DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
AD HOC HEARING COMMITTEE

In the Matter of	**Board Docket No. 22-BD-027**
RUDOLPH W. GIULIANI, ESQUIRE,	
Respondent,	**Disciplinary Docket No. 2020-D253**
A Temporarily Suspended Member of the Bar of the District of Columbia Court of Appeals.	
Bar Number: 237255	

DISCIPLINARY COUNSEL'S PRE-HEARING MEMORANDUM

In his Order of September 1, 2022, the Chair invited the parties to submit pre-hearing memoranda. Disciplinary Counsel submits this memorandum to touch lightly on several of Respondent's anticipated defenses in order to highlight its position on these issues. Disciplinary Counsel anticipates elaborating on these issues at the hearing and in post-hearing briefing.

Respondent is charged with violating Rules 3.1 and 8.4(d) of the Pennsylvania Rules of Professional Conduct for conduct in connection with his role as counsel before the U.S. District Court for the Middle District of Pennsylvania in *Donald J. Trump for President, Inc. v. Boockvar*. Disciplinary Counsel alleges that Respondent made various claims in that case without any factual or legal basis for

doing so, including that election fraud occurred in the 2020 presidential election and asking the Court to invalidate up to 1.5 million votes.

I. Choice of Law

Rule 8.5(b)(1) of the D.C. Rules of Professional Conduct specifies that "[f]or conduct in connection with a matter pending before a tribunal, the [Rules of Professional Conduct] to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise[.]" The Middle District of Pennsylvania's Local Rule 83.23.2 adopts the Pennsylvania Rules of Professional Conduct. Therefore, the Pennsylvania Rules apply.

Rule 3.1 of the Pennsylvania Rules prohibit a lawyer from "bring[ing] or defend[ing] a proceeding, or assert[ing] or controvert[ing] an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." A claim is considered frivolous "if it lacks any basis in law and fact." *Adams v. Dep't of Public Welfare*, 781 A.2d 217, 220 (Pa. 2001) (citing Rule 3.1).

Rule 8.4(d) of the Pennsylvania Rules provides that it is misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." An attorney has an ethical obligation "not to clog the courts" with frivolous claims, *Adams* at 220 (quoting *Polk County v. Dodson*, 454 U.S. 312 (1981), and doing so

may violate Rule 8.4(d). *See Office of Disciplinary Counsel v. Altman*, 228 A.3d 508 (Pa. 2020).

II. Fast-Paced Litigation

Respondent has argued to Disciplinary Counsel that he "was representing a client in a fast-moving election law challenge matter that did not permit him to investigate fully his client's position as he would normally do in any other case." Separately, he has argued that he appeared in the *Boockvar* litigation "virtually at the last minute, relied on information provided by attorneys, experts and the information that was collected by the former President's campaign team in Pennsylvania in an extremely truncated, novel, and complex statewide election in a federal court proceeding."

Whether the *Boockvar* litigation was complex and fast moving is no defense. Election challenges are by their nature expeditiously decided. Pennsylvania has an established procedure for contesting the results of a presidential election, which includes mechanisms for a rigorous fact-finding process and an expedient trial in state court to reach a final determination. *See* 25 Pa. Stat. Ann. § 3456 *et seq*. Respondent did not file such an election contest, but instead opted to proceed with a civil lawsuit in federal court under 28 U.S.C. §§ 1331 and 1343. Respondent must be held to the same standard of conduct as any other litigator who elects to bring such an action.

Comment [2] to Pennsylvania Rule 3.1 explains that lawyers are required 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 D.C. Court of Appeals has said, when determining a violation of Rule 3.1 under our Rules, that an attorney has a "continuing responsibility to make an 'objective appraisal of the legal merits of a position,' asking how a 'reasonable attorney' would evaluate 'whether a claim is truly meritless or merely weak.'" *In re Pearson*, 228 A.3d 417, 424 (D.C. 2020) (quoting *In re Yelverton*, 105 A.3d 413, 425 (D.C. 2014)). There is no distinction under Rule 3.1 for cases that are accelerated and those that are not, and the Rule does not allow an attorney to outsource his obligation to investigate the factual and legal bases of his client's claims before asserting them in court.

III. Circumstantial Evidence

Disciplinary Counsel anticipates that Respondent may argue that he had substantial circumstantial evidence (primarily in the form of witness declarations) that supported an inference of election fraud. Inferences made from circumstantial evidence must be reasonable; they cannot be made on speculation or conjecture. *See Rabadi v. Great Wolf Lodge of the Poconos LLC*, No. 3:15-cv-00101, 2016 WL 4238638 (M.D. Pa. 2016). Disciplinary Counsel's experts will testify that the evidence in the *Boockvar* litigation, even when considered in its totality, does not

support a reasonable inference that election fraud occurred in Pennsylvania's 2020 presidential election. At very best, Respondent's evidence might demonstrate the *opportunity* to commit fraud, not the actual commission of fraud. There is no presumption that because a person had the opportunity to commit fraud, he did so. To the contrary, Respondent was required to offer evidence, circumstantial or other, of actual fraud. Disciplinary Counsel's evidence will show that he did not do so.

IV. Lack of Rule 11 Sanction

In his Answer to the Specification of Charges, Respondent argues that Fed. R. Civ. P. 11 includes a "strict mandate" that the court impose sanctions if it finds that a claim is frivolous. He goes on to write that the District Court in *Boockvar* "was in the best position to determine whether the Pennsylvania proceeding was frivolous" and it is therefore "telling" that the District Court "did not sanction" him or refer him "to any group that has the authority to discipline" him.

Respondent, however, cites to an outdated version of Fed. R. Civ. P. 11. The current version, enacted in 1993, says the court "*may* impose an appropriate sanction," not that "the court … *shall* impose" one as the earlier version did (emphasis added). Additionally, no party in the *Boockvar* litigation asked the District Court to consider imposing sanctions, and Disciplinary Counsel's experts will explain why the District Court likely could not have done so if asked. The experts will also explain how the District Court not imposing sanctions *sua sponte*

is likewise of no import. In any event, the determination of whether Respondent violated the disciplinary rules is not dependent on his being found to violate Fed. R. Civ. P. 11, and the issue is one for the disciplinary system, not the federal court.

V. The First Amendment

Respondent is temporarily suspended in the District of Columbia as reciprocal discipline based his temporary suspension in New York pending final disposition of disciplinary proceedings in that state. The New York case involves "false and misleading statements [Respondent made] to courts, lawmakers and the public at large in his capacity as lawyer for former President Donald J. Trump and the Trump campaign in connection with Trump's failed effort at reelection in 2020." *In re Giuliani*, 197 A.D.3d 1, 4, 146 N.Y.S.3d 266, 268 (2021). As part of the New York proceedings, Respondent argued that certain statements he made were protected by the First Amendment.

To be clear, this matter is not about freedom of speech or statements made outside the Pennsylvania litigation. Disciplinary Counsel has not charged Respondent with making false statements in the public square, and it has no interest in policing Respondent's right as a private citizen to engage in political debate. Rather, this case is about Respondent's ethical obligation as a member of the bar to refrain from advancing claims in court that lack any legal and factual basis. It is well-settled that "in the courtroom itself, during a judicial proceeding, whatever right

to 'free speech' an attorney has is extremely circumscribed." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071 (1991). Respondent's speech as an attorney appearing before the District Court was properly limited by the Rules, and he was required by Rule 3.1 to assert claims on behalf of his client only if he had a legal and factual basis for doing so.

VI. Chilling Effect

In his written response to Disciplinary Counsel's investigation, Respondent argued that this matter "is really just one part of an overall attack to destroy the reputation, livelihood and future of anyone raising issues the establishment has decided must be censored." He wrote that "representation of President Trump subjects the lawyer to repercussions as great, if not greater than for [*sic*] the lawyer representing public enemy number one." The implication of Respondent's argument, and a defense Disciplinary Counsel anticipates he will raise, is that imposing discipline in this matter is both politically motivated and has the potential to chill zealous and creative advocacy on behalf of unpopular clients or causes. But Respondent was not representing accused members of the Communist Party in the McCarty era or civil rights workers in 1963 Alabama. A former President of the United States, who received in excess of 74 million votes in his reelection campaign, would not seem to qualify for the role of public enemy number one or the status of underdog. But the unpopularity of Respondent's client, assuming that accurately

characterizes the situation, cannot shield Respondent from the consequences of his actions. There will be no evidence of improper motivation in bringing these charges, and the issue is a red herring. It is the role of the Committee, and ultimately the Board and the Court, to determine whether Respondent's conduct violated the Rules as charged, regardless of the motivation of his accusers. If the determination is that he did so, it is perfectly appropriate to discipline him in order to deter others from engaging in similar misconduct in the future.

Respectfully submitted,

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/s/ Jason R. Horrell

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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2022, I caused a copy of the foregoing *Disciplinary Counsel's Pre-Hearing Memorandum* to be filed electronically with the Board on Professional Responsibility by email to CaseManager@dcbpr.org, and to be served on Respondent's counsel by email to John M. Leventhal, Esq., at judgeleventhal@aidalaw.com, and to Barry Kamins, Esq., at judgekamins@aidalaw.com.

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