THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
July 31, 2025

In the Matter of:	:	
	:	
JEFFREY B. CLARK,	:	Board Docket No. 22-BD-039
	:	Disciplinary Docket No. 2021-D193
Respondent.	:	
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 455315)	:	

REPORT AND RECOMMENDATION OF
THE BOARD ON PROFESSIONAL RESPONSIBILITY

In late 2020, Respondent was the Assistant Attorney General in charge of the Civil Division of the United States Department of Justice. Respondent had no role in election investigations prior to the events at issue; but based on his review of news articles, internet postings, evidence presented to courts and legislative committees, and affidavits filed in civil cases, he had concerns about the integrity of the 2020 Presidential election. Between December 28, 2020, and January 3, 2021, Respondent urged Justice Department leadership to issue a letter he had drafted that cast doubt on the election results and specifically alleged that the Justice Department's investigations into election "irregularities" had "identified significant concerns that may have impacted the outcome of the election in multiple States, including the State of Georgia."

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* Consult the 'Disciplinary Decisions' tab on the Board on Professional Responsibility's website (www.dcattorneydiscipline.org) to view any prior or subsequent decisions in this case.

Prior to the events at issue, Attorney General William Barr had announced that the Justice Department had uncovered no evidence of outcome-determinative fraud in the 2020 election. Georgia Governor Brian P. Kemp had certified Georgia's presidential electors for Joseph R. Biden, and those votes were to be counted with all other Electoral Votes during a joint session of Congress on January 6, 2021. Yet, Respondent urged his superiors to issue a letter from the Justice Department recommending that the Georgia legislature specially convene to investigate alleged election irregularities, determine which candidate had received the most legal votes, and, if necessary, to appoint electors without regard to the reported results of the popular vote. This letter was intended as a "Proof of Concept" to be sent to several states. Hearing Transcript ("Tr.") 394.

Respondent prepared the letter to be sent on Justice Department letterhead, and to be signed by the two highest-ranking lawyers at the Justice Department at that time (Jeffrey Rosen, the Acting Attorney General, and Richard Donoghue, the Principal Associate Deputy Attorney General), and Respondent. Messrs. Rosen and Donoghue, who, unlike Respondent, were actually knowledgeable about the results of the Justice Department's election-related investigations, refused to sign the letter because it was not true. The Justice Department had *not* "identified significant concerns that may have impacted the outcome of the election in multiple States, including the State of Georgia," and Messrs. Rosen and Donoghue immediately told Respondent so in no uncertain terms.

Respondent did not drop the issue following this clear warning from those who had actual knowledge about the Justice Department's investigation. He continued to advocate that the Justice Department should send the letter after having been told that it contained misrepresentations. However, he never presented Messrs. Rosen and Donoghue with evidence that justified his view. Rosen and Donoghue repeatedly explained that based on the results of its investigation the Justice Department could not truthfully represent that it had found evidence of potentially outcome-determinative election issues.

Although Respondent had developed no evidence to contradict Messrs. Rosen or Donoghue, Respondent considered accepting an offer from President Donald Trump for him to replace Mr. Rosen as the Acting Attorney General. The matter came to a head in a January 3, 2021, Oval Office meeting involving the President, Justice Department leadership, the White House Counsel and others from that office. Respondent argued that he should be appointed Acting Attorney General, so that he could conduct nationwide investigations that would uncover outcome-determinative election issues in just a few days. The others at the meeting argued against his appointment, deriding his proposal as "completely unrealistic." When the President mused that he had nothing to lose by letting Respondent "give it a shot," the others in the meeting told him that there would be mass resignations of Justice Department leadership, the White House Counsel and other attorneys in that office. The President then decided that appointing Respondent to investigate election issues would not be worth "the breakage." Respondent implored the President to

reconsider, telling him that "history is calling, we can do this, we can get it done, just put me in charge, I'll get it done." Respondent did not become the Acting Attorney General, and the letter was never sent.

Hearing Committee Number Twelve concluded that Disciplinary Counsel proved that Respondent's persistence in the face of Messrs. Rosen's and Donoghue's warnings, and without evidence to support certain allegations in the letter, constituted an attempt to make a recklessly false statement, in violation of Rule 8.4(a) (prohibiting attempts to violate a Rule, here Rule 8.4(c)). The Hearing Committee concluded that Disciplinary Counsel had not proven that Respondent's conduct constituted an attempt to seriously interfere with the administration of justice. The Hearing Committee recommended that Respondent be suspended for two years, with a fitness requirement.

Disciplinary Counsel takes exception to the Hearing Committee Report, arguing that the evidence proved that Respondent attempted to make intentionally false statements and to seriously interfere with the administration of justice, and that he should be disbarred.

Respondent also takes exception to the Hearing Committee Report. Respondent makes numerous procedural challenges to this disciplinary prosecution, including arguing that the structure of the District of Columbia attorney discipline system violates the Constitution of the United States, that the Supreme Court's decision in *Trump v. United States* renders him immune from disciplinary prosecution, and that he is not subject to the disciplinary jurisdiction of the Court of

Appeals. On the merits, Respondent argues that the Hearing Committee erred in concluding that he violated Rule 8.4(a) and argues that this case should be dismissed. Respondent's filings with the Board repeatedly mischaracterize the conduct giving rise to this case, as he argues that he is being prosecuted because he differed with others within the Executive Branch regarding what else, if anything, should be done regarding allegations of impropriety in the conduct of the 2020 election. This case is not about a professional disagreement over law enforcement policy, the advice to provide to the President, the quality and thoroughness of the Justice Department's investigations, or what evidence might have been discovered had the Justice Department conducted additional investigations. Instead, the charges against Respondent focus on the truthfulness of the factual assertions contained in the Proof of Concept letter that he authored.

Having reviewed the record in this matter, including the parties' arguments before the Board, we reject Respondent's procedural arguments and dispositive motions. On the merits, we conclude that Disciplinary Counsel proved by clear and convincing evidence that Respondent attempted to make *intentionally* false statements when he continued to advocate that the Justice Department issue a letter containing falsehoods. Although the hearing witnesses agreed that Respondent had sincere *personal* concerns about the integrity of the 2020 election, they also agreed that the *Justice Department* had not identified potentially outcome-determinative issues in Georgia or other states. Respondent knew that because Messrs. Rosen and Donoghue told him so. Thus, Respondent's conduct constituted an attempt to make

intentionally false statements about the results of the Justice Department's investigation.

We agree with the Hearing Committee that Disciplinary Counsel failed to prove that Respondent attempted to seriously interfere with the administration of justice, although for different reasons.

A majority of the Board recommends that Respondent be disbarred.[1] We recognize that there are no factually comparable prior disciplinary cases. But that is not surprising given the underlying facts. In making this recommendation, we are mindful of the need to maintain the integrity of the legal profession and deter the respondent and other attorneys from engaging in similar misconduct. Lawyers must observe the highest standard of professional conduct. At a minimum, they must be honest. While dishonesty is always intolerable, the facts here are significantly aggravating to warrant disbarment: Respondent was prepared to cause the Justice Department to tell a lie about the status of its investigation of an important national issue (the integrity of the 2020 Presidential election). Lawyers cannot advocate for any outcome based on false statements and they certainly cannot urge others to do so. Respondent persistently and energetically sought to do just that on an important national issue. He should be disbarred as a consequence and to send a message to the rest of the Bar and to the public that this behavior will not be tolerated.

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[1] Two Board Members recommend that Respondent be suspended for three years and be required to prove his fitness to practice prior to reinstatement.

I. FINDINGS OF FACT

The Hearing Committee's factual findings, summarized below, are supported by substantial evidence in the record. Board Rule 13.7; *see In re Klayman*, 228 A.3d 713, 717 (D.C. 2020) (per curiam) (quoting *In re Bradley*, 70 A.3d 1189, 1193 (D.C. 2013) (per curiam)); *see also In re Thompson*, 583 A.2d 1006, 1008 (D.C. 1990) (per curiam) ("Substantial evidence [is] enough evidence for a reasonable mind to find sufficient to support the conclusion reached."). Pursuant to Board Rule 13.7, we have made some additional findings and have cited directly to material in the record, where appropriate, to support our findings.

Respondent's Background

Respondent was admitted to the Bar of the District of Columbia Court of Appeals on motion in February 1997. Hearing Committee Finding of Fact ("FF") 1. He served as the Senate-confirmed Assistant Attorney General in charge of the Environmental and Natural Resources Division of the Justice Department from November 2018 to January 2021, and was the Acting Assistant Attorney General for the Civil Division of the Justice Department from September 5, 2020, to January 2021. FF 2. In addition to his government service, Respondent previously worked in private practice at Kirkland & Ellis, LLP, where he engaged in various areas of civil practice and specialized in environmental and regulatory litigation. FF 3.

The Justice Department's Investigations Regarding the 2020 Election

The Justice Department does not have general authority to oversee elections nationwide. It is not the "all-purpose national secretary of elections." The Criminal

Division has assigned responsibilities under the criminal laws to prosecute election fraud, and the Civil Rights Division has authority under several laws to enforce voting rights. FF 9.[2]

Prior to the November 2020 Presidential election, the Criminal Division historically had a "passive and delayed enforcement approach," in which it would conduct no investigations until the elections were over and the result certified. The goal of criminal enforcement was to deter future violations, rather than to change the result of elections. FF 28.

On November 9, 2020, shortly after the November 3, 2020, presidential election, Attorney General William Barr sent a memorandum to all of the United States Attorneys, the Assistant Attorneys General for the Criminal, Civil Rights, and

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[2] The Department of Justice Manual § 8-2.270 provides that:

> The Voting Section of the Civil Rights Division has enforcement responsibility for certain civil provisions of federal laws that protect the right to vote. This includes provisions of the Voting Rights Act of 1965, 52 U.S.C. §§ 10301 to 10702; Voting Accessibility for the Elderly and Handicapped Act of 1984, 52 U.S.C. §§ 20101 to 20107; Uniformed and Overseas Citizens Absentee Voting Act of 1986, 52 U.S.C. §§ 20301 to 20311; National Voter Registration Act of 1993, 52 U.S.C. §§ 20501 to 20511; Help America Vote Act of 2002, 52 U.S.C. §§ 21081 to 21085, 21111; and the Civil Rights Acts of 1957 and 1960, 52 U.S.C. §§ 10101, 20701 to 20706.

Hearing Committee Report at 171 & n.25.

National Security Divisions, and the Director of the FBI entitled "Post-Voting Election Irregularity Inquiries." FF 27. That memorandum noted that

> [a]lthough the States have the primary responsibility to conduct and supervise elections under our Constitution and the laws enacted by Congress, the United States Department of Justice has an obligation to ensure that federal elections are conducted in such a way that the American people can have full confidence in their electoral process and their government.

RX 559 at 1. Attorney General Barr thus authorized all of the recipients

> to pursue substantial allegations of voting and vote tabulation irregularities prior to the certification of elections in your jurisdictions in certain cases, as I have already done in specific instances. Such inquiries and reviews may be conducted if there are clear and apparently-credible allegations of irregularities that, if true, could potentially impact the outcome of a federal election in an individual State.

FF 27. As a practical matter the memorandum moved the date for facilitating initial election reviews six to eight weeks earlier than they otherwise might have. FF 29.

The Department of Justice, the FBI, and the United States Attorneys' Offices received and investigated election-related allegations throughout the country. FF 31; *see also* FF 39 (the Justice Department generally responded to allegations of which it was aware). Principal Associate Deputy Attorney General Richard Donoghue served as a clearinghouse for the Justice Department's investigations into the election and reported to Attorney General Barr and Deputy Attorney General Jeffrey Rosen (the second highest ranking person in the Justice Department). FF 6,

10, 14, 32.[3] Mr. Donoghue received all of the daily reports on significant matters from United States Attorney's Offices, and he received additional information from the Criminal Division of the Justice Department and the FBI. While others within the Justice Department were more familiar with the particular investigations they were conducting, Mr. Donoghue had the most comprehensive overall view of the Justice Department's investigations. FF 32; *see also* FF 34-35 (describing some of the information reported to Mr. Donoghue).

Some of these investigations uncovered instances of fraud or misconduct, but none on the scale to affect the results in any individual state or the election as a whole. FF 36. These investigations did not run to ground all the irregularities brought forward—especially those related to alleged violation of state election rules, for example, whether election workers in Fulton County, Georgia conducted verifications of the signatures on absentee ballots. FF 38. The Justice Department did not prosecute violations of state election procedures unless they rose to the level of criminal conduct. FF 45. Mr. Donoghue reported information about election investigations on a "real-time" basis to Deputy Attorney General Rosen—meeting with him every day at 9:00 a.m. and several times during the day. FF 33.

Prior to the events at issue, Respondent had no role in any of the Justice Department's election-related investigations. The Civil and Environmental and

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[3] The "Principal Associate Deputy Attorney General" is the first among equals of the twelve Associate Deputy Attorneys General who serve on the Deputy Attorney General's staff. FF 6.

Natural Resources Divisions had no responsibility for conducting this type of investigation. FF 37.[4]

On December 1, 2020, Attorney General Barr told an Associated Press reporter that the Justice Department had conducted investigations and not found any fraud on a scale that would change the outcome of the election. This was in accord with the information that Messrs. Rosen and Donoghue had been receiving. FF 52. In a December 21, 2020, press conference, Attorney General Barr reiterated that the Justice Department still believed that there was no fraud on a scale to change the outcome of the election. FF 59.

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[4] In his Third Notice of Supplemental Authority, Respondent provides an example of lawyers in the Civil Division of the Department of Justice filing papers in a criminal case. He offers this evidence to contradict the Hearing Committee's Finding of Fact 37 that the Civil and Natural Resources Divisions of the Justice Department had no role to play in election investigations. The filings Respondent cites in his Third Notice of Supplemental Authority related to the public release of a Special Counsel report, and thus, do not support the suggestion that lawyers in the Civil Division investigate and prosecute criminal cases. The Hearing Committee's finding is supported by testimony from former Acting Attorney General Rosen, which constitutes substantial evidence to uphold this finding because it is "enough evidence for a reasonable mind to find sufficient to support the conclusion reached." *Thompson*, 583 A.2d at 1008. Evidence that lawyers assigned to the Civil Division filed papers in a pending criminal case does not undermine this finding in any way. *See In re Szymkowicz*, 124 A.3d 1078, 1084 (D.C. 2015) (per curiam) (the Board and the Court are bound by findings of fact supported by substantial evidence, even if there is contrary evidence).

On December 14, 2020, Attorney General Barr submitted his resignation, effective at midnight December 24, 2020. FF 54. Following Mr. Barr's resignation, Deputy Attorney General Rosen became the Acting Attorney General, and Mr. Donoghue assumed the responsibilities of the Deputy Attorney General, although his title did not change. FF 60.

Messrs. Rosen and Donoghue had discussed the election fraud investigations with the President and others in a December 15, 2020, meeting in the Oval Office. FF 58. On December 24, 2020, the President called Mr. Rosen to talk more about the election. FF 61. During the course of the conversation, the President made a brief reference to Respondent.[5]

On Sunday, December 27, 2020, Mr. Rosen spoke twice with the President. Mr. Donoghue joined the second, substantive call lasting about ninety minutes. During the call, the President raised a lot of issues and allegations related to the election; some were issues raised in private civil litigation, and others had been

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[5] Mr. Rosen was surprised that the President had mentioned Respondent. *See* FF 61-62. The Justice Department's "White House Contacts Policy" requires that absent prior approval, contact between the Justice Department and the White House take place only at the highest levels—between the Attorney General or Deputy Attorney General (on the one hand) and White House Counsel or Deputy White House Counsel (on the other). FF 23. When Mr. Rosen asked Respondent why the President had mentioned him, Respondent told Mr. Rosen that he met with the President shortly before Christmas, when Respondent had been with Congressman Scott Perry, and they wound up meeting with the President. Mr. Rosen told Respondent that it was not appropriate to have such a conversation without notifying Mr. Rosen before or after. FF 62.

raised on the Internet or on cable news. FF 63. According to Mr. Donoghue's notes from that call, the President began by saying the "country is up in arms over the corruption" and that "people are angry – blaming DOJ+ for inaction." The President discussed various allegations from around the country. He told them that "Thousands of people called their [United States Attorneys' Offices] and FBI," and "DOJ failing to respond to legitimate complaints/report of crimes." FF 64.

At one point, Mr. Rosen said "that the DOJ can't and won't snap its fingers and change the outcome of the election. It doesn't work that way." FF 67. 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." FF 68. Mr. Donoghue responded "Sir, we've done dozens of investigations, hundreds of interviews. The major allegations are not supported by the evidence developed. We've looked at Georgia, Pennsylvania, Michigan and Nevada. We're doing our job. . . . Much of the information you're getting is false." Tr. 110; *see* FF 69. He then explained to the President what the Justice Department had learned in particular investigations. FF 69.

Messrs. Rosen and Donoghue also explained that the Justice Department has an important but limited role in elections and does not file lawsuits on behalf of campaigns or anyone else. They said that the Justice Department does not do quality control for the states, and instead enforces federal criminal and civil rights laws. The President responded by saying that "we have an obligation to tell people that this was an illegal, corrupt election." FF 71-73.

The President was "obviously frustrated" and mentioned that "people tell me Jeff Clark is great and that I should put him in. People want to replace DOJ leadership." FF 74. Mr. Donoghue said that the President should have the leadership he wants, but that the President should understand that the Justice Department can only operate on facts and evidence so changing the leadership is really not going to change anything. The conversation ended with the President being obviously unhappy. He complained that the election was stolen from him and the Justice Department was not doing enough about it. Messrs. Rosen and Donoghue tried to assure him that they knew their jobs, were doing their jobs and would continue to do them and that they had a limited role. FF 75-78.

The Draft "Proof of Concept" Letter

At 4:40 the next afternoon (Monday, December 28, 2020), Respondent sent an email to Messrs. Rosen and Donoghue with the subject line "Two Urgent Action Items." Both the email and the letter it attached said "FOR INTERNAL SJC USE ONLY DO NOT DISTRIBUTE." FF 85. In the cover email, Respondent requested authorization to receive a classified briefing from the Office of Director of National Intelligence ("ODNI") because "white hat hackers have evidence (in the public domain) that a Dominion [voting] machine accessed the internet through a smart thermostat with a net connection trail leading back to China." FF 86.

The cover email also referred to an attached draft of what has been called the "Proof of Concept" letter, which addressed what Respondent described as "the broader topic of election irregularities of any kind." *Id.* The proposed letter was to

be sent on Justice Department letterhead, and over the signatures of Mr. Rosen (as "Acting Attorney General"); Mr. Donoghue (as "Acting Deputy Attorney General") and Respondent (as "(Acting) Assistant Attorney General Civil Division"). FF 87; *see* DCX 8 at 0002. Respondent proposed to send similar letters to the "Governor, Speaker, and President pro temp of each relevant state to indicate that in light of time urgency and sworn evidence of election irregularities presented to courts and to legislative committees, the legislatures thereof should each assemble and make a decision about elector appointment in light of their deliberations." FF 86.

Respondent advocated that the letter be sent "as soon as possible," and offered that he saw "no valid downsides to sending out the letter." *Id.* He recognized that he "put it together quickly and would want to do formal cite check before sending but [he did not] think we should let unnecessary moss grow on this." *Id.*

As discussed in detail below, the draft letter represented 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," and that it had "taken notice" of complaints alleging election irregularities (it included a link to a report prepared by a Georgia State Senator, William Ligon, that found, among other things, that the results of the 2020 election could not be trusted). FF 87-89. "In light of these developments," the draft proposed to recommend that the Georgia legislature convene in a special session to investigate irregularities in the 2020 election to determine whether the election results show which candidate for

President won the most legal votes in the November 3 election, or whether the election failed to make a proper and valid choice between the candidates. FF 87.

This recommendation relied on a since-repealed provision of the Electoral Count Act (3 U.S.C. § 2), which had provided that when a Presidential election in any State had "failed to make a choice on the day prescribed by law [(Election Day)], the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct."[6] *See McPherson v. Blacker*, 146 U.S. 1, 40 (1892); DCX 8 at 0004. Thus, the letter recommended that, if the legislature concluded that the November 3 election failed to make a choice, the Georgia legislature take whatever action is necessary so that Congress accepts either the Biden electors or the Trump electors. FF 87.

The December 28 draft letter noted that time was of the essence because Congress would meet on January 6 to count Electoral College certificates, and, if necessary, consider objections to any certificates or decide between competing slates of elector certificates. DCX 8 at 0003.

Mr. Donoghue's response to Respondent's proposal was swift and clear. A little over an hour after receiving Respondent's email with the draft letter, Mr. Donoghue told Respondent and Mr. Rosen by email that "there [was] no chance that I would sign this letter or anything remotely like this" and he clearly refuted the

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[6] 3 U.S.C. § 2 was repealed by the Electoral Count Reform Act of 2022 (Pub. L. 117-328, Div. P, Title I, § 102(a), Dec. 29, 2022, 136 Stat. 5233).

assertion that the Justice Department had discovered potentially outcome-determinative election issues. FF 94. He agreed that the Justice Department "is investigating various irregularities in the 2020 election for President" but told Respondent that, to his knowledge, the investigations "relate to suspicions of misconduct that are of such a small scale that ***they simply would not impact the outcome of the Presidential Election***." *Id.* (emphasis added). He reminded Respondent that "AG Barr made that clear to the public only last week, and I am not aware of intervening developments that would change that conclusion." *Id.* He specifically rejected the letter's reference to potential outcome-determinative issues: "I know of nothing that would support the statement, 'we have identified significant concerns that may have impacted the outcome of the election in multiple states.'" *Id.*

In addition to factual inaccuracies, Mr. Donoghue told Respondent that it was not the Justice Department's role to make "recommendations to a State legislature about how they should meet their Constitutional obligation to appoint Electors." FF 96. He noted that pursuant to the Electors Clause of the Constitution,[7] "Georgia (and every other state) ha[d] prescribed the legal process through which they select their Electors. While those processes include the possibility that election results may 'fail[] to make a choice', it is for the individual State to figure out how to address

[7] The Electors Clause, Article II, Section 1, Clause 2, provides in relevant part that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" for the election of the President and Vice President.

that situation should it arise." *Id.* (second alteration in original). Mr. Donoghue then emphasized that "as I note above, there is no reason to conclude that any State is currently in a situation in which their election has failed to produce a choice." *Id.* He told Respondent that he had "not seen evidence that would indicate that the election in any individual state was so defective as to render the results fundamentally unreliable." *Id.* Given the evidence, Mr. Donoghue said he could not "imagine a scenario in which the Department would recommend that a State assemble its legislature to determine whether already-certified election results should somehow be overridden by legislative action." *Id.*

In short, Mr. Donoghue, the person most knowledgeable of the status of the Justice Department's investigations, told Respondent in no uncertain terms that the Justice Department had not uncovered evidence of misconduct that would affect the outcome of the Presidential election, that there was no basis to assert that the election results in any state were fundamentally unreliable, and that there was no reason to suggest that a State legislature should override the election results. Mr. Donoghue told Respondent that sending this letter would be a "momentous" step that could not be taken lightly based on limited research and investigation. FF 97.

Messrs. Rosen and Donoghue had a contentious meeting with Respondent after 6:00 pm that evening (December 28). Messrs. Rosen and Donoghue spoke about why they believed the letter was inappropriate, and about how the Justice Department had done investigations, taken in allegations, had the FBI and others run

them down, and just had no basis to make the claims Respondent was pressing it to make in his "Proof of Concept" letter. FF 101.

When Mr. Donoghue asked Respondent for the source of his information, and noted that Respondent was not involved in the Justice Department investigations, Respondent said that he had been reading allegations made in filings in civil cases and said things to the effect that "it's all over the place, . . . it's all over the news; it's all over the Internet. There were all these affidavits being filed, and we need to do something about it." FF 104.

Respondent talked about the allegations he was focusing on: that smart thermostats were altering election results and concerns about vote counting irregularities at the State Farm Arena in Atlanta. Mr. Donoghue told Respondent that the intelligence community had extensively briefed them on the smart thermostat theory before the election and it was just not something they believed was true. FF 102-03. Mr. Rosen explained that the things Respondent had been hearing on the internet were just not supported by evidence. FF 101. Respondent did not explain a factual basis for the statements in the letter about irregularities that "may" affect the result, except to express skepticism about the work that had been done. FF 103. After the meeting, Respondent knew that the letter was false, as Mr. Rosen told him "this is not consistent with what the Department's knowledge is." Tr. 392.

When Rosen and Donoghue asked why they were hearing Respondent's name from the President, Respondent said he had been to the Oval Office within the

previous few days and that the President was very concerned that "we don't have the right leadership in place"—meaning Messrs. Rosen and Donoghue—and that the President was thinking about making a leadership change—which Mr. Donoghue understood to mean that Respondent would be part of the Justice Department leadership and Messrs. Rosen and Donoghue would not be. FF 106.[8]

Continuing Disagreement Regarding the Integrity of the 2020 Election and the Proof of Concept Letter

Between Tuesday December 29, 2020, and Friday, January 1, 2021, Messrs. Donoghue and Rosen continued to have additional contacts with the White House (in one instance with the President personally and in other instances with others at the White House) about possible election-related investigations. FF 112. During a December 31, 2020 meeting, the President was "very frustrated" and said that he felt the Justice Department needed to do something. FF 116. Messrs. Rosen and Donoghue told the President that "to the extent we get allegations and they appear to be credible, we're looking at them. We're doing our job." FF 117.

Respondent was ultimately given the requested classified briefing from the ODNI, and was supposed to call the United States Attorney in Atlanta so he could see "we actually looked at [the State Farm Arena allegations], we actually

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[8] When Respondent said that he had met with the President, Mr. Donoghue was taken aback and said "you violated the White House contacts policy," and Respondent said words to the effect that "there's more at stake here than a policy." FF 107; *see supra* note 5. Mr. Donoghue said words to the effect of "[y]ou know what the policy says, you know what it requires. Do not violate it again," and Respondent said that he would not. FF 108.

interviewed the witnesses, we actually looked at the tape and . . . determined that these allegations were not well-founded." FF 109. Mr. Rosen knew that Respondent was advising the President, and Mr. Rosen wanted Respondent to know "that there's things that are untrue being said." Tr. 402; *see* Tr. 401.

On January 1, 2021, Mr. Rosen gave Respondent U.S. Attorney B.J. Pak's cell phone number. FF 126. Mr. Pak was the U.S. Attorney in Atlanta, Georgia who led the investigation of the State Farm Arena allegations. *See* Tr. 158, 402-03. The next morning, Mr. Rosen asked whether Respondent was able to follow up, but he had not. Respondent responded that, instead of speaking with U.S. Attorney Pak, "I spoke to the source and [I'm] on with the guy who took the video [of the State Farm Arena] right now. Working on it. More due diligence to do." FF 126. This was not what Mr. Rosen had asked Respondent to do. *Id.* Respondent never contacted Mr. Pak to discuss the actual results of the investigation the U.S. Attorney's Office had conducted. FF 132.

On Saturday, January 2, Messrs. Rosen and Donoghue met with Respondent in a Secure Compartmentalized Information Facility at the Justice Department, where they could discuss classified information. FF 130. The meeting was contentious and everyone was angry. Respondent reported that he had received the ODNI briefing and received the same information they had reported before the election: that there was no evidence of ballot or data tampering in the intelligence community. There were efforts to influence the election, but not to change data or tamper with ballots. Respondent expressed dissatisfaction with the quality of the

report, but did not say there was contrary evidence. FF 131. Respondent noted that he had not spoken to United States Attorney Pak in Georgia, but not did not explain why. Respondent said he had done other things, but was unable to identify any credible allegations. Respondent interviewed over the phone the largest bail bondsman in Georgia, who had been doing some investigation of his own and had some video surveillance of shred trucks at an election facility. This individual claimed that the Georgia Bureau of Investigation and the United States Attorney for the Southern District of Georgia knew about the allegations but had not taken action. Mr. Donoghue commented that Respondent wanted to send the Proof of Concept letter based on what amounted to "two allegations of ballot shredding in Georgia." FF 132.

In summary, after the December 28 meeting where Messrs. Rosen and Donoghue told him that the letter was not true, Respondent's minimal investigation appears to have been limited to reviewing publicly available civil pleadings and what he, as one person, could obtain in the short period of time between December 28, 2020 and January 3, 2021. Respondent did not discover evidence that would support his letter's assertion 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." FF 140; *see also* FF 87.

Mr. Donoghue told Respondent that he should know better now (January 2) than he did a few days before why the draft letter should not be sent. Mr. Rosen said that the letter was not something that would ever be approved on their watch.

FF 133. There is no evidence that after this January 2 meeting, Respondent obtained any additional information that would support the statements in the Proof of Concept letter. FF 134.

Also during the January 2 meeting, Respondent said that he had again spoken to the President, that the President was interested in a leadership change, and had offered him the position of Acting Attorney General. FF 135. Respondent told Messrs. Rosen and Donoghue that he had promised to give the President an answer by Monday (January 4), but that they could avoid all that if they would agree to sign onto the letter. Messrs. Donoghue and Rosen did not change their minds, and reiterated that the Justice Department would not send out the draft letter as long as they were in charge. FF 136.

Respondent's Meeting with Deputy White House Counsel Philbin

On either January 2 or 3, 2021, Deputy White House Counsel Patrick Philbin, Respondent's former colleague at Kirkland & Ellis, spoke with Respondent about accepting the role of Acting Attorney General, as well as the theories underlying Respondent's Proof of Concept letter. FF 18, 144-47. Respondent shared his view was that "there was a real crisis in the country" and he was "being given an opportunity to do something about it," and after struggling with the decision, he thought he had a duty to do something. FF 145. Mr. Philbin told Respondent that he thought that the theories had been debunked, explaining there was not "any 'there' there." FF 146. They discussed various theories of fraud, and whether Respondent should be appointed Acting Attorney General in order to investigate those theories.

Mr. Philbin told Respondent that none of the allegations warranted his appointment to conduct investigations. Mr. Philbin did not think that any of the information suggested that fraud could have changed the outcome of the election. FF 147. Mr. Philbin's testimony to the Hearing Committee was succinct: it was "not as if there was a big smoking gun problem there and everyone was trying to turn a blind eye to it so the only way to solve that situation was to have someone else come in." *Id.* Although Mr. Philbin was not as focused on the Proof of Concept letter itself, he also did not believe the circumstances justified sending the letter to the State of Georgia and did not think there was "back up" for an indication that the federal government had actually found irregularities in the Georgia election. *Id.*

Mr. Philbin explained to Respondent that if the President appointed Respondent Acting Attorney General, there would be a massive wave of resignations at the Justice Department, and people would not be willing to follow him to pursue these theories of fraud that the Justice Department had already debunked. Respondent thought there were enough people who would stick with him for him to be successful. FF 148. Mr. Philbin did not see a viable path to actually changing the vote in the Electoral College, but he told Respondent that if, by some miracle somehow, he did something and found a way for the President to stay in the White House past January 20, there would be riots in every major city in the country. It was just not an outcome the country would accept. FF 149-150. Respondent responded "well, Pat, that's what the Insurrection Act is for." The "Insurrection Act" is a colloquial term for a provision that permits the President to call out federal

troops and/or federalize the National Guard to restore order if there is an area in a state where normal civil authorities are not able to maintain order. FF 151.

Mr. Philbin thought that Respondent's statements showed a lack of judgment, and were "off the chart." FF 152. He thought for the "obvious reason that if your planned course of action is one that will or has the high likelihood of triggering riots in every major city in America, you've got to be really sure about what you're doing and have no alternatives," and "be justified 100 percent, 1000 percent," and this was not the sort of situation he understood they were talking about. *Id.* There is no evidence in the record that Respondent tried to convince Mr. Philbin that he had already obtained evidence that would contradict Messrs. Rosen's and Donoghue's conclusion that the Justice Department had not uncovered evidence of potentially outcome-determinative problems in the election. Instead, their discussion focused on whether Respondent should be appointed Acting Attorney General so that he could conduct investigations in the future. *See* FF 147.

Although Mr. Philbin disagreed with Respondent regarding the validity of the various fraud theories, he nonetheless also believed that Respondent was "100 percent sincere in his views" and that he "felt that he essentially had a duty . . . because [he thought] something wrong [was] happening . . . and he was the one who was sort of put on the spot to have the opportunity to do something." FF 153. Mr. Philbin said that he does not know many people with "that kind of courage." *Id.* Respondent's subjective belief that there was something wrong that should be investigated further is of some relevance here; however, the question presented by

Disciplinary Counsel's charges is whether it was false to represent that the *Justice Department* had already "identified significant concerns that may have impacted the outcome of the election in multiple States." *See* FF 87.

The January 3, 2021 Oval Office Meeting

On Sunday, January 3, 2021, Respondent told Mr. Rosen that he was going to accept the President's offer to become Acting Attorney General because he had a very different view of what the Justice Department's posture should be. Mr. Rosen told him it was a colossal mistake. FF 154. Mr. Rosen called White House Chief of Staff Mark Meadows, FF 114, and scheduled a meeting with the President for 6:15 p.m. at the White House, so that he could hear directly from the President. FF 155, 158-59. Before the meeting, Mr. Donoghue had a call with all but one of the Assistant Attorneys General who led the various Justice Department Divisions. During the call, he explained that Respondent wanted to send the letter that Messrs. Rosen and Donoghue did not believe was accurate. All of the Assistant Attorneys General on the call said they were going to resign if this happened. FF 160.

The meeting was attended by the President, Respondent, Mr. Rosen, Mr. Donoghue, White House Counsel Patrick Cipollone, Deputy White House Counsel Philbin, Senior Advisor to the President Eric Hershmann, and the Assistant Attorney General for the Office of Legal Counsel, Steven Engel. FF 161-62; *see also* FF 158-59. The President said that Messrs. Rosen and Donoghue had failed to do their job, but he was not advocating one way or the other on whether to have Respondent replace Mr. Rosen. FF 162.

Everyone other than Respondent opposed having Respondent replace Mr. Rosen as Acting Attorney General and opposed sending the letter. FF 163. Messrs. Rosen and Donoghue reiterated that they had done the investigations and the interviews, searched everything they ought to and the evidence did not pan out, and that people had been telling the President things that were not true. FF 164. The White House Counsel's personnel also argued against the letter. FF 165. In response, Respondent expressed that he would conduct "real investigations [that] needed to be done," without identifying any specific investigations or set of allegations he thought were worth investigating. FF 167.

At one point, the President asked "What do I have to lose, if I put this guy in, at least he can give it a shot." FF 168. Mr. Donoghue responded that the President had a lot to lose because he was looking at mass resignations in the Justice Department. Mr. Donoghue said that all of the Assistant Attorneys General were going to resign—people whom the President chose and who believed in the administration. He added that the President was going to lose a lot of the United States Attorneys. *Id.* White House Counsel Cipollone, Deputy White House Counsel Philbin and Mr. Engel said that they would resign. FF 169-170. Mr. Hershmann said "see, this is a disaster, . . . [n]o good will come of this." FF 169. There were predictions that others in the Justice Department would resign as well, including the Solicitor General. FF 170. Respondent responded with words to the effect of "well, you know, if we have to suffer some resignations, so be it, you know, we'll get the job done." FF 171.

It was an intense discussion. People raised their voices and used impolite language. The meeting lasted for about two-and-a-half hours. In the last fifteen minutes or so, the President had clearly made up his mind and said that this is not going to be worth "the breakage." FF 172. At that point, Respondent began imploring the President to reconsider. He said that "history is calling, we can do this, we can get it done, just put me in charge, I'll get it done." FF 173. Then the President "sort of doubled down," and said "no, I've already said I'm not going to do it." *Id.* The draft letter was never sent because the President overruled Respondent's request. *Id.*

II. CONCLUSIONS OF LAW

A. Respondent's Dispositive Motions and Legal Defenses

1. Respondent's Duty to Provide Legal Advice to the President Does Not Excuse His Attempt to Make a False Statement Regarding the Results of the Justice Department's Investigation.

Respondent opens his brief by arguing that his duty to advise the President somehow excuses his attempted dishonesty. To make this argument, he tries to change the nature of this case, arguing that he had a duty to zealously advocate his views regarding the 2020 election when advising the President and discussing the issue with those who did not share his views. That may be true, but this case is not about vigorous debate.

There is no dispute that many people (including the President) did not trust the results of the 2020 election. But the Proof of Concept letter did not say that there were differences of opinion among those employed by the Justice Department

regarding the existence of outcome-determinative issues with the 2020 election. Instead, it said that "at this time [the Justice Department has] identified significant concerns that may have impacted the outcome of the election in multiple States, including the State of Georgia." That simply was not true. Respondent's duty to debate with his colleagues and provide the President with his best legal advice does not allow him to misstate the conclusions of the Justice Department's investigations.[9]

2. Respondent Is Not Immune from Disciplinary Prosecution.

a. *Trump v. United States* Did Not Immunize Respondent.

Respondent argues that "the allegations against [him] are squarely within the scope of the President's absolute immunity," as discussed in *Trump v. United States*, 603 U.S. 593 (2024). Resp't Br. at 21. Respondent does not argue that *Trump* explicitly confers immunity on the President's subordinates, but rather that the Supreme Court "will extend immunity and evidence preclusion where logically necessary to give the immunity its intended effect." *Id.* at 23.

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[9] On February 7, 2025, Respondent filed a Fourth Notice of Supplemental Authorities Supporting Respondent, in which he cited a February 5, 2025, memorandum from Attorney General Pamela Bondi to support the argument that Respondent was required to provide the President with his best advice, without regard to the disagreement of others. This memorandum does not change our conclusion that Respondent's obligation to advise the President did not permit him to attempt to tell a lie.

We agree with the Hearing Committee that *Trump*'s immunity discussion is limited to the immunity of the President of the United States from criminal prosecution. Nothing in *Trump* extends that immunity to other Executive Branch employees. As the Hearing Committee discussed, the Supreme Court granted certiorari to determine a very narrow issue: "[w]hether and if so to what extent does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office." *Trump*, 603 U.S. at 637. Indeed, the first two sentences of the *Trump* opinion reiterate the limited issue: "This case concerns the federal indictment of a former President of the United States for conduct alleged to involve official acts during his tenure in office. We consider the scope of a President's immunity from criminal prosecution." *Id.* at 601; *see also id.* at 605 ("We are called upon to consider whether and under what circumstances such a prosecution [(of a former President)] may proceed."). The Supreme Court concluded that

> under our constitutional structure of separated powers, the nature of Presidential power requires that ***a former President*** have some immunity from criminal prosecution for official acts during ***his*** tenure in office. At least with respect to ***the President's*** exercise of ***his*** core constitutional powers, this immunity must be absolute. As for ***his*** remaining official actions, he is also entitled to immunity.

Id. at 606 (emphases added).

The Supreme Court noted that "[d]etermining whether an action is covered by immunity thus begins with assessing ***the President's authority*** to take that action." *Id.* at 617 (emphasis added). It then examined the allegations in the indictment to

determine whether those allegations implicated the President's exclusive authority, and considered the indictment's allegation that

> Trump and his co-conspirators sought to overturn the legitimate results of the 2020 presidential election. . . . As part of this conspiracy, Trump and his co-conspirators allegedly attempted to leverage the Justice Department's power and authority to convince certain States to replace their legitimate electors with Trump's fraudulent slates of electors. . . . According to the indictment, Trump met with the Acting Attorney General and other senior Justice Department and White House officials to discuss investigating purported election fraud and sending a letter from the Department to those States regarding such fraud. . . . The indictment further alleges that after the Acting Attorney General resisted Trump's requests, Trump repeatedly threatened to replace him.

Id. at 619-620 (internal quotation omitted). *Trump* held that the President was immune from criminal prosecution based on such allegations because

1. "[t]he allegations in fact plainly implicate Trump's 'conclusive and preclusive' authority. . . . And the Executive Branch has 'exclusive authority and absolute discretion' to decide which crimes to investigate and prosecute, including with respect to allegations of election crime." *Id.* at 620 (first quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 534 (1952) (Jackson, J., concurring); and then quoting *United States v. Nixon*, 418 U.S. 683, 693 (1974)); and,

2. "[t]he President's 'management of the Executive Branch' requires him to have 'unrestricted power to remove the most important of his subordinates'—such as the Attorney General—'in their most important duties.'" *Id.* at 621 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982).

Respondent tries to take advantage of *Trump*'s discussion of the efforts to send the Proof of Concept letter to argue that "[t]he allegations against [Respondent] here are

squarely within the scope of the President's absolute immunity." Resp't Br. at 21. Similarly, Respondent argues the disciplinary charges against him must be dismissed because *Trump* held that "Congress cannot act on, ***and courts cannot examine***, the President's actions on subjects within his conclusive and preclusive constitutional authority." *Id.* at 22 (quoting *Trump*, 603 U.S. at 609 (internal quotation omitted)). These arguments fail because unlike *Trump*, this disciplinary proceeding does not examine the President's actions, but rather considers whether Respondent violated the D.C. Rules of Professional Conduct. Any limitations on a court's scrutiny of a President's conduct do not apply to Respondent.

b. Respondent Is Not Entitled to Prosecutorial Immunity from Disciplinary Complaint.

Respondent argues that he is entitled to absolute prosecutorial immunity because he "was involved in investigative steps that were preliminary to prosecutorial evaluations." Resp't Br. at 23; *see also* Resp't Br. at 24. We agree with the Hearing Committee's analysis (set out below), rejecting this argument:

> Although federal prosecutors, for example, are generally immune from at least civil liability for prosecutorial decisions, that "[p]rosecutorial immunity is premised on the belief that disciplinary proceedings, rather than civil proceedings are the appropriate means of addressing the unethical conduct." *In re Doe*, 801 F. Supp. 478, 487 (D. N.M. 1992). Indeed, the Supreme Court decision that established civil prosecutorial immunity, *Imbler v. Pachtman*, 424 U.S. 409 (1976), noted that "a prosecutor stands perhaps unique among officials whose acts could deprive persons of constitutional rights in his [or her] amenability to professional discipline by an association of his [or her] peers." 424 U.S. at 429.

> Thus, although prosecutors are absolutely immune, for example, from civil lawsuits for failing to make disclosures of potentially exculpatory information required by *Brady v. Maryland*, 373 U.S. 83 (1963), *see Jones v. Yanta*, 610 F. Supp. 2d 34, 42 (D.D.C. 2009); *see generally, e.g.*, *Kassa v. Fulton C*[*n*]*ty.*, 40 F.4th 1289, 1292-93 (11th Cir. 2022), they remain subject to disciplinary sanction for that conduct. *See, e.g.*, Rule 3.8(e); *In re Dobbie*, 305 A.3d 780, 787 (D.C. 2023) (imposing sanctions); *In re Kline*, 113 A.3d 202 (D.C. 2015) (discussing numerous cases involving this issue).

HC Rpt. at 151.

We agree with the Hearing Committee that Respondent is not entitled to prosecutorial immunity from disciplinary complaint.

c. Respondent is Not Entitled to Qualified Immunity.

Respondent argues that he is entitled to qualified immunity because "no lawyer has ever been disciplined over a draft letter that was never sent. Therefore, there was no violation of any clearly established law." Resp't Br. at 24-25. We disagree.

In making this argument, Respondent relies on *Harlow v. Fitzgerald*, which held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Neither *Harlow* nor any case cited by Respondent applies the qualified immunity concept to professional discipline matters. The Court of Appeals has not addressed this issue, but other jurisdictions have concluded that qualified immunity does not bar

professional discipline. *See, e.g.*, *In re Discipline of Arabia*, 495 P.3d 1103, 1109-1110 (Nev. 2021); *Silberg v. Anderson*, 786 P.2d 365, 373-74 (Cal. 1990) (recognizing that although a tort action based on communications between participants in earlier litigation is precluded under immunity or privilege principles, an attorney may nevertheless be subject to discipline for such a communication); *Wright v. Yurko*, 446 So. 2d 1162, 1164 (Fla. Dist. Ct. App. 1984) (providing that there can be no civil action for slanderous statements made during the course of an action and the remedies for such slander "are left to the discipline of the courts, the bar association, and the state"); *Hawkins v. Harris*, 661 A.2d 284, 288 (N.J. 1995) ("Although the public policy served by the absolute privilege immunizes the defamer from a civil damage action, the privilege does not protect against professional discipline for an attorney's unethical conduct.").

Assuming for the sake of completeness that qualified immunity might apply in a disciplinary case, we consider the merits of Respondent's argument. *Harlow* offered the following guidance on the application of its "reasonable person" standard: "*If the law at [the relevant] time was not clearly established,* an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818 (emphasis added). Notably, Respondent's *Harlow* quote omitted the italicized language above; that language

defeats his argument.[10] At the time of the events at issue, the requirements of Rules 8.4(a), 8.4(c) and 8.4(d) were "clearly established," and a reasonable member of the D.C. Bar would have known that attempting to tell a lie or attempting to interfere with the administration of justice violated Rules 8.4(a) (prohibiting an attempt to violate the Rules); 8.4(c) (prohibiting dishonesty, fraud, deceit, or misrepresentation); and 8.4(d) (prohibiting conduct that seriously interferes with the administration of justice).

Respondent argues that "[t]he conduct that ODC asks to penalize here is conduct that has never previously been identified as unlawful because there has never been a disciplinary action against a lawyer for proposing a letter never sent." Resp't Br. at 25. However, Respondent cites no authority for the proposition that a respondent is entitled to qualified immunity unless the Court has already decided a case involving similar facts. *Harlow* held that qualified immunity may be available where the law was not clearly established. It did not hold that qualified immunity is available unless someone else has already faced the same factual allegations.

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[10] At page 25 of his brief, Respondent argues that "*Harlow* holds that qualified immunity applies where 'an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to know that the law forbade conduct not previously identified as unlawful.'" (quoting 457 U.S. at 818 (internal quotation omitted)). As noted, Respondent omitted the important condition that this allowance would arise only if the "law at time was not clearly established." *Id.*

Respondent's argument echoes one rejected by the Court of Appeals last year, in *Gordon v. District of Columbia*, 309 A.3d 543 (D.C. 2024). *Gordon* considered whether qualified immunity barred a Fourth Amendment claim against an employee of the D.C. Historic Preservation Office who entered plaintiffs' home to conduct a historic preservation site visit without plaintiffs' permission, but with the permission of a real estate agent. The D.C. government asserted the employee was entitled to qualified immunity unless plaintiffs "can cite a case where a court has held that a 'non-law enforcement employee viewing a publicly listed house to consider the property's historical character, invited as part of an approved realtor tour' violated the homeowner's Fourth Amendment rights." *Gordon* 309 A.3d at 555. The Court disagreed, and noted that the Supreme Court has "rejected the proposition that a plaintiff must be able to cite a case directly on point," and that "the Court has explained that a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." *Id.* (internal quotations omitted). As discussed above, Rules 8.4(a), 8.4(c), and 8.4(d) apply with obvious clarity to an attempt to make a false statement or an attempt to seriously interfere with the administration of justice. Respondent is not entitled to qualified immunity simply because no other members of the Bar have been prosecuted on these facts.

Respondent is not entitled to qualified immunity from disciplinary prosecution.

3. Respondent is Not Entitled to a Stay Pending Appeal on the Immunity Issue.

Respondent argues that "all proceedings on issues other than immunity" should be "frozen" while Respondent appeals the Hearing Committee's recommendation that none of the asserted immunities bar this prosecution. As Disciplinary Counsel asserts, the Court has already rejected Respondent's request to stay this proceeding pending interlocutory appeal of the immunity issue. Order, *In re Clark*, D.C. App. No. 24-BG-0719 (Sept. 4, 2024) (dismissing petition seeking "immediate judicial review of the Board's decision not to consider the merits of his immunity claim separate from, and prior to, any other claims of error that he elects to brief with the Board"). In light of this Court order, there is no basis for the Board to stay these proceedings to consider only the immunity issue. As such, Respondent is not entitled to a stay pending interlocutory appeal.

4. Disciplinary Counsel Did Not Rely on Inadmissible Evidence.

Respondent argues that *Trump* prohibits the consideration of testimony from Messrs. Rosen, Donoghue, and Philbin because "no evidence may be introduced to prosecute conduct that would intrude upon the President's exercise of his core constitutional authorities." Resp't Br. at 29 (citing *Trump*, 603 U.S. at 631). We disagree because *Trump* did not announce a categorical rule that no evidence of a President's official acts could ever be admitted in any judicial proceeding against any person.

Instead, *Trump*'s discussion of evidence preclusion was narrowly tailored to avoid defeating the intended effect of *Presidential* immunity, and concluded that

"[u]se of evidence about such conduct, even when an indictment alleges only unofficial conduct, would thereby heighten the prospect that the President's official decision making will be distorted." *Trump*, 603 U.S. at 631. Thus, *Trump*'s bar on the admission of official acts evidence applies only in cases involving a President, not a disciplinary action against a Justice Department lawyer.

Respondent also argues that the Hearing Committee should not have included evidence covered by the executive privilege, the deliberative process privilege, the law enforcement privilege, and the attorney-client privilege held by President Trump. *See* Resp't Br. at 31-38. As is thoroughly addressed in the Hearing Committee's February 27, 2024, Order, Respondent's motion in limine to exclude evidence purportedly covered by one or more of these privileges was denied because Respondent did not have standing to assert privileges on behalf of the President. Standing issues aside, the Hearing Committee also concluded that the President did not hold all of the proffered privileges, that the Justice Department did not assert any privilege, and that privilege could not be asserted over information that had already been publicly disclosed.[11] Respondent argues that the Hearing Committee

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[11] In his Eighth Notice of Supplemental Information, Respondent filed a letter from the Justice Department asserting a number of privileges in response to a Freedom of Information Act ("FOIA") request for "records concerning communications involving Richard Donoghue's monitoring investigation of allegations of election fraud and irregularities." Respondent argues that the case should be dismissed because the Hearing Committee should not have received evidence that Respondent argued was protected by a number of privileges. However, as discussed in the Hearing Committee's February 27, 2024, Order, no party holding any of these

improperly "adjudicate[d] whether an invocation of presidential communications privileges has been overcome by the need for evidence in administrative evidentiary hearing." Resp't Br. at 34-35. This argument is based on an inaccurate view of the Hearing Committee's analysis and conclusion on this issue.

5. The Impact on the Profession of Disciplining a Lawyer Over a Confidential Unsent Draft Does Not Warrant Dismissal.

Respondent argues that "based on the accumulated wisdom of centuries" confidential internal deliberations and unsent drafts "were never previously cognizable as matters of bar discipline." Resp't Br. at 38. As discussed elsewhere, Respondent is charged with attempting to make a false statement. Contrary to Respondent's argument, sanctioning Respondent will not discourage "the free, frank, and confidential internal exchange of information, advice, theories, and arguments by lawyers and their clients." *Id.* at 39. A sanction here will discourage dishonesty.

6. The Hearing Committee Did Not Erroneously Require Respondent to Assert the Fifth Amendment from the Witness Stand.

Respondent recognizes that the Court "has previously held that disciplinary respondents must invoke the Fifth question-by-question while on the stand. *In re Barber*, 128 A.3d 637 (D.C. 2015)." Resp't Br. at 40. But he argues that he should

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privileges asserted the privilege to prevent disclosure. The fact that the Justice Department recently asserted privilege in response to a FOIA request does not mean that the Hearing Committee should have excluded evidence absent objection from the privilege holder.

have been allowed "to stipulate that he would invoke the Fifth to all of ODC's questions." *Id.* He argues that the hearing should be vacated as "conducted in violation of [his] Fifth Amendment rights," and that his witness examination and references to his demeanor should be stricken. *Id.* at 42.

We see no violation of Respondent's Fifth Amendment rights. The Hearing Committee was aware of *Barber*'s holding that a respondent could not rely on the Fifth Amendment to decline to provide any testimony, but must invoke the Fifth Amendment on a question-by-question basis. *See* Tr. at 490-91 (quoting *Barber*, 128 A.3d at 640). Absent authority that permitted a blanket invocation of the Fifth Amendment to all questions posed by Disciplinary Counsel, the Hearing Committee Chair followed the procedure laid out in *Barber*: Respondent took the stand, and decided on a question-by-question basis whether to assert the Fifth Amendment. This cannot be a basis to vacate the hearing or strike Respondent's invocations from the record.

We similarly reject Respondent's request to strike the Hearing Committee's characterization of his demeanor during his Fifth Amendment assertions (that he was "annoyed, or even angry, when asked questions to which he was claiming privilege"). Resp't Br. at 41 (quoting HC Rpt. at 203-04). Disciplinary Counsel argued to the Hearing Committee that it should consider Respondent's demeanor as evidence of his failure to acknowledge the wrongfulness of his conduct. The Hearing Committee rejected that argument, concluding that "the fact that he was annoyed, or even angry, when asked questions to which he was claiming privilege

in a proceeding in which he is defending his right to practice law does not make him more worthy of sanction." HC Rpt. at 203-04. We see no prejudice to Respondent from the Hearing Committee's characterization of his demeanor, or any reason to strike it from the record.

7. This Disciplinary Proceeding Does Not Violate the Supremacy Clause or the Separation of Powers.

Respondent argues that this matter must be dismissed because it "entails an organ of the D.C. government second-guessing confidential internal deliberations at the highest level of the Executive Branch, including directly with the President himself in the Oval Office, regarding how to carry out the President's core authorities under Article II." Resp't Br. at 44. He argues that, "assuming D.C. is operating here as the analogue to a State," this case should be dismissed as "a flagrantly unconstitutional violation of federalism and the Supremacy Clause." *Id.* Alternatively, if D.C. is not acting as a State, this action is barred by the Separation of Powers, "because [the] DCCA and hence the Board and Committee descend from Congress's Article I lawmaking." *Id.*

Respondent's arguments rely on the faulty premise that the purpose of this proceeding is to second-guess Executive Branch deliberations. That is not the case; the question is whether Respondent violated the D.C. Rules of Professional Conduct in attempting to make a false statement. We deny Respondent's request to dismiss on these grounds.

In his Second Notice of Supplemental Authorities Supporting Respondent, he attempts to bolster his separation of powers argument by citing a decision of the

Texas Supreme Court in a disciplinary case involving the First Assistant Attorney General of the State of Texas (*Webster v. Comm'n for Law. Discipline*, 704 S.W.3d 478 (Tex. 2024)). In *Webster*, the Texas Supreme Court held that alleged false statements in a complaint filed by the First Assistant Attorney General are subject to "direct scrutiny" by the court in which the complaint is filed, but not "collateral review" in an attorney discipline proceeding. *See, e.g.*, *Webster* 704 S.W.3d at 497. We need not consider whether the D.C. Court of Appeals would agree with the Texas Supreme Court's distinction between direct scrutiny and collateral review of an alleged false statement by a government attorney in a court filing because this case does not involve an alleged false statement in a court filing. Instead, it involves an attempt to make a false statement on behalf of the Justice Department. Nothing in *Webster* supports the proposition that government attorneys are immune from discipline for attempting to tell a lie.

In his Fourth Notice of Supplemental Authorities Supporting Respondent, Respondent cites a Presidential Memorandum to support the proposition that "local ethics law" cannot interfere with a President's decision to remove senior Justice Department lawyers (Messrs. Rosen and Donoghue). This memorandum is irrelevant because the question here is not whether the President could remove Messrs. Rosen and Donoghue.

8. Respondent Was Not Denied Due Process Due to a Lack of Notice.

Reprising his qualified immunity argument, Respondent argues that "this case [is] a textbook example of the violation of the due process right to fair warning" because "no lawyer has ever been disciplined over an unsent draft." Resp't Br. at 46. We disagree.

Respondent quotes *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005) for the proposition that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *See* Resp't Br. at 45. The plain language of Rules 8.4(a), 8.4(c), and 8.4(d) provide just that warning. We deny Respondent's motion to dismiss on this ground.

9. Respondent Was Not Denied the Equal Protection of the Law.

Respondent argues that he was denied equal protection because he was selectively targeted for prosecution. He argues that the record is "replete with evidence of selective prosecution based on partisan political classification." Resp't Br. at 46. As support, he cites that the investigation began with a complaint from a "highly partisan" Democratic Senator, that Disciplinary Counsel threatened to "rachet up the sanctions" if Respondent invoked the Fifth Amendment in response to Disciplinary Counsel's investigative subpoena, and that other lawyers involved in prior election challenges have not been subject to professional discipline. *Id.* at 46-47. None of these allegations come close to establishing that the decision to prosecute was based on "an unjustifiable standard such as race, religion, or other

arbitrary classification," or that it was "motivated by a discriminatory purpose," the selective prosecution standards set forth in Respondent's brief. *Id.* at 46 (quoting *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996)).

D.C. Bar Rule XI, § 6(a)(2) provides that Disciplinary Counsel has "the power and duty" to investigate allegations of attorney misconduct "from any source whatsoever, where the apparent facts, if true, may warrant discipline." This means that Disciplinary Counsel may investigate complaints made by political partisans if such complaints meet the requirements of § 6(a)(2). Assuming Disciplinary Counsel made the statement about "ratchet[ing] up the sanctions," this does not show that Disciplinary Counsel's prosecution was based on an unjustifiable standard or was motivated by a discriminatory purpose. Finally, the fact that Disciplinary Counsel did not bring charges against other lawyers involved in various previous election challenges does not establish selective prosecution. Respondent offered no evidence that any of these other lawyers made or attempted to make false statements. Thus, he has failed to show that others who were similarly situated were not prosecuted.

Moreover, Disciplinary Counsel routinely charges respondents with violating Rule 8.4(c) and 8.4(d). Had Respondent been successful in his efforts to send the false letter on behalf of the Justice Department, there would be no argument that he was being singled out for making a false statement. However, here, because the President decided against sending the letter, Respondent did not tell a lie, and thus is being prosecuted for an attempt. Disciplinary Counsel has not prosecuted other respondents for attempting to tell a lie; however, there is no suggestion that other

respondents have been prepared to lie on behalf of an institution like the Justice Department on an issue of national importance. Contrary to Respondent's argument, the fact that Respondent is the first prosecuted for attempted dishonesty is not a self-evident violation of equal protection.

We deny Respondent's motion to dismiss on this ground.

10. The Structure of the Discipline System Does Not Violate the Private Nondelegation Doctrine, the Appointments Clause, or the Oath Clause.

Respondent argues that using fact-finders who are not federal officers violates the private nondelegation doctrine because the Court has impermissibly delegated its statutory authority to discipline lawyers to Hearing Committee and Board members who are not federal officers. Resp't Br. at 48-52. The private nondelegation doctrine prohibits the federal government from "delegat[ing] regulatory authority to a private entity." *Sandvig v. Sessions*, 315 F. Supp. 3d 1, 33 (D.D.C. 2018) (quoting *Ass'n of Am. R.R.s v. U.S. Dep't of Transp.*, 721 F.3d 666, 670 (D.D.C. 2013)). We find no violation of the private nondelegation doctrine because the Court has not delegated its regulatory authority to the Board and the Hearing Committees.

We begin by discussing the Court's authority to regulate the practice of law in D.C. "The District of Columbia is constitutionally distinct from the States." *In re Kerr*, 424 A.2d 94, 98 (D.C. 1980) (quoting *Palmore v. United States*, 411 U.S. 389, 395 (1973)), *overruled on other grounds*, *In re McBride*, 602 A.2d 626 (D.C. 1992). The Court of Appeals was created pursuant to the plenary power of Congress to legislate for the District of Columbia as provided in Article I, Section 8, Clause

17 of the Constitution. Congress has the constitutional authority to "vest and distribute the judicial authority in and among courts and magistrates, and (to) regulate judicial proceedings before them, as it may think fit, so long as it does not contravene any provision of the constitution of the United States." *Id.* at 98-99 (quoting *Palmore*, 411 U.S. at 397).

Pursuant to its constitutional authority, Congress created the Court of Appeals as the "highest court of the District of Columbia" in the District of Columbia Court Reform and Criminal Procedure Act of 1970 ("Court Reform Act"). D.C. Code § 11-102; *see* D.C. Code § 11-101. "One of the primary purposes of the Court Reform Act was to restructure the District's court system so that 'the District will have a court system comparable to those of the states and other large municipalities.'" *Pernell v. Southall Realty*, 416 U.S. 363, 367 (1974) (quoting H.R. Rep. No. 91-907, at 23 (1970)); *see also Palmore*, 411 U.S. at 409 (a purpose of the Court Reform Act "was to establish an entirely new court system with functions essentially similar to those of the local courts found in the 50 States of the Union with responsibility for trying and deciding those distinctively local controversies that arise under local law").

Relevant to the issues raised in Respondent's argument, section 11-2501(a) of the Court Reform Act provides that the Court of Appeals "shall make such rules as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar, and their censure, suspension, and expulsion." Section 11-2502 provides somewhat more specific overlapping authority to "censure,

suspend from practice, or expel a member of its bar for crime, misdemeanor, fraud, deceit, malpractice, professional misconduct, or conduct prejudicial to the administration of justice." The Court has described these statutes as codifying or confirming the Court's inherent power as the "highest court of the District of Columbia" to discipline attorneys. *See Bergman v. District of Columbia*, 986 A.2d 1208, 1226 (D.C. 2010) (section 11-2501(a) "simply confirms the existence of this court's inherent authority over admission and discipline of attorneys"); *In re Keiler*, 380 A.2d 119, 124 n.6 (D.C. 1977) (per curiam) (section 11-2502 "essentially is a codification of an inherent power of this court acquired upon its designation by Congress as the 'highest court of the District of Columbia'"), *overruled on other grounds*, *In re Hutchinson*, 534 A.2d 919 (D.C. 1987) (en banc). Taken together, the statutory and inherent "authority allow the court to regulate virtually every aspect of legal practice in the District of Columbia." *BiotechPharma, LLC v. Ludwig & Robinson, PLLC*, 98 A.3d 986, 994 (D.C. 2014).

In the Court Reform Act, Congress authorized the Court to censure, suspend, or expel members of the D.C. Bar, and to "make such rules as it deems proper respecting . . . [the] censure, suspension, and expulsion" of attorneys. D.C. Code § 11-2501(a). Respondent does not argue that either sections 11-2501 or 11-2502 violate the private nondelegation doctrine; instead, he argues that the Court has violated the doctrine by delegating its regulatory authority to the Board and the Hearing Committees. We disagree because the Court has not delegated any of its authority to the Board or the Hearing Committees. Pursuant to section 11-2501, the

Court has adopted Rule X of the Rules of the District of Columbia Court of Appeals Governing the Bar of the District of Columbia, which established the D.C. Rules of Professional Conduct as setting "the standards governing the practice of law in the District of Columbia." The Court also adopted Rule XI which sets out procedural rules governing the discipline system. In accordance with section 11-2502, only the Court can censure, suspend, or expel a member of the D.C. Bar.

Respondent argues that the Court has delegated its regulatory authority to private actors because the Court allows the Hearing Committee to "make presumptively binding findings of fact and make legal rulings." Resp't Reply Br. at 27. This is factually incorrect. Hearing Committee factual findings are not "presumptively binding." Hearing Committees findings are accepted only if they are "supported by substantial evidence and uninfected by legal error." *In re Krame*, 284 A.3d 745, 755 (D.C. 2022); *see, e.g.*, *In re Bradley*, 70 A.3d 1189, 1194-95 (D.C. 2013) (per curiam) (rejecting Hearing Committee's conclusion that the respondent "seemed honest" because there was "no factual support in the record" for the Hearing Committee's credibility conclusion and other evidence directly contradicted it). Hearing Committee and Board recommendations on questions of law are reviewed de novo. *In re Dobbie*, 305 A.3d 780, 792 (D.C. 2023). Respondent cites no authority to support the proposition that allowing non-government actors to engage in fact-finding as part of a disciplinary hearing violates the private nondelegation doctrine.

In his reply brief, Respondent argues that "[i]t does not save the violation of the nondelegation doctrine that the DCCA can eventually review cases in which significant discipline is imposed — the impermissible delegation to private citizens is, by that point, fully baked in." Resp't Reply Br. at 28. This is also factually incorrect. The Court does not "eventually review cases in which significant discipline is imposed." Only the Court can censure, suspend, or disbar a member of the D.C. Bar. The Hearing Committee and Board can only recommend censure, suspension, or disbarment; thus, none of these sanctions are imposed unless and until the Court does so. *In re Dwyer*, 399 A.2d 1, 11 (D.C. 1979) ("[U]nlike agency action which is binding upon the parties unless a petition for judicial review is filed, disbarment, suspension, or censure of an attorney can be made effective only upon an order of this court. D.C. Code 1973, ss 11-2502, 2503(b)."). As the Court said in *In re Shillaire*, "[i]n the final analysis, the responsibility to discipline lawyers is the court's. The buck stops here." 549 A.2d 336, 342 (D.C. 1988).

Finally, Respondent argues in his reply brief that "[t]he Bar disciplinary process can violate the private nondelegation doctrine because it relies on a purported congressional grant of the exclusive federal authority to regulate federal attorneys, especially where, as here, the regulation would interfere with the operations of the federal government and violate the Supremacy Clause." Resp't Reply Br. at 27. As discussed above, Congress authorized the Court to "make such rules as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar, and their censure, suspension, and expulsion."

D.C. Code § 11-2501(a). Respondent seems to argue that only the federal government can regulate federal government attorneys, but he cites no authority to support that proposition. He does cite to a Justice Department memorandum that noted that it "has regularly maintained that rules promulgated by state courts or bar associations that are inconsistent with the requirements or exigencies of federal service may offend the Supremacy Clause of the Constitution." *State Bar Disciplinary Rules As Applied to Fed. Gov't Att'ys*, 9 Op. O.L.C. 72 (1985). Respondent does not explain how the Supremacy Clause is implicated here, or how Rule 8.4(c)'s prohibition of dishonesty would be "inconsistent with the requirements or exigencies of federal service." He does not assert that he was required to lie about the Justice Department's investigation into the 2020 election as part of the performance of his duties as an attorney for the federal government.

11. Respondent Had Adequate Notice of the Charges Against Him.

Respondent argues that he was denied fair notice of the charges against him because "[t]he Charges allege that certain enumerated statements in the draft letter were false. The Committee exonerated [Respondent] on those charges, and instead found he should be disciplined 'because of what he did after.'" Resp't Br. at 52 (quoting HC Rpt. at 159 ("[H]e is facing discipline because of what he did afterwards.")). Respondent argues that he has been convicted of "excessive persisting," which he argues does not violate Rule 8.4(c). This argument ignores the charges against him and the Hearing Committee's recommendation.

In paragraph 31, the Specification of Charges alleged that Respondent's conduct violated

> a. Rules 8.4(a) and (c), in that Respondent attempted to engage in conduct involving dishonesty, by sending the Proof of Concept letter containing false statements; and
>
> b. Rules 8.4(a) and (d), in that Respondent attempted to engage in conduct that would seriously interfere with the administration of justice.

It did not allege that he lied to Messrs. Donoghue and Rosen when he first sent them the draft letter. Instead, the Specification alleges that the draft letter Respondent sent to Messrs. Rosen and Donoghue contained false or misleading statements, and Mr. Donoghue told him so soon after receiving it. The Hearing Committee's finding was consistent; the misconduct occurred when Respondent continued his efforts to send the letter despite being told that it was false, and without presenting contrary evidence. We reject Respondent's argument that he was denied fair notice of the charges against him.

12. Respondent Is Subject to the Court's Disciplinary Jurisdiction.

Respondent argues that as a federal government attorney, he is not subject to the disciplinary jurisdiction of the Court because 28 U.S.C. § 530B and its implementing regulations do not apply to D.C. Resp't Br. at 54. As Respondent recognizes, the Court rejected this argument in *In re Clark*, 311 A.3d 882, 888-89

(D.C. 2024) (per curiam). We have no basis to reconsider the Court's ruling on this legal issue.[12]

Respondent argues that [e]ven assuming 28 U.S.C. § 530B extends state bar disciplinary jurisdiction over federal government lawyers, it does so only "to the *same extent* and in the *same manner* as other attorneys in that State," and thus, it cannot be applied to him because "[t]here is no prior case where Rule 8.4 has been applied to any pre-decisional discussion among a team of lawyers concerning a draft statement of a proposed position in a letter that, for policy reasons, was never sent." Resp't Br. at 59-60.

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[12] To bolster his jurisdiction argument, Respondent asserts that he "was designated the Acting Attorney General, as the Committee found to be documented by White House visitor logs and as accepted by the House January 6 Committee and by ODC." The Hearing Committee concluded that the evidence *did not* support the proposition that Respondent was actually appointed as the Acting Attorney General. FF 157 n.10. The very purpose of the Oval Office meeting was to determine whether Respondent should replace Mr. Rosen as the Acting Attorney General. *See, e.g.*, FF 162 ("During the meeting, the President . . . was not advocating one way or the other on whether to have Mr. Clark replace Mr. Rosen."); FF 168 ("At one point, President Trump asked 'What do I have to lose, if I put this guy in, at least he can give it a shot.'"); Resp't Br. at 14 (asserting "that the President made the ultimate decision not to appoint [Respondent] as Acting Attorney General"). *See generally* FF 159-168. We agree with the Hearing Committee that the evidence does not support the contention that Respondent was appointed as the Acting Attorney General.

We agree with the Hearing Committee's analysis, and reject Respondent's argument that the precise nature of his misconduct places him outside the Court's disciplinary jurisdiction:

> Just because Mr. Clark's particular facts have not arisen before, however, does not mean Mr. Clark has been treated differently. Non-government lawyers face disciplinary charges alleging violations of Rules 8.4(a), (c) and (d) for attempt, dishonesty and substantial interference with the administration of justice. The same set of rules apply to their cases, as do the same elements of proof and does the same "clear and convincing" evidence standard. If the charges are proven, they face discipline to be determined under the same standards that we apply here. And if the charges are not proven (as we conclude some of Disciplinary Counsel's charges have not been here), they are not sanctioned under those Rules. So too with Mr. Clark.

HC Rpt. at 126.

Respondent also argues that any disciplinary matter against him is "within the exclusive authority of the Article II Executive Branch," specifically the Justice Department's Office of Professional Responsibility. Resp't Br. at 34. Respondent cites no authority to support this proposition, and we note that federal government lawyers who are also members of the D.C. Bar are subject to the Court's disciplinary jurisdiction. *See, e.g.*, *Dobbie*, 305 A.3d 780; *In re Kline*, 113 A.3d 202 (D.C. 2015); *In re Howes*, 52 A.3d 1 (D.C. 2012). We reject Respondent's argument.

13. The Board Did Not Err in Denying Respondent's Request to Defer This Matter Pending Resolution of a Criminal Case.

Respondent argues that this matter should have been deferred pending resolution of a criminal case pending against him in Georgia, citing what he asserts

is the Board's "decades-long history of deferring disciplinary proceedings until after related criminal proceedings [are] resolved." Resp't Br. at 61. Respondent does not catalog the cases deferred during this "decades-long history," and may be confusing the fact that disciplinary cases frequently follow a criminal conviction as reflecting the deferral of a filed Specification of Charges. *See* D.C. Bar R. XI, § 10 (Disciplinary Proceedings Based Upon Conviction of Crime). Respondent cites no authority that requires Disciplinary Counsel to wait to bring disciplinary charges until the completion of criminal proceedings, and we decline to recommend such a rule, which would allow a lawyer charged with a crime to continue to practice until the conclusion of the criminal proceeding.

Respondent also argues that his motions for deferral should have been granted. Two Board Rules govern deferral. Board Rule 4.1 applies before a Specification of Charges has been filed, and allows Disciplinary Counsel to seek a deferral "based upon the pendency of a related ongoing criminal or disciplinary investigation or upon related pending criminal or civil litigation when there is a substantial likelihood that the resolution of the related investigation or litigation will help to resolve material issues involved in the pending disciplinary matter." Board Rule 4.2 applies after a Specification of Charges has been filed, and allows either Disciplinary Counsel or a respondent to request deferral "based upon the pendency of either a related ongoing criminal investigation or related pending criminal or civil litigation." A motion brought under Rule 4.2 is decided "under the standards in Rule 4.1." Board Rule 4.2. In short, whether the motion to defer is brought before or

after the charges are filed, and whether it is brought by Disciplinary Counsel or a respondent, the same standard applies: is there "a substantial likelihood that the resolution of the related investigation or litigation will help to resolve material issues involved in the pending disciplinary matter?" The Hearing Committee Chair recommended that the Board Chair deny Respondent's motions because he had not shown a substantial likelihood that the resolution of his criminal case would help to resolve material issues in this case. The Board Chair agreed.

Respondent argues that the Hearing Committee Chair and the Board Chair erred in applying the standard in Rule 4.1 to decide a motion brought pursuant to Board Rule 4.2. He argues that the two Rules must apply different standards because "Rule 4.2. (the post-petition rule) notably omits the 'substantial likelihood/material issues' language and simply states that a respondent may request deferral "based upon the pendency" of the related case." Resp't Br. at 63. Respondent does not address the fact that Rule 4.2 expressly provides that Rule 4.2 motions are decided "under the standards in Rule 4.1." It is clear that the same standard applies whether the deferral request is made before or after a Specification of Charges is filed.

Respondent also argues that the hearing should have been deferred so that he could testify here without concern that the answers might be used against him in a criminal case. He argues that he was prevented "from taking the stand in his own defense until related criminal proceedings were resolved" because the hearing was held while the criminal case was pending, and that Rule "4.2 deferrals were clearly designed to extend to situations where allowing time for Fifth Amendment issues to

resolve would aid the search for truth." Resp't Br. at 61, 65. But this argument ignores the plain language of the Board Rules, which permit deferral only where there is a substantial likelihood that the resolution of another proceeding will resolve material issues here. That language does not permit deferral on the ground that additional evidence may be available following the completion of another proceeding.[13]

We agree with the Hearing Committee Chair's recommendation that Respondent's deferral request be denied because the Board Rules do not

> authorize deferral because a disciplinary hearing may require a respondent to decide whether to assert a Fifth Amendment privilege against self-incrimination. Accordingly, the Rule provides no basis for deferral on these grounds.
>
> Case law has also rejected Mr. Clark's contention that the Constitution affords a respondent in a disciplinary case to avoid having

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[13] Respondent criticizes the Hearing Committee Chair's framing of the issue: "as whether 'Rule 4.2 authorizes deferral because a disciplinary hearing may require a respondent to decide whether to assert a Fifth Amendment privilege against self-incrimination.'" Resp't Br. at 64-65. However, this fairly summarized Respondent's argument in favor of deferral:

> [T]his proceeding cannot be used as a hammer and anvil to force Mr. Clark to waive his Fifth Amendment privilege while facing disciplinary charges not subject to a standard as demanding as the beyond-a-reasonable-doubt standard in criminal law. Trying to put Mr. Clark to that kind of Hobson's Choice could create a serious issue under the unconstitutional conditions doctrine.

Renewed Request for Deferral Under Board Rule 4.2 (and Related Rule 4.1), at 13 (Oct. 11, 2023).

to choose between testifying in the disciplinary case and asserting his Fifth Amendment rights. *See, e.g.*, *De Vita v. Sills*, 422 F.2d 1172, 1178 (3d Cir. 1970); *Bachman v. Statewide Grievance Comm.*, 11 No. CV126028403S, 2012 WL 4040367, at *8 (Conn. Super. Ct. Aug. 22, 2012); *People v. Jobi*, 37 Misc. 3d 954, 960, 953 N.Y.S.2d 471, 476 (Sup. Ct. 2012); *Arthurs v. Stern*, 560 F.2d 477, 478-79 (1st Cir. 1977); *Sternberg v. State Bar of Mich.*, 384 Mich. 588, 591, 185 N.W.2d 395, 397 (1971). In *De Vita*, for example, the Third Circuit rejected the argument advanced by Mr. Clark here: that "the Fifth Amendment should be so construed that one is not faced with the compulsion to add his own possibly affirmative good impression to weight of evidence in the disciplinary hearing before the criminal trial." We agree with *De Vita* that

> [t]his argument proves too much, for it applies with equal force to every situation where civil and criminal proceedings may arise out of the same factual pattern. If, for example, the charge against an attorney was embezzlement of a client's funds, acceptance of plaintiff's position would require that the wronged client await the completion of a criminal trial before he sought a civil recovery, because of the possible compulsion of the risk of a judgment. The same would be true of every defendant in a wrongful death action; of many taxpayers; of most antitrust defendants.

De Vita v. Sills, 422 F.2d at 1178.

Hearing Committee Chair Report and Recommendation, at 10-11 (Oct. 25, 2023). We reject Respondent's argument that the hearing should have been deferred.

In his Fourth Notice of Supplemental Authorities Supporting Respondent, Respondent argues that this matter should be deferred until the Georgia criminal prosecution is complete and until the Weaponization Working Group established by

Attorney General Bondi completes its work. Respondent does not argue that there is a substantial likelihood that either the resolution of the Georgia criminal prosecution or the work of the Weaponization Working Group will help to resolve material issues here, and thus we deny this request to defer.

14. The Hearing Committee Did Not Err in Excluding Post January 3, 2021 Evidence.

The Hearing Committee denied Respondent's pre-hearing motion in limine to be allowed to introduce evidence

> regarding the results of investigations into the 2020 election conducted after January 3, 2021 to support the reasonableness of the positions he took in the draft letter of December 28, 2020 based on the belief, expressed in the draft letter of that date and in discussions with others, that there were "significant concerns that may have impacted the outcome of the election in multiple States, including in the State of Georgia."

HC Rpt. at 141-42 (quoting Motion in Limine, at 1 (Nov. 22, 2023)). The Hearing Committee denied the motion, concluding that the evidence did not relate to Disciplinary Counsel's charges or Respondent's defenses because Respondent could not rely on evidence that did not exist at the time at issue here. *See id.* at 142. Before the Board, Respondent argues that there was "a superabundance of compelling evidence that the 2020 election in in Georgia was afflicted by substantial fraud and irregularity warranting further investigation." Resp't Br. at 82. However, the question here is not whether there was evidence of fraud and irregularity warranting further investigation. The question is whether Disciplinary Counsel proved that Respondent attempted to make false statements in the Proof of Concept letter. We

agree with the Hearing Committee that evidence that Respondent did not know by January 3, 2021 cannot be relevant to this case.

15. Respondent's Fifth Notice of Supplemental Information, Motion to Reopen Evidence and Renewed Motion to Defer

Respondent's Fifth Notice of Supplemental Information, Motion to Reopen Evidence and Renewed Motion to Defer ("Fifth Supplement") seeks relief based on allegations by Senators Charles Grassley and Ron Johnson that political bias infected the FBI's investigation (codename "Arctic Frost") into President Trump relating to alternate slates of electors submitted in five states following the 2020 election. Fifth Supplement at 1, 3. Respondent argues that an investigation of Respondent by the Justice Department's Office of Inspector General was merged into the Arctic Frost investigation. *Id.* at 3. Respondent then argues that this disciplinary prosecution is infected by political bias, citing the substantial overlap between "Jack Smith's original indictment and ODC's charges against" Respondent, as well as the "substantial overlap between the Fulton County charges against" Respondent and Disciplinary Counsel's charges here. *Id.* at 7. He argues that "additional evidence of misconduct in the FBI and/or DOJ in connection with the Arctic Frost investigation and the related treatment of Mr. Clark" seems likely to emerge from investigations undertaken by Senators Grassley and Johnson, as well as other "actions now being taken by the Trump Administration and Attorney General Pam Bondi." *Id.*

Based on the foregoing, Respondent seeks the following relief:

a. The case should be dismissed, or in the alternative, the Board should recommend that the Court impose no sanction;

b. The record should be reopened to permit discovery "on whether the lawfare-style weaponization of government against Mr. Clark by the Biden FBI, the January 6 Select Committee, the Jack Smith investigation, and ODC was coordinated." Respondent requests the depositions of FBI Agents Timothy Thibault, Michelle Ball, Steven D'Antuono; Department of Justice Official, Richard Pilger; and Disciplinary Counsel, Hamilton P. Fox, III;

c. The authority to issue subpoenas to access (1) an FBI investigative database and other FBI records derived from the database; and (2) a full response to the pre-hearing *Touhy* requests Respondent filed to the Justice Department and the ODNI;[14] and

d. Deferral because "[i]t is very likely that information will be developed in the [weaponization] investigation that will be relevant to this case."

Id. at 17-19.

We deny each of these requests. As discussed elsewhere, this case is about whether Disciplinary Counsel proved by clear and convincing evidence that Respondent attempted to violate the charged disciplinary Rules. Whether the FBI should have investigated President Trump regarding the alternate slates of electors has nothing whatever to do with any of the facts relevant to Disciplinary Counsel's

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[14] As discussed at page 132 of the Hearing Committee Report, government agencies may promulgate regulations governing how the agency will respond to third party subpoenas and document requests. These regulations are often known as *Touhy* regulations, after the Supreme Court's decision in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 467-68 (1951).

charges. Respondent speculates that Mr. Fox may have had substantive communications with the Justice Department; however, Disciplinary Counsel represented before the hearing that "[a]side from obtaining *Touhy* letters, authorizing former Justice lawyers to testify in these proceedings, Disciplinary Counsel has had no contact with the Department about this matter." Disciplinary Counsel's Opposition to Respondent's Motion to Compel Disclosure of Exculpatory Evidence from ODC-Cooperating Government Entities, at 2 (Nov. 27, 2023).

Regarding Respondent's request for information relevant to his *Touhy* requests, as the Hearing Committee discussed, if Respondent disagreed with the ODNI's and the Justice Department's *Touhy* decisions he could have filed an action in federal court under the Administrative Procedure Act. *Houston Bus. J., Inc. v. Off. of Comptroller of Currency*, 86 F.3d 1208, 1211-12 (D.C. Cir. 1996); *see* HC Rpt. at 133. His failure to do so pre-hearing does not entitle him to reopen the record now.[15]

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[15] In his June 20, 2025, Notice of Supplemental Information and Response to ODC's Recent Notice ("Ninth Supplement"), Respondent cites to two Georgia cases to support the argument that state law criminal convictions were reversed "when a federal agency relied on its *Touhy* regulations in refusing to produce documents in response to the defendant's subpoena." Ninth Supplement at 8; *see* Ninth Supplement at 8-9. This does not fairly describe the holding in either case, and neither case supports Respondent's argument, or suggests that Respondent was denied a fair hearing here. In *Buford v. State*, a conviction was reversed because the trial court erred in quashing a subpoena for information subject to the government's *Touhy* objection and denied a request for a continuance to allow for a FOIA request that sought the same information. 282 S.E.2d 134, 138 (Ga. App. 1981). Similarly,

Finally, Respondent's assertion that "[i]t is very likely that information will be developed in the [weaponization] investigation that will be relevant to this case," Fifth Notice at 19, does not meet the standard for deferral: whether it is substantially likely that the resolution of another pending proceeding will resolve material issues here. Respondent's request for deferral is denied.

16. Respondent's Sixth Notice of Supplemental Information

In his Sixth Notice of Supplemental Information, Respondent cites two recent statements regarding the 2020 election. The first statement was in an April 9, 2025, Presidential Memorandum regarding Chris Krebs, former head of the Cybersecurity and Infrastructure Security Agency ("CISA"), which asserted that "Krebs, through CISA, promoted the censorship of election information, including known risks associated with certain voting practices. Similarly, Krebs, through CISA, falsely and baselessly denied that the 2020 election was rigged and stolen, including by inappropriately and categorically dismissing widespread election malfeasance and serious vulnerabilities with voting machines." Memorandum on Addressing Risks from Chris Krebs and Government Censorship, 2025 Daily Comp. Pres. Doc. 1 (Apr.

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in *Dean v. State*, the trial court erred in relying on the confidentiality of probation records in denying the defendant's request for his own records to use at trial: "the statutorily created privilege protecting the confidentiality of probation records must, under these circumstances, yield to an accused's constitutional right to information which is material to his defense." 477 S.E.2d 573, 574 (Ga. 1996). Both of these cases are inapposite because the Hearing Committee did not quash a subpoena or otherwise prevent Respondent from seeking information from the government.

9, 2025). Respondent also cites an April 10, 2025, statement by the Director of National Intelligence, Tulsi Gabbard, during a Cabinet meeting:

> [D]eclassification and rooting out weaponization, politicization of the intelligence community is a huge priority. You know more than anyone else the very dangerous and negative consequences of that. I have got a long list of things that we're investigating. We have the best of the best going after this, election integrity being one of them. We have evidence of how these electronic voting systems have been vulnerable to hackers for a very long time and vulnerable to exploitation to manipulate the results of the votes being cast, which further drives forward your mandate to bring about paper ballots across the country so that voters can have faith in the integrity of our elections.

Transcript: President Trump Holds Cabinet Meeting (CNN News Central Apr. 10, 2025), https://transcripts.cnn.com/show/cnc/date/2025-04-10/segment/07 (last visited July 21, 2025). Neither of these statements are relevant to the issues before the Board. We deny Respondent's request to dismiss this case.

17. Respondent's Seventh Notice of Supplemental Information

In his Seventh Notice of Supplemental Information ("Seventh Supplement"), Respondent asserts that Senator Grassley has "demanded all correspondence and communications 'related to the contempt of Congress cases.' Exhibit 1 at 8." Seventh Supplement at 3. Respondent asserts that this request would cover him, and he argues that the Board should await production of this information to allow Respondent to use it in his defense. Unfortunately, Exhibit 1 to Respondent's Seventh Supplement has only one page, not eight, and thus it is not clear from whom Senator Grassley sought this information. That issue aside, Respondent does not

explain how any information relating to contempt of Congress is relevant to the issues here. Treating his request as a request for deferral, that request is denied.

Respondent also argues that this case should be dismissed because the applicable Board Rules prohibited Disciplinary Counsel from opening a disciplinary complaint where, as here, the complainant did not have personal knowledge of the alleged misconduct. *See* Seventh Supplement at 8 ("[A]t the time Sen. Durbin's complaint against Mr. Clark was docketed, complaints not grounded in first-hand knowledge were simply incompetent to justify docketing."). Respondent is wrong. Disciplinary Counsel has the power and the duty to "investigate all matters involving alleged misconduct" which come to its attention "from any source whatsoever, where the apparent facts, if true, may warrant discipline." D.C. Bar R. XI, § 6(a)(2). That is the case now, and it was the case at the time that Disciplinary Counsel opened its investigation of Respondent. This is clearly addressed in the letter from the Board Chair to then-United States Attorney Edward Martin, which is attached as Exhibit 3 to Respondent's Seventh Supplement:

> In the past, including during the time of the letters attached to your February 7 letter to Mr. Fox, ODC considered whether a complainant had personal knowledge of the underlying facts in deciding whether to docket that specific complainant's complaint in order to avoid giving notice of an otherwise confidential disciplinary investigation to someone with no firsthand knowledge of the underlying misconduct. Complainants with firsthand knowledge of alleged misconduct—typically clients who have complained about their attorneys—were notified of the investigation because it was expected that they could provide additional information to ODC during the course of an investigation.

> When this prior practice was in effect, ODC notified a complainant that it had not docketed his or her complaint because the complainant lacked "personal knowledge" of the underlying facts. However, the fact that the particular complaint was not docketed did not necessarily mean that ODC would not investigate those facts. Instead, ODC simply declined to open an investigation based on that specific complaint, and declined to make that person a "complainant." ***ODC was not required to receive first-hand information to begin an investigation. It could open an investigation based on any information regardless of the source. Rule XI, § 6(a)(2).***

Seventh Supplement, Ex. 3 at 6 (emphasis added).

Respondent argues in the alternative that when it began its investigation of Respondent, "ODC was allowed to proceed without a clear standard bounding its powers to open investigations." Seventh Supplement at 9. Again, Respondent is wrong. D.C. Bar R. XI, § 6(a)(2) set a clear standard: an investigation may be opened only "where the apparent facts, if true, may warrant discipline." We deny Respondent's motion to dismiss.[16]

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[16] Respondent requests that "all documents related to U.S. Attorney Martin's inquiry into ODC in connection with Mr. Clark's case be ordered discovered and placed into the record of this case." Seventh Supplement at 13. That request is denied. Mr. Martin used Senator Durbin's complaint against Respondent as the predicate for his inquiry whether Disciplinary Counsel opens investigations even when a complainant may not have personal knowledge. The Board addressed this general concern, and did not respond to "an inquiry into ODC in connection with Mr. Clark's case."

18. Respondent's June 20, 2025, Notice of Supplemental Information and Response to ODC's Recent Notice: Ninth and Tenth Supplements

In his Ninth Supplement, *see supra* note 15, Respondent argues that he was denied a fair hearing because it was only recently disclosed that the FBI did not investigate, and in fact suppressed, allegations of election interference by the Chinese Communist Party. Ninth Supplement at 1. He argues that

> The new information [disclosed by the FBI Director], when paired with what was already known, further corroborates the reasonableness and legitimacy of Mr. Clark's draft letter and advice to his colleagues at the Department of Justice and to President Trump that further investigations of the election were warranted. It also corroborates Mr. Clark's evidence from direct first-hand testimony of multiple reliable witnesses that credible investigations were in fact suppressed or shut down.

Ninth Supplement at 9. This argument mischaracterizes the issues in this case. Respondent is not being prosecuted for advising his colleagues and the President "that further investigations of the election were warranted." Similarly, whether "credible investigations were . . . suppressed or shut down," is not material to whether the Proof of Concept letter accurately described what the Justice Department *had already learned* in its investigations.

Respondent makes a similar argument in his Tenth Notice of Supplemental Information ("Tenth Supplement"), where he seeks to supplement the record with a July 1, 2025, press release from Senator Grassley titled "Grassley Releases Bombshell Records Showing FBI Headquarters Interfered with Alleged Chinese Election Interference Probe to Shield Christopher Wray from Political Blowback."

Respondent argues that the disclosures in the press release show that intelligence community suppressed evidence of Chinese election interference, and as a result

> a false and fictitious intelligence-community-majority picture was presented to the President (and to Mr. Clark during his review of the draft ODNI Report and his briefing with [Former]Director [of National Intelligence, John] Ratcliffe) by the Intelligence Community and by Mr. Donoghue and Mr. Rosen—that there was zero evidence of foreign election interference.

Tenth Supplement at 8. Respondent argues that this press release is relevant to his defense because "[o]ne important aspect of Mr. Clark's defense is that he wanted to investigate more aggressively than former DOJ officials Rosen and Donoghue." *Id.* at 3. We disagree with Respondent that this evidence has any relevance. As noted elsewhere, the question presented here is whether Respondent attempted to make a false statement about what the Justice Department had learned during its investigations. His desire to conduct additional investigations has no bearing on what had been uncovered in the investigations that had been conducted by the relevant time.

B. The Charged Rule Violations

1. Disciplinary Counsel Proved that Respondent Attempted to Make an Intentionally Dishonest Statement Regarding the Justice Department's Election-Related Investigations.

Rule 8.4(a) prohibits "attempt[s] to violate the Rules of Professional Conduct" as well as "knowingly . . . induc[ing] another to do so." Rule 8.4(c) prohibits dishonesty, which includes "not only fraudulent, deceitful or misrepresentative

conduct, but also 'conduct evincing a lack of honesty, probity or integrity in principle; a lack of fairness and straightforwardness.'" *In re Samad*, 51 A.3d 486, 496 (D.C. 2012) (quoting *In re Shorter*, 570 A.2d 760, 767-68 (D.C. 1990)). The Court holds lawyers to a "high standard of honesty, no matter what role the lawyer is filling," *In re Jackson*, 650 A.2d 675, 677 (D.C. 1994) (per curiam) (appended Board Report), because "[l]awyers have a greater duty than ordinary citizens to be scrupulously honest at all times, for honesty is 'basic' to the practice of law." *Hutchinson*, 534 A.2d at 924. Both intentional and reckless false statements violate Rule 8.4(c). *Romansky*, 825 A.2d at 316-17.[17]

The Hearing Committee concluded that Respondent attempted to violate Rule 8.4(c), when he advocated in favor of sending the Proof of Concept letter that contained three recklessly dishonest statements: (1) indicating that the Justice Department had identified significant concerns about potential outcome-determinative irregularities; (2) suggesting that the Justice Department was investigating the information in the report prepared by Georgia State Senator Ligon

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[17] To prove recklessness, Disciplinary Counsel "must prove by clear and convincing evidence that [an attorney] consciously disregarded the risk that her conduct was untruthful or that it would lead to a misapprehension of the truth." *In re Romansky,* 938 A.2d 733, 740 (D.C. 2007); *see, e.g.*, *In re Boykins*, 999 A.2d 166, 171-72 (D.C. 2010) (finding reckless dishonesty where the respondent falsely represented to Disciplinary Counsel that medical provider bills had been paid, without attempting to verify his memory of events from more than four years prior, and despite the fact that he had recently received notice of non-payment from one of the providers).

("Ligon report"); and, (3) stating that the Justice Department believed that competing slates of Presidential electors had been sent to Washington, D.C.

We conclude that Respondent knew that the first two statements were not true, and thus, his efforts to send the letter constituted an attempt to make an *intentionally* false statement.[18] We disagree with the Hearing Committee on the third statement, and conclude that Disciplinary Counsel did not prove by clear and convincing evidence that the statement regarding competing slates of electors was false.

a. Attempt to Violate a Rule

The Hearing Committee looked to the criminal law of attempt to determine the required elements of proof for a Rule 8.4(a) violation. We likewise rely on the criminal law, as did both parties in their briefing before the Hearing Committee.

> In order to prove an attempt to commit any offense, the government must prove that the accused: (1) intended to commit that particular crime; (2) did some act towards its commission; and (3) failed to consummate its commission. The act must go beyond mere preparation

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[18] Respondent argues that he was the Acting Attorney General for a brief period on January 3, 2021, and thus, his views are the views of the Justice Department. As discussed elsewhere, we conclude that the evidence does not support Respondent's factual assertion. Indeed, the purpose of the January 3 meeting was for the President to determine whether Respondent should replace Mr. Rosen. However, even if Respondent had been appointed the Acting Attorney General, it is far from settled law that his personal views would constitute the views of the Justice Department. Moreover, even if his views were the views of the Justice Department, we agree with the Hearing Committee that his efforts to send the Proof of Concept letter would still have constituted an attempt to make recklessly false statements because "his sincere belief was not objectively reasonable." HC Rpt. at 183.

> and must carry the criminal venture forward to within dangerous proximity of the criminal end sought to be attained.

Taylor v. United States, 267 A.3d 1051, 1059 (D.C. 2022) (internal quotations and alterations omitted); *see also Davis v. United States*, 873 A.2d 1101, 1107 (D.C. 2005) ("To prove an attempt, the government is not required to prove more than an overt act done with the intent to commit a crime, which, except for some interference, would have resulted in the commission of the crime." (internal quotations and alterations omitted)). Under *Hailstock v. United States*, 85 A.3d 1277, 1282-83 (D.C. 2014) and *Mobley v. United States*, 101 A.3d 406, 424-25 (D.C. 2014), "dangerous proximity" can be proven with evidence demonstrating either (1) that the crime would have been committed but for "some interference," or (2) that the defendant had taken a substantial step toward completing the crime. *See also Jones v. United States*, 386 A.2d 308, 312 (D.C. 1978) (the dangerous proximity test "does not require that appellants have commenced the last act sufficient to produce the crime but focuses instead on the proximity of appellants' behavior to the crime intended").

b. Discussion

Applying these principles to the Rule 8.4(c) charge, we conclude that Disciplinary Counsel must prove that Respondent intended the Justice Department to send the letter, that he knew (or was reckless in not knowing) that the letter contained false statements, and that his efforts to send the letter went beyond "mere preparation," that he took substantial steps toward causing the Justice Department to

issue a false statement, and came within "dangerous proximity of" achieving his goal.

We conclude that Disciplinary Counsel carried its burden because it proved that Respondent attempted to cause the Justice Department to issue a false statement when he continued to advocate that the false statement be sent even though he had no facts to contradict Messrs. Rosen and Donoghue's clear and repeated warnings that the Justice Department had *not uncovered* potentially outcome-determinative issues with the 2020 election. This was no mere difference of opinion, or "thought crime" as Respondent argues. Resp't Br. at 36. Respondent came dangerously close to causing the Justice Department to issue a false statement. He never ceased his advocacy to send the letter. Had the others in the Oval Office meeting not persuaded the President that it would not be worth "the breakage," the Justice Department would have issued a letter that falsely impugned the integrity of the 2020 Presidential election. Respondent's conduct easily meets the "attempt" standard discussed above. *See, e.g.*, *Taylor*, 267 A.3d at 1060 ("an overt act toward gaining actual possession of the firearm" was sufficient to sustain a conviction for attempting to carry a pistol without a license); *Jones*, 386 A.2d 312-13 (appellants were within dangerous proximity of robbing a bank even though they were interrupted at least one block from the target bank).

When Messrs. Donoghue and Rosen first read the letter, they told Respondent in no uncertain terms that it was not true. During the time span of the underlying events (December 28, 2020, to January 3, 2021), Respondent did not uncover

evidence that would contradict Messrs. Donoghue and Rosen or otherwise support the statements in the Proof of Concept letter he had drafted. The briefing he received from the ODNI confirmed what Messrs. Rosen and Donoghue told him, that there was nothing to the foreign thermostat theory. He never followed the instruction to contact U.S. Attorney Pak to find out what that office had discovered in its investigations. He met with Messrs. Rosen and Donoghue in a secure room at the Justice Department but was unable to identify any credible allegations that would support sending the letter. But yet, he persisted in his efforts. Indeed, he was willing to be appointed as the Acting Attorney General of the United States, replacing Mr. Rosen, in order to send the letter. However, as Mr. Donoghue testified, appointing Respondent as the Attorney General would not make the letter true:

> Q . . . if the letter had been approved, and sent as a statement of DOJ's position, on the matters that it addressed, that would in fact be DOJ's position on those matters, wouldn't it?
>
> A [Donoghue]If [the letter] had been sent, the department would have been misleading the legislature. So obviously that would be problematic. I can't say that it's impossible because if the attorney general, whoever that may be, decided to send that letter, that letter would go out.
>
> Q . . . if the attorney general sent the letter out, then the letter would be the position of the Department of Justice; correct?
>
> A Yes. But it wouldn't be true.
>
> Q . . . as to the matters that represent policy choices by the department, it would be the policy choice of the then-attorney general who decided to send it out; isn't that right?

> A Right. But the attorney general, whoever they may be, can't choose to lie. You simply can't tell people in a letter, or otherwise, the opposite of what the department has actually concluded.

Tr. 217-18.

Respondent attempts to portray his misconduct as no different than a subordinate lawyer suggesting an idea to a colleague:

> A subordinate lawyer writing a draft sent to AAG Clark for filing or other dissemination was not engaging in fraud or other falsity whenever AAG Clark edited such a brief to strike arguments, revise them, or add to them. The draft letter to the Georgia Legislature here is no different than a proposal by a line lawyer in the Civil Division's Appellate Staff preparing an initial draft brief to AAG Clark, except that here it was AAG Clark making a proposal to his superiors and then vigorously advocating for his point of view—***all internally***.

Resp't Br. at 13 (emphasis in original). This quote epitomizes the fallacy of Respondent's argument. He did not make a proposal regarding a debatable point. This is not a routine disagreement regarding the arguments to include in a brief, or how those arguments should be presented. As Mr. Donoghue put it "You simply can't tell people in a letter, or otherwise, the opposite of what the department has actually concluded." Tr. 218.

Respondent advocated for the Justice Department to put out a false statement that it had uncovered possible outcome-determinative problems in the 2020 election. He knew from former Attorney General Barr's public statements regarding the election, and more detailed information from Messrs. Donoghue and Rosen that the Justice Department had not discovered outcome-determinative problems. During

his brief investigation, he did not uncover any evidence that contradicted the Justice Department's investigation, the results of which were acknowledged to him by the White House Counsel. Yet he persisted in his effort all the way to a meeting in the Oval Office. Disciplinary Counsel has satisfied the standard set forth in the authority discussed above because it proved by clear and convincing evidence that Respondent took substantial steps that carried his venture "to within dangerous proximity" of achieving the desired result: making a false statement about what the Justice Department had uncovered regarding the 2020 Presidential election.

c. The Allegedly Dishonest Statements

Significant Concerns with the 2020 Election – The letter began by noting that the Justice Department was "investigating various irregularities in the 2020" Presidential election, and would update the recipients on those investigations when able to do so. DCX 8 at 0002. However, the letter also represented that "at this time we have identified significant concerns that may have impacted the outcome of the election in multiple States, including the State of Georgia." *Id.*; FF 87. The Hearing Committee concluded that this latter statement was false because the Justice Department had not identified potentially outcome-determinative concerns.

Respondent argues this statement was not false because it "was a ***proposed*** position that DOJ ***might*** adopt, ***if it were approved by Respondent's superiors, potentially going as high as the President himself***. A proposed position in a ***pre-decisional*** discussion draft that is inherently subject to ***later approval*** by superiors cannot be characterized as false or dishonest." Resp't Br. at 78 (emphases in

original). We agree with Respondent's argument here as it applied to the December 28 initial draft of the letter that Respondent emailed to Messrs. Rosen and Donoghue. In that initial draft, he was sharing his views of the relevant facts, and his views as to how the Georgia legislature should respond. Importantly, neither Disciplinary Counsel nor the Hearing Committee concluded that Respondent's December 28 email violated any Rule. We agree with the Hearing Committee that Respondent "is not facing discipline because he sent the letter for Mr. Rosen and Mr. Donoghue's approval; he is facing discipline because of what he did afterwards." HC Rpt. at 159.

Respondent next argues that "the point of the letter [was] to have the Georgia Legislature engage in further investigation." Resp't Br. at 79. Respondent did not present any evidence as to the point of the letter, as he did not provide substantive testimony. More importantly, the "point of the letter" is irrelevant to whether Respondent attempted to make a false statement.[19]

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[19] As discussed in the sanction section, we reject the argument that the "the point of the letter [was] to have the Georgia Legislature engage in further investigation." Had that been the point of the letter, it would have ended after the second paragraph, which began by asserting that "[i]n light of these developments, the Department recommends that the Georgia General Assembly should convene in special session so that its legislators are in a position to take additional testimony, receive new evidence, and deliberate on the matter consistent with its duties under the U.S. Constitution." DCX 8 at 0003. However, the letter continued for another three pages, setting forth legal advice for the Georgia legislature in the event that it determined that the 2020 election failed to make a choice among the candidates, as well as a discussion of a State legislature's "plenary" authority to appoint presidential electors. *See id.* at 4-6. We agree with the Hearing Committee that "the letter claimed that the Department already had, 'significant concerns' that might

On this dispositive point, Respondent does not counter Disciplinary Counsel's evidence that the Justice Department had not, in fact, "identified significant concerns that may have impacted the outcome of the election in multiple States, including the State of Georgia." Instead, he argues that the Justice Department's investigations had been grossly inadequate, and thus, did not provide a valid basis for Messrs. Rosen and Donoghue to reject Respondent's proposal as reflected in the draft letter. Resp't Br. at 79.[20] But the draft letter does not say that the Justice Department's investigations had been grossly inadequate, or inadequate to any degree. To the contrary, the draft suggests that the investigations have been good enough to identify "significant," potentially outcome-determinative concerns. That simply was not true. Not a single witness testified that the *Justice Department* had identified such serious concerns with the 2020 election.[21]

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have affected the election results, and urged that the election be taken away from the vote count and the legal system and instead decided by politics of legislative bodies who could not possibly analyze the actual facts." HC Rpt. at 180.

[20] This theme of inadequate investigations permeates Respondent's arguments, as he tried to rely on later-discovered putative evidence to support the assertions in the letter. We agree with the Hearing Committee that only evidence known to Respondent at the time he prepared the draft letter is relevant to his state of mind. *See, e.g.*, HC Rpt. at 3.

[21] Respondent argues that the Hearing Committee should have considered later-discovered evidence, "which was sufficient to cast the outcome of the election into serious doubt." Resp't Br. at 79. We disagree. As discussed above, the issue before the Board is the truth or falsity of the letter's assertion of what the *Justice*

Disciplinary Counsel proved by clear and convincing evidence that it was false to assert after December 28, 2020, that the Justice Department's investigations into the 2020 election had "identified significant concerns that may have impacted the outcome of the election in multiple States, including the State of Georgia."

We disagree with the Hearing Committee that Respondent was merely reckless. The Hearing Committee's conclusion rests on its finding—based on testimony from Messrs. Philbin and Donoghue—that Respondent sincerely believed that there were problems with the 2020 election that should be investigated. *See, e.g.*, HC Rpt. at 183. But neither they, nor any other witness, testified that Respondent believed that the Justice Department had already uncovered potentially outcome-determinative problems. The Hearing Committee credited Mr. Philbin's testimony that Respondent believed that "'there was a real crisis in the country' and [that] he was 'being given an opportunity to do something about it.'" FF 145. However, Mr. Philbin told Respondent that the theories of fraud had been debunked, that there was not "any 'there' there," and that there was a lot of bad information swirling around that led people to think things that were not accurate. FF 146. Mr. Philbin told Respondent that none of the allegations of fraud warranted Respondent becoming Acting Attorney General to investigate them. FF 147. As Mr. Philbin put it, it was "not as if there was a big smoking gun problem there and

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Department had already uncovered, not what might be uncovered in future investigations.

everyone was trying to turn a blind eye to it so the only way to solve that situation was to have someone else come in." FF 147. Similarly, Mr. Donoghue testified that Respondent was sincere in his beliefs, but that he did not have information that would permit the Justice Department to say that it had found potentially outcome-determinative problems with the election. Tr. 186.

But the question is *not* whether *Respondent* believed there were problems with the election, the question is whether the *Justice Department* had uncovered potentially outcome-determinative issues with the election. The answer was "no," and Respondent knew the answer was "no." Thus, Respondent advocated for the Justice Department to send a letter knowing that the allegation about outcome-determinative issues was false. Moreover, Respondent's sincere belief that there should be further investigations into the 2020 election does not justify Respondent's willingness to encourage the Georgia legislature to open investigations based on the false assertion that the Justice Department *had already uncovered* potentially outcome-determinative problems.

The Ligon Report – After falsely asserting that the Justice Department had identified significant concerns, the very next sentence of the letter purported to provide some support for this statement:

> No doubt, many of Georgia's state legislators are aware of irregularities, sworn to by a variety of witnesses, and we have taken notice of their complaints. *See, e.g.,* The Chairman's Report of the Election Law Study Subcommittee of the Standing Senate Judiciary Committee Summary of Testimony from December 3, 2020 Hearing http://www.senatorligon.com/THE_FINAL%20REPORT.PDF (Dec.

> 17, 2020) (last visited Dec. 28, 2020); Debra, Heine, *Georgia State Senate Report: Election Results Are 'Untrustworthy;' Certification Should Be Rescinded*, THE TENNESSEE STAR (Dec. 22, 2020), *available at* https://tennesseestar.com/2020/12/22/georgia-state-senate-report-election-results-are-untrustworthy-certification-should-be-rescinded/ (last visited Dec. 28, 2020).

DCX 8 at 0002; *see* FF 88-89. The Hearing Committee concluded that this reference to the Ligon report was misleading because it suggested (1) that the Justice Department was investigating the information in Chairman Ligon's report, when it was not; and (2) that it had a role in investigating what Mr. Donoghue described as "process issues that were not appropriate for further Justice Department investigation." FF 93 (citing Tr. 184); *see also* Tr. 132-33.

Respondent argues that the statement regarding the Ligon report was not among the alleged false statements charged in the Specification of Charges, and was instead an argument made in Disciplinary Counsel's post-hearing brief to the Hearing Committee. Resp't Br. at 79. Respondent is correct that the Specification of Charges did not specifically charge that the reference to the Ligon report was a false statement. However, Respondent does not argue that he was denied fair notice of this charge against him.

Disciplinary Counsel's Proposed Findings of Fact filed with the Hearing Committee included a list of statements from the letter alleged to be either false or misleading. *See* ODC HC Br. at 12-14 ¶ 33. Disciplinary Counsel argued the letter cited the Ligon report in support of the assertion that the Justice Department had identified significant concerns, without revealing that the report was not an official

legislative report, or that the Justice 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." *Id.* at 13 ¶ 33(b). Respondent responded directly to Disciplinary Counsel's proposed Finding of Fact 33(b). Resp't HC Br. at 9-10. Thus, even though the Specification of Charges did not identify the reference to the Ligon report as a false statement, we do not find that Respondent was denied proper notice of the factual bases for the charges against him.

On the merits, Respondent argues that Mr. Donoghue's view that the Justice Department did not investigate election process issues was not dispositive and that the President "could have ordered that course of action, had he chosen to do [so]." Resp't Br. at 80. But what could have happened had no bearing on whether the Justice Department considered the Ligon report in concluding that there was evidence of potentially outcome-determinative election issues.

Respondent also argues that the letter was accurate because he reviewed and considered the Ligon report—which concluded that the Georgia election results "must be viewed as untrustworthy," (RX 42 at 2; *see* FF 89), and he was part of Justice Department leadership. We find Respondent's assertion disingenuous. If Respondent could speak for the Justice Department, there would have been no reason for him to prepare a letter for signature by him, Rosen, and Donoghue. There would have been no need for the Oval Office meeting to determine whether he should have been appointed Acting Attorney General in order to send the letter.

Respondent's belief in the accuracy of the Ligon report did not mean that the *Justice Department* had adopted the Ligon report. Indeed, the evidence shows that the Justice Department did not support the allegations in the letter, as most of the Justice Department senior leadership would have resigned had the letter been sent.

Finally, Respondent argues that the Justice Department was investigating election "irregularities" as well as election "frauds," and that Mr. Donoghue was aware that the Ligon report had concluded that election should be decertified. Resp't Br. at 80. That may be so, but there is no evidence that Mr. Donoghue (or Mr. Rosen) were concerned that those irregularities were potentially outcome-determinative. Indeed, Mr. Donoghue told Respondent in no uncertain terms in his emailed response to the draft letter: "there is no reason to conclude that any State is currently in a situation in which their election has failed to produce a choice" such that the legislature should intervene. FF 96.

Moreover, through his actions, Respondent was attempting to add the Justice Department's imprimatur to the allegations contained in the Ligon report. The Ligon report was prepared by Georgia State Senator William T. Ligon, the Chairman of the Election Law Study Subcommittee of the Standing Georgia Senate Judiciary Committee. As Respondent's draft letter noted, the intended recipients (the Governor, President pro tem, and Speaker of the House in Georgia, DCX 8 at 0002) were no doubt aware of the report. Thus, there was no reason for Respondent to reference the report, unless he was suggesting that the Justice Department was vouching for it.

In context, the citation to the Ligon report and news articles about the Ligon report suggested that the Justice Department was investigating the "process issues" discussed in the Ligon report, and that the issues addressed in the report were among the supposed evidence giving rise to the purported significant concerns about the outcome of the 2020 election. The false statement that the Justice Department had identified potentially outcome-determinative election issues, and the citation to the Ligon report served as the purported factual predicate for the letter's recommendation that the Georgia legislature convene to investigate the 2020 election. Indeed, in the very next sentence of the letter following the reference to the Ligon report, Respondent proposed to say that "[i]n light of these developments, the Department recommends that the Georgia General Assembly should convene in special session so that its legislators are in a position to take additional testimony, receive new evidence, and deliberate on the matter consistent with its duties under the U.S. Constitution." DCX 8 at 0003. In short, the false statement that the Justice Department had uncovered potentially outcome-determinative issues with the election, purportedly supported by the conclusions in the Ligon report, were clearly intended to serve as the factual predicate for the Georgia legislature to investigate the 2020 election, and perhaps appoint a different slate of electors. Respondent does not deny this. Indeed, as noted above, Respondent argues that "the point of the letter [was] to have the Georgia Legislature engage in further investigation." Resp't Br. at 79. However, Respondent intended to use a lie to prompt that further investigation.

We conclude the letter's reference to the Ligon report was an attempt to make an intentionally false statement.

The Alternate Slate of Electors – Respondent's Proof of Concept letter also asserted that

> The Department believes that in Georgia and several other States, both a slate of electors supporting Joseph R. Biden, Jr., and a separate slate of electors supporting Donald J. Trump, gathered on that day at the proper location to cast their ballots, and that both sets of those ballots have been transmitted to Washington, D.C., to be opened by Vice President Pence.

DCX 8 at 0003. The Hearing Committee concluded that this statement was false because only one slate of "legitimately selected" electors had been transmitted to Washington, D.C. HC Rpt. at 173-74.

Respondent argues that the Hearing Committee was wrong because it mistakenly concluded that the "letter said two sets of *certified* electors had been sent." Resp't Br. at 80. Respondent argues that "[t]he letter never says that and indeed, its entire gist and context" is that the Georgia legislature should decide whether the certified slate of Democratic electors "should be Georgia's electors." *Id.* Prior to oral argument, Respondent made a motion to supplement the record with evidence that an alternate slate of electors was sent to Washington, D.C. He argues that "[t]he fact that two slates of electors were sent from Georgia to Washington, D.C. was not a contested issue in this case, so we did not marshal evidence to prove it." Motion to Supplement the Record, for Judicial Notice, and/or to Treat Factual Question as Conceded, at 3 (Dec. 13, 2024) (hereinafter "Motion to Supplement").

Respondent argues that he "focused on defending the Specification of Charges that ODC actually filed and argued, which contended the draft was 'misleading' by saying that two sets of certified electors had been sent to Washington, D.C."[22] *Id.*

The Specification of Charges alleges that

> The Proof of Concept letter stated that the Department of Justice believed "that in Georgia . . . both a slate of electors supporting Joseph R. Biden, Jr., and a separate slate of electors supporting Donald J. Trump, gathered on that day at the proper location to cast their ballots, and that both sets of those ballots have been transmitted to Washington, D.C., to be opened by Vice President Pence." This statement was misleading. The Governor of Georgia had certified a slate of electors to the Electoral College pledged to Joseph Biden, and there was no legitimate alternative slate of Georgia electors pledged to Donald Trump.

Specification of Charges at 5 ¶ 17.

The first question is whether Disciplinary Counsel proved that the statement in the letter was misleading as written. That is, did Disciplinary Counsel prove that the Justice Department did not believe that Democratic and Republican electors "gathered on that day at the proper location to cast their ballots, and that both sets of those ballots have been transmitted to Washington, D.C., to be opened by Vice President Pence"? Disciplinary Counsel did not carry its burden on this point.

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[22] We grant Respondent's December 13, 2024 Motion to Supplement the Record, for Judicial Notice, And/or to Treat Factual Question as Conceded, in part as we take judicial notice that an alternate slate of Republican electors had been transmitted to Washington, D.C. That does not impact our analysis in any way.

Disciplinary Counsel explored this issue with Mr. Donoghue, who was asked whether there was "any evidence that you are aware of that there had been these two sets of electors that had voted on the same day in the proper time and proper place?" Tr. 134. This question tracked the language of the letter and the Specification of Charges. However, Mr. Donoghue answered that the Justice Department was not aware of "legitimately selected" electors: "We were not aware of any state having *legitimately* selected two slates of electors. That has happened in American history, but it did not happen in the 2020 election." Tr. 134-35 (emphasis added). Disciplinary Counsel did not present any evidence of the Justice Department's knowledge of *any* other slates of electors. Thus, Disciplinary Counsel did not present evidence that the plain language of this portion of the letter was false.

This does not end the Board's inquiry, however. Technically true statements violate Rule 8.4(c) if they were intended to mislead. *Krame*, 284 A.3d at 758 ("[T]echnical truths may still violate [Rules 3.3(a)(1) and 8.4(c)] where they are intentionally misleading via omission."). Thus, to prove a Rule 8.4(c) violation on this basis, Disciplinary Counsel would have to prove that Respondent intended that the recipients of the letter would understand that the Justice Department believed that there were two "certified" slates of electors. On this point, we do not find clear and convincing evidence that Respondent intended for the letter to be understood as referring to "certified" or "legitimate" electors.

We look at the entire mosaic of Respondent's conduct. As he argues, he was advocating that the Georgia legislature decide whether the Democrat or Republican

slate of electors should be Georgia's official slate. He also analogized to events following the 1960 Presidential election in Hawaii. HC Rpt. at 165 n.22; DCX 8 at 0003. That reference appears to contain an implicit acknowledgement that only the Democrat slate had been certified in Georgia, as the letter recounts that in the 1960 election, Vice President Nixon appeared to win the popular vote on election day, and "Nixon" electors were certified by the Hawaii Governor. The letter then notes that Senator Kennedy claimed that he won the popular vote, and "Kennedy" electors cast their ballots on the prescribed day. By January 6, 1961, the date for tallying the Electoral College votes, Hawaii had completed a recount, which showed that Senator Kennedy won the popular vote "so Congress accordingly accepted only the ballots cast for Senator Kennedy." DCX 8 at 0003. The letter cites to a 2001 law review article's discussion of the 1960 Hawaii election: Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1421 n.55 (2001). That article noted that Hawaii certified the Republican electors based on the initial election returns, but then certified the Democrat electors following completion of a recount showing that Senator Kennedy had won the popular vote. *Id.* The Democrat electors were counted on January 6, 1961. *See id.* In context, it appears that Respondent was noting that at least in that one example, an alternate slate of electors had been prepared in support of the candidate who appeared to lose the popular vote, and that that slate had been certified after a recount.

We also note Disciplinary Counsel's argument that Respondent sought to persuade the Georgia legislature to "determine who had won the most legal votes,

and determine which of two (one legitimate and one fake) slates of electors should be accepted by Congress." ODC Br. at 38-39. Thus, it seems Disciplinary Counsel acknowledges that the choice presented to the Georgia legislature was whether to accept the already-certified Democrat electors, or to choose the Republican electors. We conclude that Disciplinary Counsel has not proven by clear and convincing evidence that Respondent intended to mislead the recipients of his letter to believe that there were two "certified" slates of electors.

2. Disciplinary Counsel Did Not Prove that Respondent Attempted to Interfere with the Administration of Justice by Attempting to Recommend that the Georgia Legislature Convene to Determine Who Should Receive Georgia's Electoral Votes.

Rule 8.4(d) prohibits "conduct that seriously interferes with the administration of justice." *In re Hopkins*, 677 A.2d 55 (D.C. 1996) established the test for determining whether a respondent's conduct constituted a serious interference with the administration of justice. To prove a serious interference with the administration of justice, Disciplinary Counsel must prove that

> (i) the respondent's conduct was improper, i.e., that the respondent either acted or failed to act when he should have;
>
> (ii) the respondent's conduct bore directly upon the judicial process with respect to an identifiable case or tribunal; and
>
> (iii) the respondent's conduct tainted the judicial process in more than a de minimis way, i.e., it must have at least potentially had an impact upon the process to a serious and adverse degree.

Id. at 60-61. Because Respondent is charged with attempting to seriously interfere with the administration of justice, we consider whether Disciplinary Counsel proved

by clear and convincing evidence that Respondent attempted to engage in improper conduct, that his improper conduct would have borne directly on an identifiable case or tribunal, and that his conduct would have tainted the judicial process in more than a de minimis way. In short, did Disciplinary Counsel prove that by attempting to send the letter, Respondent attempted to seriously interfere with the administration of justice? We conclude that it did not.

Disciplinary Counsel easily satisfies the first prong of the *Hopkins* test, as we have found above that Respondent's attempt to send the Proof of Concept letter was improper.

Turning to the second prong, we consider whether Disciplinary Counsel proved by clear and convincing evidence that Respondent attempted to engage in conduct that would have borne directly upon the judicial process with respect to an identifiable case or tribunal. Rule 1.0(n) defines "tribunal" to include the actions of a legislative body when "a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter."

Much of the letter is devoted to a state legislature's authority to disregard the results of the popular vote, and award the Electoral votes to the other candidate. The letter notes that the Electors Clause of the Constitution provides that "'[e]ach State shall appoint, in such a Manner as the Legislature thereof may direct,' electors to cast ballots for President and Vice President." DCX 8 at 0004. The letter then observed that initially, many State legislatures appointed the electors, but over time

have chosen to award electors based on the result of the popular vote. Importantly, the letter explained that if an election failed to make a choice the state legislature could appoint the electors. *Id.* Against this backdrop, the letter identified the purpose of the recommended special session:

> The purpose of the special session the Department recommends would be for the General Assembly to (1) evaluate the irregularities in the 2020 election, including violations of Georgia election law judged against that body of law as it has been enacted by your State's Legislature, (2) determine whether those violations show which candidate for President won the most legal votes in the November 3 election, and (3) 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.

Id. The letter asserts that "[t]he Supreme Court has explained that the Electors Clause 'leaves it to the legislature exclusively to define the method' of appointed Electors, vesting the Legislature with 'the broadest possible power of determination.' *McPherson v. Blecker*, 146 U.S. 1, 27 (1892)." *Id.* at 005. In short, the letter attempted to persuade the Georgia legislature to convene to determine which candidate was entitled to receive Georgia's electoral votes, after considering allegations of irregularities in the election. Although a state legislature does not typically fit the image of "neutral official" who was capable of rendering a binding legal judgment, the letter proposed that the legislature act in precisely that role. As the letter proposed that the legislature determine which candidate should receive

Georgia's electoral votes, it proposed that the legislature convene as a "tribunal" as defined in Rule 1.0(n).

We must determine whether Respondent's advocacy to send the letter to the Georgia legislature moved beyond "mere preparation," and progressed to the point of attempt to cause the legislature to convene as a tribunal. This "is a question of degree which can only be resolved on the basis of the facts in each individual case." *Jones v. United States*, 386 A.2d 308, 312 n.2 (D.C. 1978) (quoting *Walker v. United States*, 248 A.2d 187, 188 (D.C. 1968)). In the criminal context, "[i]t is sufficient for the government to prove that 'except for some interference,' defendant's 'overt act done with the intent to commit a crime . . . would have resulted in the commission of the crime.'" *Corbin v. United States*, 120 A.3d 588, 602 n.20 (D.C. 2015) (quoting *Evans v. United States*, 779 A.2d 891, 894 (D.C. 2001)).

We conclude that Respondent's conduct did not constitute an attempt to seriously interfere with the administration of justice because he could not convene the legislature to act as a tribunal. His overt act of sending the letter would not necessarily have caused the Georgia legislature to convene as a tribunal. He could only suggest that it do so by sending the letter. The legislature was not and is not a tribunal unless it chose to sit and proceed as one. Applying the test set forth in the attempt cases discussed above, Disciplinary Counsel proved that Respondent (1) intended that the Justice Department recommend that the Georgia legislature convene to determine whether the correct electors had been certified; (2) prepared

to make that recommendation by proposing that the letter be sent; and (3) failed in this effort because the letter was never sent.

Respondent did not move the "venture forward to within dangerous proximity" of the end sought to be attained—the legislature convening as a tribunal—because the letter was never sent. *Taylor*, 267 A.3d at 1059. Thus, there was no possibility that his plan would be achieved. He would have come within "dangerous proximity" had he sent the letter, but at most, he prepared to interfere with the administration of justice by attempting to send a letter that would have resulted in an interference with the administration of justice only if the legislature relied on it in deciding to convene as a tribunal.

In reaching this conclusion, we take guidance from *Riley v. United States*, 647 A.2d 1165 (D.C. 1994) (per curiam), a case involving the charge of attempting to suborn perjury. There, one defendant (Allen) instructed a Grand Jury witness to lie about the defendant's whereabouts at the time of the crime. *Id.* at 1171. The witness did not follow the instruction, and thus, there was no perjury. *Id.* The Court upheld Allen's conviction for attempted subornation of perjury after concluding that "the offense of attempted subornation of perjury links the intent to procure false testimony 'with the act of soliciting an agreement to testify falsely, although such testimony is ultimately not given.'" 647 A.2d at 1172. Here, not only did the Georgia legislature not convene in special session, Respondent never suggested that it do so (because the letter was never sent). Thus, borrowing language from *Riley*, Respondent never "solicited" the legislature to convene in special session. As such, we conclude that

Disciplinary Counsel failed to prove that Respondent attempted to interfere with the administration of justice.

We consider the third *Hopkins* factor in the event that the Court disagrees with the foregoing "attempt" analysis. We conclude that causing the Georgia legislature to convene in special session as a tribunal would be a more than de minimis interference with the administration of justice.

III. SANCTION

The Hearing Committee recommended that Respondent be suspended for two years and required to prove his fitness to practice prior to reinstatement. Disciplinary Counsel argues that Respondent should be disbarred. Respondent argues that he should receive at most, a de minimis sanction, such as a private admonition.[23]

A. The Sanction Analysis

The sanction imposed in an attorney disciplinary matter must protect the public and the courts, maintain the integrity of the legal profession, and deter the respondent and other attorneys from engaging in similar misconduct. *See, e.g.*, *In re Hutchinson*,

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[23] The Court does not issue private admonitions. *In re Dunietz*, 687 A.2d 206, 210-11 (D.C. 1996) (explaining that the Court's 1995 amendments to D.C. Bar Rule XI "reflect[ed] a judgment by the court in favor of general openness of disciplinary proceedings, and of public disclosure of the sanction imposed, that is quite inconsistent with [a] private censure"); *see also In re Schwartz*, Board Docket No.13-BD-052, at 2-5 (BPR July 31, 2017) (reiterating that private sanctions are not available in the District of Columbia), *recommendation adopted*, 221 A.3d 925 (D.C. 2019) (per curiam).

534 A.2d 919, 924 (D.C. 1987) (en banc); *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *In re Cater*, 887 A.2d 1, 17 (D.C. 2005). "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney." *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc); *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam). In a sanction determination, the Court typically assesses (1) the seriousness of the conduct at issue; (2) the prejudice, if any, to the client resulting from the misconduct; (3) whether the misconduct involved dishonesty; (4) violations of other provisions of the disciplinary rules; (5) previous disciplinary history; (6) whether or not the attorney acknowledges his misconduct; and (7) circumstances in aggravation or mitigation. *See, e.g.*, *Martin*, 67 A.3d at 1053. Finally, the sanction must comply with the comparability standard of D.C. Bar R. XI, § 9(h)(1), which provides that the sanction must not "foster a tendency toward inconsistent dispositions for comparable conduct" or "otherwise be unwarranted." *See In re Murdter*, 131 A.3d 355, 359-360, 359 n.1 (D.C. 2016) (per curiam) (appended Board Report); *see also Hutchinson*, 534 A.2d at 923-24.

1. The Seriousness of the Conduct at Issue

The seriousness of Respondent's misconduct cannot be overstated. Respondent knew that the Justice Department had not discovered potentially outcome-determinative problems with the 2020 Presidential election. Despite that knowledge, as late as three days before the electoral votes were to be counted in a joint session of Congress, he advocated lying about the results of the Justice

Department's election investigations, and encouraging the Georgia legislature to consider whether the electoral votes awarded to Joseph Biden by the popular vote should nonetheless be awarded to Donald Trump. He sought to place the imprimatur of the Justice Department on his personal beliefs, despite knowing that the information available to the Justice Department did not support his beliefs.

Respondent repeatedly attempts to characterize this matter as "a disciplinary action against a lawyer for proposing a letter never sent" (Resp't Br. at 25), suggesting that he had the idea to send the letter, thought about it, and decided not to send it. The facts tell a decidedly different story: Respondent never stopped his efforts to send the letter, until the President stopped him. Respondent's misconduct is his willingness to make a false statement on behalf of the Justice Department. The fact that others prevented this effort does not lessen the seriousness of Respondent's misconduct. The sanction imposed in this case should send a message to members of the Bar—and the public—that a demonstrated willingness to lie is considered serious misconduct, even where, as here, others prevented the lie from being told.

2. Prejudice to the Client

This is not a factor here.

3. Whether the Conduct Involved Dishonesty

Respondent's conduct involves attempted dishonesty, as discussed above. He was prepared to lie about the findings of the Justice Department's post-election investigations, and was stopped only because the President decided against it. Respondent never abandoned his plan to lie.

4. Violations of Other Provisions of the Disciplinary Rules

There are no other Rule violations.

5. Previous Disciplinary History

Respondent has no record of prior discipline.

6. Whether or Not the Attorney Acknowledges his Misconduct

Respondent does not appreciate the seriousness of his misconduct. In his brief to the Board, he argued that, at most, he should receive "a private admonition that [he] be cautioned in the future always to be mindful of the need to qualify his statements." Resp't Br. at 86. This case is not about the failure to "qualify" statements. He was told that the letter was not true, and he persisted in advocating that it be sent, without any evidence that it was true.

Respondent's repeated insistence that his dispute with Messrs. Rosen and Donoghue is akin to a dispute over arguments to include in a brief shows that he does not appreciate the seriousness of his misconduct. Disagreement over arguments to make in a brief are matters of strategy and judgment. On these matters of opinion, there can be room for discussion and debate. But the dispute here was a dispute over the facts: What had the Justice Department learned in its investigations? Messrs. Rosen and Donoghue told Respondent the letter was false when they first read it. They gave him the requested ODNI briefing and connected him with the U.S. Attorney in Georgia. They met with him again to see if he had learned anything new, anything that might support sending the letter. He had not. There was nothing to debate.

7. Circumstances in Aggravation or Mitigation

In mitigation, Respondent argues that he had "unquestioned high motives," has no disciplinary record, and has had a distinguished career.[24] Resp't Br. at 86.

In aggravation, Respondent attempted to use his position to promote his concerns about the integrity of the 2020 election by misrepresenting what Justice Department investigations had established, without a basis in fact for doing so, and after being told that he was wrong to assert that Justice Department investigations had resulted in findings of outcome-determinative problems with the results of the

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[24] On December 13, 2024, Respondent filed a motion for leave to supplement the record with additional information regarding Respondent's involvement in the Justice Department's successful effort to dismiss *Gohmert v. Pence*. Motion to Supplement at 7-10. Respondent argued to the Hearing Committee that the Civil Division successfully defended against this suit, which suggested that Vice President Pence had some authority to ignore the electoral vote "shows that Mr. Clark had a balanced approach to considering the merits of arguments involving the election." HC Rpt. at 188 n.30. Respondent argues that this supplemental evidence would contradict "ODC's theory that Mr. Clark would do or say anything to assist President Trump as a candidate." Motion to Supplement at 7. Respondent argues that the additional evidence is necessary because footnote 30 of the Hearing Committee Report "says that Mr. Clark provided no evidence or details regarding his defense of the *Gohmert* case, and that even if he had, it did not support Mr. Clark's contention because the case was so easy to win." We deny Respondent's motion to supplement the record on this point. He raised the issue of the *Gohmert* litigation during his cross-examination of Mr. Rosen. *See* Tr. 455-56. He argued it to the Hearing Committee. *See* Tr. 1910-11 (arguing that Respondent's conduct in the *Gohmert* case showed that he was acting as a Justice Department lawyer, not a campaign lawyer); Tr. 1932-34 (same). That the Hearing Committee was not persuaded by this evidence does not justify supplementing the record now.

election in Georgia. Mr. Donoghue immediately warned him that sending the letter "would be a grave step for the Department to take and it could have tremendous Constitutional, political and social ramifications for the country." FF 97. Yet Respondent carried on, undeterred.

We also consider Respondent's conversation with Mr. Philbin regarding the possible consequences of Respondent's course of conduct. Mr. Philbin warned Respondent that if he found a way for the President to stay in the White House past January 20, there would be riots in every major city in the country. Respondent did not challenge this prediction, or do anything else to assuage Mr. Philbin. Instead, he suggested calling out the United States military to restore order if riots occurred, telling Mr. Philbin, "well, Pat, that's what the Insurrection Act is for." FF 151.

We agree with Mr. Philbin "that if your planned course of action is one that will or has the high likelihood of triggering riots in every major city in America, you've got to be really sure about what you're doing and have no alternatives," and "be justified 100 percent, 1000 percent." FF 152. Respondent was not "justified 100 percent, 1000 percent." He had no evidence to contradict others in the Justice Department who had knowledge of the results of the Department's election related investigations or to contradict the views of those in the White House Counsel's office. He took no account of those who said they would resign before they would be a party to lying to the American people about what the Justice Department's

investigations had established about the integrity of the 2020 election.[25] Instead, he was prepared to lie to the Georgia legislature about the results of the Justice Department's investigation in order to encourage the Georgia legislature to convene in special session and decide which Presidential candidate should receive Georgia's electoral votes. In the Proof of Concept letter, he recognized that this was a "pressing matter of overriding national importance." DCX 8 at 0006.

We also consider in aggravation that Respondent planned to lie on behalf of the Justice Department, regarding an issue that Mr. Rosen testified was "way out of [Respondent's] lane." Tr. 388. Indeed, when Respondent first drafted the letter, he did not know what the Justice Department's investigations had uncovered because he was not involved in the investigations. Instead, he based the *Justice Department's* letter on information he read online and information filed in civil cases. Tr. 391-92. A lie tarnishes the credibility of the liar, but a lie on behalf of an institution or entity tarnishes the credibility of the institution or entity. The Court considered similar type of harm in *In re Howes*:

> The fair administration of justice relies, in large part, upon the integrity, honesty and trustworthiness of prosecutors, and where misconduct causes a prosecutor's ethics to be questioned, the entirety of the criminal justice system is called into question. Accordingly, a prosecutor who violates ethical rules and exploits his broad discretion

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[25] We agree with the Hearing Committee in rejecting the argument that the group assembled in the January 3, 2021, Oval Office meeting "secretly, conspired to ensure that no evidence would be used to question the results of the election that would otherwise end the administration in which they worked." HC Rpt. at 187-88.

> and access to government resources to misuse public funds, both undermines the legal profession and calls into question the fairness of the criminal justice system within which he operates.

52 A.3d at 21.

Finally, we consider in aggravation that Respondent ignored the uniform opposition to the Proof of Concept letter. Mr. Philbin told Respondent that there would be mass resignations within the Department of Justice and the White House Counsel's Office if he were appointed Attorney General and sent the letter. We agree with the Hearing Committee that Respondent "persisted in a plan so extreme that a room full of President Trump's closest appointed advisors all considered it to be catastrophic." HC Rpt. at 187.

8. Sanctions in Cases Involving Comparable Misconduct

D.C. Bar R. XI, § 9(h)(1) requires that the Board recommend a sanction that is consistent with that imposed in cases involving "'equally egregious' or comparable misconduct." *In re Soto*, 298 A.3d 762, 770 (D.C. 2023) (quoting *Reback*, 513 A.2d at 230). Where, as here, there "are no other cases of fully comparable conduct with which we must maintain consistency," *Reback*, 513 A.2d at 230, we must recommend a sanction that will "serve not only to maintain the integrity of the profession and to protect the public and the courts, but also to deter other attorneys from engaging in similar misconduct," *id.* at 231 (citing *In re Wild,* 361 A.2d 182, 183 (D.C. 1976)).

All Board members have unanimously concluded that Respondent was intentionally dishonest, but not all agree that his conduct amounted to "flagrant

dishonesty" warranting disbarment. A majority of the Board concludes that Respondent should be disbarred for engaging in flagrant dishonesty, while a minority recommends that Respondent be suspended for three years, and required to prove fitness to practice prior to reinstatement.

"Flagrant dishonesty is either dishonesty accompanied by aggravating factors or continued and pervasive dishonesty." *In re Johnson*, 298 A.3d 294, 317 (D.C. 2023). Here, Respondent's dishonesty was arguably not continued or pervasive. This entire case focuses on the one-week period of time between December 28, 2020, and January 3, 2021, when Respondent sought to lie about the Justice Department's investigation. However, the sanction necessary to protect the public, the courts, and the integrity of the profession should not be limited to tallying the number of lies or the length of the dishonesty. Instead, it should focus on the seriousness of the misconduct and the potential harm.

As discussed above, Respondent sought to have the Justice Department lie about a "pressing matter of overriding national importance." He did so, despite being told in no uncertain terms that it was a lie. The sanction imposed here should serve to deter other lawyers from following in Respondent's footsteps, and assure the public that the legal profession will not tolerate lawyers who use their professional positions to lie about important national issues.

The Court has held that "[d]etermining whether conduct rises to the level of flagrancy involves a fact-specific approach that considers an attorney's particular misconduct, and not simply the rules that he violated, and whether the misconduct

was criminal or quasi-criminal." *In re LeFande*, 328 A.3d 775, 780 (D.C. 2025) (internal quotations omitted). We do not read the Court's precedent to limit flagrant dishonesty to temporally protracted dishonesty, and instead, as discussed above, the Court considers all surrounding circumstances. For instance, in *Howes*, the Court considered that

> Respondent's repeated dishonesty and disregard for both his ethical obligations as a prosecutor and the limitations of federal law resulted in substantial reductions of sentences for nine convicted felons, compromised the administration of justice, and jeopardized public confidence in the system of justice, which he was sworn and obligated to uphold.

Howes, 52 A.3d at 25. In *Cleaver-Bascombe*, where the respondent submitted a false CJA voucher, the Court considered that "[a]ttorneys who accept CJA appointments are therefore expected to be scrupulously honest and to exercise a high degree of care in completing their vouchers, which are paid out of taxpayer funds, and which are submitted to the court under penalty of perjury." *In re Cleaver-Bascombe*, 986 A.2d 1191, 1199 (D.C. 2010) (per curiam). Here, we consider that shortly before Congress was to certify the 2020 electoral votes, Respondent wanted to lie about the results of the Justice Department's investigations.

We recommend that Respondent be disbarred because the aggravating facts here show that the misconduct is far more serious than in some of the other dishonesty cases that resulted in disbarment. We stress that our recommendation is not limited to Justice Department lawyers, or lawyers who make statements regarding elections. Lawyers have the ability to make statements that move markets,

seek the criminal prosecution of others, and in this case, question the integrity of elections. We do not require perfection from lawyers when making these statements, we are tolerant of reasonable errors; but if lawyers are to be scrupulously honest at all times, they should be the most scrupulous when the consequences from false statements are the most severe. When a lawyer attempts to make intentional false statements on an issue that the lawyer understands to be a "pressing matter of overriding national importance," or knowing that the false statement would have serious and far ranging consequences, they deserve the ultimate sanction.

In considering the sanction, we are mindful of *Shillaire*'s observation that "[a]s members of this profession we realize that our standing is often measured in the layman's mind by the manner in which we discipline that small minority of our brethren who break the rules of fidelity and trust required by our calling." *Shillaire*, 549 A.2d at 338 (quoting *State v. Fishkind*, 107 So. 2d 131, 132-33 (Fla. 1958)).

Shillaire reminds us that "[t]he Bar is a noble calling. One who becomes a member of the legal profession is not embarking on a career in trade. Rather, he or she is enlisting as a participant in the administration of justice." *Id.* at 337. Quoting the Preamble to the then-applicable Code of Professional Responsibility, *Shillaire* emphasized the importance of the rule of law in maintaining our society, and the importance of lawyers in maintaining the rule of law:

> [T]he continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law . . . . Lawyers, as guardians of the law, play a vital role in the preservation of society . . . . A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

Id. *Shillaire* recognized that "[m]embership in our honorable profession is a privilege which places special burdens upon those choosing to pursue it," and warned that "[b]ecause our fortunes, reputations, domestic peace . . . nay, our liberty and life itself rest in the hands of legal advocates, their character must be not only without stain, but without suspicion." *Id.* *Shillaire* quoted the words of Justice Frankfurter:

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

Id. (quoting *Schware v. Bd. of Bar Exam'rs*, 353 U.S. 232, 247 (Frankfurter, J., concurring). *Shillaire* recognized that

> We are all human, and a lawyer cannot be required to be a plaster saint, but he or she should surely be expected, at the very least, to behave in a way that demonstrates honesty, fairness and respect for the rights of others and for the laws of the state and nation.

Id. (internal quotations omitted)

Respondent's conduct fell well short of the standard set forth in *Shillaire*. Given the unprecedented nature of Respondent's misconduct, we consider the Court's observation in *In re Addams* that "[t]he appearance of a tolerant attitude toward known embezzlers would give the public grave cause for concern and undermine public confidence in the integrity of the profession and of the legal system whose functioning depends upon lawyers." 579 A.2d 190, 193 (D.C. 1990). We

conclude that the appearance of a tolerant attitude toward Respondent's conduct would similarly undermine public confidence in the integrity of the legal profession and of the legal system.

Considering all of the facts proven by Disciplinary Counsel, we conclude that Respondent should be disbarred because he attempted to engage in flagrant dishonesty.

IV. CONCLUSION

For the foregoing reasons, the Board concludes that Respondent violated Rules 8.4(a) in that he attempted to violate Rule 8.4(c), and we recommend that he be disbarred from the practice of law in the District of Columbia. We further recommend that Respondent's attention be directed to the requirements of D.C. Bar R. XI, § 14, and their effect on eligibility for reinstatement. *See* D.C. Bar R. XI, § 16(c).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: Bernadette C. Sargeant
Bernadette C. Sargeant, Chair

All members of the Board concur in this report and recommendation, except Mr. Walker and Ms. Speigel, who have filed a separate statement addressing sanction.

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
JEFFREY B. CLARK,	:	Board Docket No. 22-BD-039
	:	Disciplinary Docket No. 2021-D193
Respondent.	:	
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 455315)	:	

SEPARATE RECOMMENDATION
AS TO SANCTION

We agree with the majority's findings of fact and conclusions of law in this matter. For the reasons discussed herein, however, we respectfully disagree with our colleagues as to the sanction to be recommended based on these factual findings and legal conclusions. Notwithstanding the grave nature of Respondent's proven misconduct and the unprecedented context in which Respondent engaged in that misconduct, we do not believe that the Court's line of cases articulating the current contours of the "flagrant dishonesty" rationale as a basis to impose the sanction of disbarment applies here, where Respondent has been found, essentially, to have attempted to make a single intentionally false statement. We recommend, therefore, that Respondent be suspended for three years from the practice of law in the District of Columbia, with a requirement that he prove his fitness before reinstatement.

The Board's sanction recommendation must be guided by the "imperative to avoid 'inconsistent dispositions for comparable conduct.'" *In re Dobbie*, 305 A.3d 780, 813 (D.C. 2023) (quoting D.C. Bar R. XI, § 9(h)(1)). To do otherwise would

recommend that the Court "bring about the asymmetry that [D.C. Bar R. XI § 9(h)(1)] was intended to avoid." *In re Reback*, 513 A.2d 226, 230 (D.C. 1986).

The Court has ordered disbarment in dishonesty cases involving "flagrant dishonesty." *See, e.g.*, *In re LeFande*, 328 A.3d 775, 781 (D.C. 2025) (disbarring attorney who "engaged in a long-term pattern of dishonesty" and multiple ethics violations over a number of years); *In re Johnson*, 298 A.3d 294, 300-01 (D.C. 2023) (disbarring attorney who engaged in multiple acts of dishonesty and violations of a number of other rules); *In re Mazingo-Marrone*, 276 A.3d 19, 21 (D.C. 2022) (disbarring attorney who committed "repeated acts of dishonesty" in a number of proceedings).

> Dishonesty that is "flagrant" is either (1) "continued and pervasive" or otherwise (2) "accompanied by aggravating factors." (citation omitted). Determining whether conduct rises to the level of flagrancy involves a "fact-specific approach" that considers an attorney's "particular misconduct, and not simply the[] rules that he violated," (citation omitted) and whether the misconduct was "criminal or quasi-criminal."

LeFande, 328 A.3d at 780. Because Respondent's conduct was not "continued and pervasive" and because Respondent's conduct did not exhibit the type of "aggravating factors" the Court has identified in other cases as rising to "flagrant dishonesty," we do not believe that conduct rises to the level of "flagrant dishonesty" that justifies disbarment under the Court's precedents.

Respondent's attempted intentional dishonesty essentially involved a single statement — 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," purportedly supported by the citation to the Ligon report — that he

declined to withdraw over a period of several days, even after being told repeatedly by better-informed, senior leaders at the Department of Justice that the statement was false. We have not identified any case in which the Court disbarred a respondent over a single dishonest statement supported by a false citation. *See, e.g.*, *Mazingo-Marrone*, 276 A.3d at 23 ("[T]his case in our view fits comfortably with prior cases in which we have disbarred attorneys for engaging in a broad, prolonged, and persistent pattern of dishonesty."); *In re Howes*, 52 A.3d 1, 4 (D.C. 2012) (disbarring attorney who engaged in dishonest conduct over a period of several years); *In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam) (disbarring attorney in light of his "repeated resort not only to false testimony but to the actual manufacture and use of false documentary evidence in official matters").

Similarly, in our view, the aggravating factors identified by the majority are not comparable to the factors that have been established in cases finding "flagrant dishonesty." For example, Respondent did not: engage in misappropriation or other financial misconduct (*In re Pelkey*, 962 A.2d 268, 282 (D.C. 2008)); seek to "compound[] [his] misconduct by lying to [his] clients" or otherwise attempt to conceal his dishonesty (*In re Kanu*, 5 A.3d 1, 15 (D.C. 2010); *see In re Cleaver-Bascombe*, 986 A.2d 1191, 1200 (D.C. 2010) (per curiam)); seek to shift the blame for his actions to others (*In re Bynum*, 197 A.3d 1072, 1074 (D.C. 2018)); or refuse to participate in disciplinary proceedings (*LeFande*, 328 A.3d at 781).

While the context in which Respondent's dishonesty occurred is undoubtedly a highly significant and important one, that context does not, without more, render

Respondent's dishonesty "flagrant" under the existing relevant cases. The designation "flagrant" has been reserved by the Court, to date, for particularly egregious and extended dishonest *conduct*, not more limited conduct that occurs in an "important" *matter*. Many, if not all, issues that attorneys deal with are vitally important to their clients or even to society at large. The question of whether, in the matter before us, the Justice Department did or did not identify potentially outcome-determinative problems in a national election is, again, obviously highly important. But so may be, in other real ways, questions involving: the exercise of federal power to prosecute and punish individuals; child custody and child safety; the financial or other exploitation of vulnerable individuals; and other matters that may dramatically affect the lives of clients or the operation of the legal system. Disbarring Respondent primarily because of the context of his attempted dishonesty would weigh that factor disproportionately. While the context in which an attorney's misconduct occurs is a relevant factor in weighing sanctions, it should not outweigh all other factors, including most significantly the specific acts committed by the attorney and the *actual* effects of that conduct on clients, the court system, third parties, or society. Respondent's disbarment on these facts and for the instance of misconduct proven here would not be consistent with the Court's current precedents.

Although, in our view, Respondent's false assertion does not rise to the level of "continued and pervasive" dishonesty that the Court has found to justify disbarment, it goes beyond the limited activity that has been sanctioned with shorter periods of suspension. When the Court has suspended an attorney for single or

limited acts of dishonesty, the length of the sanction imposed has depended on factors relating to the attorney's misconduct, including whether the dishonesty was accompanied by other violations, whether it was intended to conceal the lawyer's misconduct or to harm a client, or whether other considerations about the nature of the attorney's misconduct justified a longer period of suspension. *See In re Martin*, 67 A.3d 1032, 1054 (D.C. 2013) (eighteen-month suspension when an attorney's "dishonesty was both protracted and intended to conceal or excuse earlier misconduct" and the "'entire mosaic' of the attorney's practice" indicated that the lawyer sought to collect an unreasonable fee, failed to protect trust funds, and engaged in other misconduct); *In re Slaughter*, 929 A.2d 433, 445, 448 (D.C. 2007) (three-year suspension with fitness when an attorney "engag[ed] in numerous acts of dishonesty"; among other misconduct, the attorney "prepared and forged a contingency fee agreement purportedly signed by the Arkansas Assistant Attorney General" and created and placed altered pleadings in his law firm's files); *In re Hutchinson*, 534 A.2d 919, 926-28 (D.C. 1987) (one-year suspension when an attorney "lied not once but twice, with sufficient time between the incidents to allow him to reflect on the gravity of his actions" (quoting Board Report)); *cf*. *In re Carter*, 333 A.3d 558, 560-61 (D.C. 2025) (sixty-day suspension when an attorney made a false statement about the dismissal of a client's complaint to a small claims court); *In re Zeiger,* 692 A.2d 1351, 1352 (D.C.1997) (per curiam) (sixty-day suspension for an attorney who "altered his client's medical records and submitted them to opposing party's insurer").

"Lawyers have a greater duty than ordinary citizens to be scrupulously honest at all times, for honesty is 'basic' to the practice of law." *Hutchinson*, 534 A.2d at 924 (quoting *Reback*, 513 A.2d at 231); *see also In re Daniel*, 11 A.3d 291, 300 (D.C. 2011) ("There is nothing more antithetical to the practice of law than dishonesty, and it cannot be condoned by those charged with protecting the public from unscrupulous conduct by lawyers."). Given Respondent's offense to these norms, we agree with the majority that he should not have the privilege of practicing law for a substantial period of time. In our view, a three-year suspension from the practice of law (with a fitness requirement, as discussed below) will protect the public and the courts, maintain the integrity of the legal profession, and deter the respondent and other attorneys from engaging in similar misconduct. *See, e.g.*, *Hutchinson*, 534 A.2d at 924. Further, we do not believe that this recommended sanction can be viewed reasonably as fostering the appearance of a tolerant attitude toward the Respondent's conduct. *See In re Addams*, 579 A.2d 190, 193 (D.C. 1990).

We agree with the Hearing Committee that Respondent should be required to show fitness to practice prior to being reinstated to the Bar. "[T]he open-ended fitness requirement is intended to be an appropriate response to serious concerns about whether the attorney will act ethically and competently in the future, after the period of suspension has run." *In re Cater*, 887 A.2d 1, 22 (D.C. 2005). Respondent sought to have the Justice Department lie about a "pressing matter of overriding national importance," despite being told in no uncertain terms that it was a lie, and

he does not appreciate the significance of his misconduct. Those considerations "cast[] a serious doubt upon the attorney's continuing fitness to practice law." *Cater*, 887 A.2d at 24. A fitness requirement would appropriately protect the public.

For the reasons stated above, we depart from the Board's recommendation that Respondent be disbarred and recommend instead that he be suspended for three years with a fitness requirement.

By: Leslie Spiegel
Leslie Spiegel

Mr. Walker joins in this Separate Recommendation as to Sanction.