



LAW OFFICES OF
Robert J. McWhirter

Robert J. McWhirter
(480) 999-4004

December 16, 2020

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

Bar Charge re: Dennis I. Wilenchik, John “Jack” D. Wilenchik, Lee Miller, Wilenchik & Bartness; Alexander Kolodin SBN 020826, Christopher Viskovic SBN 013860, Chris Ford 029437, and Sue Becker MO 64721; Brett Johnson SBN 921527, Eric Spender SBN 022707, Snell & Wilmer, Attorney for Republican National Committee; Kory Langhofer SBN 024722 and Thomas Basile SBN 031150; Davis Spilsbury, Erick G. Kaardal, No. 1035141* Special Counsel to Amistad Project of the Thomas More Society, William F. Mohrman, 168816,* Gregory Erickson 0276522* Mohrman, Kaardal & Erickson, P.A., Minneapolis, Minnesota; Brandon Johnson, Emily P. Newman, Sidney Katherine Powell of Sidney Powell PC in Dallas, TX; Howard Kleinhendler, New York, NY; Julia Zuszua Haller, Washington, DC; L Lin Wood, Atlanta, GA.

TO THE STATE BAR OF ARIZONA: Disciplinary Department

The U.S. and Arizona judicial systems are designed to give very wide latitude in bringing claims including unpopular and novel claims, but there are limits. Attorneys have an ethical obligation to bring claims that have legal and factual merit. As Arizona attorneys, we are obligated to report when another lawyer fails in ethical obligations in such a way that it reflects on a lawyer’s honesty, trustworthiness or fitness as a lawyer and reflects poorly on the legal profession. The undersigned believe that to be the case here.

The 2020 presidential election has been politically contentious. We are loath to wade into the politics in this forum. Our concern here is the repeated presentation of utterly meritless cases that have been in the Arizona state and federal courts including the U.S. Supreme Court by local and out of state counsel, knowing that the cases lacked legal merit and any factual foundation whatsoever. Confidence in the legal system is seriously eroded when attorneys treat lawsuits as a platform for broadcasting “gossip and innuendo,” utterly devoid of factual proof, as a political

stunt. That is what has happened repeatedly in Arizona and is the basis for this report of ethical violations by said attorneys under the Rules of Professional Conduct.

First, we believe we must file this complaint. Under the Arizona Rules of Professional Conduct, Rule 42, lawyers have a duty to report professional misconduct.

ER 8.3. Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority, except as otherwise provided in these Rules or by law.

Thus, it is our professional duty to report a host of legal and ethical violations by the named attorneys in conjunction with recent Arizona litigation surrounding the 2020 presidential election.

We are not alone.

Over 3,000 lawyers from across the country, including professors of legal ethics, have signed a letter, that was published in the New York Times on Dec. 7 and Washington Post on Dec. 9, explaining that lawyers must mobilize members of our profession to fulfill their responsibility to protect and defend the rule of law and uphold the core principles and values of our democracy.

The letter outlines that this barrage of litigation is based not on law but on a clear political agenda: to undermine confidence in elections that will inevitably subvert constitutional democracy. As the letter says, "Sadly, the President's primary agents and enablers in this effort are lawyers, obligated by their oath and ethical rules to uphold the rule of law. Bar Associations need to condemn this abuse and bar disciplinary authorities need to investigate it."

Lawyers take an oath to support the Constitution. The amended version of the oath of Admission to the Arizona Bar became effective January 2, 2017 and states:

I, (state your name), do solemnly swear (or affirm) that I will support the constitution and laws of the United States and the State of Arizona;

I will treat the courts of justice and judicial officers with due respect;

I will not counsel or maintain any action, proceeding, or defense that lacks a reasonable basis in fact or law;

I will be honest in my dealings with others and not make false or misleading statements of fact or law;

I will fulfill my duty of confidentiality to my client; I will not accept compensation for representing my client from anyone other than my client without my client's knowledge and approval;

I will avoid engaging in unprofessional conduct; I will not advance any fact prejudicial to the honor or reputation of a party or witness, unless required by my duties to my client or the tribunal;

I will support the fair administration of justice, professionalism among lawyers, and legal representation for those unable to afford counsel;

I will at all times faithfully and diligently adhere to the rules of professional responsibility and A Lawyer's Creed of Professionalism of the State Bar of Arizona.

The attorneys in these cases in Arizona, ten lawsuits and twenty-one lawyers in all, have violated their oaths and their professional ethics. There is no exception to the Rules simply because someone holds passionate partisan beliefs. As the letter signed by over 3,000 lawyers says,

it is indefensible for lawyers to falsely proclaim widespread voting fraud, submit a pattern of frivolous court claims and actively seek to undermine citizens' faith in our election's integrity.

We condemn this conduct without reservation. It demeans the legal profession and the multitudes of lawyers of all political persuasions who daily serve their clients and the public honorably. Our profession needs to affirm that this behavior grossly deviates from the bar's deep commitment to democratic institutions and the fact-based processes that maintain our democracy's vitality.

That is why we ask that the Bar take seriously and do a thorough investigation and follow through on this complaint and its companion complaint filed earlier regarding one of the lawsuits.

Below is a brief summary of the ten different lawsuits that were filed by the twenty-one different attorneys:

1. Aguilera et al v. Fontes et al, CV 2020-014083 and CV 2020-014248, Hon. Margaret R. Mahoney, filed 11/2020, attorney Alexander M. Kolodin.

After motion practice and an order to show cause hearing, answers were not filed and a motion to dismiss from the plaintiff was, so the case was dismissed. See below as well.

2. Arizona Republican Party v. Adrian Fontes et al., CV2020-014553, Hon. John Hannah. Filed November 12, 2020. Attorneys were Dennis I. Wilenchik, John “Jack” D. Wilenchik, Lee Miller, Wilenchik & Bartness.

The defendant pointed out that the case had no substantial justification and was brought to delay and harass. Plaintiff’s attorneys knew there was no merit to the claim as the requested hand count had already been announced, and the state Attorney General had released a letter publicly confirming that fact. Indeed, Lee Miller, named in this complaint, had worked in the Secretary of State’s office and was well aware that the challenged counting process had been in existence for nearly 10 years without issue. And finally, only Maricopa County, where the attorneys’ favored candidate lost, was sued. Other counties using the same counting protocols and process were not, since the “right” candidate won there.

The goal in the spurious filings was to rally the anti-election base and delay the certification of the election results.

Clearly the suits were filed in bad faith, to spread disinformation about election results and add to the false claim that the election was “rigged.” For politicians to spout that nonsense in a press conference is one thing, but for attorneys to try to use the courts solely for political disruption is not allowed.

3. Laurie Aquilera et al v. Adrian Fontes et al. CV2020-014562, Hon. Margaret Mahoney, Filed 11/12/2020. The attorneys were Alexander Kolodin SBN 020826, Christopher Viskovic SBN 013860, and Sue Becker MO 64721. The case was dismissed November 29, 2020.

The judge noted that the plaintiffs said 13 times that the county did not deliver a “perfect” election but the plaintiff’s own expert testified there is no such thing as a “perfect” election nor does the law expect nor require a perfect election given the fallibility of humans and machines. Two people claimed they had difficulty voting. Both ballots were in fact in the machines and one received notice that it was in fact counted. The two voters expressed worry that their votes would not be counted. That was the extent of their concern.

Such flimsy evidence did not substantiate cognizable legal claims. The relief requested was not appropriate. The plaintiffs failed to allege harm sufficient to achieve standing. Both “worried” voters cast their ballots, both were told they were counted. Given free range to present their cases, Plaintiffs could not show that defendants had done anything wrong, could not show the plaintiffs were injured, and did not seek relief that was within the court’s jurisdiction. So the case was dismissed for failure to state a claim or alternatively denying relief for failure to produce evidence demonstrating entitlement to any relief.

4. Donald J Trump for President Inc, et al. v. Katie Hobbs, et al. CV 2020-014248, filed 11/7/2020 Hon. Daniel J. Kiley, original attorneys were Brett Johnson SBN 921527, Eric Spender SBN 022707, Snell & Wilmer, Attorney for Republican National Committee. Later attorneys Kory Langhofer SBN 024722 and Thomas Basile SBN 031150 took over representation.

This is the “green button” case in which it is alleged that the election should be overturned due to overvotes. It was merged with 014083, Aquilera v. Fontes et al, and both ultimately were dismissed. Attorneys Johnson and Spender filed a Notice of Clarification and Withdrawal of Associated Counsel on 8 November 2020. Attorneys Langhofer and Basile took over.

On 9 November 2020, Alexander Kolodin 030826, Christopher Viskovic 035860, and Chris Ford 029437 filed a motion with Sue Becker (MO 64721) for a proposed Verified Complaint-in-intervention adding Laurie Aguilera into the law suit with the “Sharpie-gate” allegations.

On November 13, 2020, Langofer filed a “Notice of Partial Mootness” before Hon. Daniel Kiley, saying that since the close of the previous day’s hearing, the tabulation of the votes rendered unnecessary a ruling on presidential electors. Both cases were dismissed.

5. Supreme Court of Az, Kelli Ward v. Jackson et al. CV2020-015285, Maricopa County Superior Court; Hon. Randall Warner, No. CV-20-0343-AP/EL Arizona Supreme Court, Case filed 11/24/20, decision from Supreme Court filed 12/08/2020. Attorneys were Dennis and Jack Wilenchik and Lee Miller SBN 012530.

The Arizona Supreme Court unanimously upheld the lower court because there was no evidence of misconduct or illegal votes or fraud or a high error rate. In fact the lower court judge had gone out of his way, some say illegally, to allow the plaintiffs to examine 1,626 duplicated ballots only to find nothing. The tiny percentage of errors showed no fraud of any kind. A petition has now been filed by Jack Wilenchik to the U.S. Supreme Court to hear this case.

6. Stevenson et al v. Ducey et al, CV2020-096490, Maricopa Superior Court, December 4, 2020, Attorney Davis Spilsbury, filed a Petition for Election Contest on behalf of an alleged group called “Arizona Election Integrity Association” to vacate the presidential election result because of the absentee ballot error rate. They claimed that defendants so mismanaged the election process that no one can have faith in it. Out of state attorneys with pro hac vice applications filed include Erick G. Kaardal, No. 1035141* Special Counsel to Amistad Project of the Thomas More Society, William F. Mohrman, 168816* Gregory Erickson 0276522* Mohrman, Kaardal & Erickson, P.A., Minneapolis, Minnesota. This suit presented one of the more bizarre claims: that unidentified grant money was distributed to direct the actions of election officials by some “shadow government” orchestrated by Mark Zuckerberg, that there was an unusually large number of absentee ballots and that there was outreach to the elderly and historically disenfranchised populations. It was also alleged that some anonymous unknown government data (not the same “shadow government” apparently) said the real difference between candidates was 300,000. The case was voluntarily dismissed on 12/7/2020.

7. Bowyer et al v. Ducey et al, Judge Diane J Humetewa, Federal District court, 2020-cv – 2321. Filed 12/02/20. Attorneys are: Alexander Michael Kolodin, Christopher Alfredo Viskovic. Out of state attorneys are Brandon Johnson, Emily P. Newman, Sidney Katherine Powell of Sidney Powell PC in Dallas, TX; Howard Kleinhendler, New York, NY; Julia Zuszua Haller, Washington, DC; L Lin Wood, Atlanta, GA. The case was dismissed on 12/9/2020. Interestingly the Snell and Wilmer attorneys are now on the side of the defense.

“This case is an attempt to undermine our confidence in the (election) system with no basis in law or fact,” Justin Nelson of the defense said. “They are using the federal court system in an attempt to undermine the rule of law and obtain breathtaking, startling and unprecedented relief to overturn the will of the people.”

Like those filed before, the lawsuit is filled with baseless claims from anonymous sources and expert witnesses with no expertise. It offers no facts or first-hand knowledge. Some of the more bizarre allegations are that Venezuela, Iran, and China rigged the election through voting machines, a former military intelligence analyst known as Spider rigged it, and some unfathomable data analysis from an unknown source proved this. This suit, like the others, is an attempt to use Arizona courts to attack democracy, to pummel our federal and Arizona state Constitution, and the rule of law, all in violation of lawyers’ oath of admission.

This suit is so absurd it is a parody of pleading. It claims that the Arizona’s Secretary of State and Governor conspired with various domestic and international actors to manipulate Arizona’s 2020 General Election. With 300 pages of attachments based on anonymous witnesses, hearsay, and irrelevant analysis of unrelated elections, the suit has not a shred of legally admissible evidence. The suit violates litigation 101 by not even alleging that the named defendants did anything in violation of law. Their conclusions, all drawn from unreliable or unidentified sources, are pure fiction; for example, one anonymous witness blames Hugo Chavez, former President of Venezuela, now dead 7 years.

The judge dismissed the case on lack of standing, lack of case or controversy, the abstention doctrine, 11th amendment immunity, laches, mootness, and failure to state a claim. In spite of that, attorney Kolodon has filed a petition with the U.S. Supreme Court to hear the case.

All twenty-one lawyers involved have violated numerous Rules of Professional Conduct. Please note that those from out of state are subject to Arizona rules when practicing in AZ. The violations include:

1. Judges, opposing counsel, and observers have repeatedly pointed out that these cases have absolutely no merit and are completely frivolous. Bringing such claims, for some of the attorneys not once or twice (Dennis Wilenchik, Lee Miller, Langhofer, Basile, Becker) or three times (Jack Wilenchik, Viskovic) but five times (Kolodon), violates ER 3.1 Meritorious Claims and Contentions.

Attorney Langhofer was chastised by the court for not divulging pertinent facts to the court including that his “expert witness” was in fact his business partner. This violates ER 3.3 Candor Toward the Tribunal. Such behavior is also in violation of ER 3.4(f) (1). In all of the cases, the offered evidence was found to be false, and there is not much doubt the attorneys knew that which is also in violation of ER 3.3. This claim is especially egregious in the case of Lee Miller, who knew full well that there was no merit to the claim as the Arizona procedure was developed under him when he worked in the Secretary of State’s office. Arizona Republican Party v. Fontes et al. CV2020-014553.

2. Those who are partners, managers, and supervisory lawyers share full responsibility for these violations. ER 5.1
3. However, those subordinate lawyers cannot lay all the blame on their supervisors because there is no arguable question of professional duty in these cases. ER 5.2
4. Those lawyers who practiced in AZ under pro hac vice applications also must be held responsible under ER 8.5 and must be barred from ever being granted a pro hac vice application in the future.

Conclusion:

To be an attorney is a privilege, not a right. To retain the privilege, we must abide by a code of ethics. These twenty-one attorneys did not do so. We ask for a thorough and complete ethics investigation into their conduct and that appropriate action be taken based upon that investigation.

Respectfully submitted,

Dianne Post
Bob McWhirter
Roxana Bacon
Brendan Mahoney
Gail Gianasi Natale
Amelia Craig Cramer
Victor Aronow