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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

LANE POWELL, PC, an Oregon
professional corporation,

Plaintiff,

v.

MARK DECOURSEY and CAROL
DECOURSEY

Defendants

No. 11-2-34596-3 SEA

**DECOURSEYS' RESPONSE TO
PLAINTIFF'S MOTION FOR
ORDER OF CONTEMPT OR RULE
37 SANCTIONS FOR FAILURE TO
RESPOND TO PLAINTIFF'S
FIRST SET OF DISCOVERY
REQUESTS AS ORDERED
WITH SUBJOINED
DECLARATION**

1. RELIEF REQUESTED

The Court should deny Lane Powell's motion.

2. STATEMENT OF FACTS

It takes a special type of audacity to remove seven (7) critical words from a court order, reverse its intent by 180 degrees, and then complain to the court that one's opponent has not obeyed the doctored wording.

But this is what Lane Powell is doing in this motion.

A. Lane Powell Mutilates the Court's Order

On February 29, 2012, this court signed an order that reads as follows:

1 DeCourseys must respond to discovery requests in full with evidence and
2 materials in accordance with this court's order of 2/3/2012 *in accordance*
3 *with CR 26(b) and ER 502*. [Emphasis added, **Exhibit A**]

4 But in its March 8 motion, Lane Powell quotes the court's Order as follows:

5 In that order, the Court required the DeCourseys to "*respond to discovery*
6 *requests in full with evidence and materials in accordance with this*
7 *court's order of 2/3/2012.*" Ex. B at 2. [Lane Powell's *Motion*, Page 4,
8 lines 12-14]

9 Note that Lane Powell has removed these critical words from the court's order:

10 *... in accordance with CR 26(b) and ER 502.*

11 Lane Powell's removal of those critical words was clearly intentional.¹ Lane Powell
12 knew full well the text of the order and included a copy of that order in *the Declaration of*
13 *Malaika M. Eaton*, Ex. B.

14 Those omitted words support DeCourseys' claim of privilege. CR 26(b) states:

15 **Discovery Scope and Limits.** Unless otherwise limited by order of the
16 court in accordance with these rules, the scope of discovery is as follows:

17 (1) In General. Parties may obtain discovery regarding **any matter,**
18 **not privileged,** ... [Emphasis added]

19 And ER 502 states in part:

20 When the disclosure is made in a Washington proceeding or to a
21 Washington office or agency and waives the attorney-client privilege or
22 work-product protection, **the waiver extends to an undisclosed**
23 **communication or information in any proceeding only if:** ...

24 (2) the disclosed and undisclosed communications or information
25 concern the same subject matter;

26 But using its mutilated version of the order, Lane Powell falsely asserts:

... the Court has rejected their privilege claims and other objections no
less than five times—including denying their motion for reconsideration

¹ On March 9, DeCourseys emailed Lane Powell's two attorneys of record, advising them that the motion was based on a truncated quote from the court's order and should be withdrawn. **Exhibit B.** As of this filing, neither lawyer has responded and the motion has not been withdrawn. That lack of response to DeCourseys March 9 email is further evidence that Lane Powell's misrepresentation of the order is knowing and deliberate.

1 of the Court's order compelling the responses at issue. [*Motion*, page 2,
2 lines 6-8, referring to the February 29 order]

3 And again, Lane Powell falsely asserts:

4 The Court likewise struck the DeCourseys' proposed language relating to
5 the attorney-client privilege. [*Motion*, page 4, lines 14-15]

6 **B. Lane Powell Attempts to Defraud the Court**

7 "Fraud upon the court" has been defined by the 7th Circuit Court of Appeals is:

8 ... that species of fraud which does, **or attempts to**, defile the court
9 itself, or is a fraud perpetrated by officers of the court so that the judicial
10 machinery can not perform in the usual manner its impartial task of
11 adjudging cases that are presented for adjudication. [*Kenner v. C.I.R.*,
12 387 F.3d 689 (1968); cited in *7 Moore's Federal Practice*, 2d ed., p. 512,
13 ¶ 60.23, emphasis added]

14 By citing a mutilated version of the order, Lane Powell is attempting to defraud this
15 court into holding DeCourseys in contempt for failing to comply with an order this court has
16 never issued.

17 Despite Lane Powell's appalling treatment of the truth, this court has never ruled
18 against DeCourseys' attorney-client privilege. The six orders this court has issued on
19 discovery are provided herewith as **Exhibits A, C, D, E, F and G**. Only the most recent
20 order (**Exhibit A**) deals with privilege, and that order cites the Rules that protect privilege.

21 Indeed, how could the court "reject [DeCourseys'] privilege claims"? In dozens of
22 pages of argument on the subject, Lane Powell has never provided the court with a legal
23 basis for denying DeCourseys' privilege—not a law, not a rule, not a precedent.

24 **C. Materials Produced by DeCourseys to Date**

25 DeCourseys have produced all non-privileged materials, with a promise to update the
26 production if and when more materials are located. DeCourseys have also provided redacted

1 copies of many privileged documents, and privilege logs of all the rest.

- 2 • On November 14, 2011, DeCourseys produced to Lane Powell answers and/or
3 objections to the interrogatories and eighty five (85) documents. **Exhibit H**
- 4 • On January 17th and 24th, 2012, DeCourseys produced to Lane Powell about 30
5 pages of additional answers to interrogatories and 2,330 pages of documents, some of
6 which Lane Powell’s agent did not pick up for copying until February 9. **Exhibit I.**
- 7 • On March 9, 2012 at 10:00 AM, ten (10) days after the February 29 order was signed,
8 DeCourseys produced to Lane Powell about 60 pages of privilege logs,² a DVD with
9 more than 430 court documents, and more than 1700 pages of emails, letters, court
10 papers, and other documents, – some of which Lane Powell’s agent has not yet
11 picked up for copying, as of this filing. **Exhibit J.**

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14 Given that DeCourseys have produced an estimated 6,000 pages³ of documents,
15 privilege logs, and answers to interrogatories, Lane Powell misleads the court when it
16 complains that “every effort to secure production of the requested documents has failed.”⁴

17 **D. Lane Powell’s Attacks Attorney-Client Privilege**

18 This suit was an attack on attorney–client privilege from the beginning. When Lane
19 Powell sued DeCourseys on October 5, 2011, Lane Powell included a set of improper
20 discovery requests targeting DeCourseys’ privilege. **Exhibit K.** It included the following
21 requests:
22

23 _____
24 ² DeCourseys note in that production that, “This case is about a contract for legal services between Lane Powell
25 and DeCourseys, and the parties’ performance thereunder. It also concerns Lane Powell’s duty as an attorney
26 to its client and its performance thereunder. DeCourseys reserve privilege on all other subjects and issues
under CR 26(b) and ER 502. These supplementary answers are provided in accordance with the Court’s Order
of February 29, 2012, affirming the applicability of those rules to this case.”

³ Estimate based on the conservative estimate of average of five pages per court document.

1 REQUEST FOR PRODUCTION NO. 1: Please produce any and all
2 documents referring to or relating to the Windermere lawsuit.

3 REQUEST FOR PRODUCTION NO. 2: Please produce any and all
4 documents reflecting or relating to your communications with Plaintiff.

5 REQUEST FOR PRODUCTION NO. 5: Please produce any and all
6 documents referring or relating to Lane Powell's representation of you.

7 Those requests are outside the scope of discovery, as defined by CR 26(b). Those
8 requests show that when Lane Powell served the summons on DeCourseys, it was already
9 intending to circumvent the laws on attorney-client privilege.

10 On October 6, 2011, the day after the suit was filed and served, Lane Powell
11 announced that it was willing "to spend \$800,000 in this suit to recover \$300,000." **Exhibit**
12 **L.** Clearly, Lane Powell intended from the beginning to bypass the privilege and conduct
13 extensive depositions on privileged subjects.

14 When DeCourseys filed counterclaims in October 25, Lane Powell changed the story
15 and argued that "Defendants apparently presume (wrongly) that they can sue Lane Powell for
16 malpractice and nonetheless still claim the protection of attorney client privilege."⁵ The only
17 source Lane Powell could cite for that legal theory was an unsupported generalization in a
18 legal desk handbook,⁶ yet Lane Powell still asserts that unsupported argument.⁷

19 When DeCourseys pointed out that the handbook was not a legal authority, Lane
20 Powell shifted ground again and began arguing that the court has already "rejected their
21

22
23 ⁴ *Motion*, page 1, lines 22-23

⁵ Docket at 18, page 6, lines 9-10.

24 ⁶ "The client *normally* waives the privilege by commencing an action against the attorney." Karl B. Tegland,
25 *Washington Practice Series*, Evid. Law & Prac. (Emphasis added.) But the Tegland quote selected by Lane
26 Powell does not deal with CR 26(b), ER 502, *Hearn v. Rhay*, *Pappas v. Holloway*, or any of the other
significant decisions on the subject in Washington and Federal law. And note that Tegland refers to the *client*
who commences the action. In this case, Plaintiff Lane Powell "commenc[ed]" the action, not DeCourseys.

⁷ "...by suing Lane Powell for malpractice, Defendants have waived the privilege." *Motion*, page 9, lines 13-14

1 privilege claims.”⁸

2 Lane Powell’s discovery requests in this case are a sham, of course. Lane Powell has
3 all the documents it might ever want or need, already in its file cabinets and servers. But
4 Lane Powell cannot use that material in evidence until DeCourseys truly waive their
5 privilege or the court is duped into ruling an involuntary waiver. Thus, Lane Powell brings
6 this motion.
7

8 If DeCourseys had truly waived the privilege, or if the court had already ruled an
9 involuntary waiver, Lane Powell could use all the material it already possesses in evidence.
10 Thus is revealed that Lane Powell knows deep down in its heart of hearts that DeCourseys’
11 privilege is still intact. DeCourseys have not waived the privilege; the court has not so ruled.
12

13 This is why Lane Powell complains in this motion about the depositions.⁹ If
14 DeCourseys’ privilege on all subjects had been waived, Lane Powell will arguably have four
15 years of confidences on all kinds of subjects for grist in its deposition mill.

16 But unless and until DeCourseys (or the court) are tricked into waiving the privilege
17 protected by CR 26 and ER 502, Lane Powell has little to use in deposition. Lane Powell is
18 utterly forbidden to use the information from its own files. Lane Powell cancelled the
19 depositions on November 14, 2011 when it learned that DeCourseys would not waive the
20 privilege. **Exhibit M.** In so doing, Lane Powell revealed that the primary target for the
21 depositions was DeCourseys’ confidences quite aside from contract issues.
22

23 Lane Powell is not “prejudiced” by its failures in these discovery maneuvers.¹⁰

24 _____
25 ⁸ *Motion*, page 2, line 6.

26 ⁹ *Motion*, page 9, lines 21-22

¹⁰ “Finally, there can be no dispute that the DeCourseys’ continued refusal to comply with the Court’s orders
has prejudiced Lane Powell.” *Motion*, page 9, lines 19-20

1 Prejudice would mean the court has been unfairly swayed against Lane Powell. But again,
2 like Humpty Dumpty to whom words mean whatever he wants them to mean,¹¹ Lane Powell
3 makes very free with the language.

4 **3. STATEMENT OF ISSUES**

5 Can DeCourseys be held in contempt for failing to comply with a court order that the
6 court did not issue?
7

8 **4. EVIDENCE RELIED UPON**

9 Declaration of Mark DeCoursey and attached exhibits.

10 **5. AUTHORITY**

11 CR 26(b), states in part:

12 **Discovery Scope and Limits.** Unless otherwise limited by order of the
13 court in accordance with these rules, the scope of discovery is as follows:

14 (1) In General. Parties may obtain discovery regarding any matter,
15 **not privileged**, ... [Emphasis added]

16 Without a specific ruling from the court to the contrary, the Washington Civil Rules
17 govern cases. This court has issued no ruling that overrides CR 26(b). On the contrary, the
18 January 29 order requires the parties to conduct discovery *in accordance with* CR 26(b).

19 The Privilege Log custom is supported in spirit by Washington Civil Rule 34(b):

20 The response shall state, with respect to each item or category, that
21 inspection and related activities will be permitted as requested, unless the
22 request is objected to, in which event the reasons for objection shall be
23 stated. If objection is made to part of an item or category, the part shall
24 be specified and inspection permitted of the remaining parts.

24 ¹¹ “When I use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to
25 mean—neither more nor less.” -- *Through the Looking-Glass* by Lewis Carroll (1872). To Lane Powell, the
26 court’s citation to CR 26(b) and ER 502 (which protect a litigant’s privileged information) means that
DeCourseys’ privileged information is *not* protected by CR 26(b) and ER 502. Lane Powell argues support
for this contention by citing “the language the Court struck” [*Motion*, page 5, line 13] rather than the order the
court actually signed and filed.

1 Federal Civil Rule 26(b)(5) reads as follows:

2 Claims of Privilege or Protection of Trial Preparation Materials. When a
3 party withholds information otherwise discoverable under these rules by
4 claiming that it is privileged or subject to protection as trial preparation
5 material, the party shall make the claim expressly and shall describe the
6 nature of the documents, communications, or things not produced or
disclosed in a manner that, without revealing information itself privileged
or protected, will enable other parties to assess the applicability of the
privilege or protection.

7
8 **6. CONCLUSION**

DeCourseys have complied with Civil Rules regarding discovery and with the orders
of this court. An order of contempt or sanctions would be wholly inappropriate.

10
11 **7. ORDER**

12 A proposed order accompanies this response.

13
14
15 DATED this 14 day of March, 2012.

16 Carol DeCoursey

17 

18 Pro se

Mark DeCoursey

19 

20 Pro se

1 12. **Exhibit L** is a fair and true copy of an email sent by Paul Fogarty on October 6,
2 2011(redacted).

3 13. **Exhibit M** is a fair and true copy of an email sent by Lane Powell's attorney,
4 Malaika Eaton, to DeCourseys on November 14, 2011.

5 I do hereby swear the above to be true under the laws of perjury of the State of
6 Washington.

7 DATED this 14 day of March, 2012

8 Mark DeCoursey

9 
10 Pro se