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Hon. Richard D. Eadie
Plaintiff's Response to
Defendants' Motion for Discovery Protection
Under CR 26(c) and Sanctions Under CR 26(i)
Noted for Consideration: Monday, November 14, 2011
WITHOUT ORAL ARGUMENT

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

LANE POWELL PC, an Oregon professional corporation, Plaintiff, v. MARK DeCOURSEY and CAROL DeCOURSEY, individually and the marital community composed thereof, Defendants.	No. 11-2-34596-3SEA PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR DISCOVERY PROTECTION UNDER CR 26(c) AND SANCTIONS UNDER CR 26(i)

I. INTRODUCTION

Mark and Carol DeCoursey's ("Defendants") Motion for Discovery Protection Under CR 26(c) and Sanctions Under CR 26(i) ("Motion") demonstrates a fundamental ignorance of the requirements of the Civil Rules. Although Defendants have chosen to proceed pro se, that does not permit them to violate the rules that apply in this Court. Neither the Court nor Lane Powell should be forced to waste time and energy responding to over length motions such as this that are based on clearly inapplicable legal principles.

As an initial matter, Defendants' motion is premature. They have not provided either full responses or objections to Lane Powell's discovery requests. Indeed, Defendants responses are not yet due. To the contrary, they have merely written an email to Lane Powell's counsel complaining about the discovery requests.

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On the merits, however, Defendants' Motion fails for numerous reasons. First, it rests on the notion that Defendants can be permitted to make claims against Lane Powell and still assert the privilege. That is not the law in Washington. It is firmly established precedent that a lawsuit against an attorney waives the privilege. Second, Defendants' claims regarding the alleged scope and burden of Lane Powell's requests are inaccurate and rest on basic misunderstandings of the discovery obligations contained in the Civil Rules.

II. STATEMENT OF FACTS

A. Lane Powell Successfully Represents Defendants in the Underlying Case

Lane Powell agreed to represent the Defendants in connection with a case brought against them by numerous parties: *V&E Medical Imaging Services, Inc. v. Mark DeCoursey, et ux., et al* (the "Windermere lawsuit"). Defendants, in turn, agreed to pay Lane Powell for its representation.

Lane Powell achieved an excellent result for the Defendants in the Windermere lawsuit. The court entered a judgment for damages in the amount of $522,200.00, and granted an award of Lane Powell's legal fees in the amount of $463,427.00 and taxable costs of $45,000.00. Lane Powell likewise successfully defended the judgment on appeal before both the Washington Court of Appeals and the Washington Supreme Court. Again, Lane Powell obtained fee awards from each of these courts as well.

The Defendants were a challenging client for Lane Powell from the beginning. Nonetheless, Lane Powell attempted to work with the Defendants to pay Lane Powell's fees as they had agreed to do. Indeed, Lane Powell was willing to forbear for a reasonable time in collecting the fees provided that Lane Powell was paid first out of any settlement proceeds or any payment of the judgment.

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B. Defendants Refuse to Honor Their Obligations to Pay Lane Powell for its Work and Sue Lane Powell for Malpractice

Despite all the work performed by Lane Powell for the Defendants, Defendants have not honored their obligations to pay Lane Powell. Indeed, they terminated Lane Powell's representation in order to prevent Lane Powell from recovering fees and costs to which it was entitled. As a result, Lane Powell was forced to protect its interests by filing an attorneys' lien and eventually suing Defendants. Complaint, Dkt. 1.

Critical, for the purpose of this Motion, is Defendants' response to Lane Powell's complaint. They filed "Defendant DeCourseys' Answer and Counterclaims." Dkt. 8. The document contains 286 paragraphs. It also includes claims for legal malpractice (¶¶ 259–61), Breach of Fiduciary Duty (¶¶ 250–53), Breach of Contract (¶¶ 254–58), "Undisclosed Conflict of Interest" (¶¶ 262–65), violations of the Consumer Protection Act (¶¶ 266–69), Malicious Prosecution (¶¶ 270–72), and Unjust Enrichment (¶¶ 273–75). *Id.* Thus, on the face of Defendants' counterclaims, it is clear that they have chosen to assert claims for malpractice (and other related claims) against their former lawyers, Lane Powell.

C. Lane Powell Propounds Discovery Requests and Defendants Refuse to Provide Responses and Instead Prematurely Seek Relief from this Court

Lane Powell propounded discovery requests on Defendants. These discovery requests sought information relating to the relationship between Defendants and Lane Powell and the underlying lawsuit. **Ex. A.**[1] Defendants' responses and objections to these discovery requests are not yet due: indeed, they will not be due until the (corrected) noting date for this Motion. *Id.*; CR 33(a); CR 34(b).

Instead of providing responses and objections to Lane Powell's discovery requests, Defendants wrote an email to Lane Powell's counsel demanding to conduct a meet and

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[1] Exhibits A–B referenced herein are attached to the accompanying Declaration of Malaika M. Eaton in Opposition to Defendants' Motion for Discovery Protection ("Eaton Decl.").

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1 confer and attempting to pressure Lane Powell's counsel to agree that the meet and confer
2 be recorded. **Ex. B** at 4. Counsel for Lane Powell replied to that email with confusion as
3 Defendants had not responded to Lane Powell's discovery and had propounded no
4 discovery of their own. *Id.* ("[S]ince you have promulgated no discovery, I am at a loss as
5 to what the point is of a CR 37 conference"). Nonetheless, counsel indicated a willingness
6 to discuss discovery with Defendants if that conference was conducted in a professional
7 way consistent with the spirit of the rules. *See id.*

8 Defendants responded again demanding to meet and confer, this time with a court
9 reporter. *Id.* at 2–3. The email included a random selection of complaints regarding Lane
10 Powell's discovery requests, the vast majority of which claimed that the discovery sought
11 was privileged as it related to Lane Powell's representation of the Defendants. *Id.* Lane
12 Powell's counsel again responded, asking Defendants to follow the procedure specified by
13 the Civil Rules: provide appropriate answers to the discovery requests, verified as
14 required by the Rules, to allow Lane Powell to make a determination whether a meet and
15 confer was required to attempt to resolve any objections. *Id.* at 1 ("Please answer my
16 discovery requests as required by the Civil Rules. Once I have your actual responses,
17 verified as required by the rules, we can arrange for a meet and confer under [the] Rules if
18 that is necessitated by your responses.").

19 Defendants refused to provide responses and instead brought this Motion claiming
20 that counsel for Lane Powell should be sanctioned for refusing to meet and confer. Lane
21 Powell respectfully requests that the Court deny Defendants' Motion and instruct them to
22 comply with the Civil Rules.

23 **III. EVIDENCE RELIED UPON**

24 Plaintiff relies on the Declaration of Malaika M. Eaton in Support of Plaintiff's
25 Opposition to Defendants' Motion for Discovery Protection Under CR 26(c) and
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Sanctions Under CR 26(i) and Exhibits A–B attached thereto, and the records and files herein.

IV. AUTHORITY

A. The Motion is Premature Because Defendants Have Not Yet Provided Their Responses to Lane Powell's Discovery Requests

When a party propounds discovery requests, the Civil Rules contemplate that the party to whom the requests were directed will provide its responses within the time permitted by the Rules (CR 33 and CR 34). If the propounding party determines that the responses are inadequate or the objections unwarranted, the Rules require the parties to meet and confer before seeking relief from the Court.

The Defendants are presumably aware of this well-established procedure through their experience with the Windermere lawsuit. Indeed, Defendants quote the applicable rule in their Motion: "If the court finds that counsel for any party, ***upon whom a motion or objection in respect to matters*** covered by such rules ***has been served***, has willfully refused or failed to confer in good faith, the court may apply the sanctions provided under Rule 37(b)." CR 26(i) (emphasis added). The Defendants here have failed to serve their objections to the discovery requests on Lane Powell as required, have insisted on recording any meet and confer session with Lane Powell's counsel, and instead have moved for relief from the Court before having provided Lane Powell with their full responses (signed and verified) to Lane Powell's discovery requests. Such full responses serve to guide the parties in evaluating and discussing areas of disagreement regarding the obligation of the responding party. Without responses, Lane Powell is at a loss as to how the parties could possibly conduct an effective meet and confer.

Accordingly, Defendants' request for a protective order and for sanctions must both be rejected on this basis alone. As Lane Powell made clear to Defendants, it is willing to meet and confer when it receives responses to its discovery requests from Defendants. **Ex. B** at 1. Defendants' claim that Lane Powell "flatly refused to participate

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in a telephonic or in-person CR 26(i) conference," Mot. at 6, is simply false. Lane Powell informed Defendants the counsel would "arrange for a meet and confer under the Rules" after Lane Powell received the DeCourseys' discovery responses "if that is necessitated by your responses." **Ex. B** at 1; *see also* Mot. at 6 (quoting email).

B. Defendants' Claims of Privilege Must Be Rejected Because They Have Waived the Privilege by Suing Lane Powell

Defendants' primary objection to Lane Powell's discovery requests, and the main basis on which they seek relief is that the discovery requests invade the attorney client privilege between Defendants and Lane Powell, their former attorneys. *E.g.*, Mot. at 9–12. Defendants apparently presume (wrongly) that they can sue Lane Powell for malpractice and nonetheless still claim the protection of the attorney client privilege. Their citation to various rules regarding the nature and extent of the privilege (Mot. at 9–12) simply misses the point. Defendants failed to pay Lane Powell fees it was owed, fired Lane Powell, and have now sued it for malpractice. Dkts. 1, 8. It is through their own actions that they have waived the privilege (which, Lane Powell agrees, was theirs to waive). Thus, Lane Powell is not "maneuvering to force DeCourseys to breach their own privilege," Mot. at 11—they did that on their own. Dkt. 8.

Indeed, it is black letter law that a claim by a client against an attorney for malpractice waives the privilege. KARL B. TEGLAND, WASH. PRAC. SERIES, EVID. LAW & PRAC. § 501.23 (5th ed. 2011) ("The client normally waives the privilege by commencing an action against the attorney. Legal malpractice actions are a familiar example."). The same is true when the claim, as here, is asserted as a counterclaim in response to a suit by the attorney to collect unpaid legal fees. *Id.* ("If the attorney commences an action against the client, as for example to collect a fee, the client waives the privilege by asserting a counterclaim against the attorney."). Indeed, "affirmative defenses that call into question the nature and quality of the attorney's work" waive the privilege. *Id.* Washington Courts have further held that even malpractice claims against an attorney waive the privilege with

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respect to work done for the client by another attorney involved in the underlying litigation. *Pappas v. Holloway*, 114 Wn.2d 198, 208, 787 P.2d 30 (1990). Thus, any objections the Defendants may have to responding to Lane Powell's discovery requests based on their continued assertion of a privilege with respect to their communications with Lane Powell lacks merit. (Had Defendants provided Lane Powell with their responses as required, Lane Powell would certainly have sought a meet and confer with respect to this objection.)

C. Defendants' Burden Objections Misapprehend the Requirements of the Rules

The last seven (overlength) pages of the Defendants' Motion appear to address claims associated with the burden of the discovery requests. Defendants frequently cite irrelevant authority.[2] But, in any event, the Defendants' claims in this regard primarily rest on a misunderstanding regarding their obligations under the Civil Rules.

For example, the Defendants claim that the materials requested are in the possession of Lane Powell. *E.g.*, Mot. at 13. But Lane Powell is also entitled to know what documents Defendants have in their possession regarding the lawsuit and Lane Powell's representation. If, after Defendants properly respond to Lane Powell's discovery requests, they have legitimate concerns regarding the volume of material, they can address these concerns by producing the documents for inspection and copying. CR 34(a). (Of course, Lane Powell would expect the Defendants to follow the same protocols in any discovery requests to Lane Powell they may propound.)

The Defendants likewise claim that they cannot be obligated to respond to the standard interrogatory requiring them to list people with information regarding the lawsuit

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[2] For example, the Defendants cite to WAC 480-70-061 to suggest that Lane Powell has an obligation to keep all of the records relating to its representation on site and organized in a specific way. Mot. at 14. Of course, the Defendants fail to mention that Part 480 of the WAC is devoted to the Utilities and Transportation Commission and section 70 deals with "Solid waste and/or refuse collection companies." It has no bearing on lawyers' files.

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(Mot. at 15–18), but their claims are meaningless. Essentially, their argument boils down to the claim that—because of their "public presence and outspoken way of life" (Mot. at 16)—they do not know many of the individuals who might have information relating to the issues in this case. But, of course, Lane Powell's discovery request does not require the Defendants to go out and obtain information that is not reasonably available to them. Thus, the Defendants are simply wrong that "Lane Powell obviously intends that the DeCourseys should 'report back' to Lane Powell every time Decourseys mention either the Windermere lawsuit or the Lane Powell lawsuit to anyone." Mot. at 16–17.[3]

D. Lane Powell Is Not Obligated to Consent to Record a Meet and Confer

The Defendants appear to argue that Lane Powell has some sort of obligation to agree to audio recording as a prerequisite to conducting a meet and confer session with Defendants, former clients of Lane Powell who have refused to pay Lane Powell for the fees it earned (and the Court awarded) even when Lane Powell prevailed for the Defendants in the underlying litigation. As described in detail above, Lane Powell's counsel was willing to meet and confer with Defendants (**Ex. B** at 1) and only after Lane Powell agreed did the Defendants assert a new demand to conduct the meet and confer before a court reporter.

Put frankly, that is not the practice in any court in Washington. The rules do not contemplate recorded conversations, which only leads to "posturing" not resolution. The requirement of a meet and confer is intended to allow the parties to have a frank and open discussion regarding potential compromises of their discovery positions in order to explore whether the parties can avoid seeking court intervention. Defendants' demand

[3] Indeed, arguments such as these merely serve to emphasize the purpose of providing full responses in advance of any meet and confer. Had the Defendants included this as a basis for objection, but provided appropriate information that they did have, Lane Powell would not have sought to pursue information that Defendants could not reasonably possess.

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runs contrary to that purpose. Lane Powell is aware of no authority supporting Defendants' demand and they have provided none.

V. CONCLUSION

For the reasons set forth herein, Plaintiff respectfully requests that the Court deny Defendants' motion and require Defendants to comply with the Court's rules governing both discovery generally and the meet and confer requirement specifically. A proposed form of order is lodged herewith.

DATED this 10th day of November, 2011.

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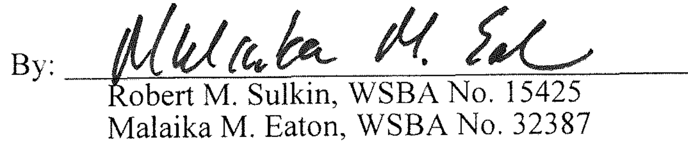
By: 

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on November 10, 2011, I caused the foregoing **Plaintiff's Opposition to Defendants' Motion for Discovery Protection Under CR 26(c) and Sanctions Under CR 26(i)** to be served by electronic mail (per agreement) on the following:

Mark and Carol DeCoursey
8209 172nd Avenue N.E.
Redmond, Washington 98052
mhdecoursey@gmail.com
Defendants Pro Se

DATED this 10th day of November, 2011, at Seattle, Washington.

By: [signature]
Robin M. Lindsey, Legal Assistant

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