



August 31, 2022

Indiana Supreme Court
Disciplinary Commission
251 N. Illinois Street, Suite 1650
Indianapolis, IN 46204

VIA ELECTRONIC MAIL: [REDACTED]

Dear Disciplinary Commission:

The 65 Project is a bipartisan, nonprofit effort to protect democracy from abuse of the legal system by holding accountable lawyers who engage in fraudulent and malicious efforts to overturn legitimate elections.

We write to request that the Disciplinary Commission investigate the actions taken by Courtney Milbank relating to her effort to overturn the 2020 presidential election. Ms. Milbank served as part of a coordinated attempt to abuse the judicial system to promote and amplify bogus, unsupported claims of fraud to discredit an election that Mr. Trump lost.

Ms. Milbank worked on *Bally v. Whitmer* in Michigan. The Complaint Ms. Milbank filed in that matter was nearly identical to complaints filed by co-counsel in three other states, except that it also simply repeated allegations made in other, Michigan-based litigation. All of those matters lacked any basis in law or fact. It represented an attempt by lawyers across the country to create a false narrative about voter fraud that was based on conjecture and conspiracy theories.

In addition, Ms. Milbank a Wisconsin court has recently revoked Ms. Milbank's pro hac vice admission for violating the rules of professional conduct. The extensive order detailing Ms. Milbank's problematic actions is attached for your further consideration.

A full investigation by the Disciplinary Commission will demonstrate the egregious nature of Ms. Milbank's actions, especially when considered in light of his purposes, the direct and possible consequences of his behavior, and the serious risk that Ms. Milbank will repeat such conduct unless disciplined.

BACKGROUND

Joe Biden received over 81 million votes in November 2020, defeating Mr. Trump by over seven million votes and over four percentage points.¹ Mr. Trump’s head of the U.S. Cybersecurity and Infrastructure Security Agency, Christopher Krebs, [announced](#) that the “November 3rd election was the most secure in American history. . . . There is no evidence that any voting system deleted or lost votes or changed votes or was in any way compromised.” Mr. Trump [fired him](#). William Barr, Mr. Trump’s own Attorney General, [declared that the Department of Justice](#) has “not seen fraud on a scale that could have effected a different outcome in the election.” Attorney General Barr announced his resignation less than two weeks later, but not before again confirming that the 2020 elections had been free and fair.²

Many of Mr. Trump’s own senior advisors agreed with Attorney General Barr and Mr. Krebs.³ Indeed, Deputy (and later Acting) Attorney General Jeffrey Rosen and Associate (and later Acting) Deputy Attorney General Richard Donoghue regularly refuted the false information and allegations that Mr. Trump and his allies asserted about a fraudulent election.⁴ Mr. Rosen has testified that on December 15, 2020, at a meeting that included Mark Meadows, White House Chief of Staff, he and others told Mr. Trump that the information he was receiving from his political allies was not correct.⁵ And Mr. Donoghue has testified to the Select Committee to Investigate the January 6th Attack on the United States Capitol (Select Committee) that on December 27, 2020, he told Mr. Trump “in very clear terms” that after “dozens of investigations, hundreds of interviews” looking at “Georgia, Pennsylvania, Michigan, and Nevada,” the Department of Justice – Mr. Trump’s own Department of Justice – had concluded that “the major allegations are not supported by the evidence developed.”⁶

Despite clear proof that no fraud occurred, and that no one stole the election from him, Mr. Trump and his lawyers sought to overturn the legitimate results by filing 65 baseless lawsuits

¹ See Federal Election Commission, *Official 2020 Presidential General Election Results*, available at <https://www.fec.gov/resources/cms-content/documents/2020presgeresults.pdf>.

² M. Balsamo, *Disputing Trump, Barr says no widespread election fraud*, Associated Press (Dec. 1, 2020), <https://perma.cc/4U8N-SMB5>.

³ See Deposition of Jason Miller (Feb. 3, 2022), available at <https://january6th.house.gov/sites/democrats.january6th.house.gov/files/2022.03.02%20%28ECF%20160%29%20Opposition%20to%20Plaintiff%27s%20Privilege%20Claims%20%28Redacted%29.pdf>; Interview of Jeffrey Rosen (Aug. 7, 2021), United States Senate Committee on the Judiciary, 117th Cong. 30, available at <https://www.judiciary.senate.gov/rosen-transcript-final>.

⁴ See Interview of Jeffrey Rosen *see also* Interview of Richard Donoghue (Oct. 1, 2021), available at <https://january6th.house.gov/sites/democrats.january6th.house.gov/files/2022.03.02%20%28ECF%20160%29%20Opposition%20to%20Plaintiff%27s%20Privilege%20Claims%20%28Redacted%29.pdf>

⁵ Interview of Jeffrey Rosen.

⁶ Interview with Richard Donoghue.

across the country.⁷ None succeeded and, in fact, courts have imposed sanctions on the lawyers who participated in these suits and referred them for sanctions to their respective state bars.⁸

CONDUCT GIVING RISE TO THE COMPLAINT

Ms. Milbank helped lead the charge on behalf of Mr. Trump in Michigan.

On November 11, 2020, Ms. Milbank initiated *Bally v. Whitmer* in the United States District Court for the Western District of Michigan. One can only speculate as to why Plaintiffs' counsel chose the Western District of Michigan, when the allegations center on cities in the eastern portion of the state.

The complaint Ms. Milbank filed in this case was nearly identical to three others filed by Ms. Milbank's co-counsel in Georgia, Pennsylvania, and Wisconsin around the same time – despite the case-specific factual assertions of illegal voting.

For example, in *Bally* the Plaintiffs stated:

In addition to the foregoing evidence, Voters will provide evidence, upon information and belief, that sufficient illegal ballots were included in the results to change or place in doubt the November 3 presidential-election results. This will be in the form of expert reports based on data analysis comparing state mail-in/absentee, provisional, and poll-book records with state voter-registration databases, United States Postal Service (“USPS”) records, Social Security records, criminal-justice records, driver’s license and state ID records, and other governmental and commercial sources by using sophisticated and groundbreaking programs to determine the extent of illegal voters and illegal votes, including double votes, votes by ineligible voters, votes by phantom (fictitious) voters, felon votes (where illegal), non-citizen votes, illegal ballot harvesting, and pattern recognition to identify broader underlying subversion of the election results. Plaintiffs have persons with such expertise and data-analysis software already in place who have begun preliminary analysis of available data to which final data, such as the official poll list, will be added and reports generated.

⁷ W. Cummings, J. Garrison & J. Sergent, *By the numbers: President Donald Trump’s failed efforts to overturn the election*, USA Today (Jan. 6, 2021), available at <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/>.

⁸ See, e.g., *King v. Whitmer*, No. 20-13134 (U.S. Dist. Ct. E. Dist. Mich. Aug. 25, 2021), available at https://www.michigan.gov/documents/ag/172_opinion_order_King_733786_7.pdf.

Upon information and belief, the expert report will identify persons who cast votes illegally by casting multiple ballots, were deceased, had moved, or were otherwise not qualified to vote in the November 3 presidential election, along with evidence of illegal ballot stuffing, ballot harvesting, and other illegal voting. This evidence will be shortly forthcoming when the relevant official documents are final and available, for which discovery may be required, and the result of the analysis and expert reports based thereon will show that sufficient illegal ballots were included in the results to change or place in doubt the November 3 presidential-election results.⁹

They repeated those same lines in Georgia,¹⁰ Pennsylvania¹¹ and Wisconsin.¹²

And the “foregoing evidence” referred to in the above paragraph were based on a study by a rightwing organization, media reports that state legislators wanted to investigate the election, and allegations made in pending litigation.

“This evidence,” the Complaint, “suffices to place in doubt the November 3 presidential-election results in identified counties and/or the state as a whole.”

Hardly. The discredited reports Ms. Milbank and her co-counsel relied on were flimsy, second-hand accounts that did not warrant filing a lawsuit.

More troubling, though, is that Ms. Milbank sought to disqualify *every vote* in “identified counties” so that Mr. Trump would prevail. In addressing the idea of invalidating millions of legally cast votes, Ms. Milbank’s co-counsel said that they wanted the court to throw out, “Every fricking one of them.”¹³

Further, Ms. Milbank’s co-counsel acknowledged that they lacked a proper factual basis for bringing the matter. He said, “There’s sufficient suspicion that [the election’s] been stolen. Our case does not end there. Our case begins there. We want the poll lists so that we can analyze the

⁹ *Brooks, et al. v. Mahoney, et al.*, Case No. 4:20-cv-00281 (S.D. Ga.), Nov. 11, 2020, Compl. ¶¶ 45-46.

¹⁰ *Brooks, et al. v. Mahoney, et al.*, Case No. 4:20-cv-00281 (S.D. Ga.), Nov. 11, 2020, Compl. ¶¶ 45-46.

¹¹ *Pirkle v. Wolf*, Case No. 4:20-cv-2088 (M.D. Pa.), Nov. 10, 2020, Compl. ¶¶ 26-27.

¹² *Langenhorst, et al. v. Pecore, et al.*, Case No. 1:20-cv-1701 (E.D. Wis.), Nov. 12, 2020, Am. Compl. ¶¶ 44-45.

¹³ Tony Cook & Johnny Magdaleno, *Top Indiana Election Attorney Rushes to Defend Trump’s Fraud Claims, Then Quietly Retreats*, Indianapolis Star (Nov. 17, 2020), <https://www.indystar.com/story/news/politics/2020/11/17/top-indiana-election-drops-lawsuits-challenging-trump-loss-4-states/6258104002/>.

poll list to see if in fact it was stolen.”¹⁴ In other words, suspicion and conjecture – not facts – underlie their effort.

Ms. Milbank repeated these assertions in a motion to expedite, stating:

Specifically, Voters have presented evidence in their Verified Complaint (ECF No. 1) that sufficient illegal ballots were included in the election results in certain counties to alter or to place in doubt the November 3 presidential-election results. In addition to the evidence alleged in the Verified Complaint (ECF No. 1), Voters will provide additional evidence that sufficient illegal ballots were included in the results to change or place in doubt the November 3, 2020 presidential-election results.¹⁵

After a flurry of activity on the case – including the court issuing over a dozen requested summonses, a Plaintiffs’ motion for expedited scheduling and discovery, and several motions to intervene – Ms. Milbank voluntarily dismissed the matter four days after filing. Ms. Milbank’s co-counsel dismissed the similar lawsuits brought in other states the same day.

Ms. Milbank’s actions warrant discipline.

**A SUBSTANTIAL BASIS EXISTS FOR THE DISCIPLINARY COMMISSION TO
INVESTIGATE MS. MILBANK’S CONDUCT AND TO
IMPOSE APPROPRIATE DISCIPLINE**

The Disciplinary Commission should investigate Ms. Milbank’s actions on the following basis:

1. Ms. Milbank Violated Rule 3.1 By Bringing and Defending a Matter He Knew Lacked Merit

Rule 3.1 provides, in part, as follows: “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”

Comment 2 states that: “The action is frivolous...if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.”

¹⁴ Tony Cook & Johnny Magdaleno, *Top Indiana Election Attorney Rushes to Defend Trump’s Fraud Claims, Then Quietly Retreats*, Indianapolis Star (Nov. 17, 2020).

¹⁵ *Bally v. Whitmer*, Case No. 1:20-cv-1088 (W.D. Mich. 2020), Mot. to Expedite at 3, available at <https://storage.courtlistener.com/recap/gov.uscourts.miwd.99603/gov.uscourts.miwd.99603.4.0.pdf>.

“Knowledge” under the Rules of Professional Conduct can be “inferred from circumstances.”¹⁶

Ample evidence demonstrates that Ms. Milbank knew of the frivolous nature of the litigation he initiated. In *Langenhorst* and *Bally* the complaints specifically acknowledged that counsel had not had ample opportunity to investigate the matter. Further, no reasonable person would consider the cited evidence a sufficient basis for throwing out nearly a million votes in two counties.

In fact, the pleadings themselves make clear that when filing the claims, Ms. Milbank did not have a proper basis for bringing them because the Plaintiffs did not have even a shred of the evidence they claimed they would produce. As Ms. Milbank’s co-counsel said, there was “suspicion” that the election was stolen and “our case begins there.”¹⁷ The Complaint repeatedly states, “upon information and belief,” but as the Third Circuit said in rejecting a Trump Campaign lawsuit, “‘Upon information and Belief’ is a lawyerly way of saying that the Campaign does not know that something is a fact but just suspects it or has heard it.”¹⁸

Finally, the fact that Ms. Milbank’s co-counsel filed complaints containing nearly identical allegations in a total of four states that Mr. Biden won helps confirm that the efforts were part of a larger effort to undermine the legitimacy of the entire 2020 presidential election.

Ms. Milbank knew the claims she was advancing lacked any basis in law or fact.

In short, for the many reasons provided above, Ms. Milbank’s conduct violated Rule 3.1.

2. Ms. Milbank Violated Rule 3.3’s Duty of Candor to the Tribunal

Rule 3.3(a)(1) and (a)(3) provide that a “lawyer shall not knowingly... make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;” or “offer evidence that the lawyer knows to be false.”

Comment 3 confirms that, “An advocate is responsible for pleadings and other documents prepared for litigation,” even when the lawyer is not responsible for the factual assertions contained therein.

Comment 5 states that, “Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client’s wishes.” And, as discussed above, knowledge can be inferred.

In filings submitted to the District Court, Ms. Milbank referred to the Plaintiffs’ “Verified Complaint.” But the verifications signed by Plaintiffs differed from the language provided in 28

¹⁶ Rule 1.0(f).

¹⁷ Tony Cook & Johnny Magdaleno, *Top Indiana Election Attorney Rushes to Defend Trump’s Fraud Claims, Then Quietly Retreats*, Indianapolis Star (Nov. 17, 2020).

¹⁸ *Donald J. Trump for President, Inc.*, 830 F. App’x at 387.

U.S.C. § 1746 for unsworn declarations. The statute provides that the statement must be “in substantially the following form”:

“I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).
(Signature).”¹⁹

However, the verifications that Ms. Milbank submitted included an important and subtle caveat:²⁰

3. I verify under penalty of perjury under the laws of the United States of America that the factual statements in this *Verified Complaint for Declaratory and Injunctive Relief* concerning me and my past and intended activities are true and correct to the best of my knowledge and understanding. 28 U.S.C. § 1746.

By cabining the verifications to only the “factual statements...concerning [Plaintiffs’] past and intended activities,” Ms. Milbank minimized the reach and value of the verifications. In fact, it appears that the only verified paragraphs are the following:

6. All Plaintiffs are eligible registered voters in this State and were qualified to, and did, vote for a presidential candidate in the November 3, 2020 presidential election in this State.

¹⁹ 28 U.S.C. § 1746.

²⁰ *Bally v. Whitmer*, Case No. 1:20-cv-1088 (W.D. Mich. 2020), Compl. at p. 25-28.

7. Plaintiff Lena Bally is an eligible and registered voter, who was qualified to, and did, vote for a presidential candidate in the November 3, 2020 presidential election in this State. She is a resident of Oakland County, Michigan.

8. Plaintiff Steven Butler is an eligible and registered voter, who was qualified to, and did, vote for a presidential candidate in the November 3, 2020 presidential election in this State. He is a resident of Jackson County, Michigan.

9. Plaintiff Gavriel Grossbard is an eligible and registered voter, who was qualified to, and did, vote for a presidential candidate in the November 3, 2020 presidential election in this State. He is a resident of Oakland County, Michigan.

Those paragraphs are hardly the crux of the claims and yet, five separate times in the four-and-half-page Motion to Expedite, Ms. Milbank noted the verified nature of the Complaint and referred to its allegations as evidence because of that:

- “Voters have presented evidence in their Verified Complaint...”²¹
- “In addition to the evidence alleged in the *Verified Complaint...*” (emphasis in original).²²
- “In voters’ *Verified Complaint*, Voters allege that their U.S. Constitutional right to vote has been infringed...” (emphasis in original).²³
- “Voters also will be irreparably harmed if discovery is not expedited, and have shown good cause described herein and in their Verified Complaint for such request” (emphasis in original).²⁴

Ms. Milbank misrepresented a material fact to the Court – that Plaintiffs’ complaint was verified, when in fact, only five largely insignificant paragraphs were attested to.

That is not the candor that the Rules demand.

3. Ms. Milbank Violated Rule 4.4’s Command That Lawyers Respect the Rights of Third Parties

²¹ *Bally v. Whitmer*, Case No. 1:20-cv-1088 (W.D. Mich. 2020) Br. in Support of Mot. to Expedite at 3.

²² *Id.*

²³ *Id.* at 1.

²⁴ *Id.* at 2.

Pursuant to Rule 4.4, “In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person.”

Comment 1 to the Rule states, “Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons.”

In the interests of his clients, Ms. Milbank sought to have millions of voters lose their right to decide the 2020 presidential election. As his co-counsel said, “Every fucking one of them.”²⁵ Every court addressing the same complaint filed by Ms. Milbank and his co-counsel noted the extraordinary remedy they sought and the effect it would have on millions of Americans.

Ms. Milbank disregarded the potential consequences of his proposed remedy – showing no respect for the rights of millions of third persons whose votes would be invalidated – and his actions warrant discipline.

4. Ms. Milbank Engaged in Misconduct that Violates Rule 8.4

Under Rule 8.4, “It is professional misconduct for a lawyer to...violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; [or] engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or] engage in conduct that is prejudicial to the administration of justice.”

Ms. Milbank participated in a purposefully dishonest effort to undermine the 2020 election. He brought frivolous claims that the Constitution, prior court decisions, and relevant statutes barred. The bare “factual” bases he relied on were supported by false statements and wild speculation from discredited sources.

Ms. Milbank misrepresented the availability of expert evidence to support the Verified Complaint’s allegations. He knew that expert reports did not exist that validated his “suspicion” about the election’s outcomes. If such expert reports were even partially complete, he would have provided some semblance of that work to support his filings. Further, he would not have voluntarily dismissed the complaint just six days after initiating the matter.

Finally, that Ms. Milbank’s co-counsel brought nearly identical claims in four separate states, all challenging the results in counties Mr. Biden won demonstrates a deceitful purpose. It all amounted to a dishonest attempt to undermine the public confidence in the 2020 election. It is easy – indeed, necessary – to also recognize the direct link between the use of the courts to sow these seeds of doubt and confusion and the events of January 6, 2021, when people believing that the 2020 was stolen stormed the Capitol in a violent insurrection.

His actions must be scrutinized and disciplined.

²⁵ Tony Cook & Johnny Magdaleno, *Top Indiana Election Attorney Rushes to Defend Trump’s Fraud Claims, Then Quietly Retreats*, Indianapolis Star (Nov. 17, 2020).

The United States Supreme Court has long recognized in upholding disciplinary actions that “speech by an attorney is subject to greater regulation than speech by others.”²⁶ As officers of the court an attorney is “an intimate and trusted and essential part of the machinery of justice” and a “crucial source of information and opinion.”²⁷ Although attorneys, of course, maintain First Amendment rights, the actions in question here cross far beyond protected speech. Indeed, disciplinary boards and courts considering the conduct of other lawyers involved in the effort to overturn the 2020 election have rejected assertions that the attorneys enjoyed First Amendment protections for their conduct.

That members of our esteemed profession would engage in such actions – conduct that contributed to substantial harm to American democracy – should cause considerable distress within the entire legal community.

False statements intended to foment a loss of confidence in our elections and resulting loss of confidence in government generally damage the proper functioning of free society. When those false statements are made by an attorney, it also erodes the public’s confidence in the integrity of attorneys admitted to our bar and damages the profession’s role as a crucial source of reliable information.²⁸

Ms. Milbank chose to offer his professional license to an assault on our democracy. He pursued litigation that lacked any basis in law or fact. He participated in an organized effort to sow discord and doubt about the 2020 elections. He helped lead the charge in Wisconsin to disenfranchise millions of his fellow citizens because he did not like how they voted.

For the reasons set forth above, we respectfully request that the Disciplinary Commission investigate Ms. Milbank’s conduct and pursue appropriate discipline.

Sincerely,



Managing Director

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On behalf of The 65 Project

²⁶ *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 465 (1978).

²⁷ *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1056, 1072 (1991).

²⁸ *In the Matter of Rudolph W. Giuliani*, Supreme Court of the State of New York Appellate Division, First Judicial Dept., May 3, 2021 at 30-31.