

First Amendment and the Rule of Law: Lawyers and Their Duty to Democracy

CLARIS PARK*

INTRODUCTION

Courts have long protected attorneys' First Amendment rights, although "speech by an attorney is subject to greater regulation than speech by others" and can be limited if it would significantly affect judicial proceedings.¹ Because lawyers are obligated to be zealous advocates for their clients, they may brush against and test that limit.² This can happen both within and outside of judicial proceedings, such as when attorneys speak publicly on behalf of their clients or engage in speech and conduct that the lawyer normally would not outside of their advocacy for their client.

However, in 2020 and 2021, multiple lawyers were sued for defamation, reprimanded, sanctioned, and in one instance, suspended from the bar for their statements related to the 2020 elections and former President Donald Trump's claims that the election was rigged.³ Court filings and opinions repeatedly raised concerns that the lawyers may have jeopardized national security, public faith in U.S. democracy, and respect for and promotion of the rule of law. What, if any, consequences can lawyers expect to face when their zealous advocacy perpetuates further, broader, unquantifiable harm to the justice system?

This Note will argue that while previous frameworks have been appropriately hesitant to infringe on the First Amendment rights of lawyers, any future tests determining whether a lawyer's conduct is protected by the First Amendment must incorporate a robustly informed evaluation of harm to public faith in the justice system. This is necessary not just to discipline attorneys acting in bad faith, but also to protect attorneys' speech and to hold attorneys to their ethical obligation of furthering public trust in the rule of law.

Part I discusses the conduct of lawyers who defended President Trump's allegations of election fraud and the legal actions taken against them by various

* J.D., Georgetown University Law Center (expected May 2023); B.A., University of Pennsylvania (2017)
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1. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991).

2. MODEL RULES OF PROF'L CONDUCT R. 1.3 (2016) [hereinafter MODEL RULES]

3. Alison Durkee, *With Giuliani's Law License Suspended, Here Are the Other Trump Lawyers Who May Face Discipline Next*, FORBES (June 24, 2021), <https://www.forbes.com/sites/alisondurkee/2021/06/24/with-giulianis-law-license-suspended-heres-the-other-trump-lawyers-who-may-face-discipline-next/?sh=4d74727213b3> [<https://perma.cc/9BAE-YXTL>].

parties. This section particularly focuses on the conduct of and actions taken against Rudy Giuliani and Sidney Powell. Part II gives a general overview of the relevant current framework used to determine whether the First Amendment protects a lawyer's conduct. Part III briefly explains the obligations of lawyers under the current *Model Rules of Professional Conduct*. Part IV proposes an amended framework by which to determine whether a lawyer's conduct is protected by the First Amendment. This framework is then applied to Sidney Powell's speech and conduct in Part V.

I. 2020 ELECTION

Following the 2020 elections, former President Trump and his supporters asserted that the election was fraudulent and that President Trump was rightfully and legally the re-elected President of the United States.⁴ President Trump's supporters quickly filed more than sixty lawsuits in Arizona, Georgia, Michigan, Nevada, and Pennsylvania.⁵ While the majority of these lawsuits were dismissed within a month of the election, support for President Trump and his alleged claim to the presidency remained consistent.⁶ This ultimately culminated in an attack on the Capitol on January 6, 2021, during which President Trump's supporters hoped to disrupt the formal counting of electoral votes by a joint session of Congress, which would have affirmed then President-elect Joe Biden's victory.⁷

The Capitol was evacuated, resulting in harrowing images of congressmen fleeing and aides crouching down within the chambers to take shelter while individuals broke windows and crushed Capitol police officers to gain access to the building. Four people died in the attack, and 140 Capitol police officers were assaulted.⁸ In the next weeks, four Capitol police officers who responded to the attack committed suicide.⁹ On October 12, 2021, the Department of Justice

4. David A. Fahrendthold, Emma Brown & Hannah Knowles, *Trump Lost at the Ballot Box. His Legal Challenges Aren't Going Any Better*, WASH. POST (Nov. 14, 2020), https://www.washingtonpost.com/politics/trump-election-legal-challenges/2020/11/14/904fbd04-25e2-11eb-a688-5298ad5d580a_story.html [<https://perma.cc/2M9G-B2ZT>].

5. Amy Sherman & Miriam Valverde, *Joe Biden Is Right That More Than 60 of Trump's Election Lawsuits Lacked Merit*, POLITIFACT (Jan. 8, 2021), <https://www.politifact.com/factchecks/2021/jan/08/joe-biden/joe-biden-right-more-60-trumps-election-lawsuits-1/> [<https://perma.cc/KJW2-Q8UW>].

6. Reuters Staff, *Fact Check: Courts Have Dismissed Multiple Lawsuits of Alleged Electoral Fraud Presented by Trump Campaign*, REUTERS (Feb. 15, 2021), <https://www.reuters.com/article/uk-factcheck-courts-election/fact-check-courts-have-dismissed-multiple-lawsuits-of-alleged-electoral-fraud-presented-by-trump-campaign-idUSKBN2AF1G1> [<https://perma.cc/Q3GU-ZDPL>].

7. Josiah Ryan, *Congress Affirms Biden's Electoral College Victory*, CNN (Jan. 7, 2021), <https://www.cnn.com/politics/live-news/congress-electoral-college-vote-count-2021/index.html> [<https://perma.cc/6M7G-PQGV>].

8. *The Attack*, WASH. POST (Oct. 31, 2021), <https://www.washingtonpost.com/politics/interactive/2021/jan-6-insurrection-capitol/> [<https://perma.cc/H4X2-THUB>]; Amy Gardner & Rosalind S. Helderman, *The Attack: After: Contagion*, WASH. POST (Oct. 31, 2021), <https://www.washingtonpost.com/politics/interactive/2021/jan-6-insurrection-capitol/> [<https://perma.cc/H4X2-THUB>].

9. Tim Fitzsimons, Geoff Bennett & Phil Helsel, *Four Officers Who Responded to Capitol Riot Have Died by Suicide*, NBC NEWS (Aug. 2, 2021), <https://www.nbcnews.com/news/us-news/third-d-c-officer-who-responded-capitol-riot-dies-suicide-n1275740> [<https://perma.cc/2LCV-MP6F>].

reported that more than 600 people had been arrested in relation to the attack.¹⁰ Forty individuals had pled guilty to misdemeanors, nine had pled guilty to felonies, and six federal defendants had been found guilty for their actions.¹¹ Business Insider reported that as of April 18, 2022, at least 818 individuals have been charged with crimes in relation to the attack, and at least 253 people have pled guilty.¹²

Both before and after the attacks, multiple attorneys, either purporting to speak for President Trump or representing him publicly, stated that there had been election fraud and that the elections were illegitimate.¹³ Some, whether zealously advocating for their client or exercising their First Amendment rights, were later accused of inciting the violence that occurred at the Capitol.¹⁴ This included attorneys Rudy Giuliani and Sidney Powell.¹⁵

A. RUDY GIULIANI

Rudy Giuliani, once hailed as “America’s Mayor” following his handling of the September 11 attacks, was a vocal proponent of President Trump in his bid for the presidency in 2016, giving a speech at the 2016 Republican National Convention and making numerous appearances throughout President Trump’s campaign.¹⁶ He later served in an informal advisory position to President Trump and joined his legal team in mid-April 2018.¹⁷ His time in

10. *Eight Months Jan 6 Attack Capitol*, U.S. DEPT. OF JUST. (Oct. 12, 2021), <https://www.justice.gov/usao-dc/eight-months-jan-6-attack-capitol> [<https://perma.cc/HP97-XNTK>].

11. *Id.*

12. Madison Hall et al., *At Least 818 People Have Been Charged in the Capitol Insurrection so Far. This Searchable Table Shows Them All.*, BUS. INSIDER (Apr. 18, 2022), <https://www.insider.com/all-the-us-capitol-pro-trump-riot-arrests-charges-names-2021-1> [<https://perma.cc/F4E8-YU4N>]; Madison Hall, *253 Rioters Have Pleaded Guilty for Their Role in the Capitol Insurrection so Far. This Table is Tracking Them All.*, BUS. INSIDER (Apr. 18, 2022), <https://www.insider.com/capitol-rioters-who-pleaded-guilty-updated-list-2021-5?inline-endstory-related-recommendations=> [<https://perma.cc/H8CQ-JA94>].

13. See Thomas Colson, *Rudy Giuliani Called for ‘Trial by Combat’ Before Trump Supporters Stormed the Capitol*, BUS. INSIDER (Jan. 7, 2021), <https://www.businessinsider.com/rudy-giuliani-called-on-trump-supporters-for-trial-by-combat-2021-1> [<https://perma.cc/LSR7-DVRN>]; Daniel Funke, *Pro-Trump Lawyer Falsely Claims Biden Is an ‘Illegal President’*, POLITIFACT (Jan. 26, 2021), <https://www.politifact.com/factchecks/2021/jan/26/l-linwood/pro-trump-lawyer-falsely-claims-biden-illegal-pres/#sources> [<https://perma.cc/2SHX-W8AM>]; *Trump Campaign News Conference on Legal Challenges*, C-SPAN (Nov. 19, 2020), <https://www.c-span.org/video/?478246-1/trump-campaign-alleges-voter-fraud-states-plans-lawsuits&live=%20https://static01.nyt.com/images/2020/11/20/world/19distortions-powell-photo/19distortions-powell-photo-jumbo.jpg?quality=90&auto=webp> [<https://perma.cc/9XXR-PCGG>] (Sidney Powell at minute 52:25 “President Trump won by a landslide.”).

14. See *Jury Trial Demanded at 5-6*, *Swalwell v. Trump*, No. 21-cv-00586 (D.D.C. 2021), 2021 WL 2152939; *Jury Trial Requested at 5*, *Thompson v. Trump*, No. 21-cv-00400 (D.D.C. 2021), 2021 WL 609412.

15. John Kruzel, *Judge: Dominion Suits Against Trump Allies Can Proceed*, HILL (Aug. 11, 2021), <https://thehill.com/regulation/court-battles/567468-judge-denies-trump-ally-sidney-powells-request-to-dismiss-dominion> [<https://perma.cc/6C5E-7Y9K>].

16. Erin Kelly, *Giuliani Blasts Clinton, Touts Trump for American Security*, USATODAY (July 18, 2016), <https://www.usatoday.com/story/news/politics/elections/2016/07/18/giuliani-blasts-clinton-touts-trump-american-security/87266562/> [<https://perma.cc/782B-GFKJ>].

17. Abby Phillip, *Trump Names Rudy Giuliani as Cybersecurity Adviser*, WASH. POST (Jan. 12, 2017), <https://www.washingtonpost.com/news/powerpost/wp/2017/01/12/trump-names-rudy-giuliani-as-cybersecurity-adviser/> [<https://perma.cc/B748-8M7A>]; Jordan Fabian, *Giuliani Joins Trump Legal Team*, HILL (Apr. 19, 2018),

both positions was marked with allegations of inappropriate contact with foreign actors.¹⁸

Following the 2020 election, President Trump put Giuliani in charge of filing legal challenges contesting the results and seeking to halt validation of the election.¹⁹ During the course of advocating for President Trump, Giuliani made numerous statements alleging that the election had been rigged, and that Dominion Voting Systems and Smartmatic, both companies that built the electronic voting systems that were used in the 2020 elections, had helped to change election results.²⁰ His statements were rarely, if ever, qualified in a manner that implied that he was stating his personal beliefs and not asserting a truth, and Giuliani's lawyers would even later argue that "some and/or all of Giuliani's statements complained of are substantially true."²¹ Additionally, his demeanor and speech suggested that he too was shocked at the duplicitous nature of this supposedly very real conspiracy. For example, while leading a Trump campaign press conference on planned legal challenges, he stated:

There was uniform shock when we first heard it. When I first heard it, I did not believe it until [Powell] showed me the documents. In fact, I feel kind of stupid, and you all should, because all you have to do is go online and find out that Smartmatic is owned by Venezuelans close to Chavez. You can Google it! Well, unless they take it down.²²

In January and February 2021, both companies filed lawsuits against Giuliani.²³ In court filings, Giuliani stated that he planned on arguing that

<https://thehill.com/homenews/administration/384028-giuliani-joins-trump-legal-team> [<https://perma.cc/7ZEZ-LKZN>].

18. Rosalind S. Helderman, Devlin Barrett, Matt Zaptosky & Tom Hamburger, *A Wealthy Venezuelan Hosted Giuliani as He Pursued Ukraine Campaign. Then Giuliani Lobbied the Justice Department on His Behalf*, WASH. POST (Nov. 26, 2019), https://www.washingtonpost.com/politics/a-wealthy-venezuelan-hosted-giuliani-as-he-pursued-ukraine-campaign-then-giuliani-lobbied-the-justice-department-on-his-behalf/2019/11/26/272105a2-0ec5-11ea-b0fc-62cc38411ebb_story.html [<https://perma.cc/8YFD-UMPP>].

19. John Santucci & Matthew Mosk, *President Trump Taps Rudy Giuliani to Take Over Election Legal Fight: Sources*, ABC (Nov. 13, 2020), <https://abcnews.go.com/Politics/president-trump-taps-rudy-giuliani-election-legal-fight/story?id=74204120> [<https://perma.cc/PAW2-88NP>].

20. Dan MacGuill, *Did a Dominion Voting Systems Employee Brag About Rigging the Election Against Trump?*, SNOPE (Nov. 20, 2020), <https://www.snopes.com/fact-check/eric-coomer-dominion-trump/> [<https://perma.cc/3WYR-YBM6>].

21. Defendant's Original Answer to Plaintiffs' Original Complaint at 21, *US Dominion, Inc. v. Giuliani*, 21-cv-00213-CJN (D.C.C. 2021) [hereinafter *Giuliani Answer*].

22. C-SPAN, *supra* note 13, at 1:08:26–1:08:47. Language in the transcript differs from the language in the video and does not include "You can Google it! Well, unless they take it down." This Note refers to the language heard in the video, not seen in the transcript.

23. Helen Coster, *Smartmatic Sues Fox News, Giuliani over Election-Rigging Claims*, REUTERS (Feb. 4, 2021), <https://www.reuters.com/article/us-smartmatic-lawsuit-fox-corp/smartmatic-sues-fox-news-giuliani-over-election-rigging-claims-idUSKBN2A42JO> [<https://perma.cc/273L-TTQZ>]; Nick Corasaniti, *Rudy Giuliani Sued by Dominion Voting Systems Over False Election Claims*, N.Y. TIMES (Jan. 25, 2021), <https://www.nytimes.com/2021/01/25/us/politics/rudy-giuliani-dominion-trump.html> [<https://perma.cc/3DKM-G39P>].

Dominions' claims are barred by the First Amendment.²⁴

On January 6, 2021, Giuliani called for a “trial by combat,” at a rally in front of the Capitol building, mere hours before the attack on the Capitol began.²⁵ He later claimed that he was making a reference to *Game of Thrones*, but he failed to address the fact that he also said, “Over the next 10 days, we get to see the machines that are crooked, the ballots that are fraudulent. And if we’re wrong, we will be made fools of. But if we’re right, a lot of them will go to jail.”²⁶ These false allegations, which he repeatedly asserted were true, may be seen as having galvanized a captive audience who relied on and believed that he was telling the truth. In fact, a number of protesters would later claim that they believed President Trump and his supporters were telling the truth, and that President Trump called them to the Capitol and that they “had followed the President’s instructions.”²⁷

In this context, Giuliani may not have believed that his words would lead to violence, and it is difficult to assert that his words directly led to that, since the violent actions of the protesters were their own. As an attorney for one of the January 6th protesters said, “Trump didn’t get in the car and drive him to D.C., but it’s important to understand the context.”²⁸ Neither did Giuliani. However, as a constant supporter of former President Trump and “America’s Mayor,” he was among one of the most prominent and outspoken public figures present at the rally and throughout the post-election quest to claim election fraud and rigging.²⁹ Whether or not he was acting in his capacity as President Trump’s attorney and a zealous advocate, he and his speech are now irrevocably intertwined with an event that shook the core of US democracy.³⁰

24. Giuliani Answer, *supra* note 21, at 21.

25. Bethania Palma, *Did Rudy Giuliani Call for “Trial by Combat” Before Trump Mob Broke Into Capitol?*, SNOPE (Jan. 6, 2021), <https://www.snopes.com/fact-check/giuliani-rally-speech/> [<https://perma.cc/9BCB-QJLQ>].

26. Aaron Rupar (@atrupar), TWITTER (Jan. 6, 2021, 10:53 AM), https://twitter.com/atrupar/status/1346847382768676864?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1346847382768676864%7Ctwgr%5E%7Ctwcon%5Es1_%2Fwww.snopes.com%2Ffact-check%2Fgiuliani-rally-speech%2F [<https://perma.cc/L2SN-9H8Z>].

27. Rachel Axon & Josh Salman, *They Rioted at the Capitol for Trump. Now, Many of Those Arrested Say It’s His Fault.*, USA TODAY (Feb. 10, 2021), <https://www.usatoday.com/in-depth/news/2021/02/10/trump-blamed-capitol-riot-some-who-were-arrested/4361411001/> [<https://perma.cc/HT6H-75D4>].

28. *Id.*

29. Bobby Cuza, *For Rudy Giuliani, a Tarnished Legacy 20 Years After He Was ‘America’s Mayor’*, NY1, <https://www.ny1.com/nyc/all-boroughs/politics/2021/09/11/rudy-giuliani-legacy-after-september-11th> [<https://perma.cc/XG4H-L4RG>].

30. Aaron Blake, *‘Let’s Have Trial by Combat’: How Trump and Allies Egged on the Violent Scenes Wednesday*, WASH. POST (Jan. 6, 2021), <https://www.washingtonpost.com/politics/2021/01/06/lets-have-trial-by-combat-how-trump-allies-egged-violent-scenes-wednesday/> [<https://perma.cc/R9PN-QSNF>]; Dan Manga, *Rudy Giuliani, Three Other Trump Allies Subpoenaed in January 6 Riot Probe*, CNBC (Jan. 18, 2022), <https://www.cnbc.com/2022/01/18/rudy-giuliani-three-other-trump-allies-subpoenaed-in-january-6-riot-probe.html> [<https://perma.cc/6AUH-KZ74>].

On June 24, 2021, the Appellate Division of the Supreme Court of New York moved to suspend Rudy Giuliani from practicing law for violating rules 3.3(a), 4.1, 8.4 (c), and 8.4(h) of the New York Rules of Conduct.³¹ Rule 3.3(a) provides that a lawyer “shall not knowingly. . . make a false statement of fact or law to a tribunal.”³² Rule 4.1 states that “[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.”³³ The relevant parts of Rule 8.4 provide that “[a] lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . [or] engage in any other conduct that adversely reflects on the lawyer’s fitness as a lawyer.”³⁴

The court primarily identified statements by Giuliani that violated Rules 4.1 and 8.4. These included claims made in court, radio programs, podcasts, at press conferences, and to state lawmakers in formal and informal settings.³⁵ While the court acknowledged that violations of the *Rules of Professional Conduct* do not necessarily mean that there is a harm to the public, the court determined that in this “unique” instance, there was an immediate threat of harm to the public.³⁶ The factors the court considered were: a) whether the misconduct is continuing, b) risk of potential harm when considered in light of the seriousness of the underlying offense, and c) whether the “underlying misconduct is likely to result in a substantial sanction at the conclusion of the formal disciplinary hearing proceeding.”³⁷ Considering the many instances in which Giuliani made false claims, the court determined that Giuliani was likely to continue to engage in future misconduct in a way that would spread false statements to “countless members of the public.”³⁸ It also concluded that the “seriousness of [Giuliani’s] uncontroverted misconduct cannot be overstated” and that it damaged democracy, public confidence in attorneys, and the New York state bar.³⁹

Later, in July 2021, the D.C. Court of Appeals also temporarily suspended Giuliani from practicing.⁴⁰ While he did not make any public statements following this ruling, he was reported to have reposted a Tweet that criticized the suspension as “just another gross miscarriage of Justice.”⁴¹

31. *Matter of Giuliani*, 197 A.D.3d 1, 146 N.Y.S.3d 266 (N.Y. App. Div. 2021).

32. New York Rules of Professional Conduct Rule 3.3(a) (McKinney) [hereinafter NY RPC].

33. NY RPC Rule 4.1 (McKinney).

34. NY RPC Rule 8.4 (McKinney).

35. See *Matter of Giuliani*, 197 A.D.3d at 9–21.

36. *Id.* at 26.

37. *Id.* at 22.

38. *Id.* at 25.

39. *Id.*

40. Rachel Weiner, *Rudy Giuliani Suspended from Practicing Law in D.C. Court*, WASH. POST (July 7, 2021), https://www.washingtonpost.com/local/legal-issues/giuliani-washington-court/2021/07/07/9f7a7f5c-df6a-11eb-9f54-7eee10b5fcd2_story.html [<https://perma.cc/E36D-KKHH>].

41. Jaclyn Diaz, *An Appeals Court Has Suspended Rudy Giuliani’s Ability to Practice Law in D.C.*, NPR (July 8, 2021), <https://www.npr.org/2021/07/08/1014047881/an-appeals-court-has-suspended-rudy-giulianis-ability-to-practice-law-in-d-c> [<https://perma.cc/X6ZX-8RCA>].

B. SIDNEY POWELL

Although Sidney Powell spoke with President Trump on the phone several times after she agreed to represent Michael Flynn, President Trump's first National Security Advisor, she had limited ties to President Trump prior to being asked to serve on his legal team.⁴² A former federal prosecutor, Powell became known for her wariness of overzealous prosecutors after she entered private practice, as well as her own overzealous promotion of conspiracy theories.⁴³

In the days leading up to the election, Powell went on Fox News' *Lou Dobbs Tonight* and promoted the conspiracy theory that a government computer program was used to change "pre-election voting ballots that were collected digitally."⁴⁴ She also alleged that government agencies such as the Cybersecurity and Infrastructure Security Agency (CISA) had ignored warnings about the software.⁴⁵ Following the election, she was appointed to Trump's legal team in an unorthodox manner, after which she continued to espouse conspiracy theories.⁴⁶ In a notable interview with Newsmax, Powell asserted that Georgia's Republican Governor Brian Kemp and Secretary of State Brad Raffensperger were part of a conspiracy with Dominion Voting Systems involving a "last-minute purchase or reward of a contract to Dominion of \$100 million."⁴⁷

Following other statements implicating Dominion in an election rig scam, Dominion sued Powell in January 2021 for defamation and demanded more than \$1.3 billion in damages, alleging that Powell spread "demonstrably false" allegations on Dominion's role in an alleged plot to steal the election.⁴⁸ Citing *United States v. Alvarez* in her Motion to Dismiss, Powell

42. Jeremy W. Peters & Alan Feuer, *What We Know About Sidney Powell, the Lawyer Behind Wild Voting Conspiracy Theories*, N.Y. TIMES (Dec. 8, 2020), <https://www.nytimes.com/article/who-is-sidney-powell.html> [<https://perma.cc/5ABK-SUEV>].

43. Joe Walsh, *Who Is Sidney Powell? Meet Trump's New Top Conspiracy Theorist*, FORBES (Nov. 20, 2020), <https://www.forbes.com/sites/joewalsh/2020/11/20/who-is-sidney-powell-meet-trumps-new-top-conspiracy-theorist/?sh=7339ebb21f9d> [<https://perma.cc/KU7A-NXYX>].

44. Reuters Staff, *Fact Check: TV News Clip Does Not Show 'Live Computerized Fraud' on Election Day 2020*, REUTERS (Nov. 9, 2020), <https://www.reuters.com/article/uk-factcheck-cnn-not-evidence-vote-fraud-idUSKBN27P2TI> [<https://perma.cc/3PG6-ECV4>].

45. Jason Lemon, *CIA Director Gina Haspel 'Should Be Fired' for Ignoring Election Software Warnings, Trump Lawyer Says*, NEWSWEEK (Nov. 15, 2020), <https://www.newsweek.com/cia-director-gina-haspel-should-fired-ignoring-election-software-warnings-trump-lawyer-says-1547582> [<https://perma.cc/U8BV-BA69>].

46. *Sidney Powell: Trump Team Cuts Ties with Lawyer Who Made Voter Fraud Claims*, BBC (Nov. 23, 2020), <https://www.bbc.com/news/election-us-2020-55040756> [<https://perma.cc/BS5Z-73PQ>]. Powell was appointed to Trump's legal team via Tweet, although the Tweet no longer exists following the suspension of his account. Although the Trump legal team distanced themselves later, Powell also participated in the press conference referred to in footnote 13.

47. Alexandra Garrett, *Trump Lawyer Sidney Powell Says Georgia Election Lawsuit 'Will Be Biblical,' Suggests GOP Governor Helped Biden*, NEWSWEEK (Nov. 22, 2020), <https://www.newsweek.com/trump-lawyer-sidney-powell-says-georgia-election-lawsuit-will-biblical-suggests-gop-governor-1549333> [<https://perma.cc/WHE4-ADSZ>].

48. Emma Brown, *Dominion Sues Pro-Trump Lawyer Sidney Powell, Seeking More than \$1.3 Billion*, WASH. POST (Jan. 8, 2021), <https://www.washingtonpost.com/politics/dominion-sues-pro-trump-lawyer-sidney->

asserted that any speech related to the election was protected under the First Amendment, “[though] few might find [Powell’s] statements anything but contemptible.”⁴⁹ Powell’s following reasoning was at times offensively novel.

In a court filing in March 2021, Powell argued that “no reasonable person would conclude that the statements [on voting machines changing votes] were truly statements of fact,” despite the fact that she repeatedly affirmed these allegations as true and as backed by evidence.⁵⁰ Regarding the alleged conspiracy between Governor Kemp, Secretary Raffensperger, and Dominion, she said, “We’ve got tons of evidence. It’s so much, it’s hard to pull it all together.”⁵¹

The fundamental argument lying at the heart of both Giuliani and Powell’s defenses is not that they did not mislead the public, but that they *could not* have misled the public. They argue that the public is responsible for making their own assessment of the information they consume, regardless of whether they have access to firsthand information and legal understanding and whether a figure of authority or expertise asserts that something is true.⁵² When viewed in a positive light, this argument could reflect a genuine belief in the ability of the public to diligently research information and formulate their own opinions.

However, this is not indicative of the realities of individual access to information and ability to discern quality of information. In a 2018 poll, over half of Americans reported that they receive their news from social media, with a significant 20% of Americans saying that they receive news from social media “often.”⁵³ While most individuals who consume news via social media questioned its accuracy, a troubling 42% said that they expect it to be largely accurate.⁵⁴ Another 2020 poll showed that those who get their news mainly through social media are “less likely to get their facts right about the coronavirus and politics and more likely to hear some unproven claims.”⁵⁵ It is unclear to what extent individuals who get their news through social media would be willing to supplement what they see on social media by referring to other news sources. However, 48% of adults say it is hard to discern what is true and what is not using social

powell-seeking-more-than-13-billion/2021/01/08/ebe5dbe0-5106-11eb-b96e-0e54447b23a1_story.html [https://perma.cc/UUW2-PULR]; Complaint and Demand for Jury Trial, *US Dominion, Inc. v. Powell*, 1:21-cv-00040-CJN (D.D.C. 2021).

49. Defendants’ Motion to Dismiss at 24, *US Dominion, Inc. v. Powell*, 1:21-cv-00040-CJN (D.D.C. 2021) [hereinafter Powell Motion to Dismiss].

50. *Id.* at 27.

51. Garrett, *supra* note 47.

52. Powell Motion to Dismiss, *supra* note 49, at 32; Giuliani Answer, *supra* note 21.

53. *News Use Across Social Media Platforms 2018*, PEW RSCH. CENTER (Sep. 10, 2018), <https://www.pewresearch.org/journalism/2018/09/10/news-use-across-social-media-platforms-2018/> [https://perma.cc/KF6E-QGLX].

54. *Id.*

55. *Americans Who Mainly Get Their News on Social Media Are Less Engaged, Less Knowledgeable*, PEW RSCH. CENTER (July 30, 2020), <https://www.pewresearch.org/journalism/2020/07/30/americans-who-mainly-get-their-news-on-social-media-are-less-engaged-less-knowledgeable/> [https://perma.cc/P8BA-QK9R].

media, 41% of adults say it is hard to tell the difference when watching cable television news, and 64% of adults say it is hard to tell when listening to elected officials.⁵⁶ Considering this, claims by Giuliani and Powell regarding the election may be construed as an active effort to abuse the right to free speech by public-facing figures.

Furthermore, and perhaps, most damningly, Powell has raised more than \$14 million from donors for Defending the Republic (“DTR”), an organization she founded that purports to file challenges to defend constitutional rights.⁵⁷ Reports from early 2021 detail that Powell told prospective donors that the group was a “legal defense fund to protect the integrity of U.S. elections,” and much of the organization’s website is dedicated to showcasing videos and blog posts that suggest that the 2020 elections were fraudulent.⁵⁸ In court filings, Dominion claimed that Powell used a defamatory campaign against Dominion to solicit donations for DTR, which she eventually used for her own personal legal expenses.⁵⁹ The group also received a cut of proceeds from ticket sales for the “For God & Country Patriot Roundup,” organized by John Sabal, who is also known as “QAnon John.”⁶⁰

II. LAWYERS’ FIRST AMENDMENT RIGHTS

Generally, courts have limited the extrajudicial speech of a lawyer when the lawyer knows or reasonably should know that the speech will “have a substantial likelihood of materially prejudicing an adjudicative proceeding” in which they are participating.⁶¹ However, as Professor Kathleen Sullivan suggests, there is a tension between the concept that lawyers are “classic speakers in public discourse, free of state control and entitled to all the ordinary protections of speech and association available to other speakers” and the concept that lawyers are “delegates of state power—officers of the court and professional licensees whose special privileges are conditioned upon foregoing some speech rights that others enjoy.”⁶²

56. *Trust and Distrust in America*, PEW RSCH. CENTER (July 22, 2019), <https://www.pewresearch.org/politics/2019/07/22/trust-and-distrust-in-america/> [https://perma.cc/BGY3-XFFT].

57. DEFENDING THE REPUBLIC, <https://defendingtherepublic.org/> [https://perma.cc/K7ML-78Y7] (last visited Jan. 11, 2022); Emma Brown et al., *Sidney Powell Group Raised More than \$14 Million Spreading Election Falsehoods*, WASH. POST (Dec. 6, 2021), https://www.washingtonpost.com/investigations/sidney-powell-defending-republic-donations/2021/12/06/61bdb004-53ef-11ec-8769-2f4ecd7a2ad_story.html [https://perma.cc/A6X5-3F5A].

58. Michael Kunzelman, *Company: Ex-Trump Lawyer Raiding Nonprofit for Personal Use*, AP (May 15, 2021), <https://apnews.com/article/donald-trump-lifestyle-election-2020-business-government-and-politics-d50cc5f0240279800f7053797a12b2d1> [https://perma.cc/6ZJF-GRFV]; DEFENDING THE REPUBLIC, *Election Integrity*, <https://defendingtherepublic.org/election-integrity/> [https://perma.cc/7PA6-8EXP] (last visited Jan. 11, 2022).

59. Memorandum in Opposition, Doc. #39 at 35-36, *US Dominion, Inc. v. Powell*, 1:21-cv-00040-CJN (D. D.C. 2021), 2021 WL 3550974.

60. Kunzelman, *supra* note 58.

61. *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991). *See also* MODEL RULES R. 3.6.

62. Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers’ First Amendment Rights*, 67 *FORDHAM L. REV.* 569, 569 (1998).

Lindsey Keiser argues that state rules regulating lawyer's speech must be narrowed to prevent a "chilling effect" that might restrict lawyers from freely choosing clients or publicly criticizing law.⁶³ She instead suggests adopting something similar to Oregon's current test, which considers: a) whether the lawyer was engaged in conduct or speech, b) whether the conduct occurred in the course of some judicial proceeding or a matter directly related to a judicial proceeding, and c) whether the conduct caused "substantial harm (either through a single act causing substantial harm or repeated conduct amounting to substantial harm) to the administration of justice."⁶⁴ Alternatively, Professor Rodney Smolla suggests that attorney speech outside of the courtroom is part of a "limited carve out" system of First Amendment rights which complicate and penalize speech that would have been protected had it not been made publicly, such as critique of the legal system.⁶⁵

While practical, these analyses seem inadequate to evaluate the concerning statements made by Giuliani and Powell, which also critique the legitimacy of a democratic process. A more rigorous framework must be established to consider the harm done and public access to information on the subject to help determine whether an attorney's speech and conduct improperly influences public confidence in the democratic process and the rule of law. Such a framework might not only hold attorneys accountable for their speech, but also protect them in instances where they face severe consequences for rightful speech and criticism.

In 2006, Major Michael Mori, a Marine Corps JAG officer, embarked on a lecture tour across Australia on behalf of his client, David Hicks.⁶⁶ During this tour, Major Mori asserted that his client was being held unlawfully by the U.S. government and that the Australian government refused to demand his client's release from U.S. custody.⁶⁷ Hicks, an Australian citizen, had been arrested in Afghanistan in 2001 after attending an Al Qaeda training camp and was detained by the United States in the Guantanamo Bay detention camp until his release in late 2007.⁶⁸

Mori's defense of his client was controversial, and in March 2007, Colonel Morris Davis, then Chief Prosecutor for the Guantanamo military commissions, publicly warned that Mori may face prosecution under Article 88 of the Uniform

63. Lindsey Keiser, *Lawyers Lack Liberty: State Codifications of Comment 3 of Rule 8.4 Impinge on Lawyers' First Amendment Rights*, 28 GEO. J. LEGAL ETHICS 629, 630 (2015).

64. *Id.* at 641.

65. Rodney A. Smolla, *Regulating the Speech of Judges and Lawyers: The First Amendment and the Soul of the Profession*, 66 FLA. L. REV. 961, 969-80 (2014).

66. Richard Phillips, *Australia: Thousands Hear US Military Lawyer for David Hicks*, WSWS (Sep. 5, 2006), <https://www.wsws.org/en/articles/2006/09/tour-s05.html> [<https://perma.cc/L8DN-249Q>].

67. *Id.*

68. *Australian David Hicks 'Relieved' After Terror Conviction Quashed*, BBC (Feb. 19, 2015), <https://www.bbc.com/news/world-australia-31529745> [<https://perma.cc/D4WL-ECMM>].

Code of Military Justice (UCMJ).⁶⁹ Article 88 criminalizes the use of “contemptuous words” against officials such as the President, Vice President, Congress, Secretary of Defense, and the Secretary of a military department.⁷⁰ Although he was never prosecuted, Mori later alleged that he was passed over for promotion multiple times as a result.⁷¹ He later sued the Navy in the District of Columbia for denying his request for a Special Selection Board to review his non-promotion decision.⁷² Mori retired from the Marine Corps in 2012, but the court granted summary judgment, and the case was remanded to the Secretary of the Navy to convene a Special Selection Board in 2013.⁷³ However, while heavily criticized, Mori never faced any formal charges of ethical violations.

This example is unique in that the proceedings took place in the Guantanamo military commissions, which have faced numerous challenges to their authority since they began in 2004.⁷⁴ In 2006, the Supreme Court struck down the military commissions for violating the UCMJ and the 1949 Geneva Conventions in *Hamdan v. Rumsfeld*.⁷⁵ Furthermore, officers of the JAG corps face discipline under the UCMJ, which place further restrictions on an individual’s right to free speech and criticism.

In this instance, while Mori’s advocacy on behalf of his client may be considered zealous advocacy or criticism of the legal system, which would be allowed as one of the carve-outs described by Professor Smolla, Mori’s position in the military complicates his criticism of the commissions. Under the Oregon test, his speech, which was directly related to a judicial proceeding, may be considered as having caused substantial harm to the administration of justice. In fact, the Guantanamo military commissions are notorious for having punished attorneys even when they try to comply with their ethical obligations because such actions can also be viewed as a threat to the chain of command or the authority of the commissions themselves.⁷⁶ While rulings or court orders made by the military

69. Raymond Bonner, *Prosecutor Criticizes Guantanamo Bay Detainee’s Lawyer*, N.Y. TIMES (Mar. 4, 2007), <https://www.nytimes.com/2007/03/04/world/asia/04iht-hicks.4787543.html> [https://perma.cc/BZ8F-PZW6].

70. 10 U.S.C. § 888.

71. Gina Cavallaro, *Lawyer: Defending Detainee Slowed Promotion*, MARINETIMES (Sep. 20, 2010), <https://web.archive.org/web/20101001061411/http://www.marinecorpstimes.com/news/2010/09/marine-promotion-denied-for-defending-terrorism-suspect-091810w/> [https://perma.cc/3RJE-LHQV].

72. *Mori v. Dep’t of the Navy*, 917 F. Supp. 2d 60 (D.D.C. 2013).

73. *Id.*

74. *Military Commissions*, ACLU, <https://www.aclu.org/issues/national-security/military-commissions> [https://perma.cc/8PFW-NNTV] (last visited Jan. 11, 2022).

75. 548 U.S. 557, 615-35 (2006).

76. Josh Gernstein, *Pentagon Official Releases Marine General Confined in Guantanamo Dispute*, POLITICO (Nov. 3, 2017), <https://www.politico.com/story/2017/11/03/john-baker-released-guantanamo-dispute-244523> [https://perma.cc/A7VY-FMW8]; Carol J. Williams, *A Dilemma for the Defenders*, L.A. TIMES (Apr. 30, 2006), <https://www.latimes.com/archives/la-xpm-2006-apr-30-na-gitmo30-story.html> [https://perma.cc/U28J-F5S3].

commissions and courts can be appealed in a non-military court, the process could take years, during which attorneys may face numerous consequences such as being passed over for promotion.⁷⁷

Mori and other military lawyers are often held to more restrictive confidential information standards through government orders and regulation, and the public may be unable to form adequately informed opinions without the attorney's speech. Any First Amendment framework for attorneys must consider not only the public harm, but the public good that may result from attorney speech. A more uniform and rigorous test will hold attorneys like Giuliani and Mori to their obligations as a lawyer, and it may also protect their speech from rulings influenced by other motivations.

III. LAWYERS' OBLIGATIONS UNDER THE MODEL RULES OF PROFESSIONAL CONDUCT

The *Model Rules of Professional Conduct* ("Model Rules"), specifically Rule 3.6, limits the instances in which lawyers may speak publicly about ongoing proceedings in a manner that may materially prejudice the proceedings.⁷⁸ However, other rules and the preamble of the *Model Rules* imply additional obligations outside of simply not affecting ongoing proceedings.

Without a doubt, both the Preamble and Rule 1.3 require that lawyers zealously advocate for their clients to "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."⁷⁹ However, the *Model Rules* also require that attorneys maintain the integrity of the profession.⁸⁰ They are explicitly required to be truthful in the court *and in public* under Rules 8.2 and 8.4.⁸¹

77. *In re Al-Nashiri*, 921 F.3d 224 (D.C. Cir. 2019). In 2017, defense counsel for another Guantanamo detainee became concerned that the rooms in which they were meeting their client were being monitored, jeopardizing confidentiality. The defense brought several motions to tell their client about the issue, but the presiding judge, Judge Vance Spath, denied them. Civilian members of the defense team received advice from Professor Ellen Yaroshefsky that they were ethically obligated to withdraw under Model Rule 1.16, and they obtained permission to withdraw from General John G. Baker, the Chief Defense Counsel of the Military Commission Defense Organization. Judge Spath disagreed and ordered attorneys to appear, and when they refused to do so, Judge Spath threatened them with arrest and sentenced General Baker to 21 days' confinement after finding him in contempt of the court. Full resolution of this case took nearly two years, with the D.C. Circuit court vacating more than three years of Judge Spath's orders after determining that his actions gave the appearance of partiality after he applied for and accepted a job as an immigration judge with the Justice Department. See also Emily Olson-Gault, *All Rulings from Past Four Years Vacated in Guantanamo Death Penalty Case*, ABA (May 10, 2019), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2019/spring/all-rulings-from-past-four-years-vacated-in-guantanamo-death-penalty-case/ [<https://perma.cc/V43B-JSX8>].

78. MODEL RULES R. 3.6.

79. MODEL RULES R. 1.3; see also MODEL RULES pmb1.

80. ABA, *Model Rules of Professional Conduct – Table of Contents*, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/ [<https://perma.cc/B5RM-S5X6>] (last visited Mar. 3, 2022) (Rules 8.1 through 8.5 are listed under the "Maintaining the Integrity of the Profession" subtitle).

81. MODEL RULES R. 8.2; MODEL RULES R. 8.4.

Additionally, the Preamble directs attorneys to strengthen legal education and further the “public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.”⁸² The Preamble is not binding and does not provide specific guidelines to which attorneys should adhere;⁸³ however, it provides “general orientation” of legal ethics and provide principles on which attorneys ought to base their conduct.⁸⁴

IV. AN AMENDED FRAMEWORK

Considering the various ethical obligations of lawyers, lawyers must uphold their duty to the rule of law when speaking publicly and outside of the courtroom on matters that could affect public faith in democratic institutions. To that end, courts should consider whether a lawyer’s conduct was meant to sway public faith in democratic institutions and rigorously question and assess the impact on the public. While the Appellate Division of the Supreme Court of New York took this into consideration when suspending Giuliani, a more definitive set of factors ought to be used to determine potential misconduct while safeguarding attorneys’ First Amendment rights. Factors to consider should include a) the stated intent of the lawyer, b) previous public knowledge of the issue and public access to information, and c) likely or actual harm to the public and/or democratic institution.

Among the three factors, the stated intent of the lawyer is arguably the most easily assessable factor in light of the fact that this test would be applied when a lawyer speaks publicly on behalf of his client. If speech made by a lawyer is of a nature that affects public opinion in democracy, it is most likely publicly recorded and easily accessible. Courts should then consider the public speech and any associated statements by the lawyer to initially determine what the lawyer purported their intent to be.

An element of intent is whether a lawyer may have known their speech was accurate at the time it was made. Because certain model rules require an element of knowingness, courts and state professional codes have defined what may satisfy that element.⁸⁵ For instance, Giuliani raised his lack of knowledge as a general defense before the Appellate Division of the Supreme Court of New York.⁸⁶ However, the court turned to the definition of “knowingly” in the New York Rules of Professional Conduct, which states that it “denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances”

82. MODEL RULES pmb1.

83. MODEL RULES pmb1.; MODEL RULES scope.

84. MODEL RULES scope.

85. See MODEL RULES R. 8.4.

86. See *Matter of Giuliani*, 197 A.D.3d 1, 8 (N.Y. App. Div. 2021).

to find that he violated Rules 3.3 and 4.1.⁸⁷ This definition allows courts to make a common-sense evaluation of whether or not a lawyer could have known, but the burden of proof as to whether there was an actual potential opposition of facts ought to fall to the lawyer, who can easily provide the sources of information that might have led to such a belief.

Courts should then assess whether the public could reasonably access enough information or alternate opinions that they could formulate their own opinions, despite the lawyers' speech. If the public can easily access trustworthy, additional information, then the speech made by lawyers should be presumed protected under the First Amendment. However, if the information is classified, protected, or extremely difficult to find, the public's ability to learn the relevant facts and form their own opinions is limited. Furthermore, a lawyer's repeated statements questioning the validity or accuracy of available information in public statements can erode the public's trust in public information and information distributors. The frequency and nature of the lawyer's speech will then help determine whether the lawyer may have unduly influenced public opinion, regardless of intention. If a lawyer frequently challenges information and sources or indicates that they believe false information to be true by either urging listeners to act on it or expressing their own reaction to learning the information, courts should consider the likely or actual harm done to the public by the attorneys' speech.

To be clear, there is likely no concrete way to measure the actual harm to the public or democratic institutions, and this factor should be difficult to meet in an effort to protect the First Amendment rights of attorneys. However, in some instances, there may be reliable data and surveys of public opinion that courts may be able to turn to. In others, a rigorous assessment of changed public opinion, which may include a general misunderstanding of provable facts, increased polarization, and heightened distrust in a public institution resulting from false statements may suffice.

That said, a causal link between the lawyer's speech and harm may be difficult to prove. In extreme cases such as the January 6 attack on the Capitol, there may be instances in which members of the public themselves state that they relied on and took the public statements of attorneys to be accurate. Ultimately, the standard should be whether a reasonable person could have understood an attorney's statements to be false, whether a significant number of the public understood those statements to be true, and whether or not that significantly eroded the general public's trust in U.S. democracy and the justice system.

If the courts find that the lawyer did intend to sway and erode public faith in democratic institutions, then courts should immediately enjoin the individual

87. The court also emphasizes that NY RPC Rule 8.4(c) does not expressly require an element of knowledge, although the court requires it in this instance after considering a reciprocal discipline in *In re Gilly*, 206 F. Supp. 3d 940, 944 (S.D.N.Y. 2016), in which a federal court found that there was a knowing violation of Rule 8.4(c). Additionally, sister states such as Maryland and Pennsylvania require an element of knowledge. *See id.*; NY RPC Rule 1.0(k) (McKinney).

from further engaging in the conduct. The lawyer's bar association should then investigate, and, depending on the severity of the damage, appropriately discipline the lawyer by either warning or suspending them from practice.

Applying the test to Giuliani's conduct changes neither the outcome determined by the court in *In the Matter of Rudy Giuliani*, nor the court's reasoning. Rather, it re-labels factors considered by the court to allow it to be re-applied in many different instances with a clear focus on the impact on the public. This test may be applicable in instances where a) the lawyer was speaking on behalf of a nationally prominent public figure and b) the failure of a democratic institution was implied. This Note will now apply this test to Powell.

V. APPLICATION TO SIDNEY POWELL

When the test is applied to Powell's statements alleging election fraud and her subsequent actions, it shows that Powell's statements were meant to sway public faith in democratic institutions and may have helped fuel the unrest leading to January 6, 2021. Again, factors to consider should include a) the stated intent of the lawyer, b) previous public knowledge of the issue and public access to information, and c) likely or actual harm on the public and/or democratic institution.

At the time, it was widely known and stated by both Powell and other members of then President Trump's legal team that they would "champion election integrity until legal [sic] vote is counted fairly and accurately."⁸⁸ In the November 2020 press conference, Powell also stated:

American patriots are fed up with the corruption from the local level to the highest level of our government, and we are going to take this country back . . . we are going to clean this mess up now. President Trump won by a landslide— we are going to prove it, and we are going to reclaim the United States of America for the people who vote for freedom.⁸⁹

This may be considered zealous advocacy on behalf of a client, but the hyperbolic statements she made such as "Georgia's probably going to be the first state I'm gonna blow up [with a lawsuit]" may still influence the ways in which the court views other statements of intent.⁹⁰ This signals, at best, an aggressive approach that borders on inappropriate and improper. However, this must be considered in the context of other statements she made in which she alleged gross misconduct and fraud by election and state officials to sway the vote, such as the ones she made about Governor Kemp and Secretary of State Raffensperger.⁹¹

88. The American Presidency Project, *Campaign Press Release – Trump Legal Team Statement on "Safe Harbor Deadline"* U.C. Santa Barbara (Dec. 8, 2020), <https://www.presidency.ucsb.edu/documents/campaign-press-release-trump-legal-team-statement-safe-harbor-deadline> [<https://perma.cc/FLD9-8MT3>].

89. Aaron Rupar, @atrupar, TWITTER (Nov. 19, 2020, 1:02PM ET), <https://twitter.com/atrupar/status/1329485338188845058> [<https://perma.cc/9KS2-XFEK>].

90. Garrett, *supra* note 47.

91. *Id.*

When considering the above with her inability or refusal to provide concrete evidence of these allegations, courts may conclude that a) she knew the statements she was making were false and that she could not support them with evidence and that b) she did not care that she was making such false statements, as long as they supported her goal of questioning the election.

While contemporaneously, public interest was heightened around the issue, it is difficult to say that the public had previous knowledge of voting procedure or that information on voting procedure was easily accessible. Because elections are typically run at local levels with input by the state, the administration structure and procedure vary from state to state, and even city by city.⁹² This wide variance makes it extremely difficult for individuals to find and compile information through state and local legislation and public records on their own, even though the information is not classified.

Additionally, Powell alleged that there was a conspiracy of “globalist dictators, corporations” seeking to change votes and the outcome of the election, and she made additional claims that individual public officials were withholding information from the public and changing votes themselves.⁹³ Faced with this barrage of delegitimizing statements by a prominent attorney like Powell, even a reasonable member of the public may suspect or conclude that any information on election procedures and results have been tampered with, making it difficult for them to gauge what sources to trust and what not to trust. She has also stated “We’ve got tons of evidence, it’s so much, it’s hard to pull it all together . . . it will be biblical,” which seems to imply that she herself was shocked at the evidence showing conspiracy.⁹⁴

Furthermore, as stated above, she continues to espouse these beliefs on the DTR website, which urges supporters to take action and make donations for unspecified use.⁹⁵ These statements and speech, taken together, elevate Powell as a champion of truth and capitalizes on the confusion surrounding voting procedures and outcomes. This makes it nearly impossible for anyone listening to Powell’s speech with no prior knowledge to find alternate sources of facts or form their own opinions.

Lastly, it is difficult to demonstrate a direct causal relationship between Powell’s speech and what happened on January 6, 2021 at the Capitol. However, Powell positioned herself to be a public harbinger of truth and champion of justice, often pointing to the rights of American citizens and lawful voters.⁹⁶ She eroded the public’s understanding of the voting process by using inflammatory

92. *Election Administration at State and Local Levels*, NCSL (Feb 3, 2020), <https://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx> [<https://perma.cc/ESP2-P985>].

93. Aaron Rugar, @atrupar, TWITTER (Nov. 19, 2020, 1:30PM ET), <https://twitter.com/atrupar/status/1329492201538195456>, [<https://perma.cc/UTE3-RA7B>]; see Garrett, *supra* note 47.

94. Garrett, *supra* note 47.

95. DEFENDING THE REPUBLIC, *supra* note 57.

96. Rugar, *supra* note 89.

language and making false statements, often and loudly. This was, at minimum, echoed by the actions of those who attacked the Capitol on January 6. Over a year later, the United States is not only still dealing with the legal aftermath of prosecuting the insurrectionists, but the reality that significant numbers of the public still believe that the 2020 election was stolen.⁹⁷

CONCLUSION

As shown above, this new framework requires a rigorous examination of all facts and considerations. It considers the full context in which an attorney's speech was made, the agency of and information available to the public, and the full damage and harm done to the rule of law and our democratic institutions. It acknowledges that all attorneys, especially those with clients who are public figures, must not only zealously advocate for their clients, but also uphold the integrity of the profession and their duty to the public. Where they may face criticism or even suspension, this test allows attorneys to refute with concrete evidence as to their intent while giving serious consideration to the actual effects of their conduct. Additionally, this flexible but comprehensive standard may prevent or warn attorneys from conduct that may implicate them in such events again.

97. Lane Cuthbert & Alexander Theodondis, *Do Republicans Really Believe Trump Won the 2020 Election? Our Research Suggests that They Do.*, WASH. POST (Jan. 7, 2022), <https://www.washingtonpost.com/politics/2022/01/07/republicans-big-lie-trump/> [<https://perma.cc/R4UE-PQN7>].