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Dealing With Lying Lawyers

Occasionally lawyers step so far over the line as to be abusive to the other party or dangerous to the public. The judicial system, judges and professional ethics watchdogs must decide where the bumpers on acceptable conduct lie and then act to preserve the boundaries on attorney conduct.

By Ellen L. Koblitz and Kim D. Ringler

In light of widely debunked contentions by lawyers on behalf of former president Donald Trump, the question has arisen as to what the New Jersey legal system could do or should do when lawyers make unsupportable arguments outside the courtroom, inside the courtroom, and in legal filings. Both courts and the disciplinary system have tools to deal with lawyers' lies. Some options overlap, some are exclusive to one process or the other, and all of them come fraught with challenges.

The New Jersey courts are intentionally extraordinarily open and welcoming to all litigants. The official New Jersey Court website declaims: "The NJ Courts are using new technology and creative solutions to ensure an open door to justice." And, indeed, the website gives self-represented litigants and lawyers significant help in prosecuting and defending law suits. **https://www.njcourts.gov/selfhelp/index.html; https://www.njcourts.gov/attorneys/index.html**

The court system is also an excellent escape-valve for lawyers and litigants with extreme views. Rather than engage in possibly dangerous self-help remedies including physical violence, extremists can safely litigate with vitriol, exaggeration and even occasional misrepresentations. But in our age of high-tech virtual dispersal of extreme ideas, where individuals may spread dangerous disinformation with no safeguards, the traditional approach of the courts and disciplinary authorities merit reexamination.

Judges generally show great understanding and empathy in allowing parties and even lawyers of parties to engage in heated rhetoric, given the high emotions often present, and the desire of the judge to conclude the case expeditiously without allegations of prejudice in favor of one side, or the need to recuse. Judges are reported to the Advisory Committee on Judicial Conduct and sued with some regularity, especially judges in Family Court, where the issues generate high emotions. Both judicial attacks are generally side-lined pending the end of the underlying case, and ultimately dismissed as meritless.

If a judge sanctions counsel or refers an attorney for discipline, the question arises whether the judge should then recuse from that attorney's other matters. The judiciary prizes fairness above all, and the prompt resolution of disputes is a big component of fairness. Recusal of the judge, or reversal by the Appellate Division based on an appearance of partiality if the judge does not recuse, is not an efficient way to resolve cases. When lawyers or litigants have a reputation for challenging court procedures, speaking out as a representative of a threatening fringe group, clearly misrepresenting the facts and the law, or otherwise behaving

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in a way that threatens a fair resolution, and when jury prejudice is not a concern, judges are encouraged by the court system to deal with the recalcitrant attorney by maintaining a thick skin, dodging the delays inherent in confronting the lawyer or litigant head-on. This is especially true in Family Court, where the matter, involving custody, child support, divorce or domestic violence, cannot reasonably be dismissed or a party not heard as a sanction. The court's long history of promoting free speech also motivates forgiving treatment of these attorneys.

But occasionally lawyers step so far over the line as to be abusive to the other party or dangerous to the public, and the judge must take action. One of Trump's impeachment defense lawyers complained about the presenters' charge that the defense was frivolous, explaining that if found frivolous, he would lose his law license. That explanation is far from actual practice. If the litigation itself is wholly frivolous, the Court Rules may be invoked to seek sanctions against the attorney. R. 1:4-8(b); *LoBiondo v. Schwartz,* 199 N.J. 62, 98 (2009). First, the opposing party

must put the advocate of the frivolous position on notice and give that counsel the ability to seek a safe harbor by dismissing the offending claim. R. 1:4-8(b)(1). When the matter is ultimately concluded, the frivolous litigator may be required to pay the other party's counsel fees and litigation costs as well as a sanction to the court. R. 1:4-8(d).

If a lawyer signs an affirmation of the validity of a claim knowing it to be false, the lawyer could also be prosecuted for the fourth-degree crime of false swearing. N.J.S.A. 2C:28-2. Such a prosecution is extraordinarily rare, if not nonexistent, unless the attorney personally benefits financially from the misrepresentation. I.e., *State v. Clawans*, 38 N.J. 162 (1962), and *State v. Kushner*, 192 N.J. Super. 583 (1984). A judge could also find the lawyer in contempt and sanction counsel if the contempt was in the presence of the judge. R. 1:10-1. If not in the face of the court, the judge may file an order to show cause to be heard by another judge, with prosecuting counsel appointed. R. 1:10-2. And finally, the judge could refer counsel to the disciplinary authorities, knowing that the start of the lengthy disciplinary investigation will likely abide the conclusion of litigation.

Grievances alleging unprofessional conduct come from many sources including judges, and the Office of Attorney Ethics (OAE) may also open investigations on its own initiative. When the court matter is still pending, and the ethical issues raised are part the controversy, the OAE or a District Ethics Committee may determine to put its investigation on hold pending the conclusion of the litigation. R. 1:20-3(f). On occasion, a lawyer sanctioned by a court, or prosecuted criminally, then faces the music in the professional conduct setting based upon the same actions or failures. *Matter of Kushner*, 101 N.J. 397 (1986). In a recent example in Florida, attorneys were first sanctioned for withholding discovery documents and then received 90-day suspensions of their law licenses. *Florida Bar v. Daley*, case number SC17-142, and *Florida Bar v. Amlong*, case number SC 17-150.

Should a disciplinary investigation of a lawyer's conduct involving lies or unfounded statements in litigation move forward, the Rules of Professional Conduct (RPCs) provide a wide platform for assessing whether actionable misconduct has taken place. Practicing law is a privilege, not a right, and both self-regulation and the esteem of the profession depend on conscientious examination of outright lying on the part of a lawyer in the course of representing a client.

The RPCs most often invoked are 3.1, Meritorious Claims and Contentions; 3.3 Candor Toward the Tribunal; 3.4, Fairness to Opposing Party and Counsel; 4.1, Truthfulness in Statements to Others; and the catch-all RPC 8.4, Misconduct, which bars conduct prejudicial to the administration of justice or conduct involving dishonesty or misrepresentation. This arsenal enables disciplinary investigations against Trump campaign lawyers and any lawyers using falsehoods as the basis for litigation.

For example, in Michigan, the Attorney General, the Governor and the Secretary of State have filed a grievance asking for an investigation into attorney Sidney Powell and three others for violation of the RPCs. In New York, over 200 lawyers signed a grievance demanding an investigation of the professional misconduct allegedly committed by attorney Rudy Giuliani. Around the country, lawyers are susceptible to disciplinary investigations in any jurisdiction in which they are admitted in addition to the jurisdiction where the allegedly unprofessional actions took place.

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To find sufficient proof of misconduct in New Jersey, the evidence must meet the clear and convincing test. Findings must also overcome protest that the investigation was not impartial, stemmed from partisan politics, or improperly limited free speech. These challenges are considerable but not overwhelming when the proof is present that a lawyer knowingly brought groundless litigation predicated on non-existent or false—as distinct from eventually discoverable—facts. When proven, violations of the RPCs may result in sanctions ranging from an admonishment to suspension from practice.

Another control on baseless lawsuits and false statements is civil litigation. Newly filed cases by Smartmatic USA Corp. against Fox News, individual newscasters, and others rest on defamation and pack a practical punch because the resultant damages are potentially formidable. Similarly, Dominion Voting Systems Corp. has sued both Powell and Giuliani alleging they made groundless allegations and statements in the course of representing clients challenging the presidential election results.

Acting independently or synchronously, the judicial system, judges and professional ethics watchdogs must decide where the bumpers on acceptable conduct lie and then act to preserve the boundaries on attorney conduct.

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