

Neal Goldfarb

June 13, 2017

**By fax (212-287-1045)
and Federal Express**

Departmental Disciplinary Committee
for the First Department
61 Broadway, 2nd Floor
New York, NY 10006

Re: Disciplinary complaint against Marc Elliot Kasowitz, Reg. No. 1309871

To the Disciplinary Committee:

The purpose of this letter is to assert a disciplinary complaint against Marc Elliot Kasowitz, a member of the New York bar. As explained below, it appears from a recent news report that Mr. Kasowitz has violated New York R.P.C. 4.3 (Communications with Unrepresented Persons) and R.P.C. 4.2(a) (Communication with Person Represented by Counsel).

Preliminary matters

According to the New York attorney-registration database, Mr. Kasowitz was admitted in the Appellate Division, First Department, and his office is located within this Department. His office address, telephone number, and email address are as follows:

Kasowitz Benson Torres LLP
1633 Broadway
New York, N.Y. 10019
(212) 516-1710
mkasowitz@kasowitz.com

I have not previously filed a complaint concerning this matter with another bar association, District Attorney's Office, or other agency.

I have not brought a civil or criminal action against Mr. Kasowitz.

Relevant facts

Mr. Kasowitz represents President Donald Trump with regard to the investigations that are being conducted by Special Counsel Robert Mueller and multiple Congressional committees, with regard

to (among other things) the Trump election campaign's possible collusion with Russia and possible obstruction of justice by President Trump.

The facts from which this complaint arises were reported by the *New York Times* on June 11, 2017.¹ According to the *Times* story, “[Mr. Kasowitz’s] visits to the White House have raised questions about the blurry line between public and private interests for a president facing legal issues.” In particular, the story described two actions by Mr. Kasowitz that appear to have violated the Rules of Professional Conduct:

- First, according to two sources, “Mr. Kasowitz in recent days has advised White House aides to discuss the inquiry into Russia’s interference in last year’s election as little as possible[.]”
- Second, the *Times* reported that Kasowitz had “told aides gathered in one meeting who had asked whether it was time to hire private lawyers that it was not yet necessary[.]”

The *Times* cited one source as saying that in having these discussions with White House staff members, “Mr. Kasowitz bypassed the White House Counsel’s Office[.]”

According to the *Times* report, “A spokesman for Mr. Kasowitz called the characterizations of his conversations with staff members ‘inaccurate,’ but would not specify how.”

Mr. Kasowitz’s violations of the Rules of Professional Conduct

Assuming that the *Times* report is accurate, Mr. Kasowitz has violated R.P.C. 4.3 (Communications with Unrepresented Persons) and R.P.C. 4.2(a) (Communication with Person Represented by Counsel).

R.P.C. 4.3 (Communications with Unrepresented Persons)

R.P.C. 4.3 provides, among other things, that a lawyer “shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.” The conclusion seems unavoidable that Mr. Kasowitz’s reported conduct violated this prohibition.

To begin with, it is clear from the *New York Times* report that Mr. Kasowitz met with White House staff members who had not retained personal counsel. Mr. Kasowitz is reported to have met with aides who “asked whether it was time to hire private lawyers[.]” Obviously, these staffers would not have asked that question if they had already hired lawyers.

In advising these staffers that “it was not yet necessary” to hire private lawyers, Mr. Kasowitz gave them legal advice. The determination whether a person needs legal representation is itself a

1. Rebecca R. Ruiz & Shannon LaFraniere, *Role of Trump’s Personal Lawyer Blurs Public and Private Lines*, *New York Times* (June 11, 2017), https://www.nytimes.com/2017/06/11/us/politics/trump-lawyer-marc-kasowitz.html?_r=0 (Attachment 1).

legal question. Indeed, R.P.C. 4.3 expressly treats advice as to the retention of personal counsel as itself constituting legal advice. The rule provides that if the lawyer “knows or reasonably should know that the interests of [the unrepresented] person are or have a reasonable possibility of being in conflict with the interests of the [lawyer’s] client[.]” the lawyer “shall not give legal advice to an unrepresented person *other than the advice to secure counsel*[.]” (emphasis added). This language by its own terms treats advice to secure counsel as legal advice. It follows that the opposite advice—that securing counsel is unnecessary—similarly constitutes legal advice.

Finally, Mr. Kasowitz most likely knew that the interests of the staffers he spoke with “are or have a reasonable possibility of being in conflict” with the interests of his client, President Trump. And even if Mr. Kasowitz was not subjectively aware of that fact, he reasonably should have known it. Members of the White House staff are potential witnesses in the various investigations (especially the Special Counsel’s investigation), and there is very obviously a reasonable possibility that their personal interests are in conflict with those of President Trump.

For example, staff members who were involved in the election campaign or the transition committee may have information relevant to the issue of contacts between campaign or transition officials and persons acting on behalf of Russia or Russian businesses. If that information is not personally inculpatory, it would be in the staff member’s interest to be fully forthcoming with investigators and thereby avoid any perceived involvement in a coverup. And if the information does expose the staff member to potential charges of wrongdoing, it would in many cases be in the staff member’s interest to cooperate with investigators under a grant of immunity. However, in both of those situations, the staff member’s cooperation with investigators might well conflict with President Trump’s interests.

Similarly, staff members’ interests may conflict with President Trump’s with regard to the staff member’s willingness to be interviewed by Mr. Kasowitz. Since Mr. Kasowitz represents the President individually rather than in his official capacity, it is up to individual staff members to decide whether they wish to speak with him. Depending on the relevant facts, a staff member’s personal counsel might advise against speaking President Trump’s defense team, and that could reasonably be expected to conflict with the President’s interest in learning what the staff member has to say. Indeed, according to an attorney who was White House special counsel for ethics issues during the Clinton administration, and who was quoted by the *New York Times*, “It is probably easier for [Mr. Kasowitz] to represent Trump if he doesn’t have to deal with a bunch of other lawyers[.]”

The *Times* article also discussed other potential areas of conflict between President Trump’s personal interests and those of the White House staff. For example, the article quotes a criminal-law professor at Georgetown University who had worked on the Whitewater investigation, and who discussed the possibility that the Special Counsel’s investigation will look into whether the President obstructed justice: “You’d have to find out what the president was thinking,” she said, and that would mean “calling everyone he talked to at the time before a grand jury and none of those people should go near a grand jury without a good lawyer with Washington savvy.” In addition, according

to the lawyer (now law professor) who was the White House ethics lawyer under President George W. Bush, in a worst-case scenario, a staff member might listen to Mr. Kasowitz's advice and "end up thrown under the bus."

At the highly-respected blog Lawfare, law professor Andrew Kent has addressed the question whether Mr. Kasowitz's conduct violated R.P.C. 4.3:

Two of the things Kasowitz allegedly stated were legal advice: talk as little as possible about the matter, and it is not necessary to hire a personal lawyer. Is there a reasonable possibility that the interests of these White House aides conflict with those of President Trump? Almost surely the answer is yes. Trump may have legal exposure regarding the campaign hacking, and he may have legal exposure concerning his reported attempts to have FBI Director James Comey drop the investigation of Michael Flynn. Whether wholly uninvolved in these matters or not, the White House aides addressed by Kasowitz have different and almost certainly conflicting interests and possible routes of legal exposure than the President does. The concern about potential abuse of authority by the lawyer is heightened when the lawyer represents your boss, and when that boss is the President of the United States.²

Prof. Kent then noted the statements in the *Times* article that according to legal experts, "Mr. Kasowitz's advice to administration staff may benefit the president more than the aides themselves," and that "[t]he conversations Mr. Kasowitz has with aides could shape their testimony before Mr. Mueller has a chance to interview them, should they be called as witnesses." Regarding that possibility, Prof. Kent stated, "If Kasowitz is indeed "shap[ing]" potential testimony of White House aides, that could be legally perilous, depending on the circumstances. Lawyers are, as noted, subject to generally applicable criminal laws. See, for example, the federal witness tampering statute."

Finally, I would like to point out an article that appeared in *Vanity Fair* several days before the *Times* article, under the self-explanatory title, "Why Everyone in the West Wing Will Need to Lawyer Up: The very high cost of operating in a White House under investigation."³ Because the article predated the report in the *Times*, it did not discuss Mr. Kasowitz's conduct. However, it did explain as a general matter that for White House staffers, "[o]perating in a White House under investigation is fraught with peril":

A counterintelligence probe itself, which is what the Russia investigation began as, will rarely result in criminal charges. But, like Whitewater, this scandal is already snowballing in complex ways. The greatest risk aides face is being accused of obstruction of justice or perjury. "That is the real danger for people," said William Jeffress, a white-collar defense

2. Andrew Kent, *Legal Ethics Questions for Trump's Personal Lawyer*, Lawfare (June 12, 2017), <https://www.lawfareblog.com/legal-ethics-questions-trumps-personal-lawyer> (Attachment 2).

3. Abigail Tracy, *Why Everyone in the West Wing Will Need to Lawyer Up: The very high cost of operating in a White House under investigation*, Vanity Fair (June 7, 2017), <http://www.vanityfair.com/news/2017/06/why-everyone-in-the-west-wing-will-need-to-lawyer-up> (Attachment 3).

attorney who represented I. Lewis “Scooter” Libby in the investigation into the leak of Valerie Plame’s identity under George W. Bush. “You see it time and again in these political investigations, that they wind up, whatever happened wasn’t a crime. It may have been a political scandal—but it wasn’t a crime—but they charged somebody with perjury or obstruction. So that is the risk for everybody.” Libby, who was not charged with any crimes related to the leak of Plame’s identity but was prosecuted for perjury and obstruction, is a prime example of this danger.

R.P.C. 4.2(a) (Communication with Person Represented by Counsel)

In addition to violating R.P.C. 4.3, Mr. Kasowitz’s communications with the White House staff members violated R.P.C. 4.2(a), which governs persons represented by counsel. That rule is implicated because in addition to affecting the staff members’ personal interests (which are protected by R.P.C. 4.3), Mr. Kasowitz’s communications affected the institutional interests of the White House, with respect to which the staff members are represented by the Office of White House Counsel.⁴ Mr. Kasowitz was therefore required to obtain White House Counsel’s consent before communicating with the staff members, but the *New York Times* reported that in having those discussions, “Mr. Kasowitz bypassed the White House Counsel’s Office[.]”

A discussion by former White House Counsel Bob Bauer (who held that office during the Obama administration) supports the conclusion that the White House Counsel represents White House staff members in their official (i.e., nonpersonal) capacities. A month after President Trump was inaugurated, Mr. Bauer published a discussion of the appropriate role of White House Counsel.⁵ As he explained in that piece, “The lawyer serving as White House Counsel is not, of course, a president’s personal counsel but is charged with providing legal support to the Office of the Presidency. The President is the ‘client,’ but *so are the individual members of the White House staff*, and the obligation extends to the public” (emphasis added).

Mr. Bauer further noted that White House Counsel “has special responsibility for legal and ethics compliance within the West Wing.” Whatever else White House Counsel may be called on to deal with, “a bedrock responsibility is ensuring the adherence to law and ethics standards by the President and the staff.”

Mr. Kasowitz’s end run around the White House Counsel’s Office represented not only a violation of the Rules of Professional Conduct, but a serious departure from past White House practice. The *New York Times* article reports that discussions between White House staff members

4. See generally Maryanne Borrelli et al., *The White House Counsel* 5, 32–36 (White House Transition Project, Report 2017-29), <http://whitehousetransitionproject.org/wp-content/uploads/2016/03/WHTP-2017-29-Counsel.pdf> (accessed June 12, 2017); Jennifer Wang, *Raising the Stakes at the White House: Legal and Ethical Duties of the White House Counsel*, 8 Geo. J. Legal Ethics 115 (1994).

5. Bob Bauer, *Thoughts on the Proper Role of the White House Counsel*, Lawfare (Feb. 21, 2017), <https://www.lawfareblog.com/thoughts-proper-role-white-house-counsel> (Attachment 4).

and personal counsel for the President are typically supervised by White House Counsel's Office "to make sure the aides understand their rights and do not feel pressured to help a lawyer who does not represent their interests[.]" The article goes on to note that "[White House Counsel's] involvement is all the more critical in this case [according to experts] because many of the aides—potential witnesses in the government's inquiry—do not currently have personal lawyers." Thus, Mr. Kassowitz's violation of R.P.C. 4.2(a) exacerbates the effect of his violation of R.P.C. 4.3.

Mr. Kasowitz's conduct contrasts starkly with the procedures that were followed in previous administrations in which the president became engulfed in scandal and had to retain personal counsel. As the *Times* article reports, "Previous administrations tried to coordinate the activities of private lawyers before letting them interact with aides":

Jane Sherburne, a White House special counsel who managed ethics issues during Mr. Clinton's first term, said Mr. Kendall [Pres. Clinton's personal counsel] was not allowed to meet with White House staff members until "we had gone through a whole exercise of having conversations with employees ourselves, talking to them about whether they wanted to retain their own counsel and telling them they didn't have to talk to Kendall."

The seriousness of Mr. Kasowitz's violations

The violations at issue here present a compelling case for investigation and disciplinary action. For one thing, this is the highest of high-profile ethical violations; Mr. Kasowitz's violations were committed occurred in the course of his representing the President of the United States in what is arguably be the most serious political scandal in U.S. history. The matters as to which Mr. Kasowitz is representing President Trump are of enormous importance for the nation. Kasowitz's violations are therefore of vastly greater consequence than run-of-the mill violations of the no-contact rules.

There is widespread fear that the current administration is undermining rule-of-law values and promoting a culture of corruption; whether or not one shares that view, it is undeniable that confidence in the legal system will be eroded if allegations against the President's lawyer are not treated with the utmost seriousness.

Yours truly,


Neal Goldfarb

Enclosures