**Ethics in Brief**

**Judicial Battles Over the Presidential election: Ethical Constraints Violated?**

By Deborah A. Wolfe

“The first thing we do, let’s kill all the lawyers.” –*Henry VI*, Part 2, Act 4, Scene 2, by Wm. Shakespeare.

Who among us hasn’t heard that trope bandied about since the moment we talked about going to law school? However, though many people assume it is a put-down of the legal profession, Shakespeare meant it to be the opposite. The context of the statement, ironically—and chillingly-- is the character Jack Cade attempting to lead a revolution in the kingdom by falsely claiming to be the rightful heir to the throne. Cade is a preening, vain, self-aggrandizing narcissist, claiming that he is “valiant”, “able to endure much”, and “fearless”. The quote above, said by Dick the Butcher, a murderous toady, is in response to Cade’s statement: “I thank you good people—there shall be no money; all shall eat and drink on my score, and I will apparel them all in one livery, that they may agree like brothers, *and worship me, their lord*.” (Emphasis added.) The equivalent statement of “a chicken in every pot if only you will annoint me King.”

Contrary to the way the statement is interpreted by many, it wasn’t meant to cast aspersions on our profession, but to bring into clear focus the protective role that lawyers play in society, as the impediment to those who would contemplate revolution and anarchy. In fact, the killing of all the lawyers would be the surest way to clear the path to tyranny. Lawyers are viewed to be the protectors of truth, guardians of the rule of law that stand in the way of Chaos.

In the past weeks, the Attorneys General of several states, repaired to the courts to challenge (and defend) the presidential election results. Were there ethical constraints on them? The answer: yes. In California, attorneys are required by Business & Professions Code section 6067 to swear loyalty to the Constitution. It states: “Every person on his admission **shall** take an oath to support the Constitution of the United States and the Constitution of the State of California, and faithfully to discharge the duties of any attorney at law to the best of his knowledge and ability. A certificate of the oath shall be indorsed upon his license.” The oath itself is quite simple and straightforward, and is the same regardless of whether or not one is being sworn in as a U. S. Senator, a judge, or a lawyer:

“I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.”

Multiple lawsuits have been filed, in numerous states’ courts—all by licensed attorneys-- and all have been dismissed based on an absence of evidence and often times demonstrably false claims. Filing and defending a lawsuit without basis in law or fact, is a violation of the Rules of Professional Conduct in every state. See ABA Model Rules of Professional Conduct 3.1, (identical to California’s Current Rule 3.1) which could subject the attorney to professional discipline by the bar of the State in which the attorney is licensed. This Rule in pertinent part, states: “(a) A lawyer **shall not**: … (2) *present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of the existing law*.” (Emphasis added.) Many would argue that given this ethical requirement, several States, with Texas leading the charge, were seeking to disenfranchise millions of voters in States in which President-Elect Biden won the popular vote. In its response to Texas’s suit to invalidate its election, Pennsylvania’s brief states “Texas does not seek to have the Court interpret the Constitution, so much as to disregard it.” The brief further states: “The cascading series of compounding defects in Texas’s filings is only underscored by the surreal alternate reality that these filings attempt to construct. That alternate reality includes an absurd statistical analysis positing that the possibility of President-Elect Biden winning the election was ‘one in a quadrillion.’ Bill of complaint at 6. Texas’s effort to get this Court to pick the next President has no basis in law or fact. The Court should not abide this seditious abuse of the judicial process, and should send a clear and unmistakable signal that such abuse must never be replicated.”

An amicus brief in the Texas lawsuit, filed in the Supreme Court and signed by numerous legal scholars from all over the country, states: “Plaintiff’s motions make a mockery of Federalism and separation of powers. It would violate the most fundamental constitutional principles for this Court to serve as the trial court for presidential election disputes.” Citing the U. S. Supreme Court case of *Rucho v. Common Cause* 139 S.Ct. 2484 (2019), the brief goes on to state: “What the plaintiff seek[s] is an unprecedented expansion of [federal] judicial power…. The expansion of judicial authority would not be into just any area of controversy but into one of the most intensely partisan aspects of American political life. The intervention would be unlimited in scope and duration—it would recur over and over again around the country with each [presidential election.] Consideration of the impact of today’s ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role.” 139 S.Ct. at 2507. U.S. Constitution, Article II, ⸹1, Cl.2; U. S. Constitution Article III, ⸹2; U.S. Constitution Article IV, ⸹1, Cl.3 and Cl. 4.

These filings by attorneys—officers of the court—are argued to be attacks on Constitutional democracy itself, a direct challenge to the separation of powers and individual States’ rights, rather than seeking to have the high Court interpret the Constitution.[[1]](#footnote-1) On the other hand, the very fact the court, rather than the streets, are being used to address fundamental constitutional issues arguably is supportive of the litigation, rather than extra- judicial means.

As lawyers, we have a responsibility to live up to the oath we take to preserve, protect and defend the Constitution. We must respect the rights of every individual to freedom of speech and access to the courts; these are rights guaranteed by the Constitution’s First Amendment. And paramount even though the many lawsuits involve grave constitutional issues, all attorneys were required to litigate within the bounds of their oaths to uphold the Constitution and Rule 3.1.

1. All of the briefs addressed to the Supreme Court are readily available to the public, and the writer encourages the readers to read them, and draw their own conclusions as to the intent and veracity thereof. [↑](#footnote-ref-1)