

The Trump Trials A Legal Ethics Survey

Whether or not you agree on the merits of the cases, the Trump trials provide a rich source of material for consideration and insight into legal ethics. In this thought-provoking interview, former prosecutors and ethics professors Rebecca Roiphe and Bruce Green dissect the key ethical dilemmas posed by the Trump trials, spanning from New York to Florida, to the Supreme Court. The discussion offers a deep dive into a wide variety of legal ethical rules at play in some of the most high-profile cases of the day.

Roiphe and Green explore the various criminal cases under the ABA Model Rules, translating these often theoretical guidelines into real-world applications involving figures like Michael Cohen and Rudy Giuliani. But the discussion goes beyond mere rules. Roiphe and Green tackle broader themes like prosecutorial discretion, the ethical handling of privileged information, and the delicate balance between offering legal advice and enabling a client's misconduct. They highlight the unique pressures facing legal professionals in high-profile cases, emphasizing the need to uphold ethical standards amid intense scrutiny.

ABA Rule 1.2(d) (Scope of Representation and Allocation of Authority Between Client and Lawyer)

Explanation: This rule prohibits a lawyer from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. However, a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

Context: The discussion centers around Michael Cohen's disbarment for assisting in criminal activities on behalf of Donald Trump. The rule highlights that a lawyer cannot knowingly help a client commit crimes, which was a clear violation in Cohen's case.

ABA Rule 1.6 (Confidentiality of Information)

Explanation: This rule mandates that a lawyer must not reveal information related to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by the rule.

Context: The relates to Michael Cohen's obligations of confidentiality and how his actions, such as recording conversations with Trump, may have breached these ethical duties. The rule also relates to the duty of an attorney, such as Bob Costello in the context of Michael Cohen and Rudy Giuliani, to maintain the confidentiality of client information even after the representation has ended. This includes avoiding voluntary disclosures that could harm the former client.

ABA Rule 1.7 (Conflict of Interest: Current Clients)

Explanation: This rule prohibits a lawyer from representing a client if the representation involves a concurrent conflict of interest, unless the lawyer reasonably believes they can provide competent and diligent representation to each affected client, and each client gives informed consent, confirmed in writing.

Context: The interview discusses potential conflicts of interest, such as those involving Michael Cohen's representation of Trump and his own personal interests, highlighting the ethical complexities in such cases. As well, Professor Roiphe discusses a conflict of interest issue where an attorney was allegedly representing both Michael Cohen and Donald Trump, creating a situation where their interests could be adverse, which is ethically problematic.

ABA Rule 1.8 (Conflict of Interest: Current Clients: Specific Rules)

Explanation: This rule addresses specific conflict of interest situations, including prohibiting lawyers from engaging in sexual relationships with clients if such relationships cause a conflict of interest.

Context: The discussion touches on the issue of conflicts arising from personal relationships, such as the alleged personal relationship between DA Fannie Willis and Nathan Wade, and how these can affect the integrity of legal proceedings.

ABA Rule 1.9 (Duties to Former Clients)

Explanation: This rule prohibits a lawyer from representing another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client gives informed consent.

Context: The discussion involves Michael Cohen's duties to Trump as a former client and how breaching confidentiality and loyalty violates this rule. Professor Roiphe also raises questions about Bob Costello's public statements against a person he claims as a former client, Michael Cohen, which could be seen as materially adverse to Cohen's interests.

ABA Rule 1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees)

Explanation: This rule addresses the specific conflict of interest concerns for lawyers who have served as public officers or employees and their ability to represent private clients in matters in which they were personally and substantially involved while in public service.

Context: The interview briefly touches on the ethical issues surrounding prosecutors and judges who may have personal or political motivations influencing their professional conduct, emphasizing the need for impartiality in legal proceedings.

ABA Rule 1.13 (Organization as Client)

Explanation: This rule addresses a lawyer's duty when representing an organization, clarifying that the lawyer represents the organization through its duly authorized constituents.

Context: The interview touches on situations where a lawyer might represent an organization or multiple clients within an organization, such as Michael Cohen's representation of Trump in various capacities, and the potential conflicts and ethical considerations that arise in such scenarios.

ABA Rule 1.16 (Declining or Terminating Representation)

Explanation: This rule specifies the circumstances under which a lawyer must decline or terminate representation. It includes situations where continuing would result in a violation of the rules of professional conduct or other law, the lawyer's physical or mental condition materially impairs their ability to represent the client, or the lawyer is discharged by the client.

Context: The interview suggests that Michael Cohen should have terminated his representation of Trump when he realized the relationship involved criminal activities such as election fraud and unethical activities such as lying to Congress.

ABA Rule 3.3 (Candor Toward the Tribunal)

Explanation: This principle is embedded in several rules, notably Rule 3.3 (Candor Toward the Tribunal). Rule 3.3(a)(3) specifically states that a lawyer shall not knowingly offer evidence that the lawyer knows to be false.

Context: brought in a discussion that while a prosecutor should not put forth testimony that is likely to be untrue, they are not prohibited from calling witnesses with a history of lying such as Michael Cohen. Standard procedure in such cases would be to externally verify as much as possible. The experts also discuss Michael Cohen's false statements to Congress, which directly violated this rule and leading to his conviction for lying under oath.

ABA Rule 3.4 (Fairness to Opposing Party and Counsel)

Explanation: This rule prohibits a lawyer from unlawfully obstructing another party's access to evidence or unlawfully altering, destroying, or concealing a document or other material having potential evidentiary value.

Context: The discussion about Michael Cohen and the obstruction of justice charge in the Menendez case touches on this rule, emphasizing the importance of honesty and fairness in legal proceedings.

ABA Rule 3.4(e)

Explanation: Rule 3.4(e) states that a lawyer shall not, in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or

state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.

Context: The discussion highlights the obligation of prosecutors to avoid introducing prejudicial evidence or testimony that isn't directly probative of the case. In the context of the Trump trials, the interview mentions the use of Stormy Daniels' testimony and whether it was necessary and relevant, suggesting that bringing in overly salacious details might violate Rule 3.4(e). This rule is particularly relevant when considering the ethical boundaries prosecutors must navigate to ensure a fair trial and the integrity of the judicial process.

ABA Rule on Extrajudicial Statements (Rule 3.6)

Explanation: Rule 3.6 covers trial publicity. It states that a lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

Context: The discussion addresses the ethical implications of public statements made by lawyers involved in high-profile cases. Specifically, the interview examines comments made by Michael Cohen and other legal representatives during the Trump trials, highlighting the tension between free speech and the potential to influence public perception and judicial proceedings. The conversation also touches on the challenges prosecutors and defense attorneys face in maintaining the integrity of the legal process while navigating media scrutiny and public interest, emphasizing the need for caution and restraint to avoid prejudicing ongoing or future proceedings.

ABA Rule 3.7 (Lawyer as Witness)

Explanation: This rule states that a lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness.

Context: Discussed in relation to calling Michael Cohen to testify against his former client, President Trump.

ABA Rule 3.8 (Special Responsibilities of a Prosecutor)

Explanation: This rule outlines the ethical obligations of prosecutors, including the duty to refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause, and the duty to disclose evidence that negates the guilt of the accused.

Context: The discussion addresses the ethical duty of prosecutors to avoid presenting overly prejudicial evidence or testimony, such as the case involving Stormy Daniels, and to adhere to court orders limiting the scope of such testimony. The interview also discusses decision making around bringing charges and the required level of confidence they should have over the guilt of the accused and the trustworthiness or testimony put forth.

ABA Rule 4.1 (Truthfulness in Statements to Others)

Explanation: This rule requires lawyers to be truthful in their statements to others and prohibits them from making false statements of material fact or law.

Context: The discussion covers the importance of truthfulness and how lawyers must navigate the line between advocacy and deceit, as exemplified by Michael Cohen's false statements to Congress or former Mayor Giuliani's disbarment for false statements.

ABA Rule 8.4 (Misconduct)

Explanation: This rule defines professional misconduct for a lawyer, including engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and conduct that is prejudicial to the administration of justice.

Context: The discussion highlights how Michael Cohen's actions, such as making false statements and secretly recording conversations, constituted professional misconduct under this rule. Additionally, the interview discusses Rudy Giuliani's disbarment for making false public statements related to his representation of President Trump, which were found to be untruthful and thus constituted professional misconduct under this rule.