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## When Lawyers Lack a Compass: Rudy, Sidney and the Privilege to Practice Law

The attorneys' derogation of their oaths presented clear and present dangers to the governments they had sworn to defend—governments that had issued their licenses.

By **Marc Garfinkle** | August 13, 2021



**Kingston Liu**

On occasion, public events have provoked Legal Ethics-related conversations of such broad interest that we have addressed them in this column. When that happens, we try to avoid being political; our vista is through the lens of the RPCs. While every issue of every sort seems political nowadays, the one we examine today really is not. It concerns attorneys who have behaved in an unacceptable manner inconsistent with their oaths of office.

The attorneys are Rudy Giuliani, Esq., and Sidney Powell, Esq. Their acts, while greatly different, had the intended impact of disrupting the orderly functioning of government and wrongfully undermining public faith and confidence in government and jurisprudence. Giuliani incited an angry mob to march on the Capitol where he knew they had no license to be, and he literally— not figuratively—encouraged violence

there. Powell engaged in false rhetoric and prolific baseless litigation (the “Kraken cases”) to challenge unquestionably fair election processes, disseminate misinformation, make untenable claims, and interfere with the orderly administration of law.

So far, Giuliani’s words have brought him under scrutiny of the New York Bar, and Powell’s baseless claims and accusations have subjected her to scrutiny by an angry judge. Both lawyers claim protection under the rubric of free speech. Both wrap themselves in the flag, wave the Bill of Rights, and portray themselves as last-ditch defenders of a democracy gone amok. Their defense argument begins with the Constitution and the protections they claim thereunder. This is a red herring. Better analysis begins with their attorney’s oath of office to defend the Constitution—not the Constitution’s obligations to protect the attorney.

Our privileges as lawyers are not congruent with our rights as citizens; our actions as attorneys are more tightly circumscribed than our actions as “civilians.” This is as it should be. While it may seem odd that the right to citizenship, which can be earned by the mere fact of local birth, confers on its possessor a greater bundle of rights than those conferred on persons who have earned a J.D. and an Esq., it makes sense.

Citizens have rights guaranteed by the Constitution and laws promulgated thereunder. Lawyers, who also enjoy those rights, have licenses to practice an important profession whose requirements may conflict with our Constitutional rights. A license is a privilege. It exists at the behest of a sovereign who empowered its judiciary to populate its world with attorneys, subject to the rules and restrictions that please the sovereign.

A licensing authority distributes the licenses to would-be attorneys who have met high standards of knowledge, ability, and character. Although we attorneys in New Jersey have a possessory view of our licenses—seeing them as our hard-won life estate in this profession—our Office of Attorney Ethics takes another view. To the OAE, hard-won or not, the license is theirs, not ours, and it is not irrevocable. Not by a long shot.

Certainly, no citizen—an attorney or otherwise—may engage in acts of treason, sedition, or sabotage against the government, and those that do should be punished. But a citizen may belong to groups that oppose the government or its policies and act to effect change without undermining that government. While many “opposition” groups and associations have found official disfavor in this country, extremely few are outlawed, and the rights of citizens to speak, associate and assemble are limited only toward the outer reaches of their extensions. Case and common law suggest that the freedom of speech, sacrosanct as it is, has limits, as well.

As Justice Holmes wrote in his (usually misquoted) 1919 opinion in *Schenck vs. United States*, the First Amendment does not authorize anyone to “falsely shout fire in a theatre and cause a panic.” The oft-overlooked word “falsely” may be the key to that analysis, bringing the specter of criminality into the picture, and suggesting that the danger to society is an edge at which our freedoms may be curbed. An attorney’s freedom of speech is curtailed far more sharply than that of other citizens.

For example, we are subject to rules of confidentiality, judicial and administrative gag orders, and other professional rules and regulations. Disgruntled litigants may speak and write with great negativity about the judge and the process, but an attorney had better be more circumspect before levelling such criticism. A citizen’s right to discuss a legal matter is generally limited only by court orders, contractual agreement, and statutes such as national security regulations. An attorney’s right to discuss a matter may also be limited by the attorney’s relationship to a party (e.g., client, former client, prospective client), the manner that information became known to the attorney, and the intended use of that information. Similarly, an attorney who is facing an Ethics investigation has a Constitutional right to refuse to answer a question that might incriminate her. This, however, does not limit her licensing authority’s power to revoke her license to practice for her failure to cooperate with their investigation.

In New Jersey, our license is a privilege bestowed upon us by the Supreme Court. That privilege is conferred only after we take a so-called “oath of office” in which we swear or affirm to uphold the state and federal constitutions and to bear allegiance to their respective governments. Since we are admitted on that conditional basis, failure to do so should have consequences.

There will be abundant litigation in the Giuliani and Powell matters. Creative theories, novel interpretations and bizarre claims of Constitutional protection will be rife. In the Ethics forum, however, there is less room for that creativity. The attorneys’ derogation of their oaths presented clear and present dangers to the governments they had sworn to defend—governments that had issued their licenses. No Bar should accept such action from its attorneys or retain among its ranks the likes of Giuliani and Powell.

But please understand, dear reader, I am not calling for their disbarment ... I’m just sayin’ ....

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