8-22-2013

Flying "A" Ranch v. Lewies Appellant's Brief Dckt. 40987

IN THE SUPREME COURT OF THE STATE OF IDAHO

FLYING "A" RANCH, INC., an Idaho Corporation, CLEN ATCHLEY, EMMA ATCHLEY, LAURA PICKARD, CLAY PICKARD, GEORGE TY NEDROW, and DAVID TUK NEDROW,

Petitioners,

and

KARL H. LEWIES,

Real Party in Interest-Appellant

vs.

BOARD OF COUNTY COMMISSIONERS FOR FREMONT COUNTY, IDAHO, a political subdivision of the state of Idaho, RONALD "SKIP" HURT, in his official capacity, and LEROY MILLER, in his official capacity,

Respondents.

E.C. GWALTNEY, III and LANA K. VARNEY,

Petitioners,

and

KARL H. LEWIES,

Real Party in Interest-Appellant

DOCKET NO. 40987-2013

APPELLANT'S BRIEF

vs.

BOARD OF COUNTY COMMISSIONERS FOR FREMONT COUNTY, IDAHO, a political subdivision of the state of Idaho, RONALD "SKIP" HURT, in his official capacity, and LEROY MILLER, in his official capacity

Respondents.

APPELLANT'S BRIEF

Appeal from the District Court of the Seventh Judicial District of the State of Idaho,

in and for the County of Fremont

HONORABLE GREGORY W. MOELLER, District Judge, Presiding

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The Real Party In Interest – Appellant, Karl H. Lewies ("Lewies"), submits this brief in support of his appeal from the final decision of the District Court of the Seventh Judicial District in and for Fremont County (the "Court").

I. STATEMENT OF THE CASE

A. Nature of the Case

The Court imposed Rule 11 sanctions on Lewies, *sua sponte,* because the presiding judge found it "unseemly" that Lewies, as a prosecuting attorney – elect for Fremont County, would file petitions for judicial review against the board of county commissioners for Fremont County ("Commissioners"), a known future client. (Transcript, p. 4, lines 23-25; p. 5, lines1-2; p. 5,lines 23-25; p. 6, lines 22-23; p. 9, lines 8-9; and R. 182 at 188.) Although Judge Moeller found no ethical or legal violations (R. 182 at 188), he believed Lewies had filed the petitions because of a "political grudge"[1] against the Commissioners. As the Court itself said to Lewies, "This may sound like a rhetorical question, but it really isn't a rhetorical question. What were you thinking filing these Petitions against Fremont County just weeks after you were elected to be Fremont County Prosecuting Attorney?" (Transcript p. 4, lines 23-25; and p. 5, lines 1-2)

B. Statement of Facts

On November 20, 2012, Lewies was contacted by a private client, Mr. Clen Atchley, owner of Flying "A" Ranch, who requested Lewies' assistance on an urgent legal matter. Mr.

[1] See R.182 at 189, footnote 14, where Judge Moeller writes that, *"the Court merely advised [Lewies] to avoid allowing a* ***political grudge (emphasis added)*** *to interfere with his professional judgment."*

Atchley explained that the Commissioners had recently adopted an official county road map (the "Map") depicting a private ranch road owned by Atchley, and others, as a Fremont County public road. (R. 65). In reviewing the Map, Lewies discovered that another private road belonging to family friend, Mr. Eugene Gwaltney, III, was also depicted as a Fremont County public road. (R. 65). Atchley and Gwaltney, respectively, requested Lewies file petitions for judicial review to preserve and protect their legal rights; and Lewies agreed to do so, with the caveat that he would have to withdraw from representing Atchley and Gwaltney soon after filing their petitions because he was the prosecuting attorney – elect for Fremont County and would be sworn-in to office as Fremont County's prosecuting attorney in mid-January, 2013 thereby giving rise to an actual conflict of interest on that date. Lewies accepted the limited representation (R. 65) and on November 23, 2012, filed two petitions for judicial review concerning the Map, one for Flying "A" Ranch, *et. al.* (R. 8) and the other for Gwaltney, *et. al.* (R. 256). On December 5, 2012, presiding district judge, Gregory W. Moeller, issued his Orders Governing Procedure on Review. (R. 15 and R. 263).

On January 7, 2013, in his final week as deputy prosecuting attorney for Fremont County,[2] Blake G. Hall, Esq. ("Hall"), filed motions to disqualify Lewies[3] (R. 18 and R. 271);

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[2] Blake G. Hall, Esq., was serving his final week as deputy prosecuting attorney for Joette C. Lookabaugh, Esq., the lame-duck Fremont County prosecuting attorney who had recently lost her bid for re-election to Lewies, her political opponent, by a margin of 65% to 35%. As District Judge Gregory W. Moeller, himself, stated, *"[A]nd, again, I understand that there's been acts of pettiness between these parties on other matters at other times, but there needs to come a time when that ends and I'm going to do what I can to see that it ends in this case..."* (Transcript p. 34, lines 15-19).

[3] Lewies argued that, *"I believe that Blake Hall filed his motion to disqualify me for an improper purpose, to harass me."* (R.64 at 65, ¶ 10). As evidence of this, Lewies pointed out to the Court that, *"Mr. Hall failed to make any good faith effort to confer or attempt to confer with me" before filing his motions to disqualify. "And Your*

and also on that same day, Lewies filed motions to withdraw from representation in both cases. (R. 32 and R. 266). On January 14, 2013, pursuant to a stipulation for substitution of counsel, W. Lynn Hossner, Esq., substituted for Lewies as petitioners' counsel in Case No. CV-12-580. (R. 42). On January 22, 2013, the Court conducted a hearing on Hall's motions to disqualify Lewies and also on Lewies' motions to withdraw. Initially, the Court *"allowed Mr. Lewies to withdraw"* (Transcript p. 24, lines 12-13); but later reversed itself, instead ruling that it, *"bars Mr. Lewies from further representing Petitioners or Respondents"* (R. 106, ¶ 1); but then, even later, it its Memorandum Decision took a different and most unusual posture that it had, *"effectively grant[ed] both the motion to disqualify and the motion to withdraw."* (R. 184). The Court also ordered Lewies to personally pay $1,185.00 in attorney's fees for Hall's work on the motions to disqualify. (R. 182 at 191).

On January 30, 2013, Hall filed his affidavit of attorney's fees (R. 50) and the next day Lewies filed his objection to attorney's fees. (R. 54). On February 26, 2013, the Court conducted a hearing on its award of attorney's fees. (Transcript, p. 40). On March 29, 2013, the Court issued its Memorandum Decision Re: Rule 11 Sanctions ("Memorandum Decision"). (R. 182). On April 4, 2013, the Court entered its final judgment re: Rule 11 sanctions ("Judgment"). (R. 194). On May 2, 2013, Lewies filed a notice of appeal (R. 200); and on May 13, 2013 Lewies

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Honor, this would have saved you all this hassle if [Hall] picked up the phone and said, 'Hey, Karl, looks like you've got a conflict on the horizon there, what are you going to do, are you going to hang onto those private clients and try to play both sides of this game?' I'd say absolutely not. In fact, I've made it clear to my clients on the day I accepted representation I'm going to have to withdraw...If that call had been made, Your Honor, and under the Rule 11 of the Rules of Civil Procedure that sort of a reasonable inquiry is to be made before filing Motions. I mean, you know, you have to inquire...there is a standard for a reasonable inquiry before filing documents, Rule 11." (Transcript p. 61, lines 15-25; p. 64, lines 18-21; and p.65, lines 7-8).

filed an amended notice of appeal in CV-12-580 (R. 236) and a notice of appeal in CV-12-581. (R. 325).

II. ISSUES PRESENTED ON APPEAL

1. Whether the Court abused its discretion in imposing I.R.C.P. 11(a)(1) sanctions against Lewies based on the following extraneous conduct, rather than a violation of Rule 11's signature certification requirements:

(a.) Because Lewies filed the petition for judicial review against a *"known future client;"*

(b.) Because Lewies did not realize that the *"Fremont County voters were entitled to expect that the person they had just elected as County prosecutor (i.e. Lewies) would not be filing new legal actions against the County;"*

(c.) Because, by filing the petition, Lewies *"initiated a chain of events that any reasonable attorney should have anticipated would create mistrust and animosity from everyone involved;"*

(d.) Because of Lewies' *"timing"* relative to filing the petition;

(e.) Because Lewies *"delayed in withdrawing as counsel"* for petitioners;

(f.) Because Lewies *"delayed in withdrawing as counsel"* for respondents;

(g.) Because Lewies *"failed to understand that his actions would almost immediately deprive petitioners of legal counsel;*

(h.) Because *"Lewies should have anticipated that his actions would deprive his*

future clients, the County and the board of commissioners, of representation;" and

(i.) Because the court found Lewies' actions *"unseemly."*

2. Whether the petitions for judicial review filed by Lewies in either case number CV-12-580 or CV-12-581violated the signature certification requirements of I.R.C.P. 11(a)(1)?

3. Whether the Court erred in finding that Lewies *"had not withdrawn as counsel for the County"* insofar as Lewies never represented the County in either case number CV-12-580 or CV-12-581in the first instance?

4. Whether the court erred in finding that Lewies' actions *"delayed adjudication of the petitions for judicial review?"*

5. Whether the Court erred by *"deeming it appropriate"* for the County to have retained private legal counsel, Blake G. Hall, Esq., to represent it in case numbers CV-12-580 and CV-12-581 even though the legal question whether the County's hiring of private counsel in violation of the Idaho Constitution's "necessity requirement" had been voluntarily withdrawn by motion of the Office of the Prosecuting Attorney, and therefore, was not a question presented to the court for its decision?

6. Whether the Court erred in finding that Lewies was unable to *"complete"* his representation of petitioners?

7. Whether Judge Gregory W. Moeller demonstrated bias or prejudice against Lewies by engaging in the following actions:

(a.) By initiating an ex parte communication with Lewies immediately following the January 22, 2013 court hearing in this matter by inviting Lewies into chambers and

proceeding to warn him, *"You have to decide what hill you want to die on."* Then, further warning Lewies, *"This conversation never happened;"*

(b.) After issuing warnings to Lewies, as described above, then changing his award of attorney's fees to the County based on the prevailing party standard under I.C. § 12-117 into I.R.C.P. 11(a)(1) sanctions against Lewies *sua sponte*;

(c.) By disregarding Lewies' arguments and allegations of unethical conduct and improper purposes engaged in by the County's counsel, Blake G. Hall, Esq.; and

(d.) By issuing a publically available Memorandum Decision Regarding Rule 11 Sanctions against Lewies thereby causing damage to Lewies' professional reputation?

III. ARGUMENT

A. Scope of Review on Appeal.

The abuse of discretion standard is used to review the award of sanctions under I.R.C.P. 11(a)(1). Sun Valley Shopping Center, Inc. v. Idaho Power Company, 119 Idaho 87, 803 P.2d 993 (Idaho 1990). The sequence of inquiry is: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. Sun Valley v. Idaho Power, *supra*, (citing State v. Hedger, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989)).

Idaho's adoption of amended Rule 11, containing language identical to the Federal Rule, presumably carries with it the interpretation placed upon that language by the federal courts.

Durrant v. Christensen, 117 Idaho 70, 785 P.2d 634 (Idaho 1990). Both amended rules require that pleadings, motions and other papers meet certain criteria, and failure to comply may result in the imposition of sanctions. I.R.C.P. 11, as amended, provides in pertinent part:

> (a)(1) *Signing of Pleadings, Motions, and Other Papers; Sanctions.* Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one (1) licensed attorney of record of the state of Idaho, in the attorney's individual name, whose address shall be stated before the same may be filed. A party who is not represented by an attorney shall sign the pleading, motion or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. ***The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.*** (emphasis added) If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

A trial court's decision to impose sanctions under Rule 11 is reviewed for an abuse of discretion. Cooter & Gell v. Hartmarx, 496 U.S. 384, 405, 110 S. Ct. 2447, 110 L.Ed.2d 359 (1990). As to fact findings, the trial court abuses its discretion when its findings are clearly erroneous. Ibid. As to questions of law, the trial court abuses its discretion when it misinterprets or misapplies the law. Id.

Federal court decisions regarding Fed. R. Civ. P. 11 hold that the "bad faith" standard is no longer applicable. Rather, the federal courts apply an objective standard of "reasonableness under the circumstances." Durrant v. Christensen, *supra*, (citations omitted). In Zaldivar v. City of Los Angeles, 780 F.2d 823, 829 (9th Cir. 1986), the Ninth Circuit Court of Appeals held that subjective bad faith in not an element to be proved under Rule 11, but sanctions shall be assessed if the pleading is frivolous, legally unreasonable, or without factual foundation. In Eastway Construction Corp. v. City of New York, 762 F.2d 243 (2d Cir.1985) the circuit court of appeals held that "the language of Rule 11 explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a *reasonable inquiry* into the viability of a pleading before it is signed...A showing of subjective bad faith is no longer required to trigger the sanctions imposed by the rule." Durrant, supra, (citing Zaldivar v. City of Los Angeles, 780 F.2d 823, 829 (9th Cir. 1986), and Eastway Construction Corp. v. City of New York, 762 F.2d 243 (2d Cir.1985)).

In light of the federal decisions interpreting language that is identical to that contained in the Idaho version of Rule 11, the Idaho Supreme Court held that reasonableness under the circumstances, and a duty to make a reasonable inquiry prior to filing an action, is the appropriate standard to apply. A showing of subjective bad faith is no longer necessary for the imposition of sanctions. Durrant, *supra*.

B. The Court abused its discretion in imposing I.R.C.P. 11(a)(1) sanctions against Lewies based on extraneous conduct, rather than a violation of Rule 11 signature certification requirements.

The purpose of Rule 11 is to deter baseless filings. CQ Intern. Co. Inc. v. Rochem Intern.

Inc., USA, 659 F.3d 53, 62, (1st Cir. 2011). Rule 11 does not apply to misconduct unrelated to signed motions, pleadings or other papers. *See, e.g.,* Ali v. Tolbert, 636 F.3d 622, 626-27 (D.C. Cir. 2011); Lamboy-Ortiz v. Ortiz Velez, 630 F.3d 228, 245 (1st Cir. 2010) (*"[N]o matter how vexatious or disruptive counsel's conduct was during trial, Rule 11 cannot reach such misconduct."*); Lawrence v. Richman Group of CT LLC, 620 F.3d 153, 158 (2d Cir. 2010) (*"Rule 11 does not...authorize sanctions for merely frustrating conduct."*). Rule 11 does not apply to attorney conduct that does not involve the filing or other presentation of a paper to the court. Ibid. It is not an all-purpose tool for regulating party or lawyer conduct. *See* Lawrence v. Richman Group of CT LLC, *supra*. Whether a lawyer has satisfied Rule 11 is measured on an objective basis. *See* Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S. 533, 111 S.Ct. 922, 112 L.Ed. 2d 1140 (1991).

In Sun Valley Shopping Center v. Idaho Power Company, *supra*, citing Durrant v. Christensen, the Idaho Supreme Court noted that in interpreting Rule 11 the federal courts have focused on "an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed." The Idaho Supreme Court held that, "reasonableness under the circumstances, and a duty to make a reasonable inquiry prior to filing an action, is the appropriate standard to apply." Ibid.

In the instant case, the Court provided a litany of reasons (R. 182 at 188) why it imposed Rule 11 sanctions against Lewies, however, as the discussion below reveals, each and every reason

dealt with extraneous conduct,[4] rather than the actual petitions themselves and whether they comported with the signature certification requirements of Rule 11.

First, the Court reasoned that, *"...Lewies' filing of the petitions against a known, future client was a significant offense against the integrity of the judicial system."* (R. 182 at 188). Judge Moeller made it very clear that he strongly disagreed (R. 106, ¶ 1) with Lewies' decision to accept representation of private clients and proceed to file petitions for judicial review on their behalf against the Commissioners given that Lewies would be sworn-in as Fremont County prosecuting attorney about two months after filing the petitions, and would therefore, become the legal advisor for the Commissioners. However, even if Judge Moeller disagreed with Lewies' actions, he cited no legal authority whatsoever in his Memorandum Decision that would prohibit Lewies, or any other attorney for that matter, from filing a legal action against a known future client.[5] Certainly, Rule 11 contains no such "known future client" prohibition. By sanctioning Lewies under Rule 11 on such grounds, the Court either misinterpreted or misapplied the law, and by doing so, abused its discretion.

Second, the Court reasoned that, *"Fremont County voters were entitled to expect that the*

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[4] The extraneous conduct that Judge Moeller concerned himself with centered around his unfounded and highly subjective belief that Lewies' motives for filing the petitions were improper and somehow related to a "political grudge" against the Commissioners. (See, e.g., R. 182 at 189, fn. 14)

[5] Indeed, at the direction of Judge Moeller, Lewies contacted Idaho State Bar counsel, Brad Andrews, to obtain his opinion on the whether a prosecutor-elect violates the Idaho Rules of Professional Conduct, if he files a lawsuit against the board of county commissioners that he will be representing in the *future*. Mr. Andrews informed Lewies that the "bright-line" test for determining whether a conflict of interest existed was the date on which the prosecutor-elect was officially sworn-in. Mr. Andrews reasoned that, until the prosecutor-elect is sworn-in, he *does not* represent the county commissioners. (*See*, Transcript p. 52, lines 21-25; p. 53, lines 1-21; and p. 54, lines 1-7)

person they had just elected as County prosecutor (i.e. Lewies) would not be filing new legal actions against the County." (R. 182 at 188). However, even if the Court from its vantage point in neighboring Madison County, had special insights into what Fremont County voters were expecting from their prosecutor-elect,[6] and even if Judge Moeller personally and strongly disagreed with Lewies' actions, he cited no legal authority that requires a prosecutor-elect to satisfy voters' expectations (let alone satisfy the Court's own subjective notions of such voter expectations). Certainly, Rule 11 contains no such "voter satisfaction" requirement. By sanctioning Lewies under Rule 11 on such grounds, the Court misinterpreted or misapplied the law, and in doing so, abused its discretion.

Third, the Court reasoned that Lewies, *"initiated a chain of events that any reasonable attorney should have anticipated would create mistrust and animosity from everyone involved."* (R. 182 at 188). However, even if the Court had been correct that Lewies created *"mistrust and animosity from everyone involved"* by filing the petitions, it cited no legal authority that obligated Lewies to refrain from creating such subjective emotional states. Certainly, Rule 11 imposes no such "emotionally-based" requirement. By sanctioning Lewies under Rule 11 on such grounds, the Court either misinterpreted or misapplied the law, and by doing so, abused its discretion.

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[6] In fact, voters greatly appreciated Lewies' earlier efforts to reign-in the Commissioners when they illegally approved a controversial gravel pit in the county. Lewies sued the Commissioners in Fremont County Case No. CV-2011-215 alleging, inter alia, bias, conflicts of interest, and ex parte communications. Judge Gregory W. Moeller issued his decision in the case just two weeks before the 2012 primary election for prosecuting attorney (and it was widely publicized in the area press) finding for Lewies' clients and writing that the Commissioners, *"...created an atmosphere that erodes public confidence in the justice of the proceedings below...the Court must conclude that due process demands a higher level of fairness, impartiality, and transparency than the record below demonstrates."* Lewies' campaign slogan was "RESTORE PUBLIC TRUST," and voters elected him by a landslide margin. For the Court now to say voters expected Lewies would not sue the same Commissioners he had successfully sued before does not reflect actual voting results. Actual voting results supported Lewies' legal action against the Commissioners in the gravel pit matter.

Fourth, the Court reasoned that, *"The court also finds that the timing of Lewies' filing of the petitions, coupled with his subsequent delay in withdrawing as counsel for petitioners and the county, constitutes the type of litigative misconduct Rule 11 was intended to rectify."* (R. 182 at 188) However, even if Lewies had timed his filings, and even if he delayed in seeking to withdraw as counsel for petitioners, the Court cited no legal authority that prohibited Lewies from timing his filings or requiring his earlier withdrawal. Certainly, there is nothing in Rule 11 that prohibited Lewies from "timing" his filings, and nothing that governs when Lewies was required to seek withdrawal from representation. By sanctioning Lewies under Rule 11 on such grounds, the Court either misinterpreted or misapplied the law, and by doing so, abused its discretion.

Fifth, the Court reasoned that Lewies, *"failed to understand that his actions would almost immediately deprive petitioners of legal counsel."* (R. 182 at 188) [7] However, even if the Court had been correct regarding what Lewies understood, or failed to understand, it cited no legal or ethical violation by Lewies. Certainly, nothing in Rule 11 required Lewies to understand that his actions may deprive his clients of legal counsel. By sanctioning Lewies under Rule 11 on such grounds, the Court either misinterpreted or misapplied the law, and by doing so, abused its discretion.

Sixth, the Court reasoned that, *"Lewies should have anticipated that his actions would*

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[7] The Court's premise that Lewies' filing of the petitions for judicial review would "immediately deprive his clients of legal counsel" is false. Indeed, petitioners Flying "A" Ranch, *et. al.*, obtained substitute counsel, W. Lynn Hossner, Esq., on January 14, 2013; and the petitioners Gwaltney, *et. al.*, obtained substitute counsel, Charles A. Homer, Esq., sometime before February 26, 2013, according to representations made to the Court by Hall. (*See*, Transcript, p. 77, lines 2-9 *(MR. HALL: "I can represent to the Court that Mr. Homer did contact me and said that he anticipated representing his client [Gwaltney, et. al.] in the future, but was still in the process of reviewing the record and so forth and had said that based upon his very initial impression, that he thought there might be a way to dismiss the petition and resolve the matter in some other fashion."*); p. 79, lines 23-25; p. 80, lines 1-2; and p. 81, lines 1-2). On June 11, 2013, Homer filed his notice of appearance on behalf of petitioners Gwaltney, *et. al.* (R. 355)

deprive his future clients, the County and the board of commissioners, of representation." (R. 182 at 188).[8] However, even if the Court had been correct regarding what Lewies should have anticipated, it cited no legal or ethical violations. Certainly, Rule 11 contains no "anticipation requirement." By sanctioning Lewies under Rule 11on such grounds, the Court misinterpreted or misapplied the law, and by doing so, abused its discretion.

Finally, and seemingly most importantly to presiding Judge Moeller, the Court found Lewies' actions *"unseemly."* (Transcript p. 6, lines 22-23; and p. 9, lines 8-9).[9] [10] However, even if the Court was correct that something about Lewies' decision to file the petitions was unseemly, it cited no legal or ethical violations by Lewies. Seemliness, or good taste, cannot be judicially determined by application of any objective standard. Afterall, like good art, good taste is a highly subjective matter. Certainly, Rule 11 does not require that papers be "seemly." By sanctioning Lewies under Rule 11 on such grounds, the Court either misinterpreted or misapplied the law, and by doing so, abused its discretion.

In summary, the Court applied a "subjective bad faith" test to Lewies' extraneous conduct, rather than applying the appropriate legal analysis – *an objective standard* – to the petitions themselves. The Court subjectively concluded that Lewies was motivated to file the petitions due to

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[8] The Court's premise that Lewies' filing of the petitions for judicial review would "deprive his future clients, the County and the board of commissioners, of representation" is false. The County and the board of commissioners were from the outset, and at all relevant times during the pendency of the petitions, ably represented by Blake G. Hall, Esq. (Transcript p. 1, lines 22-24).

[9] THE COURT: "[T]his just doesn't seem, for lack of a better word, ***seemly*** to the Court..." (Transcript p. 9, lines 8-9).

[10] "Seemly" is defined by The American Heritage Dictionary of the English Language, (5th Ed., 2011), as "conforming to standards of conduct and good taste; of pleasing appearance."

a political grudge – a bad faith motive; and that it was "interfering with Lewies' professional judgment." (R. 189, fn. 14) However, the "bad faith" standard is no longer applicable. Rather, courts apply an objective standard of "reasonableness under the circumstances" Durrant v. Christensen, *supra*, (citations omitted). The Court should have examined Rule 11 sanctions in light of the foregoing federal and state authorities and determined whether Lewies made a proper investigation upon reasonable inquiry into the factual basis and legal basis for *the petitions*. *See, e.g.,* Durrant, *supra*. The Court's imposition of sanctions without finding a lack of reasonable inquiry was not an adequate analysis under Rule 11. Hanf v. Syringa Realty, Inc., 120 Idaho 364, 816 P.2d 320 (1991). Without such a determination, Rule 11 sanctions cannot be sustained. Ibid.

C. The petitions filed by Lewies in case numbers CV-12-580 and CV-12-581 did not violate the signature certification requirements of I.R.C.P. 11(a)(1).

A Rule 11 violation occurs at the time the offending paper is signed and submitted to the court. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S. Ct. 2447, 110 L.Ed. 2d 359 (1990). A good explanation of Rule 11's signature certification requirements is found in an article entitled, Sanctions Under the New Federal Rule 11 – A Closer Look, by Judge William Schwarzer, United States District Judge, Northern District of California. In that article, Judge Schwarzer wrote the following:

> The certification which results from the attorney's signature of the paper is directed at the three substantive prongs of the rule: its factual basis, its legal basis, and its legitimate purpose....With respect to the first prong, the signature certifies that the lawyer 'has read the [paper]***that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact***' If the rule is to

> have meaning, those facts must consist of admissible evidence or at least be calculated to lead to such evidence. They need not be undisputed or indisputable but they must be sufficiently substantial to support a reasonable belief in the existence of a factual basis for the paper. Suspicion, rumor or surmise will not do.
>
> 104 F.R.D. 181, Sanctions Under the New Federal Rule 11 – A Closer Look, Shwarzer, William W., (1985).

With respect to the second prong of Rule 11 – its legal basis – Judge Schwarzer wrote,

> "where an action is patently unmeritorious as a matter of law, sanctions are appropriate...To test compliance with the rule, as some courts have done, by reference to whether bad faith has been shown is inconsistent with its text and purpose...Reasonable belief that a paper is 'warranted by law' should therefore be treated as an objective standard turning on the facts and circumstances of the case, not on the attorney's state of mind."
>
> Sanctions Under the New Federal Rule 11, *supra.*

Judge Schwarzer's analysis continued as follows,

> "The first two prongs of the rule...are directed at the merits: in substance they are aimed at frivolous papers. The third prong is directed at papers which, though not necessarily frivolous, are found to be interposed for an improper purpose....In considering whether a paper was interposed for an improper purpose, the court need not delve into the attorney's subjective intent...If a court were to entertain inquiries into subjective bad faith, it would invite a number of potentially harmful consequences, such as generating satellite litigation, inhibiting speech and chilling advocacy...Finally, a bad faith test would make courts more reluctant to impose sanctions for fear of stigmatizing a lawyer by a bad faith finding...If a reasonably clear legal justification can be shown for the filing of the paper in question, no improper purpose can be found and sanctions are inappropriate."
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> Ibid.

In the instant case, the Court's subjective bad faith analysis was as follows:

> "Lewies' filing of the petitions against a known future client was a significant offense against the integrity of the judicial system. Fremont County voters were entitled to expect that the person they had just elected as county prosecutor would not be filing new legal actions *against* the county on behalf of private individuals...By so doing, Lewies initiated a chain of events that any reasonable attorney should have anticipated would create mistrust and animosity from everyone involved – greatly undermining public confidence in the outcome of both cases....It is simply unfathomable to the Court how Lewies could have failed to understand that his actions would almost immediately deprive petitioners of legal counsel since he would have to immediately withdraw before he was sworn-in. Likewise, Lewies should have anticipated that his actions would deprive his future clients, the county and the board of commissioners, of representation since they would be understandably uncomfortable having Lewies or his deputies defend them in legal matters he initiated against them. Therefore, the Court concludes that Lewies' decision to sign and file the petitions was clearly misguided and adversely affected the integrity of the judicial process."
>
> (R. 182 at 188).

The Court undertook no objective inquiry into whether Lewies "made a proper investigation upon reasonable inquiry." Durrant, *supra.* It did not inquire into any of the three prongs of Rule 11: it did not inquire into the factual basis of the petitions; it did not inquire into the legal basis of the petitions; and it did not inquire into whether the petitions were filed for any objective improper purposes. *See*, Sanctions Under the New Federal Rule 11, *supra.* Accordingly, the Court's imposition of Rule 11 sanctions cannot be sustained. Hanf v. Syringa Realty, *supra.*

D. Attorney's fees as Rule 11 sanctions.

Rule 11 is a sanctions statute and not a fee shifting provision. Fee awards under Fed. R. Civ. P. 11 are limited to fees "*directly resulting from the violation.*" *See* Skidmore Energy, Inc. v.

KPMG, 455 F.3d 564, 569 (5th Cir. 2006). A court must be careful to trace fees to the violation and not include in the sanction fees that the party incurred with respect to matters not in violation of Rule 11. Ibid. Like the federal rule, Idaho's Rule 11 limits sanctions to those reasonable expenses incurred *"because of"* the filing of the pleading, motion, or other paper.[11]

In the instant case, however, the Court awarded attorney's fees to Fremont County not *because of* Lewies' filing petitions in violation of Rule 11, but for hours its counsel, Hall, spent working on motions to disqualify Lewies. As presiding Judge Moeller, stated,

> "The Court also believes that Mr. Hall, who was acting as a Deputy Prosecutor at the time he filed it, was justified in bringing the ***Motion to Disqualify*** *(emphasis added)*, that he shouldn't have had to file that Motion, but it was necessitated by Mr. Lewies failing to recuse himself or –how would we properly put it – withdraw from the case in a timely manner. So, therefore, the Court finds that the County does have a right to seek attorney's fees."
>
> *(Transcript p. 32, lines 22-25; and p. 33, lines 1-4)*

By ordering Lewies to pay attorney's fees as a sanction under Rule 11 for time Hall spent on motions to disqualify Lewies alleging conflicts-of-interest under I.R.P.C. 1.7 (not "*because of*" any violation of Rule 11's signature certification requirements),[12] the Court either misinterpreted or misapplied the law, and by doing so, abused its discretion. The Court's award of attorney's fees as a sanction against Lewies for violating Rule 11 cannot be sustained.

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[11] I.R.C.P. 11

[12] The motions to disqualify filed by Hall against Lewies alleged no Rule 11 violations whatsoever, only a future conflict-of-interest. The motions were not filed *"because of"* any Rule 11 violation. (R. 18).

E. The Court erred in finding that Lewies *"had not withdrawn as counsel for the County"* because Lewies never represented the County in either case number CV-12-580 or CV-12-581.

In imposing Rule 11 sanctions, the Court stated, "...the Court concludes that Lewies' filing of these petitions was clearly misguided and failure to withdraw as counsel *for both parties* amounted to litigative misconduct." (R. 182 at 187). The Court also stated, "[Lewies] initially refused to withdraw as counsel for the County." (R. 182 at 189).

The undisputed facts are, however, that Lewies never represented the county in either of the cases. From the moment the petitions were filed, and at all relevant times thereafter, Hall represented the county and the Court was fully aware of such representation, as the following exchange shows:

> THE COURT: Then we have Mr. Blake Hall present, who has appeared on behalf of Fremont County Commissioners.
>
> (Transcript, p. 1, lines 22-24).
>
> ***
>
> MR. LEWIES: I won't be representing the county at all. I don't intend to represent Fremont County on these, or the petitioners. I'll just stay clear out of all of it is my idea.
>
> THE COURT: So you basically concurred with the motion that was filed by Mr. Hall then, that pursuant to the Rules of Professional Conduct, you can't represent the county?
>
> MR. LEWIES: I would agree that that's true.
>
> (Transcript, p. 3, lines 18-25; and p. 4, line 1).

Then, during its February 26, 2013 hearing, the Court again indicated on the record that it fully understood that Mr. Hall, and not Mr. Lewies, was representing Fremont County, as follows:

> THE COURT: We have Mr. Lewies appearing on behalf of himself on an attorney's fees issue, and we have Mr. Blake Hall appearing on behalf of the Fremont County Commissioners, who have retained him on some issues related to these cases.
>
> (Transcript, p. 40, lines 19-23.)

From the outset, the Court possessed full knowledge that Hall, not Lewies, was representing Fremont County. Accordingly, it was a plain factual error for the Court to conclude that Lewies "initially refused to withdraw as counsel for the County," inasmuch as he never represented the County at any time. As such, the Court abused its discretion.

F. The court erred in finding that Lewies' actions *"delayed adjudication of the petitions for judicial review."*

In imposing Rule 11 sanctions, the Court reasoned, "Here, Lewies' actions have directly delayed adjudication of the petitions for judicial review because the Court has been required to spend over two months dealing with issues related to representation, rather than hearing the merits of the petitions."[13] (R. 182 at 188).

However, the record is clear. Lewies did not, and in fact, could not have caused any delay because unless and until the transcript and record of proceedings was settled under I.R.C.P. 84(j),

[13] It should noted that the Court wanted to *"get to the merits"* of the petitions. This admission by the Court is proof positive that the petitions were factually based, had legal basis, and were not filed for improper purposes. If the Court wanted to get to the merits, then it abused its discretion by ruling that the petitions violated Rule 11's signature certification requirements. If the petitions violated Rule 11, then the Court should have dismissed them.

and then lodged under I.R.C.P. 84(k), the Court could not possibly have proceeded to hear the merits. In fact, by virtue of the Court's own Orders Governing Procedure on Appeal[14] (R. 15 and R. 263) petitioners' briefs were due "within 35 days of the date on which notice that the transcript and record have been filed..." Three months later, the Notice of Lodging of the record was filed[15] (R.178), thus triggering the 35 day time period in which petitioners' had to file their briefs (accordingly, petitioners' briefs were due April 17, 2013). Respondent's then had 28 days after service of petitioners' briefs to file their briefs (accordingly, respondent's briefs were due on May 15, 2013). Finally, petitioners' reply briefs were due 21 days after service of respondent's briefs (accordingly, petitioners' reply briefs were due on June 5, 2013). So, the Court could not have proceeded to hear the merits until sometime after June 5, 2013. By contrast, Lewies sought permission to withdraw a full five months before that date.[16]

It was not Lewies' actions that delayed the Court in getting to the merits, rather, it was the Court's own handling of the competing motions to withdraw and to disqualify that caused delay. [17]

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[14] Orders Governing Procedure on Appeal were filed on December 3, 2012.

[15] Notice of Lodging for both cases was filed on March 13, 2013.

[16] Lewies' motions to withdraw were filed on January 7, 2013.

[17] The Court should have found that no actual case or controversy existed since Hall's motions to disqualify, and Lewies' motions to withdraw, were filed on the same day. The Court could easily have granted Lewies' motions to withdraw and denied Hall's motions to disqualify. Lewies would have been out of the cases on January 7th, and that would have quickly resolved the matter. As Lewies argued to the Court, *"Now, Mr. Hall's motion to disqualify then became moot, and that's a legal doctrine, on the same day it was filed because I filed my own motion to withdraw. Now, what's the reason to press on with a motion to disqualify when the attorney you're seeking to disqualify has said wait a minute, I want out of it, I want to withdraw? Isn't the motion to disqualify moot? I would argue yes."* (Transcript p. 67, lines 22-25; and p.68, lines 1-4) Instead, the Court chose to conduct a hearing on the competing motions on January 22, 2013. Then, it awarded attorney's fees to Hall for having to file his motions to disqualify Lewies. Then, the Court conducted another hearing on attorney's fees on February 26, 2013. Then, it converted its award of attorneys fees into Rule 11 sanctions against Lewies, *sua sponte*, in its Memorandum Decision issued on

G. The Court erred by *"deeming it appropriate"* for the County to have retained private legal counsel, Blake G. Hall, Esq., to represent it in case numbers CV-12-580 and CV-12-581 because the legal question whether the County's hiring of private counsel in violation of the Idaho Constitution's necessity requirement had been voluntarily withdrawn by motion of the Office of the Prosecuting Attorney, and therefore, was not a question presented to the Court for its decision.

In Harris v. Cassia County, 106 Idaho 513, 516, 681 P.2d 988, 991 (1984), the Idaho Supreme Court recognized that while the elements of an actual or justiciable controversy are not subject to a mechanical standard, the United States Supreme Court aptly summarized the pivotal elements of a justiciable controversy in Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937).

> "A 'controversy' in this sense must be one that is appropriate for judicial determination.... A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot.... The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests.... It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."
>
> 300 U.S. at 240–41, 57 S.Ct. at 464 (citations omitted). See also Sanchez v. City of Santa Fe, 82 N.M. 322, 481 P.2d 401 (1971); Cummings Construction Co. v. School District No. 9, 242 Or. 106, 408 P.2d 80 (1965).

We believe this federal standard provides a concise guideline for our analysis, and therefore, we will apply these criteria in conjunction with pertinent Idaho case law cited infra. Harris v. Cassia

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March 29, 2013, nearly three full months after Lewies filed his motions to withdraw.

County, *supra.*

In the case at bar, the Court improperly decided a question that was not before it. In its Memorandum Decision, the Court ruled that, "Although contested by Lewies, the Court deems appropriate the decision by the county to retain Hall, its former civil deputy, to defend it in these cases." (R.182 at 189) However, just a month earlier, during its February 26, 2013 hearing on the petitions, the Court represented to the parties that the question whether Hall had been properly hired by Fremont County had been withdrawn by the prosecuting attorney's office, and as such, the Court was relieved from having to decide a ***"very tough question."***[18] The exchange was as follows:

> THE COURT: On the first issue, the Court notes that on February 19th of 2012 [2013], Mr. Dustin filed a document with the Court informing it that his office was withdrawing and allowing Mr. Hall to represent Fremont County on these matters, representing the Board of County Commissioners on both the Flying A Ranch case and on the Gwaltney case. The Court sees that as a good development. It's going to get us straight to the merits[19] instead of worrying about who's representing who. And as I read Mr. Dustin's Notice, ***I think that brings that issue to an end.*** Are there any matters related to that that we need to still address? (Emphasis added).
>
> MR. DUSTIN: Not unless the Court has any questions, Your Honor.
>
> MR. HALL: We don't believe that there's anything further, Your Honor, I think that resolves the matter.
>
> THE COURT: Okay. Very well. I would let Mr. Dustin know, I did read your document very carefully. I think it contains some very good legal analysis and ***I think certainly the Court would have had a very tough question before it if I'd had***

[18] This is the phrase Judge Moeller used to describe the legal question raised by the Office of the Fremont County Prosecuting Attorney concerning whether the Commissioners' decision to retain Hall, as private counsel, satisfied the "necessity requirement" under Article XVIII, Section 6, of the Idaho Constitution.

[19] Once again, the Court is found undercutting its own position on Rule 11 sanctions. Why was the Court so anxious to "get straight to the merits" if the petitions violated Rule 11's certification requirement?

> ***to rule on that.*** I think ultimately, though, you made a wise decision. I think some things, as with all things in life, we sometimes have to decide what hill we want to die on and I'm not sure that's the hill any of us wanted to die on, so I am glad we got that issue behind us. (Emphasis added)
>
> (Transcript p. 41, lines 6-14; and p. 42, lines 1-3)

If, as Judge Moeller himself stated, *"I think certainly the Court would have had a very tough question before it if I'd had to rule on that,"* then on what grounds did he proceed to rule on the withdrawn question? Although the question whether "necessity" existed for the Commissioners' hiring of Hall was certainly an important legal question for the Office of the Fremont County Prosecuting Attorney,[20] and the people of Fremont County, it was rendered moot when deputy prosecuting attorney, Dustin, filed his notice informing the Court that his office had decided to withdraw the question. (R. 145) The parties, and presiding Judge Moeller, all agreed *on the record* that the matter had been resolved. No case or controversy existed. The question was no longer justiciable.

The Court rendered an opinion on a highly sensitive, but nevertheless, moot issue. Greater judicial restraint may have been the better course in light of the recent controversies surrounding the case of Kline v. Power County Board of Commissioners, Idaho Supreme Court Docket No. 40112-2012.

[20] As the elected prosecuting attorney for Fremont County, Lewies explained to the Court that, "I have a duty under the Idaho Code to prosecute and defend all cases in which my client, Fremont County, not the Board of Commissioners but the County, is a party. I thought I had an ethical obligation to assert my duties to represent and defend the County in these matters." (Transcript p. 60, lines 3-8)

H. The Court erred in finding that Lewies was unable to *"complete"* his representation of petitioners.

The Court ruled that, "Lewies should have known at the time of filing the petitions that he would be unable to see either case through to *completion* -this is undisputed." (R. 182 at 189)

"Completed," as explained by the Idaho Rule of Professional Conduct, means when the "agreed-upon assistance has been concluded." I.R.P.C. Rule 1.16, Comment 1.

In the instant case, before ever accepting representation of petitioners, Lewies explained to Flying "A" Ranch, *et. al.* and Gwaltney, *et. al.*, that since he was going to be officially sworn-in as Fremont County's prosecuting attorney in mid-January 2013, he would have to withdraw from representing them at that time. Lewies went on to explain that in consideration of the rapidly approaching statutory deadline for filing petitions for judicial review, he could proceed to file petitions to preserve legal rights, but would have to withdraw relatively soon thereafter. (Transcript p. 56, lines 17-25; p.57, lines 1-5) Both sets of clients agreed to Lewies' *limited* representation. (R. 64 at 65, ¶¶ 4 and 5)

If the Court believed that "complete" means that Lewies had to see the petitions through to ultimate conclusion, including any appeals to the Idaho Supreme Court, then it had a mistaken understanding of the term. Attorneys and their clients are free to agree between and among themselves for limited representation; representation that will be deemed "complete" at some juncture short of final judgment on appeal.

Further, unless and until an actual case or controversy was presented to the Court on the question whether Lewies had completed his limited representation of petitioners, the Court should

have refrained from issuing an opinion on the matter. For the Court to have rendered its opinion on a legal question that was not before it, was improper. The opinion was rendered without the Court hearing evidence on the issue and without allowing Lewies to present oral argument. The Court ruled without any factual basis, or alternatively, it ruled based on plain factual error regarding the true nature of Lewies' agreed-upon limited representation.

Accordingly, the Court abused its discretion.

I. Judge Moeller demonstrated bias and/or prejudice against Lewies by engaging in the following actions:

a.) Ex parte communication.

Canon 3(7) provides in relevant part, that, "A judge shall not initiate, permit, or consider *ex parte* communications..." except where authorized by law.[21]

In the instant case, immediately following the Court's January 22, 2013 hearing on the petitions, Judge Moeller invited Lewies into his chambers and proceeded to explain that he was aware there was some bad blood between Lewies and Hall;[22] that he wanted it to end; and that he was going to see to it that it "ends in this case."[23] Judge Moeller warned Lewies, *"You have to*

[21] I.C.J.C. Canon 3(7).

[22] The bad blood stemmed from the 2012 primary election campaign for Fremont County prosecuting attorney where Lewies defeated Hall's boss, prosecuting attorney Joette Lookabaugh, by a landslide margin of 65% to 35%.

[23] Judge Moeller said in open court, *"And this whole process that we're going through, I think illustrates the folly of beginning this case the way it was begun because basically we're spinning our wheels on issues that aren't serving either the Respondents or the Petitioners in this case and, again,* ***I understand that there's been acts of pettiness between these parties on other matters at other times, but there needs to come a time when that ends and I'm going to do what I can to see that it ends in this case*** *(emphasis added) because I think there are important issues*

decide what hill you want to die on." (R. 64 at 65 ¶ 11)[24] Then, as Lewies was leaving chambers, Judge Moeller issued another warning to him, saying, "*This conversation never happened."*(Ibid.)

Indeed, in his Memorandum Decision, Judge Moeller admits that an ex parte communication with Lewies took place in his chambers, and further admits that, ***"the Court merely advised [Lewies] to avoid allowing a political grudge to interfere with his professional judgment."*** (R. 189, fn. 14) Although Judge Moeller maintains, "The Court initiated this conversation after consulting *Idaho Code of Judicial Conduct,* Canon 3(D), which provides, in part: 'Judges are encouraged to bring instances of unprofessional conduct by judges or lawyers to their attention in order to provide them opportunities to correct their errors without disciplinary proceedings; ....,'" the fact is he did not identify any specific instance of unprofessional conduct and he identified no violation of the Idaho Rule of Professional Conduct. Rather, he warned Lewies to end what he subjectively believed was a "political grudge."[25] Judge Moeller admittedly believed Lewies was "provoking"[26] the Commissioners by filing the petitions. Yet, all throughout the proceedings, Judge Moeller repeatedly acknowledged the importance of the merits of the petitions by saying the following things:

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that Mr. Gwaltney and Varney and Flying A Ranch and Fremont County have in this case and they're being completely covered by the smoke of these other issues." (See, e.g., Transcript p. 34, lines 10-22)

[24] Judge Moeller used the exact same phraseology when addressing deputy prosecuting attorney, Mr. Dustin, as follows: *"I think ultimately, though, you made a wise decision. I think some things, as with all things in life,* ***we sometimes have to decide what hill we want to die on*** *and I'm not sure that's the hill any of us wanted to die on, so I am glad we got that issue behind us." (See, e.g.,* Transcript p. 42, lines 3-8)

[25] R. 182 at 189, footnote 14.

[26] Judge Moeller wrote in his Memorandum Decision that, *"Any existing bad feelings between Lewies and the Commissioners would only be escalated by* ***such provocative conduct.*** *"* (R. 182 at 190)

> "So let's take up the representation issues first ***before we proceed to the merits*** of the other issues before the Court..." (Transcript p. 2, lines 8-10)
>
> ***
>
> "I think ***there are important issues*** that Mr. Gwaltney and Varney and Flying "A" Ranch and Fremont County have in this case and they're being completely covered by the smoke of these other issues." (Transcript p. 34, lines 19-22)
>
> ***
>
> "On the first issue, the Court notes that on February 19th of 2012, Mr. Dustin has filed a document with the Court informing it that his office was withdrawing and allowing Mr. Hall to represent Fremont County on these matters, representing the Board of County Commissioners on both the Flying "A" Ranch case and on the Gwaltney case. The Court sees that as a good development. ***It's going to let us get straight to the merits*** instead of worrying about who's representing who." (Transcript p. 41, lines 5-14)
>
> ***
>
> "Here, Lewies' actions have directly delayed adjudication of the petitions for judicial review because the Court has been required to spend over two months dealing with issues related to representation, ***rather than hearing the merits of the petitions***." (R. 182 at 188).

Judge Moeller's open acknowledgement that the petitions contained *"important issues"* cannot be reconciled with his *ex parte* warning to Lewies not to let a *"political grudge"* interfere with his professional judgment and to end his provocative conduct. If the petitions contained important issues, and if Judge Moeller wanted to "get straight to the merits," then his ex parte warning for Lewies to "decide what hill you want to die on" (i.e. end his political grudge against the Commissioners) showed bias or prejudice against Lewies.

Why did Judge Moeller feel it necessary to warn Lewies to "end it" if the petitions had merit?

b.) Converting an award of attorney's fees into Rule 11 sanctions, *sua sponte*.

The Court demonstrated bias or prejudice[27] against Lewies by engaging in the following sequence of actions: First, it awarded attorney's fees to the County for having to bring motions to disqualify Lewies.[28] Second, Judge Moeller initiated an ex parte communication with Lewies by inviting him into chambers and proceeding to warn him about "deciding what hill he wanted to die on." Third, the Court, *sua sponte,* converted its earlier award of attorney's fees to the County on grounds that it had to file motions to disqualify Lewies, into Rule 11 sanctions against Lewies.

What caused the Court to convert a routine award of attorney's fees into Rule 11 sanctions? The Court never explained its reasoning on this point. The only intervening event between the initial award of attorney's fees and the conversion into Rule 11 sanctions, was the Court's *ex parte* warning to Lewies to decide what hill to die on. Afterall, as the Court in the instant case acknowledged, "The Idaho Supreme Court has made clear that "[t]he reasons for which attorneys fees may be awarded pursuant to I.C. § 12-121 and I.R.C.P. 54(e)(1) are not reasons that will support an award of sanctions pursuant to I.R.C.P. 11(a)(1)." (R. 182 at 186)

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[27] I.C.J.C. Canon 3(B)(6).

[28] "The Court also believes that Mr. Hall, who was acting as a Deputy Prosecutor at the time he filed it, was justified in bringing the Motion to Disqualify, that he shouldn't have had to file that Motion, but it was necessitated by Mr. Lewies failing to recuse himself or -- how would we properly put it -- withdraw from the case in a timely manner. So, therefore, the Court finds that the County does have a right to seek attorney's fees." (Transcript p. 32, lines 21-25; and p. 33, lines 1-4) Accordingly, in its Order on Motions, the Court ruled that, "...the County is entitled to recover its attorney fees incurred in filing the motion to withdraw [disqualify]." (R. 106, ¶ 3)

It reasonably appears, then, that because Lewies did not heed the Court's warning to end his "political grudge" and his "provocative conduct," the Court decided to make good on its threat: It converted a routine award of attorney's fees into Rule 11 sanctions against Lewes and issued a scathing Memorandum Decision (R. 182) [29] denouncing Lewies for, committing a ***"serious offense against the judicial system"*** and other grave misdeeds. In other words, the Court caused Lewies to "die on that hill."

c.) Disregarding allegations of Hall's unethical and improper conduct..

First, the Court wholly disregarded Lewies' argument that Hall should have conducted a reasonable inquiry into the facts prior to filing motions to disqualify Lewies. In Court, Lewies argued as follows,

> MR. LEWIES: Furthermore, before filing his Motion to Disqualify me, Mr. Hall failed to make any good faith effort to confer or attempt to confer with me. And,Your Honor, this would have saved you all this hassle if he'd picked up the phone and said, hey, Karl, looks like you've got a conflict on the horizon there, what are you going to do, are you going to hang onto those private clients and try to play both sides of this game? I'd say absolutely not. In fact, I've made it clear to my client on the day I accepted representation I'm going to have to withdraw.
>
> (Transcript p. 61, lines 15-25)
>
> ***
>
> MR. LEWIES: All I wanted to say here is that if Mr. Hall as an attorney for Fremont County had called me a private attorney and said, hey, private attorney, once you become a public attorney are you planning to continue to represent the private parties? If that call had been made, Your Honor, and under ***Rule 11*** of the Rules of Civil Procedure that sort of a reasonable inquiry is to be made before filing Motions.

[29] Substantial portions of Judge Moeller's Memorandum Decision were published in two major Eastern Idaho newspapers: the Idaho Falls Post-Register and the Rexburg Standard-Journal. As a result of those publications, Lewies' professional reputation and personal standing in his community have suffered damages.

I mean, you know, you have to inquire.

THE COURT: Well, I know the Rules for Discovery have a meet and confer requirement. Is there a meet and confer -- I understand your argument that perhaps Mr. Lee (sic) should have called you first and asked you, are you going to withdraw or not?

MR. LEWIES: Yeah.

THE COURT: I think that's a valid argument, but there isn't a legal requirement for a meet and confer on an issue like this, is there?

MR. LEWIES: I'm not saying a meet and confer, but there is a standard for a reasonable inquiry before filing documents, Rule 11.

THE COURT: So Counsel had an obligation to call you and say you can't be serious about this?

MR. LEWIES: Huh? I'm sorry?

THE COURT: So Counsel had an obligation to call you and say are you going to do something to withdraw or not? Is that-- I understand that you're suggesting he should have done that and I think that's a fair argument—

MR. LEWIES: I think that would have been reasonable –

(Transcript p. 64, lines 13-25; and p. 65, lines 1-18)

Why didn't the Court address Hall's alleged violation of Rule 11? Why didn't it even mention it in its Memorandum Decision?

Second, the Court disregarded Lewies' claim that Hall violated I.R.P.C. 1.11, as follows:

> MR. LEWIES: However, the truth of the matter, Your Honor, is that on or about November 20, 2012, while still employed as Fremont County's Deputy Prosecutor and in apparent violation of ***Idaho Rule of Professional Conduct 1.11(d)(2)(2)*** that prohibits attorneys who are currently serving as public employees from...negotiating for private employment with any person who is involved as a party in a matter in which the lawyer is participating personally and substantially....
>
> Mr. Hall offered in writing to Fremont County on Fremont County letterhead

> and signed in his capacity as, quote, Chief Civil Prosecuting Attorney—Chief Civil Deputy Prosecuting Attorney, he offered to, quote, contract with the County at a discounted rate of $150 per hour for my time. And here's a copy of that letter if you want to see it.
>
> So he was negotiating private employment with his own client....
>
> (Transcript p. 69, lines 24-25; and p. 70, lines 1-18)

Why didn't the Court make mention of Hall's alleged violation of Idaho's ethics rules by negotiating for his private employment with his own public client, Fremont County? Was not that conduct worth mentioning in its Memorandum Decision?

Finally, the Court disregarded Lewies' claim that Hall violated I.R.P.C. 3.3, as follows:

> MR. LEWIES: The point I really want to make is he's not billing $225 as he said in his sworn Affidavit, he's billing $150. And there it is in his own writing. Maybe he didn't think I'd discover that. Now, in his reply brief, Mr. Hall represents to the Court that...the contract between Mr. Hall and the County does not identify a specified hourly rate for services, but we now know the truth of the matter. Mr. Hall himself has specified the rate in the contract he proposed with the County, and that specified rate is $150 per hour. It appears to me, Your Honor, that Mr. Hall's run afoul of yet another ethical rule, and that would be ***Rule 3.3*** that provides, quote, a lawyer shall not knowingly make a false statement of fact to a tribunal. He says he's billing $225, that's not the case, he got a contract for $150.
>
> (Transcript p. 70, lines 19-25; and p. 71, lines 1-10)
>
> MR. LEWIES: Now, finally, Your Honor, it appears to me that Mr. Hall's engaged in an effort to deliberately overbill me here. Assuming Mr. Hall billed his eight hours, total of eight hours here, at his contracted rate of $150 an hour, that would have been $1,200, but in his sworn Affidavit he claims eight hours at $225 an hour, that's $75 an hour more than his own contracted rate. So he's claiming $1,777.50, that's an overbilling of $575, Your Honor, that I think is a knowing and deliberate overbilling and I, frankly, think dishonest conduct.
>
> (Transcript p. 74, lines 1-11)

Why did the Court wholly disregard each and every one of Lewies' allegations of unethical conduct by Hall? Were the allegations unfounded? The Court did not say so. It made not even the slightest mention of any of the allegations in its Memorandum Decision. But it wrote at length publically condemning Lewies for all sorts of serious offenses against the integrity of the judicial system.

Based on these facts, it reasonably appears that the Court was biased or prejudiced against Lewies, and as such, was not and acting fairly and impartially towards him.

d.) Issuing a publically available Memorandum Decision denouncing Lewies.

Canon 3(B)(5) provides that, "A judge shall be patient, dignified and courteous to...lawyers and others with whom the judge deals in an official capacity..."[30]

However, in seeming disregard of Canon 3, Judge Moeller seemed to go out of his way to write a blistering decision that was not only highly critical of Lewies' decision to file petitions for judicial review against the Commissioners, it also denounced Lewies *personally.* As published in both local area newspapers, the Idaho Falls Post-Register and the Rexburg Standard-Journal, Judge Moeller wrote the following about Lewies: "Lewies' filing of the petitions against a known future client was a significant offense against the integrity of the judicial system;" "Lewies initated a chain of events that any reasonable attorney should have anticipated would create mistrust and animosity from everyone involved – greatly undermining public confidence in the outcome of both cases;" "It

[30] I.C.J.C. Canon 3(B)(5).

is simply unfathomable to the Court how Lewies could have failed to understand that his actions would almost immediately deprive petitioners of legal counsel;" "Likewise, Lewies should have anticipated that his actions would deprive his future clients, the County and the Board of Commissioners of representation; "Lewies' decision to sign and file the petitions was clearly misguided and adversely affected the integrity of the judicial process;" With the application of wisdom and common sense, one could have reasonably predicted that such conduct would meet with the stern disapproval of Mr. Lewies' future clients, the County and Commissioners, as well as the Court, whose duty it is to safeguard the integrity of the judicial process." (R. 182, Memorandum Decision)

Since publication of Judge Moeller's decision in the area newspapers, Lewies has suffered damage to his professional reputation and personal standing in the community. Can it be said that Judge Moeller's decision was dignified and courteous?

Since the decision went public, several area attorneys have approached Lewies deriding him about, "How much Judge Moeller likes you." As a direct result of his decision, there is now a belief among members of the local area bar, that Judge Moeller has a personal dislike of Lewies.

Judge Moeller's withering public denunciation of Lewies was undeserving under the circumstances and did not serve the people of Eastern Idaho well.

V. CONCLUSION

For the foregoing reasons, the Idaho Supreme Court should find that the lower Court failed to conduct an adequate analysis under Rule 11 before imposing sanctions on Lewies, and therefore, such sanctions cannot be sustained. Further, the Idaho Supreme Court should find that the petitions filed by Lewies did not violate Rule 11 signature certification requirements; that the lower Court's imposition of attorney's fees as a Rule 11 sanction was improper and cannot be sustained; that the lower Court erred in finding that Lewies (a) had not withdrawn as counsel for the county; (b) delayed adjudication of the petitions for judicial review; (c) deeming it appropriate for the Commissioners to have retained Hall as private counsel; (d) finding that Lewies was unable to complete his representation of petitioners; and that presiding Judge Moeller demonstrated bias and/or prejudice against Lewies.

Submitted this 21st day of August, 2013

Karl H. Lewies, Esq.
Real Party in Interest – Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a two true and correct copies of the foregoing REAL PARTY IN INTEREST – APPELLANT'S BRIEF has this 21st day of August, 2013, been served upon the individuals listed below by depositing the same in the U.S. Mail, with proper postage thereon, and addressed as follows:

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/ Carl H. Lowe 21. Aug. 2013