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*SO, YOU DECIDED TO SPREAD DISINFORMATION ABOUT THE
2020 ELECTION AND NOW YOU'RE BEING SUED:
A BRIEF SYNOPSIS OF THE DOMINION LEGAL SAGA AND THE LESSONS
BROADCASTERS AND LAWYERS SHOULD LEARN*

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To say that the 2020 election cycle was tumultuous, would be like referring to the Cuban Missile Crisis as stressful. Amidst the myriad of election lawsuits and disinformation scandals that threatened American democracy over the past year has arisen a new question; how far can someone go when advocating issues of national importance without crossing a line? What duties, if any, do broadcasters really have in verifying claims that were also made in court? While all of those will likely remain open legal questions, by examining the largest defamation suit to come out of the 2020 election we can better understand the new scrutiny facing lawyers and broadcasters alike, and hopefully that knowledge will serve to caution others from emulating this behavior in the future.

Sydney Powell's recent legal efforts offer the best cautionary tale of what not to do when trying such a high-profile matter. Powell had a rocky debut as a part of the Trump legal team. In her first press conference with Rudy Giuliani she not only incorrectly compared the vote counts of two states to each other,¹ but she also used the opportunity to offer up wild unrelated allegations about an international communist plot by Dominion Voting Systems to rig the 2020 election.² Powell continued to proliferate those accusations without evidence, which led to her being fired from the Trump legal team in late November, but instead of resigning from the case she opted to

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¹ Louis Jacobson, *Giuliani Cites Affidavit with Crucial Errors in Press Conference*, POLITIFACT, (November 20, 2020), <https://www.politifact.com/factchecks/2020/nov/20/rudy-giuliani/giuliani-cites-affidavit-crucial-errors-press-conf/>.

² Phillip Bump, *Here's how seriously you should take the Trump legal team's conspiracy theories*, WASH. POST, (November 19, 2020), <https://www.washingtonpost.com/politics/2020/11/19/heres-how-seriously-you-should-take-trump-legal-teams-conspiracy-theories/>.

file independent suits on behalf of the President in four battleground states.³ While many in the media have derided these wild allegations as irresponsible, it's the substance of her filings that warrants further criticism and potentially exposes her to liability. Powell's filings in Georgia and Michigan contained spelling and grammatical errors, basic factual errors, and some of the witnesses she listed in those cases have since claimed they never consented to participating.⁴ While many were skeptical that such glaring oversights could actually result in sanctions for Powell,⁵ that skepticism seems to be wavering as Powell has since been served numerous disbarment and ethics complaints from the states she filed cases in.⁶ As well as being served with a \$1.3 billion dollar Defamation suit from Dominion.⁷

While Powell may not have been the most important attorney trying the most important cases for the Trump reelection effort, it is important to focus on her role because her status as a non-member of the Trump legal team subjects her representation to heightened scrutiny. Individuals who are deemed by the court to be "government officials" are exempt from any defamation liability that comes from actions they commit in the course of their public duties.⁸ That means that attorneys who were official hired by Trump like Rudy Giuliani could claim to have been an executive officer in the employ of the president during his representation to avoid defamation liability, but Powell's status as an independent lawyer likely means that she does not fit into the same exemption.

Normally lawyers are protected by the "fair reporting privilege", which is a form of qualified immunity for individuals who republish materials that have been made otherwise available in the course of public proceedings.⁹ Powell's actions are likely not protected by this exemption either, as courts have established that "[a] person cannot confer [the fair reporting] privilege upon [themselves] by making the original defamatory publication [them]self and then reporting to other people what [they] had stated."¹⁰ The dubious veracity of Powell's pretrial due diligence with key witnesses¹¹ and her inability to cite the sources of her claims calls into question if she did originate some of them herself, but even if she did not, her ex-parte conduct while interacting those witnesses still falls outside the fair reporting privilege and leaves her statements

³ Kate Brumback, *Sidney Powell unrelenting in legal battle on Trump's behalf*, ASSOCIATED PRESS, (December 10, 2020), <https://apnews.com/article/election-2020-joe-biden-donald-trump-georgia-lawsuits-0ed38af7f94b596308475aa8b28c871c>.

⁴Jacob Shamisan, *Could Sidney Powell be disbarred for her conspiracy theory election lawsuits? Experts say she's 'playing with fire.'*, BUSINESS INSIDER, (January 6, 2021), <https://www.businessinsider.com/could-sidney-powell-be-disbarred-for-election-lawsuits-conspiracy-theories-2020-12>.

⁵ Jan Wolfe, *Explainer: Can Trump's lawyers be disciplined for making false claims?*, REUTERS, (November 25, 2020), <https://www.reuters.com/article/us-usa-election-lawyers-sanction-explain-idUSKBN2851FW>.

⁶ Norman Eisen & Joanna Lydgate, *The lawyers who pushed Trump's falsehoods may soon be done lawyering*, WASH. POST, (February 3, 2021), <https://www.washingtonpost.com/outlook/2021/0/03/powell-wood-accountability-lawyer/>.

⁷ *Dominion sues Trump lawyer Sidney Powell for defamation*, ASSOCIATED PRESS, (January 8, 2021), <https://apnews.com/article/dominion-lawsuit-sidney-powell-0031ce89ba24bdeae0402861e20ede69>.

⁸ See, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (Holding in part that, "no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence").

⁹ Restatement (Second) of Torts § 611 (1977).

¹⁰ *Missner v. Clifford*, 393 Ill. App. 3d 751,762 (2009).

¹¹ Jacob Shamasan, *supra* note 4.

to witnesses open to defamation liability as well.¹² Defamation law requires a plaintiff to show that the defendant acted maliciously or recklessly in publishing untrue information. Dominion could theoretically point to any of her instances of unprofessionalism as some proof of her recklessness in publishing those same claims in the media, especially since those public statements were not material to or required by her representation in those cases.¹³

The driving force behind Powell's rise to notoriety was the conservative news media's sustained coverage of her legal efforts. Both broadcast networks and individual broadcasters who gave Powell a platform are now facing a similar legal backlash, with many of them having been served with cease-and-desist orders by Dominion requesting that they stop proliferating these debunked election conspiracies.¹⁴ Though no suit against any network has been filed by Dominion as of yet, multiple broadcasters and the Fox News Network as a whole have since been sued by the smaller election technology firm Smartmatic for similar defamation claims.¹⁵ The broadcasters in question are expected to claim that they were simply allowing Powell (and others like her) to describe her filings on air, and therefore also qualify for the fair reporting privilege.¹⁶ Even so, Dominion and Smartmatic still have a good argument that the networks who gave Powell airtime did so recklessly if they made no attempt to verify the underlying factual bases of her claims¹⁷. Given how many of her cases were dismissed outright prior to many of her public news appearances, the failure of these networks to question the veracity of her claims on air could be construed as evidence of their reckless publication of that information, as they likely had good cause to question Powell's reputation and credibility at that point.¹⁸

In an effort to protect themselves from potential liability Fox News, which mentioned Dominion by name over 792 times between November and December of 2020, attempted to walk back their statements with a 3-minute retraction where they briefly fact checked many of Powell's voter fraud allegations.¹⁹ While that may be sufficient to persuade a judge that the network fulfilled their due diligence requirements after the fact, the harm that Dominion or Smartmatic experienced in the marketplace from these allegations is clear nonetheless, and the sufficiency of a simple 3-minute retraction to fully and adequately redress the harms caused by sensationalizing these conspiracies will be a central issue in the litigation of these cases. Even if a public retraction was

¹² See, *DelMonico v. Traynor*, 116 So. 3d 1205, (Fla. 2013), (Holding that, "... privilege does not extend to statements made by an attorney during ex-parte, out-of-court questioning of a potential, nonparty witness in the course of investigating a pending lawsuit.").

¹³ See, *Green v. N. Pub. Co.*, 655 P.2d 736, (Alaska 1982), (Holding in part that, "Publishers who attempt to draw their own conclusions from ambiguous grounds will face the possibility of drawing liability upon themselves.").

¹⁴ Ben Smith, *The 'Red Slime' Lawsuit That Could Sink Right-Wing Media*, N.Y. TIMES, <https://www.nytimes.com/2020/12/20/business/media/smartmatic-lawsuit-fox-news-newsmax-oan.html>.

¹⁵ Johna E, Bromwich & Ben Smith, *Fox News Is Sued by Election Technology Company for Over \$2.7 Billion*, N.Y. Times, (Feb 4, 2021), <https://www.nytimes.com/2021/02/04/business/media/smartmatic-fox-news-lawsuit.html>.

¹⁶ *Missner v. Clifford*, 393 Ill. App. 3d 751, 761, (2009).

¹⁷ Johna E, Bromwich & Ben Smith, *Fox News Is Sued by Election Technology Company for Over \$2.7 Billion*, N.Y. TIMES, (Feb 4, 2021), <https://www.nytimes.com/2021/02/04/business/media/smartmatic-fox-news-lawsuit.html>.

(Quoting legal scholar Timothy Zick, "If they knew that the segment was going to include these false statements, then I don't think that relieves them of liability.").

¹⁸ *New York Times Co. v. Sullivan*, 376 U.S. 254, 287 (1964) (explaining that the New York Times was not acting recklessly in publishing the names of the advertisers because the source was a person the Publisher knew to be credible and had no reasonable cause to doubt their assessment).

¹⁹ Ben Smith, *The 'Red Slime' Lawsuit That Could Sink Right-Wing Media*, N.Y. TIMES, (December 20, 2020), <https://www.nytimes.com/2020/12/20/business/media/smartmatic-lawsuit-fox-news-newsmax-oan.html>.

deemed sufficient, the majority of the networks in question have not even committed to doing that, with OAN and Newsmax continuing to maintain they did nothing wrong in reporting Powell's claims.²⁰ Although it is too early to predict how a suit against any of these broadcasters might ultimately go, what is clear is that this suit represents a real danger to broadcasters everywhere who may no longer be able to avoid liability by just taking their guest's at their word.

The biggest takeaway from this debacle is that even if someone believes that they are representing a matter of existential importance to the nation, that is not an excuse to avoid doing the proper due diligence and research about it. Ambitious attorneys and opportunistic networks should beware, the age of unchecked deference toward their conduct may be ending soon. This Dominion suit seems to have opened Pandora's box and its emboldened smaller firms like Smartmatic to take legal action against these networks when such a suit was previously unthinkable. Even if Dominion or Smartmatic decide to settle these cases out of court, just a minor legal victory here could lead to even more future defamation cases in political contexts, and if or when that happens hopefully everyone can learn from Bob Sellers' example by simply walking away from cases like this in the future.²¹

²⁰ *Id.*

²¹ Samson Amore, Newsmax Anchor Flees Air After Mike Lindell Won't Shut Up About Nonexistent Voter Fraud (Video), THE WRAP, (February 2, 2021), <https://www.thewrap.com/newsmax-anchor-flees-air-after-mike-lindell-wont-shut-up-about-nonexistent-voter-fraud-video/>. (referring to how newscaster Bob Sellers walked out of an interview when his guest refused to stop citing debunked election conspiracies).