

Giuliani and ‘Throwing a Fake’: How the Ethics Rules Govern Misleading Conduct

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Agenda

- **False or misleading statements to the court**
 - **Rule 3.3**
- **False or misleading statements to the press**
 - **Rules 8.4(c) and 4.1**
- **The case law**
- **Tips for compliance**

Part 1: False or Misleading Statements to the Court

Giuliani's Suspension

- **June 2021**, the New York Supreme Court Appellate Division, First Department, suspended Rudolph Giuliani from the practice of law for violating the core professional conduct rules prohibiting a lawyer from being dishonest and making false statements to courts or third parties.

Support Cited by the Court

- In support of its extraordinary sanction, the court cited Giuliani's baseless statements that thousands of felons and dead people voted during the 2020 presidential election and that Georgia voting machines had been manipulated.

ABA and VA Rule 3.3(a)

- ABA and VA Rule 3.3(a) prohibits a lawyer from “knowingly ... mak[ing] a false statement of fact or law to a tribunal” or fail[ing] to correct a false statement of material fact or law previously made to the tribunal by the lawyer.”
- *See also* VA Rule 3.3(a)(4) (“...If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.”)

The more complicated aspects of
Rule 3.3(a) are twofold.

Rule 3.3: Reasonable Diligent Inquiry

- The first is that the rule imposes a diligent inquiry requirement:
 - You cannot make a factual statement without a “reasonably diligent inquiry” to determine if the statement is accurate.
 - *See* ABA Rule 3.3 cmt. [3]; VA Rule 3.3 cmt. [3]
 - What the scope of that diligent inquiry must be, however, is far from clear.

Rule 3.3: Affirmative Misrepresentation

- The second is that Comment 3 to ABA Rule 3.3 and VA Rule 3.3 hold, “There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.”
 - Failing to give the court information may amount to a false statement.
 - Contours of impermissible omissions are largely fact-bound.

Rule 3.3 Violation Regardless of Motive

- A lawyer who **knowingly makes a false statement** of fact or law while representing a client violates ABA Rules 3.3(a) and 4.1(a), if the statement is material, **regardless of motive**.
- *See, e.g., In re: Wahlder*, 728 So. 2d 837(La. 1999) (although lawyer did not intend to defraud anyone, his "reluctance to disclose the settlement documents during the pre-trial hearing indicated his conduct was knowing, since he feared that his misconduct would be exposed").

The Sidney Powell Defense

- In a March 22nd court filing, Sidney Powell, another attorney involved in challenges to the 2020 election, attempted to defend herself against Dominion Voting System's defamation suit.
- Her defense: **“no reasonable person would conclude that [her] statements [regarding widespread election fraud] were truly statements of fact.”**

The Sidney Powell Defense

That defense is unavailing in a disciplinary proceeding.

- A lawyer breaches duty of candor by knowingly making a false factual statement whether factfinder is deceived or *even reads* the false statement.
- *See, e.g., Diaz v. Commission for Lawyer Discipline*, 953 S.W.2d 435 (Tex. App. 1997) (lawyer breached duty of candor by making false statements in pleadings that the judge did not read).
- By doubling down on the falsity element—characterizing her statements as “outlandish,” “inherently improbable,” and “impossible”—Powell proves the validity of the bar complaint now pending against her in Michigan.

Part 2: False or Misleading Statements to the Press

Throwing a Fake

- **August 2021**, *The Washington Post* publishes a transcript of a February 2018 interview of Rudolph Giuliani by a special agent from the DOJ's Office of Inspector General.
- During that interview, Giuliani told federal agents that it was permissible to **“throw a fake”** during a political campaign. Giuliani's then-law partner, Marc Mukasey, added, **“there's no obligation to tell the truth.”**

Giuliani Transcript

MR. MUKASEY: Can I just point out one thing that is maybe a little bit out of bounds, but in the heat of a political campaign and I think everything the Mayor is saying is accurate and obviously (Indiscernible*) In the heat of a political campaign, on television, I'm not saying Rudy necessarily, but everybody embellishes everything.

MR. GIULIANI: Oh you could throw a fake.

MR. MUKASEY: You're under no obligation to tell the truth.

MR. GIULIANI: You could throw a fake.

So ... Can You Throw a Fake?

ABA Rule 4.1

- ABA Rule 4.1 states that “in the course of representing a client a lawyer shall not knowingly:
 - (a) make a false statement of material fact or law to a third person; or
 - (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”

VA Rule 4.1

- VA Rule 4.1 states that “in the course of representing a client a lawyer shall not knowingly:
 - (a) make a false statement of fact or law; or
 - (b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.”

ABA Rule 8.4(c)

- ABA Rule 8.4(c) states that “[i]t is professional misconduct for a lawyer to: engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

ABA Rule 8.4(c) v. ABA Rule 8.4(g)

- **Unlike ABA Rule 8.4(g)** which specifically calls out “conduct related to the practice of law,” **ABA Rule 8.4(c)** makes no such distinction between conduct related to the practice of law and conduct that is unrelated.

VA Rule 8.4(c) v. ABA Rule 8.4(c)

- VA Rule 8.4(c) states that it is professional misconduct to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation **which reflects adversely on the lawyer’s fitness to practice law.**”
 - Not included in the ABA version of 8.4(c).

Part 3: What Does the Case Law Say?

Scanio

- A lawyer was suspended from the practice of law for thirty days for being dishonest in his dealings with GEICO unrelated to his practice as a lawyer.
- Respondent went to the hospital and missed a day of work after his car was rear-ended. A claims adjuster for GEICO, the offending driver's insurance company, called Respondent to get information about his economic loss.
- The D.C. Court of Appeals held that Respondent was "dishonest" in his dealings with GEICO when he falsely told the claims adjuster that he was not paid hourly and that he had been docked for missed work.
- "Sanctions for violating Rule 8.4(c) run the gamut from informal admonition to disbarment." *In re Scanio*, 919 A.2d 1137, 1140 (D.C. 2007).

Suspension-worthy Offenses

- **Lawyers have received thirty-day suspensions for:**
 - Falsifying a resume and altering law school transcripts. *In re Hawn*, 917 A.2d 693 (D.C. 2007).
 - A failed attempt to steal \$200 worth of flowers and potting soil. *In re Soininen*, 783 A.2d 619 (D.C. 2001)
 - Shoplifting from a department store. *In re Kent*, 467 A.2d 982 (D.C. 1983).

Schneider

- A first-year associate was suspended from the practice of law for altering eight credit card receipts to receive reimbursement for travel expenses **to which he was entitled**.
- Schneider altered the receipts to reflect an “accurate estimate of his out-of-pocket expenses”—expenses that would have been reimbursable had he not submitted receipts at all. *In re Schneider*, 553 A.2d 206 (D.C. 1989).
- Even though the Hearing Committee found that Schneider did not intend to personally gain anything from his alterations, he was suspended for thirty days.

Sweitzer

- In *Sweitzer*, Respondent was indefinitely suspended from the practice of law for signing his wife's name on a Motor Vehicle Administration title-transfer form without her authority to avoid paying \$135 in vehicle sales tax. *Att'y Grievance Comm'n of Maryland v. Sweitzer*, 395 Md. 586, 911 A.2d 440 (2006).

Laurent

- In *Laurent*, Respondent was suspended from the practice of law for 91-days for misrepresentations made in the private sale of a condominium. *The Fla. Bar v. St. Laurent*, 617 So. 2d 1055, 1055 (Fla. 1993).

Leisure

- In *Leisure*, Respondent was suspended from the practice of law for 18-months for “writing numerous checks that, when she wrote them, her checking account could not cover”—conduct having nothing to do with her practice. *In re Complaint as to Conduct of Leisure*, 338 Or. 508 (2005).

Part 4: Tips for Compliance

1. Speak to the Press at Your Peril

Interaction with the Media

- Attorneys in high-profile cases often are called on to give statements to the media, and the Giuliani suspension is a reminder that lawyers must approach those encounters with care.

Doug Gansler

- In 2003, the Maryland Court of Appeals censured then-Montgomery County State's Attorney Doug Gansler for violating Rule 3.6 prohibiting making out-of-court statements before trial. *Attorney Grievance Comm'n v. Gansler*, 835 A.2d 548 (Md. 2003).
- It was the first time that a sitting prosecutor in Maryland had been publicly censured.
- The Court of Appeals unanimously ruled that Gansler improperly and repeatedly discussed evidence—including a defendant's confession—at news conferences involving three criminal cases.

2. Don't Allow the Client to Dictate Your Strategy

ABA and VA Rule 1.2(a)

- While ABA and VA Rule 1.2(a) require a lawyer to “abide by a client’s decisions concerning the *objectives* of representation,” clients “normally defer” to their attorney “with respect to the *means* to be used to accomplish their objectives[.]”
- ABA Rule 1.2(a) & cmt. [3]; VA Rule 1.2, cmt. [1] (“The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by the law and the **lawyer's professional obligations**.... *a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so.*”)

ABA and VA Rule 3.3(a)(3)

- **ABA and VA Rule 3.3(a)(3)** allow a lawyer to refuse to offer evidence that the **lawyer reasonably believes is false**—regardless of the client’s wishes—even if the lawyer does not “know” that the evidence is false.
- Provides an exception when a lawyer’s criminal defendant client wishes to offer testimony that lawyer *reasonably believes*, but does not know, is false.
 - *See* ABA Rule 3.3 cmt. [9]; VA Rule (same) (“[T]his Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client’s decision to testify.”).

A Lawyer's "Effectiveness as an Advocate"

- An essential aspect of a lawyer's "effectiveness as an advocate" is his or her "ability to discriminate in the quality of evidence." ABA Rule 3.3 cmt. [9]; VA Rule 3.3 cmt. [9].
- Likewise, ABA and VA Rules 1.2(d) bar a lawyer from assisting a client in committing fraudulent conduct.

Honest Means

- While the client determines the goal of a representation—*e.g.*, contesting the election—an attorney must **ensure that the means of achieving that goal are not dishonest**, even if the client might prefer a different approach.
 - *See, e.g., Thornton v. United States*, 357 A.2d 429, 437 (D.C. 1976)
(attorney’s duties toward client “must be met in conjunction with, rather than in opposition to, other professional obligations.”).
- The limits of “advocacy” and “zealousness” are not always easy to discern.
- Lawyers must be careful not to let a demanding client compromise their obligations of candor.

3. Be Honest About How You Characterize the Issues in Your Case

Did Giuliani Allege Fraud?

- One noteworthy aspect of the NY court's decision concerns an exchange about whether Giuliani's complaint alleged fraud:

THE COURT: So it's correct to say then that you're not alleging fraud in the amended complaint?

RESPONDENT: No, Your Honor, it is not, because we incorporate by reference in 150 all of the allegations that precede it...

THE COURT: So you are alleging fraud?

RESPONDENT: Yes, Your Honor.

THE COURT: ... [D]oes the amended complaint plead fraud with particularity?

RESPONDENT: No, Your Honor. And it doesn't plead fraud. It pleads the—it pleads the plan or scheme that we lay out in 132 to 149 without characterizing it.

Fraud Was Not Alleged

- The amended complaint did not include a fraud claim, and the Appellate Division found that Giuliani’s description of it was false and misleading, because “[i]t is considered . . . false and misleading . . . to mispresent the status of a pending proceeding[.]” Opinion at 13.

Statements Governed by a Lawyer's Duty to Candor

- While lawyers can (and should) make good-faith arguments about how to interpret a document, the Appellate Division's decision expressly indicates that **statements about the status of a proceeding or pleading** are governed by a lawyer's duty of candor just as any other statements to the court, such as a baseless statement that dead people voted.

4. Associates Cannot Rely on Partners to Take the Heat

The Duty of Junior Lawyers

- While the Giuliani suspension did not (yet) implicate any of his underlings, a junior lawyer who watches his or her supervisor present a false—and material—statement may very well be on the hook for failing to correct the statement.

Daniels v. Alander

- *Daniels* is a cautionary tale for the associate who seeks comfort in the fact that he did not speak the falsehood *Daniels v. Alander*, 844 A.2d 182 (Conn. 2004).
- In *Daniels*, a law firm associate and a partner at his firm represented a mother in a child custody matter. The court held that the associate breached his duty of candor to the court during an ex parte hearing when he failed to correct something the employer said that the associate knew was both untrue and vital to the case.
- The court rejected the associate's defense that only the lawyer making the false statement could be guilty of a Rule 3.3(a)(1) violation, holding, "Depending upon the circumstances, the rule can pertain to an attorney who fails to correct a misstatement to the court that was made in his presence by another attorney."

Questions?

Thank you!

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