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**Knowing When to Go:
Court of Appeals Affirms Sanctions
Against Lawyer for Continuing After Disqualification**

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Division III of the Washington Court of Appeals recently affirmed sanctions against a lawyer in an unusual scenario: the lawyer continued to participate in the case after being disqualified. *Matter of Guardianship of Cudmore*, 2017 WL 375048 (Wn. App. Jan. 26, 2017) (unpublished), involved contested guardianship proceedings for an elderly man, Cudmore. For several years, Cudmore's stepson had informally helped manage his parents' financial affairs following a debilitating stroke his mother suffered and Cudmore's general decline in health. The stepson helped manage his parents' affairs through a power of attorney and at least one joint financial account. In 2012, Cudmore was diagnosed with progressive dementia. Later, a local lawyer surfaced, announced that he had prepared a new estate plan for Cudmore and sought in a contested guardianship proceeding to be appointed Cudmore's attorney. The local lawyer filed a lengthy declaration with the court in support of his appointment in which he vouched for Cudmore's capacity and wishes.

The stepson opposed the appointment. The stepson's lawyer argued, in relevant part, that the local lawyer who sought the appointment should be disqualified under the lawyer-witness rule, RPC 3.7, because he had turned

himself into a key witness on Cudmore's capacity. The court disqualified the lawyer and instead appointed other counsel for Cudmore.

The disqualified lawyer never sought discretionary review of his disqualification. The disqualified lawyer, nevertheless, continued to participate in the guardianship proceedings through court filings and issuing subpoenas. These actions triggered the expense of responding for the other parties and led the trial court to impose nearly \$10,000 in sanctions under CR 11.

The disqualified lawyer appealed the sanctions, but the Court of Appeals affirmed. The Court of Appeals began by noting that the lawyer had not appealed his disqualification and, therefore, that was moot. It then concluded that the trial court was within its discretion in entering sanctions and affirmed the amount awarded below (and left the door open for an additional attorney fee award on appeal). The Court of Appeals summarized its rationale succinctly: "Since . . . [the disqualified lawyer] . . . did not seek discretionary review of the trial court's disqualification order, he was obliged to abide by it." (*Id.* at *4.) Although lawyers have a general duty upon withdrawing (whatever the mechanism) under RPC 1.16(d) to "take steps to the extent reasonably practicable to protect a client's interests," that is not an open invitation to remain as counsel of record once disqualified.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB *Ethical Oregon Lawyer*, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.