


Lawyer Liar, Pants on Fire: Professionalism and “Truth”

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The lying politician: this staple of American democracy leaves many rolling their eyes and changing the channel during election years. But what happens when a lying politician is also a lawyer? Do lawyer-politicians, face ethical recourse for their speech if they lie during campaigning? What about attorneys who work on political campaigns? Whether campaign behavior by attorneys is subject to professional discipline depends on their conduct, which this article explores.

The Lawyer-Politician

Let's explore a hypothetical situation: an unassailably true, objective-and-beyond-debate statement of fact that no rational person could dispute—Los Tacos makes the best al pastor in Las Vegas.¹ In this hypothetical, a lawyer-candidate tries to win over Los Tacos-deniers by asserting the falsehood, “Tacos El Gordo makes the best al pastor in Las Vegas.”

Has this lawyer-candidate violated the Nevada Rules of Professional Conduct (NRPCs)? If the lawyer-candidate made this statement in their work as a lawyer, it clearly violates the rules. Rule 3.3 requires candor toward the tribunal, and so prohibits making “a false statement of fact ... to a tribunal ...” and offering “evidence that the lawyer knows to be false.” NRPC 3.3(a)(1), (a)(3). Lawyers are also prohibited from making “a false statement of material fact” to a third person, if they are making the statement “[i]n the course of representing a client.” NRPC 4.1(a).

The challenge, however, with applying these rules in the context of politics is that a lawyer-candidate is usually not making their statements before a tribunal: Rule 3.3 doesn't require candor before the court of public opinion. And a lawyer-candidate isn't (usually) representing a client (other than their ego, amirite?), so Rule 4.1 doesn't apply either.

But lawyers are subject to the Rules of Professional Conduct even when they're not doing lawyer stuff, as the Nevada Supreme Court recently emphasized in *In re Arabia*, 137 Nev. Adv. Op. 59 (Sept. 23, 2021). There, the Nye County District Attorney argued that he could not be subject to bar discipline because he was entitled to qualified immunity or, alternatively, that the state bar lacked jurisdiction over him because he was subject to a different ethics commission. *Id.*, 495 P.3d at 1109.

The court rejected both arguments, explaining that “attorney discipline proceedings are a mechanism for deterring professional misconduct and protecting the public, the courts, and the legal profession” and these mechanisms are necessary even if behavior is otherwise allowed by the government ethics rules. *Id.*, 495 P.3d at 1110, 1111–12. The opinion makes a simple point: the Rules of Professional Conduct apply, even to elected officials.

This is good policy. As Professor Nancy Rapoport has explained, because the social role of lawyers is to advise others about public norms, lawyers have a special obligation to respect those norms, particularly when it comes to being truthful.² Rule 8.4 makes this point explicit, by declaring a number of actions to be “professional misconduct” regardless of whether taken before a tribunal or in the course of representation. As the commentary to the Model Rules states, “[a] lawyer’s abuse of public office can suggest an inability to fulfill the professional role of lawyers.”³

Thus, our Los Tacos denier might escape discipline under Rule 3.3 or 4.1, but may not under Rule 8.4(c), which makes it misconduct to engage in “conduct involving dishonesty, fraud, deceit or misrepresentation” or 8.4(d), which makes it misconduct to engage in “conduct that is prejudicial to the administration of justice.” (Obviously, because al pastor tacos are pretty serious business).

But what about the First Amendment? Nevada, after all, is famous for its forays into free speech and lawyer discipline.⁴ But the First Amendment does not protect false speech, and the Nevada Supreme Court has upheld discipline where a candidate made false statements to the press.⁵ So even political speech, if it’s false, may be subject to regulation under the rules.

And, here, our hypothetical raises an important point. “False” means provably false. That “Los Tacos makes the best al pastor” is an objectively true statement makes for an easy hypothetical, but it’s also easy to imagine subjective statements, or opinion statements, that

do not lend themselves to proving falsity (e.g., “We should bring back the faux-neon at the Nevada Supreme Court building.”). There must be evidence the statement is false.

The Lawyer-Campaign Supporter

What about attorneys who are involved in or supporting campaigns but not running for an elected position? The application of the Rules of Professional Conduct to these attorneys is not straightforward because, like campaigning attorneys, the conduct by attorneys supporting campaigns takes place outside the courtroom. The Nevada Supreme Court has noted the “reasonable latitude [that] must be given in recognition of the realities of the election process,” particularly where attorneys are active participants in that process.⁶

Attorneys may participate in the elections process by monetary contributions to candidates, subject to Nevada’s campaign finance laws set forth in Nevada Revised Statute Chapter 294A.⁷ They may participate in political campaigns and hold fundraisers

and events. If an attorney supports a judicial campaign, they should consider whether their conduct and/or contributions would cause the candidate to run afoul of Canon 4 of the Code of Judicial Conduct, especially if that candidate is a fellow member of the bar. For example, an attorney working for a judicial campaign should avoid making knowingly false or misleading statements in connection with the campaign. Not only may such conduct risk a violation of Canon 4 for the candidate, it may also risk violating Rule 4.1 (think of the campaign as the client) providing that a lawyer shall not knowingly make false statements to third persons, and a violation of Rule 8.4 prohibiting a lawyer from knowingly assisting another lawyer in violating the rules.

Our democracy and the First Amendment encourage full and free discourse regarding the election process and its candidates. Participation by attorneys in campaigns is an undeniable asset to our democratic process. What

harms that system, however, is when members of the legal profession make statements that are false and misleading, especially to members of the general public. Professional discipline may result in line with the purpose of the Rules of Professional Conduct, which are to protect the public and maintain confidence in the profession.

ENDNOTES:

1. “Los Tacos,” 1710 E. Charleston Blvd., Las Vegas, NV 89104 (last indulged on May 31, 2022).
2. Nancy B. Rapoport, “Presidential Ethics: Should a Law Degree Make a Difference?” 14 Geo. J. Legal Ethics 725, 730 (Spring 2001).
3. Model Rules of Prof’l Conduct R. 8.4 cmt. 7 (Am. Bar Ass’n 9th Ed.).
4. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).
5. *In re Discipline of Hafter*, No. 57298, 2012 WL 762036 (Mar. 7, 2012).
6. *City of Las Vegas Downtown Redevelopment Agency v. Hecht*, 113 Nev. 632, 638, 940 P.2d 127, 130 (1997) (examining whether disqualification of judge was proper).
7. Nevada has not adopted Model Rule 7.6 regarding political contributions.

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