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Discovery Ethics Revisited

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Late last year, the Washington Supreme Court in *Magaña v. Hyundai Motor America*, 167 Wn.2d 570, 220 P.3d 191 (2009), affirmed an $8 million default judgment against the defendant in a product liability case as a discovery sanction for wrongfully withholding key documents. The Supreme Court relied on CR 37 rather than the RPCs. Nonetheless, *Magaña* serves as a powerful reminder of our duties under the professional rules. Given *Magaña's* notoriety and several other developments since we last looked at discovery ethics, it is a good time to revisit this topic. In this column, we'll look at the twin poles of discovery ethics under the RPCs: our duty not to obstruct access to information that we're required to produce; and our corresponding duty not to improperly obtain and use information that we're not supposed to have.

Obstructing Access to Information

"Information you're supposed to produce" generally equates to evidence that falls within the scope of discovery permitted by CR 26(b) and the other side's proper requests. It is rooted in 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 impose similar obligations through their certification requirements. It applies to both witnesses (*see, e.g., Wright v. Group Health Hospital*, 103 Wn.2d 192, 691

P.2d 564 (1984)) and documents (*see, e.g., Washington State Physicians Ins. Exch. & Ass'n. v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993)).

Magaña both summarizes the law in this area and, as noted, serves as a powerful reminder of the sanctions lawyers (and their clients) can face. Plaintiff in *Magaña* was a passenger in a 1996 Hyundai Accent when the driver swerved to avoid an oncoming truck and lost control of the car. The Hyundai left the road and spun multiple times—ejecting plaintiff from the rear window. Plaintiff became a paraplegic as a result. He sued Hyundai on a product liability claim, asserting the seat collapse that caused his ejection was due to a design defect.

Two categories of information requested during discovery later became the focus of the sanction. The first sought documents reflecting seat failure claims or incidents on Hyundai vehicles since 1980. Hyundai objected to the request as overbroad but then went on to state that there were no injury claims for seat failures in Accent models built from 1995 through 1999. The second was an interrogatory asking whether other Hyundai vehicles used similar seat mechanisms. Hyundai responded that 1995-1999 model Accents used the same seat mechanism but no other Hyundai model did.

The case went to trial in 2002 and the jury awarded Magaña $8 million. Hyundai appealed and Division 2 sent the case back for retrial of liability—but not damages. Retrial was set for January 2006. Plaintiff's counsel asked Hyundai to update its discovery responses in advance of the new trial. That Fall, Hyundai

eventually admitted that another model, the Elantra, also used a similar seat mechanism and there were indeed seat failure claims involving both the Accent and the Elantra. Nonetheless, Hyundai continued to refuse to produce seat failure information beyond the mid-to-late 1990s. Following a motion to compel, the trial court ordered Hyundai to produce such data regardless of model year. Shortly before trial, Hyundai produced still more documents on seat failures generally and nine from its "consumer hotline" involving Accents that it had earlier withheld even though they were from the 1995-1999 model years.

At that point, plaintiff moved for a default judgment against Hyundai based on its failure to produce the information before the first trial. The trial court conducted a three day evidentiary hearing on the motion. The trial court found that Hyundai had improperly withheld relevant evidence and that plaintiff had been prejudiced as a result. The trial court considered lesser sanctions but concluded entry of a default judgment against Hyundai for the $8 million the jury had determined earlier was appropriate. Division 2 reversed, agreeing that Hyundai had improperly withheld relevant evidence but concluding that a more modest sanction would have sufficed. The Supreme Court disagreed.

The Supreme Court found that the trial did not abuse its discretion under the circumstances in entering the $8 million default as a CR 37 sanction. The Supreme Court concluded that Hyundai acted willfully and that plaintiff suffered substantial prejudice as a result. On the former, the Supreme Court rejected

Hyundai's argument that it had no duty to look beyond its legal department files. On the latter, the Supreme Court emphasized that prejudice arises if a party is hampered in preparing for trial and not simply in conducting trial. The Supreme Court also found that fee awards in both the trial court and on appeal were warranted. In reaching its conclusions, the Supreme Court relied on several other discovery sanction cases, including the seminal *Fisons* decision noted earlier and its more recent decision in *Mayer v. Sto Industries, Inc.,* 156 Wn.2d 677, 132 P.3d 115 (2006), where it upheld a monetary sanction totaling nearly $750,000 for improperly withheld documents.

As noted earlier, *Magaña* is rooted in procedural law rather than the RPCs. But, Comment 2 to RPC 3.4 recognizes that our ethical duty to produce information flows directly from procedural law:

> "Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party . . . to obtain evidence through discovery . . . is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed."

Improperly Invading Privilege

"Information you're not supposed to have" generally equates with an opponent's privilege or work product. It is rooted in RPC 3.4(c), which requires lawyers to abide by court rules, RPC 4.4(a), which prohibits methods of obtaining

evidence that violate the rights of others, and CR 26(b)(1) and its federal counterpart, which exclude privileged material from the scope of permitted discovery. It, too, applies to both witnesses (*see, e.g., In re Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 411 (1996)) and documents (*see, e.g., Richards v. Jain*, 168 F. Supp.2d 1195 (W.D. Wash. 2001)).

Richards summarizes the law and provides another potent example of the sanctions lawyers (and their clients) can face. Plaintiff in *Richards* had been a senior executive with a high tech company in Seattle for five years before leaving in the wake of a dispute over stock options. When he left (and notwithstanding a nondisclosure agreement), plaintiff downloaded all of the emails he had sent or received during his tenure at the company onto a disk and gave it to his lawyers for their use in pursuing his claim against the company. The disk contained over 100,000 emails and, by the court's later calculation, included 972 privileged communications with both inside and outside counsel. Richards' lawyers used the privileged communications in formulating their legal strategy and their initial pleadings.

When plaintiff was deposed, he revealed that he had taken the emails. The company's lawyers moved for both the return of the disk and disqualification. Relying on *Firestorm* and an ABA ethics opinion (since superseded and now addressed directly by ABA Model Rule 4.4(b)) on handling inadvertently produced documents, the court disqualified Richards' lawyers because there was

no other effective way to "unring the bell" once they had unauthorized access to their opponent's privileged information. The recent amendments to CR 26(b)(6) addressing inadvertent production and their federal counterparts in FRCP 26(b)(5)(B) and FRE 502 reinforce the result in *Richards.* As Comment 1 to RPC 4.4 puts it:

> "Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons . . . [which] . . . include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship."

Summing Up

Although dealing with converse aspects of lawyers' discovery duties, *Magaña* and *Richards* share a common thread. They both counsel lawyers to seek the courts' guidance on such major issues as whether key documents can be properly withheld or whether privilege has been waived. Lawyers who make those decisions themselves may find the penalty for guessing wrong can be severe.

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