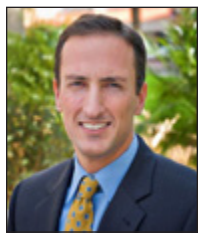
Q&A

LAWYER LIABILITY AND ETHICS

2020 Election Case Explores Boundaries of Rule 11



Joseph Brophy

Joseph A. Brophy
Jennings Haug Keleher McLeod

The fallout from the flurry of challenges to the 2020 presidential election has landed the lawyers who brought those lawsuits in ethical hot water. In August, Judge Linda Parker from the Eastern District of Michigan sanctioned nine attorneys who brought election challenges in Michigan. Her ruling is on appeal before the Sixth Circuit. The sanctions included requiring those lawyers to pay the attorneys' fees of the defendants and referring the matter for investigation and possible suspension and disbarment in the jurisdictions where they are licensed. However, if one sets aside the political noise surrounding the 2020 election, Judge Parker's ruling has implications that litigators of all political stripes may find troubling.

The complaint in King v. Whitmer alleged liability under 42 U.S.C. § 1983 for violations of the Elections and Electors Clause of the Constitution, as well as violations of the Equal Protection and Due Process Clauses. The plaintiffs were presidential electors and Republican party officials who were charged by state law with selecting those electors who received what they believed were troubling reports of election misconduct. The complaint was supported by sworn witness statements. Those witnesses alleged that election workers coached voters, changed the dates of absentee ballot packages, and did not ask for voter identification at the polls.

Judge Parker ordered sanctions because she found that no reasonable attorney would file a lawsuit making extraordinary allegations about election fraud based on affidavits containing what she characterized as speculation. She further noted that Rule 11 imposes an affirmative duty to conduct a reasonable prefiling inquiry into factual claims asserted in court. Judge Parker's accurate recitation of Rule 11 begs the question – what exactly were the sanctioned lawyers supposed to do to verify the allegations of their clients above and beyond obtaining statements under penalty of perjury? Judge Parker never answered that question except to say that attorneys are not relieved of their Rule 11 obligations simply because they obtain information from their clients. But it is the answer to that question that litigators should be most interested in, regardless of their opinions of what happened in the 2020 election.

Judge Murray Snow, writing in Arizona's federal district court, accurately stated the general rule with respect to a lawyer's right to rely on client information: "In general, a lawyer is entitled to rely on information provided by the client. ... Without knowledge that her client has made specific false statements, an attorney may, without being guilty of malicious prosecution, vigorously pursue litigation in which she is unsure of whether her client or the client's adversary is truthful, so long as that issue is genuinely in doubt." Judge Snow's statement accurately reflects the relatively broad latitude lawyers are given to rely on what their clients tell them. Most lawsuits are filed by attorneys with incomplete information, or even a belief that their client's evidence is flimsy. Often when the law or facts appear questionable or unfavorable at the outset, fortunes can change drastically in what is appropriately called "discovery."

Every lawyer who practices plaintiff's personal injury work has probably run across a client involved in a car accident who claimed whiplash and who that lawyer suspected was probably not as injured as they said. But that lawyer is allowed to take his clients at their word regarding whether and how much their neck or back hurts without obtaining an independent medical exam before filing suit. Every construction lawyer whose client said the project owner was not paying them for their flawless work simply because the owner was a stingy jerk probably suspected that there was a strong possibility that at least some of their client's work was not up to snuff. But those lawyers are allowed to allege in the complaint that their client performed all construction in a workman like manner according to the plans and specifications without first hiring a contractor to inspect the client's construction work before filing suit. Those lawyers are not subject to Rule 11 sanctions when it turns out the whiplash client never missed a day at the gym following the accident or when it turns out the construction client installed an HVAC system that was too small for the building.

Yet Judge Parker's ruling seems to suggest that the lawyers who challenged the 2020 election should have undertaken the impossible task of verifying the sworn statements of their clients before filing suit. There are simply not any other cases imposing that kind of obligation on a lawyer, particularly when verifying the client statements would be impossible. Indeed, the lawyers who brought very similar election challenges in other states were not sanctioned by those courts. Whether intended by the court or not, the effect of this ruling will be to deter lawyers from taking election challenge cases. People should consider the consequences of closing the courthouse doors to election challenges and whether it would be a positive development to have pro per plaintiffs in such cases.

This is not to suggest the sanctioned attorneys were wise to have filed suit. It is farfetched to think that a federal judge would overturn a presidential election result within the two months between Election Day and Inauguration Day or that evidence sufficient to support such a ruling could be developed in that compressed timeframe. It would probably be an extremely bad idea for an unelected judge to nullify a slate of electors – that is a job for the elected branches of government. But hard cases make bad law as the saying goes. The issue here is not the merits of the 2020 election but rather the precedent set by sanctioning the lawyers involved based upon an alleged failure to investigate the claims prior to filing suit. If litigators who cheer Judge Parker's sanctions were to apply her ruling to their practice area, they may reconsider whether they approve of the sanction she issued. ■

Joseph Brophy is a partner with Jennings Haug Keleher McLeod in Phoenix. His practice focuses on professional responsibility, lawyer discipline and complex civil litigation. He can be reached at JAB@jhkmlaw.

SPOTLIGHT ON 1700 WEST WASHINGTON

MarsonMEDIA

Voters Choose State's Path

Barrett Marson

Every two years, Arizonans get the chance at direct democracy—voting on ballot propositions forwarded by the Legislature or from the people.

Don't think the Legislature does its job right? A couple hundred thousand of your closest friends can write an initiative and put it on the ballot.

The Legislature wants to enshrine something very difficult to change with just a simple majority? Put it on the ballot, where if approved it's nearly impossible to amend later.

Change the constitution, the state's founding document? The voters get the final say.

This year, we have no shortage of propositions. In three of the last four elections, we've seen just two propositions. This year, voters get to decide whether to institute 10 new laws.

Some are, as we might say in the political world, no-brainers. Others are going to be a tough sell.

On the practical side, rural and small fire districts supported putting a referendum to voters to increase the state's sales tax by a tenth of a penny. The money would help these small fire districts with equipment and personnel needs. With much of Arizona outside the service of municipal fire departments, those traveling the desert interstates and mountainous backroads rely on rural fire districts in times of emergency. Prop. 310's tax increase raises the cost of a $100 product by 10 cents.

One legislative referral that might not be as welcomed is Prop. 132, a constitutional amendment that would require 60 percent support from voters to pass any tax increase. If approved, voters would constrain themselves when considering tax increases such as Prop. 310. Voters usually aren't inclined to limit their own power. And even popular tax increases—like 2000's Prop 301 that funded increased teacher salaries and classroom improvements—rarely get to 60 percent.

And some things have already been considered and rejected. They come back in different forms. In 2016, voters narrowly rejected marijuana legalization. Four years later, voters approved a similar measure.

In 2010, voters soundly rejected the idea of creating a lieutenant governor. The Legislature is hoping a dozen years later voters will have a change of heart and approve Prop. 131. Just as a presidential candidate selects a running mate, each gubernatorial candidate would choose someone as their lieutenant governor nominee.

Since 1974, just one governor has entered and left office through election—the current occupant of the Ninth Floor. The last five decades worth of governors have left office through a variety of ways, including cabinet secretary positions, ambassadorships and resignations. Having a hand-picked lieutenant ensures the governor's policies and party remain constant until voters get another say at the end of the term.

For those concerned about expanding government with Prop. 131, legislation specifically calls for the lieutenant governor to head the state's Department of Administration or any other cabinet level job.

In Prop. 308, backers hope to undo a law previously passed by voters. In 2006, voters banned anyone without legal residency from getting in-state tuition at public institutions of higher education. The Legislature is going back to voters and asking them to change their minds.

Prop. 308 would allow those in the country illegally but who attended high school for at least two years and received a diploma or equivalency to pay in-state tuition at the public universities and community colleges. The move represents a huge savings in tuition if given approval by voters.

Support for the referendum cuts across party lines. The proposal has garnered support from prominent Republicans like Arizona Chamber CEO Danny Seiden and Democrats such as Maricopa County Sheriff Paul Penzone.

Voters will be choosing the state's path by electing a new slate of statewide officers but little-publicized ballot propositions will have just as great of an impact on Arizona's direction. Make sure to flip that ballot over and consider all those initiatives and judges. ■