

Hon. **Redacted** D. Eadie
**Plaintiff's Response to
Defendants DeCourseys' Motion to Compel
Production of 11,000 Responsive Electronic Records
Noted for Consideration: Tuesday, October 2, 2012
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 RESPONSE TO
DEFENDANTS' MOTION TO
COMPEL PRODUCTION OF 11,000
RESPONSIVE ELECTRONIC
RECORDS

Defendants Mark and Carol DeCoursey ("DeCourseys") move the Court to compel Plaintiff Lane Powell ("Lane Powell") to produce 11,000 electronic documents. Yet again, they are playing games with the Court. Indeed, the DeCourseys fail to mention that many of these electronic documents are likely duplicates of the very same documents DeCourseys have spent months (and a staggering amount of judicial resources) refusing to produce to Lane Powell based on claimed attorney-client privilege. They fail to mention that they have refused to respond to Lane Powell's numerous emails asking whether, by demanding production of these electronic documents, the DeCourseys are now waiving their privilege claim. Indeed, it is the DeCourseys'—not Lane Powell's—privilege to waive. They fail to mention that they have refused to review Lane Powell's full Windermere case files, which have been available for them to inspect and copy since March. And they fail to mention that the instant motion to compel was filed without

1 meeting and conferring with Lane Powell as required by Civil Rule (CR) 26(i).

2 Consistent with its ethical obligations, Lane Powell has not produced documents
3 which may be subject to the DeCourseys' privilege claim. Lane Powell is willing to
4 produce those documents *as long as* the DeCourseys agree in writing that the privilege is
5 waived.

6 I. STATEMENT OF FACTS

7 Because the Court is well-versed in the facts of this case, only the facts pertaining
8 to the instant discovery dispute are included herein. For a more detailed factual recitation,
9 however, see Plaintiff's Motion for Entry of Judgment, Dkt. 192.

10 A. The DeCourseys Refuse to Produce Documents Responsive to Lane Powell's 11 Discovery Requests Based on Attorney-Client Privilege

12 On October 5, 2011, Lane Powell propounded discovery requests on the
13 DeCourseys, seeking information relating to the relationship between Lane Powell and the
14 DeCourseys in the Windermere lawsuit. **Ex. A.**¹ The DeCourseys' eventual responses to
15 Lane Powell's discovery requests were incomplete, claiming, among other things, (1)
16 attorney-client privilege over documents relating to Lane Powell's representation, and (2)
17 that they should not be required to produce materials in their possession that they believed
18 Lane Powell already had. **Exs. B–D; Ex. E** at 4.

19 The DeCourseys have maintained these privilege and other objections to Lane
20 Powell's discovery requests throughout this litigation. They have yet to produce full
21 responses to Lane Powell's discovery requests on this basis. They maintained these
22 objections despite the Court's repeated rulings rejecting their position. *See Ex. E* at 4–5
23 (summarizing the Court's rulings on privilege). They persisted even after the Court held
24 them in contempt—twice—for their failure to comply with the Court's numerous orders

25
26 ¹ Exhibits A–Z referenced herein are attached to the Declaration of Malaika M. Eaton in
Response to Defendants' Motion to Compel 11,000 Electronic Records ("Eaton Decl.").

1 requiring them to produce the documents they claimed were privileged, and dismissed
2 their counterclaims and affirmative defenses as a discovery sanction. *See* **Ex. F** (holding
3 the DeCourseys in contempt); **Ex. G** (holding the DeCourseys in contempt and striking
4 their counterclaims and affirmative defenses); *see also* **Exs. H–I** (seeking discretionary
5 review of the Court’s privilege and contempt rulings in Court of Appeals). Even as late as
6 September 24, 2012—a month after their motion for discretionary review and two motions
7 for stay were denied—the DeCourseys still refuse to produce materials they claim are
8 privileged or believe Lane Powell already has. **Ex. J** at 8–11; *see also* **Exs. X–Z**. In sum,
9 the DeCourseys have taken the position that many documents in their possession are
10 privileged and/or need not be produced because Lane Powell also possesses them.

11 **B. Lane Powell Timely Responds to the DeCourseys’ Discovery Requests and**
12 **Produces Responsive Documents**

13 The DeCourseys propounded their First Set of Discovery Requests to Plaintiff on
14 December 19, 2011. **Ex. K**. The DeCourseys’ requests likewise sought information
15 relating to the relationship between the parties in the Windermere lawsuit. *Id.* As such,
16 many documents responsive to the DeCourseys’ discovery requests are also responsive to
17 Lane Powell’s discovery requests.² On January 18, 2012, Lane Powell provided timely
18 written responses and sent to the DeCourseys responsive documents Bates numbered
19 LPDEC 000001–0000671. **Ex. L**. By February 9, 2012, Lane Powell had produced
20 nearly 1,200 documents. **Ex. M**.

21 **C. The DeCourseys Ignore Lane Powell’s Multiple Attempts to Arrange for the**
22 **DeCourseys to Review Lane Powell’s Windermere Case Files**

23 On March 7, 2012, Lane Powell reached out to the DeCourseys to arrange for
24 them to review and copy the approximately 35 boxes of Lane Powell’s full Windermere
25 case files located at Lane Powell’s counsel’s office. **Ex. N**. The DeCourseys responded

26 ² For example, any communications between Lane Powell and the DeCourseys regarding
the Windermere litigation would be responsive to both discovery requests.

1 on March 19, 2012; they asked for additional information on Lane Powell's Windermere
2 case files but did not arrange for a time to review them. **Ex. O.** Lane Powell responded
3 with that additional information and reminded the DeCourseys that the case files were
4 available for the DeCourseys to review. **Exs. P–Q.** Rather than arrange to view them, the
5 DeCourseys asked Lane Powell to view the "11,000 or so electronic documents" Lane
6 Powell's counsel had referred to in a prior email. **Ex. R.** Lane Powell responded that it
7 would look into when those could be provided, but reminded the DeCourseys that the
8 voluminous Windermere case files remained available for their review in the meantime.
9 **Ex. S.** The DeCourseys have not arranged to review Lane Powell's Windermere case
10 files. Eaton Decl. ¶ 2.

11 **D. The DeCourseys Demand Production of 11,000 Documents and Refuse to**
12 **Answer Lane Powell's Emails Asking If They Intend to Waive Privilege**

13 On September 5, 2012, the DeCourseys sent an email to Lane Powell demanding
14 production of the 11,000 electronic documents in only two days, by September 7, 2012.

15 **Ex. T.** In response, Lane Powell asked whether the DeCourseys intend to waive privilege
16 as to the documents they insisted Lane Powell disclose and produce. **Ex. U** at 4:22 PM
17 ("[i]s it your position that you are waiving any privilege with respect to these
18 documents?"). Without answering Lane Powell's waiver question, the DeCourseys again
19 demanded production of the 11,000 electronic documents. *Id.* at 4:32 PM.

20 Lane Powell again asked:

21 Leaving aside for now the unreasonable time frame in your demand, we
22 raise this issue because **if you are demanding the production of**
23 **documents in discovery that you maintain are privileged, this would**
24 **constitute an additional waiver of the privilege**, separate and apart from
the earlier waivers that have been the subject of the Court's many orders.
So, again, is it your position that you are waiving any privilege with
respect to these documents?

25 **Ex. V** (emphasis added). The DeCourseys did not respond to Lane Powell's waiver
26 question, but demanded production yet again on September 21, 2012. **Ex. W** at 1:50 PM.

1 Lane Powell inquired about waiver one last time, and the DeCourseys again refused to
2 respond.³ Ex. W at 2:48 PM.

3 The DeCourseys filed the instant motion without attempting to meet and confer
4 and without informing Lane Powell they intended to move to compel. Eaton Decl. ¶ 4.

5 II. EVIDENCE RELIED UPON

6 Plaintiff relies on the Declaration of Malaika M. Eaton in Response to Defendants'
7 Motion to Compel and Exhibits A–Z attached thereto, and the records and files herein.

8 III. AUTHORITY

9 A. The DeCourseys Have Not Complied With CR 26(i)'s Meet-And-Confer 10 Requirements

11 Washington courts will not entertain a motion under Rule 26 unless counsel have
12 conferred with respect to the motion. *See* Civil Rule (CR) 26(i). In that respect, Rule
13 26(i) requires a moving party to “arrange for a mutually convenient conference in person
14 or by telephone.” CR 26(i). It also requires the moving party to certify in the motion that
15 the meet-and-confer requirements have been met. *Id.* The DeCourseys did not meet and
16 confer with Lane Powell before filing the instant motion (*see* Eaton Decl. ¶ 4), nor did
17 they include in their motion a certification that they had attempted to contact Lane Powell
18 to comply with the meet-and-confer requirement before filing the motion. *Id.* The
19 DeCourseys' motion should be denied on this basis alone.

20 B. Lane Powell Has Properly Refused to Produce the Documents at Issue Until 21 the DeCourseys Consent to Waiver of Privilege

22 Lane Powell has not produced the electronic documents because the DeCourseys
23 refuse to take a position on waiver. Deliberate production of privileged documents in
24

25 ³ The DeCourseys claimed that they had already answered Lane Powell's privilege
26 inquiry. *Id.* at 3:54 PM. They had not. Eaton Decl. ¶ 3. When Lane Powell asked the
DeCourseys to forward the email chain they claim shows that they had answered Lane Powell's
question regarding waiver, the DeCourseys were unable to provide one. *Id.* at 7:06 PM; Eaton
Decl. ¶ 3.

1 discovery waives the privilege. ER 502; *see also Morgan v. City of Federal Way*, 166
2 Wn.2d 747, 757, 213 P.3d 596 (2009). Recognizing that many of the 11,000 electronic
3 documents the DeCourseys ask Lane Powell to produce are likely duplicates of the very
4 same documents the DeCourseys claim are privileged, Lane Powell repeatedly asked the
5 DeCourseys whether they intended to waive privilege. *See supra*, Section II.D. The
6 DeCourseys ignored Lane Powell's questions and refused to respond. *Id.* In deciding
7 waiver questions, the privilege belongs to the client and not to the attorney. *Olson v.*
8 *Haas*, 43 Wn. App. 484, 486, 718 P.2d 1 (1986). As such, Lane Powell has properly
9 refused to produce documents in its custody relating to the Windermere lawsuit without
10 the DeCourseys' consent to waiver. 5A KARL B. TEGLAND, WASH. PRAC. EVID. LAW &
11 PRAC. § 501.23 (2007). The DeCourseys' failure to respond strongly suggests that they
12 may not be willing to waive their claimed privilege, despite the fact that the Court has
13 ruled against them on privilege issues already (and more than once) and they are
14 demanding Lane Powell produce *all* responsive documents in its possession. Lane Powell
15 does not want to find itself in a position in which it is being accused of unilaterally
16 waiving the DeCourseys' privilege by producing documents (albeit at their direction) that
17 the DeCourseys maintain (wrongly) are privileged. Indeed, the DeCourseys have shown
18 they are perfectly willing to seek CR 11 sanctions against counsel for Lane Powell even
19 when there is no legitimate basis for doing so. *See* Dkts. 140, 152.

20 Finally, the DeCourseys cannot seriously argue that Lane Powell has not complied
21 with its discovery obligations. Since March 7, 2012, approximately 35 boxes of
22 documents responsive to the DeCourseys' discovery requests have been available for the
23 DeCourseys' inspection and copying. *See supra*, Section II.C. Lane Powell has reached
24 out to the DeCourseys numerous times to arrange for a mutually agreeable time to review
25
26

1 them. *Id.* The DeCourseys' failure to work with Lane Powell shows they have no interest
2 in reviewing Lane Powell's Windermere case files.⁴

3 In sum, the DeCourseys cannot now complain that Lane Powell is wrongfully
4 withholding documents when the DeCourseys ignore Lane Powell's questions regarding
5 privilege and waiver, refuse to review the Windermere case files that have been available
6 for their review for months, and do not meet and confer with Lane Powell before filing the
7 instant motion. The DeCourseys' motion to compel should be denied.⁵ Notwithstanding
8 these objections, Lane Powell is willing to produce those documents *as long as* the
9 DeCourseys agree in writing that the privilege is waived.

10 IV. CONCLUSION

11 For the reasons set forth herein, Lane Powell respectfully requests the Court deny
12 the DeCourseys' Motion to Compel Production of 11,000 Responsive Electronic Records.
13 A proposed order is lodged herewith.

14 DATED this 28 day of September, 2012.

15 McNAUL EBEL NAWROT & HELGREN PLLC

16 By: 

17 Robert M. Sulkin, WSBA No. 15425
18 Malaika M. Eaton, WSBA No. 32837
19 Hayley A. Montgomery, WSBA No. 43339

20 Attorneys for Plaintiff

21 _____
22 ⁴ Had the DeCourseys ever contacted Lane Powell to arrange for a time to review, Lane
23 Powell would have provided them with the same warning regarding their privilege waiver before
24 agreeing to a time for review.

25 ⁵ The DeCourseys' request for sanctions should likewise be denied. *See* Mot. at 3.
26 Setting aside the fact that Lane Powell has fulfilled its discovery obligations, the DeCourseys do
not cite authority to support their request. *Cf.* LCR 37(d) (allowing sanctions for a party's failure
"to serve a *written* response to a request for production" (emphasis added)). The record shows it
is the DeCourseys—not Lane Powell—who have abused the discovery process throughout this
entire litigation.