

# MASSACHUSETTS Lawyers Weekly

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## OPINION

### The ethical boundaries of zealous advocacy in election suits and beyond

■ Michael J. Rossi

In the weeks after the 2020 presidential election, Trump campaign attorney Rudy Giuliani stated in media appearances that “dead people” voted in Philadelphia. When he appeared for the campaign in a Pennsylvania federal court, Giuliani repeatedly described the campaign’s election lawsuit as a fraud case, even though the only remaining count in the complaint was an equal protection claim that was not based on fraud.



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A New York appellate court found that Giuliani’s statements were demonstrably false and violated the rules of professional conduct. Unlike lay persons, the court observed that “an attorney is a professional trained in the art of persuasion,” and thus speech by an attorney is subject to greater regulation than speech by others. The court suspended Giuliani’s license to practice law.

The Giuliani case is a high-profile example of an ethical dilemma that many lawyers face in more routine matters. That is, what are the boundaries of zealous advocacy?

How far can and should a lawyer go to further a client’s interests?

While there is room for debate, it is clear that lawyers cannot simply say anything they want to win a case. Courts and professional conduct boards are increasingly paying attention to this issue, and practitioners should do the same.

#### ZEALOUS ADVOCACY

The concept of zealous advocacy in the legal system dates back hundreds of years to a British barrister, Lord Henry Brougham. In modern practice, a lawyer’s duty of zealous representation usually is traced to the duty to act with reasonable diligence in representing a client, as set forth in Rule 1.3 of the ABA Model Rules of Professional Conduct.

Notably, the word “zealous” does not appear anywhere in the text of the ABA Model Rules. It is included in the preamble, and the comments to Model Rule 1.3 state that a lawyer must act with “zeal” in advocacy upon a client’s behalf, but the words “zealous” or “zeal” are nowhere to be found in the text of the rules themselves.

Massachusetts differs. Rule 1.3 of the Massachusetts Rules of Professional Conduct incorporates the model rule, but includes an additional sentence to the effect that a

lawyer “should represent a client zealously within the bounds of the law” (emphasis added).

The addition of that language creates a higher standard for Massachusetts attorneys in the diligent representation of their clients. At the same time, it provides attorneys more leeway to pursue their clients’ goals “zealously.”

Some jurisdictions have gone in the opposite direction due to concerns that the duty of zealous advocacy could be invoked to excuse conduct that is unprofessional. In Washington, for example, the word “zeal” in the comment to Rule 1.3 has been replaced with the word “diligence,” such that lawyers must act with “diligence in advocacy upon the client’s behalf” (emphasis added).

#### LIMITATIONS ON ZEALOUS ADVOCACY

The duty of zealous advocacy is not unlimited. Lawyers also have ethical obligations to the courts, opposing counsel and third parties. A number of rules impose limits on the things that lawyers can do and say in advocating for their clients.

Rule 11 of the Massachusetts Rules of Civil Procedure is one that comes readily to mind. In Massachusetts, an attorney who signs a pleading

certifies that the attorney has read the pleading, there is a good ground to support it, and it is not interposed for delay. In practice, this means that lawyers must take reasonable steps to ensure that their factual contentions have evidentiary support, and their legal arguments have some colorable basis in the law.

Rule 3.1 of the Massachusetts Rules of Professional Conduct similarly provides that a lawyer “shall not bring, continue, or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.”

One instance in which lawyers may unwittingly run afoul of these rules is when they serve as local counsel and are asked to sign and file a complaint drafted by someone else. Such an arrangement does not absolve a lawyer from the responsibility of verifying the factual and legal allegations in the complaint.

Several lawyers who have faced discipline over their roles in the 2020 election lawsuits have argued, unsuccessfully, that they only played a minimal part in the preparation of the complaints and did not read them closely.

Rule 3.3, which addresses candor toward the tribunal, prohibits a lawyer from offering evidence the lawyer knows to be false. Rule 3.4 prohibits a lawyer from unlawfully obstructing another party’s access to evidence. Rule 4.1 prohibits a lawyer from knowingly making a false statement of material fact or law to a third person. Rule 8.4(c) is a catch-all and states that it is professional misconduct for a lawyer to “engage in con-

duct involving dishonesty, fraud, deceit or misrepresentation.”

The Massachusetts Rules of Professional Conduct were amended in October 2022; the amendments reflect the Supreme Judicial Court’s continuing emphasis on civility. A new Rule 4.4(a)(1) states that a lawyer shall not “use means that have no substantial purpose other than to embarrass, harass, delay, or burden a third person.”

Likewise, an amendment to Rule 1.2 instructs that a lawyer should not permit a client’s “personal prejudices or animosities” to drive the litigation or dictate how the lawyer treats others involved in the litigation.

These rules are designed as an antidote to lawyers who engage in no-holds-barred conduct in the name of zealous advocacy.

## IN PRACTICE

What should a lawyer do to avoid crossing the line between zealous advocacy and unethical conduct?

First, lawyers who are concerned about a particular matter should ask themselves why they were retained. If the answer is simply to act as a mouthpiece for a client who is driven by personal animosities, the lawyer should proceed with caution. If a client insists that counsel take a position that is not supported by the facts or the law (e.g., that dead people voted in Philadelphia), this should raise red flags.

Second, lawyers should not take a client’s word on key factual issues. This is not to say that lawyers are required to disbelieve their clients. As the saying goes, trust but verify. A lawyer’s duty of competence under Rule 1.1 includes a duty to inquire

into and analyze the factual and legal elements of a problem.

Rule 3.1 recognizes that lawyers often do not yet know the full story at the outset of a case. Comment 2 to this rule states that “[t]he filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery.” What is required is that lawyers 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.

Finally, keep in mind that the ethical rules pertain to statements lawyers make both inside and outside the courtroom. Rudy Giuliani was sanctioned for statements he made in press conferences, podcasts and television appearances, in addition to one court appearance. The key is that, in all instances, he was acting in the course of representing a client. Just because he did not put false statements in a pleading or say them in court did not mean that he was unencumbered by the ethical rules.

The concept of zealous advocacy has deep roots in our legal system and remains vital in Massachusetts today. However, zealous advocacy has its limits. Just as lawyers owe ethical duties to their clients, they also have obligations to be fair and forthright in their dealings with the court, opposing counsel and third parties.

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