TEXAS LAWYER
COMMENTARY

The Lesson of Rule 11 Sanctions: Practice Professionally

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What You Need to Know

- King v. Whitmer is a study in what a court can do to an attorney who has signed off on a pleading that appears to the court to have violated Rule 11.
- The case dealt with allegations of voter fraud in the 2020 election.
- This lawsuit dealt with profound abuse of the judicial process of taking on the charge of deceiving a federal court and the American people into believing that rights were infringed, without regard to whether any laws or rights were in fact violated.

The recent opinion issued by U.S. Judge District Linda V. Parker of the Eastern District of Michigan, Southern Division, in *King v. Whitmer* is a study in what a court can do to an attorney who has signed off on a pleading that appears to the court to have violated Rule 11. There is no mystery to Parker's view on the actions of the attorneys in that case, which dealt with allegations of voter fraud in the 2020 election. Parker writes:

"This lawsuit represents a historic and profound abuse of the judicial process. It is one thing to take on the charge of vindicating rights associated with an allegedly fraudulent election. It is another to take on the charge of deceiving a federal court and the American people into believing that rights were infringed, without regard to whether any laws or rights were in fact violated. That is what happened here."

Taking a few steps back, prior to Rule 11, attorneys were governed by Rules 24 and 21: Equity Rules 24 (Signature of Counsel) and 21 (Scandal and Impertinence), which have been consolidated and unified in Rule 11. Basically, if an attorney signs off on a pleading, the statements or inquiries therein must have a basis in law and fact, not presented to delay progress of the litigation, nor to cause litigants unnecessary expense, and are not frivolous. If the court finds that there is a breach of Rule 11(b), the court may impose appropriate sanctions on any attorney or law firm or litigant it finds has breached the intent of the rule. The court may impose sanctions on its own initiative, or on the basis of a properly filed motion, after notice and hearing. In 1983, revisions to Rule 11 were intended to allow for the striking of pleadings, as well as for the imposition of disciplinary sanctions to stop attorneys, law firms, and litigants from committing abuses in the signing of pleadings. For those

attorneys who were practicing in the last century, in the 80s, this was the Rambo era. A deposition could go for hours over objections to one word. The intent of the 1983 revisions to Rule 11 was to make attorneys, law firms and litigants appreciate that they were being held to a standard of conduct and professionalism, and to make judges aware that they had a range of available sanctions to assure that the punishment fit the crime of the errant lawyer/firm/litigant. In 1993, further revisions were intended to assure that:

"Arguments for extensions, modifications, or reversals of existing law or for creation of new law do not violate subdivision (b)(2) provided they are 'nonfrivolous.' This establishes an objective standard, intended to eliminate any 'empty-head pure-heart' justification for patently frivolous arguments. However, the extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles, or through consultation with other attorneys should certainly be taken into account in determining whether paragraph (2) has been violated. Although arguments for a change of law are not required to be specifically so identified, a contention that is so identified should be viewed with greater tolerance under the rule."

Rule 11 does not reflect the only recourse against an attorney, law firm, or litigant who signs and files a frivolous pleading. A court may hold such an individual in contempt, or impose sanctions, award expenses, or order some type of remedial action, as may be allowed by other rules. Someone facing a frivolous case may file an independent case for abuse of process or for malicious prosecution.

Parker opines:

"Specifically, attorneys have an obligation to the judiciary, their profession, and the public (i) to conduct some degree of due diligence before presenting allegations as truth; (ii) to advance only tenable claims; and (iii) to proceed with a lawsuit in good faith and based on a proper purpose. Attorneys also have an obligation to dismiss a lawsuit when it becomes clear that the requested relief is unavailable. This matter comes before the court upon allegations that plaintiffs' counsel did none of these things. To be clear, for the purpose of the pending sanctions motions, the court is neither being asked to decide nor has it decided whether there was fraud in the 2020 presidential election in the State of Michigan. Rather, the question before the court is whether plaintiffs' attorneys engaged in litigation practices that are abusive and, in turn, sanctionable. The short answer is yes."

The key? Did the attorney sign off on the pleadings?

"Rule 11 sanctions are only available with regard to papers filed with the court, not attorney misconduct. Fed. R. Civ. P. 11; see also *United Energy Owners Comm., Inc. v. United States Energy Management Systems, Inc.*, 837 F.2d 356, 364-65 (9th Cir. 1988). (Under pre-'93 rule)"

Attorneys should bear in mind, following a 2020 case, *Gym Door Repairs v. Young Equipment Sales*, No. 15-CV-4244 (JGK) (S.D.N.Y. Mar. 12, 2020), which dealt with whether sanctions were appropriate in regard to a discovery dispute, the following admonition:

"Attorneys should take extra precaution when seeking sanctions under Rule 11. The rules of civility would seem to suggest that motions for sanctions under Rule 11 not only be filed sparingly but, when appropriate, should (1) be submitted to the court in accordance with the

procedural prerequisites of the rule's text and (2) result from violations of the substantive assurances that the rule governs."

Parker opines at page 3 of the 110-page opinion:

"The attorneys who filed the instant lawsuit abused the well-established rules applicable to the litigation process by proffering claims not backed by law; proffering claims not backed by evidence (but instead, speculation, conjecture, and unwarranted suspicion); proffering factual allegations and claims without engaging in the required pre-filing inquiry; and dragging out these proceedings even after they acknowledged that it was too late to attain the relief sought. And this case was never about fraud—it was about undermining the People's faith in our democracy and debasing the judicial process to do so. While there are many arenas—including print, television, and social media—where protestations, conjecture, and speculation may be advanced, such expressions are neither permitted nor welcomed in a court of law."

Parker analyzes whether any of the attorneys should be let off the hook because, rather than physically signing their pleadings, in keeping with standard operating procedure in the 21st Century, the signatures were digital. She is less than amused by this attempt to obfuscate, noting that in the era of e-filing (at 26):

"… it is frivolous to argue that an electronic signature on a pleading or motion is insufficient to subject the attorney to the court's jurisdiction if the attorney violates the jurisdiction's rules of professional conduct or a federal rule or statute establishing the standards of practice. As set forth earlier, Sidney Powell, Scott Hagerstrom, and Gregory Rohl electronically signed—at least—the Complaint, Amended Complaint, and Motion for

Injunctive Relief. The remaining attorneys, except Junttila, were listed as 'Of Counsel' on one or more of the pleadings. The cases plaintiffs cite to support their argument that non-signing attorneys cannot be sanctioned were decided before the 1993 amendments to Rule 11. (See ECF No. 95 at Pg ID 4116-17.)"

As to attorney Sidney Powell's argument that attorneys should be granted the same leeway as journalists vying to get the word out on a developing story, Parker makes no concessions (at 83):

"Attorneys are not journalists. It therefore comes as no surprise that plaintiffs' attorneys fail to cite a single case suggesting that the two professions share comparable duties and responsibilities. Perhaps this confused understanding as to the job of an attorney, and what the law says about the attendant duties and obligations, is what led plaintiffs' counsel to simply copy and paste affidavits from prior lawsuits. Perhaps not. But what is certain is that plaintiffs' counsel will not escape accountability for their failure to conduct due diligence before recycling affidavits from other cases to support their pleadings here."

As young lawyers, we were taught to proof everything, to question whether information contained in an affidavit was accurate. Nothing has changed. Well, one thing has changed. If you file a frivolous pleading, you may find yourself before someone like Packer, and that judge may feel that the appropriate sanction is to suggest that you be disbarred for signing off on a pleading that violates Fed. Rule 11. Be prudent. Does that mean that you should not fight for new law when appropriate? Absolutely not. In Texas, the recent Texas Supreme Court opinion in *In re C.J.C.* taught us that there was more to learn about the fit parent

presumption, and whether or not we should expand our horizons regarding who should be considered as a potential conservator of a minor child.

As we've always been taught: Be careful to read what you sign, and do not sign anything that does not have a basis in law or fact when it comes to pleadings or supporting affidavits. By all means, practice creatively. But also practice prudently, practically, and—most importantly—professionally.

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