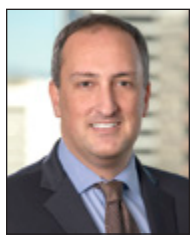
Q&A

LAWYER LIABILITY AND ETHICS

California Scheming



Joseph Brophy

The great philosopher Conan the Barbarian, when he was asked "what is best in life?" memorably responded: "Crush your enemies, see them driven before you, and hear the lamentation of their women." Many lawyers, certainly most litigators, identify with Conan's sentiment. No wonder we are so beloved by the public. However, this sentiment has recently spread to the attorney discipline process as applied to lawyers who represent clients involved in contested elections.

This trend, which has arrived in Arizona, raises questions about the propriety of using the Rules of Professional Conduct to punish lawyer speech unconnected to judicial proceedings and whether licensure is being used as "politics by other means" to silence politically dissident lawyers. As is so often the case with both the good and the bad in this country, our story takes us to California where, oddly enough, Conan the Barbarian was once governor.

John Eastman was the dean of Chapman Law School in California. President Trump retained Mr. Eastman in connection with the 2020 election to evaluate possibly challenging congressional certification on the basis of what Mr. Trump believed to be widespread counting of illegal votes and procedural irregularities in certain swing states. Mr. Eastman's area of expertise was constitutional law, including the Constitution's assignment of plenary power to state legislatures to direct the manner of choosing presidential electors and the role of the vice president in presiding over the electoral college certification process in Congress. This is a practice area reserved for law professors since lawyers in private practice would starve to death if it was their practice area.

In January 2023, the State Bar of California filed a complaint against Mr. Eastman seeking his disbarment. The complaint alleged that he endeavored to "plan, promote, and assist then-President Trump in executing a strategy, unsupported by facts or law, to overturn the legitimate results of the 2020 presidential election by obstructing the count of electoral votes of certain states." The bar alleged that Mr. Eastman engaged in "an egregious and unprecedented attack on our democracy" and that he attempted "to usurp the will of the American people." Mr. Eastman's "attack" took the form of two memos totaling eight pages that he wrote for Mr. Trump laying out two potential ways to challenge in Congress the certification of the 2020 presidential election, neither of which were acted on.

Absent from the Eastman charges was citation to an ethical rule that charges lawyers with a duty to act only in accordance with "the will of the American people" or to protect "our democracy." The California bar did not define either of those amorphous concepts and did not acknowledge that "the will of the American people" is intentionally not used to elect the American president (ask President Al Gore and President Hillary Clinton about that). The California bar also appears to not know that the presidential election is not done via democracy, but rather by the electoral college, whose members are not bound by the popular vote either nationally or in their state. These details are not mere semantics when they form the basis for a lawyer to be disbarred. The California bar also did not provide authority for the proposition that a lawyer may be sanctioned for providing legal analysis to a client of which the bar disapproves.

Mr. Eastman was not practicing law in California, representing a California client, participating in a legal proceeding in California or anywhere else, and was not alleged to have breached any duties owed to his client. Nevertheless, in March 2022 the California bar took the unusual step of invoking a "public protection waiver" to justify announcing the bar's investigation into Mr. Eastman (attorney disciplinary investigations are normally confidential). No doubt the California bar conducted a cogent legal analysis to support its determination that the public was threatened in March 2022 by memos written over two years earlier regarding an election that concluded over a year earlier. However, that analysis has not been made public.

When it comes to determining which lawyers the public must be protected from, the California bar has a somewhat elastic standard. For example, between 2014 and 2018, attorney Michael Avenatti stole $3.2 million in federal payroll taxes from the government and his employees, plus another $12 million from his clients, most of whom were from California. The California bar was made aware of these activities and did nothing. In the case of the payroll tax issue, a complainant laid out in an 18-page letter to the bar the evidence that Mr. Avenatti was stealing from both his employees and the federal government. The California bar declined to discipline Mr. Avenatti even though he was eventually sent to prison for embezzlement of those taxes. Even after Mr. Avenatti was arrested (during a hearing before the California bar) and charged with extortion, wire fraud, embezzlement and tax evasion, he maintained his license to practice law in California for over a year. California only suspended his license after he was convicted of attempting to extort Nike. The California bar never disciplined Mr. Avenatti for stealing from his clients. Unfortunately, Mr. Avenatti's case was not an anomaly.

In an April 14, 2022 report, the California State Auditor excoriated the California bar for routinely failing to adequately investigate attorneys with lengthy patterns of complaints against them. One attorney was never disciplined despite 165 complaints over seven years. In another case, the bar closed multiple complaints against an attorney who was alleged to be stealing settlement funds, even though the complaints alleged similar patterns of theft. Additional clients had money stolen as the bar fiddled. When the bar finally examined the attorney's bank records, it found that he misappropriated nearly $41,000 from clients. The auditor also found that the bar failed to document the conflicts of interest of its staff and made essentially no effort to identify California lawyers who had been disciplined by other jurisdictions. The fact that the auditor yielded these results from a small, random sample is disturbing. But it gets worse.

The California bar commissioned an investigation into its handling of attorney Tom Girardi after public and legislative outcry when he was found to have stolen millions from his clients. In March 2023, a report from the investigation revealed that despite 115 complaints against Mr. Girardi over 40 years, his record with the California bar remained pristine. At least eight investigations into Mr. Girardi were closed by bar employees with conflicts of interest. Mr. Girardi appeared to have bribed at least one bar investigator and appeared to have at least improperly influenced (if not outright bribed) a number of other bar employees. The California bar inexplicably declined to discipline Mr. Girardi even after the 9th Circuit suspended him for six months in 2010 after finding that he falsified documents to facilitate enforcing a foreign judgment.

It probably helped that the California bar's chairman had an unspecified "disqualifying conflict of interest" with respect to Mr. Girardi that is also currently under investigation. According to the Los Angeles Times, Mr. Girardi donated more than $2 million to California's politicians while he was stealing from his clients and bribing the California bar, which also probably helped.

Absent the initiative of federal Judge Thomas Durkin of the Northern District of Illinois, Mr. Girardi would have continued stealing from his clients with the California bar's tacit approval.

Against this backdrop of decades of indifference and corruption, the California bar now heroically seeks to save "our democracy" from Mr. Eastman's memos, which were written for a client in Washington, D.C. by a non-practicing California attorney, after the bar publicized its investigation in the name of "public protection." Of the possible explanations reconciling the California bar's winking at predatory lawyers and its commitment to disbar Mr. Eastman, the bar's professed concern for "public protection" is not an explanation that fits the evidence.

A modest proposal—perhaps the California bar should first fire and discipline what appear to be an inordinate number of corrupt and rapacious bar employees, then deal with the California lawyers who are stealing from their California clients, and then move on to saving democracy from Mr. Eastman—in that order. Admittedly, that course of action would reduce the bar's opportunities for graft at the expense of the clients it is charged with protecting. But what is life if not a series of tradeoffs?

Mr. Eastman's case follows those of Trump lawyers Rudy Giuliani in New York (license suspended without a hearing) and Jenna Ellis

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in Colorado (censured by the Colorado bar). The three cases share remarkable similarities: (1) extrajudicial statements made by lawyers regarding the political issue of who won the 2020 presidential election, and in the cases of Giuliani and Ellis, statements made to the media; (2) no connection to a judicial proceeding; (3) no clients in or connection to the sanctioning jurisdiction; (4) no allegation that the lawyers breached any duty to a client; (5) an unprecedented expansion of Rule 8.4(c) (prohibiting deceptive conduct, not deceptive speech).

The purpose of raising this issue is not to defend what Mr. Giuliani or Ms. Ellis said or to endorse Mr. Eastman's legal analysis. Assume it is all garbage. The purpose is to point out that ER 8.4(c) has jumped the tracks from prohibiting deceptive conduct and is morphing into a license for the judiciary to regulate the content of speech by conditioning a lawyer's right to practice law on the expression of only those political statements that are approved by the judiciary.

The Rules of Professional Conduct exist to protect clients and the integrity of the judicial process from incompetent or dishonest lawyers. Those rules are not a license for the judiciary to regulate lawyer speech in the court of public opinion under the guise of protecting "our democracy" or "the public" from political speech that particular judges or state bars do not like. Nor do those rules exist to give the public confidence in elections.

The flimsy grounds upon which these disciplinary actions rest suggests that what is at work is not a legitimate concern for the judicial process, the legal profession, or clients, but rather Conan the Barbarian-style smashmouth politics masquerading as attorney regulation. This will not lead anywhere good and will justifiably harm the public's perception of the judiciary. It is not hard to appreciate the appeal of not just winning an election, but also having your political opponents' lawyers disbarred (Conan would love it). But one would hope that the legal profession would be better at considering the long-term consequences of its actions than our political class, who have displayed an unwavering commitment to short-term thinking for the last 20 plus years that would almost be admirable if the consequences were not so catastrophic.

Conan was seeking vengeance for the death of his parents at the hands of a snake cult, which was undoubtedly a legitimate beef that ultimately resulted in his removal of the cult leader's head and the approval of movie audiences worldwide. But Conan's methods are not ideally suited to run a state bar. Hopefully, the California courts will put the breaks on this troubling trend. ■

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