Honorable Judge Redacted D. Eadie
Hearing Date: October 17, 2012
Hearing Time: 9:00 AM

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 **MOTION TO RECONSIDER ORDER DENYING DEFENDANTS' MOTION TO COMPEL PRODUCTION OF 11,000 RESPONSIVE ELECTRONIC RECORDS AND SUBJOINED DECLARATION**

Without waiving prior objection that Judge Eadie is disqualified to rule in this case under the Code of Judicial Conduct, CJC 2.11(A), DeCourseys file the following Motion with the Court:

I. RELIEF REQUESTED

The Court ordered three things on October 2 that should be reconsidered and reversed because they are inconsistent with previous rulings of the Court, the facts of the case, and existing law:

1. The Court refused to issue an order compelling Lane Powell to produce the documents DeCourseys lawfully requested in discovery, based apparently on the literal interpretation of CR 26(i) but ignoring the law of the case and the Court's previous Orders.

Mark & Carol DeCoursey, *pro se*
8209 172nd Ave NE
Redmond, WA 98052
Telephone 425.885.3130

2. The Court required DeCourseys to state whether certain materials are privileged based upon the summary descriptions provided by Lane Powell's counsel.
3. The Court ordered a court-supervised discovery conference, apparently pursuant to CR 26(f).
4. The Court ordered DeCourseys to "prepare a log of all documents held by Defendants that are responsive to Plaintiff's discovery requests." The Court should acknowledge that DeCourseys have already produced full logs of the responsive discovery documents to Plaintiff and filed same with the Court on March 14, 2012, including full logs and privilege logs, comprising more than 12,000 pages. These were included with *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,* **Dkt. 103**.
5. The Court should reconsider its position on Lane Powell's improper and unlawful discovery requests of October 5, 2011, including as they do requests for privileged material in violation of CR 26(b)(1). Such requests are clear violations of the Rules and are subject to penalty and sanctions under CR 26(g).

II. STATEMENT OF FACTS

CR 26(i) Conferences: In October 2011, Lane Powell's counsel flatly refused to confer on discovery except through email. Robert Sulkin wrote:

> [**Exhibit J.4** Wed, Oct 26, 2011 at 10:21 AM] Once I have your actual responses, verified as required by the rules, we can arrange for a meet and confer under Rules if that is necessitated by your responses.
> [**Exhibit J.6** Fri, Oct 28, 2011 at 4:02 PM] Mr. DeCoursey, I have been quite clear about the parameters for any conversation we have. To date you have not met them. Bob

This information was provided to the Court on November 3, 2011, **Dkt. 11**, page 6

Mark & Carol DeCoursey, *pro se*
8209 172nd Ave NE
Redmond, WA 98052
Telephone 425.885.3130

line 19, and page 7 line 18. Lane Powell even argued its refusal to conference in its *Response* to the Court on November 10, 2011, **Dkt. 18**, page 3 lines 23-4, page 4 lines 1-5:

> 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 confer … Counsel for Lane Powell replied to that email with confusion as Defendants had not responded to Lane Powell's discovery and had propounded no discovery of their own. … ("[S]ince you have promulgated no discovery, I am at a loss as to what the point is of a CR 37 conference").

Despite Lane Powell's violation of the Rules, the Court refused to sanction Lane Powell. **Dkt. 23**.

On January 26, 2012, Lane Powell moved to compel discovery, despite Lane Powell not having a CR 26(i) compliant discovery conference with DeCourseys. In the February 1, 2012 *Response*, **Dkt. 90**, page 5 lines 12-20, DeCourseys informed the Court:

> **Discovery Conference**: This motion is not in compliance with the Rules because **the parties have not had a CR 37/26 discovery conference**. Despite Lane Powell's assertions in the motion, DeCourseys have not refused a discovery conference. On January 3, 2011, as instructed by Washington and King County officials, DeCourseys filed an administrative request with the presiding judge concerning the conduct of the proceedings, including hearings and conferences. The presiding judge has not dealt with that administrative matter, and the case is stalled on that issue. [Page 5, emphasis added]

Despite the lack of discovery conference by telephone or in person, on February 3, 2012, the Court issued an order to compel DeCourseys' production. **Dkt. 93**. And on April 27, 2012, the Court issued an Order of Contempt and Sanctions based upon that Feb. 3 order and (apparently) on emails between the parties during March 2012 concerning attorney-client privilege. **Dkt. 106A**. The Court has thereby accepted as a law of the case that email conferences between the parties is sufficient to meet the requirements of CR 26(i), a Civil Rule that was originally written long before email was available.

When the shoe was on the other foot, however, the law of the case changed. In a series of emails in September 2012, despite being nine months late under the Rules of discovery, Lane Powell flatly refused to produce 11,000 responsive electronic documents

Mark & Carol DeCoursey, *pro se*
8209 172nd Ave NE
Redmond, WA 98052
Telephone 425.885.3130

unless DeCourseys signed a waiver of privilege. DeCourseys produced Lane Powell's written statement to the Court. But in the order of October 2, 2012, the Court found that email conferences between the parties do ***NOT*** meet the requirements of CR 26(i). **Dkt. 248**.

CR 26(f) Conferences: The Civil Rules provide that if a party requests a court-supervised discovery conference under CR 26(f), the Court shall hold one:

> At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. **The court shall do so** upon motion by the attorney for any party … [CR 26(f), emphasis added]

DeCourseys requested such a conference on November 9, 2011, **Dkt. 16**, and again in a revised motion on November 21, 2011**, Dkt. 24**. The court denied the first motion for a conference on November 30, 2011 (**Dkt. 35**), and denied the second motion on December 12, 2011 (**Dkt. 44**), despite the Civil Rule requiring the court to hold such conference on the request of a party.

Instead, on October 2, 2012, **Dkt. 248**, the Court *sua sponte* ordered a discovery conference for November 16, 2012, and did not ask the parties to formulate a discovery plan in conformance with CR 26(f).

Recording Discovery Conferences: In response to DeCourseys' *Motion for Protection under CR 26(c)* on November 3, 2011, **Dkt. 11**, Lane Powell expended lengthy argument against DeCourseys' offer to hire a court reporter to record the conference. Lane Powell wrote, page 8:

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

At that time, the Court agreed with Lane Powell:

Mark & Carol DeCoursey, *pro se*
8209 172nd Ave NE
Redmond, WA 98052
Telephone 425.885.3130

> CR26(i) discovery conferences are not required to be recorded; if any Party insists on recording a discovery conference, and the other party accedes to the request, then all costs, including the cost of a transcript for each party should be assessed against the party requesting that the conference be recorded. However, reporting should not be necessary – a discovery conference is not a deposition.

Now, however, the Court is ordering a discovery conference in the courtroom where King County, or one or both of the parties, or perhaps all three will record the proceedings. All Lane Powell's objections about posturing and the lack of necessity for recording (with which the Court previously agreed) are discarded.

Privilege Logs and Discovery Records: The October 2, 2012 order was in response to DeCourseys' motion to compel production from Lane Powell. Instead of compelling production of documents, the Court required Lane Powell to produce a log of the documents.

The order is unnecessary and completely without support in law, precedent, or the Rules of Discovery. The Court ordered:

> Plaintiff shall provide defendants with a log the estimated 11,000 documents in a reasonable form given that a large number of those documents may be described in a simple log entry. The log shall be served with[in] 14 days of this Order, unless extended by the Court or agreement of the Parties. Defendants may then assert or wave [sic] the attorney client privilege as to any or all of the documents described in the log or declare their position that the attorney-client privilege does not apply.

Then, without a motion from Lane Powell, the Court turned again to exercising its prejudice on DeCourseys, apparently because DeCourseys noticed and mentioned the judge's inappropriate Windermere connection and moved for recusal.

Ordering DeCourseys to produce a log is particularly inappropriate and ironic because DeCourseys documented 12,000 pages of discovery production and filed the evidence with the Court on March 14, 2012, **Dkt. 103**. The Court has apparently failed to read DeCourseys' briefs, and has ignored all that undisputed evidence, not only by finding DeCourseys in contempt and levying sanctions for failure to make discovery, but now orders the production of all that information all over again. In total disregard of those records the

Mark & Carol DeCoursey, *pro se*
8209 172nd Ave NE
Redmond, WA 98052
Telephone 425.885.3130

Court wrote on July 6, 2012 (Dkt. 164, page 7):

> The Discovery violations by Defendants are substantial and have been repeated despite this Court's orders to compel.

Given that the Court apparently reads only Lane Powell's briefs and ignores DeCourseys' briefs, can this judge still claim not to be prejudiced against DeCourseys?

Attorney Client Privilege: Lane Powell has repeatedly acknowledged that DeCourseys hold the privilege over the documents and that Lane Powell would be in violation of its ethical requirements by releasing them, even to their counsel at McNaul Ebel. On July 8, 2012, Lane Powell argued to the Court of Appeals, Div. I (**Exhibit):**

> The DeCourseys, of course, hold the privilege (not Lane Powell) and their continued albeit improper assertion of the privilege needlessly complicates Lane Powell's use of documents in its possession in this litigation. See App. 33 (claiming the Lane Powell is not even entitled to provide "privileged" information to its own counsel). [Typo in original]

In its September 28, 2012 *Response* to this *Motion to Compel*, Lane Powell argued, **Dkt. 242**, pages 1 lines 20-24, page 2 lines 2-4:

> . . . They [DeCourseys] 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 . . . Consistent with its ethical obligations, Lane Powell has not produced documents which may be subject to the DeCourseys privilege claim. Lane Powell is willing to produce those documents **as long as** the DeCourseys agree in writing that the privilege is waived." [Underling added; bold face in original.]

In the same document, Lane Powell argued on pages 5 lines 21-2, page 6 lines 1-19:

> Lane Powell has not produced the electronic documents because the DeCourseys refuse to take a position on waiver. … In deciding waiver questions, the privilege belongs to the client and not to the attorney. *Olson v Haas,* 43 Wn. App. 484, 486, 718 P.2d 1 (1986). As such, Lane Powell has properly refused to produce documents in its custody relating to the Windermere lawsuit without the DeCourseys' consent to waiver. … Lane Powell does not want to find itself in a position in which it is being accused of unilaterally waiving the DeCourseys' privilege by producing documents (albeit at their direction) that the DeCourseys maintain (wrongly) are privileged. Indeed, the DeCourseys have shown they are perfectly willing to seek CR 11 sanctions against counsel for Lane Powell …

Indeed, DeCourseys assert the privilege and categorically deny any waiver that would permit Lane Powell to share DeCourseys' privileged material with any other entity, including

Mark & Carol DeCoursey, *pro se*
8209 172nd Ave NE
Redmond, WA 98052
Telephone 425.885.3130

the law firm of McNaul Ebel.

Given both Lane Powell and DeCourseys' position on the privileged documents, the Court would be incorrect to require Lane Powell's counsel to produce a log of the documents. To log the documents, McNaul attorneys (who are not designees of Lane Powell for the purpose of DeCourseys' privilege) would have to review the documents that Lane Powell now refuses to produce. That would be a violation of DeCourseys' privilege.

DeCourseys are in agreement with Lane Powell that this order imperils Lane Powell's ethical position, and that DeCourseys would take whatever measures are necessary to preserve their privilege. DeCourseys have never given permission to Lane Powell to share attorney client privileged material with anyone on issues that are not germane to the claims and defense of the parties.

Designating Privilege Documents from a Log: The October 2, 2012 order requires DeCourseys to designate privileged and non-privileged documents from a log produced by Lane Powell or Lane Powell's counsel.

What would the purpose of the exercise? Lane Powell is a large law firm. If the attorneys at Lane Powell do not understand the Rules of Professional Conduct with regard to privilege, they should resign from practice.

DeCourseys cannot be reasonably expected to understand, identify, or, designate privileged materials from the log the Court has described. Nor can DeCourseys be required to trust the various designations by the opposing attorneys, particularly *these* opposing attorneys who have deliberately misrepresented the sequence of events in the court records and altered the Court's own words when quoting an order back to the Court. Moreover, the

Mark & Carol DeCoursey, *pro se*
8209 172nd Ave NE
Redmond, WA 98052
Telephone 425.885.3130

Court has specifically required the log to be of a general and vague nature, whereby no such determination could be made.

The process is completely without support in law, precedent, and rules.

The documents relating to DeCourseys' case at Lane Powell belong to DeCourseys. No legislature or court under the sun in this state or this nation, has ever found that the act of returning the client's documents to the client affects, or is affected by, the client's privilege. The same is true of documents Lane Powell has produced for hire. Producing to DeCourseys the documents generated within Lane Powell for internal use also would not violate or waive DeCourseys' privilege.

Summary Judgment Hearing: Lane Powell has scheduled with the Court Clerk a summary judgment hearing on November 16, 2012. But Lane Powell has deliberately delayed producing this discovery material, in violation of CR 34. CR 56(f) addresses this very issue:

> Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Lane Powell has announced to the Court that its paper discovery responses are **also** withheld under its "ethical" obligations. On page 7, footnote 4, Lane Powell wrote:

> Had the DeCourseys ever contacted Lane Powell to arrange for a time to review [Lane Powell's Windermere case files], Lane Powell would have provided them with the same warning regarding their privilege waiver before agreeing to a time for review.

By these words, Lane Powell confesses that though it pretended to make the documents available for the first time on March 12, 2012,[1] the documents were not really

[1] DeCourseys served the discovery request on December 19, 2011. Lane Powell was

Mark & Carol DeCoursey, *pro se*
8209 172nd Ave NE
Redmond, WA 98052
Telephone 425.885.3130

available for viewing and copying. When it came to the actual production, Lane Powell confesses it would interpose a horse-trade instead – DeCourseys must waive privilege and then Lane Powell might comply with its obligations.

This demand by Lane Powell is tantamount to extortion under color of law, and this Court's cooperation with Lane Powell's flagrant violations is a discredit to the State's legal system.

Lane Powell's deliberate flouting of its discovery obligations under the Civil Rules is obviously timed to prejudice DeCourseys. This Court cannot reasonable expect DeCourseys to analyze 11,000 electronic documents and 35 banker boxes of paper material in time to meet the summary judgment motion Lane Powell has scheduled for November 16.

III. STATEMENT OF ISSUES

Do DeCourseys own the documents and information they gave to Lane Powell, and the work Lane Powell produced for hire when Lane Powell was representing them as their attorney, including internal memos generated within Lane Powell while working for DeCourseys?

Does this court recognize discovery equity of rights between the parties in the discovery process?

Does any law, precedent, court rule, or ethical principle require Lane Powell to deny DeCourseys their own confidential materials?

Does any law, precedent, or court rule enable the court to exempt Lane Powell from the lawful production of discovery documents?

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almost eight weeks late announcing even this faux availability.

Mark & Carol DeCoursey, *pro se*
8209 172nd Ave NE
Redmond, WA 98052
Telephone 425.885.3130

Does any law, precedent, or court rule support the production of logs in place of discovery documents in this situation?

IV. AUTHORITY

CR 1, 26, 34, 37, 56; LCR 37; ER 102.

Lane Powell has provided no authority under which an attorney can withhold documents from its own client. No authority enables a litigant to produce a list (or "log") of materials in place of the documents requested except to protect privilege as provided by CR 26(b), and protecting privilege is not the issue here. As Lane Powell itself argued in **Dkt. 11**, page 5:

> 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).

Instead, Lane Powell has flatly and illegally refused to provide its discovery responses, even 10 months overdue as those responses are now.

LCR 37(d) provides as follows:

> The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by CR 26(c). For purposes of this section, an evasive or misleading answer is to be treated as a failure to answer.

Lane Powell has objected to these discovery requests and refused to produce, but has never sought a discovery conference, and has never filed a motion for protective order with the Court. In the absence of such filing, Lane Powell is in violation of the Rules.

CR 1 states:

> These rules govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

There can be no just determination of this action when the Court punishes

Mark & Carol DeCoursey, *pro se*
8209 172nd Ave NE
Redmond, WA 98052
Telephone 425.885.3130

There can be no just determination of this action when the Court punishes DeCourseys for asserting their rights under the Rules, and yet goes into alliance with Lane Powell's tortured logic to avoid its obligations.

The Court's Order of October 2, 2012 does not satisfy this rule.

The truly tragic aspect of this situation is that the Court has gone into confederacy with Lane Powell's unlawful conduct. In the subject order, the Court ruled prejudicially and in error. This motion is brought under CR 60(b)(11).

V. ORDER

A proposed order accompanies this motion.

DATED this 12th day of October, 2011

Carol DeCoursey

Pro se

Mark DeCoursey

Pro se

Mark & Carol DeCoursey, *pro se*
8209 172nd Ave NE
Redmond, WA 98052
Telephone 425.885.3130

Declaration of Mark DeCoursey

Mark DeCoursey hereby declares as follows:

Being over the age of eighteen and competent to testify, I hereby attest and declare the following under the laws of perjury of the State of Washington:

Having researched the rules and laws applicable to this subject, I find the Court's order of October 2 to be inconsistent with the letter and intent of the courts of Washington. The result of the Order would actually be contrary to the design and intent of the discovery rules.

This Court continues to operate with prejudice against DeCourseys, granting sanctions against DeCourseys for asserting objections of prejudice under the Rules and acquiescing to Lane Powell violations.

DeCourseys cannot comply in good conscience with the unusual terms of the October 2, 2012 order, particularly in view of the dishonesty of Lane Powell and its counsel, and the condoning of that dishonesty by the Court. See **Dkt. 140** (June 25, 2012), **Dkt. 156** (July 2, 2012), **Dkt. 161** (July 3, 2012), **Dkt. 152** (June 29, 2012), **Dkt. 165** (July 9, 2012), **Dkt. 167** (July 11, 2012, **Dkt. 173** (July 13, 2012), **Dkt. 185** (July 27, 2012), **Dkt. 174** (July 16, 2012), **Dkt. 187** (August 2, 2012), **Dkt. 196** (August 9, 2012), **Dkt. 225** (August 16, 2012), **Dkt. 235** (Sept. 5, 2012).

DATED this 12 day of Oct., 2012

Mark DeCoursey

Pro se

Mark & Carol DeCoursey, *pro se*
8209 172nd Ave NE
Redmond, WA 98052
Telephone 425.885.3130