

STATE OF VERMONT

SUPERIOR COURT
Orange Unit

CIVIL DIVISION
Docket No. 195-9-11 Oecv

In re Estate of Allen Avery

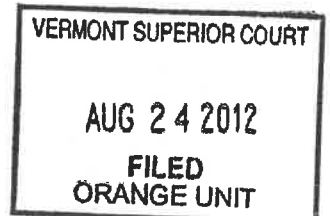
Decision on Probate Appeal

Attorney W.E. Whittington appeals from Rule 11 sanctions imposed upon him during a probate proceeding. He argues that sanctions were unavailable as a matter of law because: (1) the motion for sanctions was not made separately; (2) the motion did not describe the offending conduct with specificity; and (3) the 21-day "safe harbor" requirement described in Vermont Probate Procedure Rule 11(c)(1)(A) was not followed. For the following reasons, the sanctions order is vacated.

The following material facts are established by the record. Attorney Whittington filed a written motion during the probate proceeding espousing an interpretation of Probate Rule 62 that would require interim orders to be stayed until final judgment under certain circumstances. In response, Attorney Potter Stewart filed a written opposition in which he described Attorney Whittington's argument as "stand[ing] common sense on its head" and "insulting to the court." Attorney Stewart moreover described Attorney Whittington's motion as "another in a series of unnecessarily aggressive and improper litigation tactics," but Attorney Stewart did not describe that series of events in more specific detail. Finally, Attorney Stewart requested, in the final paragraph of his written response, an order that Attorney Whittington pay \$500 to the executor of the estate "as a caution . . . to exercise more care in determining whether there is a good faith basis for asserting claims on behalf of clients."

Attorney Stewart's request for sanctions was not filed separately from his response on the merits, and Attorney Stewart filed the motion with the court without first serving it on Attorney Whittington. Attorney Whittington later filed a reply defending his position on the merits, but he did not address the request for costs.

About one month later, without holding a hearing, the probate judge denied Attorney Whittington's motion on the merits and granted Attorney Stewart's request for sanctions. He described Attorney Whittington's motion as advancing "the most bizarre and tortured interpretation of V.R.P.P. 62 that this court has ever seen" and furthermore found that the filing amounted to "another in a series of unnecessarily aggressive and improper litigation tactics" on the part of Attorney Whittington, although the prior conduct was not specified. The probate judge therefore concluded that the filing of the motion had been a violation of Rule 11, and sanctioned Attorney Whittington by ordering him to pay \$500 to the executor. This appeal followed.



Probate Rule 11 generally imposes an obligation on attorneys to ensure that their legal arguments 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.” V.R.P.P. 11(b)(2); see also V.R.P.P. 11, Reporter’s Notes—2002 Amendment (explaining that Probate Rule 11 conforms to the analogous state and federal civil rule). Because constitutional due process considerations require notice and an opportunity to be heard before sanctions may be imposed, Rule 11 prescribes a detailed mechanism that must be followed before sanctions may be awarded in response to a motion filed by an opposing party. *Nuwesra v. Merrill Lynch, Fenner & Smith, Inc.*, 174 F.3d 87, 92 (2d Cir. 1999); 5A Wright, Miller, Kane & Marcus, Federal Practice and Procedure: Civil 3d § 1337.3.

In particular, “a party seeking Rule 11 sanctions must make the request separately from other motions or requests, [must] describe the specific conduct alleged to warrant the sanctions[,] and must serve the motion on the opposing party in question” at least 21 days before the motion for sanctions is filed with the court. *Bennington Realty, LLC v. J&R Co., Inc.*, 169 Vt. 538, 538 (1999) (mem.) (citing V.R.C.P. 11(c)(1)(A)). Each of the three requirements serves a purpose. The “separate paper” requirement is meant to highlight the request for sanctions by preventing it from being tacked onto or buried in motions on the merits. 5A Federal Practice and Procedure, *supra*, at § 1337.1. The requirement of an explanation of the “specific conduct” at issue serves to put the attorney “on notice as to the particular factors that he must address if he is to avoid sanctions.” *Nuwesra*, 174 F.3d at 92. And the 21-day “safe harbor” provision provides both an opportunity to respond and an opportunity to avoid sanctions if the attorney chooses to withdraw or correct the potential violations brought to his attention. *Agency of Nat. Res. v. Lyndonville Savings Bank & Trust Co.*, 174 Vt. 498, 499 (2002) (mem.). All three of the procedural requirements are integral to the process of providing notice and an opportunity to respond, and the rule is that “sanctions are generally unavailable, as a matter of law, if the moving party fails to abide by the rule’s procedural requirements.” *Id.* at 499–500 (citing *Bennington Realty*, 169 Vt. at 539); see also *Perpetual Securities, Inc. v. Tang*, 290 F.3d 132, 142 (2d Cir. 2002) (holding that an award of sanctions “in contravention of the explicit procedural requirements of Rule 11 was . . . an abuse of discretion”); accord 5A Federal Practice and Procedure, *supra*, at § 1337.2 (collecting cases).

In this case, the motion for Rule 11 sanctions did not comply with any of the three procedural requirements: the motion for sanctions was not filed separately from the written response on the merit; the motion did not adequately describe the specific conduct at issue but rather referred to a generalized “series of unnecessarily aggressive and improper litigation tactics” that did not fairly put the attorney on notice of the preceding conduct at issue;¹ and the motion was not served on the attorney at least 21 days before it was filed with the court. Under these circumstances, motion should have been denied “as a matter of law.” *Bennington Realty*, 169 Vt. at 539. For this reason, the decision imposing sanctions must be vacated.

¹ The need for specific explanations of conduct is particularly important in cases where, as this one seemed to be, the decision to impose sanctions was motivated by a pattern of conduct that ultimately reached a tipping point. The explanation that “this was the straw that broke the camel’s back” does not provide the attorney or the appellate court with sufficient notice of the preceding conduct at issue; an explanation of the preceding events is needed.

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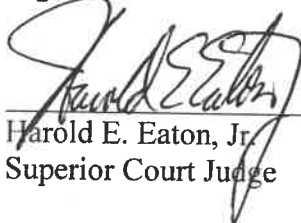
Because the sanctions order is reversed for a procedural reason, this court expresses no opinion on the merits of the Rule 11 issue: whether Attorney Whittington's legal arguments were "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Nor should this decision be interpreted as an endorsement of the litigation tactics below; the court expresses no opinion on the matter.

Finally, the court has considered remanding the issue of sanctions to the probate division for further consideration, but there would be little gained by this because the proceedings in the probate division have concluded and the matter is now in the civil division, sitting as "a higher court of probate." *Whitton v. Scott*, 120 Vt. 452, 457 (1958). It should suffice to note that, if the conduct at issue in the probate division is seen to continue in the civil division, the matter may be brought to this court's attention by way of a properly-filed Rule 11 motion.

ORDER

For the foregoing reasons, Appellant W.E. Whittington's Motion for Summary Judgment (MPR #2), filed May 1, 2012, is *granted*. The Opinion and Order of the Vermont Superior Court, Orange Unit, Probate Division dated July 18, 2011 in Docket No. Oep 096-08 is *vacated* as to the order that Attorney W.E. Whittington pay the executor of the estate \$500.00. The executor is ordered to remit the \$500 to Attorney Whittington. Attorney Whittington is further entitled to a statement that no order of contempt was ever entered in the probate court.

Dated at Chelsea, Vermont this 23rd day of August, 2012.



Harold E. Eaton, Jr.
Superior Court Judge