

**Comment In Response to Temporary Emergency Adoption of Petition R-24-0046 that would amend Rule 53 of the Rules of the Supreme Court of Arizona to impose a standing requirement to qualify as a complainant in a state Bar disciplinary proceeding.**

We write in opposition to the temporary emergency Rule change in Petition R-24-0046. We will avoid repeating our arguments from our earlier submission though we maintain that those points still stand.

**STARTING PRINCIPLES**

The State Bar's mission as outlined on its website is "to serve and protect the public with respect to the provision of legal services and access to justice." The focus is the public not the lawyers. To do that the Bar states it will seek to improve the "administration of justice and the competency, ethics, and professionalism of lawyers practicing in Arizona." Note it doesn't cover just those licensed but those practicing i.e. the *pro hac vice* attorneys. The Bar aims for the highest standards of ethical conduct and recognizes under their Leadership prong that what lawyers do matters for the future.

Those ethics that the Bar seeks to improve include ER 4.4. Respect for Rights of Others that says (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden any other person, or use methods of obtaining evidence that violate the legal rights of such a person; ER 8.3 (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, except as otherwise provided in these Rules or by law; and ER 8.4 defining misconduct such as (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; and (d) engage in conduct that is prejudicial to the administration of justice. All of these ethical rules are eviscerated by the passage of this rule.

**OPENING SALVO**

The election deniers are already gearing up for a flurry of lawsuits attacking the 2024 election. Michigan Republicans have sued Detroit; North Carolina Republicans, and the National Committee have sued North Carolina. An RNC spokesperson Claire Zunk admits that they are putting a plan in place to confront so called "schemes."

The election attacks in Arizona have already started as well. On September 4, 2024, "Strong Communities Foundation of Arizona" filed lawsuits against all 15 county recorders claiming they are letting non-citizens' vote. The group was formed by Steven Miller, a former Trump advisor. The complaint starts out with the lie that the 2020 election was flawed. Then the author quotes from other election denier complaints to justify their claim i.e. building on the lie as intended. The same people are attacked i.e. the Board of Supervisors and Recorder with the same arguments though case after case and millions of dollars spent on "Cyber Ninjas" have shown

that there was no fraud or misconduct in that election. The only reason for public mistrust of elections is the constant banging of the drum claiming there was fraud when there wasn't. As Goebbels said repeat a lie often enough and it becomes the truth. The election deniers are creating the mistrust so they can benefit from it both financially and politically. Hannah Arendt, the famous German historian and philosopher who developed the concept of the "banality of evil" said, "The aim of constantly lying is not to make people believe a lie, but to ensure that no one believes in anything anymore. A people that can no longer distinguish between truth and lies cannot distinguish between good and evil. And such a people, deprived of the power of thought and judgment, without knowing it or wanting it, are completely subjected to the empire of lies. With such people you can do whatever you want." This rule enables that kind of false and fraudulent claim and leaves no way for ethical lawyers to protect the public or rule of law by filing a complaint.

While the court wraps its decision in *Arizona Republican Party v. Richer et al* (No. CV-23-0208-PR, May 2, 2024) in democratic language (chilling advocacy, not silencing dissent, protecting the rule of law), what it really does is the opposite. This rule and that case silence dissent of those lawyers who observe or learn about other lawyers acting unethically. Filing lawsuits with no evidence or legal theory is not advocacy, it is chicanery designed to undercut the very rule of law that it claims to be standing up for. The court claims that election cases should have more leeway because of the importance of the issues and political strife. But when there is no evidence and no legal theory for the complaint initiating an election case, as what occurred in most of the meritless election denier lawsuits, important issues are not being discussed but attacked. When the political strife is manufactured by the proponents of a frivolous lawsuit based upon fraudulent allegations - which would be revealed to be fraudulent if there were even the most modest preliminary investigation or inquiry conducted prior to filing the complaint - in order to achieve a political end, it is an attack on the rule of law.

Turning Point USA, True the Vote and other MAGA affiliated entities are already spreading conspiracy theories about election fraud for the upcoming election. True the Vote has sent out fundraising to raise money to "draft arguments for litigation." Turning Point rallies are repeating the same bogus claims about fraud that were heard in 2020 including at the Dream City Church in Phoenix. One false claim is that large number of noncitizens will vote, which has been debunked numerous times. House speaker Mike Johnson led the House to pass an unnecessary bill to outlaw voting by non-citizens though it is already illegal and historically has been miniscule. He is now even holding the federal budget hostage over a law we already have.

At the election denier rallies the talk is about "election interference" and "lawfare" to downgrade the legal efforts being made to follow the rule of law. The former president has not agreed to accept the results of the 2024 election as he also refused in 2016 and 2020 inaccurately claiming still, though over 60 lawsuits failed, that there was fraud in 2020.

Even though extraordinary measures were taken to try to prove election fraud in the 2020 election, even spending millions on an audit by a firm called "Cyber Ninjas," no such fraud was ever uncovered. David Becker from the Center for Election Innovation and Research said that the false claims are to sow discord, chaos, and potential violence. Attacks on election are not successful because they are true, but because they intentionally create an atmosphere of apparent

corruption which does not exist. Such orchestrated fraud is an attack on democracy and the Constitution.

In an Arizona Mirror article<sup>1</sup> the reporter outlined the problems already occurring in several swing states. The attacks are based on the claim that the 2020 presidential election was stolen that has been repeatedly disproved. Widespread voter fraud does not pervade our election system, and what few cases have become public have mostly come from the very side claiming fraud. Lauren Miller Karalunas, a counsel for the Brennan Center, a voting rights group housed at the New York University School of Law, has expressed concern over the illegitimate attacks. This rule gives the lawyers free license to pursue such illegitimate attacks.

In Michigan, a county official said that by these unfair attacks the election deniers are doing what no foreign country has managed to do – undermine our election system. For more than a century certifying elections has been completely routine. Suddenly, because the losing side cannot accept electoral defeat, the deniers are attacking the very bedrock of democracy. Across the country election officials are putting new rules, regulations, and procedures in place to deal with a non-existent problem that the election deniers will trumpet. For months one campaign has claimed it can only lose if the election is rigged, exactly the same lie told in 2020, to lay the groundwork for numerous meritless lawsuits again. This rule enables that lie and promotes that meritless litigation, thus undermining the rule of law and our democracy.

In spite of losses in sixty-three lawsuits, numerous audits including one by Cyber-Ninjas in Arizona, and even the then U.S. Attorney General Bill Barr saying the election was valid, the election deniers keep beating the drum, and many Americans believe it against all odds. This is what this rule is aiding. If people don't have faith in our elections, we don't have a democracy. Allowing bad-faith potshots against the guard rails of democracy - elections, courts, agencies – to be taken without ethical consequences imposed by the Bar can only lead to the demise of our Constitutional democracy. A false equivalence is being made between political disagreements that are valid and the pursuit of illegitimate court cases, which is not.

The actions of the election deniers are deliberately fomenting violence. More than one-third of the 20 cases prosecuted by the U.S. Department of Justice's Election Threats Task Force stem from threats against Arizona officials. According to a study published in May by the Brennan Center for Justice, 54% of election workers fear for their or their colleagues' safety. Another 34% say they know of someone in the field who quit over these concerns. Law enforcement officials nationwide are beginning to recognize that elections, once an afterthought, must become a major focus. In Maricopa County Sheriff Russ Skinner has made election safety a top priority since he was appointed in February. This rule adds to that climate of fear and violence.<sup>2</sup>

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<sup>1</sup> Swing states prepare for a showdown over certifying votes in November BY: MATT VASILOGAMBROS/STATELINE - SEPTEMBER 4, 2024, Arizona Mirror

<sup>2</sup> September 4, 2024, The Capital Times, Peggy Dodd, Pierce Gentry, Shelby Rickert and Olivia Talkington, 'Our No. 1 job is to make sure that they're safe': America confronts election intimidation.

Bill Gates, Clint Hickman, Mark Brnovich, and Rusty Bowers are some of the prominent political figures targeted by the deniers in their own political party. Gates received death threats and Bowers had protesters at his home. Tom Liddy, an attorney at the Maricopa County Attorney's Office, and his family had to be provided FBI protection because of election denier threats. One of the deniers who was prosecuted for those threats claimed he was inundated with misinformation and exaggerations which led him to commit the offense. That is precisely what the Stop the Steal campaign intends. Because of these escalating threats, Arizona changed its law to allow election and poll workers to shield their addresses. This rule gives license for that kind of election intimidation to continue by letting the attorneys leading the charge know they will face no fines and no discipline for their fraudulent claims.

According to an article by Howard Fischer, from Capital Media Services,<sup>3</sup> David Byers Director of the Administrative Office of the Courts that provides Independent Bar Counsel when the State Bar's in-house lawyers have conflicts of interest or are overburdened by excessive caseloads, admitted the rule, for which is petitioned, is aimed at the upcoming election. If it's true that his office saw "lots of cases" from people filing over a newspaper article, it's simple enough to dismiss them if they are without merit or to consolidate them if they are duplicative. Byers bemoans that a small number of cases out of the more than 2,000 a year the Bar adjudicates were new topics related to the election deniers. That is because it wasn't happening before. This a new strategy to attack our democracy. Byers complains that it appears the complaints were filed for political reasons. This is untrue in whole or in part. The undersigned who submitted some of those Bar charges were not politically motivated but rather were motivated by a desire to uphold the rule of law and the Ethics Rules of our profession. It's questionable how he would know that others may have been politically motivated, but even if they were, their Bar charges, like ours, may still be valid if the lawyers were acting inappropriately whether political or not. (Some of our charges resulted in attorney discipline that was made public.) Byers said most complaints were from Democrats filing complaints against lawyers representing Republicans. Of course the Bar charges were filed against lawyers representing Republicans, because that is who lost the election and who filed the fraudulent court claims. What is political is not the filing of legitimate Bar charges, but rather the Director of the Administrative Office of the Courts and the Court itself aiming to stop lawyers from pointing out ethical violations committed by other attorneys - violations committed for political ends. Attacks on those submitting legitimate charges and making principled arguments is a poor strategy to protect the Bar, the legal profession, and the rule of law. It undermines the self-regulation of our profession and undermines confidence in the judicial branch of government.

While it rarely happened in the past, refusing to concede a race and filing a lawsuit is now a matter of course. According to Tim Murphy<sup>4</sup> the Maricopa Recorder's office has been sued 43 times since 2020 not counting the one filed this month. Senator Kern, one of the indicted fake

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<sup>3</sup> [https://tucson.com/news/local/subscriber/arizona-supreme-court-provides-more-leeway-political-partisan-lawsuits/article\\_f693535a-6558-11ef-91c9-d74a8bc971b5.html?utm\\_source=tucson.com](https://tucson.com/news/local/subscriber/arizona-supreme-court-provides-more-leeway-political-partisan-lawsuits/article_f693535a-6558-11ef-91c9-d74a8bc971b5.html?utm_source=tucson.com)

<sup>4</sup> *State of Denial: Forget the presidency. The biggest battle in Arizona this fall is over reality itself.* Mother Jones, September+October 2024

electors and a participant in the insurrection and attempted coup on January 6, 2021, introduced a bill that would protect any attorney who filed an election challenge no matter how frivolous. Representative Kolodin, whom the Bar gave a mere slap on the hand for his ethics violation proven by clear and convincing evidence, supported a bill that would strip the Bar of the power to sanction lawyers altogether. Other bills introduced in the Arizona legislature were to let the legislature not the voters award electoral votes and another to give Arizona's electoral votes to Trump in 2024 in an election that hasn't even happened yet.

The repetition that the State Bar process has been improperly "weaponized" is a Fox news MAGA politically motivated talking point devoid of any factual basis. Byers ignores the fact that the charges against lawyers involved in election law denial were based upon them improperly attempting to weaponize the justice system in Arizona by filing frivolous, fraudulent lawsuits. Yet Byers repeats the false allegation of "weaponization" against ethical attorneys doing their duty to submit Bar charges against unethical attorneys' multiple times in his reply. It is this new rule that has defensively weaponized the discipline system to undermine the rule of law and lawyer ethics.

The elephant in the room is that the Bar, the Director of the Administrative Office of the Courts, and Supreme Court fear the national movement to destroy mandatory bars and are giving in to threats by politically motivated election deniers by acceding to their demands to weaken the ethics rules. Two of the legislators behind the attempt to end the mandatory bar (Petersen and Kern) are also claiming the system has been misused by lawyers filing ethical complaints. The attack in Arizona has been going on some years by many of the same legislators supporting this rule. Appeasing bullies is cowardly and is never the appropriate solution. They only ask for more. Surely the Court and the Bar can fight that issue without compromising our ethical responsibilities or our duty to the Constitution and rule of law.

HISTORY DOESN'T REPEAT ITSELF; BUT IT DOES RHYME.

In 2010, the State Bar of Arizona offered continuing legal education entitled: *Law, Justice and the Holocaust: What You Do Matters* with Dr. William Meinecke the chief historian from the U.S. Holocaust Memorial Museum in Washington, D.C. The Bar leadership should review its own training, and the leadership of the Administrative Office of the Courts and members of the Supreme Court should watch it, as well. The CLE outlined how the failure of lawyers and judges to act in Germany prior to and during the Nazi era led to the destruction of the constitution and rule of law. Another excellent example of the failure of judges and lawyers to defend the rule of law and the cost to society is *Hitler's Courts: The Misuse of Executive and Judicial Power*.<sup>5</sup> As the presenter points out, the rule of law is insufficient alone to establish civilized society. Women and men with impeccable character and motives must stand up and speak out.

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<sup>5</sup> <https://www.youtube.com/watch?v=yMvVmBU10S0>.

Numerous historical examples show what happened when lawyers functioned as enablers of the destruction of the rule of law from Nazi Germany to Fascist Italy.<sup>6</sup> History shows that the authoritarian tactics included creating chaos, book banning and burning, empowering the police, silencing protest, inventing danger, and terrifying people. All of these things are happening in the U.S. today. As lawyers we have a higher duty to challenge injustice. Law is a calling not a job. We have responsibilities for protecting and safeguarding law which is not invincible. We must speak up or we side with the perpetrators. Yet this rule silences protesters, precluding them from speaking up.

## ABA TASK FORCE FOR AMERICAN DEMOCRACY

The Task Force for American Democracy, formed by immediate-past ABA President Mary Smith is on the front lines of fighting this attack on democracy. Spearheaded by a bipartisan group of preeminent legal minds they analyzed current threats to our democratic processes and proposed viable solutions and released a report on August 2, 2024. The key issues identified are the rise of misinformation, the normalization of political violence and a growing disillusionment with democratic governance. The ABA emphasizes the role of law in ensuring accountability, transparency and predictability in governance.

The report says:

The causes behind our current situation are many, including the tactics of misinformation and disinformation, the intentional polarization of the American public by both domestic and foreign actors, a disregard for the rule of law and the norms that sustain such legal guardrails and a lack of basic civic knowledge. This has been exacerbated by a demonization of the “others” in our communities and threats and acts of violence against elected officials, members of the judicial branch and election workers.

The ABA Task Force calls on bar associations to help rebuild trust in elections and educate the public on the democracy and the Constitution. Yet this rule reduces the ability of lawyers to do that and does not hold accountable those who are responsible for stoking the false narrative of election fraud.

The ABA also wants to be sure lawyers know that their advice and counsel should be faithful to and consistent with the Constitution and laws not a conspiracy theory to undermine democracy. The ABA Task Force encourages that the lawyers be held accountable when they violate those ethics. This rule does just the opposite and hampers accountability.

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<sup>6</sup> See, e.g., INGO MÜLLER, *HITLER’S JUSTICE: THE COURTS OF THE THIRD REICH* (Deborah Lucas Schneider trans., 1992) (analyzing the role of courts in advancing Nazism); Justice Richard D. Fybel, *Judges, Lawyers, Legal Theorists, and the Law in Nazi Germany (1933–1938)*, 70 *UCLA L. REV. DISCOURSE* 2, 8 (2022) (stating that “courts, judges, and legal theorists all joined in the Nazi plan and implemented it with vigor”); Brandon Gatto, *Race Law Revisited: A Brief Review of Anti-Semitism and the Role of Lawyers in Fascist Italy*, 24 *DIGEST: NAT’L ITALIAN AM. BAR ASS’N L.J.* 1, 10–11 (2016) (discussing complicity of the Italian legal profession in supporting Mussolini’s laws purging Jewish lawyers).

The ABA Task Force calls on lawyers to reduce disinformation around elections not increase it; to ensure election workers safety not attack it; and to improve the system of holding lawyers accountable under the Rules of Professional Conduct. This rule undermines every one of those goals.

The ABA Task Force's number one suggestion is: First and foremost, enforce lawyers' ethical obligations when it comes to the filing of questionable election-related lawsuits. This rule does just the opposite. The third request of the ABA is for other lawyers to speak up in defense of Constitutional principles and the rule of law. This rule muzzles those very lawyers.

In a detailed article David Bleisch<sup>7</sup> outlined the type of suits that were filed to challenge the 2020 election and the fact they all were lost wasting time and money but achieving the goal of diminishing trust in the election system. He suggested that the ABA Task Force should propose model state legislation for swift dismissal of baseless election claims and imposing sanctions on the plaintiffs.

Some Bars such as Oregon have stepped forward to recognize the extraordinary threat to our legal system by the normalization of violence and attacks on our election system. As they point out, even the First Amendment is not limitless. As first year law students we learned you can't yell fire in a crowded theatre. Lawyers no more than other citizens have a right to elevate their own opinions to law. The current climate of election attack on both the system and the workers harms everyone. As lawyers, we have special keys to the courtroom and the legislature to open the doors to justice. We must use those keys to safeguard the rule of law.

Scott Cummings, a professor of legal ethics, explored the role of lawyers in a democracy that is backsliding as is the U.S.<sup>8</sup> The backsliding consists of degrading democratic institutions and practices including elections using law. From an ethics standpoint, he examines why and how lawyers attack the rule of law. He looks at the perceived shift of lawyers as the defenders of democracy to lawyers as the authors of autocracy.

He concludes that the legal profession is backsliding in two areas: the slow path of gradual democratic decline and the fast track of democratic attack. Reducing trust in the legal system is one method of backsliding in the slow track. He uses the 2020 Stop the Steal campaign as a case study to illustrate the fast track of using the legal system and media tactics to weaponize distrust, legitimize false claims, and justify invocation of extraordinary power. He urges necessary change in lawyer regulation and education and suggests a research agenda.

In the Stop the Steal case study he outlined three coordinated actions: filing 60 meritless, unsuccessful lawsuits to overturn the results of the vote, propagating false claims of election

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<sup>7</sup> N. David Bleisch, Addressing Baseless Election Related Lawsuits, May 6, 2024 published in ABA.

<sup>8</sup> In Public Law & Legal Theory Research Paper No. 23-01, LAWYERS IN BACKSLIDING DEMOCRACY BY SCOTT CUMMINGS, *ROBERT HENIGSON PROFESSOR OF LEGAL ETHICS, UCLA SCHOOL OF LAW* 112 Calif. L. Rev. 513 (2024).

fraud to undermine the election's legitimacy, and giving legal advice to the former president on arguments to make to avoid a peaceful turnover of power - the first such attempt in U.S. history.

While some of the lawyers have been sanctioned or disbarred on ethics charges, many, especially in Arizona, have not and remain unrepentant. This is a challenge to the ability of the Bar to be a self-governing body responsible for discipline of its own members. The attacks on democracy by the lawyers have led to very serious ethical questions and the role that lawyers are playing in democracy's decline. Attacks on the legitimacy of core elements of democracy (elections, voting, and judicial independence) should be out of bounds by both political leaders and lawyers no matter their party. The Supreme Court should not put its thumb on the scales against elections by prohibiting lawyers from filing ethics complaints and undermining transparency.

While lies do occur in other types of lawsuits, lying is worse in voting fraud cases because of the attack on the democratic rule of the game that after an election, the loser accepts the results. It is not a political dispute because it is not about policy but about the rules of the game. Those rules include having facts and a legal theory prior to filing a lawsuit and not telling lies to the judge or the public.

What is purely political and devious is that the attacks on the election are a strategy invented by lawyers to de-legitimize elections and thus destabilize democracy. This harms the legal profession in that lawyers ignore the rules of professional ethics, and it harms the public's perception of lawyers as they witness them attempt to overturn the voters' will. A loss of confidence in lawyers means people are more likely to question the entire legal system i.e. the courts, the prosecutors, and law enforcement.<sup>9</sup>

Fully a third of Americans believe "lawyers contribute not very much or nothing at all" to society.<sup>10</sup> To reduce transparency and the ability to file ethics complaints against lawyers will lead the public to see lawyers as "circling the wagons" to protect their profession rather than to discharge their duty – a duty that is higher than that of a nonlawyer.

Lawyers must remain independent from their clients so that though they are required to advocate, they also must say no when clients want them to assert frivolous arguments or make untruthful claims. This Arizona Supreme Court previously removed the requirement that lawyers advocate "zealously" to clarify that advocacy must be done with professionalism and based solely upon accurate facts and accurate presentation of the law. Incomplete and one-sided advice

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<sup>9</sup> Matthew Kim, *For Appearance's Sake: An Empirical Study of Public Perceptions of Ethical Dilemmas in the Legal Profession*, 83 OHIO ST. L.J. 530, 566–67 (2022) (finding that public trust in the legal system declines in response to information about lawyer ethical breaches). NAT'L CTR. FOR STATE CTS., STATE OF THE STATE COURTS 5, 8 (2022), [https://www.ncsc.org/\\_\\_data/assets/pdf\\_file/0019/85204/SSC\\_2022\\_Presentation.pdf](https://www.ncsc.org/__data/assets/pdf_file/0019/85204/SSC_2022_Presentation.pdf) [<https://perma.cc/E3SJ-KBXB>] (finding a year-to-year drop in the percentage of voters having some or a great deal of confidence in state courts).

<sup>10</sup> *Public Esteem for Military Still High*, PEW RSCH. CTR. (July 11, 2013), <https://www.pewresearch.org/religion/2013/07/11/public-esteem-for-military-still-high/> [<https://perma.cc/A93T-Z7JA>].

at the expense of a lawyer's duty of thoroughness, objectivity, and candor is a violation of the ethics rules. Lawyers can make aggressive and novel legal arguments and frame issues and arguments in favor of their clients, but they cannot make up facts, ignore legal authority, or make baseless attacks on the judges and other lawyers. Lawyers should represent marginalized groups and should make difficult claims, but they still must abide by professional rules to be factually and legally based and in the interest of justice.

Elihu Root, a prominent Republican lawyer who served in the administrations of Presidents McKinley and Teddy Roosevelt and also won the Nobel Peace Prize, once said, "About half the practice of a decent lawyer is telling would-be clients that they are damned fools and should shut up." This rule cuts out that half of the practice of decent lawyers. This new rule instead espouses the view that lawyers can simply act as zealous, hired attack dogs, rather than professional counselors and advisors. It means those of us who are most familiar with the ethics rules are prohibited from participating in self-policing our profession.

The legal profession has been appropriately criticized for failing to police lawyer misconduct.<sup>11</sup> An example in Arizona is the tortured history of the Juan Martinez case.<sup>12</sup> When lawyers see that other lawyers are not disciplined, or that the discipline is administered unfairly, it weakens their commitment to those professional duties. This rule makes the problem worse.

The use of disinformation and conspiracy theories is part of what Cummings calls "truth decay" and blurs the line between opinion and fact. Sidney Powell famously defended herself in the Dominion case brought against her by saying no sensible person would believe that what she had written in her complaint was factual. "Candidates cannot make defamatory assertions they hope voters will believe, then, when sued for defamation, seek refuge in the defense that no one believes what politicians say. *See, e.g., US Dominion, Inc. v. Powell*, No. 1:21-CV-00040, — F.Supp.3d — —, — — — —, 2021 WL 3550974, at \*10–12 (D.D.C. Aug. 11, 2021)" as quoted in *Rogers v. Mroz*, 502 P. 3d 986, 63 Arizona Cases Digest 4 (Ariz. 2022). John Eastman criticized the Georgia election interference case by saying he was just doing zealous advocacy and that he reasonably believed in his own lies.

In the Stop the Steal case study, Cummings looks at six steps: creating a cycle of distrust (this includes filing pre-election lawsuits which has already occurred in Arizona); using bar members and influencers with power to amplify fraud claims (as the legislative members have been used here); flooding courts with cases that combine false claims with a shred of a legitimate claim to buy time and confuse the public (as in the *Richer* case); disseminating false fraud claims in social media (prolific here); attempting to stop certification (see fake electors case); coopting government lawyers to claim there is an emergency and extraordinary measures must be taken (precisely what the court has done here). Arizona is a textbook case for every one of these steps.

Cummings did look at Arizona along with the other battleground states. The first wave was a focus on state voting laws. That occurred in Arizona with cases focusing on voting machines,

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<sup>11</sup> DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 4–6 (2000) (describing inadequate bar enforcement of ethical violations).

<sup>12</sup> Juan Martinez, Case Number 17-0624, 2018

mail voting, sharpies, and machine counting. The second wave of lawsuits asked to set aside the election that occurred in Arizona with Lake, Hamadeh, and the fake electors' scheme. Some of those named in the Cummings study are lawyers who operated in Arizona and who had Bar charges lodged against them. Some of them were disbarred or punished in their own states but in Arizona, nothing was done. The third wave was outlandish, including the Kraken cases and claims against Dominion. Such claims were also filed in Arizona. This rule signals that Arizona remains wide open to these kinds of devious, fraudulent claims.

In the Stop the Steal cases, the conspiracy theories put out in social media then appeared in court documents as if they were facts in an attempt to justify the “concern” which had been generated by the very persons who fed them to media – a manufactured crisis. Many of the lawyers claimed in their written or oral presentations, including the complaint filed Sept. 4, 2024, that the public was concerned, but the only ones concerned are the ones who framed the public narrative based on false conspiracy theories in the first place. It is a self-perpetuating negative feedback loop that this rule change is facilitating.

Cummings outlined an extensive litany of all the lawyers did to void a valid election including co-opting gatekeepers and mobilizing public distrust. Arizona cases led in his outline including the Kraken and Kaardal lawsuits that were cookie cutter false allegations, dubious “experts,” and nearly identical legal arguments. He described how this litigation campaign was using the law to weaken the law which leads to democratic backsliding. This national attack on voting was only thwarted by some inside lawyers standing up and judges rejecting the false claims.

But the campaign worked as years later many people still believe the election was stolen. We see this same strategy being repeated today. The damage done creates a risk to democracy. This rule to shield attorneys from ethics complaints and to prevent transparency of the process is an example of a step further down the backsliding road.

The Stop the Steal campaign showed the gaps and vulnerabilities in the system of professional regulation and values with the delayed and very weak response of the Arizona State Bar, Independent Bar Counsel, and Arizona Supreme Court on the complaints being exhibit number one. This rule change to further weaken accountability is exhibit number two. The legal structure has a role, and lawyers have a duty to protect democracy; this rule undermines that role and violates that duty. Resistance by ethical lawyers is vital. Those 40 complaints Byers said he received represent lawyers upholding their ethical duties and stepping up to their responsibility as protectors of our Constitution, laws, and democracy. This rule undercuts their ability to do so today.

Attacking the validity of elections is one step on the path to autocratic power.<sup>13</sup> Stopping these false attacks is critical to maintain our democratic system. This rule does the opposite; it invites such attacks by immunizing the lawyers from complaint or discipline. In the protection of

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<sup>13</sup> TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 9 (2018) *supra* note 51, at 10, 113 (noting competitive elections are a key aspect of liberal constitutional democracy and outlining measures “that can be used to push an election off the tracks”).

democracy, lawyers should be held to a higher standard not shielded from responsibility.<sup>14</sup> The D.C. Bar, which disbarred Rudy Giuliani, explicitly emphasized that interference with the right to vote is a particularly “destructive” act requiring the ultimate sanction: disbarment. Yet this Arizona rule invites such interference.

The ethics rules prohibit lawyer lies and require candor to the court, truthful statements, nonfrivolous claims, and not acting to prejudice the administration of justice. Yet this rule allows lawyers to abstain from undertaking even the most preliminary fact-checking investigation before relying on false claims based on weak or manufactured evidence and then claim that somehow this is legitimate legal advocacy. Manipulation of the law to seize power is not legitimate legal advocacy but the violation of ethical norms and the undermining of our Constitutional democracy.

Cummings notes that using the First Amendment to protect lying lawyers creates a moral hazard. John Eastman was charged with moral turpitude among other charges. Reducing the ability to submit charges in Arizona opens the door for any argument based on conspiracy claims easily found on the internet from aliens to Hugo Chavez to worms ate my brain. We have seen such arguments before e.g. the Twinkie defense in the murder of George Moscone in San Francisco and the so-called “gay panic” defense. Fortunately in the past, these types of frivolous claims have been rejected by the courts, as lawyers are obligated to present facts not the fevered imaginings of their clients. Lawyers are not meant to be obedient attack dogs. Lawyers should not just do any bidding requested of them by clients. While action by the disciplinary system is not the only nor the first line of defense, discipline is critical for accountability and deterrence. Yet by the inaction of the Bar, Independent Bar Counsel managed by the Administrative Office of the Courts, and the Supreme Court and now this rule, Arizona is doing just the opposite.

In his article, Cummings and the ABA, ask to strengthen bar transparency and accountability for discipline. This rule does just the opposite.<sup>15</sup> Cummings encourages specially trained units to swiftly investigate and expedited review. Yet in Arizona, some complaints have languished nearly three years with the complainants still in the dark.

While perhaps difficult, lawyers can draft ethics standards reducing false claims and respecting free speech. Lawyers deal with this kind of difficult line drawing frequently. The standard should be higher in election cases that so affect the underlying legal structure. The court did the opposite

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<sup>14</sup> Alex Goldstein, *The Attorney’s Duty to Democracy: Legal Ethics, Attorney Discipline, and the 2020 Election*, 35 GEO. J. LEGAL ETHICS 737, 739–40 (2022) (making the case for a heightened standard of disciplinary review for lawyers accused of ethics violations in connection with elections); Renee Knake Jefferson, *Lawyer Lies and Political Speech*, 131 YALE L.J.F. 114, 115 (2021) (arguing that “ethics rules governing candor in the courtroom and frivolous litigation require sanctions for lawyer lies designed to sabotage valid election results”).

<sup>15</sup> Dahlia Lithwick & Mark Joseph Stern, *Jack Smith’s Indictment of the Entire Legal Profession*, SLATE (Aug. 2, 2023), <https://slate.com/news-and-politics/2023/08/rudy-giuliani-co-conspirators-jack-smith-indictment.html> [<https://perma.cc/6MGM-48RW>]; see also Leah Litman, *Lawyers’ Democratic Dysfunction*, 68 DRAKE L. REV. 303, 306 (2020) (arguing that bar secrecy creates a “zone of unaccountability”).

and lowered the standard with this rule, along with reducing accessibility to the disciplinary system and restricting transparency.

Contrary to what has occurred in Arizona, Cummings recommends strengthening Rule 8.3 requiring lawyers to report misconduct of other lawyers. He recommends making the rule mandatory when the behavior is compromising democratic institutions, and the public could perceive that the lawyer is putting the client's interest above the rule of law. A mandatory rule would also help motivate internal watchdogs and whistleblowers to come forth. This new Arizona rule does the opposite; it weakens Rule 8.3 by prohibiting concerned lawyers from making complaints.

#### OTHER STATE BARS IMPOSED APPROPRIATE SANCTIONS AND DO NOT HAVE THIS RULE

Unlike Arizona's Supreme Court and Court-appointed Independent Bar Counsel, the enforcers of the ethics rules for lawyers in other states opted to discipline and even disbar lawyers who filed meritless, specious lawsuits falsely alleging election fraud in the 2020 presidential election. New York disbarred Rudy Giuliani for spreading 2020 election lies in frivolous litigation. Colorado censured Jenna Ellis for her misrepresentations in litigation alleging 2020 election fraud. California has suspended and has recommended disbaring John Eastman for his efforts to overturn the 2020 election. Washington, D.C. ruled Jeffrey Clark should be suspended for two years for aiding efforts to misuse the Justice Department to undermine the 2020 election results. Michigan sanctioned Sidney Powell and other "Kraken" attorneys, including Lin Wood, for bringing a lawsuit not backed by evidence and instead based on "speculation, conjecture and unwarranted suspicion."

In the aftermath of the scourge of big lie lawsuits filed across the country in an effort to undermine the 2020 election, California's Supreme Court adopted just the opposite of this new Arizona rule to promote transparency and accountability. On August 1, 2023, the California Supreme Court approved its new Rule 8.3 requiring California attorneys to report a fellow lawyer who has committed a criminal act or "engaged in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation...that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects."

The undersigned are not aware of any other state supreme court that has adopted a rule like this one. Other states welcome, rather than discourage, Bar charges being filed by fellow lawyers to uphold the integrity of the profession and to enhance trust in the administration of justice.

#### THIS RULES UNDERMINES ETHICS RULE 8.3 AND CONTRADICTS ETHICS RULE 8.4

Arizona years ago adopted Ethics Rule 8.3 providing that a lawyer "who knows 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, except as otherwise provided in these Rules or by law." Accordingly, based upon ER 8.3 as it had been in effect until this new rule, when a lawyer read a news article containing a startling report that another lawyer had been sanctioned by a court for

dishonesty in filing frivolous litigation based upon information the lawyer knew or should have known was fraudulent, and when the lawyer reading this news had reason to believe the judge who sanctioned the other lawyer may not have reported that lawyer's egregious misconduct to the State Bar, it was incumbent upon the lawyer learning this news to check the court record to ascertain whether the news story was accurate and, if so, to then report the misconduct to the State Bar. This new rule limiting standing and imposing secrecy undermines and eviscerates Rule 8.3.

Ethics Rule 8.4(d) prohibits actions prejudicial to the administration of justice. This new rule also undermines and runs contrary to Rule 8.4(d). By using the language of law to stoke mistrust in elections that have been proven repeatedly to be free and fair is to undermine the administration of justice and the rule of law. Such efforts should not be rewarded by throwing a roadblock of limited standing and cloak of secrecy over the process, to prohibit legitimate Bar charges from being filed, and to hide findings.

## CONCLUSION

This rule is a grave mistake that will do serious harm to the legal profession and the rule of law. The Supreme Court is allowing frivolous, meritless lawsuits to be filed for political purposes without applying ethics and imposing disciplinary consequences upon the lawyers who file those ill-conceived lawsuits by devious means. The Court has dramatically watered down the Ethics Rules prohibiting such lawsuits and eviscerated the rules that heretofore have encouraged ethical lawyers to speak up. We ask that you use your emergency powers to revoke this rule before the November 5 election.

Dianne Post, Attorney

006141

1826 E. Willetta St.

Phoenix, AZ 85006-3047

602-271-9019

[postdlpost@aol.com](mailto:postdlpost@aol.com)

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Amelia Craig Cramer, State Bar President, 2012-2013

Roxanna Bacon, State Bar President, 1991-1992

Victor Aronow, Judge Pro Tem, Phoenix Municipal Court, 1982-1986

Brendon Mahoney

Gail Natale