Chapter 1

Law as a Regulated Profession

1. Emergence of the Modern Legal Profession

Lawyers and Their Competitors[1]

Professions' histories are littered with splinter groups and faltering competitors. These are usually ignored in official mythologies, although occasionally recalled as precursors, charlatans, or worse. By studying interprofessional conflict, we can set the successful professions in their real context and correct our theories of their development.

1 Andrew Abbott, *The System of Professions*, chap. 9 (1988)

Potential Jurisdictional Conflicts of the Legal Profession

Two organizational forms emerged in the late nineteenth and early twentieth centuries that generated enormous demand for legal services—the large commercial enterprise and the administrative bureaucracy. The growth of business practice involved some problems never before encountered—large-scale reorganizations, massive bond issues, tax planning, and, in America, antitrust. There were also vastly increased quantities of traditional business work. Governmental work grew similarly. It often involved practice before new tribunals, tribunals with their own staffs, their own forms of procedure, and their own sense of prerogative. Like business work, government-related work was extremely diverse, ranging from personal matters associated with the welfare state's involvement in housing and education to the corporate business generated by the state's regulatory intrusions into the economy. By contrast with business and government work, matters of land and property did not multiply but merely expanded additively with the population.

Potential legal jurisdictions in this period thus grew rapidly. In business and government there appeared qualitatively new areas of work. Even traditional business work expanded very rapidly. In land and property the expansion was slower, but still proportionate to population.

Did the legal profession grow in relation to this changing body of work? Garrison's detailed survey of the Wisconsin bar in the early 1930s estimated the growth in legal work since 1880. He concluded that legal work had vastly outstripped the growth of lawyers; work per lawyer was more plentiful than ever before. Even in urban Milwaukee the increase of lawyers did not keep pace with most of these indicators. Others, however, believed in overcrowding at the bar. In New York City, Isidor Lazarus noted, there were in 1930 264 lawyers per hundred thousand population, about five times the number in England. Indeed, the number of lawyers in the United States increased by over 30 percent from 1920 to 1930 alone. Yet Lazarus too saw large reservoirs of untapped demand in the "lower middle, and the more or less employed or active lower, sections of the community," as well as in "the legal needs of the economically submerged army of the practically unemployed." But he recognized that this demand would be effective only if "the facilities were created for bringing together the supply and demand and adjusting them on an efficient, reasonable, and profitable volume basis."

Two developments allowed the American profession to avoid this situation. The first was the large firm, whose extensively divided labor accomplished more work with given resources; the Cravath firm, for example, had twenty-five lawyers by 1906 and fifty by 1923. The second was the replacement of clerkship with law school. In 1870, one-quarter of new lawyers had gone to law schools. By 1910, the figure was two-thirds. This shift decoupled the profession's rate of growth from its current size in two ways. First, not only could law schools take extra students more easily than could individual practitioners, but also, since schools were both profitable and prestigious, there was an enormous incentive to found them. There resulted an immense potential for recruitment. Second, the typical law-school career in this period was two years, not five, providing a much shorter response to demand changes.

This rapid expansion was, however, accompanied by a stratification of the American bar, indicated in part by the separation of the night law school graduates from the full-time law school graduates. This stratification has important implications for the interpretation of competition between lawyers and others. Roughly speaking, the night school graduates, along with some day school graduates, dealt with the land and property jurisdiction—individual matters expanding at the rate of population growth. The graduates of the elite full-time schools and their newly huge law firms controlled the qualitatively expanding area of big business practice as well as extensive parts of the new government practice. Work in the traditional business jurisdiction, expanding in amount but not kind, was split between the two groups. Since the majority of the United States lawyer expansion came in night schools and nonelite day schools (whose graduates entered the relatively slowly expanding area of land and property), the American legal profession was moving towards the paradoxical situation of having a lower tier oversupplied with lawyers and an upper one under-supplied.

The demographic and institutional flexibility of the American lawyers, so disturbing to the elite WASP lawyers of the East Coast, in fact enabled the [profession] to handle the demand expansion with relative ease. But as we shall see, this simple picture is by no means the whole story.

Complaints about Unqualified Practice and Other Invasions

General Matters

In the United States, organized concern with unauthorized practice began with the Committee on Unlawful Practice of Law of the New York County Lawyers Association in 1914, and spread from there to such other urban jurisdictions as Chicago, Nashville, Kansas City, and Memphis. In the late 1920s, unauthorized practice became a serious concern of the American Bar Association, which directed a national attack on it throughout the 1930s. Americans generally handled unauthorized practice and external competition by councils and agreements if possible. Direct legal action was a last resort. [T]he urban origins of the first unauthorized practice committees are significant. Since city lawyers were by this time quite stratified, the first conflicts appeared either in the qualitatively new jurisdictions of the upper-tier or in the oversupply of lower-tier lawyers, who were pushing out for new work.

American unauthorized-practice committees characteristically started with large caseloads, then settled down to a lower but fairly steady level of work. "The number of inquiries does not vary much from year to year," said the Pennsylvania Bar Association committee in 1950, speaking of "the routine problems of the relationship between lawyers, bankers, realtors, accountants, justices of the peace, aldermen, and notaries public." This surprisingly constant pattern of activity implies that enforcement became something of a formality.

Despite the apparent stability of routine enforcement, lawyers' *sense* of the degree of unauthorized practice had definite cycles. Partly this reflected phases natural to any social movement. Interest in the problem would suddenly wax, with violent speeches, excited talk, and often some new kind of organization or interprofessional agreement. But then the newly created enforcement organization would go on to a fairly routine existence, indeed often complaining of lawyers' inattention. Agreements like the code of ethics negotiated between the Pennsylvania lawyers and the Pennsylvania Bankers Association in 1922 could endure a decade of benign neglect before grassroots complaints generated renewed Bar Association action.

Areas of Conflict

The areas about which lawyers complained included all of the chief legal jurisdictions—business affairs like bankruptcy and companies; property matters such as conveyancing, wills, and trusteeship; advocacy before courts and administrative tribunals; and finally, general advice on business, legal, and personal affairs.

[T]he invasion of lawyers' jurisdiction was not peripheral, at least in terms of areas. On the contrary, the rates of complaints seem to follow the rates of work. For example, figures from Pennsylvania on distribution of lawyers' actual work show that property matters were the most important work for 62 percent of the Pennsylvania profession outside of Philadelphia and Pittsburgh. The correspondence with the complaints of unauthorized practice in property matters (58 percent) is extremely close. Similarly, the greater level of business complaints in the American cities reflects the equally greater importance of business work there. Of course lawyers are more likely to act on a complaint the more central the area invaded. But still, it is noteworthy that jurisdictional enforcement is not just a matter of professional borders. That this invasion occurred with peripheral *clients*, however, is easily verified from discussions of the complaints. Both in America and Britain the cases often involved small shopkeepers who refused to pay lawyers' rates for enforcing debts, as well as private individuals who sought inexpensive wills and deeds. The conflicts thus involved not change of cultural jurisdiction but largely change of clientele settlements.

The national differences, however, reflect important aspects of jurisdictional claims. Advocacy, the classic heart of lawyers' jurisdiction, was of equal concern to both, as was business, perhaps because of the rapid expansion that had called forth competitors in both countries. (It is notable that business conflicts were urban in the United States and rural in England.) Advice was a different matter. Although the British believed advice to be an important legal function, they never really attempted a dominant settlement in the area. American lawyers did, presumably because their greater numbers made them believe they could reasonably uphold the claim. Finally, land and property conflicts sharply differentiated urban from upstate lawyers in the United States, but not urban from provincial solicitors in England. This indicates a second division among United States lawyers—that between rural and urban attorneys. The two status-tiers discussed before were both largely urban. The extensive competition rural lawyers faced in their basic property jurisdiction suggests possible under-lawyering in the countryside, a fact often noted by rural lawyers in debate.

American urban lawyers pushed out into advice giving, an area the solicitors [in England] rapidly gave up. This expansion occurred both in the upper and lower tiers of the urban profession. These lawyers had little trouble in land and property, although their country cousins—the few who remained—faced a massive invasion of this heartland jurisdiction. In England, land and property clearly became the obsession of both urban and provincial solicitors. The reversal of patterns in business practice seems, at this point, to be quite anomalous.

This picture complements and expands the predictions made earlier. In the United States, a relatively understaffed urban upper tier of lawyers pushed into corporate and government work and found substantial competition there. The overstaffed urban lower tier perhaps pushed out into general advice and other areas, looking for work. The rural group was desperately understaffed and was losing its central monopolies.

The overall pattern thus emerging is one of activity within constraint. Professional groups take certain jurisdictional actions partly for internal reasons involving their own structure and knowledge base, partly for external reasons like status and power, and partly because these actions are constrained by the competitive environment.

Audiences for Jurisdictional Claims

Efforts to curb unqualified practice are efforts to make the workplace relations of jurisdiction conform to the legal and public ones. As I argued before, if the lawyers have workplace jurisdiction but not public or legal jurisdiction, then they are expanding into the area. If, by contrast, they have legal and perhaps public jurisdiction, but not workplace jurisdiction, then they are facing an invasion.

The only sources where lawyers are fighting to get legal jurisdiction established are city sources. Both New York committees had active legislation and court subcommittees dedicated to solidifying legal control of jurisdictions lawyers had acquired in the workplace. [U]rban jurisdictions were the only sites of lawyer expansion. The rural lawyers were fighting invasions.

Additional evidence comes from the differing extents of legal and public jurisdiction. On the one hand, what was law for the city was law for the countryside; in the legal arena, lawyers' jurisdiction was theoretically uniform from one place to another. Yet throughout the [rural] data rings the message that the public simply doesn't know lawyers' prerogatives: "There undoubtedly does exist throughout the State in many places, throughout the laymen, a certain reluctance to go to a law office." "... the detestation of the law and lawyers evinced by the public, the general unthinking public ..."

Such complaints seldom appear in city sources. That the public jurisdiction was less extensive than the legal one in the countryside reemphasizes the interpretation here given—that provincial lawyers were too few for the business and were facing serious invasion. This is further strengthened by the fact, which we know from the actual complaints, that large amounts of legally routine law work—conveyancing and other property matters—were being done by nonlawyers. The workplace jurisdiction was even less extensive than the public one.

In the city, as we have already seen, the arena pattern of jurisdiction shows evidence of expansion. An elegant example of this comes not from the expansion into advice giving and similar areas by the too-numerous lower-status lawyers. Rather it bespeaks an earlier expansion, at the expense of a group called conveyancers. We know that the expansion was old because the uncertainty about jurisdiction was merely at the legal level; the workplace and public jurisdictions, at least in the cities, were secure. The area immediately concerned was the drawing of wills. The legal status of this work was confusing even for lawyers themselves. Thus while most lawyers in both countries assumed that the drawing of wills was a legally established jurisdiction, it was in fact not so. In England, the Stamp Act of 1870 allowed an unqualified person to draw a will, power of attorney, or transfer of stock (provided the transfer contained no trusts or limitations) and to be paid for these activities. In America, when the Pennsylvania Bar Association's brand-new unauthorized practice committee reported in 1932, its chairman, a Philadelphia suburban lawyer, asserted that "the Committee feels that the writing of wills is the practice of law." W. G. Littleton of Philadelphia rose to his feet and thundered:

> Is it not a fact that the writing of wills is not only not the practice of the law but in the English system lawyers themselves were not permitted to draw wills until the year 1760, when the exclusive privileges of the English association which formerly had that right were thrown open to members of the Bar, and when I come to speak, my mind running back personally as far back as 1885, when I was thrown in with that class of men who were known as conveyancers, who prepared deeds, mortgages, and other legal instruments, and wrote wills, it would be perfectly astonishing to the lawyer of that day to say that members of the conveyancers' association, whose names you probably know, some of whom I recollect, were violating any law.

This passage is notable not only for its total disagreement about the legally established jurisdiction, but also for its reference to an invisible group of non-lawyer legal professionals, who had in workplace fact been ousted from this jurisdiction within the half century of Mr. Littleton's memory. The new social-history method—studying conflict to find the lost people of history—has produced a lost profession.

The Philadelphia conveyancers had been, in fact, a small, elite group of practitioners, some of whom were lawyers and some of whom were not. They normally both drafted and stored title papers, wills, and other documents. At first employed as hired specialists to abstract titles, they eventually became independent consultants. A family lawyer would consult a conveyancer concerning property to be

purchased, and the conveyancer would then abstract the title and take counsel from a consulting real-estate lawyer on the title's encumbrances. As specialists in property documents, the conveyancers naturally handled wills, mortgages, trusts, and related property matters. Apparently they had strong professional structure; as Littleton mentions, they had an association. Other sources report that their examinations were felt by many to be considerably more difficult than those of the lawyers.

Nonetheless, the conveyancers were destroyed, very rapidly, by a convergence of forces. The lawyers were rapidly increasing in numbers and looking for work. This threatened the conveyancers' control of wills, trusts, and similar documents. In their heartland title work, a crucial court case both gave them "professional" stature and destroyed them. In *Watson v. Muirhead* (57 PA 161, 1868), the court held conveyancers not liable for bad titles if they had taken reasonable precautions. But this left purchasers without recourse in cases of bad title, a situation the growing business community would not accept. A coalition of exasperated businessmen, lawyers, and conveyancers created in 1876 the Land Title Insurance Company (the first such corporation), to provide a mechanism for pooling the risks of property transfer. In a similar move, lawyers and bankers founded the Fidelity Trust Company to take up work with trusts and other financial matters. As a result of these changes, the conveyancers rapidly disappeared.

The example of the conveyancers shows again how the relative extents of jurisdictional claims can tell us much about the direction of jurisdictional change. For lawyers of the 1930s, the writing of wills was an old expansion jurisdiction, one in which they sought to convert a successful workplace invasion into publicly and legally recognized domination. That the rural public persisted in having wills drawn by banks, trust companies, prothonotaries, and aldermen indicates that this expansion had never had the success in rural areas that it enjoyed in the city.

Competitors

The lawyers had other antagonists besides the vanquished conveyancers. These antagonists, as I have argued throughout, provide the structure that bends the two professions in different directions. They fall into seven groups. The first are the other free professions—the accountants, the bankers, and others. The second are the other professions affiliated with the law. In America this meant notaries, foreign (out-of-state or out-of-country) lawyers, and disbarred individuals working for other lawyers. A third group, the land professions, comprises the simple category of real estate agents in the United States. A fourth group is local officials—justices of the peace, magistrates, police, and other municipal authorities, as well as their various clerks. Fifth, a group of negligible importance in the United States, but of great importance in England, is national officials. Conversely, the sixth group was more important in the United States—corporations. These in-

clude title and trust companies, insurance companies, collection agencies, legal aid societies, trade associations, and various other groups. The seventh category of offenders is a miscellaneous group of outsiders—chiefly insurance agents in the United States.

Competition from other free professions is more common in the provincial than the metropolitan data in both countries, but the general level seems somewhat higher in England. Competition from other legal professionals, by exact contrast, is more common in metropolitan than provincial data, and distinctly more common in the United States. Competition from the land professionals is, as one might expect, largely a provincial concern, and perhaps a little more common in England. Competition from local authorities is purely a rural phenomenon in the United States, although about equally common for both groups in England. A sharp contrast between the two countries arises over competition from officials of national administrative bodies: in the United States, this was negligible, while in Britain it made up nearly a quarter of the Law Society's complaints, and was a substantial problem for the more provincially oriented *Law Notes*. The figures for competition from organizations—companies of various shapes and sizes—exactly reverse this situation. Companies supply the majority of urban complaints in the United States, and one-fifth of the rural ones. They supply about one-tenth of the English complaints. It is not unfair to summarize these patterns by saying that the English lawyers faced an invasion by officials and other free professionals, and the Americans an invasion by companies and other legal professionals.

[T]he amount of American jurisdiction in property was expanding with the population, and the business jurisdiction much more rapidly. Yet in both jurisdictions, American lawyers faced competition not from individuals but from specialized corporations—trust companies, title companies, collection agencies. This competition was directed not against the expanding law firms in the qualitatively new jurisdictions of big business and government, but against individual lawyers and small partnerships working in more slowly expanding areas. This conflict arose out of external invasion of areas under full lawyer jurisdiction, and proceeded by price cutting; it exemplifies the third form of conflict discussed above.

Important Contests

To gain a clearer picture of the actual settlements of the major jurisdictional disputes, we may analyze problem areas and competitors in detail. This means replacing general classifications (free professions, national officials, land and property) with actual groups and bodies of work (accountants, the Board of Trade, trusts).

In America, there is a distinct difference between the urban and rural complaints. The rural complaints concern bread and butter property work—wills first and foremost, followed distantly by conveyancing, general property work, the winding up of estates, and trusts. In the city, the specific problems are general debt work, bankruptcy, and advocacy on retainer, followed distantly by legal, tax, and published advice, the writing of threatening letters, wills, and trusts. It is noticeable that the two lists overlap only in wills, trusts, and general property work, and that much of this competition is attributable to one type of competitor—the trust company and the bankers who ran it. The collection agency, by contrast, seems a completely urban phenomenon, as do the title company and other corporations. Local officials are important chiefly in the countryside, while other legal groups have their chief impact in the city, although notaries do cause some problems in the country.

The urban bar's lower tier, over-supplied by the night law schools, is fighting to expand into (or perhaps to retain) a collection business that is apparently conceded in the country, where the declining lawyer populations are fighting to defend more central jurisdictions against invasion. The urban groups' most important competitors are corporations offering efficient services. Having achieved great economies of scale in searching titles, the title companies next sought to construe their right to draft legal instruments directly affecting insurability as a right to draft deeds. The lawyers managed to turn back this attempt to seize a coequal jurisdiction in land affairs—one that would have been fatal to them—but did have to settle for the removal of much title work that had once belonged to them. The same thing happened in collections. The lawyers defeated the collection agencies' bid to seize coequal legal jurisdiction—by denying them the rights to have lawyers on retainer, to write certain kinds of threatening letters, and so on. But the collection agencies in fact performed that centralization of demand which Lazarus had foreseen as necessary and absorbed a considerable amount of demand for legal services in the process. The story was repeated with trust companies. The trust companies' bids to write wills and draft trusts were denied, retaining crucial aspects of property jurisdiction under lawyers' legal control. But the lawyers still lost most administrative work connected with trusts and probate.

In each of these competitions with companies, the lawyers preserved what I have called an advisory jurisdiction. Their competitors' administrative efficiency provided far more effective services in the collection, trust, and title areas than could lawyers. In defense against them, the best the lawyers could manage was to retain legal and public control over the purely legal residual of these areas. The companies took over the administrative work in the workplace and, as time passed, were conceded the public right to it in bar association arguments and the legal right to it in court cases. These jurisdictions proved poachable because the subjective jurisdictions over them were weak; only a small fraction of the traditional work in them actually involved lawyers' special skills. Most of it was administration for

which lawyers were neither specially trained nor specially able. Yet all of it had been considered part of trusts, collections, or title work as the case might be. The courts tried for some time to defend the lawyers' view by holding *workplace* jurisdictional standards to apply to lawyers (practice of law includes anything that lawyers have customarily done) while holding *legal* standards to apply to their opponents (practice of title companies includes only what statutes say it does). Ultimately, however, the courts retreated and the poachers relented, satisfied with the lucrative administrative work they could so effectively handle. The result split each of the three old legal jurisdictions in half, giving their administrative portions to the corporations and their legal ones to the lawyers. The meaning of trust, title, and collections as areas of work thus radically changed.

The notaries and foreign lawyers offer two interesting footnotes to unauthorized urban practice.The New York bar attributed the notarial problem to the city's large foreign population. The bar associations attacked "ignorant foreigners coming from countries where the 'notary' is a quasi-lawyer" for supposing that notaries were capable of performing legal actions. Eventually, perhaps because America entered the First World War as France's ally, the committee's remarks became a little less nativistic. The (later) foreign lawyer problem was similar; foreigners arriving in the 1930s often saw fit to advise fellow countrymen concerning the laws of their own land, something the bar association originally tried to attack, but later permitted. But the chief problem with foreign lawyers was their procuring offshore divorces for clients, something which drove the bar committees quite mad. Under the heading of foreign lawyers came also those large law firms from other American cities that opened New York offices. These provide the lone example in these data of a conflict, within the qualitatively new big-business jurisdiction, between members of the upper tier of the profession. Although these invaders were nationally reputable firms, the New Yorkers insisted that they announce on their letterheads their incapability of New York practice. The competition for the new commercial work was so intense as to cause fighting within the profession.

The American rural scene was quite different. There lawyers were scarce and even lawyers were frank about the necessity of non-lawyers doing some legal work. In 1921, half of Pennsylvania's counties had less than forty lawyers apiece, and a quarter had less than twenty. Justices of the peace, aldermen, notaries, prothonotaries, and various other officials and laymen had perforce to do a variety of lawyers' work. Complaints about this practice surfaced most in the smaller cities like Wilkes-Barre, Allentown, and Williamsport, where the clearly defined legal systems of the cities met the locally negotiated divisions of labor characteristic of the true countryside. The rural conflicts concerned basic heartland legal work in land and property and betray all the usual signs of invasion of an underserved

jurisdiction. It is striking, by comparison with the urban data, that Pennsylvania shows no sign whatever of the problems associated with collections—complaints about letters, about representation on retainer, about debt work. This too signifies a retreat to heartland work.

Surprisingly, many problems related to the new government business—tax appeals and advocacy before minor and government tribunals—seem to be equally split between urban and rural American lawyers. The presumption that governmental work provided an expansion area mainly for upper-tier urban lawyers may thus be incorrect. The tax advice findings do support it, for that problem is a largely urban matter. But still, the government work may have offered more general opportunities than it seemed at the outset. Perhaps it was the attempt to enter this new jurisdiction that left the rural lawyers so open to invasion in their land and property work.

People v. Alfani, 125 A. 671 (N.Y. 1919)

Crane, J.

The defendant was convicted by the Special Sessions of the city of New York, borough of Brooklyn, of violating section 270 of the Penal Law. He was not an attorney and counselor-at-law, but had for a long period of time drawn legal papers and instruments for hire and held himself out to the public as being in that business. His conviction was reversed by the Appellate Division on the ground that such acts did not constitute practicing law and, therefore, were in nowise contrary to the statute.

The question is fairly presented whether the things done by Alfani are open to the public generally or require a license from the state before a person can perform them for compensation and as an occupation.

Henry Alfani had lived at 475 Park avenue, Brooklyn, New York, since 1888. In the basement he had an office in which he carried on a real estate and insurance business. Distinct from such work he also drew legal papers, contracts for real estate, deeds, mortgages, bills of sale and wills. A large sign placed over his dining-room or basement window bore the words in big letters "Notary Public—Redaction of all legal papers." The defendant said "redaction" meant the drawing of legal papers. He was sixty years of age and evidently an Italian, as he testified in part through the Italian interpreter.

On December 27, 1917, two investigators of the state industrial commission called on Alfani at his office and asked him to look after a matter for them. Gallo, one of the men, said his name was George Lecas and that he lived at 23 Cook street, Brooklyn, where he had a soda water stand which together with a stock of cigars, cigarettes, candies and malted milk he had sold to the other man whom he introduced

as Geannelis. The terms of the sale were these: the purchaser agreed to assume the seller's contract to pay five dollars twice a month to the American Siphon Company from which the fountain had been obtained, $65 being still due thereon; the stock was to be $26 cash and the good will $145 to be paid for by Geannelis—$50 that night, $50 January 15th and $45 January 31st. The last payment was to be extended ten days if the purchaser was unable to meet it on time. The defendant advised that a bill of sale be drawn and that the purchaser give back a chattel mortgage. He explained about the necessity of filing the mortgage in the county clerk's office and the foreclosure by a city marshal in case of non-payment. The papers were drawn and executed for which the defendant charged and received four dollars. Before leaving Gallo said: "In case I have any trouble of any kind and I need any legal advice can I come back to you?" to which Alfani replied, "Yes."

By section 270 of the Penal Law it is a misdemeanor for any natural person "to make it a business to practice as an attorney-at-law * * * or to hold himself out to the public as being entitled to practice law as aforesaid, or in any other manner, * * * without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state." To practice or to represent as being entitled to practice law in any manner is prohibited to those not lawyers.

The Appellate Division was of the opinion that this section related only to practice connected with court or legal proceedings. The restriction is broader than this for effect must be given to the words "or in any other manner." The words "as aforesaid" have reference to practice in the courts mentioned, and the following "or in any other manner" refer to the practice as an attorney-at-law out of court and not in legal proceedings. Practicing as an attorney-at-law in or out of court or holding oneself out as entitled to so practice is the offense. Not only is this the natural reading of the section but the lower court in a previous decision held that practicing law was not confined to court work.

In *Matter of Duncan* it is said: "It is too obvious for discussion that the practice of law is not limited to the conduct of cases in courts. According to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law. An attorney-at-law is one who engages in any of these branches of the practice of law."

In *Eley v. Miller* the court stated: "As the term is generally understood, the practice of law is the doing or performing services in a court of justice in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court."

To make it a business to practice as an attorney-at-law not being a lawyer is the crime. Therefore, to prepare as a business legal instruments and contracts by which legal rights are secured and to hold oneself out as entitled to draw and prepare such as a business is a violation of the law.

It does not lead us to a conclusion to investigate the powers of notaries public under the Roman law or of scriveners and notaries under the English system past or present. The legislators who enacted section 270 knew what practicing law was in this state as many of them were of the profession and they were dealing with that as carried on here at the present day. It is common knowledge for which the above authorities were hardly necessary, that a large, if not the greater, part of the work of the bar to-day is out of court or office work. Counsel and advice, the drawing of agreements, the organization of corporations and preparing papers connected therewith, the drafting of legal documents of all kinds, including wills, are activities which have long been classed as law practice. The legislature is presumed to have used the words as persons generally would understand them, and not being technical or scientific terms "to practice as an attorney-at-law" means to do the work, as a business, which is commonly and usually done by lawyers here in this country.

The reason why preparatory study, educational qualifications, experience, examination and license by the courts are required, is not to protect the bar as stated in the opinion below but to protect the public. Similar preparation and license are now demanded for the practice of medicine, surgery, dentistry and other callings, and the list is constantly increasing as the danger to the citizen becomes manifest and knowledge reveals how it may be avoided.

Why have we in this state such strict requirements for admission to the Bar? A regents' certificate or college degree followed by three years in a law school or an equivalent study in a law office marks the course to a bar examination which must finally be passed to entitle the applicant to practice as an attorney. Recognizing that knowledge and ability alone are insufficient for the standards of the profession, a character committee also investigates and reports upon the honesty and integrity of the man. And all of this with but one purpose in view and that to protect the public from ignorance, inexperience and unscrupulousness.

Is it only in court or in legal proceedings that danger lies from such evils? On the contrary, the danger there is at a minimum for very little can go wrong in a court where the proceedings are public and the presiding officer is generally a man of judgment and experience. Any judge of much active work on the bench has had frequent occasion to guide the young practitioner or protect the client from the haste or folly of an older one. Not so in the office. Here the client is with his attorney alone, without the impartial supervision of a judge. Ignorance and stupidity may here create damage which the courts of the land cannot thereafter undo. Did the legislature mean to leave this field to any person out of which to make a living? Reason says no. Practicing law as an attorney likewise covers the drawing of legal instruments as a business.

That such work is properly that of an attorney seems to be recognized by other provisions of law. Section 88 of the Judiciary Law, relating to the disbarment of attorneys, makes it the duty of the Appellate Division in each final order of suspension to forbid the giving to another of an opinion as to the law or its application or of any advice in relation thereto.

Section 835 of the Code of Civil Procedure provides in substance that an attorney shall not be allowed to disclose a communication made by his client to him or his advice given thereon, in the course of his professional employment. Such communications have referred to a deed; an affidavit; a chattel mortgage and a bill of sale.

Also the summary power of courts over attorneys may be exercised in matters unrelated to court proceedings.

Even the instances cited below of scriveners and notaries public in foreign lands drawing legal papers sustain this contention, as the laws require such to be trained and experienced men.

The duties of notaries public here are defined by section 105 of the Executive Law. Only in the name is there a correspondence to the continental official.

All rules must have their limitations, according to circumstances and as the evils disappear or lessen. Thus a man may plead his own case in court, or draft his own will or legal papers. Probably he may ask a friend or neighbor to assist him.

We recognize that by section 270 and also 271 a person, not a lawyer, may appear for another in a court not of record outside cities of the first and second class. The results cannot be serious. The cases are generally of minor importance to the parties; such occasions are seldom frequent enough to make it a business, and the procedure is so informal as to constitute the judge really an arbiter in the dispute.

We must, therefore, in harmony with these views, reverse the judgment of the Appellate Division and affirm that of the Special Sessions.

McLAUGHLIN, J. (dissenting).

The defendant was convicted of violating section 270 of the Penal Law. [On appeal], the judgment of conviction was reversed and he was discharged. The People, by permission, appeal to this court.

So much of the section of the Penal Law under which the conviction was obtained as is material to the question presented on appeal, reads as follows: "Practicing or appearing as attorney without being admitted and registered. It shall be unlawful for any natural person to practice or appear as an attorney-at-law or as attorney and counsellor-at-law for another in a court of record in this state or in any court in the city of New York, or to make it a business to practice as an attorney-at-law or as an attorney and counsellor-at-law for another in any of said courts * * * or to hold himself out to the public as being entitled to practice law as aforesaid, or in any other manner, * * * without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state * * *."

The defendant, at the time stated in the information, was a notary public, living at 475 Park avenue, Brooklyn, in the basement of which he had a small office for the transaction of business. Over the entrance of the office was the following sign:

On the 27th of December, 1917, one Gallo, special investigator of the state industrial commission, in company with one Geannelis, entered defendant's office and he asked them what they wanted. Gallo stated that he was selling his store, which consisted of a soda water stand, together with a stock of cigars, cigarettes, etc., to Geannelis, for a certain consideration, which was named, part of which was to be paid down and the balance in installments. Gallo also stated there was a certain amount due to the American Siphon Company on the purchase price of the soda water fountain, which Geannelis was to assume and pay. The defendant advised that Gallo give a bill of sale to Geannelis and that he give a chattel mortgage for the amount remaining unpaid. He also explained it would be necessary to file the mortgage in the county clerk's office, so that the same could be foreclosed by the city marshal in case of non-payment. His suggestions as to the bill of sale and mortgage were followed and he thereupon prepared the same, for which he was paid four dollars.

It is contended that this transaction, together with the sign, amounted to a violation of the provisions of the statute quoted. I have been unable to reach this conclusion. The statute, unless something is read into it which does not there appear, is to prohibit a natural person practicing or appearing as an attorney-at-law in the courts mentioned, or to hold himself out to the public as being entitled to practice in such courts. The defendant did neither. Clearly, the drafting of the bill of sale and chattel mortgage was not practicing or appearing as an attorney-at-law in any court. Nor did the words on the sign, "Redaction of all legal papers" indicate that he was holding himself out as entitled to practice in such courts. The words "in any

other manner," upon which stress is laid, relate to what precedes them in the sentence, viz., the courts referred to. The phrase, although general in its nature, is limited and qualified by the prior specific designations. The rule of ejusdem generis applies. Where the enumeration of specific things is followed by some more general word or phrase, such general word or phrase is held to refer to the things of the same kind.

At the time defendant was convicted it was not illegal, and is not now, for natural persons to draft papers usually intrusted to lawyers. Judicial notice may be taken of the fact that in the rural districts of the state leases, deeds, bills of sale, chattel mortgages, wills and other instruments creating legal obligations are frequently prepared by laymen, notaries public and justices of the peace. Indeed, a natural person could, at the time defendant was convicted, appear for another in a Magistrate's Court, or before a justice of the peace, except in cities of the first and second class, and receive pay therefor. This practice is recognized by section 271, which prohibits a person from receiving compensation for appearing as attorney in a court before any magistrate in any city of the first or second class, unless admitted to practice as an attorney and counsellor in the courts of record of the state. That the legislature did not intend to prohibit such practice is apparent from the fact that at its last session it amended section 271, so that it now includes cities of the third, as well as those of the first and second class.

To give to the words "in any other manner" the legal effect suggested would prohibit a natural person anywhere in the state from drawing a legal paper of any description, or appearing in any court. This, the legislature has not yet indicated its intent to do.

One of the well-settled rules of statutory construction is that statutory offenses cannot be established by implication and that acts in and of themselves innocent and lawful cannot be held to be criminal, unless there is a clear and unequivocal expression of the legislative intent to make them such.

I am of the opinion that the defendant was not guilty of violating section 270 of the Penal Law; that the Appellate Division was right in reversing the conviction and discharging him; and its judgment should, therefore, be affirmed.

2. Professional Conduct

Model Rules of Professional Conduct

Preamble: A Lawyer's Responsibilities

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discre-

tion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. 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.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

Scope

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between

the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[15] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

Rule 1.0: Terminology

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

3. Professional Gatekeeping

3.1 Bar Admission

Model Rules of Professional Conduct

Rule 8.1: Bar Admission & Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

In re Converse, 602 N.W.2d 500 (Neb. 1999)

Paul Raymond Converse appeals a decision of the Nebraska State Bar Commission (Commission) denying his request to take the July 1998 Nebraska bar examination. Converse claims that the decision of the Commission should be reversed because the Commission rested its denial of Converse's application, at least in part, upon conduct protected by the First Amendment to the U.S. Constitution and, in the alternative, that Converse's conduct did not constitute sufficient cause under Nebraska law for denying his application on the ground of deficient moral character. For the reasons that follow, we affirm the decision of the Commission.

Factual Background

In 1998, Converse applied for permission to sit for the Nebraska bar examination. On June 29, 1998, Converse was notified by letter that the Commission had denied permission for him to take the July 1998 Nebraska bar examination because it had determined that Converse lacked the requisite moral character for admission upon examination to the Nebraska State Bar Association. On July 7, the Commission received notice that Converse was appealing the Commission's initial determination. Converse's appeal was heard on September 15, after which the Commission reaffirmed its initial determination and notified Converse on December 18 that he would not be allowed to sit for the Nebraska bar examination at that time.

The evidence at the Commission hearing revealed that as part of the application process, Converse was required to request that the dean of his law school submit a form certifying completion of Converse's law school studies. That form contained a question asking, "Is there anything concerning this applicant about which the Bar Examiners should further inquire regarding the applicant's moral character of fitness to practice law?" The question was answered, "Yes," and the dean also noted, "Additional information will be provided upon request." The Commission followed up on this notation by conducting an investigation which ultimately revealed certain facts regarding Converse.

After the completion of his first semester at the University of South Dakota (USD) Law School, Converse sent a letter to then assistant dean Diane May regarding certain issues—not relevant to this appeal—that he had had with the law school during fall classes, closing that letter with the phrase, "Hope you get a full body tan in Costa Rica." Subsequent to that note, Converse had several more encounters with May, beginning with his writing letters to May about receiving grades lower than what he believed he had earned in an appellate advocacy class.

After he received a grade he believed to be unjustified by his performance in the appellate advocacy course, Converse wrote letters to May and to the USD law school dean, Barry Vickrey, requesting assistance with an appeal of that grade. In addition to writing letters to Vickrey and May, Converse also sent a letter to the South Dakota Supreme Court regarding the appellate advocacy course professor's characterization of his arguments, with indications that carbon copies of the letter were sent to two well-known federal court of appeals judges. The letter was written to suggest the professor believed her stance on certain issues was more enlightened than that of the judges. Converse sent numerous correspondence to various people regarding the grade appeal against the specific professor. Despite all such correspondence, Converse testified at the hearing that no formal appeal of the grievance was ever filed. Converse's grade was never adjusted.

The evidence showed that following the grade "appeal," Converse prepared a memorandum and submitted it to his classmates, urging them to recall an "incident" in which yet another professor lashed out at him in class, and to be cognizant of the image that incident casts "on [that professor's] core professionalism" prior to completing class evaluations. Converse also wrote a letter to a newspaper in South Dakota, the Sioux Falls Argus Leader, regarding a proposed fee increase at the USD law school. Converse immediately began investigating the salaries of USD law professors and posted a list of selected professors' salaries on the student bulletin board, as well as writing a letter that accused Vickrey of trying to pull a "fast one."

Converse's next altercation at the USD law school involved a photograph of a nude female's backside that he displayed in his study carrel in the USD law library. The picture was removed by a law librarian. In response to the removal of this photograph, Converse contacted the American Civil Liberties Union (ACLU) and received a letter indicating that his photograph might be a protected expression under the First Amendment. Once again, Converse went to the student newspaper to alert the student body of the actions of the law school authorities, accusing them of unconstitutional censorship.

Converse redisplayed the photograph once it was returned by the law librarians. Vickrey received several complaints about the photograph from other students, classifying Converse's behavior as "unprofessional and inappropriate." Upon Converse's redisplay of the photograph, Vickrey sent him a memorandum explaining that the picture would not be removed only because Vickrey did not want to involve the school in controversy during final examinations. Converse testified that he redisplayed the photograph in order to force the alleged constitutional issue.

The evidence also revealed that Converse filed an ethics complaint with the North Dakota Bar Association regarding certain correspondence between Vickrey and a retired justice of the North Dakota Supreme Court. The complaint was dismissed. Converse went to the USD student newspaper, claiming that a letter from a retired North Dakota justice to the ACLU, in response to questions from Vickrey, was a violation of professional ethics (apparently Model Rules of Professional Conduct Rule 4.2 (1999), which precludes a lawyer from discussing matters with opposing parties the lawyer knows to be represented by counsel). In addition to going to the press, Converse also contacted the president of USD, referring to Vickrey as an "incompetent" and requesting that Vickrey be fired. In addition to this incident, Converse reported his suspicions about USD's student health insurance policy to the student newspaper under the title of "Law Student Suspects Health Insurance Fraud," as well as in a separate article alleging that USD had suppressed an investigation of its insurance carrier.

The Commission also heard testimony regarding Converse's attempt to obtain an internship with the U.S. Attorney's office in South Dakota. Converse arranged for the internship on his own, only to have his request subsequently rejected by the law school. Upon receiving his denial, Converse sent a complaint to all of USD's law school faculty members. Vickrey testified that Converse's internship was rejected because he failed to comply with the law school's procedures regarding internships. Converse then contacted the chairperson of the law school committee of the South Dakota State Bar Association with his complaint, expressly referring to Vickrey as being "arrogant." There is no indication of a response from the chairperson in the record.

The issue next considered by the Commission was that of various litigation threatened by Converse. Converse indicated that he would "likely" be filing a lawsuit against Vickrey for violations of his First Amendment rights. Converse was also involved in a dispute with other law students, in which he threatened to file a lawsuit and warned the students that all lawsuits in which they were involved would need to be reported to proper authorities when they applied to take a bar examination. Further, Converse posted signs on the bulletin board at the law school denouncing a professor, in response to the way in which Converse's parking appeal was handled, and then went to the student newspaper to criticize the process and those involved in that appeal.

One of the final issues addressed by the Commission in its hearing was that of a T-shirt Converse produced and marketed on which a nude caricature of Vickrey is shown sitting astride what appears to be a large hot dog. The cartoon on the shirt also contains the phrase "Astride the Peter Principle," which Converse claims connotes the principle that Vickrey had been promoted past his level of competence; however, Converse admits that the T-shirt could be construed to have certain sexual overtones. Converse admitted that the creation of this T-shirt would not be acceptable behavior for a lawyer.

In response to not being allowed to post signs and fliers at the law school, Converse sent a memo to all law students in which he noted to his fellow students that his "Deanie on a Weanie" T-shirts were in stock. In that same memo, Converse included a note to his schoolmates:

> So far 4 causes of action have arisen, courtesy Tricky Vickrey. [He then listed what he believed the causes of action to be.] When you pass the SD Bar, if you want to earn some atty [sic] fees, get hold of me and we can go for one of these. I've kept evidence, of course.

Vickrey asked Converse not to wear his T-shirt to his graduation ceremony, and Converse decided that "it would be a better choice in [his] life not to go to that commencement." Converse acknowledges that Vickrey's request was made in a civil manner.

The evidence also revealed that prior to law school, Converse, in his capacity as a landlord, sued a tenant for nonpayment of rent and referred to the tenant as a "fucking welfare bitch." At the hearing, in response to questioning from the Commission, Converse testified at great length as to how he tends to personally attack individuals when he finds himself embroiled in a controversy.

After the Commission notified Converse that he would not be allowed to sit for the Nebraska bar examination, Converse appealed the adverse determination to this court.

Assignments of Error

Converse claims that the Commission erred in basing its decision, in part, upon conduct and speech arguably protected by the First Amendment; not making Converse aware of all of the "charges" against him in the proceedings in violation of the 14th Amendment; and determining that Converse's conduct gave rise to sufficient cause under Nebraska law for the Commission to deny his application to sit for the Nebraska bar examination.

Analysis

Converse first assigns as error that the Commission's determination should not stand because it is based in large part upon speech that is protected by the First Amendment. Thus, the threshold question we must answer is whether conduct arguably protected by the First Amendment can be considered by the Commission during an investigation into an applicant's moral character and fitness to practice law. We answer this question in the affirmative.

There are four U.S. Supreme Court cases that provide particular guidance with respect to this issue. In *Konigsberg v. State Bar,* 366 U.S. 36 (1961), the bar applicant argued that when the California bar commission forced him to either answer questions about his affiliation with the Communist Party or to face the repercussions of not being certified as possessing the required moral character to sit for the bar, the commission violated his First Amendment rights. The Supreme Court disagreed, pointing out that "regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment [forbids] ... when they have been found justified by subordinating valid governmental interests." In the context of a character inquiry, "it is difficult, indeed, to imagine a view of the constitutional protections of speech and association which would automatically ... exclude all reference to prior speech or association on such issues as character, purpose, credibility, or intent." The Court balanced the effect of allowing such questions against the need for the state to do a complete inquiry into the character of

an applicant and concluded that questions about membership would not chill association to the extent of harm caused by striking down the screening process. The Court held that requiring the applicant to answer the questions was not an infringement of the applicant's First Amendments rights.

In 1971, the Court was once again confronted with the issue and decided a trilogy of cases concerning the bar admissions procedures of various states. It was the final case in this trilogy, *Law Students Research Council v. Wadmond*, that clarified the law as to the appropriate depth of a state bar commission's inquiry on an applicant's moral character. The Court declined to uphold a First Amendment attack against the admission procedure of the New York bar association. The Court upheld the statute, which required that the admitting authority be "'satisfied that [the applicant] possesses the character and general fitness requisite for an attorney and counsellor-at-law.'" The Court declared that a state is constitutionally entitled to make such an inquiry of an applicant for admission to the bar and placed its imprimatur upon a state's conducting a preliminary inquiry into the moral character of those seeking admission.

Converse conceded at oral argument that the Commission's decision cannot be based solely on an applicant's exercise of First Amendment freedoms but that it is proper for the Commission to go behind the exercise of those freedoms and consider an applicant's moral character. That is exactly what was done by the Commission in the instant case. An investigation of Converse's moral character is not a proceeding in which the applicant is being prosecuted for conduct arguably protected by the First Amendment, but, rather, "an investigation of the conduct of [an applicant] for the purpose of determining whether he shall be [admitted]." Converse's reliance upon cases where a judgment was invalidated at least in part because it was based on conduct protected by the First Amendment is therefore misplaced.

Were we to adopt the position asserted by Converse in this case, the Commission would be limited to conducting only cursory investigations of an applicant's moral character and past conduct. Justice Potter Stewart, writing for the majority in *Law Students Research Council v. Wadmond*, noted that the implications of such an attack on a bar screening process are that no screening process would be constitutionally permissible beyond academic examination and an extremely minimal check for serious, concrete character deficiencies. "The principle means of policing the Bar would then be the deterrent and punitive effects of such post-admission sanctions as contempt, disbarment, malpractice suits, and criminal prosecutions." Assuming but not deciding that Converse's conduct may have been protected by the First Amendment to the U.S. Constitution, *Law Students Research Council v. Wadmond* makes clear that a bar commission is allowed to consider speech and conduct in making determinations of an applicant's character, and that is precisely what has occurred in the instant case. As aptly stated by the South Dakota Supreme Court in *In re Egan,* 24 S.D. 301 (1909):

> [T]here can be such an abuse of the freedom of speech and liberty of the press as to show that a party is not possessed "of good moral character," as required for admission to the bar of this state ... and therefore to require that such person be excluded from the bar of this state; and to our mind the evidence submitted here shows such an instance.... "Nor can the respondent be justified on the ground of guaranteed liberty of speech. When a man enters upon a campaign of villification, he takes his fate into his own hands, and must expect to be held to answer for the abuse of the privilege extended to him by the Constitution...."

We conclude that the Commission properly considered Converse's conduct as it reflects upon his moral character, even if such conduct might have been protected by the First Amendment. Converse's first assignment of error is therefore without merit.

Converse next contends that the Commission violated his due process rights by not making him aware of all of the "charges" against him in these proceedings. This argument is basically that when the Commission determined that he lacked the requisite moral character and gave some examples as to why they reached such a determination, they should have provided an all-inclusive list delineating every reason on which their decision was based. We conclude that such a procedure is not required.

By alleging that he has not been made fully aware of the "charges" against him, Converse has confused this inquiry into his moral character with a trial. Such is not the case. An inquiry regarding an application to the bar is not a lawsuit with the formalities of a trial, but, rather, is an investigation of the conduct of an applicant for membership to the bar for the purpose of determining whether he shall be admitted. No charges have been filed against Converse, and he has been advised of the reasons for which his application was denied. Converse's assignment of error that he has been denied due process of law is therefore without merit.

Converse's third assignment of error alleges that the Commission erred by determining there was sufficient cause to deny his application to sit for the Nebraska bar exam. Much of his argument centers around his conduct being protected by the First Amendment, as discussed previously. However, the question presented is not the scope of Converse's rights under the First Amendment, but whether Converse's propensity to unreasonably react against anyone whom he believes opposes him reveals his lack of professional responsibility, which renders him unfit to practice law.

There is no question that "[a] state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar...." The Court has also stated that it must be "kept clearly in mind ... that an applicant for admission to the bar bears the burden of proof of 'good moral character'—a requirement whose validity is not, nor could well be, drawn in question here." "If at the conclusion of the proceedings the evidence of good character and that of bad character are found in even balance, the State may refuse admis-

sion....” Nebraska does, in fact, require a bar applicant to show that the applicant is of good moral character. Therefore, the burden is upon Converse to adequately prove his fitness to practice law in Nebraska, and the evidence will be viewed in this light.

The legal reality is that this court, and only this court, is vested with the power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar. With that in mind, we commence our analysis with the standards for moral character required for admission to the Nebraska bar as set out in our rules governing the admission of attorneys. Neb. Ct. R. for Adm. of Attys. 3 governs this situation, which provides in pertinent part:

> An attorney should be one whose record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them. A record manifesting a significant deficiency by an applicant in one or more of the following essential eligibility requirements for the practice of law may constitute a basis for denial of admission. In addition to the admission requirements otherwise established by these Rules, the essential eligibility requirements for admission to the practice of law in Nebraska are:
>
> (a) The ability to conduct oneself with a high degree of honesty, integrity, and trustworthiness in all professional relationships and with respect to all legal obligations;
>
> ....
>
> (c) The ability to conduct oneself with respect for and in accordance with the law and the Code of Professional Responsibility;
>
> ....
>
> (j) The ability to conduct oneself professionally and in a manner that engenders respect for the law and the profession.

Under rule 3, Converse must prove that his past conduct is in conformity with the standards set forth by this court, and the record in this case compels the conclusion that he has failed to do so.

We considered an appeal of a similarly situated bar applicant in *In re Appeal of Lane,* 249 Neb. 499 (1996). *In re Appeal of Lane* involved an individual seeking readmission to the Nebraska bar whose past included confrontations with law school faculty, the use of strong and profane language with fellow students at his bar review course, the use of intimidating and rude conduct directed at a security guard at the place where he was taking his bar review course, and some controversial interactions with females. We held that, taken together, “these incidents show that Lane is prone to turbulence, intemperance, and irresponsibility, characteristics which are not acceptable in one who would be a counselor and advocate in the legal system,” and we upheld the denial of his application.

We explained in *In re Appeal of Lane* that the "requisite restraint in dealing with others is *obligatory conduct for attorneys* because '[t]he efficient and orderly administration of justice cannot be successfully carried on if we allow attorneys to engage in unwarranted attacks on the court [or] opposing counsel.... Such tactics seriously lower the public respect for... the Bar.'" Furthermore, "'[a]n attorney who exhibits [a] lack of civility, good manners and common courtesy ... tarnishes the ... image of ... the bar....'" We held in *In re Appeal of Lane* that "abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, or turbulent behavior is a proper basis for the denial of admission to the bar." Expanding on this holding, we stated:

> "Care with words and respect for courts and one's adversaries is a necessity, not because lawyers and judges are without fault, but because trial by combat long ago proved unsatisfactory.
>
> ....
>
> "The profession's insistence that counsel show restraint, self-discipline and a sense of reality in dealing with courts, other counsel, witnesses and adversaries is more than insistence on good manners. It is based on the knowledge that civilized, rational behavior is essential if the judicial system is to perform its function. Absent this, any judicial proceeding is likely to degenerate into [a] verbal free-for-all.... [H]abitual unreasonable reaction to adverse rulings... is conduct of a type not to be permitted of a lawyer when acting as a lawyer. *What cannot be permitted in lawyers, cannot be tolerated in those applying for admission as lawyers.*"

In Nebraska, *In re Appeal of Lane* is clearly the rule and not an exception thereto.

The evidence in this case shows that Converse's numerous disputes and personal attacks indicate a "pattern and a way of life which appear to be [Converse's] normal reaction to opposition and disappointment." The totality of the evidence clearly establishes that Converse possesses an inclination to personally attack those with whom he has disputes. Such inclinations "are not acceptable in one who would be a counselor and advocate in the legal system."

In addition to Converse's tendency to personally attack those individuals with whom he has disputes, his pattern of behavior indicates an additional tendency to do so in arenas other than those specifically established within the legal system. This tendency is best exemplified by observing Converse's conduct in situations where there were avenues through which Converse could have and should have handled his disputes, but instead chose to mount personal attacks on those with whom he had disputes through letters and barrages in the media.

One such incident occurred when Converse received the below average grade in the appellate advocacy course, and he wrote letters to various individuals regarding his arguments. Converse testified that he wrote letters to members of the South Dakota Supreme Court, Judge Richard Posner, Judge Alex Kozinski, and others, but filed no formal appeal. Moreover, upon return of the nude photograph, Converse testified that he redisplayed the photograph to force the issue with the

university, but chose not to pursue any action regarding the alleged violation of his rights. There was also the incident regarding Converse's internship with the U.S. Attorney's office, where Converse went outside established procedures, arranged for the internship on his own, and then complained to all faculty and to members of the South Dakota bar when his request was denied for not complying with established procedures. Finally, there was Converse's production and marketing of the T-shirt containing a nude depiction of Vickrey on a hot dog as a result of the ongoing tension between Vickrey and himself. Converse is 48 years old, and his actions cannot be excused as isolated instances of youthful indiscretions.

Taken together with the other incidents previously discussed, the evidence clearly shows that Converse is prone to turbulence, intemperance, and irresponsibility; characteristics which are not acceptable in one seeking admission to the Nebraska bar. In light of Converse's admission that such conduct would be inappropriate were he already an attorney, we reiterate that we will not tolerate conduct by those applying for admission to the bar that would not be tolerated were that person already an attorney. Furthermore, Converse has consistently exhibited a tendency to cause disruption and then go to some arena outside the field of law to settle the dispute, often to an arena not specifically designed for dispute resolution. As explained by Justice Stewart in *Law Students Research Council v. Wadmond*,

> a State is constitutionally entitled to make ... an inquiry [into the moral character and past conduct] of an applicant for admission to a profession dedicated to the peaceful and reasoned settlement of disputes between men, and between a man and his government. The very Constitution that the appellants invoke stands as a living embodiment of that ideal.

The record before us reflects that the Commission conducted such an inquiry and, at the conclusion thereof, correctly determined that Converse possessed a moral character inconsistent with one "dedicated to the peaceful and reasoned settlement of disputes," but, rather, more consistent with someone who wishes to go outside the field of law and settle disputes by mounting personal attacks and portraying himself as the victim and his opponent as the aggressor. Such disruptive, hostile, intemperate, threatening, and turbulent conduct certainly reflects negatively upon those character traits the applicant must prove prior to being admitted to the Nebraska bar, such as honesty, integrity, reliability, and trustworthiness.

The result might have been different if Converse had exhibited only a "single incident of rudeness or lack of professional courtesy," but such is simply not the case. The record clearly establishes that he seeks to resolve disputes not in a peaceful manner, but by personally attacking those who oppose him in any way and then resorting to arenas outside the field of law to publicly humiliate and intimidate those opponents. Such a pattern of behavior is incompatible with what we have required to be obligatory conduct for attorneys, as well as for applicants to the bar.

Converse has exhibited a clear lack of self-restraint and lack of judgment, and our de novo review of the record leads us to independently conclude that Converse has exhibited such a pattern of acting in a hostile and disruptive manner as to render him unfit for the practice of law in Nebraska. We conclude that the Commission's determination to deny Converse's application was correct, and Converse's third assignment of error is therefore without merit.

Conclusion

The Commission correctly determined that Converse possessed insufficient moral character and was unfit to practice law in the State of Nebraska. This determination was based on an inquiry into Converse's moral character that was both proper and constitutionally permissible. Finding no error in the Commission's determination or the process used to reach that determination, we affirm the Commission's denial of application.

In re Roots, 762 A.2d 1161 (RI 2000)

This case comes before us on an application by the petitioner Roger I. Roots (petitioner or Roots) seeking admission to the bar of the State of Rhode Island. Roots, who was born in October, 1967, is a 1999 graduate of the Roger Williams University School of Law. Following his law-school graduation, he took and passed the Rhode Island bar examination. In accordance with its usual procedures, this Court's Committee on Character and Fitness (committee) examined Roots's record and interviewed him after he had passed the bar examination. Because the committee had serious concerns relating to his character and fitness to become a member of the bar of this state, it conducted a number of hearings to determine whether it would recommend Roots's admission to the bar. [After the hearings, the majority of the committee, with two members dissenting, voted in favor of Roots's admission.]

To avoid an unduly long recitation of the pertinent facts concerning Roots's application, the various reports that the majority and minority members prepared are attached to this opinion and made a part hereof. The report of the majority is appended and marked as exhibit A. The concurring report recommending admission is appended and marked as exhibit B. The minority report that Chairman Steven M. McInnis wrote is appended and marked as exhibit C. The dissenting opinion of the Attorney General's designee is appended and marked as exhibit D. All these reports contain very similar accounts of the factual elements underlying the reports of the members of the committee. Nevertheless, we shall attempt to set forth in this opinion the important facts and circumstances that we believe justify our conclusion.

Through its hearings and by examining the material submitted in support of and in opposition to the application, the committee sought to resolve three major areas of concern about the petitioner: (1) his criminal record; (2) his candor and veracity; and (3) his ability to take and abide by the attorney's oath. Some of the evidence was documentary in nature. In addition, extensive testimony was taken from the petitioner himself. The three areas of concern shall be dealt with separately in this opinion.

[W]e are of the opinion that Roots's application should be denied without prejudice to Roots reapplying at some later date after he has proven that he has truly rehabilitated himself.

I

Petitioner's Criminal Record

In 1985, when he was eighteen years old, Roots was charged with and convicted of shoplifting in the State of Florida. He had relocated there after leaving his home in Montana during his freshman year in high school. In his bar application, Roots admitted that, following his arrest for this crime, he "failed to appear at [his] scheduled hearing on the matter." He conceded that he was aware that he needed to attend the hearing but claims that his immaturity at the time caused him to disregard the court's order. Within two months, however, the Orlando police rearrested him on the same charge. He was then detained until he could be presented to a judge. And even though the court still treated him with leniency, Roots shirked his responsibility to abide by the terms of his probation when he failed to perform the community-service condition of his sentence. (He admitted in his application to the bar that he just "left Orlando without performing the community service.")

Within a year, however, he was arrested again in Florida and convicted of yet another crime, the felony of resisting arrest with violence. Generally, this crime involves disobeying, with the use of force (as opposed to mere flight), a police officer's lawful attempt to arrest an alleged criminal. As reflected in the police report and in Roots's law school application, the alleged facts of the crime reveal that Roots's truck had collided with another vehicle. A police officer arrived at the accident scene and an argument ensued between Roots and the officer. When the officer learned that Roots had failed to pay two fines for separate moving violations and was driving on a suspended license, he attempted to take Roots into custody but Roots physically resisted the arrest. Although a federal sentencing judge would later characterize this incident as minor because, in attempting to subdue Roots, the police officer struck the only actual blow, a Florida sentencing judge, who presumably was more familiar with the relevant facts and circumstances, ultimately sentenced Roots to fifty-one weeks in prison following his *nolo contendere* plea after he again violated his initial three-year-probation sentence.

The petitioner then left Florida and moved to Wyoming, where he attended the Northwest Community College in Powell, Wyoming. While there, he exhibited in class a homemade air gun that he had constructed. (This may have been part of a speech presentation.) Because the authorities knew that petitioner had a prior record, they searched his dormitory room. There, they found additional weapons, including an automatic pistol, an automatic rifle with approximately 500 rounds of ammunition, and an assault rifle described as an AK-47. The petitioner was charged in federal court with being a felon in possession of firearms and with the possession of an unregistered firearm in violation of various federal statutes. Pursuant to a plea agreement, petitioner pled guilty to the registration count (relating to the air gun). The other counts were dismissed. A federal judge sentenced petitioner to twenty months in federal prison on January 10, 1992. This sentence terminated on April 4, 1993. As previously mentioned, the federal judge indicated that the petitioner's felony conviction for resisting arrest with violence in Florida was not as serious an offense as might appear on the surface since the only injury was to the officer's hand when he struck the petitioner in the face. Nevertheless, it was established that in purchasing the various weapons, the petitioner had filled out a number of forms in which he had misrepresented his status as a person convicted of a felony in Florida.

The applicant's criminal record also includes the following:

(1) On at least eight occasions from the spring of 1986 to as recently as the winter of 1997, Roots was caught speeding and ordered to pay fines. These moving-traffic violations occurred in Utah, Washington, and Montana.

(2) Roots apparently ignored his previous driver's license suspensions and flouted these dispositions because he later was charged in Georgia not once but twice in 1989 for driving on a suspended license. On the first occasion he not only drove on a suspended license, but also was issued citations for driving without a license, without insurance, and without proper registration. On the second such occasion, he was again driving on an expired registration plate and a suspended license. Roots's bar application explains his conduct thus:

"I was without sufficient money for insurance or registration. I made it to work for several days but was pulled over by another officer only a couple days later. Again, I was arrested for driving without a license, registration, or insurance. * * * To this day I do not know what became of the cases in Georgia."

On the present record, we do not know whether Roots has satisfied whatever lawfully imposed fines he was obliged to pay in Georgia. Apparently, he has not inquired about what present responsibilities — or possible warrants for his arrest based on his failure to resolve these matters — he still may have outstanding in Georgia.[2] Nothing in the record shows that Roots has resolved these matters. Moreover, even if Roots formerly lacked sufficient funds to pay for his automobile

2 (n. 4 in opinion) Roots also has not accounted for his 1986 Utah speeding and reckless driving violations. His bar application lists the disposition or fine for these speeding and reckless driving violations as "u/k," which we assume means "unknown." Although Roots has not forgotten about these violations, he has neglected to determine for over fourteen years whether any sanctions remain outstanding against him in Utah for these transgressions.

insurance or registration, he should have arranged to use public transportation or pursued other alternatives (for example, carpooling with friends or co-employees), rather than driving continuously on a suspended or revoked license as he did when he was caught doing so on three separate occasions.

Every prospective attorney in this state must complete an application that asks for a listing of all the candidate's "violations of * * * traffic law[s] or ordinance[s] other than parking offenses." This part of the application is not superfluous nor a mere incursion into the applicant's privacy, and it should not be so considered. Rather, it bears a logical and appropriate relationship to the ability of a prospective attorney in this state to maintain respect for and to uphold the law. And although repeated violations of various traffic laws, in isolation, may not preclude a candidate from admission to the bar, they certainly are relevant to the moral fitness and good-character determination that must be made when evaluating the qualifications of prospective attorneys.

(3) In Florida, Roots was convicted of providing a false statement to the authorities. To be sure, Roots has admitted that he provided a false name, but it should go without saying that this crime also reflects upon a candidate's ability to serve the public as an attorney, as well as upon the applicant's candor and truthfulness.

In their totality, these various citations, misdemeanors, and felonies that Roots has accumulated over the years present sufficient evidence to warrant, at minimum, a significant delay in acting favorably upon his application for admission to the Rhode Island bar, especially in light of the fact that Roots has admittedly ignored and violated the terms of his two previous probationary periods. Indeed, Roots's first probation required him to perform community services — yet he chose to ignore that mandate from the Florida court. Instead, it was only after he scuffled with an arresting police officer — itself a display of disobedience to the officer's attempt to effect a lawful arrest — and again disobeyed the terms of his probation, that Roots was ultimately forced to serve time in prison.

We recognize that Roots has not been convicted of violating any criminal laws since his conviction on the federal weapons charge and since his release from prison in 1993 after serving his federal jail sentence of twenty months. We also acknowledge and commend Roots's award-winning writings, his law-school class rank, his position on the student newspaper, and his service on the Roger Williams University Law Review. On the other hand, while these more recent accomplishments are indeed praiseworthy, they are largely irrelevant in establishing his moral fitness and good character to practice as a member of our bar. Indeed, no one has sought to disqualify Roots based on his academic incompetency or lack of intelligence. On the contrary, his record in this regard is conceded to be out-

standing. But even some notorious criminals can point with pride to their relative intelligence. Thus, mere intelligence and academic achievement do not necessarily equate to moral fitness and good character, both of which are preconditions to becoming a member of our bar.

Notwithstanding these more recent positive factors, it is our belief that we have not yet had enough opportunity to conclude that Roots has totally rehabilitated himself, especially because his conduct during the years leading up to and including the filing of his bar application raises further questions about the depth, scope, and extent of his alleged rehabilitation. Indeed, his probationary status on the federal-weapons conviction expired only a mere four years ago, after which he then enrolled in law school and continued to engage in activities that cast doubt on his candor, truthfulness, and ability to take the attorney's oath in good faith.

II

The Petitioner's Lack of Candor and Truthfulness

It has been established that the petitioner was not truthful in applying for the purchase of firearms. It also has been established that petitioner was not truthful in answering a question on the bar application about the use of aliases, although he did admit to having used three aliases: Carl Davis, Rodger Roop, and Roger Bell. He indicated on his application that these aliases were used for the purpose of attending school, writing, and telephone fundraising. In his testimony before the committee, however, he admitted that the use of the alias Carl Davis was to help him evade the law after he was indicted for the weapons charge in Montana. When he assisted in a senatorial campaign, he also used another alias, Roger Bell, in order to hide his true identity when salary payments were made to him. The minority report that Chairman McInnis submitted concluded that Roots's lack of candor in this respect would not be consistent with allowing petitioner to practice law.

We have recently affirmed that "[t]he attorney-client relationship is 'one of mutual trust, confidence, and good will,' in which the attorney 'is bound to * * * the most scrupulous good faith.'" A central purpose of requiring character review as part of the attorney-admission process is to protect those members of the public who might become clients of the practicing lawyer from those attorneys who are so morally or ethically challenged that they are unable to demonstrate the type of good character and moral fitness requisite to serving in a fiduciary capacity. As Mr. Justice Frankfurter once observed, lawyers stand

> 'as a shield' * * * in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character.'

The fiduciary position of trust that a lawyer assumes vis-à-vis his or her clients demands that individuals whom this Court admits to the bar should be worthy of the confidence that members of the public repose in them. An equal and complementary concern is to safeguard the administration of justice from those who might subvert it through misrepresentations, falsehoods, or incomplete disclosures when full disclosure is necessary.

As we have noted previously, Roots was not truthful in applying to buy firearms. Indeed, he repeatedly checked a box indicating that he was *not* a convicted felon when he applied for his gun purchases, despite previously having been convicted of a felony. Thereafter, Roots was convicted for violently resisting arrest, and ultimately spent close to a year in prison for that offense after violating his initial three-year-probation sentence. He was also well aware of his convictions at the time he applied to buy his various assault weapons, yet he failed to disclose them.

Furthermore, Roots admitted to the committee that he was less than forthcoming on his bar application about the reason for his use of the "Carl Davis" alias. Significantly, Roots submitted this untruthful application for admittance to the bar *in 1999*. When pressed about this discrepancy, Roots was unable to reconcile these contradictory statements.

Moreover, as mentioned above, Roots already had been convicted criminally of providing a false statement to the authorities. Such a record of dishonesty, combined with Roots's other criminal misconduct and recent fabrication on his bar application, appears to us to justify at least a several-year delay before Roots's application even should be considered again for his possible admission to the bar. And Roots's use of an alias to mask his "unsavory" connections to white supremacy groups while working for the Committee to Reelect Conrad Burns, and his use of false indorsements on his paychecks, are simply further reasons for this Court to deny Roots's application at this time.

In sum, then, we agree with the minority report that this applicant's lack of candor is inconsistent with admitting him to practice law at this time.

III

Ability to Abide by the Attorney's Oath

Pursuant to Article II, Rule 8 of the Supreme Court Rules, "[e]very person who is admitted as attorney and counselor at law shall take in open court the following engagement:"

"'You solemnly swear that in the exercise of the office of attorney and counselor you will do no falsehood, nor consent to any being done; you will not wittingly or willingly promote, sue or cause to be sued any false or unlawful suit; or give aid, or consent to the same; you will delay no man's cause for lucre or malice; you will in

all respects demean yourself as an attorney and counselor of this court and of all other courts before which you may practice uprightly and according to law, with fidelity as well to the court as to your client; and that you will support the constitution and laws of this state and the constitution and laws of the United States. So help you God.'"

Beginning in 1993 petitioner has published a number of articles — including articles as recent as 1998 — that express explicit racial and ethnic bias as well as contempt and disdain for the federal government. His 1993 article is entitled "100 Truths and One Lie" and purports to establish that members of the black race are inferior to members of the white race. Excerpts from this work are set forth in the minority report. Moreover, as recently as 1998, Roots has written that he disavows the "de facto" regime of the United States government, its laws, and, apparently, its Constitution. Similarly, he has written in support of the bogus liens that the Freemen in Montana have attempted to place on federal officials who, in his opinion, have violated certain dictates that the Freemen espouse. It is noteworthy that Roots expressed these views in writing even while he was attending law school in 1998. Roots, however, now attempts to retreat from that stance. He would now have us believe that, consistent with the oath all prospective attorneys must take, he now can swear that he will support the constitution and the laws of this state as well as those of the federal government. This oath, as well as similar oaths that prospective attorneys across the United States must take, does not violate any individual constitutional right that Roots may have to express his contrary views.

At the same time, the United States Supreme Court has stated that "[c]itizens have a right under our constitutional system to criticize government officials and agencies. * * * Government censorship can no more be reconciled with our national constitutional standard of freedom of speech and press when done in the guise of determining 'moral character,' than if it should be attempted directly." Thus, we have no intention or desire to censor or to punish Roots for his past or present political views or for exercising his rights of free speech. Nevertheless, when as here, a candidate for admission to the bar of a state has published writings that communicate his or her explicit refusal to accept our federal government as the legitimate government of this country, such a candidate raises legitimate questions about whether he or she in good faith can take and abide by the attorney's oath to support the laws and the constitution of the United States while in the exercise of the office of attorney and counselor. For example, if a candidate for admission to the bar were to express the view that, in his or her opinion, the laws and constitution of the United States were illegitimate and, for that reason, unsupportable, but that in the exercise of his or her office as an attorney or counselor, he or she still could and, therefore, would swear to support that constitution and those laws, then the committee and this Court would be entitled, we believe, to view that candidate's professed oath-taking ability with some degree of skepticism — especially if the candidate were a convicted felon with a history indicating a recurring

lack of truthfulness and candor. While it is possible to draw and maintain a sharp line between a lawyer's personal beliefs and his or her professional conduct, a predictive assessment of a prospective lawyer's ability to take and abide by the attorney's oath is a fair subject for character review when considering an applicant for admission to the bar. Here, Roots bore the burden at all times to demonstrate his moral fitness and character to practice as a lawyer in this state. But his recent 1997-1998 publications and comments disavowing the legitimacy of our federal government — especially when considered in light of his criminal record and history of other misconduct indicating a lack of forthrightness and candor — give us pause in accepting his avowal to us that he can now in good faith take and abide by the requisite attorney's oath.

Nevertheless, in reaching this conclusion, we agree with the majority of the committee that the First Amendment inhibits both the committee and this Court from denying membership in the bar to the petitioner because of his political beliefs and unorthodox political and social ideas. All of these cases related to applicants who either were or had been at one time members of the Communist Party or refused to answer questions relating to their membership in an organization (presumably the Communist Party) that advocated the violent overthrow of the government of the United States. We also recognize, as did the majority members of the committee, that neither a criminal record nor the political views of an applicant constitute an automatic bar to his or her admission. Yet both may be *relevant* in assessing (1) the applicant's candor, honesty, sincerity, and good faith in professing a willingness to take and abide by the requisite attorney's oath, and (2) the ability of the applicant, in the exercise of his or her office as an attorney and counselor, to support the constitution and laws of the United States.

The petitioner has stated to the committee and to this Court that he will not only take the attorney's oath if admitted to the bar, but that he will abide by it. He stated unequivocally under oath to this Court that he would not discriminate against any person for racial or ethnic reasons. He further stated that he would abide by the lawyer's oath in all respects without any mental reservation or purpose of evasion. And he has stated to the committee that he no longer entertains his extremist views on the illegitimacy of the government of the United States.

We are of the opinion, however, that the prior record of the petitioner — including his criminal past and the other conduct referenced above demonstrating his lack of candor and truthfulness — casts such doubt upon the sincerity of Roots's professed willingness to abide by the terms of the oath that he must take as a member of the bar of this state that his application should be denied at this time.

Conclusion

For the above reasons, we conclude that Roots's application to the bar should be denied. The record in this case reveals far too many recent and past criminal acts, instances of untruthfulness, and a lingering inability of this candidate to take the requisite attorney's oath in good faith. Thus, we cannot endorse Roots's admission to the bar of this state at this time. Nevertheless, our denial of his application shall not preclude the possibility of Roots reapplying for and obtaining approval of his admission to the bar at some later time, but no sooner than two years from the date of this opinion. Moreover, if Roots reapplies for admission to the bar of this state within three years from the date of this opinion, he shall not be required to retake the bar examination. However, in addition to satisfying the committee's usual criteria, he shall be required to demonstrate to the satisfaction of the committee and, ultimately to this Court, that, during the period between the date of this opinion and his reapplication:

1. He has secured and maintained gainful employment;
2. He has kept the peace and been of good behavior;
3. His writings and other conduct are consistent with his ability to take the attorney's oath in good faith;
4. His previous motor vehicle and driving violations and any resulting sanctions in the states of Georgia and Utah have been satisfied and are no longer outstanding;
5. He has performed *pro bono publico* services of a substantial and continuing nature;
6. His post-1993 conduct and achievements outweigh the misconduct and other detrimental factors detailed in this opinion and, thus, are better indications of his moral character and fitness to practice law than his previous misconduct.

Accordingly, we hereby deny Roots's application without prejudice to his reapplication at some later time (no sooner than two years) when a more accurate and adequate assessment of Roots's professed rehabilitation can be undertaken.

Matter of Anonymous, 875 N.Y.S.2d 925 (N.Y. App. Div. 2009)

Applicant passed the February 2008 New York State bar exam and the State Board of Law Examiners certified him for admission to this Court. The Committee on Character and Fitness has completed its investigation of his application for admission, including an interview of applicant.

Applicant has disclosed various student loans with balances now totaling about $430,000. He has stated that the loans are currently delinquent but professes good faith intentions to pay them. He has attributed his nonpayment to the downturn in the economy and bad faith negotiations on the part of some of the loan servicers. Our review of the application indicates that the disbursement dates of the loans cover a 20-year period, from as early as 1985. Applicant has not made any substantial payments on the loans. He has not been flexible in his discussions with the loan servicers. Under all the circumstances herein, we conclude that applicant has not presently established the character and general fitness requisite for an attorney and counselor-at-law.

3.2 Unauthorized Practice of Law

Model Rules of Professional Conduct

Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practiceof Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c) (2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(e) For purposes of paragraph (d):

(1) the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority; or,

(2) the person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction must be authorized to practice under this Rule by, in the exercise of its discretion, [the highest court of this jurisdiction].

N.C. Gen. Stat.

§ 84-2.1: "Practice law" defined.

(a) The phrase "practice law" as used in this Chapter is defined to be performing any legal service for any other person, firm or corporation, with or without compensation, specifically including the preparation or aiding in the preparation of deeds, mortgages, wills, trust instruments, inventories, accounts or reports of guardians, trustees, administrators or executors, or preparing or aiding in the preparation of any petitions or orders in any probate or court proceeding; abstracting or passing upon titles, the preparation and filing of petitions for use in any court, including administrative tribunals and other judicial or quasi-judicial bodies, or assisting by advice, counsel, or otherwise in any legal work; and to advise or give opinion upon the legal rights of any person, firm or corporation: Provided, that the above reference to particular acts which are specifically included within the definition of the phrase "practice law" shall not be construed to limit the foregoing general definition of the term, but shall be construed to include the foregoing particular acts, as well as all other acts within the general definition.

(b) The phrase "practice law" does not encompass:

(1) The drafting or writing of memoranda of understanding or other mediation summaries by mediators at community mediation centers authorized by G.S.7A-38.5 or by mediators of employment-related matters for The University of North Carolina or a constituent institution, or for an agency, commission, or board of the State of North Carolina.

(2) The selection or completion of a preprinted form by a real estate broker licensed under Chapter 93A of the General Statutes, when the broker is acting as an agent in a real estate transaction and in accordance with rules adopted by the North Carolina Real Estate Commission, or the selection or completion of a preprinted residential lease agreement by any person or Web site provider. Nothing in this subdivision or in G.S.84-2.2 shall be construed to permit any person or Web site provider who is not licensed to practice law in accordance with this Chapter to prepare for any third person any contract or deed conveying any interest in real property, or to abstract or pass upon title to any real property, which is located in this State.

(3) The completion of or assisting a consumer in the completion of various agreements, contracts, forms, and other documents related to the sale or lease of a motor vehicle as defined in G.S.20-286(10), or of products or services ancillary or related to the sale or lease of a motor vehicle, by a motor vehicle dealer licensed under Article 12 of Chapter 20 of the General Statutes.

In re Creasey, 12 P.3d 214 (Ariz. 2000)

Feldman, Justice

This court disbarred Frederick C. Creasy, Jr. on September 16, 1996, for a number of violations of the Code of Professional Conduct and other Rules of the Supreme Court. The most serious involved failure to properly maintain client funds entrusted to him on two separate occasions, failure to adequately supervise a non-lawyer, and failure to assist in the State Bar's investigation of these matters. In the eleven years prior to his disbarment, Creasy received six informal reprimands from the State Bar.

On April 14, 1999, the State Bar received a report from attorney William Shrank regarding Creasy's possible violations of the disbarment order. The submission included the transcript of the sworn statement of a witness taken in what is described in the record as a private arbitration matter involving a claim for underinsured motorist benefits made by Sterling K. Smith against his insurer, USAA Casualty Insurance Company. Smith's USAA policy required him to submit this disputed claim to arbitration.

Along with his wife, Marilyn Creasy, a certified public adjuster and owner of The Legal Shoppe, Creasy "represented" Smith in this arbitration. Shrank represented USAA. At the time of the accident with the underinsured motorist, Smith evidently had some preexisting injuries caused by industrial accidents and covered under workers' compensation. Creasy sought to establish that the automobile accident, rather than the industrial problems, caused specific injuries. During a sworn statement of Dr. Dennis Crandall, Smith's treating physician, and over Shrank's objections, Creasy extensively and probingly examined Dr. Crandall concerning Smith's injuries.

Based on Creasy's appearance at and actions during the sworn statement, the State Bar filed a petition asking this court for an order directing Creasy to appear and show cause why he should not be held in contempt for violating the 1996 disbarment order by engaging in the practice of law. Creasy appeared in response to our order and the issues were briefed and argued.

Creasy, no longer a member of the bar, contests the jurisdiction of this court to regulate the actions of a non-lawyer. He also denies that he practiced law when he examined Dr. Crandall, arguing that actions that constitute the practice of law before a court are not the practice of law when done in the context of a private arbitration proceeding. Finally, he contends that because he was employed by an insurance adjuster licensed under A.R.S. § 20-281 (1990), the Arizona Department of Insurance has sole jurisdiction to regulate his conduct in this matter. We disagree with all three of his submissions.

DISCUSSION

A. Jurisdiction

We first address Creasy's argument that this court lacks jurisdiction over him because he is a non-lawyer. The argument is without merit. As we have previously said:

> Article III of the Arizona Constitution creates the judicial branch of government, separate and distinct from the other branches.

> This court has long recognized that under article III of the Constitution "the practice of law is a matter exclusively within the authority of the Judiciary. The determination of who shall practice law in Arizona and under what condition is a function placed by the state constitution in this court."

The court's authority over the practice of law is also based on the creation of an integrated judicial department and the revisory jurisdiction of this court as provided in the Arizona Constitution. Prior to 1985, the Arizona Legislature prohibited the practice of law by unlicenced persons. Effective January 1, 1985, however, the entire title regulating attorneys was repealed; since then the practice of law has been under the exclusive regulatory jurisdiction of this court, governed by the Supreme Court Rules, in particular Rule 31(a)(3). This constitutional power to regulate the practice of law extends to non-lawyers as well as attorneys admitted to bar membership.

The facts of this case do not require us to determine the extent of our power to regulate "practitioners" who are not and have never been lawyers. In the situation presented here, our rules specifically apply to both active lawyers and those who have been disbarred. Rule 31(a)(3) states:

> *Privilege to practice.* Except as hereinafter provided in subsection 4 of this section (a), no person shall practice law in this state or hold himself out as one who may practice law in this state unless he is an active member of the state bar, and no member shall practice law in this state or hold himself out as one who may practice law in this state, while suspended, disbarred, or on disability inactive status.

We see no reason why we would have jurisdiction over lawyers and not over disbarred lawyers like Creasy. Creasy's case actually presents an even stronger situation for jurisdiction than that of a person never admitted to the bar. On admission, Creasy submitted himself to the authority of the State Bar and this court. He is still bound by the restrictions imposed on him by this court's disbarment order, made under Rule 31, which explicitly prohibits a disbarred lawyer from continuing or re-

suming practice. His expulsion from the bar in no way frees him from these restrictions. It would be strange doctrine that as a result of being disbarred, a lawyer may not only resume practice but be free of the obligations imposed on lawyers who have not been disbarred.

Given our authority over the practice of law and those who have been admitted to the bar, we conclude that we have continuing jurisdiction to prevent Creasy from resuming the practice of law. We turn, then, to the question of whether he was engaged in the practice of law.

B. The practice of law

Creasy argues that his actions during the private arbitration proceeding— unconnected to any pending judicial matter— do not constitute the practice of law. We long ago defined the practice of law as

> those acts, whether performed in court or in the law office, which lawyers customarily have carried on from day to day through the centuries constitute the practice of law. Such acts ... include rendering to another *any other advice or services* which are and have been customarily given and performed from day to day in the ordinary practice of members of the legal profession.

More recently, we applied this definition to hold that a judge who represented a corporation in contract negotiations and who advised the corporation regarding those negotiations had engaged in the practice of law. As these cases make clear, a person need not appear in a judicial proceeding to engage in the unauthorized practice of law. Creasy concedes that he represented Smith when he took Dr. Crandall's sworn statement but argues that the medical claim evaluation issues at stake did not require the "application of a trained legal mind." He also argues that because his examination of Dr. Crandall occurred in the context of a private arbitration, his actions do not constitute the unauthorized practice of law. We are unpersuaded for the following reasons.

In this case we need not decide whether the Arizona Land Title definition should be changed or whether the Baron definition of the practice of law is an appropriate narrowing of Arizona Land Title or Fleischman. Whatever may be the line separating the proper activities of lay people and lawyers in a non-adversary context, even a cursory look at the caption of the proceedings at which Creasy appeared and a sample of Creasy's examination of Dr. Crandall during the sworn statement makes it apparent that Creasy rendered the kind of core service that is and has "been customarily given and performed from day to day [only] in the ordinary practice of members of the legal profession." As noted, our cases make clear that a person need not appear in a judicial proceeding to engage in the practice of law. If negotiation of a contract in Fleischman was the practice of law, then, a fortiori, Creasy's

representation of Smith by examining a witness in an adversary setting involving a disputed claim certainly falls within that definition as well, particularly in light of the nature of the examination, which was no less exhaustive or rigorous than one would ordinarily see during a formal deposition in a judicial proceeding.

We are quite aware of the social, technological, and economic changes that have taken place since our decision in Arizona Land Title. In some situations these changes may require us to reexamine our broad definition of the practice of law. This is not the case in which to do so. We do not deal here with the legitimate practice of other professionals, with the preparation or distribution of generic documents and forms for general use, the mere giving of legal advice, or even the preparation of documents for a specific client, the situation in which the "trained legal mind" test evolved.

Our conclusion that Creasy engaged in the practice of law by acting as a public adjuster is supported by the decisions of other jurisdictions. The Illinois Supreme Court held that a suspended lawyer engaged in the unauthorized practice of law when he represented a former client in settlement negotiations against her insurance company even though the insurance company had already admitted liability. Citing *Liberty Mutual Insurance Co. v. Jones*, for the proposition that adjusters employed by insurance companies do not engage in the unauthorized practice of law, Bodkin argued that "his position was the same as that of an adjustor for an insurance company except that he was acting on behalf of a claimant." The Illinois court rejected this argument, distinguishing Liberty Mutual on the grounds that the Missouri Supreme Court had

> distinguished between services rendered by an insurance adjuster on behalf of his company and services rendered by one who negotiates a claim against the company. ... The court stated ... [that] "appellants' lay claim adjusters work only for their several employers, who hire and retain them with their eyes open. When they deal with claimants it is on an adversary basis, not a representative basis implying a fiduciary relation."

Kansas, like Arizona, has no statute prohibiting the unauthorized practice of law, has reached the same result by approximately the same reasoning. The Martinez court held that an insurance claims "consultant" engaged in the unauthorized practice of law by putting together settlement brochures, negotiating settlements on behalf of injured persons, and advertising that he could save claimants the trouble of hiring a lawyer. The court concluded that the consultant offered a service that required knowledge of legal principles and that his financial interest in settling without litigation conflicted with his clients' interest in receiving a fair settlement, thus distinguishing the consultant's work from that done by insurance company adjusters. The court thus enjoined the consultant from further representation. Although the injunction was issued under the Kansas Consumer Protection Act, the finding of unauthorized practice was based on the court's "inherent power to define and regulate the practice of law."

Of course, unlike Illinois, which had no statute authorizing adjusters to investigate or settle claims "on behalf of either the insurer or the insured," the Arizona Legislature arguably has authorized private adjusters to represent claimants against insurance companies. However, we still find persuasive the Illinois court's rejection of Bodkin's argument that his actions were merely "administrative" because of his status as an admitted, though suspended, attorney. The court held that Bodkin was engaged in the practice of law, reasoning, "It is obvious that settling a case, under these circumstances, required legal skill. It is mere sham ... to contend that the acts during suspension were clerical, administrative, and ministerial only." Creasy clearly employed legal skill during his examination of Dr. Crandall and cannot now claim he was not engaged in practicing law.

The Kansas Supreme Court reached a similar result in a case in which a suspended lawyer continued all his activities except court appearances, finding that his activities were not permissible just because they could have been performed by non-lawyers. The court's rationale was that "some actions which may be taken with impunity by persons who have never been admitted to the practice of law, will be found to be in contempt if undertaken by a suspended or disbarred attorney." Applying this reasoning to our facts, we believe Creasy, who acted as a representative for his client by examining a witness in an adversarial setting, cannot now claim to have merely engaged in insurance adjusting under A.R.S. § 20-281.

C. Legislative authority to license private insurance adjusters

Finally, we turn to Creasy's argument that pursuant to A.R.S. § 20-281, the legislature has authorized the licensing of private insurance adjusters and that he is therefore subject only to the jurisdiction of the Department of Insurance. This argument is also without merit. In defining adjuster and setting out licensing requirements in A.R.S. §§ 20-281 and 20-312, the legislature has undertaken the regulation of insurance adjusters. Section 20-281(A) defines an adjuster as

> any person who, for compensation as an independent contractor or as the employee of such an independent contractor ... *investigates and negotiates settlement of claims* arising under insurance contracts, on behalf of either the insurer or the insured.

(Emphasis added.) Creasy acted as an employee of his wife, who is licensed as an adjuster under A.R.S. § 20-312. Creasy's actions during the sworn statement are therefore permissible if we consider only the statute and if they can technically be characterized as only the investigation, negotiation and settlement of claims.

But even if we were so persuaded, the legislature's adoption of A.R.S. § 20-281 cannot authorize Creasy to violate our disbarment order by engaging in activities that constitute the practice of law. Section 20-281 is intended to regulate insurance adjusters. The legislature has not purported to, nor can it, authorize non-lawyers or

disbarred lawyers to practice law. Whether it is within the legislature's power to authorize one to engage in activities that constitute the practice of law while engaging in the business of insurance adjusting is a question we reserve for the appropriate case, if and when brought.

CONCLUSION

We hold that Creasy has violated Rule 31(a)(3) and the order of disbarment. We thus find him in contempt and order that he immediately cease and desist from any further activities that constitute the practice of law. In lieu of other penalties that might be imposed, Creasy is ordered to pay the costs incurred by the State Bar, plus reasonable attorneys' fees, the amount to be approved by this court on application by the State Bar.

MARTONE, Justice, concurring.

I join the holding that this court has jurisdiction over disbarred lawyers pursuant to the order of disbarment and Rule 31(a)(3). Creasy is a disbarred lawyer. This case, therefore, affords us no opportunity to address the quite separate question of whether this court has jurisdiction over persons who were never lawyers and whose activities are not part of, or ancillary to, Judicial Department institutions within the meaning of Article VI, § 1 of the Arizona Constitution.

This court has regulatory power over lawyers and disbarred lawyers engaged in the practice of law in this state, for activities both within the Judicial Department and outside of it. This court also has the exclusive authority to determine who shall appear in a representative capacity in Judicial Department institutions and activities ancillary to them. This means that we can prohibit non-lawyers from representing others in Article VI institutions and proceedings conducted pursuant to Article VI authority (e.g., depositions). But what of non-lawyers engaged in the practice of law outside of Judicial Department institutions? I do not join in that part of the majority opinion which contains dicta suggestive of an answer to this troublesome question. The expansive dicta is imprudent because this is not an action against a person who was never a lawyer.

The question of jurisdiction over non-lawyers for activities outside of Article VI institutions or authority is the direct result of the absence of an unauthorized practice of law statute. That absence creates a potential incongruity between the breadth of the definition of the practice of law, on the one hand, and the limited scope of the Judicial Department's enforcing authority under Article VI of the Constitution, on the other. Because this court does not possess the broader police power of the state (the legislature does), the question of non-lawyers engaged in

activities within the definition of the practice of law, yet unconnected to Judicial Department institutions, is complex and its answer must await another day. In the meantime, it is enough to say that we have the power to enforce our orders of disbarment.

3.3 Pro Hac Vice

Model Rules of Professional Conduct

Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c) (2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

Page v. Oath, Inc., C.A. No. S20C-07-030 CAK (Del. Super. Jan. 11, 2021)

Karsnitz, J.

Several weeks ago, I issued a Rule to Show Cause why the approval I had given to L. Lin Wood, Esquire to practice before this Court in this case should not be revoked. Mr. Wood is not licensed to practice law in Delaware. Practicing *pro hac vice* is a privilege and not a right. I respect the desire of litigants to select counsel of their choice. When out of state counsel is selected, however, I am required to ensure the appropriate level of integrity and competence.

During the course of this litigation, a number of high profile cases have been filed around the country challenging the Presidential election. The cases included, *inter alia,* suits in Georgia, Wisconsin and Michigan. Opinions were delivered in all of the States which were critical in various ways of the lawyering by the proponents of the lawsuits. In the Rule to Show Cause, I raised concerns I had after reviewing written decisions from Georgia and Wisconsin. Specifically, in Georgia, a lawsuit filed by Mr. Wood resulted in a determination that the suit was without basis in law or fact. The initial pleadings in the Wisconsin case were riddled with errors. I had concerns as listed in the Rule to Show Cause.

I gave Mr. Wood until January 6, 2021 to file a response. He did so at 10:09 p.m., January 6. The response focused primarily upon the fact that none of the conduct I questioned occurred in my Court. The claim is factually correct. In his response, Mr. Wood writes:

> Absent conduct that prejudicially disrupts the proceedings, trial judges have no independent jurisdiction to enforce the Rules of Professional Conduct.

Mr. Wood also tells me it is the province of the Delaware Supreme Court to supervise the practice of law in Delaware and enforce our Rules of Professional Conduct. With that proposition I have no disagreement. In my view it misses the point and ignores the clear language of Rule 90.1. The response also contains the declaration of Charles Slanina, Esquire. I know Mr. Slanina and have the highest respect for him, especially for his work and expertise in the area of legal ethics. His declaration here focused on my lack of a role in lawyer discipline and was not helpful regarding the issue of the appropriateness and advisability of continuing *pro hac vice* permission.

Rule 90.1(e) reads in full:

> Withdrawal of attorneys admitted *pro hac vice* shall be governed by the provisions of Rule 90(b). The Court may revoke a *pro hac vice* admission *sua sponte* or upon the motion of a party, if it determines, after a hearing or other meaningful opportunity to respond, the continued admission *pro hac vice* to be inappropriate or inadvisable.

The standard then I am to apply is if the continued admission would be inappropriate or inadvisable.

I have no intention to litigate here, or make any findings, as to whether or not Mr. Wood violated other States' Rules of Professional Conduct. I agree that is outside my authority. It is the province of the Delaware Office of Disciplinary Counsel, and ultimately the Delaware Supreme Court, or their counterparts in other jurisdictions, to make a factual determination as to whether Mr. Wood violated the Rules of Professional Conduct. Thus, the cases cited by Mr. Wood are inapposite and of no avail. In *Lendus, LLC v. Goode,* and *Crumpler v. Superior Court, ex. rel New Castle County,* the courts allowed the foreign lawyer to withdraw as *pro hac vice* counsel and referred alleged ethical violations to the Office of Disciplinary Counsel. Neither of those is happening here. Similarly, in *Kaplan v. Wyatt,* Chancellor Brown, on very different facts, allowed *pro hac vice* counsel to continue his representation but stressed that this did not constitute approval of his conduct and that ethical violations could be addressed elsewhere.

What I am always required to do is ensure that those practicing before me are of sufficient character, and conduct themselves with sufficient civility and truthfulness. Violations of Rules of Professional Conduct are for other entities to judge based upon an appropriate record following guidelines of due process. My role here is much more limited.

In response to my inquiry regarding the Georgia litigation Mr. Wood tells me he was (only) a party, and the case is on appeal. He also tells me that the affidavit filed in support of the case only contained errors. Neither defense holds merit with me. As an attorney, Mr. Wood has an obligation, whether on his own or for clients, to file only cases which have a good faith basis in fact or law. The Court's finding in Georgia otherwise indicates that the Georgia case was textbook frivolous litigation.

I am also troubled that an error-ridden affidavit of an expert witness would be filed in support of Mr. Wood's case. An attorney as experienced as Mr. Wood knows expert affidavits must be reviewed in detail to ensure accuracy before filing. Failure to do so is either mendacious or incompetent.

The response to the Rule with regard to the Wisconsin complaint calls the failings "proof reading errors". Failure to certify a complaint for injunction or even serve the Defendants are not proof reading errors. The Complaint would not survive a law school civil procedure class.

Prior to the pandemic, I watched daily counsel practice before me in a civil, ethical way to tirelessly advance the interests of their clients. It would dishonor them were I to allow this *pro hac vice* order to stand. The conduct of Mr. Wood, albeit not in my jurisdiction, exhibited a toxic stew of mendacity, prevarication and surpris-

ing incompetence. What has been shown in Court decisions of our sister States satisfies me that it would be inappropriate and inadvisable to continue Mr. Wood's permission to practice before this Court. I acknowledge that I preside over a small part of the legal world in a small state. However, we take pride in our bar.

One final matter. A number of events have occurred since the filing of the Rule to Show Cause. I have seen reports of "tweets" attributable to Mr. Wood. At least one tweet called for the arrest and execution of our Vice-President. Another alleged claims against the Chief Justice of the Supreme Court of the United States which are too disgusting and outrageous to repeat. Following on top of these are the events of January 6, 2021 in our Nation's Capitol. No doubt these tweets, and many other things, incited these riots.

I am not here to litigate if Mr. Wood was ultimately the source of the incitement. I make no finding with regard to this conduct, and it does not form any part of the basis for my ruling. I reaffirm my limited role.

I am revoking my order granting Lin Wood, Esquire the privilege of representing the Plaintiff in this case.

3.4 Misconduct & Discipline

Model Rules of Professional Conduct

Rule 8.2: Judicial & Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Rule 8.3: Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Rule 8.4: Misconduct

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;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Rule 8.5: Disciplinary Authority; Choice of Law

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. 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. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

N.C. Gen. Stat.

§ 84-28: Discipline and disbarment.

(a) Any attorney admitted to practice law in this State is subject to the disciplinary jurisdiction of the Council under such rules and procedures as the Council shall adopt as provided in G.S. 84-23.

(b) The following acts or omissions by a member of the North Carolina State Bar or any attorney admitted for limited practice under G.S. 84-4.1, individually or in concert with any other person or persons, shall constitute misconduct and shall be grounds for discipline whether the act or omission occurred in the course of an attorney-client relationship or otherwise:

(1) Conviction of, or a tender and acceptance of a plea of guilty or no contest to, a criminal offense showing professional unfitness;

(2) The violation of the Rules of Professional Conduct adopted and promulgated by the Council in effect at the time of the act;

(3) Knowing misrepresentation of any facts or circumstances surrounding any complaint, allegation or charge of misconduct; failure to answer any formal inquiry or complaint issued by or in the name of the North Carolina State Bar in any disciplinary matter; or contempt of the Council or any committee of the North Carolina State Bar.

(c) Misconduct by any attorney shall be grounds for:

(1) Disbarment;

(2) Suspension for a period up to but not exceeding five years, any portion of which may be stayed upon reasonable conditions to which the offending attorney consents;

(3) Censure - A censure is a written form of discipline more serious than a reprimand issued in cases in which an attorney has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or potential significant harm to a client, the administration of justice, the profession or members of the public, but the protection of the public does not require suspension of the attorney's license;

(4) Reprimand - A reprimand is a written form of discipline more serious than an admonition issued in cases in which an attorney has violated one or more provisions of the Rules of Professional Conduct, but the protection of the public does not require a censure. A reprimand is generally reserved for cases in which the attorney's conduct has caused harm or potential harm to a client, the administration of justice, the profession, or members of the public; or

(5) Admonition - An admonition is a written form of discipline imposed in cases in which an attorney has committed a minor violation of the Rules of Professional Conduct.

Any order disbarring or suspending an attorney may impose reasonable conditions precedent to reinstatement. No attorney who has been disbarred by the Disciplinary Hearing Commission, the Council, or by order of any court of this State may seek reinstatement to the practice of law prior to five years from the effective date of the order of disbarment. Any order of the Disciplinary Hearing Commission or the Grievance Committee imposing an admonition, reprimand, censure, or stayed suspension may also require the attorney to complete a reasonable amount of continuing legal education in addition to the minimum amount required by the North Carolina Supreme Court.

(d) Any attorney admitted to practice law in this State, who is convicted of or has tendered and has had accepted, a plea of guilty or no contest to, a criminal offense showing professional unfitness, may be disciplined based upon the conviction, without awaiting the outcome of any appeals of the conviction. An order of discipline based solely upon a conviction of a criminal offense showing professional unfitness shall be vacated immediately upon receipt by the Secretary of the North Carolina State Bar of a certified copy of a judgment or order reversing the conviction. The fact that the attorney's criminal conviction has been overturned on appeal shall not prevent the North Carolina State Bar from conducting a disciplinary proceeding against the attorney based upon the same underlying facts or events that were the subject of the criminal proceeding.

(d1) An attorney who is disciplined as provided in subsection (d) of this section may petition the court in the trial division in the judicial district where the conviction occurred for an order staying the disciplinary action pending the outcome of any appeals of the conviction. The court may grant or deny the stay in its discre-

tion upon such terms as it deems proper. A stay of the disciplinary action by the court shall not prevent the North Carolina State Bar from going forward with a disciplinary proceeding against the attorney based upon the same underlying facts or events that were the subject of the criminal proceeding.

(e) Any attorney admitted to practice law in this State who is disciplined in another jurisdiction shall be subject to the same discipline in this State: Provided, that the discipline imposed in the other jurisdiction does not exceed that provided for in subsection (c) above and that the attorney was not deprived of due process in the other jurisdiction.

(f) Upon application by the North Carolina State Bar, misconduct by an attorney admitted to practice in this State may be restrained or enjoined where the necessity for prompt action exists regardless of whether a disciplinary proceeding in the matter of the conduct is pending. The application shall be filed in the Superior Court of Wake County and shall be governed by the procedure set forth in G.S. 1A-1, Rule 65.

(g) Any member of the North Carolina State Bar may be transferred to disability inactive status for mental incompetence, physical disability, or substance abuse interfering with the attorney's ability to competently engage in the practice of law under the rules and procedures the Council adopts pursuant to G.S. 84-23.

(h) There shall be an appeal of right by either party from any final order of the Disciplinary Hearing Commission to the North Carolina Court of Appeals. Review by the appellate division shall be upon matters of law or legal inference. The procedures governing any appeal shall be as provided by statute or court rule for appeals in civil cases. A final order which imposes disbarment or suspension for 18 months or more shall not be stayed except upon application, under the rules of the Court of Appeals, for a writ of supersedeas. A final order imposing suspension for less than 18 months or any other discipline except disbarment shall be stayed pending determination of any appeal of right.

(i) The North Carolina State Bar may invoke the process of the General Court of Justice to enforce the powers of the Council or any committee to which the Council delegates its authority.

(j) The North Carolina State Bar may apply to appropriate courts for orders necessary to protect the interests of clients of missing, suspended, disbarred, disabled, or deceased attorneys.

The senior regular resident judge of the superior court of any district wherein a member of the North Carolina State Bar resides or maintains an office shall have the authority and power to enter orders necessary to protect the interests of the clients, including the authority to order the payment of compensation by the member or the estate of a deceased or disabled member to any attorney appointed

to administer or conserve the law practice of the member. Compensation awarded to a member serving under this section awarded from the estate of a deceased member shall be considered an administrative expense of the estate for purposes of determining priority of payment.

§ 84-36: Inherent powers of courts unaffected.

Nothing contained in this Article shall be construed as disabling or abridging the inherent powers of the court to deal with its attorneys.

Neal v. Clinton, No. CIV 2000–5677 (Ark. Cir. Ct. Jan. 19, 2001)

Agreed Order of Discipline

Come now the parties hereto and agree to the following Order of this Court in settlement of the pending action:

The formal charges of misconduct upon which this Order is based arose out of information referred to the Committee on Professional Conduct ("the Committee") by the Honorable Susan Webber Wright, Chief United States District Judge for the Eastern District of Arkansas. The information pertained to William Jefferson Clinton's deposition testimony in a civil case brought by Ms. Paula Jones in which he was a defendant, *Jones v. Clinton*.

Mr. Clinton was admitted to the Arkansas bar on September 7, 1973. On June 30, 1990, he requested that his Arkansas license be placed on inactive status for continuing legal education purposes, and this request was granted. The conduct at issue here does not arise out of Mr. Clinton's practice of law. At all times material to this case, Mr. Clinton resided in Washington, D.C., but he remained subject to the Model Rules of Professional Conduct for the State of Arkansas.

On April 1, 1998, Judge Wright granted summary judgment to Mr. Clinton, but she subsequently found him in Civil contempt in a 32–page Memorandum Opinion and Order (the "Order") issued on April 12, 1999, ruling that he had "deliberately violated this Court's discovery orders and thereby undermined the integrity of the judicial system." Judge Wright found that Mr. Clinton had "responded to plaintiff's questions by giving false, misleading and evasive answers that were designed to obstruct the judicial process ... [concerning] whether he and Ms. [Monica] Lewinsky had ever been alone together and whether he had ever engaged in sexual relations with Ms. Lewinsky." Judge Wright offered Mr. Clinton a hearing, which he de-

clined by a letter from his counsel, dated May 7, 1999. Mr. Clinton was subsequently ordered to pay, and did pay, over $90,000, pursuant to the Court's contempt findings. Judge Wright also referred the matter to the Committee "for review and any action it deems appropriate."

Mr. Clinton's actions which are the subject of this Agreed Order have subjected him to a great deal of public criticism. Twice elected President of the United States, he became only the second President ever impeached and tried by the Senate, where he was acquitted. After Ms. Jones took an appeal of the dismissal of her case, Mr. Clinton settled with her for $850,000, a sum greater than her initial ad damnum in her complaint. As already indicated, Mr. Clinton was held in civil contempt and fined over $90,000.

Prior to Judge Wright's referral, Mr. Clinton had no prior disciplinary record with the Committee, including any private warnings. He had been a member in good standing of the Arkansas Bar for over twenty-five years. He has cooperated fully with the Committee in its investigation of this matter and has furnished information to the Committee in a timely fashion.

Mr. Clinton's conduct, as described in the Order, caused the court and counsel for the parties to expend unnecessary time, effort, and resources. It set a poor example for other litigants, and this damaging effect was magnified by the fact that at the time of his deposition testimony, Mr. Clinton was serving as President of the United States.

Judge Wright ruled that the testimony concerning Ms. Lewinsky "was not essential to the core issues in this case and, in fact, that some of this evidence might even be inadmissible ...." Judge Wright dismissed the case on the merits by granting Mr. Clinton summary judgment, declaring that the case was "lacking in merit—a decision that would not have changed even had the President been truthful with respect to his relationship with Ms. Lewinsky." As Judge Wright also observed, as a result of Mr. Clinton's paying $850,000 in settlement, "plaintiff was made whole, having agreed to a settlement in excess of that prayed for in the complaint." Clinton also paid to plaintiff $89,484 as the "reasonable expenses, including attorney's fees, caused by his willful failure to obey the Court's discovery orders."

On May 22, 2000, after receiving complaints from Judge Wright and the Southeastern Legal Foundation, the Committee voted to initiate disbarment proceedings against Mr. Clinton. On June 30, 2000, counsel for the Committee filed a complaint seeking disbarment. Mr. Clinton filed an answer on August 29, 2000, and the case is in the early stages of discovery.

In this Agreed Order Mr. Clinton admits and acknowledges, and the Court, therefore, finds that:

A. That he knowingly gave evasive and misleading answers, in violation of Judge Wright's discovery orders, concerning his relationship with Ms. Lewinsky, in an attempt to conceal from plaintiff Jones' lawyers the true facts about his improper relationship with Ms. Lewinsky, which had ended almost a year earlier.

B. That by knowingly giving evasive and misleading answers, in violation of Judge Wright's discovery orders, he engaged in conduct that is prejudicial to the administration of justice in that his discovery responses interfered with the conduct of the Jones case by causing the court and counsel for the parties to expend unnecessary time, effort, and resources, setting a poor example for other litigants, and causing the court to issue a thirty-two page Order civilly sanctioning Mr. Clinton.

Upon consideration of the proposed Agreed Order, the entire record before the Court, the advice of counsel, and the Arkansas Model Rules of Professional Conduct (the "Model Rules"), the Court finds:

1. That Mr. Clinton's conduct, heretofore set forth, in the Jones case violated Model Rule 8.4(d), when he gave knowingly evasive and misleading discovery responses concerning his relationship with Ms. Lewinsky, in violation of Judge Wright's discovery orders. Model Rule 8.4(d) states that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."

WHEREFORE, it is the decision and order of this Court that William Jefferson Clinton, Arkansas Bar ID # 73019, be, and hereby is, SUSPENDED for FIVE YEARS for his conduct in this matter, and the payment of fine in the amount of $ 25,000. The suspension shall become effective as of the date of January 19, 2001.

In re Riehlmann, 891 So.2d 1239 (La. 2005)

This disciplinary matter arises from formal charges filed by the Office of Disciplinary Counsel ("ODC") against respondent, Michael G. Riehlmann, an attorney licensed to practice law in Louisiana.

Underlying Facts

Respondent is a criminal defense attorney who was formerly employed as an Assistant District Attorney in the Orleans Parish District Attorney's Office. One evening in April 1994, respondent met his close friend and law school classmate, Gerry Deegan, at a bar near the Orleans Parish Criminal District Court. Like respondent, Mr. Deegan had been a prosecutor in the Orleans Parish District Attorney's Office before he "switched sides" in 1987. During their conversation in the bar, Mr. Deegan told respondent that he had that day learned he was dying of colon cancer. In the same conversation, Mr. Deegan confided to respondent that he had suppressed exculpatory blood evidence in a criminal case he prosecuted while

at the District Attorney's Office. Respondent recalls that he was "surprised" and "shocked" by his friend's revelation, and that he urged Mr. Deegan to "remedy" the situation. It is undisputed that respondent did not report Mr. Deegan's disclosure to anyone at the time it was made. Mr. Deegan died in July 1994, having done nothing to "remedy" the situation of which he had spoken in the bar.

Nearly five years after Mr. Deegan's death, one of the defendants whom he had prosecuted in a 1985 armed robbery case was set to be executed by lethal injection on May 20, 1999. In April 1999, the lawyers for the defendant, John Thompson, discovered a crime lab report which contained the results of tests performed on a piece of pants leg and a tennis shoe that were stained with the perpetrator's blood during a scuffle with the victim of the robbery attempt. The crime lab report concluded that the robber had Type "B" blood. Because Mr. Thompson has Type "O" blood, the crime lab report proved he could not have committed the robbery; nevertheless, neither the crime lab report nor the blood-stained physical evidence had been disclosed to Mr. Thompson's defense counsel prior to or during trial. Respondent claims that when he heard about the inquiry of Mr. Thompson's lawyers, he immediately realized that this was the case to which Mr. Deegan had referred in their April 1994 conversation in the bar. On April 27, 1999, respondent executed an affidavit for Mr. Thompson in which he attested that during the 1994 conversation, "the late Gerry Deegan said to me that he had intentionally suppressed blood evidence in the armed robbery trial of John Thompson that in some way exculpated the defendant."

In May 1999, respondent reported Mr. Deegan's misconduct to the ODC. In June 1999, respondent testified in a hearing on a motion for new trial in Mr. Thompson's armed robbery case. During the hearing, respondent testified that Mr. Deegan had told him that he "suppressed exculpatory evidence that was blood evidence, that seemed to have excluded Mr. Thompson as the perpetrator of an armed robbery." Respondent also admitted that he "should have reported" Mr. Deegan's misconduct, and that while he ultimately did so, "I should have reported it sooner, I guess."

On September 30, 1999, respondent gave a sworn statement to the ODC in which he was asked why he did not report Mr. Deegan's disclosure to anyone at the time it was made. Respondent replied:

> I think that under ordinary circumstances, I would have. I really honestly think I'm a very good person. And I think I do the right thing whenever I'm given the opportunity to choose. This was unquestionably the most difficult time of my life. Gerry, who was like a brother to me, was dying. And that was, to say distracting would be quite an understatement. I'd also left my wife just a few months before, with three kids, and was under the care of a psychiatrist, taking antidepressants. My youngest son was then about two and had just recently undergone open-heart surgery. I had a lot on my plate at the time. A great deal of it of my own making; there's no question about it.

> But, nonetheless, I was very, very distracted, and I simply did not give it the important consideration that it deserved. But it was a very trying time for me. And that's the only explanation I have, because, otherwise, I would have reported it immediately had I been in a better frame of mind.

Disciplinary Proceedings

Formal Charges

On January 4, 2001, the ODC filed one count of formal charges against respondent, alleging that his failure to report his unprivileged knowledge of Mr. Deegan's prosecutorial misconduct violated Rules 8.3(a) (reporting professional misconduct), 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and 8.4(d) (engaging in conduct prejudicial to the administration of justice) of the Rules of Professional Conduct. The ODC subsequently amended the formal charges to delete the alleged violation of Rule 8.4(c).

On March 5, 2002, respondent answered the amended formal charges and admitted some of the factual allegations therein, but denied that his conduct violated the Rules of Professional Conduct. Specifically, respondent asserted that Rule 8.3(a) "merely requires that an attorney possessing unprivileged knowledge of a violation of this Code shall report such knowledge to the authority empowered to investigate such acts. It is undisputed that respondent did report his knowledge of Deegan's statements to Thompson's attorneys, with the clear understanding that this information would be reported to the District Attorney and the Court, undeniably authorities empowered to investigate Deegan's conduct."

Formal Hearing

When this matter proceeded to a formal hearing before the committee, respondent testified that his best recollection of his conversation with Mr. Deegan in 1994 "is that he told me that he did not turn over evidence to his opponents that might have exculpated the defendant." Nevertheless, when asked whether he recognized during the barroom conversation that Mr. Deegan had violated his ethical duties, respondent replied, "Well, certainly." Respondent admitted that he gave the conversation no further thought after he left the bar because he was "distracted" by his own personal problems.

Hearing Committee Recommendation

In its report filed with the disciplinary board, the hearing committee concluded that respondent did not violate Rule 8.3(a), but that he should be publicly reprimanded for his violation of Rule 8.4(d).

Considering the evidence presented at the hearing, the committee made a factual finding that during the 1994 barroom conversation, Mr. Deegan explained to respondent that he did not turn over evidence in a case that might have exculpated a defendant, but "equivocated on whether the evidence proved the innocence of a defendant." Moreover, the committee found there is no clear and convincing evidence that Mr. Deegan identified John Thompson by name in the disclosure to respondent in 1994. The committee believed respondent's testimony that he did not draw a connection between Mr. Deegan's 1994 statements and the Thompson case until 1999, when he heard about the inquiry of Mr. Thompson's lawyers.

Based on its factual findings, the committee found that respondent did not violate Rule 8.3(a) because he did not have "knowledge of a violation" that obligated him to report Mr. Deegan to the ODC or to any other authority. The committee pointed out that it believed respondent's testimony that Mr. Deegan made equivocal statements in 1994 that did not rise to the level of a "confession" that Deegan had actually suppressed the crime lab report nine years earlier. The committee found Mr. Deegan qualified his statement that the evidence "might" have exculpated the defendant, and furthermore, agreed that if the evidence did not tend to negate the defendant's guilt, Mr. Deegan would have had no obligation to turn over that evidence under *Brady*. Consequently, the committee determined that respondent would have had no violation to report. The committee found Mr. Deegan's statements at most suggested a potential violation of the ethical rules, but the committee declined to construe Rule 8.3(a) to require a lawyer to report a potential violation of an ethical rule by another lawyer.

Although the committee did not find that respondent violated Rule 8.3(a), the committee found he violated Rule 8.4(d), which imposes a "broader obligation to ensure that justice is fairly administered," by his "complete inaction after the barroom disclosure." The committee found respondent's conversation with Mr. Deegan "was of sufficient importance that not pursuing Deegan for a disclosure or to rectify the situation, failing to investigate further, and ultimately not taking any affirmative action for five years constituted conduct that hindered the administration of justice." The committee determined the baseline sanction for such conduct by respondent is a reprimand.

As aggravating factors, the committee recognized respondent's experience in the practice of law (admitted 1983) and the vulnerability of the victim, Mr. Thompson. In mitigation, the committee acknowledged the absence of a prior disciplinary record, absence of a dishonest or selfish motive, personal or emotional problems (including the terminal colon cancer of his best friend, Mr. Deegan; marital problems; and the health problems both he and his son were experiencing), timely good faith effort to rectify the consequences of Mr. Deegan's misconduct, full and free disclosure to the disciplinary board and a cooperative attitude toward the proceeding, character and reputation, and remorse.

In light of the mitigating factors present, and finding that a suspension would serve no useful purpose in this case, the committee recommended the imposition of a public reprimand.

Both respondent and the ODC filed objections to the hearing committee's recommendation.

Disciplinary Board Recommendation

The disciplinary board adopted the hearing committee's factual findings but rejected its application of Rule 8.3(a) of the Rules of Professional Conduct. The board determined that a finding of a violation of Rule 8.3(a) requires clear and convincing evidence that an attorney (1) possessed unprivileged knowledge of an ethical violation and (2) failed to report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation. Concerning the knowledge requirement, the board considered various legal authorities interpreting both Louisiana Rule 8.3(a) and Model Rule 8.3(a), and determined that a lawyer's duty to report professional misconduct is triggered when, under the circumstances, a reasonable lawyer would have "a firm opinion that the conduct in question more likely than not occurred." The board explained that the requisite knowledge under Rule 8.3(a) is "more than a mere suspicion, but less than absolute or moral certainty."

Employing this analysis, the board concluded the committee erred in its finding that respondent had no duty to report because Mr. Deegan's statements were equivocal. The board found respondent must have understood from his 1994 conversation with Mr. Deegan that Mr. Deegan had suppressed Brady evidence:

> If Respondent did not understand from his conversation with Deegan that Deegan has suppressed evidence that he was obligated to produce, why was Respondent shocked and surprised? Why did Respondent tell Deegan that what he had done was "not right" and that Deegan had to "rectify" the situation? Respondent never changed his testimony in this respect. Obviously, if Respondent understood from his conversation with Deegan that Deegan had done nothing wrong, there would have been no occasion for Respondent to say that it was "not right" or that Deegan had to "rectify" what he had done. The Committee makes no attempt to explain these circumstances which are wholly inconsistent with the Committee's theory. This uncontradicted circumstantial evidence cannot be ignored. Indeed, if Deegan believed he had done nothing wrong, why did Deegan even bother to bring the matter up nearly ten (10) years after Thompson was convicted? More importantly, why did he bring it up in the same conversation that he disclosed to Respondent that he (Deegan) had terminal colon cancer?

The board concluded that a reasonable lawyer under the circumstances would have formed a firm opinion that Mr. Deegan had wrongfully failed to disclose the blood evidence, and that respondent did in fact form such an opinion because he advised Mr. Deegan that what he (Deegan) did was "not right" and that he (Deegan) had to "rectify" the situation. Accordingly, the board found respondent had sufficient knowledge of misconduct by Mr. Deegan to trigger a duty to report the misconduct to the disciplinary authorities.

The board then turned to a discussion of whether respondent's failure to report Mr. Deegan's misconduct for more than five years after learning of it constituted a failure to report under Rule 8.3(a). The board acknowledged that Rule 8.3(a) does not provide any specific time limit or period within which the misconduct must be reported. Nevertheless, the board reasoned that Rule 8.3(a) serves no useful purpose unless it is read to require reporting to an appropriate authority within a reasonable time under the circumstances. Therefore, absent special circumstances, the board determined that a lawyer must report his knowledge of misconduct "promptly." Applying these principles to the instant case, the board determined respondent's disclosure in 1999 of misconduct he discovered in 1994 was not timely and did not satisfy the requirements of Rule 8.3(a).

The board also found that respondent's conduct violated Rule 8.4(d) because his inactivity following Mr. Deegan's disclosure was prejudicial to the administration of justice.

The board found respondent knowingly violated a duty owed to the profession, and that his actions resulted in both actual and potential injury to Mr. Thompson. The board noted that if respondent had taken further action in 1994, when Mr. Deegan made his confession, Mr. Thompson's innocence in connection with the armed robbery charge may have been established sooner. The board also observed that negative publicity attached to respondent's actions, thereby causing harm to the legal profession. The board determined the baseline sanction for respondent's conduct is a suspension from the practice of law.

The board adopted the aggravating and mitigating factors cited by the hearing committee, except that the board refused to credit respondent with the mitigating factor of making a timely good faith effort to rectify the consequences of Mr. Deegan's misconduct.

[T]he board determined that some period of suspension is appropriate for respondent's conduct. In light of the significant mitigating factors in this matter, the board recommended that respondent be suspended from the practice of law for six months. One board member dissented and would recommend a suspension of at least one year and one day.

Both respondent and the ODC filed objections to the disciplinary board's recommendation.

Discussion

In this matter we are presented for the first time with an opportunity to delineate the scope of an attorney's duty under Rule 8.3 to report the professional misconduct of a fellow member of the bar. Therefore, we begin our discussion with a few observations relating to the rule and its history.

The American legal profession has long recognized the necessity of reporting lawyers' ethical misconduct. When the American Bar Association adopted its first code of ethics in 1908, Canon 29 of the Canons of Professional Ethics, entitled "Upholding the Honor of the Profession," encouraged lawyers to "expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, ..." More than sixty years later, the ABA enacted Disciplinary Rule 1-103(A) of the Model Code of Professional Responsibility, the predecessor of the current Rule 8.3(a) of the Model Rules of Professional Conduct. Both the 1969 Code, in DR 1-103(A), and the 1983 Model Rules, in Rule 8.3(a), make it clear that the duty to report is not merely an aspiration but is mandatory, the violation of which subjects the lawyer to discipline.

This court first adopted Rule 8.3 on December 18, 1986, effective January 1, 1987. Louisiana's rule is based on ABA Model Rule 8.3; however, there are several differences between the Model Rule and the Louisiana Rule that was in effect in 2001, at the time the formal charges were filed in this case. Most significantly, Model Rule 8.3 requires a lawyer to report the misconduct of another lawyer only when the conduct in question "raises a substantial question" as to that lawyer's fitness to practice. Louisiana's version of Rule 8.3 imposed a substantially more expansive reporting requirement, in that our rule required a lawyer to report all unprivileged knowledge of any ethical violation by a lawyer, whether the violation was, in the reporting lawyer's view, flagrant and substantial or minor and technical. A task force of the Louisiana State Bar Association concluded that it was inappropriate to put a lawyer "in the position of making a subjective judgment" regarding the significance of a violation, and felt it was preferable instead "to put the burden on every lawyer to report all violations, regardless of their nature or kind, whether or not they raised a substantial question as to honesty, trustworthiness, or fitness."

We now turn to a more in-depth examination of the reporting requirement in Louisiana. At the time the formal charges were filed in this case, Louisiana Rule 8.3(a) provided:

> A lawyer possessing unprivileged knowledge of a violation of this code shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

Thus, the rule has three distinct requirements: (1) the lawyer must possess unprivileged knowledge of a violation of the Rules of Professional Conduct; (2) the lawyer must report that knowledge; and (3) the report must be made to a tribunal or other authority empowered to investigate or act on the violation. We will discuss each requirement in turn.

Knowledge

In its recommendation in this case, the disciplinary board did excellent work in collecting and analyzing the cases and legal commentary interpreting the knowledge requirement of Rule 8.3(a). We need not repeat that analysis here. Considering those authorities, it is clear that absolute certainty of ethical misconduct is not required before the reporting requirement is triggered. The lawyer is not required to conduct an investigation and make a definitive decision that a violation has occurred before reporting; that responsibility belongs to the disciplinary system and this court. On the other hand, knowledge requires more than a mere suspicion of ethical misconduct. We hold that a lawyer will be found to have knowledge of reportable misconduct, and thus reporting is required, where the supporting evidence is such that a reasonable lawyer under the circumstances would form a firm belief that the conduct in question had more likely than not occurred. As such, knowledge is measured by an objective standard that is not tied to the subjective beliefs of the lawyer in question.

When to Report

Once the lawyer decides that a reportable offense has likely occurred, reporting should be made promptly. The need for prompt reporting flows from the need to safeguard the public and the profession against future wrongdoing by the offending lawyer. This purpose is not served unless Rule 8.3(a) is read to require timely reporting under the circumstances presented.

Appropriate Authority

Louisiana Rule 8.3(a) requires that the report be made to "a tribunal or other authority empowered to investigate or act upon such violation." The term "tribunal or other authority" is not specifically defined. However, as the comments to Model Rule 8.3(a) explain, the report generally should be made to the bar disciplinary authority. Therefore, a report of misconduct by a lawyer admitted to practice in Louisiana must be made to the Office of Disciplinary Counsel.

Determination of Respondent's Misconduct and Appropriate Discipline

Applying the principles set forth above to the conduct of respondent in the instant case, we find the ODC proved by clear and convincing evidence that respondent violated Rule 8.3(a). First, we find that respondent should have known that a reportable event occurred at the time of his 1994 barroom conversation with Mr. Deegan. Stated another way, respondent's conversation with Mr. Deegan at that time gave him sufficient information that a reasonable lawyer under the circumstances would have formed a firm opinion that the conduct in question more likely than not occurred. Regardless of the actual words Mr. Deegan said that night, and whether they were or were not "equivocal," respondent understood from the conversation that Mr. Deegan had done something wrong. Respondent admitted as much in his affidavit, during the hearing on the motion for new trial in the criminal case, during his sworn statement to the ODC, and during his testimony at the formal hearing. Indeed, during the sworn statement respondent conceded that he would have reported the matter "immediately" were it not for the personal problems he was then experiencing. Respondent also testified that he was surprised and shocked by his friend's revelation, and that he told him to remedy the situation. There would have been no reason for respondent to react in the manner he did had he not formed a firm opinion that the conduct in question more likely than not occurred. The circumstances under which the conversation took place lend further support to this finding. On the same day that he learned he was dying of cancer, Mr. Deegan felt compelled to tell his best friend about something he had done in a trial that took place nine years earlier. It simply defies logic that respondent would now argue that he could not be sure that Mr. Deegan actually withheld Brady evidence because his statements were vague and non-specific.

We also find that respondent failed to promptly report Mr. Deegan's misconduct to the disciplinary authorities. As respondent himself acknowledged, he should have reported Mr. Deegan's statements sooner than he did. There was no reason for respondent to have waited five years to tell the ODC about what his friend had done.

In his answer to the formal charges, respondent asserts that he did comply with the reporting requirement of Rule 8.3(a) because he promptly reported Mr. Deegan's misconduct to the District Attorney and the Criminal District Court through the attorneys for the criminal defendant, John Thompson. Respondent has misinterpreted Rule 8.3(a) in this regard. The word "tribunal" must be read in the context of the entire sentence in which it appears. The proper inquiry, therefore, is what authority is "empowered" to act upon a charge of attorney misconduct. In Louisiana, only this court possesses the authority to define and regulate the practice of law, including the discipline of attorneys. In turn, we have delegated to disciplinary counsel the authority to investigate and prosecute claims of attorney misconduct. Furthermore, while a trial court bears an independent responsibility

to report attorney misconduct to the ODC, only this court may discipline an attorney found guilty of unethical behavior. Therefore, respondent is incorrect in arguing that he discharged his reporting duty under Rule 8.3(a) by reporting Mr. Deegan's misconduct to Mr. Thompson's attorneys, the District Attorney, and/or the Criminal District Court. It is undisputed that respondent did not report to the appropriate entity, the ODC, until 1999. That report came too late to be construed as "prompt."

Having found professional misconduct, we now turn to a discussion of an appropriate sanction. In considering that issue, we are mindful that the purpose of disciplinary proceedings is not primarily to punish the lawyer, but rather to maintain the appropriate standards of professional conduct, to preserve the integrity of the legal profession, and to deter other lawyers from engaging in violations of the standards of the profession. The discipline to be imposed depends upon the facts of each case and the seriousness of the offenses involved, considered in light of any aggravating and mitigating circumstances.

Respondent's actions violated the general duty imposed upon attorneys to maintain and preserve the integrity of the bar. While we adhere to our observation in *Brigandi* that an attorney's failure to comply with the reporting requirement is a "serious offense," in the instant case, we find that respondent's conduct was merely negligent. Accordingly, Standard 7.3 of the ABA's *Standards for Imposing Lawyer Sanctions* provides that the appropriate baseline sanction is a reprimand.

The only aggravating factor present in this case is respondent's substantial experience in the practice of law. As for mitigating factors, we adopt those recognized by the disciplinary board, placing particular emphasis on the absence of any dishonest or selfish motive on respondent's part. Notwithstanding these factors, however, respondent's failure to report Mr. Deegan's bad acts necessitates that some sanction be imposed. Respondent's knowledge of Mr. Deegan's conduct was sufficient to impose on him an obligation to promptly report Mr. Deegan to the ODC. Having failed in that obligation, respondent is himself subject to punishment. Under all of the circumstances presented, we conclude that a public reprimand is the appropriate sanction.

Accordingly, we will reprimand respondent for his actions.

Conclusion

Reporting another lawyer's misconduct to disciplinary authorities is an important duty of every lawyer. Lawyers are in the best position to observe professional misconduct and to assist the profession in sanctioning it. While a Louisiana lawyer is subject to discipline for not reporting misconduct, it is our hope that lawyers will comply with their reporting obligation primarily because they are ethical people who want to serve their clients and the public well. Moreover, the lawyer's duty

to report professional misconduct is the foundation for the claim that we can be trusted to regulate ourselves as a profession. If we fail in our duty, we forfeit that trust and have no right to enjoy the privilege of self-regulation or the confidence and respect of the public.

Matter of Giuliani, No. 2021-00506 (N.Y. App. Div. June 24, 2021).

The Attorney Grievance Committee moves for an order immediately suspending respondent from the practice of law based upon claimed violations of rules 3.3(a); 4.1; 8.4(c) and 8.4(h) of the Rules of Professional Conduct. Respondent was admitted to practice as an attorney and counselor at law in the State of New York on June 25, 1969, under the name Rudolph William Giuliani. He maintains a law office within the First Judicial Department.

For the reasons that follow, we conclude that there is uncontroverted evidence that respondent communicated demonstrably false and misleading statements to courts, lawmakers and the public at large in his capacity as lawyer for former President Donald J. Trump and the Trump campaign in connection with Trump's failed effort at reelection in 2020. These false statements were made to improperly bolster respondent's narrative that due to widespread voter fraud, victory in the 2020 United States presidential election was stolen from his client. We conclude that respondent's conduct immediately threatens the public interest and warrants interim suspension from the practice of law, pending further proceedings before the Attorney Grievance Committee (sometimes AGC or Committee).

The Nature of this Proceeding

During the course of this ongoing investigation into numerous complaints of respondent's alleged professional misconduct, the AGC seeks respondent's immediate suspension from the practice law in the State of New York. Under certain circumstances, such serious interim relief is available, pending a full formal disciplinary proceeding. Interim suspension is available even where formal charges have not yet been filed.

All attorneys who are licensed to practice law in New York are subject to the Rules of Conduct, which establish a framework for the ethical practice of the law and a lawyer's duties as an officer of the legal system. Violation of these rules may lead to professional discipline. The ultimate purpose of any disciplinary proceeding, however, is not to impose punishment for breaches of the Rules of Conduct, but rather "to protect the public in its reliance upon the integrity and responsibility of the legal profession".

Each Judicial Department of theAppellate Divisions of the New York Supreme Court is responsible for the enforcement of the Rules of Professional Conduct within its departmental jurisdiction. Attorney Grievance Committees, either upon receipt of a written complaint, or acting sua sponte, are charged with investigating misconduct through various means, including interviewing witnesses, directing the attorney under investigation to submit written responses or appear for a formal interview, and other actions necessary to investigate the complaint. Once the investigation is complete, the Committee may commence a formal proceeding in which the attorney has the right to be heard. If the Committee concludes that the attorney may face public discipline, then, consistent with the objective of "protect[ing] the public, maintain[ing] the integrity and honor of the profession, or deter[ing] others from committing similar misconduct," the matter is brought before the Appellate Division. The Court is tasked with the responsibility of reviewing the record and deciding whether there has been any misconduct and if so, what the appropriate discipline would be.

In certain cases, the Committee may, during the pendency of its investigation, make a motion to the Court for an attorney's interim suspension. Interim suspension is a serious remedy, available only in situations where it is immediately necessary to protect the public from the respondent's violation of the Rules. At bar, the AGC is proceeding on the basis that there is uncontroverted evidence of professional misconduct. Importantly, when an attorney is suspended on an interim basis, he or she nonetheless has an opportunity for a post-suspension hearing.

Uncontroverted Claims of Misconduct

Only uncontroverted claims of professional misconduct may serve as a basis for interim suspension on this motion. In connection with its claim that uncontroverted attorney misconduct has occurred, the AGC relies upon the following provisions of the New York Rules of Professional Conduct: rule 3.3 which provides that: "(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal. . . ." rule 4.1 which provides that: "In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person," and rule 8.4 "A lawyer or law firm shall not: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, . . . or (h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer."

Under the Rules of Professional Conduct, the prohibition against false statements is broad and includes misleading statements as well as affirmatively false statements. In addition, the Rules concern conduct both inside and outside of the courtroom.

In general, the AGC relies upon statements that respondent made following the 2020 election at press conferences, state legislative hearings, radio broadcasts (as both a guest and host), podcasts, television appearances and one court appearance. Respondent concedes that the statements attributed to him in this motion were all made in the context of his representation of Donald J. Trump and/or the Trump campaign.

Preliminary Issues

Respondent raises an overarching argument that the AGC's investigation into his conduct violates his First Amendment right of free speech. He does not attack the constitutionality of the particular disciplinary rules; he seemingly claims that they are unconstitutional as applied to him. We reject respondent's argument. This disciplinary proceeding concerns the professional restrictions imposed on respondent as an attorney to not knowingly misrepresent facts and make false statements in connection with his representation of a client. It is long recognized that "speech by an attorney is subject to greater regulation than speech by others". Unlike lay persons, an attorney is "a professional trained in the art of persuasion". As officers of the court, attorneys are "an intimate and trusted and essential part of the machinery of justice". In other words, they are perceived by the public to be in a position of knowledge, and therefore, "a crucial source of information and opinion". This weighty responsibility is reflected in the "ultimate purpose of disciplinary proceedings [which] is to protect the public in its reliance upon the integrity and responsibility of the legal profession". While there are limits on the extent to which a lawyer's right of free speech may be circumscribed, these limits are not implicated by the circumstances of the knowing misconduct that this Court relies upon in granting interim suspension in this case.

Respondent also raises lack or absence of knowledge as a general defense, stating that even if his statements were false or misleading, he did not make the statements knowing they were false when he made them. We agree that the Rules of Professional Conduct only proscribe false and misleading statements that are knowingly made. Both rules 3.3 and 4.1, expressly provide for an element of knowingness. Rule 8.4(c), however, contains no such express element. In New York there are no cases which directly hold that a violation of rule 8.4(c) must be knowing, although there is authority that implies it. In a Federal case applying New York's Rules, the court found that there was a violation of rule 8.4(c) where false statements made by the offending attorney were not inadvertent, but were knowing. This Court thereafter imposed reciprocal discipline based on that finding. Sister state jurisdictions have held that knowledge is a required element of misconduct in violation of rules identical to RPC 8.4(c). We, therefore, hold that in order to find a violation of RPC 8.4(c), the AGC is required to satisfy a knowing standard. Knowingness is expressly defined in the Rules of Professional Conduct. Rule 1.0(k)

provides that "[k]nowingly," "known," "know" or "knows" "denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Thus, the element of knowingness must be considered in connection with each particular claim of misconduct.

On this motion, whenever the AGC has sustained its burden of proving that respondent made knowing false and misleading factual statements to support his claim that the presidential election was stolen from his client, respondent must then demonstrate that there is some legitimate dispute about whether the statement is false or whether the statement was made by him without knowledge it was false. Conclusory or vague arguments will not create a controverted issue as to whether there has been misconduct. Consequently, once the AGC has established its prima facie case, respondent's references to affidavits he has not provided, or sources of information he has not disclosed or other nebulous unspecified information, will not prevent the Court from concluding that misconduct has occurred. Respondent cannot create a controverted issue of misconduct based upon what he does not submit to this Court. Nor will offers to provide information at a later time, or only if the Court requests it, suffice.

Instances of Attorney Misconduct

In making this motion, the AGC primarily relies on claims that respondent made false and misleading factual statements to cast doubt on the reliability of the results of the 2020 presidential election, in which Joseph R. Biden was constitutionally certified and then inaugurated as the 46th President of the United States. We find that the following false statements made by respondent constitute uncontroverted proof of respondent's professional misconduct.

Respondent repeatedly stated that in the Commonwealth of Pennsylvania more absentee ballots came in during the election than were sent out before the election. The factual "proof" he claimed supported his conclusion was that although Pennsylvania sent out only 1,823,148 absentee ballots before the election, 2,589,242 million absentee ballots were then counted in the election. This factual statement regarding the number of ballots mailed out before the election was simply untrue. The true facts are that 3.08 million absentee ballots were mailed out before the general election, which more than accounted for the over 2.5 million mail-in ballots that were actually tallied. Notwithstanding the true facts, respondent repeatedly advanced false statements that there were 600,000 to 700,000 fabricated mail-in ballots, which were never sent to voters in advance of the election. Respondent made these false claims during his November 8, 2020 radio program, *Uncovering the Truth with Rudy Giuliani & Dr. Maria Ryan*, during a November 25, 2020 meeting of the Republican State Senate Majority Policy Committee in Gettysburg, Penn-

sylvania, during a December 2, 2020 meeting of the Michigan House Oversight Committee, during his December 17, 2020 broadcast of the radio show *Chat with the Mayor*, and he repeated it during an episode of Steve Bannon's the *War Room: Pandemic* podcast on December 24, 2020.

Respondent does not deny that his factual statement, that only 1.8 million mail-in ballots were requested, was untrue. His defense is that he did not make this misstatement knowingly. Respondent claims that he relied on some unidentified member of his "team" who "inadvertently" took the information from the Pennsylvania website, which had the information mistakenly listed. There is simply no proof to support this explanation. For instance, there is no affidavit from this supposed team member who is not identified by name or otherwise, nor is there any copy of the web page that purportedly listed the allegedly incorrect data. In fact, the only proof in this record is the official data on the Pennsylvania open data portal correctly listing the ballots requested as 3.08 million.

The above identified misstatements violate Rules of Professional Conduct 4.1 and 8.4(c).

On November 17, 2020 respondent appeared as the attorney for plaintiff on a matter captioned *Donald J. Trump for President, Inc. v Boockvar*, in the United States District Court for the Middle District of Pennsylvania. He was admitted pro hac vice based on his New York law license.

Respondent repeatedly represented to the court that his client, the plaintiff, was pursuing a fraud claim, when indisputably it was not. Respondent's client had filed an amended complaint before the November 17, 2020 appearance in which the only remaining claim asserted was an equal protection claim, not based on fraud at all. The claim concerned the experience of two voters having their mail-in ballots rejected and challenged the notice and cure practices concerning mail-in ballots in different counties.

The plaintiff's original complaint had included claims about canvassing practices. The plaintiff, however, voluntarily withdrew those claims when it served the amended complaint. Notwithstanding, respondent insisted on extensively arguing a fraud case based on the withdrawn canvassing claims.

Respondent's mischaracterization of the case was not simply a passing mistake or inadvertent reference. Fraud was the crown of his personal argument before the court that day. In his opening remarks, respondent claimed that the allegations in the complaint concerned "widespread, nationwide voter fraud of which this is a part." He persisted in making wide ranging conclusory claims of fraud in Pennsylvania elections and other jurisdictions allegedly occurring over a period of many years. Respondent argued that the plaintiff's fraud arguments pertained to the canvassing claim, notwithstanding that there was neither a fraud nor a canvassing claim before the court.

After opposing counsel pointed out, and respondent's own co-counsel agreed, that the plaintiff had asserted no claims of fraud the court made the following inquiries and received the following answers from respondent:

> "THE COURT: So it's correct to say then that you're not alleging fraud in the amended complaint?
>
> "RESPONDENT: No, Your Honor, it is not, because we incorporate by reference in 150 all of the allegations that precede it, which include a long explanation of a fraudulent, fraudulent process, a planned fraudulent process.
>
> "THE COURT: So you are alleging fraud?
>
> RESPONDENT: Yes, Your Honor."

Later in the transcript, after the court pointed respondent to the amended complaint, the following further court inquiries and responses occurred:

> "THE COURT: . . . So the amended complaint—does the amended complaint plead fraud with particularity?
>
> "RESPONDENT: No, Your Honor. And it doesn't plead fraud. It pleads the—it pleads the plan or scheme that we lay out in 132 to 149 without characterizing it."

These proceedings were open by phone line to as many as 8,000 journalists and other members of the public. At the outset of the argument it was reported that at least 3,700 people had already dialed in.

It is considered a false and misleading statement under the Rules of Professional Conduct to mispresent the status of a pending proceeding, whether in or out of court. Stating that a case presents a fraud claim when it does not, is a false and misleading statement about the status of a pending proceeding.

Respondent argues that there was no misconduct because he truthfully told the court that day that there were no fraud claims. This defense rings hollow. Respondent's original position, that there was a fraud claim, was made despite an amended complaint in which his very own client withdrew any fraud related claim. Respondent's own co-counsel represented, in respondent's presence, that the plaintiff was not asserting a fraud claim and there was extensive argument by opposing counsel. It is indisputable that respondent had to be aware that there were no fraud claims in the case. Significant time and effort were expended on respondent's false misrepresentations to the court regarding the nature of the proceedings. This resulted in respondent's arguments in support of fraud appearing to be seemingly unanswered on the record and misleading the listening public, because fraud was not a part of the case. Respondent's so-called admission of the true status of the case did not occur until he was pressed by the court to concede the point at page 118 of the transcript.

The confusion respondent created by falsely insisting that there was a fraud/canvassing claim before the court persisted beyond that court appearance. The parties were given leave to submit briefs. Plaintiff's brief included argument about the canvassers' claim, even though it had been withdrawn. Consequently, the court addressed the claim in its subsequent decision and dismissed it on the merits. In footnote 127 the court stated "Count I makes no mention of the poll-watching allegations, nor does it seek relief for any violation of law on the basis of those allegations. Out of an abundance of caution, however, the Court considers whether these allegations state a claim".

The above identified misstatements violate RPC 8.4(c). These misstatements violate RPC 3.3 because they were made before a tribunal. These misstatements violate RPC 4.1 because they were made to third parties consisting of over 3,700 members of the press and the public.

Respondent repeatedly stated that dead people "voted" in Philadelphia in order to discredit the results of the vote in that city. He quantified the amount of dead people who voted at various times as 8,021; while also reporting the number as 30,000.

As the anecdotal poster child to prove this point, he repeatedly stated that famous heavyweight boxer Joe Frazier continued to vote years after he was dead and stated on November 7, 2020 "he is still voting here." The public records submitted on this motion unequivocally show that respondent's statement is false. Public records show that Pennsylvania formally cancelled Mr. Frazier's eligibility to vote on February 8, 2012, three months after he died.

As for respondent's argument that his misstatements were unknowing, respondent fails to provide a scintilla of evidence for any of the varying and wildly inconsistent numbers of dead people he factually represented voted in Philadelphia during the 2020 presidential election. Although respondent assured the public that he was investigating this claim, respondent has not provided this tribunal with any report or the results of any investigation which supports his statements about how many dead voters he claims voted in Philadelphia in the 2020 presidential election. Respondent claims his statements were justified because the state of Pennsylvania subsequently agreed to purge 21,000 dead voters from its rolls in 2021. This fact, even if true, is beside the point. This statistic concerns the whole state. Purging voter rolls does not prove that the purged voters actually voted in 2020 and per force it does not prove they voted in Philadelphia. It does not even prove that they were dead in November 2020. Moreover, the number of statewide purged voters (21,000) bears no correlation to the numbers of dead voters respondent factually asserted voted in Philadelphia alone (either 8,000 or 30,000). Clearly any statewide purging of voters from the voting rolls in 2021 could not have provided a basis for statements made by respondent in 2020, because the information did not exist. Regarding Mr. Frazier, respondent claims he reasonably relied on the

reporting of a "blogger." The blog article provided on this motion, however, never claims that Mr. Frazier voted in the 2020 election. Nor could it, because the claims made in the article (in which respondent was quoted) are based upon an alleged review of public records from 2017 and 2018.

Respondent made these false statements at least twice before the AGC brought this motion; first at a November 7, 2020 press conference at Four Seasons Total Landscaping and again during the November 25, 2020 meeting of the Republican State Senate Majority Policy Committee in Gettysburg, Pennsylvania. Despite the unequivocal evidence provided in this very motion, that Mr. Frazier is not on the Pennsylvania voting rolls, respondent continued to endorse this fictionalized account in the March 4, March 11 and March 14, 2021 episodes of his broadcast radio show *Chat with the Mayor*, all of which aired after this motion was brought.

The above identified misstatements violate RPC 4.1 and RPC 8.4(c).

Respondent repeated to lawmakers and the public at large numerous false and misleading statements regarding the Georgia presidential election results. These statements, as particularized below, were all knowingly made with the object of casting doubt on the accuracy of the vote. Respondent's general claim, without providing this Court with any documentary support, that he relied on "hundreds of pages of affidavits and declarations in [respondent's] possession that document gross irregularities"will not suffice to controvert the specific findings that he knowingly made the false statements that are particularized below.

Respondent made extensive and wide-ranging claims about Dominion Voting Systems Inc.'s voting machines manipulating the vote tallies to support his narrative that votes were incorrectly reported. Georgia, however, had completed a hand count of all ballots cast in the presidential audit. The hand audit, which relied exclusively on the printed text on the ballot-marking device, or bubbled-in the choice of the absentee ballot, confirmed the results of the election with a zero percent risk limit. Respondent's statement that the vote count was inaccurate, without referencing the hand audits, was misleading. By law, this audit was required to take place following the election and be completed no later than December 31, 2020. Respondent's statements were made while the hand audit was proceeding and after it concluded. We understand that Dominion has sued respondent for defamation in connection with his claims about their voting machines. Consequently, we do not reach the issue of whether respondent's claims about the Dominion voting machines were false, nor do we need to.

In view of the hand counts conducted in Georgia, we find that respondent's statements about the results of the Georgia election count are false. Respondent provides no basis in this record for disputing the hand count audit. Respondent made these statements at least on December 3, 2020 when appearing before the Georgia Legislature's Senate Judiciary Committee, during a December 6, 2020 episode of

the radio show *Uncovering the Truth*, during a December 22, 2020 episode of his radio show *Chat with the Mayor*, he alluded to it in a December 27, 2020 episode of *Uncovering the Truth*, and then again during a January 5, 2021 episode of the *War Room* podcast.

The above identified misstatements violate RPC 4.1 and RPC 8.4(c).

At various times, respondent claimed that 65,000 or 66,000 or 165,00 underage voters illegally voted in the Georgia 2020 election. The Georgia Office of the Secretary of State undertook an investigation of this claim. It compared the list of all of the people who voted in Georgia to their full birthdays. The audit revealed that there were zero (0) underage voters in the 2020 election. While a small number of voters (four) had requested a ballot prior to turning 18, they all turned 18 by the time the election was held in November 2020. Respondent does not expressly deny the truth of this information. Instead respondent claims that he reasonably relied on "expert" affidavits, including one by Bryan Geels, in believing the facts he stated were true. None of these affidavits were provided to the Court. Respondent claims that Mr. Geels opined that there were "more than 65,000 individuals who voted had registered to vote prior to their 17th birthday" At a bare minimum, the statement attributed to Mr. Geels does not support respondent's claim that the number of underage teenage voters was 165,000. But respondent's statement about what was said to him is insufficient as to all of respondent's statements on underage voters for other reasons. We do not have the affidavit that respondent claims Mr. Geels prepared and he relied on. We do not know when the affidavit was provided to respondent. We do not know what data or source information Mr. Geels relied on in reaching his conclusion, nor do we know what methodology Mr. Geels used for his analysis. Other than respondent calling him an "expert," we do not know Mr. Geels' actual area of expertise or what qualifies him as such. Merely providing names and conclusory assertions that respondent had a basis for what he said, does not raise any disputed issue about whether misconduct has occurred.

Respondent made statements regarding underage voters in Georgia on his radio show, *Chat with the Mayor*, at least on January 5, January 7, and January 22, 2021. He then repeated this statement on the April 27th episode of his radio show, after this motion for interim suspension was brought.

The above identified misstatements violate RPC 4.1 and RPC 8.4(c).

Respondent stated to lawmakers, and the public at large, that more than 2,500 Georgia felons voted illegally. The Georgia Secretary of State also investigated this claim. By comparing lists from the Departments of Corrections and Community Supervision, with the list of people who actually voted in November 2020, the Secretary of State identified a universe of 74 potential felony voters, who were then

investigated. Even if all 74 identified persons actually voted illegally, the number is nowhere near the 2,500 that respondent claimed and the number would, in any event, be statically irrelevant in supporting a claim that the election was stolen. Respondent's statements that there were 2,500 voting felons is false.

Respondent claims to have relied on the unproduced affidavit of Mr. Geels for this information as well. Respondent states that Mr. Geels opined that "there could have been" more than 2,500 incarcerated felons who voted. This opinion, as phrased and as reported by respondent, is wholly speculative. It is also conclusory, rendering it insufficient for the same reasons as is Mr. Geels' reported opinion regarding underage voters.

On January 5, 2021, during a *War Room* podcast respondent stated that at least 2,500 felons voted in the Georgia election.

The above identified misstatements violate RPC 4.1 and RPC 8.4(c).

Respondent stated that dead people voted in Georgia during the 2020 presidential election. He claimed that he had the names of 800 dead people who voted based upon the number of people who had passed away in 2020. Respondent further stated that this number was really in the thousands. At another point he claimed that 6,000 dead people had voted. This claim was refuted by the Georgia Secretary of State. After reviewing public records, the Secretary of State concluded that potentially two votes may have been improperly cast in the name of dead voters in the 2020 election and those instances were being investigated. Respondent's claim of thousands of dead voters is false. So is respondent's claim of 800 dead voters. The two potentially dead voters discovered by the Secretary of State during its investigation is not statistically relevant to affect election results and does not support any narrative of fraud. Respondent does not claim that either of the identified experts he relied upon for information about the Georgia election made any statement to him whatsoever regarding the number of dead people in whose names votes were allegedly cast in the 2020 election and he does not provide any other source for the false numerical information he disseminated.

On December 22, 2020, during a *War Room* podcast, respondent stated that 6,000 dead people voted. On January 3, 2021, during an episode of *Uncovering the Truth*, respondent stated that 10,515 dead people voted. On January 5, 2021, during a *War Room* podcast, respondent stated that 800 or more dead people voted in the Georgia election. On the April 7, 2021 episode of his radio show *Chat with the Mayor*, respondent challenged the Georgia Secretary of State's finding that only potentially two votes were cast in the name of dead voters, despite having no evidence to refute the facts developed after investigation of public records. The April 7th false statement was made after this motion for interim suspension was brought.

The above identified misstatements violate RPC 4.1 and RPC 8.4(c).

Respondent represented that video evidence from security cameras depicted Georgia election officials engaging in the illegal counting of mail-in ballots. Although respondent acknowledged that he had viewed the surveillance videos in their entirety, the version of the videos shown to the public was comprised only of snippets. The gist of his claim was that illegal ballots were being surreptitiously retrieved from suitcases hidden under a table and then tabulated. In fact, the entirety of the videos shows the "disputed" ballots were among those in a room filled with people, including election monitors, until about 10:00 pm. At about 10:00 p.m., the boxes—not suitcases—containing the ballots were placed under a table in preparation for the poll watchers to leave for the evening. Those boxes were reopened and their contents retrieved and scanned when the state official monitor intervened, instructing the workers that they should remain to tabulate the votes until 10:30 p.m. that evening. When viewed in full context and not as snippets, the videos do not show secreting and counting of illegal ballots. Based upon the claim, however, the Georgia Secretary of State conducted an investigation. The video tapes were viewed in their entirety by the Secretary's office, law enforcement, and fact checkers who, according to Secretary of State Brad Raffensperger, all concluded that there was no improper activity.

Respondent's argument with respect to the video is that a reasonable observer could conclude that there was an illegal counting of the mail-in ballots. If, as respondent claims, he reviewed the entire video, he could not have reasonably reached a conclusion that illegal votes were being counted. We disagree that the video can be viewed as evidence of illegal conduct during the vote tabulation process or that it provided a reasonable basis for respondent's conclusions.

Respondent showed the snippets of video and/or made false statements regarding its content on at least the following occasions: the podcast *Rudy Giuliani's Common Sense* on December 4, 2020, the radio show *Uncovering the Truth* on December 6, 2020 and then again on the same radio show on December 27, 2020 and January 3, 2021; on December 3, 2020 at a hearing before the Georgia State Legislature; and yet again on December 8, 2020 and December 10, 2020 on respondent's *Chat with the Mayor* radio program, and on December 19, 2020, and January 5, 2021 as a guest on the *War Room* podcast.

The above identified misstatements violate RPC 4.1 and RPC 8.4(c).

Respondent made false and misleading statements that "illegal aliens" had voted in Arizona during the 2020 presidential election. These false facts were made by respondent to perpetuate his overall narrative that the election had been stolen from his client.

On November 30, 2020, respondent appeared before a group of Arizona legislators at the Hyatt Regency Hotel in Phoenix. It was acknowledged during that session that no statewide check on undocumented noncitizens had been performed. In other words, there was no data available from which to draw any conclusion about undocumented noncitizens. Nonetheless, respondent persisted in stating, during that same session, that there were "say" five million "illegal aliens" in Arizona and that "it is beyond credulity that a few hundred thousand didn't vote. . . ." Undeterred by the lack of any empirical evidence, in a December 17, 2020 episode of *Chat with the Mayor*, respondent queried "Do you think more than 10,000 illegal aliens voted in Arizona?....We know that way more than 10,000 illegal immigrants voted." During an appearance on the *War Room* podcast on December 24, 2020 respondent once again claimed with respect to the number of undocumented noncitizens who voted in Arizona that "the bare minimum is 40 or 50,000, the reality is probably about 250,000. . . ." He then used these unsubstantiated figures to support a claim that Trump won Arizona by about 50,000 votes. After the New Year, in another episode of the *War Room* podcast, the number of "illegal immigrants" respondent was claiming had voted illegally changed yet again. This time respondent claimed there were 32,000 of such illegal votes. Respondent admitted in the podcast that he did not have the "best sources" to justify this estimate, but stated that he was relying on "newspaper and records" for his claims. Respondent later either reiterated and/or agreed with statements made by others, that undocumented noncitizens had voted in Arizona in the 2020 election; he made these statements during the March 9th, 11th, and April 27, 2021 broadcasts of his *Chat with the Mayor* radio show and on April 21, 2021 during an appearance on the *War Room* podcast. Respondent made these misstatements most recently after the AGC brought this motion for his interim suspension.

On their face, these numerical claims are so wildly divergent and irreconcilable, that they all cannot be true at the same time. Some of the wild divergences were even stated by respondent in the very same sentence. Moreover, at the November 30, 2020 hearing, when it was brought to respondent's attention that no study to support the conclusions had been done, respondent persisted in making these false factual statements. In January 2021, respondent even admitted that he did not have the "best sources" to justify the numbers he was stating as fact. Nonetheless, respondent has failed to produce any sources, whether "best" or marginal, to support any of the figures he has presented to the public with authority. He has not identified, let alone produced the "newspaper and records" he claimed were the bases for his assertions when he made them.

Respondent argues that he reasonably relied on Arizona State Senator Kelly Townsend, who respondent claims collected information on noncitizen voters. Respondent does not tell us what Senator Townsend actually said to him or when she said it. We do not have an affidavit or any statement from Senator Townsend. We simply have none of the information Senator Townsend is claimed to have col-

lected. Saying that Senator Townsend collected information does not explain any of respondent's numbers, let alone why they are wildly divergent. Respondent's claim, that he also relied on "other witnesses" who testified that thousands of individuals voted despite any proof of citizenship, lacks detail and is not specific enough to be considered by this Court as probative. Not one of those witnesses is identified, none of their testimony is provided, nor has respondent provided an affidavit from any of them. Respondent cannot rely on this "evidence" to controvert that he knowingly made false statements to the public about the number of "illegal aliens" or "illegal immigrants" voting in the Arizona 2020 presidential election.

The above identified misstatements violate RPC 4.1 and RPC 8.4(c).

We find that all of these acts of misconduct, when considered separately or taken together, also establish that respondent violated RPC 8.4(h) because his conduct adversely reflects on his fitness as a lawyer.

We recognize that the AGC has identified other instances of respondent's misconduct. We make no substantive decision on those additional claims at this time because the record is insufficiently developed on those claims in this motion for interim relief. The additional claims may be part of any formal charges that the AGC will interpose in the full disciplinary proceeding that will follow this interim suspension. We find, nonetheless, that the incidents we have identified in this decision satisfy the requirement of uncontroverted misconduct required for an interim suspension.

Immediate Threat to the Public Interest

Uncontroverted claims of misconduct alone will not provide a basis for interim suspension, unless there is a concomitant showing of an immediate threat to the public interest. We recognize that this case presents unique circumstances. Nonetheless, there are certain factors we generally consider in connection with whether an immediate threat of harm to the public has been established.

Violation of the Rules of Professional Conduct in and of themselves necessarily means that there is harm to the public. One obvious factor to consider on an interim suspension application is whether the misconduct is continuing. Even where there are no actual incidents of continuing misconduct, immediate harm threatening the public can be based on the risk of potential harm when considered in light of the seriousness of the underlying offense. Many cases where the seriousness of the offending conduct alone satisfies the immediate threat requirement for an interim suspension concern the mishandling of money. The broader principle to be drawn from these cases is that when the underlying uncontroverted evidence of professional misconduct is very serious, the continued risk of immediate harm to the public during the pendency of the underlying disciplinary proceeding is unacceptable. For example, we have ordered interim suspensions where the of-

fense is serious, although the risk of recurrence is slight, because the attorney intends to resign from the practice of law. Another consideration, related to the seriousness factor, is whether the underlying misconduct is likely to result in a substantial sanction at the conclusion of the formal disciplinary hearing proceeding. We adopt this factor in reliance on sister state authority on the same issue.

Consideration of these factors in this case leads us to conclude that the AGC has made a showing of an immediate threat to the public, justifying respondent's interim suspension. We find that there is evidence of continuing misconduct, the underlying offense is incredibly serious, and the uncontroverted misconduct in itself will likely result in substantial permanent sanctions at the conclusion of these disciplinary proceedings.

Respondent argues that there is no immediate threat of future harm, because he has and will continue to exercise personal discipline to forbear from discussing these matters in public anymore. He also claims that because legal matters following the 2020 election have concluded, he will no longer be making any statements about the election under the authority of being an attorney.

Notwithstanding respondent's claim that he has exercised self-restraint by not publicly commenting on the election, there are numerous instances demonstrating the opposite. Focusing only on the false statements that support our conclusion of uncontroverted misconduct (and not his statements about 2020 election matters generally), respondent has made or condoned the following false statements just since the AGC brought this application for his interim suspension: On his March 4, 2021 radio show *Chat with the Mayor*, respondent reprised his claim that Joe Frazier had voted from the grave. On the March 9th episode of his radio show *Chat with the Mayor*, respondent stated in substance that immigrants voted illegally in the 2020 presidential election. On the March 11th episode of his radio show *Chat with the Mayor* he again referred to Joe Frazier and "illegals" voting in Arizona. On the March 14th episode of *Chat with the Mayor*, respondent recounted the tale of Joe Frazier voting after he died and joked with his co-host about the Philadelphia cemeteries emptying on election day. On his April 8th episode of *Chat with the Mayor*, respondent disputed the fact that in Georgia only two dead people had voted, even though, as previously indicated, respondent had no informational basis for making that statement and disputing the results of Georgia's investigation. On the April 27th episode respondent once again falsely stated that there were 65,000 underage teenage voters who had voted in Georgia. Respondent also stated that there were 38,000 "illegal immigrants" voting in Arizona, while at the same time estimating the number at maybe 5,000 or maybe 100,000. Imminent threat to the public is established by this continuing pattern of respondent's offending conduct and behavior. We cannot rely on respondent's representations that he will exercise restraint while these proceedings are pending.

Contrary to respondent's assertion, there are many ongoing legal matters all over the United States that arise from the narrative of a stolen election. Respondent himself points to an ongoing audit of the 2020 ballots presently occurring in Maricopa County, Arizona. Another audit of the 2020 ballots has just been authorized in Fulton County, Georgia by Chief Judge Brian Amero of the Henry County Superior Court. The Federal government and many state legislators are actively engaged in enacting competing laws concerning voting in this country. Many of the state laws are facing serious court challenges.

The risk that respondent will continue to engage in future misconduct while this disciplinary proceeding is pending is further borne out by his past, persistent and pervasive dissemination of these false statements in the media. This is not a situation where the uncontroverted misconduct consisted of only a few isolated incidents. Rather, each of the false statements identified and analyzed herein were made multiple times on multiple platforms, reaching countless members of the public. They continued after this motion was brought, and despite respondent facing imminent suspension from the practice of law.

The seriousness of respondent's uncontroverted misconduct cannot be overstated. This country is being torn apart by continued attacks on the legitimacy of the 2020 election and of our current president, Joseph R. Biden. The hallmark of our democracy is predicated on free and fair elections. False statements intended to foment a loss of confidence in our elections and resulting loss of confidence in government generally damage the proper functioning of a free society. When those false statements are made by an attorney, it also 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. It tarnishes the reputation of the entire legal profession and its mandate to act as a trusted and essential part of the machinery of justice. Where, as here, the false statements are being made by respondent, acting with the authority of being an attorney, and using his large megaphone, the harm is magnified. One only has to look at the ongoing present public discord over the 2020 election, which erupted into violence, insurrection and death on January 6, 2021 at the U.S. Capitol, to understand the extent of the damage that can be done when the public is misled by false information about the elections. The AGC contends that respondent's misconduct directly inflamed tensions that bubbled over into the events of January 6, 2021 in this nation's Capitol. Respondent's response is that no causal nexus can be shown between his conduct and those events. We need not decide any issue of "causal nexus" to understand that the falsehoods themselves cause harm. This event only emphasizes the larger point that the broad dissemination of false statements, casting doubt on the legitimacy of thousands of validly cast votes, is corrosive to the public's trust in our most important democratic institutions.

Before Judge Brann in the *Boockvar* case, respondent himself stated: "I don't know what's more serious than being denied your right to vote in a democracy." We agree. It is the very reason why espousing false factual information to large segments of the public as a means of discrediting the rights of legitimate voters is so immediately harmful to it and warrants interim suspension from the practice of law.

3.5 Law Firms

Model Rules of Professional Conduct

Rule 5.1: Responsibilities of a Partner or Supervisory Lawyer

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

> (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.2: Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Rule 5.3: Responsibilities Regarding Nonlawyer Assistance

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.4: Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation ; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Rule 5.6: Restrictions on Rights to Practice

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

Rule 5.7: Responsibilities Regarding Law-related Services

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.