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Just Consider Sidney Powell's Defense

By [Joel Cohen](#)

Can the organized bar (that essentially speaks for us), in whatever venue applicable to Powell's status as an attorney, afford to let this particular one go?

"Shouldn't Sidney Powell Be Disbarred?" would have been a better title. After all, Powell has now effectively told America—and, more importantly, every judge she might ever appear before—that we simply can't believe what she [says](#), and we should know that we can't believe her.

As she basically argues in defending the defamation lawsuit against her by Dominion Voting Systems: "I just put it out there (as it supported my client's position). Let the courts decide. That's what they're there for."

In some poetic way, Powell has disbarred herself—that is, if the goal of disbarment or any disciplinary action is to protect clients and the judicial system from abuse. Just imagine being the judge who asks her the next time she appears in court for any client: "Ms. Powell, I've read your Dominion defamation defense motion. So, that said, do you actually believe what you're saying to me *in this case*? Or is it just a factual claim that, you believe, favors your client?" And if she says "Yes, your honor, I do believe it"—given her *Dominion* defense, how can a judge believe that?

To fully understand this, Powell has been sued by the voting machine company, Dominion Voting Systems, for defamation. Understandable, indeed. The cause of action? Specifically, and bizarrely, during a Washington, D.C. press conference, a Georgia political rally and a media blitz, Powell [claimed](#) *falsely*—she doesn't now dispute the falsity of it—that Dominion had rigged the 2020 presidential election in favor of Joe Biden; that Dominion was created in Venezuela to rig elections for dictator Hugo Chavez; and that Dominion bribed Georgia officials for a no-bid contract. Imagine the financial and reputational harm to the company: governmental entities—its source of business—unalterably afraid to use Dominion's equipment in future elections based on the mere possibility that Powell's claim was true. One needn't be a defamation law expert to recognize the lawsuit's powerful ad damnum.

Whatever technical arguments or even constitutional defenses to such tortious conduct on Powell's part—that Dominion is a public figure; that Powell acted without malice; that the challenged statements related to matters of "public concern"; that the statements were constitutionally protected and, thus, not actionable; and that there's no venue or jurisdiction in D.C. for that lawsuit—Powell has taken her truly sui generis defamation defense to an entirely new level.

She literally claims that, in the context of President Trump's political battle to "Stop the Steal," she made these aggressively unsupported comments claiming Dominion engaged in voter fraud against her client, Trump, now arguing "*that reasonable people would not accept such statements as fact but view them only as claims that await testing by the courts through the adversary process (emphasis added).*" I'm [quoting](#), if you can believe it!

Ironically, to support her defense, Powell literally relies on Dominion's own view of it. She, thus, argues that even Dominion viewed her comments as "wild accusations," and "outlandish claims"—that they were "inherently improbable," even "impossible." That is, inasmuch as Dominion itself saw her comments to the American electorate as ludicrous, why would anyone else have believed them? The problem with that argument? Simple. Dominion knew that what she was saying about it was false. Dominion, though, wasn't damaged by what *it* thought of its product's integrity, but by what the rest of the world might, or did.

Imagine a lawyer communicating, in any context, that "when I say something suggesting that I'm stating a fact, I only mean to communicate that I'm only making a claim that needs testing in the courts." One must assume that Powell believes that she is herself a "reasonable person"—I expect she does, although I'm now forced to wonder—so that means that she herself didn't believe herself when speaking to the citizenry. (Fox, parenthetically, must really be wondering how Powell's admission will impact its separate, \$1.6 billion, lawsuit against it by Dominion).

In fairness to Powell's position, Justice Kennedy speaking for the Supreme Court in *Gentile v Nevada* 30 years ago, said that "An attorney's duties do not begin inside the courtroom door." A lawyer, Justice Kennedy went on, can't blithely ignore the practical implications of a legal proceeding for the client in the court of public opinion.

Nonetheless, neither the Supreme Court nor any court has said anything suggesting that an attorney may recklessly throw some contention that she herself doesn't believe up against the wall to see if it might stick, however ridiculous. Stripped away of her verbiage defending the defamation lawsuit, she

simply tossed her theories against the wall. Making reckless comments at a cocktail party about the merits of a case a lawyer brings is bad enough. But Powell was representing the President of the United States and *dangerously* telling America, while the fierce election battle was underway, that the election was stolen—and Dominion was the cause. This, when she herself didn't believe it.

Had Powell argued, in her own defense, that she actually believed her heat of battle remarks, it might arguably have helped support her claim that she lacked malice. Now, however, she's essentially admitted malice—i.e., "I made remarks that no reasonable person would have believed." Neither did she, is the extremely reasonable conclusion!

This article, though, isn't about the merits of Dominion's lawsuit—how can she possibly prevail. Just think about what her deposition will look like? (Boy, would any lawyer want to examine her.) And as a pure matter of reputational damage to Dominion, it has essentially already prevailed, hasn't it? Whatever Dominion might potentially receive in a monetary judgment against her—\$10, \$10,000 or even \$10,000,000—her basic acknowledgement that her defamatory remarks were blatantly bogus when made, should be worth far more to Dominion reputationally than any monetary recovery she might pony up.

The broader issue, though, isn't about defamation. It's about we, as lawyers, particularly litigators. So put aside Dominion—it will survive. Importantly, for us, at least four different rules apply to what occurred: (1) a lawyer can't make a false statement in court. ABA Model Rules of Professional Conduct (3.3(a)(1)); (2) a lawyer can't engage in conduct whether representing a client or not involving dishonesty, fraud, deceit or misrepresentation (8.4(c)); (3) a lawyer can't engage in conduct "prejudicial to the administration of justice" (8.4(d)); and (4) a lawyer can't make false statements to third parties in the course of representing a party (4.1).

If the courts were to find it acceptable for lawyers to make reckless comments like these—whether or not legally defensible civilly—the litigating bar will have been accorded a dangerous off ramp from its overarching duty of professionalism. It's one thing, yes painful, for Donald Trump to have stated repeatedly that his election was stolen by Dominion (whether or not he believed it). Quite another for his lawyer to have done so,

especially given her recent admission that she herself never believed it, which she employs now that Trump is out of the picture.

Previously I, frankly, inwardly questioned the various bar associations and lawyer groups that urged discipline against Trump lawyers who litigated specious election claims, each one a loser in the courts. I have also questioned their calling for discipline when a lawyer—think Giuliani—made scandalous statements to the press, but not in court itself, where a lawyer’s duty is somewhat higher.

My opinion about all of this: Can the organized bar (that essentially speaks for us), in whatever venue applicable to Powell’s status as an attorney, afford to let this particular one go?

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