fucile & reising | LLP

September 2024 WSBA *Bar News Ethics & the Law* Column

Conflicts Arising from Sanctions Motions: An Analytical Framework

> **"[R]equests for sanctions should not turn into satellite litigation or become a 'cottage industry' for lawyers."**
> **~*Washington State Physicians Ins. Exchange v. Fisons*, 122 Wn.2d 299, 356 (1993)**

By Mark J. Fucile
Fucile & Reising LLP

Sanctions litigation has not become the "cottage industry" the Washington Supreme Court warned against 31 years ago in its seminal *Fisons* decision. At the same time, even a cursory electronic search of Washington trial and appellate decisions will reveal that sanctions motions are relatively common. Some are directed solely against clients.[1] Some are directed solely at lawyers.[2] Still others are directed at both lawyers and their clients.[3] When a sanctions motion is filed by an opposing party, the lawyer on the receiving end can face difficult conflict issues depending on who the motion is targeted against and the lawyer's involvement in the underlying conduct. Some conflicts in these scenarios are waivable, while others are not. If not, the lawyer may be faced with obligatory withdrawal.

In this column, we'll focus on an analytical framework for determining whether the lawyer involved has a conflict and, if so, whether the conflict can be waived by the client. To put those issues in context, we'll first briefly survey both the procedural and conflict rules involved.

Before we do, two caveats are in order.

First, although sanctions will form the backdrop for our discussion of conflicts, the accent here will be on conflicts rather than the nuances of particular sanctions rules or statutes.

Second, we'll focus today on civil rather than criminal proceedings.

Procedural Rules

Procedural rules and statutes addressing sanctions are many and varied.[4] Two of the most commonly cited, however, are Washington Superior Court Civil Rules 11 and 37.[5] Both are patterned generally on their federal counterparts.[6]

CR 11(a) primarily addresses pleadings, motions, and other "legal memorandum[s]." Under CR 11(a)(1)-(2), an attorney's signature on that class of documents is "a certificate by . . . the attorney that the . . . attorney has read the pleading, motion, or legal memorandum, and that to the best of the . . . attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" the document involved "is well grounded in fact" and "is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law[.]" CR 11(a)(3), in turn, includes in the attorney's certification that the pleading or other paper "is not interposed for any improper purposes, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation[.]"

Sanctions under CR 11 can be imposed on a lawyer, the lawyer's client, or both. The rule vests courts with broad authority to impose an "appropriate sanction"—including attorney fees.[7]

CR 37, in turn, addresses sanctions for a broad spectrum of discovery misconduct ranging from incomplete answers to discovery requests to the failure to comply with discovery orders.[8] Like CR 11, sanctions under CR 37 can be imposed against a lawyer, the lawyer's client, or both. Sanctions under CR 37 are potentially very broad and can include striking pleadings, limiting evidence, and outright dismissal in addition to attorney fees.[9]

Conflict Rules

Lawyer conduct leading to sanctions motions by a litigation opponent may invoke many different Rules of Professional Conduct. Today, however, we'll draw a distinction between RPCs that may be involved in the conduct underlying a sanction motion and the conflict that may be presented when the motion is filed. We'll focus on conflicts once a sanctions motion is filed—however ultimately resolved by the court concerned.

RPC 1.7(a)(2) addresses conflicts between the interest of a lawyer and the lawyer's own client:

> (a) Except as provided in paragraph (b) [addressing waivers], a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> . . .
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities . . . by a personal interest of the lawyer.

Comments 8 and 10 to RPC 1.7 elaborate on the nature of the conflict:

> [8] . . . [A] conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's . . . interests . . . The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose course of action that reasonably should be pursued on behalf of the client.
>
> [10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct . . . is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.

Conflicts under RPC 1.7(a)(2) are often referred to as "material limitation" conflicts because the financial or professional interest of the lawyer may "materially limit" the lawyer's professional judgment to the detriment of the client.[10] In the sanctions context, the concern is whether the lawyer's professional judgment on behalf of the client will be compromised by the lawyer's

role in the conduct underlying the sanctions motion and the lawyer's potential interest in avoiding sanctions being entered against the lawyer personally.[11]

As we'll discuss in the next section, some conflicts in this context are waivable by the client but others are not.[12] If the latter, RPC 1.16 ordinarily requires the lawyer's withdrawal (subject to court approval, if applicable). In any event, conflicts—and their implications—must be timely discussed with the client so that the client can make informed decisions about the representation.[13]

Analytical Framework

At the outset, it is important to underscore that each situation turns on its own facts and, as a result, "one size does not fit all." Rather, each situation usually involves its own unique nuances that merit close analysis. That said, there are some recurring patterns that form the contours of a general framework to analyze conflicts in this area. They turn principally on whether the sanctions involved are sought against the client alone, the lawyer alone, or both.

Client Alone. If the sanctions are directed solely against the client for asserted misconduct by the client alone, then the lawyer should not ordinarily have a conflict in defending the client. *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 220 P.3d 191 (2010), for example, focused on the corporate defendant—including its in-house legal department—withholding documents

rather than outside counsel.[14] Black can fade to gray, however, if the lawyer advised the client concerning the behavior involved. In *Angelo v. Kindinger*, 2022 WL 1008314 (Wn. App. Apr. 4, 2022) (unpublished), for example, a party opponent in an arbitration sought sanctions against a lawyer's client for improperly withholding material information and the arbitrator imposed sanctions solely against the client. Later, the client sued the lawyer—arguing, in relevant part, that the lawyer had advised the client to withhold the information concerned and, therefore, had a conflict when the party opponent brought the sanctions motion because the lawyer had an incentive to minimize his role in advising the client. The Court of Appeals reversed summary judgment for the lawyer and his firm—finding the lawyer did have a conflict. The Court of Appeals in *Angelo* also suggested that when the conduct of the client and the lawyer are interwoven and they have the potential to "point fingers" at each other, the conflict is not waivable and the lawyer must withdraw:

> At that point [*i.e.,* when the party opponent sought sanctions] . . . [the lawyer] . . . was in direct conflict with Angelo as to who was to blame for the nondisclosure that eventually resulted in sanctions against Angelo. Despite this conflict, . . . [the lawyer] . . . did not advise Angelo of the conflict or withdraw from representing him in the arbitration.[15]

Lawyer Alone. If the sanctions are directedly solely against the lawyer, the lawyer may be able to continue if—depending on the circumstances—the

client waives the conflict. In this scenario, although the lawyer bears the direct risk of sanctions—for example, monetary sanctions under CR 11 for making frivolous legal arguments[16]—the client's case may still be impacted. In *Engstrom v. Goodman*, 166 Wn. App. 905, 271 P.3d 959 (2012), for example, a lawyer improperly obtained a declaration from a represented party in violation of RPC 4.2 (the "no contact" rule) in opposing a request for a trial de novo following an arbitration award for the lawyer's client. The lawyer was sanctioned—and the court both struck the declaration and ordered the trial de novo. If the reasonably foreseeable risk of injury to the client's case is remote even if the lawyer is sanctioned, then the lawyer in most circumstances should be able to continue if the client waives the conflict. In some instances, however, either the risk to the lawyer may be so great[17] or the potential harm to the client may be so significant[18] that the conflict ripens into a nonwaivable one because the lawyer cannot reasonably exercise professional judgment on behalf of the client.[19]

Lawyer and Client. If the sanctions are directed against both the lawyer and the client, conflict issues quickly come into sharp relief. In *In re Marriage of Wixom and Wixom*, 182 Wn. App. 881, 332 P.3d 1063 (2014), for example, the Court of Appeals disqualified a lawyer *sua sponte* when he tried to shift the blame for jointly sanctioned conduct from himself to his client. The Court of

Appeals in *Wixom* noted that the conflict in that instance is nonwaivable. By contrast, in *K.M.P. by and through Pinto v. Big Brother Big Sisters of Puget Sound*, 16 Wn. App.2d 475, 483 P.3d 119 (2021), the Court of Appeals found that a conflict was waivable when the lawyer admitted that any responsibility for sanctions was his alone.[20] This suggests that if a lawyer stipulates that any sanctions are solely the responsibility of the lawyer, the conflict may be waivable by the client absent other considerations.

Summing Up

This is definitely an area where the proverbial "devil is in the details" and any given situation must be evaluated on its own facts. Nonetheless, framing the analysis around who the sanctions are sought can be a useful way to bring a measure of clarity to some otherwise murky waters.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms, and corporate and governmental legal departments throughout the Northwest on professional ethics and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and a principal editor and contributing author for

the OSB *Ethical Oregon Lawyer* 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 503.860.2163 and Mark@frllp.com.

---

[1] *See, e.g., Magana v. Hyundai Motor America*, 167 Wn.2d 570, 220 P.3d 191 (2010).

[2] *See, e.g., Matter of Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 411 (1996).

[3] *See, e.g., Washington State Physicians Ins. Exchange v. Fisons*, 122 Wn.2d 299, 858 P.2d 1054 (1993).

[4] In addition to CRs 11 and 37, *see also* CR 26(g) (certifications on discovery responses), Fed. R. Civ. P. 26(g) (same), CR 30(d) (deposition misconduct), Fed. R. Civ. P. 30(d)(3) (same), RCW 4.84.185 (expenses for opposing frivolous claims), 28 U.S.C. § 1927 (expenses for "vexatious" litigation). Sanctions may be imposed at the appellate level under, among others, Washington RAP 18.9(a) and Fed. R. App. P. 38. Courts also have inherent authority to control the conduct of counsel appearing before them and invoke this authority, for example, when imposing the sanction of disqualification. *See Kaiser Steel Corp. v. Frank Coluccio Const. Co.*, 785 F.2d 656, 658 (9th Cir. 1986) (discussing authority to disqualify counsel).

[5] *See generally* Elizabeth A. Turner, 3A Wash. Prac., Rules Practice CR 11 and CR 37 (7th ed. 2023) (overview of each rule).

[6] *See* Fed. R. Civ. P. 11 and 37.

[7] *See generally* Philip Talmadge, Emmelyn Hart-Biberfeld, and Peter Lohnes, *When Counsel Screws Up: The Imposition and Calculation of Attorney Fees as Sanctions*, 33 Seattle U. L. Rev. 437, 446-47 (2010) (surveying Washington case law for determining an "appropriate sanction" under CR 11).

[8] CR 26(g) includes a certification requirement similar to CR 11 for lawyers signing discovery responses. *See generally Mayer v. Sto Industries, Inc.,* 156 Wn.2d 677, 685-86, 132 P.3d 115 (2006) (discussing certification under CR 26(g)). *See also* Fed. R. Civ. P. 26(g) (analogous federal certification).

[9] Washington's appellate courts have established factors that courts should consider when imposing particular sanctions from this broad range. *See generally Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 496-98, 933 P.2d 1036 (1997) (noting considerations especially when imposing severe sanctions); *Carroll v. Akebono Brake Corporation*, 22 Wn. App.2d 845, 863-64, 514 P.3d 720 (2022) (same).

[10] *See generally* ABA, *Annotated Model Rules of Professional Conduct* 177-79 (10th ed. 2023) (surveying material limitation conflicts).

[11] *See State v. Wood*, 19 Wn. App.2d 743, 759, 498 P.3d 968 (2021) (addressing conflicts between the professional interests of a lawyer and the lawyer's client under RPC 1.7(a)(2)); *see also* Cal. St. Bar. Formal Op. 1997-151 (1997) (discussing conflicts in the sanctions context).

[12] *See* RPC 1.7(b) (waivers); RPC 1.7, cmts. 14-15 (discussing waivable and nonwaivable conflicts).

[13] *See* RPC 1.4 (duty of communication); *see also* ABA Formal Op. 481 (2018) (discussing a lawyer's duty to inform a client of a possible material error in handling a client's work); *Shoemake ex rel. Guardian v. Ferrer*, 168 Wn.2d 193, 225 P.3d 990 (2010) (same).

[14] *See also TrueBlue, Inc. v. Marchel*, 2020 WL 2857610 (Wn. App. June 2, 2020) (unpublished) (sanctions for discovery misconduct entered against client only).

[15] 2022 WL 1008314 at *10. The Court of Appeals also noted that an unwaived conflict in this scenario may justify fee disgorgement as a remedy for the client affected. *Id*. at *11.

[16] *See, e.g., Matter of Critchlow*, 2021 WL 734777 (Wn. App. Feb. 25, 2021) (unpublished) (CR 11 sanctions against lawyer only for asserted frivolous legal arguments).

[17] *See, e.g., Ota v. Wakazuru*, 2023 WL 1962363 (Wn. App. Feb. 13, 2023) (unpublished) (although remanded for further analysis of sanction factors, lawyer was accused of improperly seeking to influence witness).

[18] *See, e.g., Carroll v. Akebono Brake Corporation*, *supra*, 22 Wn. App.2d 845 (although remanded for further analysis of sanction factors, lawyer's withholding of information about autopsy put client's case at risk of dismissal as discovery sanction).

[19] A generally similar set of considerations arises if an opposing counsel or party files a bar grievance against a lawyer in ongoing litigation. For a discussion of this adjacent area, *see* ABA Formal Op. 94-384 (1994).

[20] The decision in *K.M.P.* came in the context of whether the lawyer had a nonwaivable conflict requiring withdrawal as a result of sanctions motion filed against both the lawyer and the client.