2023 UPDATE TO

THE LEGAL PROFESSION: ETHICS IN CONTEMPORARY PRACTICE

Second Edition

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CHAPTER 2: THE AMERICAN LEGAL PROFESSION: AN OVERVIEW

On p. 41, add the following before Part E:

A study of U.S. law school enrollment trends published in 2020, based on comprehensive data for the past decade, explored how the demographic composition of law students has changed since the Great Recession. Here are a few of the key findings:

- Law school enrollment declined almost 25% from its peak in 2010. Although first-year enrollment increased by 8% from 2016 to 2017 (what some have called the "Trump bump"), there were no additional increases in 2018 or 2019.
- Male enrollment declined by 33%, while female enrollment declined by 13%. Male enrollment decreased every year since 2010, while female enrollment decreased from 2010 to 2016 but increased every year since then.
- The share of law school enrollment by Black students increased from 7.2% to 7.8%, and the Hispanic share grew from 9.2% to 12.7%.
- Black and Hispanic students were disproportionately enrolled in lower-ranked schools with lower bar passage and post-graduation employment rates.
- Asian American and White law school enrollments declined significantly. Law school enrollment by Asian Americans declined more than the enrollment of any other racial or ethnic group.[1]

CHAPTER 3: THE LAWYER'S ROLE: THE AMORAL CONCEPTION AND ITS CRITICS

On p. 79, add the following before Notes on the Choice of Clients and Causes:

Harvey Weinstein. In January 2019, Ronald S. Sullivan, Jr., director of Harvard Law School's Criminal Justice Institute, joined a team of lawyers representing Hollywood producer Harvey Weinstein, who had been charged with rape and sexual assault. Sullivan's decision to represent Weinstein led to student protests and calls for him to resign from his position as the first black dean of one of Harvard's undergraduate residential colleges. Some students argued that Sullivan's representation of Weinstein jeopardized his ability to serve as an effective residential dean with responsibility for overseeing a comfortable social climate at the college. Sullivan said of his decision to represent Weinstein, "Lawyers are not an extension of their client. Lawyers do law work, not the work of ideology. When I'm in my lawyer capacity, representing a client, even one publicly vilified, it doesn't mean I'm supporting anything my client may have done."[2] Many of Sullivan's colleagues defended him. One wrote that [t]hose calling for Sullivan's resignation or dismissal as a faculty dean solely because he is serving as Harvey Weinstein's lawyer in a rape prosecution are displaying an array of disturbingly widespread tendencies . . . [including]

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[1] *See* Miranda Li, Phillip Yao, and Goodwin Liu, *Who's Going to Law School? Trends in Law School Enrollment Since the Great Recession*, 54 U.C. DAVIS L. REV. 1 (2020).

[2] Jan Ransom and Michael Gold, '*Whose Side Are You On?': Harvard Dean Representing Weinstein Is Hit With Graffiti and Protests,* N.Y. TIMES, Mar. 4, 2019, https://www.nytimes.com/2019/03/04/nyregion/harvard-dean-harvey-weinstein.html?searchResultPosition=1.

impatience with drawing essential distinctions such as that between a lawyer and his client."[3] A journalist criticized this line of argument, writing:

> Sullivan isn't a public defender who's simply taking the clients assigned to him. He's not even a full-time criminal defense lawyer who just takes whichever clients happen to come through his door. . . . While it's obviously true that all criminal defendants have a right to an attorney, it's equally obvious that criminal defendants don't have a particular right to Ronald Sullivan's services. It would be genuinely outrageous to condemn a public defender for catching some heinous clients in the course of pursuing an honorable vocation. But as Sullivan is obviously picking and choosing his clients – and, in Weinstein's case, getting well paid for his time -- it doesn't seem unreasonable to draw some inferences based on his choices.[4]

In May 2019, Harvard announced that Sullivan would no longer serve as a faculty dean of the residential college. Sullivan thereafter withdrew from Weinstein's defense team.[5]

Setting aside whether it was appropriate for Harvard not to allow Sullivan to continue to serve as residential dean, which side do you think has the better of the argument about whether Sullivan's willingness to represent Weinstein supports some legitimate "inferences"? If you think that some inferences based on his choices might be reasonable, what might such inferences be? Could one reasonably infer that his representation of Weinstein reveals something about his attitudes regarding sexual assault, the #MeToo movement, the #MeToo backlash, something else, or none of the above?

Insert on p. 79, before Notes on the Choice of Clients and Causes:

ExxonMobil. In January 2020, #DropExxon organizers asked law students to pledge not to interview with or work for Paul, Weiss, Rifkind, Wharton & Garrison until the law firm agreed to stop representing ExxonMobil. The protesters said that Paul Weiss cultivates a reputation for doing impressive amounts of pro bono work and attracting public-spirited lawyers but that its defense of ExxonMobil in a series of cases about the oil company's role in climate change made it complicit in the destruction of the planet. "As future lawyers, we have a choice," the pledge reads: "Will we commit ourselves to enabling corporations to continue putting human civilization at risk of climate catastrophe? Or will we dedicate our careers to making a positive impact in our communities and helping build a more just and sustainable future?" Paul Weiss's chairman responded, "We are proud of the outstanding work we do for a wide range of commercial and pro bono clients in their most challenging and high-profile matters, including our recent defense of ExxonMobil in a securities fraud case in which the court found, after trial, that plaintiff's claims were entirely without merit. Paul, Weiss is committed to . . . the principle that we represent our clients and safeguard the rule of law zealously and to the best of our abilities."[6]

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[3] *Id.* (quoting Harvard Law Professor Randall Kennedy's column in *The Chronicle of Higher Education*).
[4] Matthew Yglesias, *The Raging Controversy Over Ronald Sullivan, Harvey Weinstein, and Harvard, Explained,* VOX, May 17, 2019, https://www.vox.com/2019/5/17/18626716/ronald-sullivan-winthrop-house-harvard-law-school.
[5] Yohana Desta, *Ex-Harvard Dean Dismissed for Repping Harvey Weinstein Says He Did "Nothing Wrong,"* VANITY FAIR, June 25, 2019, https://www.vanityfair.com/hollywood/2019/06/harvey-weinstein-ronald-sullivan-jr-lawyer.
[6] *See* Karen Sloan, *First Harvard, Now Yale. Law Students Want Paul Weiss to #DropExxon,* LAW.COM, Feb. 7, 2020.

Also on p. 79, note 1 should now read:

1. What Would You Do? Would you have been willing to represent Bernie Madoff in his fraud prosecution, Phillip Morris in tobacco cases, John Demjanjuk in connection with charges that he was an accessory to murder of many thousands, the House of Representatives in the DOMA case, an authoritarian-kleptocratic regime in its efforts to improve its political image in the U.S., Harvey Weinstein in his trial for rape and sexual assault, or ExxonMobil in litigation about its role in climate change?

CHAPTER 4: DIVERSITY OF THE PROFESSION

On p. 81, add in the first paragraph just after note 1:

Another study of the demographics of law students shows that women have outnumbered men among law students since 2016, and since the 2009 recession, Asian Americans and whites have constituted a declining share of total law school enrollment, while African American and Latino/a/x enrollment has comprised a larger share. But, the study found, women, African American, and Latino/a/x students disproportionately attend law schools with lower rates of bar passage and post-graduate employment. Thus, it remains unclear whether the increasing numbers of women and racial and ethnic diversity will be reflected in the diversity of the bar as a whole, particularly jobs in the elite sectors of the bar.[7]

On p. 103, the last paragraph before the notes should include these final sentences: In Formal Opinion 493 (July 15, 2020), the ABA explained that Rule 8.4(g) prohibits conduct that might not violate anti-discrimination law, such as workplace harassment that is not sufficiently severe or pervasive to violate Title VII. However, the Formal Opinion also cautioned: "The Rule does not prevent a lawyer from freely expressing opinions and ideas . . . . The fact that others may personally disagree with or be offended by a lawyer's expression does not establish a violation." So far, only a few states have adopted Model Rule 8.4(g) or substantially similar language, and some have considered and rejected it. However, about half the states already included an anti-discrimination provision in their rules before the ABA adopted 8.4(g).

CHAPTER 7: PROTECTIONS AGAINST LAWYER OVERREACHING

On p. 155, insert this footnote after the penultimate sentence in the first paragraph:

[8]

[7] *See* Miranda Li, Phillip Yao & Goodwin Liu, *Who's Going to Law School? Trends in Law School Enrollment Since the Great Recession*, 54 U.C. DAVIS L. REV. 613 (2020).

[8] An example of a situation potentially involving a conflict between the duty of loyalty to the client and the personal interests of the lawyer arose in connection with the controversy over Michael Cohen's secret taping of his conversations with his client, then-presidential-nominee Donald Trump. Cohen's lawyer said that Cohen taped conversations with clients in lieu of taking notes, but Trump complained in a tweet that taping was an act of disloyalty: "What kind of lawyer would tape a client? So sad!" *See* Deanna Paul, *Michael Cohen Secretly Recorded Trump. Does that Make Him a Bad Lawyer?*, WASH. POST, July 26, 2018. An article examining whether it is ever ethically

On p. 168, after the first carryover sentence at the top of the page, insert the following:

In Formal Opinion 492 (June 9, 2020), the ABA explained that "significantly harmful" information could include views on various settlement issues including price and timing; the prospective client's strategic thinking; knowledge about a client's settlement position; sensitive or personal information in a divorce case; and possible terms and structure of proposed bid by one corporation to acquire another.

CHAPTER 9: EXCEPTIONS TO CONFIDENTIALITY AND TO THE ATTORNEY-CLIENT PRIVILEGE

On p. 198, following the second paragraph, add the following:

The Covid-19 pandemic prompted many employers to permit and encourage lawyers to work remotely from home. But lawyers' reliance on digital technology to facilitate remote work has created a host of ethical challenges, including with respect to the duty to safeguard clients' confidential information. Home computers often rely on internet security that is inferior to the protections incorporated into professional telecommunications systems. Increased reliance on videoconferencing tools for meetings presents similar dangers relating to data security and confidentiality.

On p. 202, note 1 should read as follows:

1. ***The History of and Variations on the Death or Injury Exception to Confidentiality.*** At the time of *Spaulding*, the ethics rules of Minnesota, like those of most states, did not allow an exception for lawyers to reveal confidential information to prevent death or substantial bodily injury. The Model Rules first recognized such an exception in 1983. California and many other states still do not have exceptions as broad as Model Rule 1.6(b)(1); in these states confidential information may be disclosed only "to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual." Calif. Rule of Professional Conduct 1.6(b). Moreover, California also requires that before revealing the confidential information the lawyer "shall, if reasonable under the circumstances" both "make a good faith effort" to persuade the client not to commit or continue the crime and inform the client that the lawyer will reveal the confidential information. Calif. R. Prof. Conduct 1.6(c). Would a lawyer confronted with the situation of *Spaulding v. Zimmerman* in California be permitted to disclose to David that he was suffering from an aortic aneurysm?

Among the states that allow an exception only for *criminal* acts (or some states say a "criminal or fraudulent act") likely to cause death or substantial bodily harm are Alabama, Arizona, Arkansas, Connecticut, District of Columbia, Hawaii, Indiana, New Jersey, Rhode Island, and South Dakota. Several states, however, require more disclosure than Model Rule 1.6(b)(1); Illinois, Iowa, Tennessee, Texas, Vermont, Virginia, Washington, Wisconsin *require* (not merely *permit*) lawyers to disclose confidential information to prevent death or substantial bodily injury.[9]

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permissible to secretly record a conversation with a client is John Bliss, *The Legal Ethics of Secret Client Recordings*, 33 GEO. J. LEGAL ETHICS 55 (2020).

[9] Note 1 draws from the ABA's compilation of state ethics rules:
https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-1-6.pdf.

On p. 212, following the end of the second paragraph, add the following:

Criminal and congressional investigations into the efforts of lawyers for former President Trump to overturn the results of the 2020 Election have spawned a great deal of litigation in many courts over the scope of the crime fraud exception to confidentiality and privilege. For example, *Eastman v. Thompson*, 594 F.Supp.3d 1156 (C.D. Cal. 2022), addressed the question whether to compel production of 111 documents, mainly emails sent by then-law professor John Eastman, who represented Trump in various election litigation and who participated in devising a scheme whereby Congress, when certifying the decision of the Electoral College that Trump lost to President Biden, could disregard slates of electors from several states that voted for Biden. The court ruled that Eastman could not assert attorney-client privilege in a document outlining a strategy by which the Vice President could disregard slates of electors because the communication was in furtherance of Eastman's and Trump's crime of obstructing the joint session of Congress on January 6. Similarly, prosecutors were able to obtain notes taken by M. Evan Corcoran, a former lawyer for Trump, in the criminal investigation of Trump's mishandling of classified documents. Corcoran asserted that the notes were protected by attorney-client privilege. But a federal judge ruled that the crime-fraud exception applied, based on evidence indicating that Trump had encouraged Corcoran to either falsely allege that Trump did not have the subpoenaed documents or destroy them. The judge found that Trump had attempted to use Corcoran in the commission of a crime.[10]

CHAPTER 11: CONCURRENT CONFLICTS

On p. 246, insert this paragraph before the one on "'Consentable' Conflicts":

Lawyers' Own Interests. This chapter focuses primarily on how lawyers should manage conflicts between two or more current clients. But keep in mind (as discussed in Chapter 7) that a concurrent conflict of interest also exists if "there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer." Model Rule 1.7(a)(2). This rule was relevant to a controversy that arose in 2018, when the public learned that Michael Cohen had routinely and secretly taped his telephone conversations with his then-client, Donald Trump.[11] (We consider the circumstances surrounding the release of the tapes in Chapter 15, Problem 15-8.) If Cohen was taping the phone calls because he feared that Trump would later lie about their conversations and implicate Cohen in wrongdoing, would that constitute a "significant risk" that Cohen's representation of Trump would be "materially limited" by his own interests? Should a lawyer who mistrusts a client in such circumstances be expected to rely on alternative measures to protect himself, such as writing memos to the file or seeking the client's consent to taping? [12]

On p. 249, insert a new Problem 11-1.5 after Problem 11-1:

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[10] See Debra Cassens Weiss, *Notes from Trump's Lawyer Cited as Evidence of Obstruction in Classified Documents Case*, ABA JOURNAL, June 12, 2023.

[11] *See* Bernie Berk, *Was Michael Cohen's Secret Taping of His Then-Client Donald Trump Improper?*, THE FACULTY LOUNGE, (July 26, 2018).

[12] For a discussion of this issue and other aspects of the ethics of lawyers secretly taping their conversations with clients, see John Bliss, *The Legal Ethics of Secret Client Recordings*, 32 GEO. J. LEGAL ETHICS __ (forthcoming 2019).

Committees of Congress investigating alleged misconduct by former President Trump have subpoenaed numerous aides to the President to testify and produce evidence. Committees raised funds on behalf of both President Clinton and President Trump to pay legal fees of White House staff who were subpoenaed to testify or produce evidence in connection with Congressional and other investigations of alleged White House misconduct. The committees paid legal fees of members of both administrations. But the practice came under criticism from legal ethics experts after Cassidy Hutchinson, an aide to President Trump, fired the lawyers paid for by the Trump committee, hired another lawyer, and then agreed to testify before the Select Committee to investigate the January 6th attack on the United States Capitol. Hutchinson revealed evidence of former President Trump's involvement in the January 6 riot that she had not previously disclosed while represented by her prior counsel. While former President Trump charged that her new lawyer pressured Ms. Hutchinson to testify falsely about Trump's involvement in the January 6 effort to overturn the results of the 2020 Election, others asserted that Trump and his supporters used the payment of legal fees and the selection of counsel to pressure witnesses to refrain from revealing evidence of the former President's misconduct.[13]

What are the possible conflicts of interest when a political action committee funded by supporters of the President who is under investigation pays the legal fees of the witnesses who appear before Congress? Are there sufficient legitimate reasons to allow the practice notwithstanding the conflicts? May the committee funding the legal representation seek to influence the advice the lawyer gives to the witness? See Model Rules 5.4(c) and 1.8(f).

CHAPTER 12: CONFLICTS INVOLVING FORMER CLIENTS

On p. 277, after note 3, insert the following note:

4. ***When Are Interests "Materially Adverse"?*** ABA Formal Opinion 497 clarifies what Model Rule 1.9(a) means by "material adverseness." The opinion identifies three types of situations that fall within the meaning of material adversity: 1) suing or negotiating against a former client or defending a new client against a claim by a former client; 2) attacking or undermining one's own prior work for a former client—for example, by challenging a patent previously obtained for a former client; and 3) cross-examining a former client. In all these circumstances, the rule precludes lawyers from representing another person in the same or a substantially related matter, unless the former client gives informed consent, confirmed in writing.[14]

CHAPTER 14: CRIMINAL DEFENSE PRACTICE

On pp. 319-320 at the end of the carryover paragraph discussing the crisis in Louisiana's indigent criminal defense system, add the following:

[13] Luke Broadwater, *et al.*, *Trump Group Pays for Jan. 6 Lawyers, Raising Concerns of Witness Pressure*, N.Y. TIMES (June 30, 2022).

[14] This guidance also applies to Model Rule 1.18 on duties to prospective clients, covered in Chapter 7.

A recent study of the situation in Louisiana revealed the crisis continues. An article in the *New York Times* reported that public defender offices are so short-staffed that lawyers must handle the caseload that ordinarily would be full-time work for five lawyers. Richard A. Oppel, Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES, Jan. 31, 2019. The article built on study conducted under the auspices of the ABA finding that as of 2017, the state had enough indigent criminal defense lawyers to handle only 20 percent of the pending cases. AMERICAN BAR ASSOCIATION, THE LOUISIANA PROJECT: A STUDY OF THE LOUISIANA DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS (February 2017), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_louisiana_project_report.pdf.

On p. 347, the first line of the second paragraph quotes ABA Standard 4-7.7, not 4-77.

CHAPTER 15: CRIMINAL PROSECUTION

On page 379, add this paragraph immediately before the paragraph that begins "Particular controversy surrounds. . . .":

> In 2019, the ABA issued a new formal opinion on the duties of prosecutors while negotiating plea bargains for misdemeanor offenses. It responds to empirical evidence indicating that prosecutors have enormous leverage at this preliminary stage and that many accused know little about the legal system, are willing to accept almost any plea to exit the criminal process, and often do so without consulting a lawyer and without fully understanding the consequences. ABA Formal Opinion 486 reminds prosecutors of their duties to ensure: (i) that the accused is advised of the procedure for obtaining counsel; and (ii) that the nature and timing of prosecution does not interfere with this procedure.

On p. 383, insert the following sentence after n. 38 at the end of the middle paragraph:

A 2022 study of the over 9,700 death sentences in the U.S. since 1972 found that of the 189 exonerations of death row inmates, 121 (64%) involved prosecutorial misconduct; including cases in which the sentence was vacated but the defendant was not immediately exonerated, 550 sentences were overturned because of prosecutorial misconduct.[15]

On p. 391, insert the following paragraph after the first full paragraph, before section 3:

The difficult issues in the politics of prosecuting alleged government corruption extend beyond disclosure violations, as in the Stevens case, or the choice of which officials to prosecute, as in the Siegelman case. A number of incidents during the Trump Administration have sparked

[15] Rachel Rippetoe, *1 in 20 Death Row Reversals Tied to Prosecutor Misconduct*, LAW360.COM (July 8, 2022), https://www.law360.com/access-to-justice/articles/1509865/1-in-20-death-row-reversals-tied-to-prosecutor-misconduct?nl_pk=8d2df97c-4c66-418c-822a-4be930d21c43&utm_source=newsletter&utm_medium=email&utm_campaign=access-to-justice&utm_content=2022-07-09&read_more=1

debate about the extent to which the U.S. Department of Justice should be independent from the White House. One was the criminal prosecution of Michael Flynn, who briefly served as national security advisor to President Trump and later pleaded guilty to lying to the FBI during a counterintelligence investigation of Russian interference with the 2016 investigation and the Trump campaign's involvement in it. President Trump maintained that the investigation was politically motivated and urged the Attorney General to dismiss cases against Flynn and another Trump friend, Roger Stone, who was convicted of obstructing the investigation. Political appointees at DOJ, overruling decisions of career prosecutors, dismissed the case against Flynn after he had pleaded guilty and recommended leniency for Stone (whose prison sentence for 7 felonies Trump later commuted). The career prosecutors in the Flynn and Stone cases withdrew from the cases and some resigned from DOJ altogether. Thousands of former DOJ lawyers signed letters criticizing Attorney General William Barr for undermining the rule of law and compromising prosecutorial independence.[16] To reconcile the desire for prosecutorial independence with the fact that the Attorney General is a presidential appointee, in the wake of the Attorney General's involvement in the Nixon Administration's Watergate scandal, Congress enacted a 1978 statute providing for an independent counsel chosen by a three-judge panel to handle investigations of senior executive officials. Congress let the statute lapse in 1999 because some believed some independent counsels launched too many investigations.

CHAPTER 16: LARGE FIRMS

On p. 434, add the following note:

5. ***Controversial Clients and Causes***. Recall the discussion in Chapter 3 about whether lawyers are morally accountable for their choices of clients and causes. Those choices can also have business implications. Large law firms sometimes part ways with controversial clients and causes for reasons that are at least partly financial. For example, Skadden Arps Slate Meagher and Flom stopped representing Russian billionaire Roman Abramovich after Russia invaded Ukraine in 2022 and the UK imposed sanctions that made it impossible for the oligarch to pay for the firm's legal services.[17] In another instance, after two Kirkland & Ellis partners won a Supreme Court decision invalidating a law that required "proper cause" to obtain a concealed-carry gun license,[18] the firm told those partners that they could either drop their gun clients or withdraw from the firm.[19] The Supreme Court ruling came just weeks after several mass shootings, including one at an elementary school in Uvalde, Texas. A source familiar with the matter told the *Wall Street Journal* that the firm "started getting a lot of pressure post-Uvalde, hearing from several big-dollar clients that they were uncomfortable," leading the firm to decide to drop the representation.[20]

CHAPTER 19: COUNSELING

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[16] Emily Bazelon & Eric Posner, *There Used to Be Justice. Now We Have Bill Barr*, N.Y. TIMES (May 13, 2020).
[17] *See* James Booth, *How Skadden Dropped Chelsea FC's Roman Abramovich Before UK Sanctions Hit the Oligarch*, FINANCIAL NEWS, March 11, 2022.
[18] *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. __ (2022).
[19] *See* Debra Cassens Weiss, *Winning SCOTUS Litigators Say Kirkland Gave Them a Choice: Abandon Gun Clients or Leave*, ABA JOURNAL, June 27, 2022.
[20] *See* Jess Bravin, *Winning Lawyers in Supreme Court Gun Case Leave Firm*, WALL STREET JOURNAL, June 24, 2022.

On p. 481, insert the following at the end of the carryover paragraph, just before Section C:

In Formal Opinion 491 (Apr. 29, 2020), the ABA spelled out that Rule 1.2(d), along with Rule 1.13 and other Rules, impose a duty to inquire on lawyers in order that they avoid assisting clients engage in fraudulent or criminal activity. The duty applies wherever "facts known to the lawyer establish a high probability" that a client or prospective client seeks to use the lawyer's services to commit a fraud or a crime. And, if the client or prospective client refuses to provide information necessary to assess the legality of the proposed conduct or transaction, the lawyer must decline the representation or withdraw.

CHAPTER 20: IN-HOUSE COUNSEL

On p. 538, add the following sentence at the end of note 1: Would a robust approach to the lawyer's Rule 1.2(d) duty to inquire to prevent assisting in a crime or fraud have helped the lawyer's avoid the situations in which they found themselves? See ABA Formal Op. 491 (Apr. 29, 2020), discussed in Chapter 19.

CHAPTER 21: GOVERNMENT LAWYERS

On p. 549, add the following sentences at the end the first full paragraph: The District of Columbia Bar, which exercises authority over the thousands of lawyers who work for the United States in D.C., has proposed revisions to its rules to address confusion over identity of the client of the government lawyer. The comments note that the issue may arise in several contexts, including in deciding issues about the duty of confidentiality and privileged client communications, and conflicts of interest. The memorandum explaining the proposed changes notes that a lawyer employed by an agency has the agency for a client and "may pursue a legal result that will benefit the narrow area of law administered by the agency." The Bar proposes to add the following comment to its version of Rule 1.13 to guide government lawyers struggling with the question of who is their client: "In general, the client is the organization that has authority to direct the lawyer's work, as articulated by an organizational constituent who is duly authorized to speak on its behalf. Often, the client may be the agency that employs or retains the lawyer. But some lawyers, such as U.S. Department of Justice lawyers, usually are charged with representing the United States."

On p. 574, insert the following before subheading D.

NOTE ON GOVERNMENT LAWYERS AND THE STRUGGLE OVER THE 2020 ELECTION

As President Trump and his supporters ran out of options to overturn his election loss to Joseph Biden, a few lawyers outside of government seized upon a novel idea: persuade Republican leaders in states where the popular vote went to Biden to certify alternate slates of electors that would vote for Trump, and then persuade Vice President Mike Pence, who presided over the Joint Session of Congress that certified the Electoral College vote on January 6, to accept the alternate slates and to declare President Trump the winner. A related strategy consisted of persuading the Department of Justice to declare that the voting in several states was tainted by fraud in order to justify disregarding the recorded votes and the slates of electors that went to Biden and appointing slates of Trump electors instead. White House lawyers tried to prevent some of the outside lawyers

from meeting with the President, but they did not succeed. Attorney General William Barr left the job at the end of December 2020, having refused Trump's requests to say that fraud had tainted the voting and, indeed, having said the DOJ had found no evidence of fraud that would affect the outcome of the election.

The Acting Attorney General, Jeffrey Rosen, testified before the House Select Committee investigating the events of and leading up to the January 6 attack on the U.S. Capitol that he explained to President Trump several times that there was no merit to the claims of voting fraud. A Republican member of Congress arranged for Jeffrey Clark, a Trump supporter who was working in the DOJ's Civil Division, to meet secretly with President Trump to state his willingness, if he were appointed Acting Attorney General, to declare that DOJ had found enough voter fraud to change the outcome in several key states. Clark then drafted such a letter to send to state legislatures, and on January 3 informed Acting AG Rosen that Trump had decided to fire Rosen and replace him with Clark. Rosen promptly had a long meeting with Trump, with White House Counsel Pat Cipollone, and a few other senior DOJ attorneys at which they explained that if Trump fired Rosen and replaced him with Clark, many DOJ lawyers would resign in protest. Trump eventually relented. As is well known, he then sought to overturn the election by speaking at a rally just outside the White House and urging his supporters to march on the Capitol to persuade Vice President Pence and the Joint Session of Congress to declare him the winner.

Here are few additional details about what occurred at the January 3rd meeting in the Oval Office, as related in testimony before the House select committee. According to Acting AG Rosen, Trump confronted Rosen and pointed out that Rosen, unlike Clark, "did not even agree with the claims of election fraud" and that "this other guy [Clark] at least might do something." Rosen testified that he explained his position this way:

> I said, well, Mr. President, you're right that I'm not going to allow the Justice Department to do anything to try to overturn the election. That's true. But the reason for that is because that's what's consistent with the facts and the law, and that's what's required under the Constitution. So, that's the right answer and a good thing for the country, and therefore I submit it's the right thing for you, Mr. President.

Deputy Attorney General Richard Donoghue testified that it became clear at the meeting that Trump intended to remove Jeff Rosen and replace him with Jeff Clark and that the letter to state legislatures would go out. Trump said, "What do I have to lose?" and Donoghue replied, "You have a great deal to lose":

> And I began to explain to him what he had to lose and what the country had to lose and what the department had to lose, and this was not in anyone's best interest. Everyone essentially chimed in with their own thoughts, all of which were consistent about how damaging this would be to the country, to the department, to the administration, to him personally.

Among the other arguments presented at the meeting, according to Donoghue's testimony, was this:

> I said, "Mr. President you're talking about putting a man in that seat who has never tried a criminal case, who has never conducted a criminal investigation, and he's telling

> you that he's going to take charge of the department's 115,000 employees, including the entire FBI, and turn the place on a dime and conduct nationwide criminal investigations that will produce results in a matter of days. It's impossible, it's absurd, it is not going to happen, and it is going to fail.
>
> "He has never been in front of a trial jury, a grand jury, he's never even been to [FBI Director] Chris Wray's office." I said [to Clark] at one point, "If you walked into Chris Wray's office, one, would you know how to get there, and two, if you got there, would he even know who you are? And do you really think that the FBI is going to suddenly start following your orders?" "It's not going to happen. He's not competent."[21]

Donoghue testified that Trump asked Donoghue what he would do if he replaced Jeff Rosen with Jeff Clark, and Donoghue replied that he would resign immediately. Steven Engel, Assistant Attorney General for the Office of Legal Counsel, also indicated that he would resign immediately and that the entire department leadership would walk out within hours.[22]

Among the many extraordinary aspects of the House testimony about the lawyers are:

- DOJ lawyers used an orchestrated threat of resignation en masse to persuade the President to desist from his plan;
- Donoghue invoked Clark's lack of criminal experience and, therefore, the difficulty he would have gaining the respect of the FBI to demonstrate his lack of competence for the job of Attorney General;
- President Trump increasingly relied on lawyers outside government, including Rudy Giuliani, John Eastman, and Sidney Powell, when the White House Counsel and DOJ would not provide him the ideas or answers he wanted to hear about how to overturn the election;
- Senior White House staff attempted to insulate Trump from the outside lawyers who they considered to be a source of unfounded conspiracy theories and meritless legal theories.

What does each of these points reveal about how the different government lawyers sought to exert authority in the chaotic period between the November 2020 Election and January 6?

CHAPTER 23: ADVERTISING AND SOLICITATION

In August 2018, the ABA House of Delegates voted to simplify and reorganize the advertising and solicitation rules. While most of the changes do not substantially modify the substance of the rules, and while only a few states have begun to consider whether to adopt and incorporate the amended rules, please note relevant changes in this chapter's references.

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[21] Barbara Sprunt, *Former DOJ Officials Detail Threatening to Resign En Masse in Meeting with Trump*, NPR.ORG (June 23, 2022). A more detailed account of the events and the testimony is Jeremy Stahl, *How Trump's Plot to Make an [Expletive deleted] Attorney General and Steal the Election Almost Came to Fruition* SLATE.COM (June 23, 2022), https://slate.com/news-and-politics/2022/06/trump-effin-a-hole-jeff-clark-attorney-general.html.

[22] Transcript of House Select Committee Hearing, June 23, 2022, available at https://www.npr.org/2022/06/23/1106700800/jan-6-committee-hearing-transcript

On p. 614, the third sentence in the second paragraph should now read: "Rule 7.2(a) provides that lawyers 'may communicate information regarding the lawyer's services through any media.'"

On p.615, the textbox notes the requirement that advertisements must include the name and contact information of at least one lawyer or law firm responsible for its content. That requirement is now in Rule 7.2(d) rather than 7.2(c).

The second and third sentences in the last paragraph on p. 624 now should read:

> It provides that "[a] lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain," unless the person contacted is a "(1) lawyer; (2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or (3) person who routinely uses for business purposes the type of legal services offered by the lawyer." (Rule 7.3(b)). It also prohibits soliciting employment from a prospective client if the client has made it known that he or she does not wish to be solicited by the lawyer or the solicitation involves coercion, duress or harassment. (Rule 7.3(c)).

The first sentence at the top of p. 638 should now refer to Model 7.3(b) rather than 7.3(a). The textbox on the same page should now read:

Model Rule 7.3: Solicitation of Clients

Rule 7.3(b) provides that a lawyer may not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the contact is with a: 1) lawyer; 2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or 3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

Rule 7.3 (c) provides that a lawyer may not solicit professional employment even when not otherwise prohibited by paragraph (b) if the target of the communication has made known to the lawyer a desire not to be solicited by the lawyer, or the solicitation involves coercion, duress or harassment.

On p. 639, the book asks whether Rule 7.3 would be constitutional as applied to a corporate lawyer who seeks to solicit business from a sophisticated business client over golf or lunch. Model Rule 7.3(b)(3) now includes an exception to the solicitation rule for contact with a "person who routinely uses for business purposes the type of legal services offered by the lawyer."

On p. 640, the last sentence of the first paragraph should be deleted, and on p. 641, the second text box should be disregarded; amended Model Rule 7.3 no longer requires lawyers to label written marketing materials.

Relevant to the discussion at the top of p. 643, note that the comment to Model Rule 7.3 [par. 2] now specifically provides that live person-to-person contact "does not include chat rooms, text messages or other written communications that recipients may easily disregard."

* * *

On p. 644, the end of the second paragraph should read:

> Avvo Legal Services discontinued its online legal marketplace in late 2018, but other similar online platforms have emerged. For example, Basic Counsel offers flat-fee, limited scope services on a platform that allows consumers to search the site for a service they need and facilitates the sharing of documents between attorneys and clients. Basic Counsel addresses one of the ethics concerns raised against Avvo Legal Services; it charges clients a fee for using the platform but does not charge participating lawyers a marketing fee. This service still may be vulnerable to the charge that it violates prohibitions on splitting fees with nonlawyers since the fee that clients pay Basic Counsel increases with the price of the lawyers' services.

CHAPTER 28: JUDGES

On p. 752, add the following paragraph at the end of note 1:

In March 2022, news organizations disclosed 29 text messages between Virginia Thomas, wife of Supreme Court Justice Clarence Thomas, to Mark Meadows, who was President Trump's Chief of Staff. The messages disclosed Mrs. Thomas's efforts to support the Trump campaign's efforts to overturn the 2020 Election through litigation and through efforts to subvert the Congressional certification of the votes of the Electoral College.[23] Justice Thomas had been the lone dissenter from a Supreme Court ruling allowing the House Select Committee investigating January 6 to compel disclosure of Trump Administration communications. *Trump v. Thompson*, 565 U.S. __ (Jan. 19, 2022). Meadows filed a brief in the case in support of Trump, and the communications that Justice Thomas voted to protect from disclosure could include those of Mrs. Thomas. Should Justice Thomas have recused himself from any involvement in that case or in any other that involved the 2020 Election litigation? Justice and Mrs. Thomas had rejected prior concerns that his impartiality might be questioned based on her political activism on conservative causes that come before the Supreme Court; they insisted that he does not involve her in his work and she does not involve him in hers. Are her text messages regarding the election litigation and the January 6 scheme different? Does it matter that she attended the rally on January 6 that led to the riot at the Capitol? Do the Thomases present a more or less compelling case for recusal than Justice Scalia's duck hunting trip with Dick Cheney?

On p. 755, add new notes:

[23] *See* Jane Mayer, *Legal Scholars Are Shocked by Ginni Thomas's 'Stop the Steal' Texts*, THE NEW YORKER (Mar. 25, 2022).

8. ***Recusal Based on Financial Interest***. In 2021, the *Wall Street Journal* published a front-page story reporting that between 2010 and 2018, more than 130 federal judges failed to recuse themselves from 685 cases involving companies in which they or family members owned stock.[24] After this story broke, judges in 883 cases notified courts that they should have recused themselves and that the cases over which they improperly presided were eligible to be reopened.[25] Chief Justice John Roberts mentioned these incidents in his year-end report on the federal judiciary. He called for improved software for detecting potential conflicts of interest and more rigorous ethics training for federal judges.[26] But some have argued that these measures are insufficient—that the bigger problem is that there is no effective compliance or enforcement mechanism. What would a more effective compliance and enforcement mechanism look like? Might it include more timely and easily accessible information about judges' current financial holdings? Should judges be required to give reasons for their rulings on recusal motions?

9. ***Renewed Calls for An Ethics Code for the Supreme Court.*** Investigative reporting in 2023 found that Justice Thomas and Justice Alito had accepted lavish trips and other expensive gifts from major Republican donors without disclosing them, and one donor had paid private school tuition and purchased a home for Justice Thomas' relatives. The Senate Judiciary Committee voted on straight party lines for a statute regulating Supreme Court ethics like the one that applies to other federal judges. Justice Alito then stated in the *Wall Street Journal* that Congress lacks the constitutional authority to impose an ethics code on the Supreme Court.[27] What are the best arguments for and against the adoption of a binding and enforceable ethics code for the Supreme Court? Which arguments do you find most convincing and why?

CHAPTER 29: LEGAL SERVICES

On pp. 790-791, the notes following the Hung excerpt should read:

NOTES ON HUNG

1. ***What Should Poverty Lawyers Aspire to Do?*** Are you persuaded by Hung's account of the nature of a social movement lawyer's practice? Are you persuaded by her critique of how lawyers are trained to think about problems?

2. ***Who Should Decide?*** What are the advantages and disadvantages of relying on the judgments of legal services lawyers in determining what will most benefit the client population? Does your answer to this question, informed by Hung's arguments, suggest you might revise your

[24] *See* James V. Grimaldi, Coulter Jones and Joe Palazzolo, *131 Federal Judges Broke the Law by Hearing Cases Where They Had a Financial Interest,* WALL STREET JOURNAL (Sept. 28, 2021).
[25] *See* Michael Siconolfi, Coulter Jones, Joe Palazzolo and James V. Grimaldi, *Dozens of Federal Judges Had Financial Conflicts: What You Need to Know,* WALL STREET JOURNAL (April 27, 2022).
[26] 2021 YEAR-END REPORT ON THE FEDERAL JUDICIARY, https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf.
[27] Steven Lubet, *Samuel Alito Inadvertently Made the Best Case for Supreme Court Ethics Reform*, SLATE.COM (July 31, 2023); Jeannie Suk Gersen, *The Real Scandal Surrounding Clarence Thomas's Gifts* THE NEW YORKER (May 14, 2023); David Rivkin, Jr. and James Taranto, *Justice Alito, the Supreme Court's Plain-Spoken Defender*, WALL ST. J. (July 28, 2023).

answer to the question we considered above about whether Congress, legal services program boards of directors, individual legal services lawyers, or clients should decide how to allocate scarce resources? How would a client-directed process of priority setting be implemented?

3. ***Can an LSC-Funded Lawyer Be an Effective Organizer?*** If an LSC-funded lawyer were convinced by Hung's arguments, would the OCRAA restrictions pose an obstacle to implementing their suggestions?

CHAPTER 30: PUBLIC INTEREST LAW

On p. 825, after note 3, add a new note:

4. ***Another Wrinkle***. In a documentary released in May 2020, "AKA Jane Roe," McCorvey offers what she calls "my deathbed confession" – that she never really supported the anti-abortion movement: "I took their money and they put me out in front of the camera and told me what to say, and that's what I'd say." McCorvey died before the documentary was completed.[28] If this statement truly reflected her views about abortion just before her death and perhaps also at the time she appeared to have joined the anti-abortion cause, does it influence your perspective about whether Weddington appropriately handled her representation of McCorvey?

CHAPTER 31: THE MARKET FOR LEGAL SERVICES

On p. 840, at the end of the first full paragraph, add a new paragraph:

Thereafter, the Board of Trustees of the State Bar of California convened a task force to identify possible regulatory changes that could remove barriers to innovation and enhance access to legal services. The task force recommended 16 reform options, including exceptions to current restrictions on unauthorized practice and non-attorney ownership, and the Board of Trustees invited public comment on the proposed regulatory changes. In 2020, the task force submitted its final recommendations, including a proposal to create a regulatory sandbox to encourage the development of innovative legal service delivery models, as well as proposal to allow paraprofessionals to provide limited legal services in areas such as employment and consumer debt. In 2022, the California Bar created a working group charged with exploring the development of these ideas. But the initiative ended when the California legislature halted these projects, citing a need for the California bar to focus on improving its attorney discipline system.[29]

CHAPTER 32: UNAUTHORIZED PRACTICE AND NONLAWYER INVOLVEMENT IN THE PROVISION OF LEGAL SERVICES

On p. 862, a new sentence added before the last sentence in the second paragraph should read:

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[28] Monica Hesse, '*Jane Roe,' from Roe v. Wade, Made a Stunning Deathbed Confession. Now What?*, WASHINGTON POST, May 20, 2020, https://www.washingtonpost.com/lifestyle/style/jane-roe-from-roe-v-wade-made-a-stunning-deathbed-confession-now-what/2020/05/20/fad9d296-9a09-11ea-89fd-28fb313d1886_story.html

[29] See Karen Sloan, *California Lawmakers Pull Plug on Legal Industry Reforms*, REUTERS, Aug. 29, 2022.

"In 2018, the Utah Supreme Court approved rules creating a new role of 'licensed paralegal practitioners,' who will be permitted to provide limited assistance to clients without lawyer supervision in some family law, forcible entry and detainer, and debt collection matters."

On p. 875, immediately before Notes on Outside Ownership of Legal Services Providers:

In 2018, in response to a study finding that 55 percent of Californians experienced at least one civil legal problem in the previous year and that Californians received inadequate or no legal representation for 85 percent of those problems, the Board of Trustees of the State Bar of California convened a task force to identify options to enhance access to legal services through innovation. The task force made several recommendations, including a proposal to create a pilot program, or "regulatory sandbox," that would allow limited experimentation with changes to the rules of professional conduct to permit participants in the program to explore fee sharing with nonlawyers, nonlawyer ownership of law firms, and other activities that are currently prohibited under California's rules. Among the questions to be considered in connection with this pilot program are whether a machine using artificial intelligence can deliver advice and legal assistance, and whether the creator of software that enables a law firm to deliver its services more efficiently or effectively or to provide on-line advice and assistance to consumers can take an ownership interest in the firm or share fees. In May 2020, the Board of Trustees of the State Bar of California approved this sandbox proposal, and in February 2021 the California Supreme Court approved an amendment to its Rule 5.4 to allow fee-sharing with nonprofit organizations.[30] Massachusetts and Georgia have adopted similar, and similarly modest, changes to allow limited fee sharing with certain qualifying organizations that are not wholly owned by lawyers.[31]

The Utah Supreme Court in August 2020 adopted regulatory reforms that eliminate the prohibition on attorney fee sharing with nonlawyers. It created a two-year (since extended to seven years) pilot project that has replaced Rule 5.4 with a provision that allows law firms with nonlawyer owners and allows forming a professional corporation with a non-lawyer so long as certain conditions are met, including that there is no interference with the lawyer's professional independent judgment, duty of loyalty to a client, and protection of client confidences. The reform creates a new Office of Legal Services Innovation to oversee a pilot regulatory sandbox to evaluate nontraditional legal service providers and entities offering new types of legal services. One of the justices explained that the Covid-19 pandemic had increased the need for affordable innovations and that individuals and entities that are able to offer low-cost or no-cost legal services relating to issues stemming from the pandemic would be considered for expedited approval.

Under the new Utah rule, 31 organizations had been approved to provide a wide range of services in business law, immigration, personal injury and family law. One such organization is a firm operating under the name "Law on Call," staffed by three lawyers and two paralegals working in Utah. The firm, which is owned by a Spokane, Washington corporation, allows clients to pay $9 per month to get unlimited phone access to lawyers and discounted rates starting at $100 per hour for representation. The firm offers services in the areas of business law, end-of-life planning,

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[30] *See* Toby J. Rothschild, *Whatever Happened to the Task Force on Access and Innovation?*, https://calawyers.org/california-lawyers-association/whatever-happened-to-the-task-force-on-access-and-innovation/.

[31] *See* Conrad J. Jacoby, *Practice Innovations: Non-lawyer Ownership of Law Firms – Are Winds of Change Coming for Rule 5.4?* THOMSONREUTERS.COM (Mar. 29, 2022), available at https://www.thomsonreuters.com/en-us/posts/legal/practice-innovations-april-2022-non-lawyer-ownership/.

contracts, employment, and housing and real estate. The company also announced plans to serve clients in other states that lift restrictions on nonlawyer ownership of law firms, including Arizona.[32] Arizona has repealed its Rule 5.4 and created a new licensing requirement for Alternate Business Structures that may provide legal services without lawyer ownership so long as at least one lawyer serves as compliance counsel.[33]

CHAPTER 33: PRO BONO

On p. 887, add the following note:

3. ***Other Costs of Pro Bono***. A recent study of pro bono relationships showed that nonprofit legal services organizations tend to respond to law firms' requests for pro bono work and board seats in order to secure critical resources, including money, labor and prestige, even when these nonprofit legal services providers are dissatisfied with the commitment and quality of the work provided by the law firms' pro bono volunteers. It also found that the involvement of law firms in legal services organizations' work tends to produce a mismatch between the needs of the poor and the kinds of matters that receive free legal representation.[34]

CHAPTER 34: PRACTICE ACROSS BORDERS AND BOUNDARIES

On p. 909, before the notes, add the following new paragraph:

ABA Formal Opinion 498, released in March 2021, addressed the permissibility of virtual practice. It found that "technologically enabled law practice beyond the traditional brick-and-mortar law firm" is permitted as long as lawyers practicing virtually meet their ethical duties regarding competence, diligence, and communication, especially with respect to their use of technology. The opinion emphasized that lawyers in virtual practices must make reasonable efforts to prevent inadvertent or unauthorized disclosure of confidential information, and they must supervise subordinate lawyers and nonlawyer assistants to ensure their compliance with the rules. This formal opinion did not address issues of unlicensed or unauthorized practice of law in virtual law offices. But Formal Opinion 495, issued several months earlier, addressed remote work by lawyers—an issue that became especially pressing with the onset of the pandemic. This opinion found that lawyers may practice virtually in a jurisdiction where they are licensed while physically located in a different jurisdiction where they are not licensed, unless the local jurisdiction has determined that such conduct constitutes unauthorized practice, and so long as they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold themselves out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction. Together, these opinions acknowledge and permit

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[32] *See* Debra Cassens Weiss, *First Law Firm Owned Entirely by Nonlawyers Opens in Utah*, ABA J., Mar. 17, 2021; Lyle Moran, *Utah's High Court Proposes Nonlawyer Ownership of Law Firms and Wide-Ranging Reforms*, ABA J., Apr. 27, 2020.

[33] *See* Conrad J. Jacoby, *Practice Innovations: Non-lawyer Ownership of Law Firms – Are Winds of Change Coming for Rule 5.4?* THOMSONREUTERS.COM (Mar. 29, 2022), available at https://www.thomsonreuters.com/en-us/posts/legal/practice-innovations-april-2022-non-lawyer-ownership/.

[34] Atinuke O. Adediran, *The Relational Costs of Free Legal Services*, 55 HARV. C.R.-C.L. L. REV. 357-407 (2020).

virtual law practice, but they leave multi-jurisdictional virtual law practices subject to state-by-state differences in definitions of unauthorized practice.

On p. 907, insert the following sentence at the end of the final paragraph:

ABA Formal Opinion 504, released in March 2023, lists factors to be used in assessing where the predominant effect occurs. It also provides guidance about the application of the rule in five areas: fee agreements, law firm ownership, reporting professional misconduct, confidentiality duties, and screening for lateral hires.

CHAPTER 36: BAR ADMISSION AND DISCIPLINE AND THE LAW OF MALPRACTICE

On p. 970, insert the following new paragraph before the first full paragraph:

An empirical study of the bar examination cut score across multiple states and years found that higher cut scores produced a disparate impact on underrepresented minorities and disadvantaged groups and found no evidence that higher cut scores produced fewer disciplinary complaints, charges, or disciplinary actions. In other words, the study's authors conclude, their "findings fail to support the claim that higher bar exam cut scores correspond to greater public protection. If anything, statistical evidence points in the opposite direction: Higher bar exam cut scores may lead to less public protection" by excluding from practice many qualified law school graduates who might provide valuable service to people in disadvantaged communities who otherwise could not find a lawyer. Michael B. Frisby, Sam C. Erman, Victor D. Quintanilla, *Safeguard or Barrier: An Empirical Examination of Bar Exam Cut Scores*, 70 J. LEG. EDUC. 125 (2020).

On p. 971, add the following new paragraph after note 5.

NOTE ON BAR ADMISSION DURING THE CORONAVIRUS PANDEMIC

When the Covid-19 pandemic of 2020 made in-person education and testing dangerous, state bars struggled to determine whether or how to administer the July 2020 bar examination, as well as the summer MPRE. A variety of approaches were adopted, but many did not last beyond 2021, as states sought to lift pandemic restrictions. Updates are posted regularly on the website of the National Conference of Bar Examiners: www.ncbex.org.

- About half the states eliminated the in-person July 2020 bar examination, opting first to postpone it to September or October and then, when the pandemic persisted, scheduling an online examination. Of those states administering an online examination, some used the UBE, and others administered a state-specific exam useful only for admission in that state. To address the concerns of applicants who lack home circumstances enabling them to take an online examination, some state supreme courts urged law schools to open their facilities for administration of the online bar exam.
- Some states administered the bar exam in person, in either September or October 2020.
- A few small states with few in-state law schools (Oregon, Utah, Washington, and Louisiana) opted for a diploma privilege. Washington extended the diploma privilege for all 2020 bar

applicants. Utah extended the diploma privilege to graduates of ABA-accredited schools whose recent bar pass rate for first-time takers met or exceeded the pass rate of the graduates of the in-state schools, which was 86 percent. Oregon copied Utah, and extended diploma privilege to graduates of ABA-accredited law schools with an 86 percent pass rate on recent bar exams. Louisiana's emergency diploma privilege applies to first-time bar exam takers who graduated from ABA-accredited law schools since December 2019 and who complete 25 hours of CLE and the state's Transition to Practice Program.

- Some states, such as Montana and Massachusetts, considered and expressly rejected diploma privilege.
- Some states, such as Arizona, California, Colorado, Georgia, Illinois, Kentucky, Montana, New York, and Tennessee, created provisional licenses or expanded their rules that allow law students to practice under supervision to allow candidates to practice under supervision for a period of time until they could safely take the bar examination in person. The California Supreme Court, for example, directed the California State Bar "to expedite creation of a provisional licensure program under supervision to 2020 law school graduates—effective until they can take and pass a California bar exam, and expiring no later than June 1, 2022."
- While addressing administration of the bar exam during a pandemic, the California Supreme Court also permanently lowered the minimum passing score from 1440 to 1390. This decision responded to longstanding criticism that the minimum passing score is too high and has a disparate impact on some people of color and on candidates from less-privileged backgrounds, and that the impact is not justified by the purpose of assessing competence to practice law. The California State Bar estimates, based on ten years of data about exam pass rates, that lowering the minimum passing score to 1390 will result in a 4 percent increase in passing among graduates of ABA-accredited law schools and a 14 percent increase among graduates from California-accredited schools. The estimated increase in passing rates by race and ethnicity are predicted to be 13 percent among African Americans, 8 percent among Latinx, 8 percent among "other," 7 percent among Asians, and 5 percent among whites. California State Bar Office of Research and Institutional Accountability, *Simulation of the Impact of Different Cut Scores on Bar Passage, by Gender, Race/Ethnicity, and Law School Type* (Mar. 18, 2020), http://www.calbar.ca.gov/Portals/0/documents/reports/CA-State-Bar-Exam-Cut-Score-Simulations-Analysis.pdf.

All states require candidates to pass the MPRE before admission. As of this writing, the National Conference of Bar Examiners, which administers the MPRE, has announced the August 2022 MPRE and future administrations of it will be in person.

On p. 983, modify the third sentence of the second full paragraph to read "Ethics rules in <u>all states now follow Model Rule 8.3. . . .</u>"[35] Delete the first sentence of the penultimate paragraph.

On p. 985, insert the following at the end of note 1:

[35] In 2023, California joined all other states in requiring attorneys to report misconduct by other lawyers.

The California State Bar has blamed scarcity of resources and the difficulty of investigating complex cases for its failure to uncover evidence of massive financial misconduct committed by high-flying plaintiffs' attorney Tom Girardi, who allegedly funded a lavish lifestyle by stealing millions of dollars from clients before his firm finally collapsed in scandal.[36] But critics of the State Bar, including the California State Auditor, remain concerned about its failures to protect clients from lawyer misconduct even in egregious cases such as Girardi's, or even after a single lawyer was the subject of 165 complaints over the course of seven years.[37] The California State Bar revealed in November 2022 that it had opened 205 disciplinary matters against Girardi over 40 years, over half of which involved improper handling of client trust funds. Until the last few complaints (which resulted in Girardi being disbarred) the State Bar closed all previous cases, in many cases without investigation, and never publicly disciplined Girardi. An outside review of the Bar's handling of the many complaints against Girardi found that he had lavished gifts on nine State Bar employees, invited Bar employees and officials to parties, and employed the children of some Bar employees who nevertheless were involved in his disciplinary cases. The Bar announced new policies to prevent failures of oversight such as occurred with respect to Girardi: henceforward the Bar will use an automated system for tracking complaints so that cases will not be closed without investigation if a similar complaint was filed against the same lawyer within the past two years.[38]

On p. 983, insert the following before section 3:

IN THE MATTER OF RUDOLPH W. GIULIANI
Supreme Court, Appellate Division, First Department, New York
146 N.Y.S. 3d 266 (2021)

PER CURIAM:

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.

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).

We find that the following false statements made by respondent constitute uncontroverted

[36] Brandon Lowrey, *Girardi Investigations Fizzled Amid Watchdog's 'Mistakes'*, LAW360.COM (July 20, 2021).
[37] Joyce E. Cutler, *Tom Girardi Downfall Casts California Bar in Unflattering Light*, NEWS.BLOOMBERGLAW.COM (July 11, 2022); *The State Bar of California's Attorney Discipline Process*, Report of Auditor of State of California 2022-030 (April 14, 2022), https://www.auditor.ca.gov/reports/2022-030/index.html.
[38] Deborah Cassens Weiss, *State bar finds 'shocking past culture of unethical and unacceptable behavior' in its handling of Girardi complaints*, ABA J. (Mar. 13, 2023); Open Letter Regarding the State Bar's Thomas V. Girardi Disclosure (Nov. 3, 2022).

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, Pennsylvania, 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.

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 (502 F. Supp. 3d 899, aff'd 830 Fed. Appx. 377 (3d Cir. 2020). 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. Respondent's fraud argument spanned pages 12 to 31 of the transcript.

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.

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.

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

[The Appellate Division then discusses false and misleading statements Giuliani made on radio shows, podcasts, and before the Georgia Legislature's Senate Judiciary Committee regarding allegedly inaccurate vote counts in Georgia, and regarding tens of thousands or hundreds of thousands of underage voters, felons, and dead people voting in Georgia. The court then discusses false and misleading statements that Giuliani made to a group of Arizona legislators at a hotel in Phoenix that "it is beyond credulity that a few hundred thousand [undocumented persons] din't vote" in November 2020 in Arizona. The court then said that Giuliani said: "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 (*id.*). 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 (*id.*).

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.

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. [W]hen 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 offense 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.

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: [The court discusses statements Giuliani made on radio shows and podcasts in March and April 2021 regarding Joe Frazier and other deceased residents of Pennsylvania or Georgia voting from the grave and undocumented people voting in Arizona.] 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.

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.

Accordingly, the AGC's motion should be granted and respondent is suspended from the practice of law in the State of New York, effective immediately, and until further order of this Court.

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On March 1, 2022, the California State Bar announced it had been investigating John Eastman for possible discipline arising out of his involvement in the Trump campaign efforts to overturn the 2020 Election. https://www.calbar.ca.gov/About-Us/News/News-Releases/state-bar-announces-john-eastman-ethics-investigation. Under California law, State Bar investigations remain confidential until a decision is made. State bars in other states are investigating discipline of other lawyers who represented Trump in filing frivolous election litigation or who sought to overturn the election by various methods. Among those who are being investigated are Texas Attorney General Ken Paxton and Trump campaign lawyer Sidney Powell, both of whom are the subject of bar discipline investigations in Texas. Taylor Goldenstein, *Texas State Bar Sues Sidney Powell for Professional Misconduct*, HOUSTON CHRONICLE (Mar. 9, 2022), https://www.houstonchronicle.com/politics/texas/article/Texas-State-Bar-sues-Trump-lawyer-Sidney-Powell-16989673.php. In July 2022, the D.C. Bar's Office of Disciplinary Counsel filed a complaint against Jeffrey Clark for possible discipline arising out of his efforts to use the authority of the U.S. Department of Justice to falsely persuade election officials that Donald Trump had won the presidential election. Katie Benner, *Ethics Board Moves to Penalize Jeffrey Clark, Who Aided Trump in Election Plot*, NEW YORK TIMES (July 22, 2022), https://www.nytimes.com/2022/07/22/us/politics/jeffrey-clark-dc-bar-justice.html.

On p. 986, add the following:

> (e) Former Illinois governor Rod Blagojevich was removed from office in 2009 and later convicted of various criminal charges, including wire fraud, attempt to commit extortion and corrupt solicitation. President Trump granted him clemency in 2020, soon after an appearance by Blagojevich's wife on Fox news calling on the

president to commute her husband's 14-year prison sentence. The Illinois Supreme Court disbarred Blagojevich in May 2020.[39]

On p. 992, the last sentence of the chapter summary should read:

"In all but two states, lawyers are not required to carry malpractice insurance and many lawyers do not."

CHAPTER 37: LAWYER SATISFACTION AND WELL-BEING

On p. 1009, at the end of note 4, add the following:

A recent study analyzing nationally representative data from the 2015 National Survey of College Graduates to examine gender differences in lawyers' job satisfaction suggests that any apparent similarity of job satisfaction between genders likely stems from female JDs exiting the legal profession at higher rates than their male counterparts, leaving more satisfied women behind. The researchers found that among those who graduated from law school more than 10 years ago, female JDs were less likely to be working in the legal profession, and that, among new law graduates, female lawyers were less likely to be "very satisfied" with their jobs than male lawyers. The analysis also compared lawyers to other professions and found no gender gap with respect to those other graduate and professional degrees. The article called for additional research to explain what it is about the conditions of law practice that lead women to exit the legal profession.[40]

On p. 1012, add to footnote 24:

This lawyer's ex-wife has published a book recounting her discoveries about his life and about drug addiction among other high achieving professionals like him. Eilene Zimmerman, SMACKED: A STORY OF WHITE-COLLAR AMBITION, ADDICTION, AND TRAGEDY (2020).

On p. 1026, after the block quote, add the following:

The arrival of OpenAI's new chatbot, ChatGPT, has spurred increased attention to how AI might change the delivery of legal services and reshape various aspects of law practice. Tech companies are investing in new AI platforms, some tailored for law firms, to assist in legal drafting and research.[41] Some experts predict that AI could help address the access-to-justice crisis by giving people access to information they would otherwise find difficult to obtain.[42] But the perils of using AI in law practice have also been in the news. A lawyer who relied on ChatGPT for legal research and cited cases that ChatGPT invented later admitted that he had done nothing to verify that the fabricated cases actually existed.[43]

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[39] Rebecca Klar, *Blagojevich Officially Disbarred by Illinois Supreme Court,* THE HILL, May 18, 2020.
[40] Joni Hersch & Erin E. Meyers, *Why Are Seemingly Satisfied Female Lawyers Running for the Exits? Resolving the Paradox Using National Data,* 102 MARQ. L. REV. 915 (2019).
[41] Sara Merken, "Legal AI Race Draws More Investors as Law Firms Line Up," REUTERS, Apr. 26, 2023.
[42] See Matt Reynolds, "Words with Bots: How ChatGPT and Other AI Platforms Could Dramatically Reshape the Legal Industry," ABA JOURNAL, June-July 2023.
[43] See Benjamin Weiser and Nate Schweber, "The Lawyer Who Relied on ChatGPT Explains Himself. It Was Awkward," NEW YORK TIMES, June 9, 2023, B5.