DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
HEARING COMMITTEE NUMBER TWELVE

In the Matter of	:	**Board Docket No. 22-BD-039**
	:	
JEFFREY B. CLARK, ESQUIRE	:	**Disciplinary Docket No. 2021-D193**
	:	
Respondent,	:	
	:	
A Member of the Bar of the District of Columbia Court of Appeals	:	
Bar Number: 455315	:	
Date of Admission: July 7, 1997	:	
	:	

DISCIPLINARAY COUNSEL'S PROPOSED FINDINGS
OF FACT AND CONCLUSIONS OF LAW

The 2000 presidential election was a much closer contest than in 2020. Omitting Florida, the electoral vote stood at: Gore 266; Bush 246. Florida's 25 electoral votes would be decisive, but out of almost six million ballots cast, Governor Bush led by 1,784 votes, less than one-half of a percent, and after the automatic machine recount, his margin diminished even further. *Bush v. Gore*, 531 U.S. 98, 100-101(2000). Vice President Gore contested the election pursuant to the appropriate state procedures. The lawyers who litigated that election contest, although under tremendous pressure, carried out their responsibilities in the nobliest traditions of the profession. When the Supreme Court put an end to the litigation, the lawyers shook hands, and Vice President Gore conceded the election.

The lawyers who contested the 2020 election on behalf of President Trump, far from upholding the nobliest traditions of the profession, betrayed their ethical obligations. At President Trump's direction, they employed any means necessary to keep him in office. This included frivolous civil rights actions filed in federal court seeking to set aside the results of lawful elections. *See In re Giuliani* Board Docket No. 22-BD-027 (BPR HCR July 7, 2023). It included dishonest legal advice to Vice President Pence in an effort to persuade him to unilaterally reject certain states' slate of electors and delay or recess the electoral count during the January 6, 2020 Joint Session of Congress. *In re Eastman*, Case No. SBC-23-0-30029-YDR (State Bar Court of California, March 27, 2024). It also included Jeffrey Clark's attempt to replace the leadership of the Department of Justice so that he could, as Acting Attorney General, make dishonest representations about findings of election fraud and irregularities in an attempt to have certain states send two slates of electors to the January 6 Joint Session.

These efforts all failed because the legal profession proved to be an insurmountable barrier to these lawyers' misconduct. Judges unanimously rejected frivolous lawsuits. The lawyers advising Vice President Pence (and the Vice President himself) rejected unconstitutional, crackpot schemes to overturn the results of the election. Other lawyers in the Department of Justice and the White House, in defiance of President Trump's wishes, rejected Mr. Clark's dishonest attempt to

create national chaos on the verge of January 6. It was nevertheless a very near thing. It took a last-minute showdown in the Oval Office on January 3 to reverse Mr. Clark's appointment as Acting Attorney General and frustrate his scheme.

It is not enough that the efforts of these lawyers ultimately failed. As a profession, we must do what we can to ensure that this conduct is never repeated. The way to accomplish that goal is to remove from the profession lawyers who betrayed their constitutional obligations and their country. It is important that other lawyers who might be tempted to engage in similar misconduct be aware that doing so will cost them their privilege to practice law. It is also important for the courts and the legal profession to state clearly that the ends do not justify the means; that process matters; and that this is a society of laws, not men.

Jeffrey Clark betrayed his oath to support the Constitution of the United States of America. He is not fit to be a member of the District of Columbia Bar.

PROCEDURAL HISTORY[1]

Disciplinary Counsel filed a Specification of Charges and Petition Instituting Formal Disciplinary Proceedings on July 19, 2022. Mr. Clark was personally served on July 22, 2022. He filed an Answer on September 1, 2022. Following an

[1] "DCX" refers to Disciplinary Counsel's Exhibits and "RX" refers to Mr. Clark's Exhibits, both filed on April 11, 2024. "Tr." refers to the transcript of the hearing held March 26 through April 4, 2024. "PFF" refers to Disciplinary Counsel's Proposed Findings of Fact.

unsuccessful attempt by Mr. Clark to remove the proceedings to federal court, an evidentiary hearing was held before Hearing Committee Number 12 from March 26 through April 4, 2024.

RESPONSE TO "THRESHOLD QUESTIONS" PLEADING

On the eve of the hearing in this matter, Mr. Clark filed a pleading in which he objected to the composition of the hearing committee, claiming that "Bar Rule XI unconstitutionally, and without statutory authorization, appears to delegate judicial authority to a layperson." Clark Request to Clarify at 5. He claimed the Court may not "delegate any part of its judicial powers" to non-lawyers, including "find[ing] facts (even if subject to later review)" and "mak[ing] legal recommendations to the Court of Appeals." *Id.* at 7, 8. That argument is unsound at its core, in multiple respects. Because Mr. Clark has not attempted to support it with any legal authority, this brief discusses only two of the more obvious flaws. Should Mr. Clark address this issue further in his responsive brief, we will respond as necessary in our reply brief.

First, Mr. Clark incorrectly assumes that hearing committees exercise judicial power. *See id.* at 7, 8. But as the Supreme Court has held, the "judicial Power is one to render dispositive judgments." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (cleaned up); *see also Mistretta v. United States*, 488 U.S. 361, 389 (1989) (describing the "exercise of judicial power in the constitutional sense" as

"deciding cases and controversies"). Hearing committees do not decide cases or issue dispositive judgments. They issue findings and recommendations in disciplinary matters which are ultimately reviewed by the D.C. Court of Appeals. As that Court has emphasized: "the responsibility to discipline lawyers is the court's. The buck stops here." *In re Holdmann*, 834 A.2d 887, 889 (D.C. 2003) (internal quotation marks omitted). In short, the Court of Appeals has not improperly delegated judicial power because it has not delegated judicial power at all.

Second, Mr. Clark is incorrect to claim that the Court lacked statutory authority to establish three-member hearing committees with one non-lawyer member as part of its disciplinary system. As he acknowledges, Congress directed the Court of Appeals to "make such rules as it deems proper" regarding the "censure, suspension, and expulsion" of members of its bar. Clark Request to Clarify at 6-7 (quoting D.C. Code § 11-2501(a)). Congress left the specifics of the disciplinary apparatus to the Court's discretion, and in exercising that discretion, the Court deemed it proper to adopt the Rules Governing the District of Columbia Bar, including the provisions of Rule XI that specify the composition and appointment of hearing committees. Mr. Clark does not explain why this authority does not suffice.

PROPOSED FINDINGS OF FACT

1. Respondent Jeffrey B. Clark is a member of the Bar of the District of Columbia Court of Appeals, having been admitted in 1997. Tr. 496 (Clark).

2. He was appointed by President Trump as Assistant Attorney General in charge of the Environmental and Natural Resources Division of the Department of Justice and assumed that position on November 1, 2018. Tr. 497-498 (Clark).

3. On September 5, 2020, he became acting head of the Civil Division. Tr. 498 (Clark); 77 (Donoghue); 357-358 (Rosen).

4. At that time, William Barr was Attorney General, Jeffrey Rosen was Deputy Attorney General, and Richard Donoghue was Principal Associate Deputy Attorney General. Tr. 74 (Donoghue); 354-356 (Rosen).

5. The presidential election was held on November 3, 2020. Tr. 75 (Donoghue).

6. The following week, Mr. Barr issued a memorandum informing the United States Attorneys that they had authority to immediately investigate "substantial allegations of voting and vote tabulation irregularities" if they were credible and might have affected the outcome of an election in a particular state. RX 559. This was a change from past guidance in which such investigations were not conducted until the election was over and certified. Tr. 78-79 (Donoghue); 361-363 (Rosen).

7. Investigations of potential election fraud were conducted by the Federal Bureau of Investigation under the supervision of the United States Attorneys and

with the assistance of the Election Crimes Branch of the Public Integrity Section of the Criminal Division. Tr. 80-82, 85-86 (Donoghue).

8. The Civil Rights Division had responsibility for voting rights enforcement. Tr. 86 (Donoghue).

9. The Civil Division had no responsibility to conduct investigations into election fraud, and Mr. Clark was not involved in any such investigations. Tr. 94, 127 (Donoghue); 358-359 (Rosen).

10. Mr. Donoghue was the central point of contact in the Department of Justice for monitoring the election investigations, and he kept Mr. Barr and Mr. Rosen apprised of their status. Tr. 87-88 (Donoghue); 365-366 (Rosen). Mr. Donoghue was the most knowledgeable person in the Department as to the progress of all the investigations. Tr. 92-93 (Donoghue).

11. While the investigations uncovered some isolated instances of fraud and misconduct, none were at a scale that would have affected the outcome of the election in any individual state. Tr. 93-94 (Donoghue).

12. On December 1, 2020, Attorney General Barr announced to the Associated Press that the Department had conducted investigations but had not found fraud on a scale that would change the outcome of the election. Tr. 94 (Donoghue), 368-369 (Rosen).

13. On December 7, 2020, the Governor of Georgia certified the results of the presidential election in that state, showing that Joseph Biden had won, and appointed electors pledged to Joseph Biden. DCX 35.

14. On December 14, 2020, the electoral college vote was recorded. President Biden won a majority of the electoral vote. Tr. 118 (Donoghue).

15. That same day, Mr. Barr announced his resignation as Attorney General, effective December 23, 2020. Tr. 94 (Donoghue).

16. On December 14, 2020, President Trump called Mr. Donoghue and asked him if he would be interested in serving as Acting Attorney General. Mr. Donoghue recommended that the President designate Mr. Rosen for the position. Tr. 94-98 (Donoghue).

17. Later that day, President Trump appointed Mr. Rosen to serve as Acting Attorney General. Tr. 98-99 (Donoghue); 354-355 (Rosen).

18. The next day, President Trump met with Mr. Rosen and Mr. Donoghue. President Trump told them he was unhappy with the post-election investigations and that people were telling him the election was fraudulent. Mr. Rosen and Mr. Donoghue explained that the Department's investigations had not found evidence of widespread fraud in the election. Tr. 371-372 (Rosen).

19. The President asked Mr. Rosen and Mr. Donoghue about an allegation that there were substantial errors in the machine count of the vote in Antrim County,

Michigan. Tr. 99-101 (Donoghue). They advised the President that there was a hand count under way. When that recount was subsequently concluded, the machine count was confirmed. Tr. 372 (Rosen).

20. The following week, Mr. Barr reiterated at a press conference that the Department had not found fraud on a scale to change the results of the election. T r. 101-102 (Donoghue); 369 (Rosen).

21. Mr. Rosen became Acting Attorney General on December 24, 2020. Tr. 373 (Rosen). Although Mr. Donoghue's title did not change, he served in the role of Deputy Attorney General. Mr. Clark reported to him. Tr. 102-103 (Donoghue).

22. On Christmas Eve, President Trump once again telephoned Mr. Rosen to discuss his concerns about election fraud. During the call, the President asked if Mr. Rosen knew Mr. Clark. Tr. 374-375 (Rosen).

23. Mr. Rosen did not ask President Trump why he was asking about Mr. Clark, but on December 26, 2020, he telephoned Mr. Clark to find out if he knew why the President was raising his name. Mr. Rosen was "flabbergasted" to learn that Mr. Clark had met with the President shortly before Christmas. He explained that such meetings were not appropriate under the Department's White House contacts policy and that Mr. Clark should have at least informed Mr. Rosen about the contact. Mr. Clark was apologetic and assured Mr. Rosen that it would not happen again and

that if there were a request for another meeting, he would inform Mr. Rosen or Mr. Donoghue. Tr. 375-377 (Rosen).

24. On Sunday, December 27, 2020, President Trump telephoned Mr. Rosen to again complain that he was hearing from people that there had been election fraud in some states. Mr. Rosen added Mr. Donoghue to the call. Tr. 377-379 (Rosen); 103 (Donoghue). Mr. Donoghue took notes. Tr. 104-105 (Donoghue); DCX 6.

25. During that call, the President raised an allegation that was unfamiliar to Mr. Donoghue: that Pennsylvania had certified more votes than had been cast. Tr. 106-107 (Donoghue). He raised other allegations that had already been investigated and which Mr. Donoghue told him had been found to be untrue. Tr. 110-112 (Donoghue). One of these baseless claims was an allegation about counting the votes at the State Farm Arena in Fulton County, Georgia. Tr. 107-108, 111 (Donoghue); DCX 6 at 3. The President said the "Georgia legislature is on our side. They want to bring a case but the governor won't let them." Tr. 108-109 (Donoghue); DCX 6 at 4.

26. Mr. Rosen told the President that they would look into the new allegation about Pennsylvania but that the Department could not and would not just snap its fingers and change the outcome of the election. The President replied, "I don't expect you to do that. Just say the election was corrupt and leave the rest to me and the Republican Congressmen." Tr. 109-110 (Donoghue); DX 6 at 4-5. Later, the

President said, "we have an obligation to tell people that this was an illegal, corrupt election." Tr. 113 (Donoghue); DCX 6 at 6. *See* Tr. 379-80 (Rosen).

27. In this December 27 telephone conversation, the President expressed frustration with Mr. Rosen and Mr. Donoghue and said that people had told him Mr. Clark was great and that the President should put him in to replace the Department's leadership. Tr. 113-114 (Donoghue); DCX 6 at 6. *See* Tr. 381-383 (Rosen).

28. Later on December 27, 2020, Congressman Scott Perry called Mr. Donoghue at the President's request. He also cited Mr. Clark as someone who would do something about the allegations relating to the election. Tr. 118-120 (Donoghue); DCX 7.

29. Within the White House, during the last half of December 2020, Mr. Clark's name was raised as someone who might take a hard look at the investigations arising from the election. Mr. Rosen informed Patrick Philbin, the Deputy White House Counsel, that the White House was pressuring him to have someone else look at the election investigations. Tr. 255-257 (Philbin).

30. On Monday, December 28, 2020, Mr. Rosen learned from his assistant that Mr. Clark had asked to meet with him. Because of Mr. Rosen's schedule, a meeting could not be arranged until 6:00 or 6:30 p.m. Tr. 384-385 (Rosen).

31. At 4:40 p.m., Mr. Clark sent Mr. Rosen and Mr. Donoghue an email with an attached draft "Proof-of-Concept" letter. The email requested authorization

for Mr. Clark to receive a briefing from the Director of National Intelligence about foreign election interference, citing a claim that "white hat" hackers have evidence that a Dominion voting machine accessed the internet through a "smart thermostat" with a net connection leading back to China. In the cover email, Mr. Clark did not ask to look at investigative files from the criminal investigations or inquiries that had been conducted. DCX 8 at 1; *cf.* Tr. 228 (Macdougald).

32. The email also proposed sending the Proof-of-Concept letter to Georgia and other "relevant states," urging state officials to convene the legislature and reconsider the appointment of electors. The letter was drafted for the signatures of Acting Attorney General Rosen, Mr. Donoghue, and Mr. Clark. In his email, Mr. Clark wrote, "I think we should get it out as soon as possible. Personally, I see no valid downsides to sending out the letter." DCX 8 at 1.

33. The Proof-of-Concept letter was addressed to the Georgia Governor, Speaker of the House, and President *Pro Tempore* of the Senate. It contained several statements that were either false or misleading. Specifically:

a. The letter stated, "we have identified significant concerns that may have impacted the outcome of the election in multiple States, including the State of Georgia." DCX 8 at 2. In fact, the Department of Justice had not identified any such "significant concerns," and the former Attorney General had publicly said so on two occasions. Tr. 131-132 (Donoghue).

b. In support of this statement, the letter cited a publication, referred to in these proceedings as the "Ligon Report" (and a news article about that report) that was not in fact an official legislative report, but rather a summary of testimony. RX 42 at 2. The letter did not reveal that the Department had looked at the "report" and concluded that it concerned election process issues that had nothing to do with election fraud or matters the Department might investigate. Tr. 132-133 (Donoghue).

c. The letter promised to update the Georgia officials on the Department's investigation as progress was made. DCX 8 at 2. However, it was not the Department's practice to update state officials on federal investigations. Tr. 130-131 (Donoghue).

d. The letter stated that the Department believed that in Georgia and other states, two slates of electors had been chosen on December 14, 2020, and that both sets of ballots—one supporting Biden and one supporting Trump—had been transmitted to Washington, D.C. DCX 8 at 3. Mr. Clark's cover email acknowledged that a second set of electors had not actually been sent to Washington by expressing the view that "the legislatures [of each relevant state] *should* assemble and make a decision about elector appointment in light of their deliberations." DCX 8 at 1 (emphasis added). In fact, two slates of electors had not been chosen on December 14, 2020, and

the Department did not harbor the belief described in the letter. Tr. 134-135 (Donoghue).

e. The letter stated that the Department found "troubling" the current posture of a lawsuit in Fulton County, Georgia because no hearing had been scheduled and it was unlikely to be resolved before January 6, 2021, the date for the Congress to finally certify the election results. DCX 8 at 3. This was misleading because the Department was not a party to this lawsuit. There had been seven or eight other lawsuits filed by the Trump campaign or its supporters challenging the results of the Georgia election, and all the others had been dismissed. Tr. 1454-1461 (Favorito).

34. The Proof-of-Concept letter also proposed a course of conduct that exceeded the Department's role in a federal system:

a. It recommended that the Georgia legislature convene in special session to act as a sort of tribunal—taking testimony, receiving evidence, and deliberating, with the possibility of reversing the results of the already certified election. DCX 8 at 3-4. The Governor and Lieutenant Governor of Georgia had already declared that a special session was not an option under state or federal law and that any attempt to do so would be "unconstitutional and immediately enjoined by the courts, resulting in a long legal dispute and

no short-term resolution." DCX 40 at 1. *See* Tr. 133-134 (Donoghue); 476-477 (Rosen).

b. It proposed a novel legal theory as to the Georgia legislature's plenary power under the federal constitution to call itself into session even if the Governor refused to do so. DCX 8 at 4-6. This theory was unvetted and unapproved by the Office of Legal Counsel and the Solicitor General. Tr. 134-136 (Donoghue); 475-477 (Rosen).

35. After receiving the email and attached letter from Mr. Clark, Mr. Donoghue emailed him back, stating that there was no evidence "that would support the statement, 'we have identified significant concerns that may have impacted the outcome of the election in multiple states.'" He also wrote that it was not the Department's role to make recommendations to state legislatures as to how they could meet their constitutional obligations to appoint electors and that no such recommendation could possibly be made without research, discussion, and the involvement of the Office of Legal Counsel. DCX 9.

36. At about 6:00 p.m. on December 28, 2020, Mr. Rosen, Mr. Donoghue, and Mr. Clark met. Mr. Rosen and Mr. Donohue explained to Mr. Clark that the Department had run down all the credible allegations of election fraud and there was simply no basis for Mr. Clark's claims. They had received intelligence community briefings, and there was nothing anyone was aware of about a "smart thermostat."

The other allegations, such as the ones about the State Farm Arena in Georgia, had been investigated and found to be untrue. Mr. Clark expressed doubts whether the Department had done enough. Mr. Donoghue pressed Mr. Clark for the source of his information, and all he could respond was that he had been reading some allegations in some of the civil cases filed by private parties challenging the election results and reading things on the Internet. Tr. 139-141, 214-215, 218 (Donoghue); 390-392; 478-479 (Rosen).

37. Mr. Donoghue reinforced Mr. Rosen's earlier admonition that Mr. Clark should not have any other unauthorized meetings at the White House, and Mr. Clark seemed to agree. Tr. 142-144 (Donoghue); 392-393 (Rosen).

38. On December 31, Mr. Rosen and Mr. Donoghue met with the President and others, including his Chief of Staff, Mark Meadows. The President was frustrated that the Department was not doing more with the allegations of election fraud. Mr. Rosen and Mr. Donoghue assured him that they were doing their job. The President responded that maybe he did not have the right leadership, again mentioning Mr. Clark. Tr. 154-155 (Donoghue).

39. Mr. Rosen had initially opposed Mr. Clark's request for a briefing from the Director of National Intelligence. Tr. 394 (Rosen). But he began to receive emails from Mr. Meadows seeking the Department's involvement in investigations in Georgia and suggesting that Mr. Clark investigate signature match anomalies in

Fulton County, Georgia. DCX 11 & 12; Tr. 396-399 (Rosen). Mr. Rosen regarded these as efforts to have the Department intervene in state matters to help a particular campaign. Tr. 433-434 (Rosen).

40. At some point, Mr. Rosen told Deputy White House Counsel Philbin that Mr. Clark wanted to conduct investigations for which there was no basis. After speaking with Mr. Clark, Mr. Philbin concluded that the allegations Mr. Clark sought to investigate were not plausible or credible. Tr. 258-263 (Philbin).

41. In a conversation toward the end of the week of December 28, Mr. Clark told Mr. Rosen that, contrary to his earlier promises, he was having further conversations with the President. Tr. 401-402 (Rosen).

42. Since Mr. Clark was speaking to the President, Mr. Rosen authorized the intelligence briefing he had previously been unwilling to authorize in the hope that he would be better informed and able to counter various allegations that were being made. Tr. 398-402 (Rosen); 144 (Donoghue).

43. Mr. Rosen also instructed Mr. Clark to speak with the U. S. Attorney for the Northern District of Georgia, B.J. Pak, because the President or his Chief of Staff had complained that ballots had been destroyed in Georgia. Mr. Pak knew those claims were false. Tr. 402-403 (Rosen); Tr. 145 (Donoghue). On January 1, 2021, Mr. Rosen gave Mr. Pak's cellphone number to Mr. Clark. DCX 13; Tr. 403 (Rosen).

44. Mr. Clark did receive an intelligence briefing, and following that, made no more claims of foreign interference in the election. Tr. 405-406 (Rosen); 157 (Donoghue). However, on the morning of Saturday, January 2, 2021, when Mr. Rosen sent a follow-up email to ascertain if he had spoken with Mr. Pak, Mr. Clark responded that he had been busy speaking by phone to a "source." DCX 13; Tr. 404 (Rosen).

45. Later on January 2, 2021, Mr. Rosen, Mr. Donoghue, and Mr. Clark met. They met in a secure facility because they thought national intelligence matters might be discussed, although Mr. Clark no longer seemed to be interested in those matters. Tr. 405-406 (Rosen); 156-157 (Donoghue). Despite being instructed to speak with Mr. Pak, Mr. Clark had not done so. He did not explain why he had not, but he did say that he has spoken to a witness, whom he identified as the largest bail bondsman in Georgia, without disclosing what evidence this witness had to offer. He also said that he had no interest in speaking with the Georgia Bureau of Investigation. Tr. 164 (Donoghue). In response to questions about what he had found, Mr. Clark was unable to identify any credible allegations. Tr.157-160 (Donoghue); Tr. 405-406, 470-471 (Rosen).

46. At this meeting, Mr. Clark told Mr. Rosen and Mr. Donoghue that he had spoken to the President about making a leadership change at the Department. Mr. Clark said the President had offered to appoint him as Acting Attorney General,

but Mr. Rosen and Mr. Donoghue could avoid this change if they would sign the Proof-of-Concept letter. Mr. Clark gave them a deadline of January 4, when he was supposed to respond to the President's offer. Both men adamantly refused to sign the letter. Tr. 160-162 (Donoghue); 407-408 (Rosen); DCX 14.

47. Mr. Clark drafted another version of the Proof-of-Concept letter, dated January 3, 2021. DCX 34. The new version asserted some of the misstatements of fact with stronger language, claiming, for example, that "As of today, there is evidence of significant irregularities [rather than "significant concerns"] that may have impacted the outcome of the election." *Id.* at 2. The substance of the new version, however, was not materially different.

48. Mr. Philbin spoke to Mr. Clark by telephone on either January 2 or 3, 2021 because he had heard about the possibility that Mr. Clark might become Acting Attorney General. Mr. Philbin told Mr. Clark that the allegations he wanted to pursue had been debunked. He also said that if by some miracle, Mr. Clark found something that served as an excuse for keeping the President in the White House after January 20, 2021, there would be riots in every major city. Tr. 264-268 (Philbin). Mr. Clark responded, "that's what the Insurrection Act is for," referring to the statute that permits the President to call out federal troops and federalize the National Guard to restore order. Tr, 281-282 (Philbin).

49. On Sunday, January 3, 2021, around 3:00 in the afternoon, Mr. Clark met with Mr. Rosen alone. Mr. Clark announced that he had decided to accept the President's offer to make him Acting Attorney General because he had a very different concept as to what the Department should do about the election allegations. Mr. Rosen said Mr. Clark did not have the authority to dismiss him and insisted on a meeting with the President. Tr. 409-410 (Rosen).

50. Mr. Rosen informed Mr. Donoghue of this development and then called the White House to arrange for a meeting with the President. Mr. Rosen called the White House Counsel, Patrick Cipollone, and the head of the Office of Legal Counsel, Steven Engle, and asked them to attend the meeting. Eric Herschmann, a White House senior advisor, also telephoned Mr. Rosen, learned what was happening, and agreed to attend the meeting. Tr. 411-412 (Rosen).

51. Mr. Donoghue organized a conference call to inform the Assistant Attorneys General of what was happening. All of those who participated agreed that they would resign if President Trump appointed Mr. Clark to replace Mr. Rosen as Acting Attorney General. Tr. 167-170 (Donoghue).

52. Some time after his mid-afternoon meeting with Mr. Rosen, Mr. Clark appeared to have accepted the President's offer to become Acting Attorney General. White House telephone logs for January 3, 2021, refered to Mr. Clark as "Mr. Jeffrey

Clark" until 4:19 p.m., when they referred to him as "Acting Attorney General Jeffrey Clark." DCX 33 at 1, 2, 5, 7.

53. A meeting was scheduled in the Oval Office for 6:15 p.m. Present were President Trump, Mr. Clark, Mr. Rosen, Mr. Engle, Mr. Cipollone, Mr. Philbin, and Mr. Herschmann. Mr. Donoghue joined after the meeting had started. Other than Mr. Clark, all the lawyers were adamantly opposed to Mr. Clark replacing Mr. Rosen as Acting Attorney General and sending the Proof-of-Concept letter. Mr. Clark proposed conducting large-scale national investigations in just a few days that he said would completely change the outcome of the election. He did not, however, identify any specific allegations that he would investigate. Mr. Philbin did not believe Mr. Clark cited anything that would justify sending the letter. He did not believe that there was anything to back up a statement that the federal government had actually found irregularities in the Georgia election. Mr. Donoghue debunked Mr. Clark's theories. All the other lawyers threatened to resign if Mr. Clark was appointed and began to conduct investigations without a factual basis, and Mr. Donoghue explained that the entre leadership of the Department—lawyers apponted by the President—would likely resign. The President ultimately decided not to appoint Mr. Clark. Even after he announced that decision, Mr. Clark implored him to reconsider, saying that history was calling and to just put him in charge. Tr. 170-178 (Donoghue); 413-420 (Rosen); 284-287 (Philbin).

54. Mr. Rosen served as Acting Attorney General until January 20, 2021. Tr. 354, 420 (Rosen).

55. Based on their demeanor, consistency of testimony, plausibility, and responsiveness, Mr. Rosen, Mr. Donoghue, and Mr. Philbin provided credible testimony. When called as witness, Mr. Clark provided no substantive testimony, other than about his background, asserting the privilege against self-incrimination, and also claiming executive privilege, deliberative privilege, law enforcement privilege, and attorney-client privilege. *See*, *e.g.*, Tr. 499-500 (Clark). None of the witnesses called by Mr. Clark had any direct knowledge of Mr. Clark's conduct between November 3, 2020 and January 3, 2021.

CONCLUSIONS OF LAW

By attempting to induce and then coerce his superiors at the Department of Justice to send the Proof-of-Concept letter after he knew it was false, Mr. Clark attempted to engage in dishonest conduct. The natural and probable consequences of that misconduct would have resulted in an explosion of litigation, an unnecessary (and probably illegal) adjudicatory proceeding in the Georgia Assembly, and a disruption of the statutory procedures for certifying a presidential election. Mr. Clark therefore attempted to engage in conduct that would have seriously interfered with the administration of Justice. In the unique circumstances of this case, the only possible sanction is disbarment.

A. Mr. Clark's effort to send his "Proof-of-Concept" letter violated Rule 8.4(a) because he attempted to engage in conduct involving dishonesty and misrepresentation in violation of Rule 8.4(c).

1. The Elements of Rule 8.4(a) and (c).

"Lawyers have a greater duty than ordinary citizens to be scrupulously honest at all times, for honesty is basic to the practice of law." *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (cleaned up). That duty is reflected in Rule 8.4(c), which prohibits a lawyer from "engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation." Although each of those four terms has a distinct meaning, the Rule "is not to be accorded a hyper-technical or unduly restrictive construction." *In re Ukwu*, 926 A.2d 1106, 1113 (D.C. 2007). Of the four, dishonesty is the most general term, encompassing not only the other three but also "conduct evincing a lack of honesty, probity or integrity in principle; a lack of fairness and straightforwardness." *In re Shorter*, 570 A.2d 760, 767-768 (D.C. 1990) (cleaned up). Dishonesty also includes suppression of the truth, not just affirmative misrepresentations, *id.* at 768, and conduct that demonstrates a "reckless disregard of the truth" can likewise sustain a charge of dishonesty. *Ukwu*, 926 A.2d at 1113-1114; *In re Dobbie*, 305 A.3d 780, 804-805 (D.C. 2023).

If the dishonest conduct is "obviously wrongful and intentionally done, the performing of the act itself is sufficient to show the requisite intent for a violation." *In re Romansky*, 825 A.2d 311, 315 (D.C. 2003). Willful blindness to the truth

demonstrates dishonest intent. *See U.S. v. Poole*, 640 F.3d 114, 122 (4th Cir. 2011) ("intentional ignorance and actual knowledge are equally culpable under the law" and intentional ignorance "reflects a state of mind that extends beyond any form of mere negligence, or even recklessness."). Dishonest intent can also be established by proof of recklessness, that the respondent "consciously disregarded the risk" created by his actions. *Romansky*, 825 A.2d at 316, 317; *In re Boykins*, 999 A.2d 166, 171-172 (D.C. 2010). The entire context of the attorney's actions is relevant to a determination of intent. *See Ib re Ekekwe-Kauffman*, 210 A.3d 775 at 796-797 (D.C. 2019).

Misrepresentation occurs when a lawyer leads someone to believe "a thing is in fact a particular way, when it is not so[.]" *In re Shorter*, 570 A.2d 760, 767 n. 12 (D.C. 1990) (per curiam). As with dishonesty, a misrepresentation does not have to be deliberate to violate the Rule; it only need be made with "reckless disregard for the truth." *In re Brown*, 112 A.3d 913, 916, 918 (D.C. 2015) (per curiam); *see, e.g.*, *In re Jones-Terrell*, 712 A.2d 496, 499 (D.C. 1998) ("Even if they were, at least in part, attributable to respondent's haste in preparing the petition, the false statement and omissions were of such significance to the issues before the court that we believe her conduct was at least reckless and sufficient to sustain a violation of the rule." (quoting Board report)).

Rule 8.4(a) prohibits a lawyer from "attempt[ing] to violate the Rules of Professional Conduct," or knowingly assist[ing] another to do so . . . ." The Rule does not prescribe a specific *mens rea* for attempt, but in the criminal context, the Court of Appeals has held that "[t]he only intent required to commit the crime of attempt is an intent to commit the offense allegedly attempted." *Smith v. United States*, 813 A.2d 216, 219 (D.C. 2002) (collecting cases). In addition, "every completed criminal offense necessarily includes an attempt to commit that offense," and an attempt may be "proven by evidence that the defendant committed the crime alleged." *Id.* (cleaned up). Thus, to show that Mr. Clark attempted to violate Rule 8.4(c) and thereby violated Rule 8.4(a), Disciplinary Counsel must establish that Mr. Clark intended to engage in conduct involving dishonesty, and proof that he did engage in conduct involving dishonesty also shows that he attempted to do so.

2. Mr. Clark agreed to push President Trump's false claims of election fraud.

After he lost the November 3, 2020 election, President Trump sought to undermine the legitimacy of that election with baseless claims of fraud. But the Department of Justice refused to play along. Although Attorney General Barr accelerated the normal pace of post-election investigations of alleged election irregularities, those investigations did not uncover evidence of fraud that would have

affected the outcome in any state, as Mr. Barr announced on December 1 and again on December 21, 2020. PFF 6, 11, 12, 20.

Once Mr. Barr announced his resignation, President Trump began to look for someone at Justice who would be willing to support his false claims of election fraud. He approached Mr. Donoghue and Mr. Rosen on December 15, the day after Mr. Barr announced his intent to resign, PFF 18-19, December 24, PFF 22, and most pointedly on December 27. PFF 24-27. On that last date, the President was explicit: "Just say the election was corrupt and leave the rest to me and the Republican Congressmen." Although there was no evidence to show it, President Trump urged, "We have an obligation to tell people that this was an illegal, corrupt election." PFF 26.

But Mr. Rosen and Mr. Donoghue would not do the President's corrupt bidding, so he found someone who would, Jeffrey Clark. Before Christmas, Mr. Clark had met at least once with the President, in violation of the Department's White House contacts policy and without informing his superiors. He promised not to do so again—which turned out to be a lie. PFF 23. Mr. Clark then ambushed Mr. Rosen and Mr. Donoghue with his Proof-of-Concept letter in the closing days of the year. PFF 31.

3. The disingenuous Proof-of-Concept letter.

This letter displayed an utter absence of good faith. Mr. Clark's disingenuous statement that he saw "no valid downsides" to sending it cannot possibly have been true. PFF 32. The obvious downside was that if Georgia and the other "relevant" states had acted as he sought to have them act, send two sets of electors to the Congress on January 6, the country would have faced a constitutional crisis unparalleled since 1861. And while he cited some minimal "evidence" to support taking action in Georgia—evidence that the Department had already looked into and discredited, PFF 33b—he cited not one iota of evidence to support taking similar action in any other state.

Mr. Clark's "Proof of Concept" letter was dishonest and contained misrepresentations, and his effort to have the Department of Justice send it to officials in Georgia was an attempt to engage in conduct involving dishonesty and misrepresentation in violation of Rule 8.4(c) and 8.4(a). The letter itself contained numerous false and misleading statements. It stated that the Justice Department had "identified significant concerns that may have impacted the outcome of the election in multiple States, including the State of Georgia," but that was not true. PFF 33a. It cited only the Ligon Report as support for that statement, but the Department did not view the report as evidence of election fraud. PFF 33b. It promised to update state officials about pending investigations even though that would be contrary to the

Department's practice. PFF 33c. It claimed that competing slates of electors had been appointed in Georgia, when that had not happened. PFF 33d. And it falsely claimed that the Department was "trouble[ed]" by aspects of pending litigation in Georgia. PFF 33e.

The email to which the letter was attached and Mr. Clark's subsequent conduct show that he knew these claims were false. The letter claimed that the Department had already identified significant concerns which may have affected the election, but Mr. Clark's subsequent conduct showed that he was still hunting such instances. *See* PFF 44-45. The letter likewise said the Department believed that two slates of electors had been sent to Washington, but Mr. Clark's cover email shows that he knew this was not so; he urged that the legislature "should"—future tense—assemble and make a decision about electors. Compare DCX 8 at 1 *with* DCX 8 at 3. Moreover, both Mr. Donoghue—the person most knowledgeable about the Department's ongoing election investigations— and Mr. Rosen told Mr. Clark, in no uncertain terms, that the statements made in the letter were not true. PFF 35-36.

Mr. Clark did not have any basis to believe the statements in the letter were true. He presented no evidence to Mr. Rosen or Mr. Donoghue at the time to support the claims. PFF 36. Indeed, he contradicted the letter's claims by expressing doubt about whether the Department had done enough to investigate allegations of supposed irregularities. Moreover, a glance at the public record would have revealed

that seven or eight election challenges had already been rejected by the Georgia state and federal courts. PFF 33e. Public statements made by the Republican Secretary of State in Georgia following multiple recounts and audits—all of which were issued weeks before Mr. Clark drafted his letter and were available online—contradicted the letter's statements about the outcome of the election. *See* DCX 37-39, 42. A simple Google search would have uncovered this. While such a search may also have produced wild internet allegations, such as the one about the smart thermostat, and crank complaints by election deniers, the existing credible evidence was that there was no basis for the position Mr. Clark wanted the Department to take. Mr. Clark could not believe otherwise without willfully blinding himself to the truth.

Furthermore, Mr. Clark presented no evidence to the Hearing Committee of which he was aware prior to January 3 that would support the letter. Instead, he invoked the Fifth Amendment—along with various other, inapplicable privileges—when asked specifically for the evidentiary support he had. Tr. 501-521 (Clark). (Mr. Clark's knowledge of election irregularities could not be a matter of executive privilege.) The Hearing Committee should infer from his silence that Mr. Clark had no such support. Mr. Clark invoked the privilege on a question-by-question basis. He could have disclosed any evidence of election irregularities of which he was aware without incriminating himself. Had such evidence existed, disclosing it would have exculpated, not incriminated Mr. Clark. *See In re Clark*, No. 22-BG-0891, 2024

WL 1122655, at *7 n. 29 (D.C. Mar. 15, 2024) (recognizing that adverse inferences are allowed in civil cases but leaving unresolved whether they are allowed in disciplinary matters); *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (Fifth Amendment allows adverse inferences against parties in civil actions when they refuse to testify to probative evidence offered against them); *Mitchell v. U.S.*, 526 U.S. 314, 332 (1999) (Scalia, J., dissenting) (questioning logic of precluding adverse inferences in criminal cases when doing so "runs exactly counter to normal evidentiary inferences").

4. Rather than abandon the Proof-of-Concept letter upon learning of its factual deficiencies, Mr. Clark intensified his efforts to send it.

Mr. Clark did not abandon the idea of sending the letter when his superiors told him they would not sign it; he doubled down. Mr. Donoghue was the most knowledgeable person about the overall status of the Department's post-election investigations, PFF 10, but the most knowledgeable person of the status of the Georgia investigations was the U.S. Attorney in Atlanta, B. J. Pak. Mr. Rosen instructed Mr. Clark to speak with Mr. Pak and gave him Mr. Pak's cellphone number. PFF 43. Mr. Clark disobeyed that instruction. Instead, he conducted his own "investigation," apparently by telephone, although the only person he identified speaking with was an unnamed bail bondsman. He also had no interest in speaking with the Georgia state law enforcement officers. PFF 44-45.

There are two significant conclusions to be drawn from this conduct. First, Mr. Clark's continued amateur investigation belies his claim that the Department had already identified significant concerns—a statement that he amplified in his January 3 draft of the Proof-of-Concept letter by claiming there was now "evidence" of "significant irregularities, rather than "significant concerns." PFF 47. Of course, he had not identified such "evidence;" that statement was a lie. And because he had identified no facts—and never told anyone what the facts were that supported his claims, PFF 36, 40, 45, 53, other than the already debunked Ligon Report, PFF 33b, he cannot plausibly claim that he simply had a different opinion than Mr. Rosen and Mr. Donoghue as to what the facts meant. Second, he was willfully blinding himself to the facts. He refused to speak with the federal official most knowledgeable about the actual evidence and had no interest in speaking with the Georgia Bureau of Investigation. PFF 45.

Mr. Clark also continued to speak directly with President Trump in violation of the Department's White House contact policy, and despite having promised to at least inform Mr. Rosen or Mr. Donoghue if he intended to do so. PFF 23, 37, 41. He threatened to take Mr. Rosen's job if he and Mr. Donoghue did not sign the letter; PFF 46. He actually took Mr. Rosen's job for a period of time on January 3; PFF 49, 52. He apparently revised the letter to make its language more definitive; PFF 47. Finally, he pressed sending the letter at the contentious Oval Office meeting on

January 3 despite being repeatedly told that the claims made in the letter were false and despite the threat of resignations from numerous high-ranking Department and White House officials. PFF 48, 53. Mr. Clark was so intent on sending the letter that he played on the president's sensibilities by appealing to how history might remember them, PFF 53, and he apparently had little concern that it may be necessary to invoke the Insurrection Act against U.S. citizens to quell the public outrage that would have ensued if the president had tried to stay in office beyond January 20. PFF 48. In sum, Clark's prolonged effort to have the Department of Justice send a letter with numerous false claims regarding the 2020 election shows that he attempted to engage in conduct involving dishonesty and misrepresentation in violation of Rule 8.4(c) and thereby violated Rule 8.4(a).

Mr. Clark has emphasized that the letter was never sent, claiming that he engaged in nothing but a vigorous discussion of how to proceed and that he is being prosecuted for a "thought crime." But his conduct was much more than a debate about policy. This was an attempt to do the President's dirty work to undermine, with no basis, the integrity of a presidential election—to do what Mr. Rosen and Mr. Donoghue refused to do, just say the election was corrupt and leave the rest to President Trump. Mr. Clark intended to send, in the name of the Department of Justice, a dishonest letter. The fact that he was stopped from doing so by lawyers who displayed the integrity he lacked does not mitigate the impact of what he did

and what he almost accomplished—what he surely would have done as Acting Attorney General, had Mr. Rosen not insisted on and prevailed in that Oval Office meeting. Rule 8.4(a) prohibits a member of the D.C. Bar from an "attempt to violate the Rules of Professional Conduct." Mr. Clark first attempted to assist or induce Mr. Rosen and Mr. Donoghue to engage in conduct involving dishonesty or misrepresentation, prohibited by Rule 8.4(c). When that effort failed, he attempted to do so himself.

B. Mr. Clark violated Rule 8.4(a) by attempting to send his "Proof of Concept" letter, which would have seriously interfered with the administration of justice in violation of 8.4(d).

1. The Elements of Rule 8.4(d)

Rule 8.4(d) prohibits a lawyer from engaging "in conduct that seriously interferes with the administration of justice." The elements of a Rule 8.4(d) violation are (1) that the lawyer took improper action; (2) that the conduct involved bore directly upon the administration of justice; and (3) that the conduct tainted the process in more than a *de minimis* way, meaning that it at least potentially had an impact upon the process to a serious and adverse degree. *In re White*, 11 A.3d 1226, 1230 (D.C. 2011) (per curiam) (cleaned up). The Court has "declined to adopt a scienter requirement for [Rule 8.4(d)] and concluded that the conduct of [a] respondent . . . was prejudicial to the administration of justice 'whether [it] was reckless or somewhat less blameworthy.'" *In re Hopkins*, 677 A.2d 55, 60 (D.C.

1996); *see also In re Dobbie*, 305 A.3d 780, 808 (D.C. 2023) (citing *In re R.L.*, 640 A.2d 697, 701 (D.C. 1994)) (conduct "somewhat less blameworthy" includes negligent conduct for purposes of Rule 8.4(d)).

Conduct may be improper because it violates another Rule, but "it may [also] be improper simply because, considering all the circumstances in a given situation, the attorney should know that he or she would reasonably be expected to act in such a way as to avert any serious interference with the administration of justice." *In re Hopkins*, 677 A.2d 55, 61 (D.C. 1996).

In most instances, the Rule has been applied to a judicial proceeding, and some of the cases seem to limit its application to such proceedings. But the Court has also found Rule 8.4(d) violations in the absence of an identifiable judicial proceeding. The Court has found a violation where a lawyer's dishonesty in proceedings before the D.C. Council affected that body's decision-making about the propriety of ousting an executive branch official and enacting special legislation on the matter. *White*, 11. A3d at 1232-1233. As Comment [2] to the Rule indicates, the prohibited conduct also includes failure to cooperate with Disciplinary Counsel, and the Rule has been applied in instances where a respondent sought to discourage witnesses from cooperating in a Disciplinary Counsel investigation, outside of an identifiable judicial proceeding. *See In re Martin*, 67 A.3d 1032, 1051 (D.C. 2013) ("well-settled" that agreement with client to refrain from filing or dismissing bar

complaint violates Rule 8.4(d)); *In re Green,* Board Docket No. 13-BD-021 at 18-20 (BPR May 5, 2015) (violation for refusing to settle claim unless other party agreed to withdraw or refrain from filing disciplinary complaint), aff'd. by 136 A.3d 699 (D.C. 2016); *In re Tully*, Board Docket No. 22-BD-025 at 74-6 (BPR HCR Nov. 20, 2023) (Rule 8.4(a) & (d) violations for agreements with departing lawyers prohibiting voluntarily participating in investigations).

2. Sending the Proof-of-Concept letter would have caused needless litigation, a needless quasi-judicial proceeding in the Georgia Assembly, and might have altered the orderly proceedings in Congress to certify the election results.

Mr. Clark's "Proof of Concept" letter was replete with false and misleading statements about the Justice Department's investigation of the 2020 presidential election. It also constituted an improper interference by the Department into determinations assigned by the Constitution to the states. PFF 34-35; Tr. 752-53 (Elliott)). The letter advocated—weeks after the Electoral College had met and the Georgia governor had transmitted the results to the U.S. Archivist—for the state legislature to convene in special session to deliberate on "whether the election failed to make a proper and valid choice between the candidates, such that the General Assembly could take whatever action is necessary to ensure that one of the slates of Electors cast on December 14 will be accepted by Congress on January 6." DCX 8 at 4.

Had Mr. Clark's letter been sent, and had the legislature followed through with the letter's recommended course of action, chaos would have ensued. There would have been a predictable explosion of litigation challenging the legislature's action, as the Republican Governor and Lieutenant Governor of Georgia had warned. *See* DCX 40; Tr. 754-755 (Elliott). The letter also advocated convening the Georgia Assembly into a tribunal to take testimony, consider evidence, and render a decision on the outcome of the presidential election. DCX 8 at 3. This was an attempt to bring about an unwarranted and unnecessary proceeding, analogous to the conduct condemned as a Rule 8.4(d) violation in *White*, *supra.*

The ultimate purpose and effect of the course of conduct Mr. Clark advocated would be to interfere with the certification of the election by Congress on January 6, tipping the election into the House of Representatives if enough state legislatures adopted his recommendation, Tr. 754 (Elliott), U.S. Const. Amend. XII, and possibly reversing the result of a presidential election with no basis for doing so. The Court of Appeals, of course, has never confronted comparable conduct in assessing the scope of Rule 8.4(d), but it is difficult to conceive of a more serious interference with the administration of justice: baselessly bringing about a "contingent election" in Congress to continue in office a President whom the voters had rejected. Mr. Clark was following the direction of President Trump that Mr. Rosen and Mr. Donoghue

refused, "just say that the election was corrupt and leave the rest to me and the Republican congressmen." PFF 26.

It does not matter that Pandora's Box was not opened. The potential effect that Mr. Clark's misconduct would have had on both the legislative and judicial processes is enough. *See In re Martin*, 67 A.3d 1032, 1052 (D.C. 2013) (actual prejudice not required to prove violation of Rule where potential impact is clear).

SANCTION

1. The Standards for Imposing Sanction.

Disciplinary Counsel submits that the only appropriate sanction in this matter is disbarment.

The Court has laid out a number of factors to be considered in determining an appropriate sanction including (1) the nature and seriousness of the misconduct; (2) the prejudice to the client; (3) whether the conduct involved dishonesty or misrepresentation; (4) whether multiple rules were violated; (5) the lawyer's disciplinary history; (6) whether the lawyer has acknowledged his misconduct; and (7) circumstances in aggravation or mitigation. *See In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013).

The sanction should be consistent with that imposed upon comparable misconduct, D.C. Bar R. XI, § 9(h)(1), while recognizing that "each case must be decided on its particular facts." *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en

banc) (cleaned up). A primary purpose of a sanction is deterring other lawyers from engaging in similar conduct. *Id.*; *see also In re Cater*, 887 A.2d 1, 17 (D.C. 2005). The Court also considers "the moral fitness of the attorney and the need to protect the public, the courts, and the legal profession." *In re Rodriguez-Quesada*, 122 A.3d 913, 921 (D.C. 2015) (cleaned up).

2. The Special Circumstances of this Case.

This is a highly unusual case, however, arising from an existential crisis for our democracy. It poses the issue of whether a lawyer may be permitted to use his privilege to practice law to undermine the basic structure of a democratic republic. The Hearing Committee cannot "blind [itself] to the broader context" in which Mr. Clark's misconduct occurred, namely that "[i]t was calculated to undermine the basic premise of our democratic form of government: that elections are determined by the voters." *In re Giuliani*, Board Docket No. 22-BD-027 at 36 (BPR HCR July 7, 2023) (recommending disbarment).

It does not matter that Mr. Clark's misconduct took place over a relatively short period of time. As the committee found in *Giuliani*, that consideration "is singularly unimpressive." *Id*. at 27. Like Mr. Giuliani, Mr. Clark "sought to upend the presidential election but never had evidence to support that effort." *Id*. In fact, the short period of time between December 28, when Mr. Clark first proposed his improper course of action, and January 6, when the Congress was required to certify

the results of the election, only aggravates his misconduct. Had Mr. Clark's proposal been adopted just nine days before January 6 (or on January 3, just three days before), there would have been no time for supporters of the Constitution to react.

It is no secret that the 2020 presidential election was hotly contested and that passions ran high on all sides of the election. But the Hearing Committee should not be distracted by testimony that Mr. Clark appeared sincerely to believe in what he was doing. His sincerity should be examined in the context of his inability to identify any specific claims of fraud or irregularities that would affect the outcome of the election, although repeatedly challenged to do so. PFF 36, 40, 45, 48, 53. It should be examined in the context of his refusal to interview U.S. Attorney Pak, despite being directed to do so, and that he had no interest in speaking to the Georgia Bureau of Investigation. PFF 44-45. It should be examined in the context of his dishonesty to Mr. Rosen and Mr. Donoghue, promising them that he would adhere to the White House contacts policy or at least alert them to future contacts, and then failing to do so. PFF 23, 37, 41.

Finally, it should be examined in the context of his callous indifference to the consequences of his proposed course of conduct—riots in every city—an indifference that exceeds mere recklessness. PFF 48. Extremists are often sincere, and fanatics are the sincerest of all. Such sincerity is no virtue; it is evidence of how dangerous the true believer can be. And if sincerity is feigned, to disguise

overweening ambition, that lawyer is arguably the most dangerous of all. As in the Eastman disciplinary matter, "[v]igorous advocacy does not absolve [a lawyer] of his professional responsibilities around honesty and upholding the rule of law." *In re Eastman*, Case No. SBC-23-0-30029-YDR at 124 (State Bar Court of California, March 27, 2024) (recommending disbarment).

The January 6th Committee rightly found that Mr. Clark's letter "was a lie," and it was part of a scheme to "use the hefty imprimatur of the U.S. Department of Justice" to perpetuate a losing incumbent in power by throwing the results of the presidential election into doubt. Final Report of the Select Comm. to Investigate the January 6th Attack on the United States Capitol, 117th Cong. H.R. Rep. 117-663, at 390-91 (Dec. 22, 2022), https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf. This misconduct contributed to irreparable harm to our nation stemming from unfounded claims of election fraud in the 2020 presidential election. Eight prominent conservatives, who spent "most of [their] adult lives working to support the Constitution and conservative principles upon which it is based" have written, "Repetition of these false charges causes real harm to the basic foundations of the country, with 30 percent of the population lacking faith in the results of our elections." Danforth, Ginsberg, Griffiths, Hoppe, Luttig, McConnell, Olson, & Smith, "Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election," at 1, 3 (July 2022),

https://lostnotstolen.org/wp-content/uploads/2022/07/Lost-Not-Stolen-The-Conservative-Case-that-Trump-Lost-and-Biden-Won-the-2020-Presidential-Election-July-2022.pdf. "To have 30 percent of the country lack faith in election results based on unsubstantiated claims of a 'stolen' election is not sustainable in a democracy." Id. at 6.

The courts and the legal profession cannot tolerate a lawyer misusing his law license in this way. All of us practice law within the structure of a democratic form of government constrained by the Constitution. This structure has stood for more than 230 years, longer than any other democracy, but it is still an experiment in a form of government rarely seen in history. It will not survive if people lose faith in election results. As a member of the D.C. Bar, Mr. Clark swore an oath that he would "support the Constitution of the United States of America." As an officer in the Department of Justice, he undoubtedly took a variation of that oath. By attempting to violate the Rules of Professional Conduct in the ways he did, he betrayed those oaths and, in doing so, his country. Lawyers who betray their country must be disbarred. *See generally In re Squillacote*, 790 A.2d 514, 521 (D.C. 2002) (Bd. Rpt.) (lawyer disbarred following convictions for espionage, misconduct which harms "the security of our republic" and where the victim "is not one person but the entire nation"). Mr. Clark's misconduct was extraordinarily serious. The Hearing Committee can and must consider the extremely probable disruptive consequences

to our democracy when assessing the gravity of Mr. Clark's actions. *See generally Snowden v. U.S.*, 52 A.3d 858, 863 (D.C. 2012) (additional criminal liability can attach for "reasonably foreseeable consequence" of original conduct).

3. **Mr. Clark's Continuing Obduracy.**

Mr. Clark did not explain his actions to the Hearing Committee, instead invoking the Fifth Amendment. Certainly, he can defend himself here however he chooses. But that does not relieve him "from recognizing the seriousness of the misconduct that led to" this proceeding. *In re Yelverton*, 105 A.3d 413, 430 (D.C. 2014). Indeed, lawyers can both mount a vigorous defense while acknowledging mistakes and pledging to do things differently if given the opportunity. *See Dobbie*, 305 A.3d at 812 (crediting the respondent for doing so).

From the outset of these proceedings, Mr. Clark has refused to engage with the facts and the actual allegations against him but has instead treated the process as though it were a totalitarian show trial. His Answer addressed none of the salient facts alleged in the Specification of Charges. Instead, it raised 54 affirmative defenses, including "ODC's Prosecution Here is Political in Nature" (No. 36); "ODC's Collusion with Congress Violates the Separation of Power" (No. 41); "ODC May Not Violate the Confidentiality of the Investigative Stage of the Disciplinary Process or Try Its Case in the Press" (No. 44); "ODC's Filing of Charges Occurred at Least in Part to Penalize Respondent for Exercising His Constitutional Rights, a

Course of Conduct that Violates Due Process and the First Amendment" (No. 46); and "*Res Judicata*/Preclusion" [based on President Trump's acquittal at his second impeachment trial] (No. 51). Needless to say, no evidence was ever adduced to support any of these claims.

This pattern of avoidance, pressing every legal theory no matter how implausible, coupled with an overall strategy of delay, continued throughout these proceedings. Mr. Clark has consistently sought to defer, to remove, and to continue. Indeed, 12 hours before the hearing was scheduled to begin, he filed his Request to Clarify Threshold Questions Regarding the Hearing Committee's and Board's Composition & Nature, Along with Related Statutory and Constitutional Objections. Lest there be any doubt that Mr. Clark, an experienced and proficient civil litigator, was fully invested in the strategy and tactics of his counsel, he sought to argue this "motion" himself. Tr. 33. He also argued another matter personally. Tr. 1757-1763 (Clark).

Rather than grapple with the actual issues in this case, Mr. Clark put on a case of misdirection, calling not a single witness who had any personal knowledge of his conduct. His defense seemed to be that if the Department of Justice had continued to investigate allegations raised by these witnesses after December 28, 2020, it *might* have uncovered some evidence of election fraud that *might* have affected the results. This "defense" ignored the fact that Mr. Clark was claiming that the Department

already had, as of December 28, "significant concerns" (by January 3, "evidence of significant irregularities") that might have affected the election results. In short, he tried to convert the issue at the hearing from what he and the Department were aware of as December 28 or January 3 into what they might have found out if they continued to investigate. But that was not the issue. The issue was whether Mr. Clark had a basis for his proposal to throw a spanner into the workings of the process of certifying the election as of the time of the Proof-of-Concept letter.

This misdirection strategy was coupled with continual argument that he could not receive a fair hearing. *See*, *e.g.*, Tr. 38 (this case was filed as part of "a campaign to destroy conservative lawyers who are willing to raise issues about the election even in privileged and confidential deliberations") Tr. at 1912 ("in Washington D.C., how does someone that's Trump adjacent get a fair hearing …"), 1982 ("Because activist groups, they want to destroy their enemies."), 2071 ("You must have faith in the election [results], or you cannot be a lawyer in the District of Columbia.").

Mr. Clark became combative and self-righteous when asserting privileges on the stand, and he tried on several occasions to make legal arguments in lieu of his three attorneys. *See* Tr. 503, 511-512 (Clark). The Hearing Committee can—and should—consider Mr. Clark's demeanor as additional evidence of his failure to acknowledge the wrongfulness of his misconduct. *See generally Bates v. Lee*, 308 F.3d 411, 421-422 (4th Cir. 2002) (consideration of criminal defendant's demeanor

during trial when assessing guilt did not violate Fifth Amendment). Although he was represented throughout these proceedings, Mr. Clark explicitly named himself as both lawyer and respondent, and identified himself as part of his defense team. Tr. 512 (Clark). How his defense was litigated should, therefore, be attributed to him. The inescapable conclusion is that Mr. Clark believes he did nothing wrong.

During closing argument, the Chair asked Disciplinary Counsel to address what lesser sanction would be appropriate if the Hearing Committee rejects the recommendation of disbarment. While we recognize an obligation generally to assist the Committee, for two reasons we cannot comply with this request—other than to list the factors the Court has said should be taken into consideration, which we have done. First, the practical reason that we cannot help the Committee further is that, with the exceptions of Mr. Giuliani in this jurisdiction and Mr. Eastman in California, no lawyer of whom we are aware has engaged in comparable misconduct. The recommended discipline for Mr. Giuliani and Mr. Eastman, although charged with violation of different rules, was disbarment. Second, we believe it would be inconsistent with our duty to the disciplinary system and the profession to even suggest that a sanction other than disbarment should be contemplated for this respondent. Mr. Clark's misconduct was part of a concerted effort to overturn the will of the voters in the 2020 presidential election. He attempted to usurp the leadership at the Justice Department and misuse the Department's authority to help

accomplish that result, despite all evidence contradicting his position. He had to know that what he was doing was wrong. But Mr. Clark is clearly unwilling to recognize the extreme magnitude of his misconduct. That refusal should be unsettling to us all. It—along with the gravity of potential consequences of his misconduct to the foundations of our country—supports disbarment and only disbarment as the right and necessary sanction to uphold the integrity of the courts and the profession, to protect the public, while deterring Mr. Clark and others from engaging in this sort of misconduct.

CONCLUSION

Disciplinary Counsel requests that the Hearing Committee adopt these proposed findings of fact, conclude that Mr. Clark violated the Rules as charged, and recommend that he be disbarred.

Respectfully submitted,

s/ Hamilton P. Fox, III

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CERTIFICATE OF COMPLIANCE

This document complies with the length and format requirements of Board Rule 19.8(c) because it contains **57,581** words, double-spaced, with one-inch margins, on 8 ½ by 11-inch paper. I am relying on the word-count function in Microsoft Word in making this representation.

s/ Hamilton P. Fox, III
HAMILTON P. FOX, III
Disciplinary Counsel

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2024, I caused a copy of the foregoing *Disciplinary Counsel's Post-Hearing Brief* to be filed electronically with the Board on Professional Responsibility by email to CaseManager@dcbpr.org, and to be served on Mr. Clark's counsel by email to:

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s/ Hamilton P. Fox, III
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