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What Does the 'Giuliani' Decision Teach Us?

By Joel Cohen

So what about Giuliani? Why was he suspended from practice even before an evidentiary hearing, for doing what we want a lawyer to do? That is, being a zealous advocate willing to go to the wall and beyond for a client, impervious to the personal consequences—a lawyer willing to endanger his own reputation precisely because he believes in the client.

Try to ignore how he has diminished himself in recent years. Unquestionably, in the past, prosecutor Giuliani operated as a force of nature. Those who knew him "back when" are truly astonished by what has happened—going from a near genius as a litigating force to someone intoxicated by what he managed to talk himself into.

Put aside his Trumpian politics that offend so many and effectively took him over the brink. And forget the platitudes about what the public should expect of a lawyer's duty of honesty, with or without a signed retainer in hand. That is, even though Giuliani has defended, arguing that the First Amendment protects his right to speech in the public square—in his case, however, with some level of public deceit. Finally, recognize that Giuliani was a "lawyer" representing a client, even if also an unyieldingly loyal press surrogate for Trump's political and personal agendas. Giuliani was as loyal to Trump as Andrew Giuliani is to his father. If you can imagine that!

Repeat: Giuliani was Trump's lawyer—no getting around that. No public figure should want a lawyer unwilling to get before the cameras and proclaim that the client will be vindicated, if required—even if the lawyer *knows* that the client lacks a snowball's chance in hell. The public expects a lawyer's zealousness in putting the client's best foot forward—always; and no matter how horrendous the odds. Even the Supreme Court has said that "the attorney's duties to a client do not begin inside the courtroom door." The lawyer needs to be willing to be there at the microphones, whenever strategically valuable to the client.

Inside court, totally ethical lawyers oftentimes do present arguments that they can't possibly believe will succeed. If it were otherwise, most of the time lawyers would simply be defaulting their clients' cases. Society rightly doesn't want that. We don't want effete lawyers hamstrung by the likelihood that they don't believe in their cause or its possible success. In a client's dark night, his lawyer may be the only thing going for him. Society applauds that as a virtue. Despite the sometimes snarky presentations of insouciant defense lawyers in TV drama, the public simply can't abide lawyers depicted playing dead, however much the client deserves burial under a pile of rubble of his own creation.

So what about Giuliani? Why was he suspended from practice even before an evidentiary hearing, for doing what we want a lawyer to do? That is, being a zealous advocate willing to go to the wall and beyond for a client, impervious to the personal consequences—a lawyer willing to endanger his own reputation precisely because he believes in the client. Maybe even a lawyer who actually believes the client's fabricated rhetoric that something has been "stolen" from him—and the American people too. Clients, and occasionally their lawyers, often come to honestly believe their own BS, or the supposed "truth" that the client has served up to them. (Sad to say, truly believing the BS often makes the lawyer more effective.)

Here's, though, what Giuliani did in literally *the case of the American century*. Not an average litigation, in which Giuliani went off the rails. Here, the very fabric of American democracy was at stake, and a sitting presidential candidate, and Giuliani himself, were brazenly and beguilingly telling a revved up constituency willing to listen, that the election was stolen—having no legitimate reason for that belief. That is, except from a "believing one's own BS" perspective. Believing one's own BS, though, isn't a threshold standard for lawyers going public with that BS!

If the public, though, wasn't itself a victim of this episode the result, might have been different, at least from an *interim* suspension perspective. But Giuliani pushed the envelope by continuing the "stolen election" diatribe after he knew that a disciplinary investigation was underway, somewhat forcing the Appellate Division's hand.

"Hard cases [do] make bad law." Significant *public* cases that push the courts to the wall, however, often result in decisions harder on those who forced the courts there. Giuliani did that, and recklessly so. He did it either with zealous abandon, or deludedly believing that if Trump ultimately prevailed, his presidential platform would keep Giuliani off the hook. Perhaps he overheard a cynical mentor of mine once say, paraphrasing here, that a lawyer's successes for a well-positioned clientele often overcome the perception that the lawyer is a "bad guy" who deserves official reprisal for sometimes odious conduct. Roy Cohn famously pulled that off for a long time (albeit for different misconduct)—that is, until they nailed him too.

Perhaps Giuliani thought, though, that Cohn lacked the 1600 Pennsylvania Avenue hook that Giuliani probably believed he had. And, interestingly, even after that "hook" disappeared when Trump left to Mar-a- Lago, Giuliani astonishingly and unexplainably continued the Big Lie on podcasts. He somehow didn't accept that the ballgame was over, even if he had believed while the ballgame remained underway that he had a perfect right to continue his baseless onslaught.

So what's the Appellate Division's message for the rest of lawyers, particularly when clients expect zealousness—maybe even the unbridled zealousness that Giuliani willingly displayed? It must be this: When he made his radical public declarations of "steal" and "people voting [for Biden] from the grave," Giuliani had no basis to believe it, especially when lawsuit after lawsuit was being dismissed precisely for lack of evidence. Yes, it's hard to say "no" to a president, especially one as scheming as the one Giuliani represented. Still!

Attorneys may indeed spin things favorably for a client, especially in public. Still, while the Appellate Division didn't express it thusly, at bottom "there's got to be *some* there, there." A lawyer can't manufacture or take the client's manufacture of something out of whole cloth and argue it—both in court *and even in the court of public opinion*. The court of public opinion isn't a "Speaker's Corner" or safety zone for a lawyer who speaks at that podium for the client hoping it will somehow subliminally reach into the court's decision-making process—aware that he'd be confronted on it by the judge if he had the temerity to say it in the courtroom.

The *Giuliani* interim suspension order isn't about the court emasculating an attorney's First Amendment right. Lawyers may not frivolously spout lies in the context of litigating a case (whether in court or outside), no

matter the client or the cause. And, too, no matter how much the client actually believes or promotes the lie, urgently calling on his lawyer to megaphone it.

It may be that both the *Giuliani* decision and what he tried to do leading to it are sui generis. Let's hope so!

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