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Court of Appeals Clarifies Disqualification Standards For Improper Access to Privileged Information

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On September 14, Division I issued an important clarification on disqualification standards for improper access to an opponent's privileged information in *Foss Maritime Co. v. Brandewiede*, ___ Wn. App. ___, ___ P.3d ___, 2015 WL 5330483 (2015). *Foss* was a commercial dispute over the renovation of a ship for the plaintiff by the defendant contractor. During the litigation, defense counsel contacted the plaintiff's former project manager—who by that time had left the plaintiff. During the course of the interview, the former project manager gave the defense lawyer several emails he still had from his employment with the plaintiff—including some that contained attorney-client privileged communications. The defense lawyer later included them in a proposed trial exhibit. Before trial, the plaintiff moved to disqualify the defense lawyer based on the emails and possession of a "thumb drive" that the former project manager provided the defense lawyer in a second interview that also contained some privileged material. The plaintiff argued that the defense lawyer had improperly invaded privilege under RPC 4.4(a), which broadly prohibits a lawyer from violating the legal rights of another person.

The trial court reviewed the material *in camera* and disqualified the lawyer in a comparatively perfunctory order. On discretionary review, the Court of

Appeals reversed and remanded for further proceedings. Without reaching the merits, the Court of Appeals concluded that the trial court had not made adequate findings. Relying primarily on *In re Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 411 (1996), the Court of Appeals found (at *6) that “any order of disqualification will require the consideration and analysis of (1) prejudice, (2) counsel’s fault, (3) counsel’s knowledge of privileged information, and (4) possible lesser sanctions.”

Foss highlights three important points. *First*, the factors the Court of Appeals identified should frame both sides of the briefing on disqualification motions that are based on asserted improper invasion of privilege. Although the lawyer conduct involved will remain at the heart of any disqualification motion, the *Foss* factors provide an analytical lenses for litigants and courts alike. *Second*, the Court of Appeals pointedly did not rule out disqualification in appropriate cases for improperly invading an opponent’s privilege. *Richards v. Jain*, 168 F. Supp.2d 1195 (W.D. Wash. 2001), which also relied on *Firestorm 1991* and was cited by the Court of Appeals in *Foss*, is a dramatic example of how improper access can lead to disqualification. *Third*, lawyers should be mindful that in a discovery context, CR 26(b)(6), which was adopted in 2010 and is modeled on its federal counterpart, now requires a lawyer on the receiving end

of what appears to be an opponent's privileged information to notify the opponent and to seek the guidance of the court if contending that privilege does not apply or has been waived. The notification requirement is similar in this regard to RPC 4.4(b).

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