

Trial By Combat
By Chris McDonough and Joel R. Brandes

On January 6, 2021, just hours before a mob stormed the Capital Building, in a speech at the rally outside the Capitol, New York attorney Rudy Giuliani, counsel to the President, described the 2020 presidential election as “stolen” and said it involved “crooked ballots.” The former mayor told the crowd. “I’m willing to stake my reputation, the President is willing to stake his reputation, on the fact that we’re going to find criminality there [related to the election process].” “If we’re wrong, we will be made fools of, but if we’re right a lot of them will go to jail,” Mr. Giuliani said. “Let’s have trial by combat.”

Two months earlier, before a Pennsylvania Court, Giuliani argued that lack of access for GOP observers in Democratic-leaning Allegheny and Philadelphia counties should invalidate some 700,000 mail-in ballots. "As far as we're concerned, those ballots could be from Mickey Mouse," he said. The Trump campaign also claimed that Pennsylvania election officials had violated the Equal Protection Clause of the Constitution because some Democratic-leaning counties allowed voters to cure, or fix, mistakes on their mail-in ballots, while other mostly Republican-leaning counties did not. Mark Aronchick, an attorney for some counties sued by the Trump campaign, called Giuliani's demand that legal ballots be tossed out "disgraceful." The president's lawyer also alleged, without providing any evidence, that voting in Pennsylvania was riddled with fraud. He said it was "not an isolated case" either, but part of "widespread national voter fraud" involving other jurisdictions, including Detroit and Milwaukee. However, Giuliani was later forced to admit to the judge that the Pennsylvania lawsuit was "not a fraud case." (See <https://www.npr.org/2020/11/17/936027693/led-by-giuliani-trump-campaign-effort-to-stop-certification-falters-in-pennsylvania>)

Based on hundreds of complaints it received in recent months about Mr. Giuliani and his baseless efforts on behalf of President Trump to cast doubt on the veracity of the 2020 presidential election and, after the votes were cast, to overturn its legitimate results, as well as the statement Mr. Giuliani uttered shortly before the attack on the Capitol, New York State Bar Association (“NYSBA”) President Scott M. Karson has launched an inquiry to determine whether Mr. Giuliani should be removed from the membership rolls of the Association. As widely reported, Giuliani’s efforts included the commencement and prosecution of court actions in multiple states without any evidentiary basis whatsoever. In each and every instance, these actions were appropriately dismissed by the courts in which they were brought. (See <https://nysba.org/new-york-state-bar-association-launches-historic-inquiry-into-removing-trump-attorney-rudy-giuliani-from-its-membership/>)

The New York Law Journal reported on January 13, 2021 that the Chair of the New York Senate's Judiciary Committee said he had lodged a complaint against Giuliani, with the court's Attorney Grievance Committee. In this article we pose the question whether Mr. Giuliani should be disciplined for his conduct, and his participation in frivolous lawsuits.

Rule 8.4 of the Rules of Professional Conduct (“RPC”) appear to be applicable to his conduct. Rule 8.4 provides in part that a lawyer or law firm shall not: (c) engage in conduct involving dishonesty, fraud, deceit or *misrepresentation*; (d) engage in conduct that is prejudicial to the administration of justice; and ... (h) engage in any other *conduct that adversely reflects on the lawyer’s fitness* as a lawyer. (Emphasis supplied)
“The prohibition on conduct prejudicial to the administration of justice is generally invoked to punish conduct, whether or not it violates another ethics rule, that results in substantial harm to the justice system comparable to those caused by obstruction of justice, such as advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding, or failing to cooperate in an attorney disciplinary investigation or proceeding.” (NYSBA RPC 8.4, Comment [3])

Rule 3.1 (a), Non-Meritorious Claims and Contentions, provides that a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. A lawyer's conduct is “frivolous” for purposes of this Rule if: (1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law; or (3) the lawyer knowingly asserts material factual statements that are false. (RPC Rule 3.1.(a)) “Knowingly,” “denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” (RPC Rule 1.0(k))

“The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure.” (NYSBA RPC, Comment [1]) “Lawyers are required, however, to inform themselves about the facts of their clients' cases and the applicable law, and determine that they can make good-faith arguments in support of their clients' positions. ... The action is frivolous, ... if the lawyer is unable either to make a good-faith argument on the merits of the action taken or to support the action taken by a good-faith argument for an extension, modification or reversal of existing law.” (NYSBA RPC, Comment [2])

Mr. Giuliani’s baseless efforts on behalf of his client, President Trump, to overturn the legitimate results of the 2020 presidential election by the commencement and prosecution of frivolous court actions in multiple states without evidentiary basis

appears violative of Rule 8.4(c) by engaging in conduct involving misrepresentation; and Rule 3.1 (a) (1) and (3) by knowingly advancing a claim that is unwarranted under existing law in multiple states and by knowingly asserting material factual statements that are false.

Ethics Opinion 1214 *released* January 11, 2021, by the NYSBA Professional Ethics committee appears to be in point. It dealt with an inquiry by a lawyer whose homeowner client wanted him to present what the lawyer believed were frivolous arguments in support of the client's motion to vacate a judgment of foreclosure. The Committee opined that by virtue of Rule 3.1(a) the attorney could not argue or advance frivolous arguments to support the homeowner's motion. If the lawyer determines that there were no non-frivolous arguments to be made in support of an application to vacate, then the lawyer could not proceed with the motion. "A client has no right to instruct a lawyer to violate a Rule of Professional Conduct, and a lawyer has no right to follow an instruction that the lawyer violate a Rule."

More than 60 courts concluded that there was no basis in law or fact that would support the allegations raised for seeking to vacate the 2020 election results. Despite this, Mr. Giuliani persisted in repeating his claims of election fraud again and again. His pursuance of these unsubstantiated claims repeatedly violated Rules 8.4 and 3.1.

Mr. Giuliani's reported conduct in the speech at the rally outside the Capitol would also subject him to discipline under Rule 8.4 (d) for engaging in conduct that is prejudicial to the administration of justice; and Rule 8.4 (h) for engaging in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

There is no question that he can be disciplined for conduct apart from his law practice. ([Matter of Percy, 36 N. Y. 651](#); [Matter of Langslow, 167 N. Y. 314, 60 N. E. 590](#); [Matter of Wall, 107 U. S. 265, 2 S. Ct. 569, 27 L. Ed. 552.](#))

In *Matter of Richard M Nixon*, (53 A.D.2d 178, 385 N.Y.S.2d 305 (1st Dept.,1976)) the charges against the respondent, the former President of the United States, which were sustained, alleged inter alia, that Mr. Nixon: improperly obstructed an FBI investigation of the unlawful entry into the headquarters of the Democratic National Committee; improperly authorized or approved the surreptitious payment of money to E. Howard Hunt in order to prevent or delay Hunt's disclosure of information to federal law enforcement authorities; improperly attempted to obstruct an investigation by the United States Department of Justice of an unlawful entry into the offices of Dr. Lewis Fielding; improperly concealed and encouraged others to conceal evidence relating to unlawful activities of members of his staff and of the Committee of Re-elect the President; and, improperly engaged in conduct which he knew or should have known would interfere with

the legal defense of Daniel Ellsberg. The Appellate Division pointed out that the gravamen of respondent's conduct was obstruction of the due administration of justice, a most serious offense, which was rendered even more grievous by the fact that Nixon was an attorney who was at the time of the conduct in question the holder of the highest public office of this country and in a position of public trust. While Mr. Nixon was holding public office he was not acting in his capacity as an attorney. However, the power of the Court to discipline an attorney extends to misconduct other than professional malfeasance when such conduct reflects adversely upon the legal profession and is not in accordance with the high standards imposed upon members of the Bar. It found that the evidence adduced in the case warranted the imposition of the most severe sanction available to the Court and, accordingly, Nixon was disbarred.

On January 12, 2021 more than 160 deans of the United States' best-known law schools issued a joint statement, condemning the attempted insurrection at the U.S. Capitol as well as the lawyers who challenged the election results without evidence. They stated: "Many lawyers and judges worked honestly and in good faith, often in the face of considerable political pressure, to ensure the 2020 election was free and fair ...However, we recognize with dismay and sorrow that some lawyers challenged the outcome of the election with claims that they did not support with facts or evidence. This betrayed the values of our profession."

Mr. Giuliani's conduct, like Mr. Nixon's conduct, appears to us, and to hundreds of other lawyers, to betray the values of our profession and reflects adversely upon it. His actions were not in accordance with the high standards imposed upon members of the Bar.

We offer that Mr. Giuliani's conduct should be scrutinized and he should be dealt with accordingly after being given notice of the charges against him and an opportunity to be heard. As a final note, while Mr. Giuliani has a laudable record of public service, even if he is not disciplined for his conduct, there is no question that he has shamed our profession by his recent conduct.

Joel R. Brandes is an attorney in New York City. He is the author of the nine volume treatise Law and the Family New York, 2d, and Law and the Family New York Forms, 2020 Edition (five volumes), both published by Thomson Reuters, and the New York Matrimonial Trial Handbook (Bookbaby). He can be reached at joel@nysdivorce.com or at his website at www.nysdivorce.com.

Chris McDonough is Special Counsel to Foley Griffin LLP in Garden City, New York. For over 30 years he has taught, written on, and practiced exclusively in the field of attorney discipline. He can be reached at Chris@FoleyGriffin.com or Newyorkethicslawyer.com.

*Reprinted with permission from the February 19, 2021 edition of the "New York Law Journal"©
2021 ALM Media Properties, LLC. All rights reserved.*

*Further duplication without permission is prohibited. ALMReprints.com – [877-257-3382](tel:877-257-3382) -
reprints@alm.com.*