to succeed. Prompt action by ethics authorities will expeditiously separate the legal profession from systematic lawyer lies. The existing rules are not only sufficient to impose liability but would enable disciplinary counsel to act independently from courts. Moreover, these standards are politically neutral, applicable based on the potential for spillover and not the subject matter of the attorney's false statements.

1. The Importance of Prompt Action.—A proactive state bar sanctioning regime would help prevent lawyers from spreading the next Big Lie. By enforcing the plain language of the rules of professional conduct already on the books, bar authorities will be able to protect the legal profession from the stain of dishonest lawyers.

Turning bar sanctions from an abstract, esoteric feature of mandatory professional responsibility classes into a potent tool wielded readily and rapidly against offenders would bolster the effectiveness of professional discipline.[174] Indeed, prominent, high-profile discipline is optimal because it has the greatest potential to resonate broadly.[175] With proactive ethics prosecutors pursuing prominent legal figures, any future untruthful lawyer cannot credibly claim ignorance of the rules.[176] Therefore, the knowledge element of Model Rule 4.1 would be much more readily met with more frequent, high-profile cases because any claims that lawyers were not actually aware of their falsehoods would be harder to make credibly in light of well-known figures facing sanctions for making false statements.

Furthermore, the mere existence of bar disciplinary scrutiny and oversight is the point. Putting dishonest lawyers on notice of potential professional disciplinary repercussions provides an incentive for these lawyers to correct their lies or face the consequences. And by acting expeditiously, state bar authorities jumpstart the process, rather than waiting for a referral from the general public or a judge. Proactive discipline need not impose a drastic enough sanction to stop well-endowed Big Liars with large

174. *See* AM. BAR ASS'N, STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCHS. 18 (2023), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2022-2023/22-23-standard-ch3.pdf [https://perma.cc/T3JD-8K98] (mandating the teaching of professional responsibility in law school).

175. *Cf.* Travis N. Ridout & Glen R. Smith, *Free Advertising: How the Media Amplify Campaign Messages*, 61 POL. RSCH. Q. 598, 598 (2008) (describing the effect of earned media, which can have "much greater impact through the unpaid than through the paid media").

176. Lawyers cannot absolve themselves of liability by relying on willful blindness. *See* Moore, *supra* note 159, at 24 (describing the willful blindness doctrine and noting its availability in disciplinary proceedings to impute knowledge to an attorney who does not actually determine whether a fact exists but is aware of its "highly probable existence").

war chests.[177] Although academic research has shown that sanctions are ineffective, and that professional rules are little more than guidelines,[178] the scholarly debate misses the mark. The rarity of lawyer discipline for false statements made by lawyers outside the courtroom or under oath is irrelevant to the question of whether disciplinary authorities *can* or even *should* act to protect the public from falsehoods—a question this Note answers decisively in the affirmative.[179] By providing both a framework and a defense for sanctions proceedings, this Note helps to construct a fence between the legal profession and the lies of its members—one made possible only if ethics prosecutors act.

2. Sufficiency of Current Standards.—Both substantive and procedural standards are sufficient to allow bar authorities to take swift action when attorneys' lies have spillover effects. No changes are necessary. Not only would more proactive disciplinary counsel help to restore integrity to the legal profession overall—in all types of cases—but a more responsive state bar would also reduce the burden on the judiciary from the surge in frivolous election-related litigation.

For example, Professor Renee Knake Jefferson agrees that the Model Rules provide actionable grounds for sanctions against Trump lawyers, including for lies not told in a courtroom.[180] However, Jefferson claims the duty of candor does not go far enough, arguing for amendments to state ethical rules to encompass media commentary—not just statements made to courts.[181] As shown, the Model Rules *already* prohibit deliberate election lies in Rules 4.1 and 8.4(c), requiring no substantive change to the disciplinary framework.[182]

Although singling out cases of election lies for special treatment may have normative merits in highly visible cases, focusing on the most politically salient, divisive cases for greater bar scrutiny ignores the run-of-the-mill cases that also threaten to undermine public trust in the justice

177. *But see generally* Blake W. Cowman, Note, *Cash Cow: The Futility of Monetary Sanctions as a Deterrent for Post-Election Litigation Abuse*, 35 GEO. J. LEGAL ETHICS 607–08 (2022) (arguing that monetary sanctions would not deter lawyers with access to significant resources).

178. *See, e.g.*, Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEXAS L. REV. 639, 648 (1981) ("[S]tudy after study has shown that the current rules of professional conduct are not enforced.").

179. *See* Jefferson, *supra* note 47, at 127–28 (noting the rarity of lawyer discipline for lawyers' lies made outside the courtroom or under oath).

180. *See id.* at 129–30 (inferring that "some law firms stopped representing President Trump's election challenges because of professional conduct rules," including Model Rules 3.1, 3.3, 4.1, and 8.4).

181. *Id.* at 132–34.

182. *See supra* Part I.

system.[183] A heightened standard is unnecessary for bar associations to merely begin investigations into false statements affecting elections.[184] As shown, the rules of professional responsibility are sufficient in their existing form to punish attorneys from lying.[185] Applying a heightened standard of conduct in the context of election lies would diminish the seriousness of falsehoods in other contexts where those lies have a spillover effect, such as lies about the defects in a consumer product, the harms not actually suffered from a new governmental regulation, or the damage from a violation of civil rights that did not occur.

As seen by the fallout from the Big Lie, reliance on Rule 11 and its state equivalents exclusively is insufficient to prevent the spread of falsehoods by lawyers. While some courts have acted, others have not, leading some commentators to question the efficacy of Rule 11 as a sanctioning mechanism if courts fail to utilize it.[186] Moreover, because Rule 11 only allows for sanctions based on the filing of papers to a court, it does not arise without formal litigation.[187] Courts cannot act *sua sponte* to sanction lawyers who violate ethical rules within their jurisdictions outside the context of litigation.[188] Therefore, unscrupulous lawyers who fear Rule 11 sanctions could lie scandalously before the cameras and then decline to file paperwork initiating judicial proceedings. Indeed, many of the most outrageous claims of voter fraud delivered to the press did not appear in court.[189]

Having state bar authorities play a more proactive role in litigation takes the pressure off courts. Following the 2020 election, lawyers filed more than 60 cases challenging the election outcome.[190] President Trump lost all but

183. *See*, *e.g.*, O'Rourke v. Dominion Voting Sys., Inc., 552 F. Supp. 3d 1168, 1203 (D. Colo. 2021) (discussing a "heightened" duty to investigate the merits of claims in politically significant cases).

184. *But see* Goldstein, *supra* note 46, at 765–70 (calling for a heightened standard for lies affecting elections).

185. *See supra* subpart I(B).

186. *E.g.*, Brendan Williams, *Did President Trump's 2020 Election Litigation Kill Rule 11?*, 30 B.U. PUB. INT. L.J. 181, 213–14 (2021).

187. FED. R. CIV. P. 11(b), (c)(1).

188. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 46–50 (1991) (discussing federal courts' inherent contempt power in the context of litigation-related conduct).

189. *See*, *e.g.*, Aaron Blake, *Trump's Own Lawyers Keep Undermining His Voter Fraud Claims*, WASH. POST (Nov. 19, 2020, 11:07 AM), https://www.washingtonpost.com/politics/2020/11/19/trumps-own-lawyers-keep-undermining-his-voter-fraud-claims/ [https://perma.cc/D37L-Z26J] (noting that President Trump's lawyers tended to back away from flagrant voter fraud allegations in court).

190. Russell Wheeler, *Trump's Judicial Campaign to Upend the 2020 Election: A Failure, but Not a Wipe-Out*, BROOKINGS (Nov. 30, 2021), https://www.brookings.edu/blog/fixgov/2021/11/30/trumps-judicial-campaign-to-upend-the-2020-election-a-failure-but-not-a-wipe-out/ [https://perma.cc/K684-Q2QP]; *see also* Amy Sherman & Miriam Valverde, *Joe Biden Is Right that More than 60 of Trump's Election Lawsuits Lacked Merit*, POLITIFACT (Jan. 8, 2021), https://www

one of those cases.[191] More aggressive ethics prosecutors would invariably decrease the number of patently frivolous cases filed in court, as attorneys would decline to sign pleadings making false or frivolous allegations knowing they were certain to face immediate sanctions. Moreover, courts are busy, and initiating Rule 11 proceedings simply adds to their dockets. Fundamentally, however, courts are not the only actors in the system—a detail other scholars sidestep.[192] Bar authorities do not need courts to begin investigations.[193]

3. Neutral Application of Standards.—Asserting broad authority to sanction lying lawyers would neuter political criticisms, as ethics prosecutors would target both election liars and ordinary lawyers whose false statements have spillover effects.[194] This proposal derives its strength from both its simplicity and its generality.[195]

In cases with high political salience, selective-prosecution claims would likely arise.[196] If successful, those claims threaten to derail the entire system of bar discipline. Not only would selective-prosecution claims constitute grounds for dismissal as an abuse of discretion, but meritorious claims would paint the entire system of bar authorities as biased, corrupt, and politically motivated.[197]

.politifact.com/factchecks/2021/jan/08/joe-biden/joe-biden-right-more-60-trumps-election-lawsuits-l/ [https://perma.cc/LM8U-MKBP] (quoting Democratic attorney Marc Elias describing his litigation record rebutting over sixty election challenges).

191. Wheeler, *supra* note 190.

192. *See, e.g.*, Edward D. Cavanagh, *Countering the Big Lie: The Role of the Courts in the Post-Truth World*, 107 CORNELL L. REV. ONLINE 64, 91–92 (2021) (calling for proactive *sua sponte* sanctions by courts and referrals to state bar associations to initiate bar discipline).

193. *See supra* subpart I(A).

194. *See, e.g.*, Andrew Strickler, *Ethics Complaints Against Trump Attys Are Likely a Dead End*, LAW360 (Nov. 24, 2020, 9:31 PM), https://www-law360-com.eu1.proxy.openathens.net/articles/1331926/ethics-complaints-against-trump-attys-are-likely-a-dead-end [https://perma.cc/T32A-YHMB] (noting the reluctance of state bar associations to punish political advocacy on behalf of a client); Jan Wolfe, *Explainer: Can Trump's Lawyers Be Disciplined for Making False Claims?*, REUTERS (Nov. 25, 2020, 5:11 AM), 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/BKK2-ZR22] (suggesting that elections-related sanctions by state bar authorities would be unlikely because of political concerns).

195. *But cf.* Claris Park, Note, *First Amendment and the Rule of Law: Lawyers and Their Duty to Democracy*, 35 GEO. J. LEGAL ETHICS 1039, 1051 (2022) (articulating several factors for courts to weigh when evaluating whether to sanction a lawyer).

196. *See* Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 HARV. J.L. & PUB. POL'Y 173, 230 (2019) (describing the potential for selective prosecution in the context of abortion).

197. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 8.4-2 (2021–2022 ed.) (discussing Model Rule 8.4(g) and stating that "prosecutorial [d]iscretion, however, may lead to abuse of discretion, with

To counter these attacks, bar officials must be steadfastly neutral. Applying nonpartisan rules and objective standards to determine which cases to pursue proactively and adhering to them rigorously is the best way to protect against inevitable concerns of political targeting. Indeed, not pursuing disciplinary action when the standards say it is warranted and easily provable because of concerns the attorney is likely to claim political prosecution is itself taking sides in a political debate. The simple way to avoid political criticisms is to apply ethical rules neutrally.

Facially neutral standards for proactive bar discipline against lawyers who peddle systematic falsehoods would divorce the legal profession from the lies of its members. Not only would discipline have a deterrent effect, but the existence of sanctions proceedings would separate the legal profession from any endorsement of the false statements themselves.

4. Prudential Considerations.—On a cost-benefit level, a more proactive state bar is likely to save taxpayers, litigants, the legal profession, and the general public time, money, and hassle. Not only would stopping systemic falsehoods from spreading strengthen truth-telling norms (which aligns with the historical role of a lawyer as an officer of the court),[198] disciplining attorneys who violate ethical standards through systemic lying also protects the legal system from misuse and frivolous proceedings.

Sanctions proceedings are expensive. By one estimate, the Big Lie has cost taxpayers more than half a billion dollars in both legal fees and property damage, even excluding private costs.[199] Although courts can shift fees through Rule 11, compensation for wasted time does not make up for the expense of court proceedings and the opportunity cost of courts spending resources on frivolous cases.[200] By deterring lawyers from filing frivolous cases, a more proactive state bar would also benefit the judicial system by allowing judges to focus on meritorious cases.

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disciplinary authorities going after lawyers who espouse unpopular ideas"); *cf.* Jonathan Allen & Allan Smith, *'A Very Dark Cloud': Trump Tears into All the Investigations He Faces in Post-Arrest Speech*, NBC NEWS (Apr. 4, 2023, 8:05 PM), https://www.nbcnews.com/politics/donald-trump/trump-returns-mar-lago-campaign-speech-arrest-rcna77979 [https://perma.cc/UD7J-TW2L] (describing Trump and his allies' remarks following Trump's arraignment in New York on state felony charges).

198. *See* Deborah M. Hussey Freeland, *What Is a Lawyer? A Reconstruction of the Lawyer as an Officer of the Court*, 31 ST. LOUIS U. PUB. L. REV. 425, 485 (2012) (describing the lawyer's duty as an officer of the court not to manipulate facts and not to lie).

199. Toluse Olorunnipa & Michelle Ye Hee Lee, *Trump's Lie That The Election Was Stolen Has Cost $519 Million (And Counting)*, WASH. POST (Feb. 6, 2021), https://www.washingtonpost.com/politics/interactive/2021/cost-trump-election-fraud/ [https://perma.cc/Y7LH-3KQ2].

200. *Cf.* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990) (noting the "central goal" of Rule 11 is deterrence, not compensation); Doering v. Union Cnty. Bd. of Chosen Freeholders, 857 F.2d 191, 196 (3d Cir. 1988) ("[C]ourts must be careful not to impose monetary sanctions so great that they are punitive—or that might even drive the sanctioned party out of practice.").

Certainly, more active ethics prosecutors would increase the prominence of state bar disciplinary authorities. Some states may feel financial pressure to hire additional disciplinary investigators and prosecutors, threatening to divert resources away from other state bar initiatives.[201] After all, why should state bars spend finite resources on lawyers who lie in public when plenty of lawyers lie in private?[202] Especially for conduct outside a courtroom, one could argue a self-regulating profession can sanction itself without a larger role for state bars.[203]

Yet such arguments elevate the harm from in-court misconduct, which already has a well-established sanctions process attached to it, while diminishing the harm from out-of-court misconduct—especially when many lawyers never interact with courts in their daily practice.[204] Active ethics prosecutors would target both big liars and, for instance, unscrupulous M&A counsel whose lies about the strength of a company's financial position could undermine other unrelated entities that depend on accurate reporting. Thus, a beefed-up state bar protects both private and public interests—in line with lawyers who practice both in public courts and in private transactions.

C. First Amendment Concerns

Opponents of proactive bar sanctions may argue that lawyers and clients should have First Amendment speech protections.[205] While the Supreme Court has yet to weigh in on the application of the First Amendment to deliberate lies by lawyers outside a courtroom, it has crafted separate rules for lawyers that proscribe certain kinds of attorney speech. Therefore, speech concerns about this proposal are misplaced because the Supreme Court has ensured that the substantive bases for lawyer sanctions would survive First

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201. For an example of these other initiatives see, for example, *President Initiatives*, ST. BAR OF TEX., https://www.texasbar.com/Content/NavigationMenu/AboutUs/StateBarPresident/PresidentInitiatives/default.htm [https://perma.cc/TWB7-ETS3]; *Access to Justice Initiatives*, ST. BAR OF CAL., https://www.calbar.ca.gov/Access-to-Justice/Initiatives [https://perma.cc/W2DJ-24GK].

202. *Cf.* Barrie Althoff, *Big Brother Is Watching: Discipline for "Private" Conduct*, PROF. LAW. SYMP. ISSUE, 2000, at 81, 105 (discussing the merits of sanctions against attorneys for private forms of misconduct).

203. MODEL RULES OF PRO. CONDUCT preamble (AM. BAR ASS'N 2020) ("Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.").

204. *See* James W. Jones and Bayless Manning, *Getting at the Root of Core Values: A "Radical" Proposal to Extend the Model Rules to Changing Forms of Legal Practice*, 84 MINN. L. REV. 1159, 1178 (2000) (noting that by the year 2000, "most lawyers were engaged in transactional, corporate, and counseling activities and not in litigation").

205. *See, e.g.*, Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859, 861 (1998) ("[A]ttorney speech about pending cases and about courts should be regarded as political speech protected by the core of the First Amendment.").

Amendment scrutiny. Moreover, legal scholars generally have argued that lawyers cannot intentionally make false statements and receive First Amendment protection, whether inside or outside a courtroom.[206]

Generally, the Supreme Court is hostile to governmental restrictions on speech, such as viewpoint-based and content-based regulations. Viewpoint-based speech restrictions "regulate speech in ways that favor some viewpoints or ideas at the expense of others," which the Court in 1984 expressly rejected.[207] Content-based speech restrictions concern the substance of the speech itself rather than the perspective that speech advocates, and "are presumptively invalid."[208]

The Supreme Court has permitted professional ethics rules governing certain types of lawyers' speech. In *Gentile v. State Bar of Nevada*,[209] the Court rejected a First Amendment facial challenge to Nevada's version of Rule 3.6.[210] Although the Court recognized that "[t]here is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment," a separate majority applied a lower standard for certain speech, acknowledging that "in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed."[211] Indeed, the Court has blessed ethics rules preventing lawyers from allowing a client to commit perjury on the witness stand.[212] Furthermore, the Court has asserted that "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press," providing a basis for regulating out-of-court speech about pending cases on administration-of-justice grounds.[213]

In this immediate context, the court sanctioning Sidney Powell recognized that "[a]n attorney's right to free speech while litigating an action

206. *See, e.g.*, Margaret Tarkington, *The Role of Attorney Speech and Advocacy in the Subversion and Protection of Constitutional Governance*, 69 WASH. U. J.L. & POL'Y 287, 317 (2022) (asserting the constitutionality of pretrial prohibitions on "knowing or reckless false statements of fact or law"); Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569, 574–75 (1998) (discussing the Court's approval of restrictions on false or misleading lawyer advertising); Jefferson, *supra* note 47, at 115, 136–37 (arguing that the First Amendment does not protect "lawyer lies designed to sabotage valid election results"); Chemerinsky, *supra* note 205, at 861 (arguing for a test that prohibits lawyers from making knowingly or recklessly false statements).

207. Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984).

208. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

209. 501 U.S. 1030 (1991).

210. *See id.* at 1033–34 (holding only that Nevada's *application* of Rule 177 was unconstitutional).

211. *Id.* at 1034, 1071.

212. Nix v. Whiteside, 475 U.S. 157, 168–70 (1986).

213. *Gentile*, 501 U.S. at 1074. The Court ultimately upheld the substantial-likelihood test in Nevada's version of Model Rule 3.6 under a strict scrutiny standard. *Id.* at 1075–76.

'is extremely circumscribed.'"[214] The court noted in dicta that "the First Amendment may allow Plaintiffs' counsel to say what they desire on social media, in press conferences, or on television," though the lawyers' out-of-court statements were not subject to discipline under the Michigan Rule 11 proceeding.[215] Conversely, the court sanctioning Jenna Ellis referenced her statements to the media as a basis for sanctions.[216] The *Eastman* court also rejected a First Amendment defense, stating that lawyers' right "to make statements in public . . . does not extend to making knowing or reckless false statements of fact or law."[217] Recent courts have approved of the general authority of a state to restrict lawyers' professional speech.[218] While the Supreme Court has yet to confront this issue squarely, ample precedent exists to support limited restrictions on lawyers' professional speech.

Conclusion

Untruthful lawyers can only get away with their deceit if we let them. A proactive state bar has all the tools it needs in existing substantive law and procedure to initiate investigations into dishonest lawyers the moment they utter a false statement publicly that has spillover effects beyond the immediate case or client. As seen through the Big Lie sanctions proceedings, the legal profession faces a challenge of whether to sanction its most prolific liars, and if so, how aggressively. By beginning disciplinary proceedings at a significantly earlier stage in the process, ethics authorities would be able to reassert their prominence—even if the sanctioned lawyers persist in their conduct. Taking disciplinary action draws a sharp line between state bar officials and unethical, dishonest lawyers, rehabilitating the reputation of the legal profession by divorcing liars from the remainder of honest, rule-abiding attorneys. If done early, bar authorities may even succeed in stopping the spread of lies before they evolve into an entrenched, inexorable pathogen. This Note outlines a simple, generally applicable, and actionable proposal for ethics prosecutors to act to counter attorneys' falsehoods by enforcing well-established ethics rules in effect in every state. The question remaining is whether bar authorities will decide to act on it.

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214. King v. Whitmer, 556 F. Supp. 3d 680, 727 (E.D. Mich. 2021) (quoting Mezibov v. Allen, 411 F.3d 712, 717, 720–21 (6th Cir. 2005)).

215. *Id.* at 727.

216. People v. Ellis, 526 P.3d 958, 959–60 (Colo. O.P.D.J. 2023).

217. *In re* Eastman, No. SBC-23-O-30029, at 79 (St. Bar Ct. of Cal. Mar. 27, 2024).

218. *Cf.* McDonald v. Lawson, No. 8:22-cv-01805-FWS-ADS, 2022 WL 18145254, at *16 & n.5 (C.D. Cal. Dec. 28, 2022) (recognizing that California has an "ability to regulate licensed professionals any time those measures relate to the provision of professional advice").