Lawyering in the Courtroom: Frivolous Advocacy or Legitimate Public Protest?

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Introduction

Attorneys have a duty to avoid frivolous litigation.[1] But the line between an attorney's zealous advocacy for a client and frivolous litigation can sometimes be unclear. Just because a case is weak or unlikely to succeed does not mean that it is necessarily frivolous.[2] Various cases throughout our nation's history have sought relief in areas not squarely covered by existing law or else directly contrary to such law, particularly in the civil rights or social justice context. The causes pursued in these actions have rightfully supported the notion that courts are "not merely . . . forums to settle private disputes, but [can be] instruments of social change."[3] Some may argue that the recent post-presidential election cases fall into this category, raising the question of whether political causes of this nature represent a legitimate use of our courts.

I. 2020 Post-Presidential Election Litigation

A. King v. Whitmer

In Michigan, after the conclusion of the presidential election and the declaration of Joe Biden as the presumptive winner, several attorneys brought suit on behalf of registered Michigan voters and proposed Republican presidential electors against Michigan state officials, seeking to

[1] *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . . .").

[2] *See Id.* at r. 3.1 cmt. 2 (explaining that an "action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail").

[3] Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 479 (2004).

block certification of the election.[4] In ultimately ordering sanctions against attorney Sidney Powell and various others[5] for their participation in what was found to be a frivolous lawsuit, Judge Linda V. Parker expressed disapproval of using the courts as forums for protest, specifically indicating that "[w]hile 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."[6] This is especially true where the allegations are unsubstantiated.[7] Judge Parker also noted that while the protections of the First Amendment are important to American society, "it is well-established that an attorney's freedom of speech is circumscribed upon 'entering' the courtroom."[8]

Moreover, Judge Parker found that "[a]t the inception of this lawsuit, all of Plaintiffs' claims were barred by the doctrines of mootness, laches, and standing, as well as Eleventh Amendment immunity," and the plaintiffs' attorneys "did not provide a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law" to cure the defects in their initial claims.[9] Most notably, she found that the plaintiffs' lawyers had acted with "bad faith" or "improper purpose," in violation of Rule 11(b)(1).[10] This "bad faith," according to the court, was evidenced by the "Plaintiffs' attorneys . . . trying to use the judicial process to frame a public 'narrative,' [which] seem[ed] to be one of the [lawsuit's] primary purposes."[11] Additionally, Judge

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[4] Adam Brewster, *Judge sanctions Sidney Powell and others who brought baseless lawsuit to overturn Biden victory*, CBS NEWS (Aug. 26, 2021) https://www.cbsnews.com/news/sidney-powell-sanctioned-baseless-election-lawsuits/.

[5] *Id.*

[6] King v. Whitmer, 2021 U.S. Dist. LEXIS 160532, *4 (E.D. Mich. 2021).

[7] *Id.*

[8] *Id.*

[9] *Id.* at *52.

[10] *Id.* at *85.

[11] *Id.*

Parker found that plaintiffs' counsel had asserted opinions instead of facts in their allegations, "with the purpose of furthering counsel's political positions rather than pursuing any attainable legal relief."[12] Along the same lines, the attorneys also, in violation of 28 U.S.C. § 1927, "unreasonably and vexatiously multiplied the proceedings" insofar as even after conceding the mootness of their action, the attorneys continued to press their claims.[13]

Apart from ordering plaintiffs' counsel to pay the defendants' attorneys' fees and attend mandatory continuing legal education,[14] Judge Parker called into question their "fitness to practice law," and as result, also referred them to the appropriate disciplinary authorities "for investigation and possible suspension or disbarment."[15]

B. O'Rourke v. Dominion Voting Systems, Inc.

Following the 2020 election, Colorado attorneys, Gary D. Fielder and Ernest John Walker, filed a class action, purportedly on behalf of all American voters, against Dominion Voting Systems, Facebook, Mark Zuckerberg, and state officials in Georgia, Michigan, Pennsylvania, and Wisconsin.[16] The original complaint alleged that the parties had conspired to "steal" the election from Donald Trump and sought $160 billion in damages.[17] In an attempt to ameliorate some of the

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[12] *Id.* at *86.

[13] *Id.* at *51.

[14] *Id.* at *105 ("given the deficiencies in the pleadings, which claim violations of Michigan election law without a thorough understanding of what the law requires, and the number of failed election-challenge lawsuits that Plaintiffs' attorneys have filed, the Court concludes that the sanctions imposed should include mandatory continuing legal education in the subjects of pleading standards and election law")

[15] *Id.* (citing FED. R. CIV. P. 11 Advisory Committee Notes (1993 Amendment) (explaining that such referrals are available as a sanction for violating the rule)).

[16] Jan Wolfe, *Lawyers sanctioned over 'fantastical' suit alleging 2020 U.S. election was stolen*, REUTERS (Aug. 4, 2021), https://www.reuters.com/world/us/lawyers-sanctioned-over-fantastical-suit-alleging-2020-us-election-was-stolen-2021-08-04/.

[17] *Id.*; *see also* O'Rourke v. Dominion Voting Sys., Inc., 2021 U.S. Dist. LEXIS 145664, *3 (D. Colo. 2021) ("Claims included alleged violations of the Electors, Due Process, and Equal

initial concerns regarding standing and jurisdiction, plaintiffs amended the complaint to add claims under the Racketeer Influenced and Corrupt Organizations Act (RICO).[18] All of the defendants moved to dismiss the complaint for lack of standing and lack of personal jurisdiction. The court granted the motions of Dominion, Facebook, and Zuckerberg, but the plaintiffs voluntarily dismissed their claims against the state officials, rendering moot the defendants' remaining motions to dismiss.[19]

Facebook and Dominion subsequently moved for sanctions pursuant to Rule 11, 28 U.S.C. § 1927, and the court's inherent authority, as did the Michigan state officials. The Pennsylvania officials sought sanctions as well, but not under Rule 11.[20] In ordering Fielder and Walker to pay the defendants' attorneys' fees, the court found the action to be "one enormous conspiracy theory,"[21] and observed that "the effect of the allegations and relief sought would be to sow doubt over the legitimacy of the Biden presidency and the mechanisms of American democracy."[22] Importantly, the court, without mentioning Rule 11's safe harbor provision, found that it did not matter that the plaintiffs had voluntarily dismissed the suits against the Pennsylvania officials because "those voluntary dismissals came only after" the officials had moved to dismiss and the lawyers persisted in naming the state officials as defendants" in their proposed Amended Complaint.[23] As to the plaintiffs' inability to establish standing in their amended complaint, the court found that "[p]laintiffs' effort to distinguish this case from what [it] referred to as a 'veritable

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Protection Clauses of the Constitution, and alleged violations of the First Amendment, including burdens on political speech and freedom of the press.").

[18] *Id.*

[19] *Id.* at *3–*4.

[20] *Id.* at *4–*5.

[21] *O'Rourke*, 2021 U.S. Dist. LEXIS, at *7.

[22] *Id.* at *8.

[23] *Id.* at *19.

tsunami' of adverse precedent was not just unpersuasive but crossed the border into the *frivolous*."[24] Regarding the lack of personal jurisdiction, the court chastised plaintiffs' counsel, stating that "[i]t should have been as obvious to Plaintiffs' counsel as it would be to a first-year civil procedure student that there was no legal or factual basis to assert personal jurisdiction."[25]

In sanctioning both attorneys under Rule 11, Section 1927, and the court's inherent authority, it is significant that the court noted that there is a higher level of scrutiny when attorneys file actions that could negatively affect an already volatile political atmosphere.[26]

C. Rudy Giuliani's Post-Election Representations

Rudy Giuliani is a former U.S. Attorney for the Southern District of New York and former Mayor of New York City.[27] Once a presidential hopeful himself, Giuliani has long been a prominent member of the Republican Party. He joined President Trump's personal legal team in 2018.[28] In the aftermath of various representations challenging the validity of the 2020 presidential election, Giuliani faced defamation lawsuits, Rule 11 motions, and a number of disciplinary complaints for false statements made both in court and to the media.[29] Indeed, Giuliani has been

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[24] *Id.* at *23 (emphasis added).

[25] *Id.* at *27–*28. The court went on to explain that "[f]iling a lawsuit against an out-of-state defendant with no plausible good faith justification for the assertion of personal jurisdiction or venue is sanctionable conduct." *Id.* at *31–*32.

[26] *Id.* at *83–*84 ("The unique circumstances of this case, including the volatile conditions surrounding the 2020 election [and] the extremely serious and potentially damaging allegations against public servants and private entities . . . meant that any reasonable pre-filing investigation needed to involve extensive due diligence and the testing of the allegations.").

[27] Adam Davidson, *Rudy Giuliani and the Desperate Campaign to Protect the President*, THE NEW YORKER (May 3, 2018) https://www.newyorker.com/news/news-desk/rudy-giuliani-and-the-desperate-campaign-to-protect-the-president.

[28] *Id*.

[29] Nick Corasaniti, *Rudy Giuliani Sued by Dominion Voting Systems over False Election Claims,* N.Y. TIMES (Feb. 10, 2021), https://www.nytimes.com/2021/01/25/us/politics/rudy-giuliani-dominion-trump.html (detailing Dominion's lawsuit against Giuliani, which accuses him of "carrying out a viral disinformation campaign against Dominion made up of demonstrably false allegations, in part to enrich himself through legal fees and his podcast" and specifically citing

subject to an interim suspension by the New York Bar Association and a temporary suspension by the D.C. Bar Association[30] for such statements, among others things.[31]

In its decision suspending Giuliani, the New York court cited his repeated false statements that "in the Commonwealth of Pennsylvania more absentee ballots came in during the election than were sent out before the election."[32] In support of this contention, Giuliani had submitted an affidavit in which he attested that "he relied on some unidentified member of his 'team' who 'inadvertently' took the information from the Pennsylvania website."[33] The court took issue with this defense because Giuliani did not provide any specific details about the supposed "team

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statements made by Giuliani at a rally for Trump prior to the riot at the Capitol on January 6th); Jeremy Barr & Elahe Izadi, *Smartmatic Files $2.7 Billion Defamation Suit Against Fox News over Election-Fraud Claims,* WASH. POST (Feb. 4, 2021, 5:54 PM), https://www.washingtonpost.com/media/2021/02/04/smartmatic-fox-lawsuit/ ("'Mr. Giuliani and Ms. Powell needed a platform to use to spread their story,' the lawsuit states. 'They found a willing partner in Fox News.'"); Harry Litman, *Trump's Lawyers are Abusing the Courts. They Should Be Sanctioned*, L.A. TIMES (Dec. 2, 2020 10:07 AM) https://www.latimes.com/opinion/story/2020-12-02/donald-trump-election-lawsuit-rudy-giuliani-jenna-ellis-abuse-of-court (contending the Giuliani and other lawyers "abus[ed] the courts and justice system . . . [,] violat[ed] the civil rules and ethical requirements for lawyers . . . [,] [and] [i]t is past time for sanctions").

[30] In re Giuliani, 197 A.D.3d 1 (N.Y.S.3d 2021); Nicole Hong, William K. Rashbaum, & Ben Protess, *Court Suspends Giuliani's Law License, Citing Trump Election Lies*, N.Y. TIMES (June 24, 2021) https://www.nytimes.com/2021/06/24/nyregion/giuliani-law-license-suspended-trump.html; Christina Wilkie & Dan Mangan, *Rudy Giuliani's DC Law License is Suspended*, CNBC (July 7, 2021 6:24 PM) https://www.cnbc.com/2021/07/07/rudy-giulianis-dc-law-license-is-suspended-.html.

[31] *Giuliani*, 197 A.D.3d at 5 (finding that Giuliani's "false statements . . . constitute uncontroverted proof of [his] professional misconduct"); *In re* Giuliani, No. 21-BG-423 (D.C. July 7, 2021) (suspending Giuliani from the practice of law in the District of Columbia based on the New York disciplinary proceeding); *see also Giuliani's Law License in Washington Suspended*, REUTERS (July 8, 2021) https://www.reuters.com/world/us/giulianis-law-license-washington-suspended-court-document-2021-07-07/ (reporting that the District of Columbia cited New York's reasoning in its decision to suspend Giuliani).

[32] 197 A.D.3d at 5.

[33] *Id*.

member," and the only evidence related to this point in the record was the Pennsylvania open data portal, which contained a *correct* listing of the number of ballots requested."[34]

The court also cited Giuliani's multiple false and misleading statements regarding the Georgia election results, including "extensive and wide-ranging claims about Dominion Voting Systems Inc.'s voting machines manipulating the vote tallies."[35] While the court did not reach the merits of Giuliani's comments about Dominion, it found his recurrent statements that the results in Georgia were fraudulent—even after the hand-count audits certified the outcome—to be ethically improper.[36] Giuliani also made serial dubious claims to the media that Georgia election officials engaged in illegal counting of mail-in ballots based on selected portions of a video.[37] However, the court found that when the video was viewed in its entirety, Giuliani could not have reasonably concluded that "illegal votes were being counted."[38] Significantly, Giuliani has since admitted that he failed to investigate the truthfulness of some of the election-fraud theories he advocated.[39]

Giuliani's discipline in New York was based on perceived violations of the following provisions of the New York Rules of Professional Conduct: (1) Rule 3.3(a), for knowingly making false statements of fact or law to a tribunal; (2) Rule 4.1, for knowingly making false statements of fact or law to third persons during the course of a representation; (3) Rule 8.4(c), for engaging

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[34] *Id*.
[35] *Id*. at 9.
[36] *Id.*
[37] *Id*. at 12.
[38] *Id.* The court also found that Giuliani's unsubstantiated claims that underage individuals, felons, and dead persons voted in Georgia and that "illegal aliens" had voted in Arizona to provide further support for his interim suspension. *Id*. at 11–12.
[39] Rachel Maddow, *Rudy Giuliani, Under Oath, Reveals Baseless Origins of Trump Big Lie*, MSNBC (Oct. 1, 2021), https://www.msnbc.com/rachel-maddow/watch/rudy-giuliani-under-oath-reveals-baseless-origins-of-trump-big-lie-claims-122458181721.

in conduct involving dishonesty, fraud, deceit, or misrepresentation; and (4) Rule 8.4(h), for engaging in conduct that adversely reflected on his fitness as a lawyer.[40] The court reasoned that there were uncontroverted claims of misconduct by Giuliani and that "[u]nder the Rules of Professional Conduct, the prohibition against false statements is broad and includes misleading statements as well as affirmatively false statements."[41] In defense of his statements surrounding the election, Giuliani raised the issue that this "investigation into his conduct violate[d] his First Amendment right of free speech."[42] The court, however, was unpersuaded,[43] concluding that "[w]hile there are limits on the extent to which a lawyer's right of free speech may be circumscribed, these limits are not implicated by the circumstances of the knowing misconduct that this Court relies upon in granting interim suspension in this case."[44]

II. Scope and Application of the Pertinent Rules

As evidenced by the foregoing examples, there are various procedural and ethical constraints on a lawyer's courtroom advocacy, even when that advocacy is in the furtherance of presidential interests. As actors within the judicial branch, lawyers are subject to the inherent powers of the courts of the United States.[45] The legal profession is largely self-regulating, with lawyers essentially making and enforcing the rules that govern their behavior.[46] Still, the authority

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[40] *Giuliani*, 197 A.D.3d at 2.

[41] *Id.* at 5.

[42] *Id.* at 6.

[43] *Id.* (citing *Gentile*, 501 U.S. 1030).

[44] *Id.* at 7.

[45] CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 23 (1986) ("[T]he majority of American courts have claimed unusual and sometimes sweeping regulatory powers when dealing with the legal profession.").

[46] *See* STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 8 (Rachel E. Barkow et al. eds., 11th ed. 2018) (discussing the Model Rules of Professional Conduct and how proponents of these rules "argue that self-regulation is the hallmark of a profession"); *see also* MODEL RULES OF PRO. CONDUCT Preamble ¶ 10 ("The legal profession is largely self-governing.").

to regulate the legal profession remains almost exclusively within the judiciary's control.[47] The court system is charged with "bear[ing] the major political responsibility for the good or poor health of the legal profession."[48] In regulating litigation-related conduct, however, it is not always clear where a court will or must draw the line between zealous and frivolous advocacy,[49] making it difficult for lawyers to determine whether there may be instances in which they can legitimately use the courtroom as a forum for political or social protest.

As already discussed, there are various ethical and procedural rules that establish the behavioral boundaries. If a lawyer knows or reasonably should know, based on an appropriate investigation, that a contention or position is wholly without legal or factual merit, then the lawyer can and should be subject to sanction and/or discipline. As part of providing competent representation, a lawyer must prepare thoroughly and diligently.[50] In litigation, this invariably involves conducting an adequate pre-filing investigation into the bases for claims and positions to be asserted.[51] Furthermore, under Model Rule 3.1, lawyers are ethically obligated to abstain from "bring[ing] or defend[ing] a proceeding, or assert[ing] or controvert[ing] an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."[52] Lawyers also have a duty

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[47] *Id.* (concluding that the inherent powers doctrine "prohibits any other constitutional body, legislative or executive from participating in the regulation of lawyers").

[48] *Id.* at 24.

[49] *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N); FED. R. CIV. P. 11.

[50] MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 5 (AM. BAR ASS'N 2018).

[51] *Id.* at r. 3.2 cmt. 2 ("What is required of lawyers . . . is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions.").

[52] *Id.* at r. 3.1. Rule 3.1 provides the ABA's counterpart to FRCP Rule 11's prohibition against frivolous litigation.

to expediate litigation[53] and must exhibit candor toward the tribunal.[54] If a lawyer determines that a previous statement made or position taken has no basis in fact or law, then the lawyer must correct it.[55] More broadly, lawyers are obligated, as officers of the court, to preserve the integrity of the judicial process, even if they must disclose information otherwise protected by the duty of confidentiality.[56]

In addition, lawyers are generally required to act with fairness towards opposing parties and their counsel.[57] Consistent with this, at trial, for example, a lawyer may not "allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence."[58] In the same vein, in representing a client, lawyers must not "use means that have no substantial purpose other than to embarrass, delay, or burden a third person."[59] Significantly, lawyers who hold public office may be subject to an even higher standard of professional conduct.[60]

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[53] *Id.* at r. 3.2.

[54] *Id.* at r. 3.3.

[55] *Id.* at r. 3.3(a)(1) ("A lawyer shall not . . . fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.").

[56] *Id.* at r. 3.3 cmt. 12.

[57] *Id.* at r. 3.4

[58] *Id.* at r. 3.4(e).

[59] *Id.* at r. 4.4(a)

[60] *Id.* at r. 8.4 cmt. 7 ("A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers.").

The Federal Rules of Civil Procedure also provide an avenue for redress when attorneys pursue frivolous actions.[61] While "belief alone cannot form the foundation for a lawsuit,"[62] Rule 11 is not meant to "chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."[63] Courts have recognized that lawyers are individuals who may assert different interpretations of the given law or facts, and therefore the critical inquiry in determining whether Rule 11 sanctions are appropriate is whether an attorney conducted a reasonable inquiry under the circumstances.[64] Sanctions under Rule 11 are far from routine, especially considering Rule 11's "safe-harbor provision," which allows an attorney 21 days to amend or withdraw an offending paper to avoid potential sanction.[65] The availability of Rule 11 sanctions, apart from the prospect of discipline, raises the question of whether one of these approaches should be used to the exclusion of the other. Or is it appropriate for a lawyer to be subject to both Rule sanctions and professional discipline under Rule 3.1?

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[61] FED. R. CIV. P. 11(b)(2) ("By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . 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.").

[62] O'Rourke v. Dominion Voting Sys., Inc., 2021 U.S. Dist. LEXIS 145664, *35 (D. Colo. 2021).

[63] FED. R. CIV. P. 11 Advisory Committee's Note to 1983 Amendment.

[64] *O'Rourke*, 2021 U.S. Dist. LEXIS at *35 (holding that "whether an attorney's beliefs as to the law and the facts were formed after 'an inquiry reasonable under the circumstances'" is the critical inquiry when determining whether Rule 11 sanctions are appropriate).

[65] Fed. R. Civ. P. 11(c)(2) (requiring a complaining attorney to file a motion for Rule 11 sanctions with opposing counsel, but the motion "must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets"). *See, e.g.*, Lonnie T. Brown, Jr., *Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty to Report*, 62 OHIO STATE L.J. 1555 (2001).

In addition to the ethics rules and Rule 11, a court can require a lawyer to pay costs and attorneys' fees, if the offending lawyer's conduct "unreasonably and vexatiously" multiplied the proceedings.[66] Under 28 U.S.C. § 1927, a showing of "bad faith" is required, which may include:

> (1) acting recklessly or with indifference to the law, as well as by acting in the teeth of what he knows to be the law; (2) when an attorney is cavalier or "bent on misleading the court;" (3) intentionally acts without a plausible basis; (4) when the entire course of the proceedings was unwarranted; (5) or when certain discovery is substantially unjustified and interposed for the improper purposes of harassment, unnecessary delay and to increase the costs of the litigation.[67]

D. The Courtroom as a Forum for Protest

Although there are ample ethical and procedural constraints to address frivolous litigation tactics, the question that remains is: When is an action or contention "frivolous" for purposes of discipline or sanctions? Is it possible for an objectively frivolous action or contention to be tolerated or permitted because it relates to an important political or social issue? *Saltany v. Reagan*[68] provides a good example of a situation where this might be conceivable.

The plaintiffs in *Saltany* sued civilian and military officials of the United States government, British Prime Minister Margaret Thatcher, and President Ronald Reagan, as well as the United States and United Kingdom "to recover damages for death, personal injury, and the destruction of property [that occurred] in the course of air strikes by U.S. military forces on targets in . . . Libya in April, 1986."[69] The district court granted defendants' motion to dismiss based on

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[66] 28 U.S.C. § 1927 ("Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.").

[67] *O'Rourke*, 2021 U.S. Dist. LEXIS at *40 (citing Miera v. Dairyland Ins. Co., 143 F.3d 1337, 1342 (10th Cir. 1998)).

[68] 702 F. Supp. 319 (D.D.C. 1988); 886 F.2d 438 (D.C. Cir. 1989).

[69] 702 F. Supp. at 320.

sovereign and official immunity but denied a Rule 11 motion.[70] Recognizing that the suit "was brought as a public statement of protest of Presidential action with which counsel (and, to be sure, their clients) were in profound disagreement," the district court determined that sanctions should be denied even though the action had "no hope whatsoever of success."[71] The district court reasoned "that the case [was not] frivolous so much as it [was] audacious" and that the courts of the United States can "serve in some respects as a forum for making such statements" of protest.[72]

On appeal, the court of appeals affirmed the district court's granting of the motion to dismiss[73] but reversed and remanded with respect to the denial of sanctions.[74] In particular, the court expressly disagreed with the district court's position that federal courts can serve as forums for protest.[75] Whereas the district court had held that the substantial injuries for which the suit was brought were enough to warrant no action under Rule 11, the court of appeals concluded that the "seriousness of the injury . . . has no bearing upon whether a complaint is properly grounded in

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[70] *Id.* at 321–22.

[71] *Id.* at 321.

[72] *Id.* (relying on Justice Stevens's reasoning that there should be "the strongest presumption of open access to all levels of the judicial system . . . [and that] [c]reating a risk that the invocation of the judicial process may give rise to punitive sanctions simply because the litigant's claim is unmeritorious could only deter the legitimate exercise of the right to seek a peaceful redress of grievances through judicial means" (quoting *Talamini v. Allstate Insurance Co.,* 470 U.S. 1067, 1070–71 (1985) (Stevens, J., concurring))).

[73] *Saltany v. Reagan*, 886 F.2d 438, 439 (D.C. Cir. 1989).

[74] In 1989, when this case was decided, sanctions were mandated under Rule 11 and precedent at the time supported imposing sanctions against the plaintiffs/petitioners. *See* FED. R. CIV. P. 11 (1983); *Saltany*, 886 F.2d at 439 (finding that it was a "well established principle that the court must impose a sanction 'once it has found a violation of the rule.'" (quoting Weil v. Markowitz*,* 829 F.2d 166, 171 (D.C. Cir.1987) (footnote omitted)).

[75] *Id.* at 440 (noting that it is not "a proper function of a federal court to serve as a forum for 'protests,' to the detriment of parties with serious disputes waiting to be heard"). The court also reasoned that the district court's reliance on *Talamini* was misplaced. *See id.* (contending that the decision in *Talamini* "in no way speaks to the use of the courts as any sort of political or protest forum").

law and fact."[76] Indeed, the court ultimately held that "filing a complaint that 'plaintiffs' attorneys surely knew' had 'no hope whatsoever of success'" could not "be anything but a violation of Rule 11."[77]

The court of appeals' approval of Rule 11 sanctions in *Saltany* has been criticized by some in terms of its determination that the suit was frivolous. In particular, one critic has argued that the hopelessness of the litigation did not make the action frivolous because the plaintiff's legal argument was not unreasonable.[78] "Rather, it was the political and legal reality that U.S. courts have refused to apply the Nuremberg precedent, and more generally international law norms" that made the suit hopeless.[79]

Following the same reasoning as the *Saltany* district court, proponents of using the courtroom as a forum for protest argue that courts have historically provided "[fora] for making such statements . . . and should continue to do so."[80] "Incremental changes in settled rules of law often result from litigation," so claiming that a cause is "hopeless" because of settled law does not automatically make it frivolous and sanctionable.[81]

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[76] *Id.*

[77] *Id.*

[78] *Id.* at 520.

[79] *Id.*

[80] *Saltany*, 702 F. Supp. at 322. In arguing for the continued use of courts as a forum for protest, Lobel discusses historical examples of abolitionists, suffragists, and the ACLU doing so. *See* Lobel, *supra* note 3, at 493 (discussing how "the tradition of using litigation as a forum for protest to obtain favorable publicity for a political cause dates back to before the American Revolution").

[81] *See Talamini*, 470 U.S. at 1070 (Stevens, J. concurring) (arguing that open access to the courts is of utmost importance and "[c]reating a risk that invocation of the judicial process may give rise to punitive sanctions because the litigant's claim is unmeritorious could only deter the legitimate exercise of the right to seek a peaceful redress of grievances through judicial means").

It is also important to note that the court of appeals did not mention the First Amendment in concluding that Rule 11 sanctions were warranted under the circumstances[82] However, prohibiting the filing of public-protest actions in federal court may actually violate that provision. The Supreme Court has stated that "litigation is a 'form of political expression' protected by the First Amendment."[83] Access to the courts is part of the right to petition the government for redress, and the Court has reasoned that "filing a complaint in the court is a form of petitioning activity."[84] Furthermore, public interest lawsuits "are at the core of the First Amendment's protective ambit and are thus entitled to greater protection."[85] Nevertheless, this does not address when litigation brought in protest is frivolous and/or at great risk to public confidence in the United States government and courts. In an analogous scenario, the Supreme Court has called for a balancing of a lawyer's First Amendment right to make public statements regarding pending litigation and the potential effect that such statements could have on an adjudicative proceeding.[86] Model Rule 3.6 recognizes that "there are vital social interests served by the free dissemination of information about events having legal consequences and about the legal proceedings themselves."[87]

Professor Carol Rice Andrews has argued that because the Supreme Court has held that the Due Process Clause does not give individuals the right to be heard in court, the Petition Clause of

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[82] *See* Lobel, *supra* note 3, at 523 (quoting *Saltany*, 886 F.2d at 440).

[83] *Id.* at 510–11.

[84] *Id.* at 511 (citing Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus. Inc., 508 U.S. 49, 56 (1993)).

[85] *Id.* at 511.

[86] Gentile v. State Bar of Nev., 501 U.S. 1030, 1070–76 (finding it constitutionally permissible for a state to prohibit lawyers from making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding" (citing MODEL RULE 3.6)).

[87] Lobel, *supra* note 3, at 525.

the First Amendment[88] may represent "the best avenue for asserting a right of court access."[89] She recognizes, however, the difficulty of defining the parameters of rights in this context.[90] The Court has consistently maintained that "court access is fundamental," but it seemingly has not gone so far as to give this important concept constitutional status.[91] Yet, Professor Andrews has noted that the Court seems to have at least acknowledged the importance of court access alongside the right of political expression.[92] Specifically, in *NAACP v. Button*,[93] it found that encouraging Black Virginians "to utilize NAACP lawyers and file school desegregation suits"[94] did not constitute prohibited solicitation.[95] The Court ultimately held that the NAACP's actions were modes of expression protected by the First Amendment and recognized the importance of court access for the vindication of constitutional rights.[96]

Although the *Button* Court did not sanction use of the courts as a forums for protests, the often slow progress in the civil rights area appears to make cases of this nature especially suitable for protest-inspired litigation.[97] In this regard, Professor Jules Lobel has cited specific examples

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[88] U.S. Const. amend. I ("Congress shall make no law . . . abridging the . . . right of the people . . . to petition the government for a redress of grievances.").

[89] Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 Ohio State L.J. 557, 559–560 (1999).

[90] *Id.* at 561 ("The historical record offers little insight into the mere existence of a right to petition courts, let alone the proper contours of that purported right.").

[91] *Id.* at 562.

[92] *Id.* at 576 ("In these cases, the Court primarily addressed infringement of other First Amendment rights, namely those of association and political expression, but obliquely referred to both the right of court access and the right to petition.").

[93] 371 U.S. 415 (1963).

[94] Andrews, *supra* note 90, at 576.

[95] *Id.* ("[U]nder the conditions of modem government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances." (quoting 371 U.S. at 430)).

[96] 371 U.S. at 430.

[97] *See* Lobel, *supra* note 3, at 486 (arguing for courts to be utilized more as forums for protest because "[e]mpirical studies in such disparate areas as pay equity reform litigation, disability rights cases, school financial reform litigation, environmental and consumer litigation,

of how suffragists and abolitionists previously utilized courts to educate the public about their causes, demonstrating historical support for resorting to the courts for purposes of protest[98] to encourage society and governmental actors to remedy . . . injustice[s] which otherwise will continue unchecked."[99] While tenable, Lobel's position has clearly not been embraced by many scholars or courts, and is, of course, in tension with the prohibitions related to frivolous litigation.[100]

III. Conclusion

Because the line between zealous advocacy and frivolous litigation is, at times, tenuous, the question remains whether, and how intensely, courts should investigate potential ethical violations of attorneys who use the courts as forums for protest. The post-election lawsuits seem to be examples of lawyers engaging in such a strategy. The response by judges thus far suggests that, at least in this context, the First Amendment does not provide protection, notwithstanding the highly political nature of these cases. Rule 11 and the related ethical proscriptions focus on the objective factual and legal merits of claims and defenses, not necessarily on the character of the cause or the motivation of the litigants and their lawyers. It remains to be seen whether actions dealing with other types of high-profile matters, perhaps not so lacking in factual support, would provide a stronger argument for using courts as forums for protest.

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and civil rights organizing have demonstrated the significant indirect benefits that litigation can achieve for plaintiffs who use courts to mobilize public sentiment or to provide leverage for their claims").

[98] *Id*. at 494–504 (discussing litigation by abolitionists against the Fugitive Slave Act and how lawyers who brought these claims were not penalized for frivolous litigation); *Id.*at 505–509 (discussing suffragists' usage of the courtroom to educate the public about their cause).

[99] *Id*. at 561.

[100] *Id.* at 479 (contending that the model of the court as a forum for protest has been largely "ignored by scholars and viewed as illegitimate by some courts").

Panel #1