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## Discovery Ethics: Playing Fair While Playing Hard

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Discovery in civil litigation brings together two competing professional norms: playing fair while playing hard. On one hand, the professional and civil rules require fair play. On the other hand, we are advocates who play to win. The Washington Supreme Court captured this tension in *Washington State Physicians Ins. Exch. & Ass'n. v. Fisons Corp.*, 122 Wn.2d 299, 354-55, 858 P.2d 1054 (1993):

“The lawyer’s duty to place his client’s interests ahead of all others presupposes that the lawyer will live with the rules that govern the system. Unlike the polemicist haranguing the public from his soapbox in the park, the lawyer enjoys the privilege of a professional license that entitles him to entry into the justice system to represent his client, and in doing so, to pursue his profession and earn his living. He is subject to the correlative obligation to comply with the rule and to conduct himself in a manner consistent with the proper functioning of that system.”<sup>i</sup>

Broadly put, the ethics rules governing discovery cover two areas and share a common bond with their civil rule counterparts. *First*, they prohibit obtaining information that you’re not supposed to have. *Second*, they prohibit

obstructing access to information that you're supposed to produce. In this column, we'll look at both.<sup>ii</sup>

***Obtaining Information You're Not Supposed to Have***

"Information you're not supposed to have" equates with an opponent's privilege or work product. It is rooted in both RPC 3.4(c), which requires lawyers to abide by court rules, and CR 26(b) (and its federal counterpart), which governs the general scope of discovery. It applies to both witnesses and documents.

Washington case law offers telling examples of each. *In re Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 411 (1996), illustrates the former and *Richards v. Jain*, 168 F.Supp.2d 1195 (W.D. Wash. 2001), the latter.

*Firestorm 1991* involved a large series of wildfires that took place near Spokane. Shortly after the fires, several local utilities signed a joint defense agreement and sent teams of investigators into the burned areas to assess whether their electric lines had caused the fires. The teams were being coordinated by a law firm and generally included a mix of lawyers, consulting experts retained by the law firm and utility company employees. One of the experts concluded that at least one of the fires had been started by an electric line. When litigation was brought later against the utilities, the expert contacted the plaintiffs' lawyers because he thought his concerns might not surface during discovery. Although the plaintiffs' lawyers knew that the expert had been retained by the utilities' law firm, they conducted a recorded interview with him

that included his observations and opinions. The plaintiffs' lawyers provided a transcript to the utilities' law firm. That firm, in turn, filed a motion to disqualify the plaintiffs' lawyers for improper ex parte contact with their expert. The trial court agreed and disqualified the lawyers. On review, the Supreme Court held that CR 26(b)(5) specifies the exclusive means for discovery of an opponent's experts and that violation of the rule warranted sanctions. In a split decision, a majority concluded that the particular information elicited did not reach either privilege or work product and, therefore, a sanction less severe than disqualification should be imposed. At the same time, even the majority made plain that improper access to, and use of, an opponent's privileged information would warrant disqualification.

*Richards* involved just such a case. With *Richards*, the privileged information came in the form of documents rather than a witness. The plaintiff in *Richards* had been a senior executive with a high tech company in Seattle for five years before he left in the wake of a dispute over stock options. When he left and notwithstanding a nondisclosure agreement, the plaintiff downloaded onto a disk all of the emails he had sent or received during his tenure at the company and gave the disk to his lawyers for their use in pursuing his claim against the company. The emails totaled over 100,000 and, by the court's later calculation, included 972 privileged communications with both inside and outside counsel. The plaintiff's lawyers used the privileged communications in formulating their

legal strategy and their initial pleadings. When the plaintiff was deposed, he revealed that he had taken the emails. The company's lawyers moved for both the return of the disk *and* to disqualify the plaintiff's lawyers. Relying on *Firestorm* and an ABA ethics opinion on handling inadvertently produced documents<sup>iii</sup>, the court agreed and disqualified the lawyers because there was no other effective way to "unring the bell" once they had unauthorized access to their opponent's privileged information. Both *Firestorm* and *Richards* counseled that issues of privilege waiver need to be decided by the court rather than the lawyers unilaterally.

***Obstructing Access to Information You're Supposed to Produce***

"Information you're supposed to produce" equates with evidence that fairly falls within CR 26(b) and the other side's requests. It is rooted in both RPC 3.4(a) and (d), which prohibit lawyers from obstructing access to evidence and require lawyers to make reasonable efforts to comply with discovery requests, and CR 26(g) (and its federal counterpart), which imposes similar requirements.<sup>iv</sup> It, too, applies to both witnesses and documents. Again, Washington case law offers telling examples of each. *Johnson v. Mermis*, 91 Wn. App. 127, 955 P.2d 826 (1998), illustrates the former and *Washington State Physicians Ins. Exch. & Ass'n. v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993), the latter.

*Johnson* involved a replevin action seeking the return of a car the defendant hadn't paid for. The plaintiff's lawyer noticed the defendant's

deposition and requested other discovery. The defendant's lawyer cancelled two deposition settings on short notice and the plaintiff then moved to compel. The trial court ordered the deposition and production of the requested documents. At the deposition, the defendant refused to answer background questions or reveal the car's location. The defendant's lawyer specifically instructed the defendant to refuse to answer many other questions, claiming they were irrelevant. The defendant produced virtually none of the documents requested (and ordered). The court both struck part of the defendant's pleadings and imposed monetary sanctions on both the defendant's lawyer and his client. The Court of Appeals affirmed (and then sanctioned the defendant's lawyer for filing a frivolous appeal). The Court of Appeals emphasized that if a party believes the other side is exceeding the scope of permissible inquiry the remedy is to seek a protective order from the court rather than simply "stonewalling."

*Fisons* involved a lawsuit by a doctor against a drug manufacturer claiming that the drug company had failed to warn him about a particular drug and, as a result, he had prescribed it with adverse effect on a young patient who later sued him for malpractice. The Supreme Court found that the drug company and its lawyers had avoided timely producing relevant documents and other information in response to requests for production and interrogatories by reading and responding to them so narrowly that the responses were misleading, particularly as it related to two "smoking gun" documents that showed that the

drug company was aware of the precise health risks involved and had failed to warn physicians generally to those risks. The Supreme Court found that sanctions should be imposed and remanded to the trial court to fashion a specific remedy. *Fisons* relied on the wording of CR 26 in outlining a lawyer's duty to make reasonable inquiry in responding to a discovery request and emphasized that the lawyer's conduct is measured against an objective standard.

### ***Summing Up***

The law firm sanctioned in *Fisons* argued that it was “just doing its job.” That led to the Supreme Court's forceful rejoinder quoted at the beginning of this column. Although improper discovery conduct is subject to bar discipline, it more often results in direct practical consequences: disqualification, attorney fees, exclusion of evidence, striking pleadings, adverse inference instructions and, on occasion, even default. And, if the conduct was the lawyer's doing rather than the client's, it raises the specter of civil liability of the lawyer to the client depending on the harm to the client. From both the professional considerations the *Fisons* court underscored to very practical risk management reasons, lawyers need to “play fair while playing hard.”

### **ABOUT THE AUTHOR**

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege

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<sup>i</sup> Quoting Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 184 (1985).

<sup>ii</sup> Pleading-related rules and sanctions, in turn, are found at RPC 3.1, CR 11 and FRCP 11.

<sup>iii</sup> The *Richards* court relied on ABA Formal Ethics Opinion 94-382. With the ABA's subsequent adoption of a specific model rule governing inadvertent production, ABA Model Rule 4.4(b), the ABA issued a new ethics opinion on inadvertent production, Formal Ethics Opinion 05-437. Proposed amendments to the Washington RPCs are pending as I write this and would include a new RPC 4.4(b) on inadvertent production. The pending amendments would not affect RPC 3.4 substantively.

<sup>iv</sup> See also CR 37 and FRCP 37.