

October 21, 2024

Chief Trial Counsel George Cardona
State Bar of California
845 South Figueroa Street
Los Angeles, CA 90017

Dear Mr. Cardona:

We write to express our grave concern about the conduct of John Kent Walker, Jr. (known publicly as Kent Walker), an active licensee since 1987 of the California State Bar.¹ Despite Mr. Walker's decades of experience representing a series of sophisticated clients,² he has coached one such client, Google LLC ("Google"), to engage in widespread and illegal destruction of records relevant to multiple ongoing federal trials. While Mr. Walker's conduct has attracted the rebuke of multiple federal judges, as detailed below, Mr. Walker has evaded personal responsibility for his role in counseling his client to violate federal and state law. The undersigned organizations accordingly call for an investigation into whether, in so doing, Mr. Walker also violated provisions of the California Rules of Professional Conduct.

The conduct in question has its origins in a memo crafted by Mr. Walker in 2008 (the "Walker Memo") while Mr. Walker served as General Counsel to Google, a position he held from approximately 2006-2018.³ The United States Department of Justice ("Justice Department") has described the Walker Memo as "an early hallmark of Google's intent to deprive litigants of evidence."⁴ In relevant part, the Walker Memo caused Google to change the default history setting for all employee chats from "history on" to "history off"—a practice referred to internally as "Vegas mode"⁵—which permanently deleted messages after 24 hours.⁶ The Walker Memo also formed the basis of a mandatory training program at Google known as "Communicate with Care" that instructed employees to move sensitive discussions "off the record," and to ensure that "sensitive"

¹ See Attorney Profile: John Kent Walker Jr #129945, The State Bar of California, <https://apps.calbar.ca.gov/attorney/Licensee/Detail/129945>

² See Kent Walker, President, Global Affairs at Google & Alphabet, LinkedIn, <https://www.linkedin.com/in/kent-walker-5963bb198/details/experience/>

³ Mr. Walker still works for the same employer, as President of Global Affairs. See *id.*

⁴ Memorandum of Law in Support of Plaintiffs' Motion for an Adverse Inference, *United States, et al. v. Google*, E.D. Va., Case No. 1:23-cv-00108, Dkt. No. 1116, at 24; available online: <https://www.courtlistener.com/docket/66753787/1116/united-states-v-google-llc/>

⁵ "Judge Accuses Google of 'Clear Abuse' in Antitrust Case Over Deleted Employee Chats," Competition Policy International, August 29, 2024 <https://www.pymnts.com/cpi-posts/judge-accuses-google-of-clear-abuse-in-antitrust-case-over-deleted-employee-chats/>

⁶ *Supra*, note 4, at 5

information about business would be “less likely ... [to] be discovered by an adversary and used against ... Google.”⁷

Google employees — who understood the goal was to remove information that might be discoverable at trial — actively complied. Numerous instances have emerged of employees working together to ensure information that might be relevant to a government investigation was deleted, giving rise to exchanges like the following:⁸

Employee 1: “btw you might want to turn your chat history off”

Employee 2: “geez . . . for sure! . . . thank you! [end of chat]”

Or:

Employee: “Like, I could see this being done in a way that leads to law suits

Omgf

History is on, jesus”

At Walker’s direction, Google also instructed employees to “communicate with care” by copying lawyers on emails and formulaically invoking privilege, in order to hide ordinary business communications from disclosure to judges and juries at trial.⁹ When D.C. District Judge Amit Mehta questioned Google’s claims that 140,000 documents were privileged in the search antitrust trial, he recently concluded, 98,000 were immediately submitted to the Justice Department, making clear the claims were a ruse.¹⁰

As a direct result of Walker’s “communicate with care” policy, dozens if not hundreds of custodians of record across three federal lawsuits failed to preserve relevant litigation records despite a duty to preserve them, resulting in the destruction of “potentially thousands” of relevant chats and other

⁷ *Supra*, note 4, at 11

⁸ Jason Koebler, “Here’s 22 Examples of Google Employees Trying to Avoid Creating Evidence in Antitrust Case,” 404 Media, (Aug, 31, 2024), <https://www.404media.co/heres-22-examples-of-google-employees-trying-to-avoid-creating-evidence-in-antitrust-case/>

⁹ John D. McKinnon, “Google Improperly Invoked Legal Privilege to Withhold Emails, Government Claims,” The Wall Street Journal, March 21, 2022, <https://www.wsj.com/articles/google-improperly-invoked-legal-privilege-to-withhold-emails-government-claims-11647894881>; “U.S. asks judge to sanction Google in pretrial document fight,” Reuters, March 21, 2022, <https://www.reuters.com/article/technology/u-s-asks-judge-to-sanction-google-in-pretrial-document-fight-idUSNIKCN2LI1S6/>

¹⁰ “U.S. judge in Google case not convinced company’s conduct will get sanction,” Reuters, April 8, 2022, <https://www.reuters.com/legal/litigation/us-judge-google-case-not-convinced-companys-conduct-will-get-sanction-2022-04-08/>

documents.¹¹ The United States Justice Department has now alleged in two federal lawsuits that “Google failed to take even minimally reasonable steps to preserve chats”¹² and in doing so violated Federal Rule of Civil Procedure 37(e) for failing to preserve electronically stored information that should have been preserved in the anticipation or conduct of litigation.¹³

Confronted with evidence of rampant document destruction, federal judges have condemned the communications protocol established by Mr. Walker. Last month, Judge Leonie Brinkema of the Eastern District of Virginia, called Google’s concealment of evidence “a clear abuse of privilege,”¹⁴ agreeing to consider the Justice Department’s motion asking for an “adverse inference” under which she would presume the company had destroyed evidence at Walker’s direction before trial. Judge Amit Mehta of the District of Columbia District Court, called the behavior “negligent” and “shocking.”¹⁵ And last year in yet another trial, Judge James Donato of the Northern District of California excoriated the company over similar shenanigans, calling them “a frontal assault on the fair administration of justice.”¹⁶

Judge Donato took specific aim at Kent Walker for his role in causing the rampant deletion of relevant litigation records and for “tap dancing” around questions about missing chats, asking of Walker, “Why didn’t you just preserve the chats and turn the history on as you did for emails?”¹⁷ Judge Donato later called Google’s conduct surrounding the chat logs “the most serious and disturbing evidence I have ever seen in my decade on the bench.”¹⁸

Following an evidentiary hearing, Judge Donato concluded that “Google failed to preserve relevant evidence from its Chat message system, and that the failure to preserve was intentional and

¹¹ Memorandum of Law in Support of Plaintiffs’ Motion for an Adverse Inference, *United States et al. v. Google*, E.D. Va., Case No. 1:23-cv-00108, Dkt. No. 1116 at 20

<https://www.courtlistener.com/docket/66753787/1116/united-states-v-google-llc/>

¹² *Supra*, note 3, at 21

¹³ Memorandum in Support of the United States’ Motion for Sanctions Against Google, LLC, *United States et al. v. Google*, D.D.D.C., Case No. 1:20-cv-03010, Dkt. No. 513-1 at 5,

<https://www.courtlistener.com/docket/18552824/513/1/united-states-of-america-v-google-llc/>

¹⁴ Thomas Barrabi, “Judge blasts Google over ‘destroyed’ evidence as another DOJ antitrust case looms:

‘Clear abuse of privilege,’” New York Post, August 29, 2024, <https://nypost.com/2024/08/29/business/judge-blasts-google-over-destroyed-evidence-as-another-doj-antitrust-case-looms/>

¹⁵ Thomas Barrabi, “Google blasted as ‘negligent’ over evidence destruction as landmark DOJ antitrust case wraps up,” New York Post, May 3, 2024, <https://nypost.com/2024/05/03/business/google-blasted-as-negligent-over-evidence-destruction-as-landmark-doj-antitrust-case-wraps-up/>

¹⁶ *Supra*, note 17

¹⁷ Malathi Nayak, “Google’s Legal Chief Faces Rebuke by Judge Over Missing Chats,” Bloomberg, November 16, 2023, <https://www.bloomberg.com/news/articles/2023-11-16/google-legal-chief-faces-rare-rebuke-by-judge-over-missing-chats?sref=q0qR8k34>

¹⁸ Mike Scarcella, “Judge deciding Google’s fate in Epic case is antitrust veteran,” Reuters, December 13, 2023 <https://www.reuters.com/legal/judge-deciding-googles-fate-epic-case-is-antitrust-veteran-2023-12-13/>

prejudicial” (emphases added).¹⁹ In the Google Search antitrust litigation, Judge Mehta determined that Google’s conduct rose to the level of sanctionable conduct, but that sanctions were unnecessary because Google was liable even absent an adverse inference.²⁰ And Judge Brinkema has taken the Justice Department’s motion for an adverse inference under submission while a final judgment is pending.²¹

California State law sets forth every attorney’s duty to support the Constitution and laws of the United States and of California; to maintain the respect due to the courts of justice and judicial officers; and never to seek to mislead a judge or judicial officer.²² The California Professional Code of Conduct further provides that a lawyer shall not “intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.”²³ The Professional Code of Conduct also prohibits a lawyer from counseling or assisting a client in conduct that the lawyer knows is a violation of “any law, rule, or ruling of a tribunal.”²⁴ In *Cedar-Sinai Med. Ctr. v. Superior Court*, 18 Cal.4th 1 (1998), the California Supreme Court held that “lawyers are subject to discipline, including suspension and disbarment, for participating in the suppression or destruction of evidence.”²⁵

At minimum, Mr. Walker’s failure to “take affirmative steps to preserve and safeguard relevant evidence” is conduct unbecoming of an attorney licensed by the California State Bar.²⁶ Mr.

¹⁹ Pretrial Order for *Epic and Match Trial, In re Google Play Store Antitrust Litigation*, N.D. Cal., Case No. 3:20-cv-05671

²⁰ Order, *United States, et al. v. Google*, D.D.C., Case No. 1:20-cv-03010, Dkt. No. 1033 at 275 (“On the request for sanctions, the court declines to impose them. Not because Google’s failure to preserve chat messages might not warrant them. But because the sanctions Plaintiffs request do not move the needle on the court’s assessment of Google’s liability.”), <https://www.courtlistener.com/docket/18552824/1033/united-states-of-america-v-google-llc/>

²¹ See Civil Motion Minutes, *United States, et al. v. Google LLC*, Case No. 1:23-cv-00108-LMB-JFA, Dkt. No. 1277 at 1 (Aug 27, 2024), <https://www.courtlistener.com/docket/66753787/1277/united-states-v-google-llc/>

²² Cal. Bus. & Prof. Code §6068; Rule 3.3, Cal. Prof. Code of Conduct

²³ Rule 1.1, Cal. Prof. Code of Conduct

²⁴ Rule 1.2.1, Cal. Prof. Code of Conduct

²⁵ *Cedar-Sinai Med. Ctr. v. Superior Court*, 18 Cal.4th 1, 13 (1998)(also noting that “Penal Code Section 135 creates criminal penalties for spoliation”); see also Rule 3.4, Cal. Prof. Code of Conduct (“A lawyer shall not (a) ...unlawfully alter, destroy or conceal a document or other material having evidentiary value... [or] counsel or assist another person to do any such act; [or] (b) suppress any evidence that the lawyer or the lawyer’s client has a legal obligation to reveal or to produce.”); Bus. & Prof. Code § 6106 (“commission of any act involving moral turpitude, dishonesty or corruption... constitutes a cause for disbarment or suspension”), *id.* at § 6077 (“For a willful breach of any of these rules, the State Bar Court has power to discipline attorneys by reproof, public or private, or to recommend to the Supreme Court the suspension from practice”).

²⁶ *Id.*, at 13 (“The purposeful destruction of evidence by a client while represented by a lawyer may raise suspicions that the lawyer participated as well. Even if these suspicions are incorrect a prudent lawyer will wish to avoid them and the burden of disciplinary proceedings to which they may give rise and will take affirmative steps to preserve and safeguard relevant evidence” [emphasis added].)

Walker's policy was expressly designed to destroy relevant litigation records, and several designated custodians of record continued to permanently delete litigation records even after litigation holds were put in place. The behavior is plainly unethical and violates both California State Law and Walker's ethical obligations as a member of the California State Bar. And as the State Bar has explained, reporting such "possible misconduct assists the State Bar to protect the public, the courts, and the legal profession from lawyer harm; helps to maintain the integrity of the legal system; and furthers public trust in the legal profession."²⁷

We urge the Chief Trial Counsel to investigate this behavior by a senior legal counsel at one of the state's – and the world's – largest and most powerful corporations, and to take swift action to penalize Mr. Walker to the full extent of the law. We also urge the Chief Trial Counsel to investigate the extent to which other California attorneys who served as Walker's colleagues or outside counsel were aware of or aided in this longstanding course of conduct, and may therefore have violated the Professional Code of Conduct as well.²⁸ Only by doing so can the Chief Trial Counsel maintain an appropriate standard for the ethical practice of law in the State of California, and deter other similar conduct.

We respectfully request confirmation of your receipt of this communication, as well as public confirmation²⁹ that your office will undertake an investigation of Mr. Walker's conduct in the same manner it would any other member of the California State Bar.

Sincerely,

American Economic Liberties Project
Check My Ads
Tech Oversight Project

²⁷ "Frequently Asked Questions: Rule of Professional Conduct 8.3," The State Bar of California (Update May 16, 2024), <https://www.calbar.ca.gov/Portals/0/documents/ethics/Rule-8-3-FAQ.pdf>

²⁸ California attorneys have a duty to report misconduct by another California attorney "when the lawyer knows [] of credible evidence" that the other attorney had engaged in conduct involving dishonesty, deceit, or reckless or intentional misrepresentation "that raises a substantial [] question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." See Rule 8.3, Reporting Professional Misconduct, <https://www.calbar.ca.gov/Portals/0/documents/rules/Rule-8.3.pdf>; see also Merrill Balassone, "California Supreme Court Approves New Rule Compelling Attorneys to Report Misconduct by Other Attorneys," Judicial Branch of California Supreme Court (June 22, 2023), <https://supreme.courts.ca.gov/news-and-events/california-supreme-court-approves-new-rule-compelling-attorneys-report-misconduct>. Although Rule 8.3 went into effect on August 1, 2023, the State Bar has clarified that its obligations are retroactive and would apply to conduct an attorney is currently aware of that occurred prior to August 1, 2023. See "Frequently Asked Questions: Rule of Professional Conduct 8.3," The State Bar of California (Update May 16, 2024), <https://www.calbar.ca.gov/Portals/0/documents/ethics/Rule-8-3-FAQ.pdf>

²⁹ Cal. Bus. & Prof. Code §6068.1(b)(2)