STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

Case Type: Civil Other/Misc.

Julie Quist, [redacted] and Lisa Kaiser, | Court File No.: 62-CV-20-5598

Contestants,

vs. | **ORDER FOR SANCTIONS AND OTHER RELIEF**

Steve Simon, only in his official capacity as the Minnesota Secretary of State, and Tina Smith, Senate candidate,

Contestees.

This matter came before the court on May 19, 2021, following the April 14, 2021 order to show cause issued by this panel. Attorney Susan Shogren Smith and contestants [redacted] and Julie Quist made written submissions to the court. There was no appearance by or on behalf of contestant Lisa Kaiser or contestees Steve Simon and Tina Smith.

BASED ON THE FILE, RECORD, AND PROCEEDINGS HEREIN, IT IS HEREBY ORDERED:

1. [redacted] is **DISMISSED** from this action;

2. The judgments entered against [redacted] on December 29, 2020, and January 20, 2021, are hereby **VACATED** as to [redacted] only;

3. The caption of this proceeding shall be **AMENDED**, and [redacted] shall be removed from the caption as a named contestant;

4. The original filings in this case shall be **SEALED** and shall not be disclosed without court order. Requests to view or obtain copies of the original pleadings by any party (or any individual otherwise named in this action), shall be subject to prior review and approval by the Chief Judge of the Second Judicial District;

5. The District Court Administrator shall create and file public versions of the filings in this case, including this order, with [redacted] name redacted;

6. Attorney Susan Shogren Smith is hereby **SANCTIONED** in the amount of $15,000, penalty payable to court pursuant to Minn. R. Civ. P. 11.03(b) or Minn. Stat. § 549.211, subd. 5(a) (2020); and

7. The matter is hereby **REFERRED** to the Minnesota Lawyers Professional Responsibility Board.

The attached memorandum is incorporated herein by reference.

There being no just reason for delay, let judgment be entered accordingly.

IT IS SO ORDERED.

Dated: June 22, 2021

Judge Jennifer L. Frisch

Judge Denise D. Reilly
Presiding Judge

Judge Renee L. Worke

I hereby certify that this Order
constitutes the Entry of Judgment of the Court.
Michael Upton, Court Administrator
(Jessica Fowler)

Jun 22 2021

MEMORANDUM

Procedural History

On December 1, 2020, attorney Susan Shogren Smith filed a notice of election contest pursuant to Minn. Stat. § 209.021 (2020) naming Julie Quist, [redacted] and Lisa Kaiser as contestants and United States Senator Tina Smith and Minnesota Secretary of State Steve Simon as contestees. The contestees moved to dismiss the action and on December 29, 2020, the court issued an order dismissing the contest with prejudice. The court entered judgment and, after the contestees applied for taxation of costs and disbursements, money judgments were entered against the contestants in the amounts of $2,105 and $275.

By letter to the court dated April 2, 2021, [redacted] asked to be removed from the case, stating (1) "I am fraudulently listed – without my permission or knowledge – on this lawsuit as a plaintiff"; (2) "I had no knowledge of this case, or any of the parties or attorneys involved until after being notified that this information is on the public court website . . . on April 1, 2021"; (3) "I did not sign any retainer agreement, wasn't notified in any way about this case or its filings, and had never heard of the attorney or other alleged plaintiffs or litigants"; (4) "None [of the other contestants] had signed retainers and most – like me – probably have no knowledge of this at all." On April 14, 2021, this court issued an order to show cause describing the contents of [redacted] correspondence and directing Shogren Smith to show cause about whether the dismissal of contestants, the modification of judgments and files, the imposition of sanctions, or a referral to the Minnesota Lawyers Professional Responsibility Board (LPRB) were appropriate. The order afforded Shogren

Smith the opportunity for a hearing upon her request. Shogren Smith did not request a hearing and the matter came before the court on the written submissions of Shogren Smith, [redacted][1] and Quist.

Undisputed Facts

The Minnesota Election Integrity Team (MNEIT) was formed on or about November 7, 2020. According to its co-founder Jose Jimenez, MNEIT was created for the purpose of "help[ing] voters and state legislative candidates communicate with each other and to assist in filing state actions to contest [2020] elections around the state of Minnesota believed to be inappropriately conducted in contravention of state election laws." MNEIT is not incorporated and consists of a "group of volunteers and pro bono lawyers."

On November 30, 2020, MNEIT sent the following mass email to various recipients:

> **THE TIME HAS COME!** It is time for your voice to be heard! Anyone who supports the challenge of these elections to stop the election fraud happening in Minnesota, and wants to be listed as a: VOTER CONTESTING THE ELECTIONS.
>
> Attached please find a form-fillable PDF: Affidavit for Eligible MN Voter
>
> In the coming days/weeks, we are planning on filing a Voter contest to each of the following races:
>
> - Jason Lewis
> - Tyler Kistner
> - Kendall Qualls
>
> Please complete this affidavit and return to the email address ASAP: [MNEIT Email]

[1] [redacted] first letter to the court was not served. But the court served his second written submission. We consider his allegations of fact for the purpose of this proceeding.

You can sign it online or type out your full name with a / s / before the name.
If you can fill out electronically – please print, sign, and scan or take a picture and email it back.

The email also included the following note in a smaller font at the bottom of the message: "**Please remember, the MNEIT is a group of volunteers that are committing a lot of time and effort towards this cause. We will try to get to emails in a timely manner but please bear with us as this is a very big undertaking.**"

[redacted] responded by email that night, stating, "Here is my signed copy of the Affidavit[.]" In the attached "Affidavit of Eligible Minnesota Voter," [redacted] attested, in relevant part:

> 3. I was and am an eligible voter in Minnesota;
>
> 4. I am contesting the election of the candidate(s), listed below, for whom I had the right to vote on November 3, 2020:
>
> a. MN Senate candidate: Tina Smith
>
> 5. I contest the aforementioned election(s) for the following reasons:
>
> a. I believe there were irregularities in the conduct of the election;
>
> b. I believe there were irregularities in the canvass of votes;
>
> c. I believe there is a question of who received the largest number of votes legally cast in each contested election;
>
> d. I believe there are grounds to assert deliberate, serious, and material violations of the Minnesota Election Law.

6. I understand I will be joining with other voters across MN to contest Minnesota election results.

I declare under penalty of perjury that everything I have stated in this document is true and correct to the best of my knowledge and recollection.

The affidavit bore [redacted] typewritten name on the signature line and was dated November 30, 2020.

According to Jimenez, MNEIT asked Shogren Smith and another attorney "to draft and file the election contests." Shogren Smith did so, submitting a notice of election contest naming [redacted] as one of three contestants. The notice contained allegations of many irregularities in the 2020 elections, asserted various legal claims, and sought relief from the court. Although all the allegations and claims were implicitly asserted on behalf of the named contestants, the notice made specific and repeated mention to the contestants, such as:

- "The Contestants assert the Minnesota Secretary of State has failed to fulfill his responsibilities to Minnesota and the voters by violating multiple Minnesota statutes and the principles of both Due Process and Separation of Powers in the United States and Minnesota Constitutions."
- "These contestants acknowledge that Minnesota's voter registration system has been a concern of voters for years."
- "The Contestants bring this action to ensure election integrity in the November 3, 2020 election in Minnesota."
- "Contestants seek the following relief . . . ."
- "Contestants respectfully request this court remedy the injustices that have resulted from the many abuses of power, derelictions of duty and the disrespect shown towards the

> people of Minnesota by ordering a true count of the legally cast votes by the eligible voters across Minnesota."

Shogren Smith signed the notice with an acknowledgment that sanctions could be awarded pursuant to Minn. Stat. § 549.211, subd. 2 (2020). Later, and in response to the contestees' motions to dismiss, Shogren Smith filed a responsive memorandum, also signed with a Section 549.211 acknowledgment that purported to make factual assertions and legal arguments on behalf of the contestants, including:

- "Contestants submit this response memorandum opposing [the contestees'] motions to dismiss."
- "Contestants, and their volunteer attorney, working *pro bono*, seek to ensure integrity in the Minnesota elections . . . ."
- "Contestants believe the November 3, 2020 election is tainted by fraud and corruption."
- "Contestants assert the State Canvassing Board has wrongly certified the Minnesota Elections."
- "Contestants believe the elections should be decertified and the state should undergo a complete audit."
- "Contestants are certain Contestees do not want this election examined closely because they likely know the truth behind the curtain."

Shogren Smith did not discuss the substance of the notice of contest with [redacted] the allegations and legal claims set forth in it, the strategies through which she purported to represent his interests, the fact that the contestees had moved to dismiss the contest, the procedural posture of the case upon those motions, the direct consequences of dismissal, the potential for postjudgment proceedings, the possibility that [redacted] might be held liable for costs and disbursements, or any other possible consequences of dismissal. In fact,

Shogren Smith had *no* contact with [redacted] either before filing the notice of contest, throughout the contest, upon dismissal of the action, or in the weeks following the entries of judgments. Instead, "other MNEIT volunteers managed the communications from and between the MNEIT and the contestants." And [redacted] signed no written retainer agreement and he did not know who Shogren Smith was. Shogren Smith does not dispute that there is no written agreement for her legal representation to which she and [redacted] were signatories. According to Shogren Smith, "[t]he MNEIT and the volunteer attorneys working with the MNEIT relied upon" [redacted] affidavit in bringing the action.

On February 22, 2021, MNEIT emailed many recipients, including [redacted] with an update on election contests at the federal and state levels. The email informed recipients that Shogren Smith and another attorney had filed "seven complaints seeking to address the many issues identified" and that "[a]ll of the cases were dismissed on technicalities." The email also revealed, "There were fees charged to the plaintiffs in several of the cases. Those fees are being paid entirely this week." On March 4 and March 24, 2021, contestees certified that the money judgments against the contestants had been fully satisfied.

ANALYSIS

I. Shogren Smith is subject to sanctions for presenting to the court submissions for an improper purpose and committing a fraud upon the court.

Shogren Smith made submissions to this court representing that: (1) [redacted] was exercising his statutory right to challenge election results pursuant to Minn. Stat. §§ 209.02, .021 (2020); (2) Shogren Smith was representing [redacted] in his capacity as an election contestant; (3) [redacted] was alleging the existence of numerous irregularities in the 2020

elections; and (4) [redacted] was seeking various forms of relief, including an order of the court directing a "true count of the legally cast votes by the eligible voters across Minnesota." [redacted] claims he knew nothing about the lawsuit, never consented to his involvement, never signed a retainer agreement, was never asked to be a plaintiff, would have declined to be a plaintiff had he been asked, had never heard of Shogren Smith, and thought his affidavit "was going to be a petition where a lot of names were being collected to show that many people were not happy with the outcome of the election." Shogren Smith and Quist contend that [redacted] affidavit shows that he understood the nature of the contest and agreed to be represented as a named contestant in the action.

Minn. Stat. § 549.211, subd. 1 (2020), requires that an attorney "attach to and make a part of the pleading, written motions, and papers served on the opposite party or parties a signed acknowledgment stating that the parties acknowledge that sanctions may be imposed under [section 549.211]." Minn. R. Civ. P. 11.01 meanwhile provides that, "Every pleading, written motion, and other similar document shall be signed by at least one attorney of record in the attorney's individual name . . . ."

Minn. Stat. § 549.211, subd. 2(1)-(4), provides:

> By presenting to the court . . . a pleading, written motion, or other [document or] paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Rule 11 contains similar provisions. *See* Minn. R. Civ. P. 11.02(a)-(d). A court may impose an appropriate sanction upon a determination that an attorney has violated these provisions "after notice and a reasonable opportunity to respond." Minn. Stat. § 549.211, subd. 3 (2020); Minn. R. Civ. P. 11.03.

A. [redacted] did not agree to be a named contestant in this action or to legal representation by Shogren Smith.

[redacted] claims that he never agreed to be a named contestant in this action. Shogren Smith contends that [redacted] return of a completed affidavit "was factually an acceptance of engagement in response to an offer of representation made through email correspondence between the [MNEIT] and the contestants." Quist similarly contends that she and everyone who responded with a completed affidavit "stated in no uncertain terms that we would be included in an MNEIT election contest." In essence, Shogren Smith and Quist frame the issue as one of offer and acceptance, claiming that there was an agreement for legal services in which [redacted] understood the nature of the election contest and his voluntary involvement in it.

Whether a contract exists is a question of fact. *Morrisette v. Harrison Int'l Corp.*, 486 N.W.2d 424, 427 (Minn. 1992). "A contract for legal services can be express or implied from the conduct of the parties." *Pine Island Farmers Coop v. Erstad & Riemer, P.A.*, 649 N.W.2d 444, 448 (Minn. 2002). "The formation of a contract requires communication of a specific and definite offer, acceptance, and consideration." *Thomas B. Olson & Assocs., P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 918 (Minn. App. 2008) (quotation omitted), *review denied* (Minn. Jan. 20, 2009). "Whether a contract is formed is judged by the objective conduct of the parties and not their subjective intent." *Com. Assocs., Inc. v. Work Connection, Inc.*, 712 N.W.2d 772, 782 (Minn. App. 2006). "Minnesota follows the 'mirror image rule,' which requires that an acceptance be coextensive with the offer and not introduce additional terms or conditions." *Id.* "Once an offer is positively accepted, however, a requested or suggested modification will not prevent contract formation." *Id.*

Here, the record establishes that [redacted] did not agree to be named as a contestant in the action and did not authorize or agree to legal representation by Shogren Smith.

Shogren Smith contends that the November 30 email "explained the intent of the MNEIT to file election contests on behalf of Eligible Minnesota voters" and "included an explanation that MNEIT volunteer attorneys were preparing to contest several Minnesota elections." But the substance of the email did not mention the filing of an action in district court regarding Senator Smith; it instead showed that MNEIT was "planning on filing a Voter contest" in the elections of Lewis, Kistner, and Qualls. Nor did the email mention

any attorney; it explained that MNEIT was merely "a group of volunteers that are committing a lot of time and effort towards this cause."

Even construing the terms of the purported "offer" as including the contents of the incomplete affidavit sent to [redacted] the offer lacks any appreciable degree of specificity. The affidavit shows merely that the affiant is "contesting the election of" an unnamed candidate for office; that the affiant "contest[s] the aforementioned election(s)" for various reasons, including a belief that there were "violations of the Minnesota Election Law"; and suggests the affiant's understanding that he "will be joining with other voters across MN to contest Minnesota election results." As with the body of the email, the fillable version of the affidavit contained no mention of Senator Smith nor any representation by an attorney in a formal legal action.

Most importantly, nothing in the email or affidavit described what the "filing [of] a Voter contest" actually entailed: the initiation of a legal proceeding in a Minnesota court on behalf of named contestants, subject to the substantive and procedural strictures of Minn. Stat. §§ 209.01-.12 (2020) and accompanying rules of civil procedure and general practice. Nothing in MNEIT's correspondence explicitly conveyed that [redacted] could or would be named as a party in a legal proceeding or that he agreed to legal representation by Shogren Smith or any other attorney chosen by MNEIT in such a proceeding. Relatedly, the email and affidavit failed to describe any type of legal service offered in relation to the contest. We find that there was no valid offer of legal representation and that there was therefore no valid agreement for legal representation.

Even assuming the existence of a specific and definite offer to bring an election contest on [redacted] behalf, there was no valid acceptance by [redacted] Shogren Smith contends that the return of the affidavit constituted an engagement agreement, but she ignores the disparities between the email and [redacted] actual response. The email referred to the elections of Lewis, Kistner, and Qualls, but [redacted] did not indicate any willingness to contest any of those elections in a district court proceeding; he indicated that he was challenging Senator Smith's election. And there is nothing in the record reflecting that [redacted] accepted an offer of legal representation by Shogren Smith—the record shows that [redacted] did not know Shogren Smith at all until well after the dismissal of the action. Thus, there was no acceptance of a purported offer, and to the extent [redacted] expressed his desire to contest Senator Smith's election, it was not coextensive with the email's offer. *See Com. Assocs.*, 712 N.W.2d at 782.

Finally, the record does not establish any of the hallmarks of an agreement between attorney (Shogren Smith) and client ([redacted] for the provision of legal services *on behalf of that client*. Shogren Smith does not allege, and the record does not establish, any communication between her and [redacted] supporting the existence of a privileged relationship between a client and counsel. *See* Minn. Stat. § 595.02, subd. 1(b) (2020) (recognizing privilege attaches to "communication made by the client *to the attorney*" (emphasis added)); *Kobluk v. Univ. of Minn.*, 574 N.W.2d 436, 440 (Minn. 1998) (treating favorably the Wigmore formulation: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance

permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." (quotation omitted)).

For these reasons, on this record, we find that (1) there was no agreement—explicit or implicit—that [redacted] would be named as a contestant in this action, and (2) there was no agreement that Shogren Smith would represent [redacted] in this action.[2]

B. Shogren Smith's submissions were made for an improper purpose and constituted a fraud upon the court.

Having found the lack of any agreement that [redacted] be named as a contestant or that Shogren Smith would represent him in such an action, we next consider whether Shogren Smith's submissions violate the provisions of either Minn. Stat. § 549.211, subd. 2, or Minn. R. Civ. P. 11.02.

At the outset, we conclude that her representations regarding [redacted] status as a contestant and Shogren Smith's role as his counsel do not fall under the purview of those provisions governing frivolous claims, assertions without factual support, or unwarranted denials in responsive pleadings. *See* Minn. Stat. § 549.211, subd. 2(2)-(4); Minn. R. Civ. P. 11.02(b)-(d). Those provisions generally address the substantive allegations, claims, and defenses of the proceedings. Here, our order to show cause and the question of sanctions do not concern the substantive merits of the election contest, but the manner in which the contest was initiated and the nature of [redacted] involvement in the action in the first instance.

[2] Shogren Smith suggests that the court ought to consider whether [redacted] perjured himself. We reject that invitation, as the record contains no good-faith basis in support of the implicit allegation that [redacted] perjured himself.

With that said, we find that Shogren Smith filed her submissions for an improper purpose and committed a fraud upon the court. Minn. Stat. § 549.211, subd. 2(1), and Minn. R. Civ. P. 11.02(a) separately provide that an attorney making a written submission to the court certifies that "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Harassment, delay, and increased costs are merely examples of improper purposes, but the list is not exclusive.

A fraud upon the court is what is "connected with the presentation of a case to the court." *Angier v. Angier*, 415 N.W.2d 53, 56 (Minn. App. 1987). It occurs when the attorney intentionally misleads the court as to material circumstances of the case or if the attorney abuses the court's process. *See Halloran v. Blue & White Liberty Cab Co.*, 92 N.W.2d 794, 798 (Minn. 1958). "[C]ourts are constituted to decide actual questions existing between *real parties* involved in a real controversy and the submission of anything but a real controversy is recognized judicially as a fraud upon the court." *Id.* (emphasis added). Fraudulent intent is present if the individual "knows or believes the matter is not as . . . she represents it to be." *Florenzano v. Olson*, 387 N.W.2d 168, 173 (Minn. 1986). But "[f]raudulent intent is also present when a misrepresenter speaks positively and without qualification, but either is conscious of ignorance of the truth, or realizes that the information on which . . . she relies is not adequate or dependable enough to support such a positive, unqualified assertion." *Id.* "A claim to an honest belief that what is false is

true" does not preclude a finding of fraud "if that claim[ed belief] is, under the circumstances, completely improbable." *Id.* at 174.

Here, Shogren Smith suggests that she "acted in good faith based upon the affidavits provided by the contestants" and "believed a valid contest was filed based upon affidavits of apparently legitimate contestants." On this record, Shogren Smith's claim that she had an honest belief that [redacted] consented to his participation and her legal representation in this action is completely improbable. Shogren Smith knew that either (1) [redacted] had not agreed to join the action under her counsel or (2) the information she relied upon was inadequate to establish his status as a party and her status as his attorney.

The initiation and litigation of an election contest as [redacted] purported counsel without his knowledge, consent, or participation undoubtedly render the purpose of Shogren Smith's submissions improper. The substance of written submissions filed with the court rests on the implicit yet foundational premise that the named party has, in fact, consented to act as a party to the action and is seeking to make some sort of claim and obtain some sort of relief from the court. Relatedly, the signing of a pleading by an attorney on behalf of a client rests on a similarly implicit and foundational assurance: that the client authorized the attorney to represent the client's interests in making those claims and has done so with the express agreement of the client.

Accordingly, it is foundational to the proper functioning of the judiciary that the court may rely on the representations of attorneys who appear before it. The Minnesota Rules of Professional Conduct recognize this foundational principle by mandating candor toward tribunals, prohibiting an attorney from making knowingly false statements of fact

or law, failing to disclose binding authorities, and offering false evidence. Minn. R. Prof. Conduct 3.3(a)(1)-(3). An attorney has "special duties . . . as [an] officer[] of the court to avoid conduct that undermines the integrity of the adjudicative process." Minn. R. Prof. Conduct 3.3, cmt. [2]. Misrepresentations of circumstances as basic as a party's *actual status as a real party*, *see Halloran*, 92 N.W.2d at 798, or an attorney's *actual representation* of a purported party are as injurious to the administration of justice as misrepresentations of material facts or law about the substance of the claims at issue.

[redacted] right to bring an election contest was personal to him. *See* Minn. Stat. § 209.02 (conferring standing upon "[a]ny eligible voter"); *see also* Minn. R. Civ. P. 17.01 ("Every action shall be prosecuted in the name of the real party in interest."). As we discuss below, our decision today is not concerned with the merits of this particular election contest. But we do take this opportunity to emphasize the profound importance of a voter's ability to pursue an election contest generally. An eligible voter's ability to participate in the electoral process and challenge its outcomes is fundamental to the proper functioning of our elections and the democracy they sustain. To this end, the Minnesota Legislature has afforded the voters a procedure in Minn. Stat. §§ 209.01-.12, through which the voters may make their contests. And the judiciary carries, in its respective role, the duty of hearing and deciding such matters.

Shogren Smith contends that "[t]he courts have a duty to protect the election process when just cases are brought before it." We agree, and that is why we emphasize the personal nature of [redacted] election-contest rights and the importance of fundamental representations made to the court in pleadings, such as an individual's consent to bring an

action as a party. The court's duty to protect the election process derives from the court's duty to protect the integrity of judicial proceedings more broadly—a duty in which every attorney must share. The judiciary is an institution dependent, in no small part, upon the confidence of the public that the process is competent in deciding genuine disputes with a degree of finality in a fair and transparent manner. And when an action is initiated with an improper purpose, the impropriety impairs the integrity of the judicial process and erodes confidence in the institution.

The impropriety of the submissions purportedly made on [redacted] behalf is compounded by the fact that Shogren Smith failed to make an inquiry reasonable under the circumstances. Shogren Smith essentially concedes that she had no contact with [redacted] about the substance of the contest or the scope of her purported representation, explaining:

> (1) The MNEIT email did not indicate which attorneys would be filing the election contests because there were volunteer attorneys working on the cases and they were not sure who would be filing the cases until the last few hours due to the need to comply with very tight statutory deadlines.
>
> (2) None of the affiants, Mr. [redacted] included, contacted the MNEIT to ask who would be filing the election contests.
>
> (3) The MNEIT gathered the contact information for voters and contestants while the volunteer lawyers began drafting the documents to contest the elections. Because of COVID, the Thanksgiving and Christmas Holidays and the very tight timeline to file the election contests, other MNEIT volunteers managed the communications from and between the MNEIT and the contestants. The emails were monitored and no emails seeking additional information were received from the contestants during December or January.

Shogren Smith contends that the short deadline governing the election-contest filing justified her reliance on [redacted] affidavit. But even in the face of a fast-approaching deadline, the lack of any inquiry was not reasonable. And we observe that Shogren Smith had no communication with [redacted] *at all*—not after the deadline passed, not throughout the action, not after the dismissal of the action or entries of adverse judgments *against* [redacted] and not after the issuance of our order to show cause.

We find that Shogren Smith violated Minn. Stat. § 549.211, subd. 2(1), and Minn. R. Civ. P. 11.02(a). We next consider whether sanctions are appropriate.

II. A monetary sanction in the amount of $15,000 is appropriate under either Section 549.211 or Rule 11.

A sanction under either Section 549.211 or Rule 11 must be "limited to what is sufficient to deter repetition" of the conduct "or comparable conduct by others similarly situated." Minn. Stat. § 549.211, subd. 5 (2020); Minn. R. Civ. P. 11.03(b).

> Since one of the primary purposes . . . is to deter litigation abuse, [a notice of the possibility of sanctions] should be given as early as possible during the proceedings to provide the attorney . . . the opportunity to correct future conduct. A policy of deterrence is not well served by tolerating abuses during the course of an action and then punishing the offender after the [proceeding] is at an end. A proper sanction assessed at the time of the transgression will ordinarily have some measure of deterrent effect on subsequent abuses and resultant sanctions. Only in very unusual circumstances will it be permissible for the trial court to wait until the conclusion of the litigation to announce that sanctions will be considered or imposed. Similarly, a party intending to seek sanctions should notify the court and other parties with specificity of that intention.

Uselman v. Uselman, 464 N.W.2d 130, 143 (Minn. 1990) (quotation omitted).

"[T]he sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation." Minn. Stat. § 549.211, subd. 5(a); Minn. R. Civ. P. 11.03(b). But "[m]onetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned." Minn. Stat. § 549.211, subd. 5(b); Minn. R. Civ. P. 11.03(b)(2).

Here, a monetary sanction is permissible even though the contest has already been dismissed and money judgments have been satisfied. First, the contest was involuntarily dismissed. *See id.* Second, we think this matter presents an "unusual circumstance[]," *Uselman*, 464 N.W.2d at 143, in which it is permissible to impose sanctions after resolution of the matter. The conduct at issue relates to how Shogren Smith presented the case to the court, but the conduct was not discovered or raised until after the case reached its final disposition.

Having concluded that a monetary sanction is *permissible*, we also find that a monetary sanction is *appropriate*. A monetary sanction serves the proper purpose of deterrence, both for Shogren Smith and others similarly situated. As we have conveyed, the court relies on counsel to effect the administration of justice, and representations about the status of parties and their consent to prosecute their actions is foundational to the propriety of the adjudicative process. And we cannot under-emphasize the seriousness of

the conduct at issue. The right to pursue an election contest, and how to pursue that right, belongs to the individual. By pursuing an action on behalf of [redacted] without his consent, Shogren Smith deprived [redacted] of his ability to vindicate rights belonging exclusively to him. Shogren Smith and other attorneys must ensure that a party has consented to representation by a specific lawyer, has agreed to pursue litigation, and is informed about the litigation.

We add that Shogren Smith's conduct necessarily turned the adjudicative process toward a wasteful purpose: the resolution of claims that were only *purportedly* raised by [redacted] Although other contestants were named in this proceeding, a portion of the court's and parties' time and effort were necessarily directed toward addressing [redacted] apparent assertions and claims for relief.

We also note that Shogren Smith hindered and delayed the adjudicative process when she did not comply with the Rules of Practice for District Court. She did not respond to the court's order to show cause because she did not open her email to read the court's order. When the court e-filed its order, she was deemed to have received notice of the court's order to show cause. When she did not respond timely, this court could have issued this order without her response. See Minn. R. Gen. Prac. 14.03(f). But because the potential consequences to Shogren Smith are so serious, the court hired a process server to personally serve her with the order to show cause. Then she did file a written submission. While these events do not form the basis for the imposition of sanctions, we emphasize that Shogren Smith's conduct impaired the efficient administration of justice.

The court finds it appropriate to impose a monetary sanction in the amount of $15,000, which is enough to deter similar future conduct. Such a sanction would be appropriate under either Section 549.211 or Rule 11.

III. Vacation or modification of judgments and records as to [redacted] is proper.

[redacted] requests that the court "remove [him] from this case" and "release [him] from any penalties of any sort." Shogren Smith and Quist oppose this request on the ground that [redacted] knowingly consented to joining this action as a contestant. For the reasons set forth, we reject their argument. We therefore conclude that it is appropriate to vacate the judgments against [redacted] remove him from the case and its caption, seal the original filings in this case, and order the preparation of public versions of filings in which [redacted] name is redacted.

> Where a court is misled as to material circumstances, or its process is abused, resulting in the rendition of a judgment which would not have been given if the whole conduct of the case had been fair, the court has inherent power to vacate for fraud and that power includes as well the power to modify.

Halloran, 92 N.W.2d at 798. And the judiciary maintains inherent authority governing "that which is essential to the existence, dignity, and function of a court because it is a court," which may include the maintenance of court records. *State v. S.L.H.*, 755 N.W.2d 271, 275, 277-78 (Minn. 2008).

Having found that Shogren Smith worked a fraud upon the court about [redacted] status as a party, we conclude that the judgments against [redacted] must be vacated because they would not have been entered had his status as a non-party been known to the court. *See Halloran*, 92 N.W.2d at 798. Further, [redacted] shall be dismissed as a contestant, the

caption of the case shall be amended to remove [redacted] name, the original filings in this case shall be sealed, and public versions of the filings shall be prepared with [redacted] name redacted.[3]

IV. Referral to the Minnesota Lawyers Professional Responsibility Board is necessary.

"A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority." Minn. R. Prof. Conduct 8.3(a). Shogren Smith contends that this matter should not be referred to the LPRB because "[t]he attorneys working with the MNEIT and the filing attorney acted in good faith, based upon the affidavits provided by the contestants, who each clearly indicated they were contesting the elections and were joining in the election contests."

It is professional misconduct for an attorney to:

> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> . . . .
>
> (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; [or]
>
> (d) engage in conduct that is prejudicial to the administration of justice[.]

[3] Shogren Smith and Quist each suggest that, if [redacted] is removed, there are many other willing contestants that should be substituted in his place. But the underlying contest has already been dismissed.

Minn. R. Prof. Conduct 8.4(a), (c)-(d).

As set forth herein, Shogren Smith worked a fraud upon the court by making submissions representing that [redacted] was actually a contestant and that she was his attorney. The conduct warrants a referral to LPRB for further investigation.

Even if we were to accept as true Shogren Smith's claim that [redacted] agreed to her representation (we do not), the record challenges her compliance with foundational rules of professional conduct. Shogren Smith did not communicate with [redacted] before beginning an action on his behalf. There was no communication regarding the fact of representation. And there was no consultation regarding the nature of the action, its significance, [redacted] objectives, how his objectives might be accomplished, or potential consequences of an adverse judgment. At a minimum, the record demonstrates violations of standards governing the scope of representation, diligence, and communication. *See* Minn. R. Prof. Conduct 1.0(c); 1.2(a); 1.4(a)(2), (3); 1.4(b).

Finally, this court is also particularly concerned about certain allegations in Shogren Smith's written submission to the order to show cause. She urges this court to consider whether [redacted] perjured himself when he asked this court to dismiss him from the case. It is a grave allegation to assert that one's purported client has committed perjury and we discern no good-faith basis in fact or law to support such an allegation.

Our rules of professional conduct do not set the ceiling of permissible conduct, but they do establish threshold levels of competency, diligence, communication, and candor governing an attorney's conduct toward both the court and client. On this record, a referral is required.

V. The imposition of sanctions and referral relate to the manner and conduct through which the case was presented, not the substance of the election contest.

Shogren Smith and Quist each raise concerns of political bias and other improper motivations affecting this and other courts. Shogren Smith contends that sanctions and a board referral are not warranted because it would "discourage attorneys from accepting unpopular cases" and because "[a]ttorneys representing voters in political matters or election contests should not be punished because they assisted voters in seeking their day in court." She also urges that "[t]he courts should resist all efforts to be drawn into partisan matters by using recusal rules when appropriate." Quist questions, "Are there members of the judiciary who have allowed their own biases to cloud their handling of these issues? Is the court becoming a participant in these matters?"[4] She asserts that "[t]he . . . court has now spent more time attacking an attorney . . . than it did hearing the contest to protect the rights of the voters. The court should not have become embroiled in the politics of the election cases because it will serve to further undermine the people's trust in the courts."

We stress the importance of the right of an eligible Minnesota voter to contest an election result and highlight this right to the foundation of our democratic process. Our order should not be construed to discourage counsel from representing an individual who desires to vindicate that right and agrees to pursue an election contest in district court with the counsel of their choosing. The basis for sanctions here is *the presentation of a claim to a court without that person's knowledge and consent*—conduct that is sanctionable in

[4] Quist also raises questions of bias and process relating to proceedings in a different court in a different case. Those proceedings are irrelevant to our consideration of the conduct in this case, and so we do not address those issues.

any context. But for clarity's sake, we underscore that our decision today does not concern the substance of the underlying election contest. It concerns representations made to this court regarding [redacted] status as a contestant and the absence of an agreement that Shogren Smith act as his counsel. As important as the individual right to contest an election may be, a fraud upon the court about an individual's status as a party who consented to bringing an action is improper in *any* context.

J.L.F., D.D.R., R.L.W.