

Brittany Petrillo
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THE DUTY OF CANDOR AND ZEALOUS CLIENT ADVOCACY:
A Note on Harmony

A hush spreads across a crowded theatre. One hundred musicians, armed with their bows, mallets, and black-tie apparel, look up. Their eyes simultaneously fall upon one person: the concertmaster. She glides slowly towards the center of the stage. As she breathes in, her bow rises to meet the violin on her shoulder. With a single pull of her arm, she unleashes a note upon the ears of everyone in the theatre. What was once a cacophony of drumrolls, scales, riffs, and rhythms is replaced by a singular note. The orchestra members, no longer focusing on their individual warm ups, come together over a single note, tuning their instruments to form one sound. They are no longer an amalgam of dissonant musicians. They are one symphony orchestra.

It is easy to look at the polarization in our nation and despair. Our wants and needs as individual Americans vary depending on whether we live in urban or rural areas, conservative or liberal states. As Americans, we are a hodgepodge of cultures, religions, political stances, and life philosophies. These differences nearly brought us to a breaking point over our most recent presidential election. With so many differences, how can we last as a unified country? But looking beyond the surface, we see that embracing the tensions between us is the very ingenuity that underlies America's design. Our Founding Fathers built our nation upon a bedrock of differences, in the hope that these differences would ultimately make us strong. Our very system of government – the three branches – was built on the knowledge that human beings, when holding power, will always seek to gain more. *Ambition to counteract ambition* was the phrase used in the Federalist Papers to convince a fledgling nation to ratify a new Constitution. Whenever one branch oversteps its boundaries, the other branches, by nature of their own ambitions, will pull against it. In a symphony orchestra, dozens of differing musical instruments play notes that contrast from their neighbors' sheet music, yet we the audience don't hear a clashing of notes and rhythms working against each other. What we hear is a masterpiece. The tension between our different parts keeps our system as a whole

thriving. It is not dissonance that flows out from our differences – it is *harmony*. And since 1789, our constitutional system of government has marched to the tune of freedom.

But what do we do when there's a raucous noise in the audience? What do we do when a few loud spectators object to the sonata's current movement? In our democracy, elections give us the right to swap out the conductors and composers in our national bandstand. In fact, it is our duty to vet and carefully select the ones waving the baton. However, just as a distaste for a singular musical performance does not give us the right to burn down the Kimmel Center, so must our challenges to the legal system not undermine our constitutional democracy's foundation. The tension between a lawyer's duty to zealously advocate for her client and her duty of candor to the court is resolved in harmony when we look at the musical score as a whole – a lawyer's duty to protect our democracy and its legal system that give us a court to bring grievances in the first place.

Does the duty of candor extend beyond the courts? The Model Rules suggest that indeed, it does. The Model Rules themselves admit they are not merely a finite list of 'dos' and 'don'ts' – but that we as lawyers have moral and ethical considerations that go beyond the Rules' finite list. *See Model Rules, Preamble and Scope* ¶ 16. We have a duty to keep things in context – a responsibility to remember that each of us is but one musician in a great orchestra. Our ultimate responsibility is to the legal system that gives us our laws, legal remedies, and courtrooms. We have a duty to uphold our Constitution and the nation built upon its laws and liberties. The Preamble to the Model Rules reminds us that we as lawyers need to maintain the public's confidence in the rule of law, because popular participation is the very lifeblood of our constitutional democracy. *Id.* at ¶ 6. Lawyers are more than contracted counsel; as lifelong students of the law, we are responsible for the preservation of our society. *Id.* at ¶ 13. We are to simultaneously represent our clients, be officers of the legal system, and be outstanding public citizens. *Id.* at ¶ 8. The Rules describe the tension that exists amongst these roles as one that can play out harmoniously. *Id.*

Sometimes reading the sheet music is hard, though. We hear the harmony when we recognize we have a duty to the big picture. Each of our journeys as legal advocates is like one seat in a symphony orchestra. Each member is an integral part of a greater sound – what we hope history will dub a masterpiece.

The piccolo player may have a solo at times and at other times blend into the background, but she knows she operates within a certain tempo and a certain key signature – not to restrain her, but to optimize the beauty of her sound. Similarly, as lawyers, we advocate passionately and diligently for the cause of our clients, but we have a duty not to abuse or cheat the legal process. The law puts limits on the actions we can take – not to limit our work, but to ensure that our system works for all persons involved. *See Model Rule 3.1, Comment 1.*

Along with our duty to our clients, we carry a duty to our nation in every case we take on. A license to practice law does not give us the freedom to lie or cheat the system. Lies in the law, while they may seem to assist a client in the short term, ultimately only serve to undermine our body politic. *See Debra Cassens Weiss, Hundreds of Lawyers Call for Ethics Probes of Attorneys for Election Fraud Claims, ABA Journal (Dec. 8, 2020) (citing Model Rules 4.1(a), 8.4(c)).* That is why the efforts of Donald Trump’s attorneys cross the line. Fueling a fire that delegitimizes the outcome of the 2020 election may seem to have supported their cause. What they ignored was the ultimate cost of their efforts. We do not burn down the opera house when we don’t like the sonata being showcased. An attorney’s duty is to support the Constitution, despite a client’s wish to disregard it. Lawyers who lie to advance partisan interests dishonor the system they have sworn to protect. *Id.*

The Trump Campaign’s lawyers went beyond simply dishonoring our Constitution and the legal system it creates. They endangered it. Fueling lies across national platforms – lies that permeate through newscasts, newspapers, and into the minds of our populace – undermines our faith in a democratic system. When the leader of the free world and his legal representatives spent months spreading lies that the electoral system is rigged, they spent months hacking at the roots of our delicate democracy. One does not rip out the strings in the violin section when he does not like the musical piece the director has chosen. That would serve to silence the current song, yes. But it would stifle the music moving forward. Similarly, the Trump Campaign attorneys cannot destroy our Constitution or the free elections it relies upon in order to gain one term in the White House.

Our duty as attorneys to our nation's system of government extends beyond the courtrooms, because the crafting of this false national narrative not only deceives fellow citizens, but also subverts our entire democracy. The insurrection that took place on January 6 of this year showed what happens when attorneys allow lies to delegitimize our election. They allowed a faction to swell, fueled by hatred and lies. These lies undermined faith in society and caused a violent mob to attack our very temple of democracy – the halls of the legislative branch. The Model Rules note that bringing frivolous cases wastes resources. But our faith in free and fair elections is our nation's *most precious resource*. We cannot erode democracy for the sake of one client's case, even if that client is loud and powerful. This is why our duty of candor extends beyond what we say in the courtroom. Our words regarding our client's cases cannot subvert our whole democracy. The Model Rule on the duty of candor requires that lawyers avoid conduct that undermines the integrity of our legal system. The rule refers to the duty of candor when an attorney is speaking in court. However, the Model Rules as a whole, in noting that these professional rules of conduct cannot be exhaustive, and rooting them in a duty to uphold our constitutional democracy, show that a duty of candor exists beyond the courtroom in this case. The client was an incumbent president. An allegedly aggrieved party was a large portion of the American voting populace. While Trump attorneys may admit in courtrooms that their case isn't actually about the 'fraud' they rallied large mobs over, they are responsible for the incitement of violence and lack of faith in our government's legitimacy that resulted. The words of our leaders, calling this election to be rigged or full of fraud, while spoken outside of the courtroom, were words that affected our nation. Our duty of candor to the court and duty to zealously advocate for clients should harmonize with our underlying responsibility to maintain the legal system within which we work.

That is not to say that attorneys should be sanctioned for bringing weak or losing cases. No one loses their license over a 12(b)(6) motion. The attorneys in *Twombly* and *Iqbal* didn't face jail time for having their case thrown out in court. In an adversarial system, we will always have winners and losers. In a free society, we will always have people alleging grievances that sometimes do not have a remedy in the law. Furthermore, representing the interests of unpopular clients is the backbone of our system. The hallmark of a civilized society is the extent to which we still give our most reviled members a fair chance

to be heard in court. See Daniel Medwed, *Election Lawsuits Could Result in Ethical Challenges, Even Punishments, Says Legal Analyst*, GBH News (Nov. 17, 2020). This is why John Adams famously defended a Redcoat in revolutionary times. *Id.* This is why people charged with heinous crimes have a constitutional right to counsel. This is why no attorney needs to fear punitive repercussions when her case is dismissed for failure to state a claim upon which relief may be granted.

Representing an unpopular client or bringing a weak case is one thing. Bringing claims without a scintilla of evidence, on behalf of the leader of the free world, while simultaneously convincing tens of millions of citizens that these baseless legal claims are truthful and legitimate is another thing entirely. See Daniel Medwed, *Election Lawsuits Could Result in Ethical Challenges, Even Punishments, Says Legal Analyst*, GBH News (Nov. 17, 2020); Adam Winkler, *Trump's Wildest Claims Are Going Nowhere in Court. Thank Legal Ethics*, Washington Post (Nov. 20, 2020). The Preamble to the Model Rules puts it succinctly: "While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold the legal process." *Model Rules, Preamble and Scope* ¶ 5. The Middle District of Pennsylvania exemplified what the Model Rules look like in practice: their opinion explained how asking the Court to violate the Constitution and disenfranchise millions of voters is a danger to the legal system in which the claims were filed. *Donald Trump for President, Inc. v. Boockvar*, No. 4:20-CV-02078 (M.D. Pa. 2020). As the Court stated, "Our people, laws, and institutions demand more." *Id.*

It is the responsibility of attorneys to bring together their duty of candor and duty of zealous representation and harmonize them with their ultimate duty to respect and preserve the legal system that forms our nation. While the reverberations of the past few months shook the tenants of our democracy, the ethics undergirding attorneys' conduct and mission held our nation steady. What has threatened our democracy has flowed into a reprise. Harmony through the tension of our differences built a nation meant to last through generations. We are not headed towards a curtain call; instead, we continue to march on to the tune of freedom.