

December 1, 2020

Lawyer Regulation Division
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

Re: Bar Charge against, Kory Langhofer and Jack Wilenchik

To the State Bar of Arizona:

Kory Langhofer and Jack Wilenchik filed baseless lawsuits challenging the validity of Arizona's 2020 election.

Their meritless complaint alleged “potentially thousands” of disenfranchised Arizona voters and “systematic, improper” vote overrides. They alleged Maricopa County poll workers routinely disregarded procedures to give voters a chance to correct ballot mistakes on Election Day. Their complaint also claimed the “haphazard differential treatment of similarly situated ballots cast within the same geographic jurisdiction in the same election encapsulates precisely the discriminatory disenfranchisement the Equal Privileges & Immunities Clause proscribes.”

At the November 12, 2020 hearing, Langhofer admitted their claim was meritless. In stark contrast to his complaint, he declared they were "not alleging fraud" or "that anyone is stealing the election" but simply raising concerns about a "limited number of cases" involving "good faith errors." *See Maria Polletta, Trump Attorney Tells Maricopa County Judge that Vote Challenge is not about Fraud or Election Theft*, ARIZONA REPUBLIC, November 12, 2020.

Over a six-hour hearing, Langhofer failed to provide evidence of even a “good faith error.”

The lawyers have made no subsequent filings to substantiate their accusations.

We bring this matter to the attention of the State Bar as part of our duty as lawyers under ER 8.3. We asked the Bar to investigate not only this instance, but also the pattern of several frivolous elections cases these lawyers have filed.

Background:

President-elect Joe Biden won Arizona (by 10,457 votes, or 0.31 percent).

Despite the difficult circumstances of the pandemic, Arizona administered its election with no malfeasance or fraud.

Nevertheless, partisan lawyers filed a series of baseless lawsuits to overturn the will of the voters in several states including Arizona. Lead by the absurd claims of partisan Rudy Giuliani, these suits main purpose is to cause irreversible damage to public trust in the fair administration of our elections.

Not one of these lawsuits produced evidence of voter fraud.

Discussion:

Meritless Claims - Lawyers and the parties they represent are not allowed to use the courts as their political playground. Ethical Rule 3.1 requires a lawyer to assure all claims to have merit before filing a complaint:

ER 3.1. Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a good faith basis in law and fact for doing so that is not frivolous, which may include a good faith and nonfrivolous argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

The rule commentary underscores lawyers must not abuse the court system with meritless claims:

Comment: [1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, **but also a duty not to abuse legal procedure.** (added emphasis).

Although the comment allows for suits to clarify “the law’s ambiguities,” here, Langhofer and Wilenchik never alleged a legal ambiguity but rather asserted

unsubstantiated claims of voter fraud and election theft. But ER 3.1's comment states that,

“What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith and nonfrivolous arguments in support of their clients' positions.” ER 3.1, Comment.

As the comment explains,

“[t]he action is not in good faith, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person, and is frivolous if the lawyer is unable either to make a nonfrivolous argument on the merits of the action taken or a good faith and nonfrivolous argument for an extension, modification or reversal of existing law.”

During the hearing, the judge noted,

“The fact that your process for obtaining these affidavits yielded affidavits that you yourself found to be false does not support a finding that this process generates reliable evidence,”... “This is concerning.”

Langhofer again conceded the lack of merit of his case given there weren't “a tremendous number of votes” at stake, calling the suit a “narrow claim about a good-faith failure.”

The morning after the hearing, Langhofer and Wilenchik tried to distance themselves from their own complaint's allegations by claiming the case was moot. In a Notice to the judge, Langhofer stated,

“Since the close of yesterday's hearing, the tabulation of votes statewide has rendered unnecessary a judicial ruling as to the presidential electors.”

This same tabulation existed well before Langhofer and Wilenchik filed their complaint.

In addition to violating ethical rules, Langhofer and Wilenchik's meritless complaint violated Arizona Rules of Civil Procedure 11(b), which requires attorneys only file factually based pleadings with legal merit:

(b) Representations to the Court. By signing a pleading, motion, or other document, the attorney or party certifies that to the best of the person's knowledge, information, and belief formed after reasonable inquiry:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Here, Langhofer and Wilenchik filed this lawsuit without evidence. They did so as the COVID pandemic burdens the Arizona court system. They filed this lawsuit to undermine the 2020 election, which does nothing but sow public discord at a time when we need unity.

This is not Langhofer's first frivolous filing. In 2018, the Arizona Court of Appeals imposed a nearly \$150,000 sanction on him for filing frivolous litigation regarding medical cannabis cultivation in Snowflake Arizona. The Arizona Supreme Court declined to review the Appellate court's ruling that,

"There is no public interest in a frivolous lawsuit, and discouraging groundless litigation is what the legislature intended."

Apparently, Mr. Langhofer learned nothing.

Lack of Candor to the Tribunal – During the November 11, 2020 hearing, Mr. Langhofer called witness Zack Alcyone. Langhofer did not disclose to the court that Alcyone is his business partner in Signfide, a petition analysis company providing “[e]xpert witness on ballot access calculations.” Notably, Langhofer did not call Alcyone as an expert witness.

Alcyone and Langhofer's relationship only came out during opposing counsel's cross-examination.

Mr. Langhofer's action violated ER 3.3 Candor Toward the Tribunal:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

Mr. Langhofer's conduct also implicates ER 8.4 Misconduct:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

...

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice.

See also ER 3.4. Fairness to Opposing Party and Counsel.

Conclusion:

To be an attorney is a privilege, not a right. To retain the privilege, we abide by a code of ethics.

Langhofer and Wilenchik did not do so. We ask for an ethics investigation into their conduct and appropriation action taken.

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Dianne Post

S/ Roxie Bacon

Roxie Bacon

A handwritten signature in black ink that reads "Robert J. McWhirter". The signature is written in a cursive style with a horizontal line extending from the end of the word "Whirter".

Robert J. McWhirter

THE LAW OFFICES OF ROBERT J. MCWHIRTER