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A Lawyer's Duty of Candor and Zealous Advocacy:
Reframing the Concept of Tension

The boy blinked once, twice, to bat away the tears that had welled in his eyes. Though they now streamed freely from the side of his face, his vision was still impaired from a light that could only be the sun that he had grown so accustomed to hearing about in his father's tales. Still, hearing and seeing are two different things. *Whatever you do, don't look at the source of the light*, the old man's first warning echoed in his ear. He had made sure not to look at the light but, still, the boy was nearly blinded by the sudden adjustment from the pitch-black darkness to full spectrum daylight. The boy's stomach convulsed in knots, and he shuddered at the thought of what looking directly into the sun might have brought on.

Avoid flying too low. His father's second warning rang out so clearly that he looked back, half expecting the gray-bearded old man to be right behind him. His vision had finally cleared, and he could just make out his father's silhouette next to a speck of black in the wide ocean below him. That must be the prison-labyrinth that he had once called home. Again, he let out a shudder. The boy moved his arms with more force now, propelling himself further away from that hell. The warmth of the sun on his back put him at ease, and he allowed himself a rare moment of peace. *Click-click, whirrr, click-click.* The rhythmic sounds of his father's ingenious machine rose over the harsh ocean roar. He let out a smile. The old man had proven himself again, he thought. The warmth of the sun's rays tickled his bare back, enticing him to

stretch his arms wider and spread the makeshift wings to their limit. Surely, he thought, no harm would come from ignoring the old man's third and final warning. And so, he propelled himself closer, and closer still, toward the sun.

Legendary among the ancient Greek myths is the tragic tale of young Icarus. Icarus, having finally escaped from the infamous dungeon of Crete that he called home most of his short life, disregarded the last of his father's warnings before the two took off in flight. His father's handcrafted flying machines were a miraculous tool – but perfect they were not. The frail wings of wax and feather only worked under certain conditions. Flying too close to the ocean's spray would weigh the feathers down, and flying too close to the sun would cause the wax to melt. The tension these conditions created constricted the user's freedom of flight but enabled the machine to work flawlessly.

Knowledge of and competence in the law is a technology parallel to old Daedalus' winged suits he fashioned for his son and himself. After years of toil in law school, a lawyer becomes equipped with a unique skillset that amounts to an ability to navigate society in ways laypersons cannot. As lawyers take on representation of their clients, they may, at different points, be entrusted with the finances, livelihoods, and even liberty interests of those clients. This is a grant of tremendous power to lawyers. At the risk of too attenuated a metaphor, lawyers can, in essence, fly and help others fly. What a technology the law is! Naturally, awesome technologies have their limiting restraints, their conditions. Icarus had his father's warnings, while lawyers have the Model Rules of Professional Conduct.

No set of rules put together has the potential of creating as much tension for lawyers as the duty of candor to the tribunal and the obligation of zealous advocacy for one's client. This

tension is necessary to effective lawyering. It keeps lawyers away from the sun's seductive warmth and clear of the salty lap of the ocean's waves. When a lawyer avoids that tension and cuts slack on either one of these rules, disaster follows.

The Preamble to the Model Rules of Professional Conduct sets the stage for an analysis of the behavior of President Trump's attorneys. Encumbered as we are, as lawyers, with immense power, so too are we endowed with tremendous responsibility. Our key responsibility is carved out in the first clause of the Preamble: the responsibility for the quality of justice. The Model Rules make it clear that lawyers owe a duty not only to their client and the profession, but to society at large. *See Model Rules, Preamble*. The ante is upped by the fact that our profession is a self-regulating one. *Id.*, ¶ 11. Deviance from these rules, and in particular, the duty of candor, has the potential to undermine the integrity of the adjudicative process. *See Model Rule 3.3, Comment 2*. In turn, this erodes the quality of justice and amounts to a violation of our core responsibility as lawyers.

President Trump's attorneys untethered themselves from the rule of candor to the tribunal and, in doing so, transgressed the limits of the Model Rules. These attorneys' behavior was so flagrant that sanctions are in place and pending for various groups of them across the country. *See Rosalind S. Helderman, 'The Stuff of Which Violent Insurrections are Made:' Federal Judge Sanctions Colorado Lawyers for 2020 Election Lawsuit*, *The Washington Post* (Aug 4, 2021) (citing *Model Rule 3.1*). As a matter of course, an attorney alleging impropriety in the procedure of any election, much less the national presidential election, should be *absolutely sure* that they have the law and the facts on their side. President Trump's attorneys were not even able to make good faith arguments on the merits of their suits. *See Debra Cassens Weis,*

Hundreds of Lawyers Call for Ethics Probes of Attorneys for Election Fraud Claims, ABA Journal (Dec. 8, 2020), *Model Rule 3.1, Comment 2*. Perhaps more disappointing than the clear violation of the Model Rules is the degree of disregard the president's attorneys held for the responsibility they owe society at large.

Consider the stakes surrounding the flippant lawyering. The election lawsuits implicated the foundation of our democratic society: free and fair elections. The first clause of the Preamble to the Model Rules wasn't simply idealistic pontificating. It seemed curated specifically to caution against the type of lawyering the president's attorneys were engaged in. Also, consider the scale of the pattern of behavior engaged in. The president's attorneys regularly filed lawsuits across the country on behalf of classes of persons as large as half of the country. See Rosalind S. Helderman, *The Washington Post* (Aug 4, 2021). That is to say nothing about the fact that the attorneys were clearly aware of their inappropriate behavior. The wise among his attorneys abandoned ship as soon as they could, only, unfortunately, to be replaced just as quickly. See Adam Winkler, *Trump's Wildest Claims are Going Nowhere in Court*, *The Washington Post* (Nov. 20, 2020). The only plot present at the time of the election lawsuits was one cooked up by the president's attorneys to flood the court system with frivolous and artful claims.

By indulging in such reckless behavior, the president's attorneys managed not only to call into question their own ethics, but the integrity of the election process itself. Though the suits were frivolous, these attorneys wielded the trust bestowed upon the legal profession as a shield as they assaulted the democratic process. The president's attorneys knew better. American society deserves better.

This episode in American history should be marked as a cautionary tale. Lawyers are bound by a set of rules that purposefully create tension. This tension isn't to be avoided, but embraced, for peril abounds when slack is cut in either direction. When the duty of zealous advocacy is shirked, an attorney may poorly represent their client; when the duty of candor to the court is neglected, an attorney turns their back on the profession and society. On the other hand, when both duties are properly noted and heeded, attorneys can steer clear of pitfalls as they present themselves. Opposite though they may seem, a lawyer's role is to venerate these two canons. Without these rules as guideposts, a lawyer's fall from grace is sure and swift.