Supreme Court No. 92422-8

SUPREME COURT OF THE STATE OF WASHINGTON

No. 71611-5-I
WASHINGTON STATE COURT OF APPEALS, DIVISION ONE

FOSS MARITIME COMPANY,

Respondent,

v.

JEFF BRANDEWIEDE and JANE DOE BRANDEWIEDE, and the marital community comprised thereof; and BRANDEWIEDE CONSTRUCTION, INC.,

Petitioners,

and

CORE LOGISTIC SERVICES; LISA LONG and JOHN DOE LONG, and the marital community comprised thereof; FRANK GAN and JANE DOE GAN, and the marital community comprised thereof,

Defendants.

PETITION FOR REVIEW

Gregory M. Miller, WSBA #14459

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215
Attorneys for Petitioner Brandewiede

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A. IDENTITY OF PETITIONER AND ISSUE

Petitioners Jeff Brandewiede et al ("Brandewiede"), seek review of the published Court of Appeals decision filed September 14, 2015, (Appendix A).

This case provides the first opportunity to address ER 502(b) governing waiver for the inadvertent disclosures of privileged materials and specify how it applies in discovery. The rule has not been applied by an appellate court since it was adopted in 2010.

Under ER 502(b)(2), does an employer waive its claims to privilege for information held by its ex-employee which he discloses to opposing counsel in discovery, when the employer took no steps to protect that information from disclosure at the time it gave opposing counsel direct access to the ex-employee, who had been fired and was to be a key witness in the case?

B. COURT OF APPEALS DECISION & CASE SUMMARY

Division One granted discretionary review and a stay of the trial court's eve of trial order disqualifying Brandewiede's counsel for "wrongful conduct". App. A, pp. 4-5. Mr. Welch had reviewed documents given to him by Foss' ex-employee during private interviews *in lieu* of deposition. *Id.* Mr. Vorwerk was the project manager on the vessel renovation project that generated the litigation. Foss agreed the interviews were proper. *Id.*, p.3 It had provided Mr. Vorwerk's direct contact information following Mr.

Welch's inquiry about taking his deposition. The trial court concluded "some but not all" of the documents Mr. Welch reviewed were privileged and disqualified him. The panel reversed for failing to follow the requirements of *In re Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 411 (1996) ("*Firestorm*") and *Wa. State Physicians Ins. Exch., et al. v. Fisons*, 122 Wn.2d 299, 858 P.2d 1054 (1993) ("*Fisons*"), but did not address waiver of privilege. App. A, pp. 8-15. It remanded for further proceedings which could include a renewed disqualification motion and disputes over what evidence is still protected by claims of privilege. *Id.*

C. ISSUES PRESENTED FOR REVIEW

Under ER 502(b)(2), does an employer waive its claims to privilege for information held by its ex-employee which he discloses to opposing counsel in discovery, when the employer took no steps to protect that information from disclosure at the time it gave opposing counsel direct access to the ex-employee, who had been fired and was to be a key witness in the case?

D. STATEMENT OF THE CASE

Judge Verellen's decision succinctly sets out the basic facts:

> ¶ 2 This case arose from a contract dispute for the renovation of the vessel *Alucia*. Foss Maritime subcontracted with Core Logistic Services to do the work. A key question in the underlying dispute is whether Jeff Brandewiede and Brandewiede Construction, Inc. were affiliated with Core Logistic Services or were an independent contractor.

¶ 3 Foss terminated Van Vorwerk, the project manager, in May 2012. In July 2012, Foss sued Core Logistic Services and Brandewiede for breach of contract, unjust enrichment, and fraud. During discovery, Foss identified Vorwerk as a person "likely to have discoverable information" and "who prepared, assisted with, or furnished information" used to prepare Foss's discovery response. Foss did not indicate that Vorwerk was no longer employed by Foss. Foss listed Vorwerk as a potential witness and identified his contact information as in care of Foss's counsel.

¶ 4 In September 2013, Brandewiede's counsel John Welch contacted Foss's counsel John Crosetto about setting Vorwerk's deposition. Crosetto explained that Vorwerk no longer worked for Foss and gave Welch contact information for Vorwerk. In late September 2013, Welch met Vorwerk for an interview "in lieu of sitting for a deposition." Foss agrees the interview itself was proper.

¶ 5 During the interview, Vorwerk gave Welch a copy of a "wrongful termination" letter that Vorwerk drafted and gave to Foss after his employment was terminated. Vorwerk's letter recited facts about his work on the project. The letter included several e-mails between Vorwerk, Foss's in-house counsel Frank Williamson, and several other Foss employees. The e-mails were not designated as attorney-client privileged communications but did contain some privileged information. Brandewiede later identified the letter as a proposed trial exhibit. At the interview, Vorwerk offered to provide copies of his other e-mails with Foss management about the project.

¶ 6 In late October 2013, Welch again met with Vorwerk. Vorwerk gave Welch a thumb drive containing e-mails about all of his work as a project manager for Foss.

¶ 7 About two weeks later, Welch informed Crosetto of the materials he received from Vorwerk, stating he had "only reviewed a portion" of them. The record is unclear how much Welch reviewed. In his declaration, Welch stated he

became aware that the termination letter contained "potential attorney-client communications" when Crosetto alerted him. Once Crosetto asserted that the thumb drive contained privileged information, Welch stopped further review.

*2 ¶ 8 Crosetto was concerned that Vorwerk had provided Welch with privileged information. On November 12, 2014, Crosetto requested that Brandewiede give Foss "all documents provided by Mr. Vorwerk." Three days later, Welch gave Crosetto the thumb drive. Although Welch claims he stopped any further review of Vorwerk's materials on November 12, 2013, he e-mailed Crosetto on November 22, 2013, stating that he wanted to read Vorwerk's termination letter again.

¶ 9 On November 22, 2013, Foss filed a motion to disqualify Welch and his firm. Foss argued that Vorwerk's materials contained privileged information and that Welch's possession and use of the documents prejudiced Foss in violation of both RPC 4.2 and 4.4(a). Foss also sought a CR 26(b) discovery sanction excluding all evidence "tainted" by Vorwerk's and Welch's "wrongful conduct."

¶ 10 The trial court heard the parties' argument on Foss's motion to disqualify counsel and for sanctions. Foss filed the allegedly privileged documents under seal with a privilege log per the trial court's order.

App. A, pp. 2-5 (footnotes omitted).

As part of his argument that the disqualification order was erroneous and that Mr. Welch had done nothing wrong, Brandewiede asked Division One to rule as a matter of law that Foss had waived any privilege it may have had in information held by Mr. Vorwerk under ER 502(b)(2) and *Sitterson v. Evergreen School Dist. No. 114*, 147 Wn. App. 576, 196 P.3d 735 (2008). *See* OB, pp. 26-

28; RB, pp. 3-4 and 5-11. Brandewiede argued waiver applied because, on the admitted facts, since Foss did not take any protective measures when giving Mr. Welch direct contact information for Mr. Vorwerk, Foss could not be deemed to have taken reasonable measures to protect privileged information, which is required under both ER 502(b) and *Sitterson.*

The panel reversed the disqualification order (including its associated exclusion of evidence) in a published decision which applied *Firestorm* and *Fisons* and remanded, but did not expressly address the waiver issue. *See* App. A, pp. 8-15. Because waiver was not addressed, on remand Foss can still seek disqualification of Mr. Welch and exclusion of the information provided to him by Mr. Vorwerk, including Mr. Vorwerk's 38-page "Wrongful Termination" letter he wrote in June, 2012 and delivered to Foss before Foss initiated the litigation. *Id.,* pp. 13-15. The panel left for the trial court to determine on remand whether there is a basis for disqualification under the criteria of *Firestorm* and how much of the Vorwerk letter or of the other materials he provided to Mr. Welch may be excluded. *Id.*

The only potential basis for disqualification of Mr. Welch is his review of the materials provided to him by Mr. Vorwerk. But under the circumstances here, if as a matter of law under ER 502(b)(2) Foss waived its ability to claim privilege by failing to take reasonable steps to protect any privileged information which Mr.

Vorwerk may have had–which would include privileged or otherwise protected information "in his head"–then there could be no basis for disqualification of Mr. Welch on remand. There also would be no need for review of the Vorwerk letter for privileged materials to determine how much of that document could come into evidence, or of the Foss documents contained on the thumb drive.[1]

E. REASONS WHY REVIEW SHOULD BE GRANTED

1. Review Should Be Granted Per RAP 13.4(b)(4) To Confirm A Party's Obligation Under ER 502(b) To Take Reasonable Steps To Protect Claimed Privileged Materials During Discovery.

The case presents the first opportunity for this Court to address a party's obligations under ER 502(b)(2) to take reasonable steps to safeguard its allegedly privileged information in order to maintain a claim of privilege, here in the often troublesome context of discovery related to ex-employees. It should be considered in the context of Washington's established law of the attorney-client privilege – how it is established and what is required to maintain it.

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[1] Brandewiede does not contend that third parties would necessarily have access to the disclosed information, particularly in the context of discovery which is a private process. What steps the parties or the trial court should take to protect any further disclosure to third parties or the public is a separate issue that need not be addressed in this appeal. Proprietary information could be protected from public disclosure by sealing and protective orders.

(a) The protection of confidentiality is essential to maintaining a privilege.

Basic to maintaining a privilege is that it is intended to be confidential when made and that its confidentiality is maintained. Karl B. Tegland, 5A WASHINGTON PRACTICE, EVIDENCE LAW AND PRACTICE §501.16 (5th ed. 2007) ("Tegland"), citing to *Halffman v. Halffman*, 113 Wash. 320, 194 Pac. 371 (1920). Thus, as described by Prof. Tegland, a normally privileged communication or conversation that is intercepted or heard by eavesdropping will not have the privilege destroyed by being obtained by the third party "assuming the attorney and client had *taken reasonable steps* to assure privacy, and all the other necessary elements of the privilege were present." Tegland, *supra,* "Eavesdropping, electronic and otherwise," p. 160 (emphasis added). In order to maintain the privilege where the communication's confidentiality was breached the attorney and client must have taken "reasonable steps" to avoid the breach in confidentiality. *Id.*

In short, it is fundamental to the law of privilege that a party who does not take reasonable steps to protect its claimed privileged information loses that privilege, whether by loss of the requirement of confidentiality or by what is considered waiver under the modern rules and cases addressing inadvertent disclosures in discovery. *See* ER 502(b)(2); *Sitterson,* 147 Wn. App. at 584-589.

This Court has recognized in a long line of cases that because the assertion of a privilege interferes with the full production of information and therefore impinges on the search for the truth, which is what the legal system and trials are supposed to uncover, the privilege is strictly construed to exclude the least amount of relevant evidence.[2] Consequently, "[t]he burden of establishing nondisclosure rests with the party resisting discovery." *Fellows v. Moynihan,* 175 Wn.2d 641, 649, 285 P.3d 864 (2012). This principle is embodied in ER 502(b)(2) and places the burden on the party claiming privilege to demonstrate that it protected its allegedly privileged information by taking reasonable steps to keep it from being disclosed to third parties.

(b) ER 502(b) and its history.

This case provides the Court its first opportunity to address ER 502(b) governing waiver for the inadvertent disclosures of

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[2] *Pappas v. Holloway*, 114 Wn.2d 198, 203-04, 787 P.2d 30 (1990) ("Because the privilege sometimes results in the exclusion of evidence which is otherwise relevant and material, contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege cannot be treated as absolute; rather, it must be strictly limited to the purpose for which it exists."); *Dietz v. Doe,* 131 Wn.2d 835, 842-43, 935 P.2d 611 (1997). *Accord, State v Burden,* 120 Wn.2d 371, 376, 841 P.2d 758 (1992); *State v. Maxon*, 110 Wn.2d 564, 574, 756 P.2d 1297 (1988) ("In litigation the truth is seldom manifest, and the danger of an erroneous verdict increases whenever the trier of fact must reach a decision with less than all available relevant evidence. Thus, every privilege impairs the administration of justice, and this burden is tolerable only when the corresponding benefit is clear."); *Fellows v. Moynihan*, 175 Wn.2d 641, 649, 285 P.3d 864 (2012) ("Statutes that create privileges restricting discovery are in derogation of the common law and the policy favoring discovery, and so must be strictly construed.").

privileged materials and specify how it applies in discovery. The Rule has not been applied by an appellate court since it was adopted in 2010. The Rule states:

> (b) Inadvertent Disclosure. When made in a Washington proceeding or to a Washington office or agency, the disclosure does not operate as a waiver in any proceeding if:
>
> (1) the disclosure is inadvertent;
>
> (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; **and**
>
> (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following CR 26(b)(6).

ER 502(b) (emphasis added).

Under the plain text of the Rule, an inadvertent disclosure of privileged information results in a waiver in the privilege unless all three parts of the test are met.

Brandewiede's position is that the analysis under ER 502(b) finishes after the second subsection here because, when Foss gave Mr. Welch the direct contact information for Mr. Vorwerk, Foss took no steps to prevent disclosure of any privileged or confidential information Mr Vorwerk had, and therefore cannot meet the reasonableness requirement. Further, subsection (b)(2) puts the burden squarely where it should be under established Washington law: on the holder of the claimed privilege to take reasonable steps to protect that information. The failure to take any such steps related to an inadvertent disclosure or breach of confidentiality under long-

standing law and now under the Rule requires a ruling of waiver of the privilege as to the recipient of the information.

Prof. Tegland summarizes the rule's purpose:

> Rule 502 was adopted as a new rule in 2010. The rule codifies the law governing the issue of whether the protections of the attorney-client privilege and work product rule are waived if protected material is disclosed to the opposing party, either deliberately or inadvertently. ER 502 is similar, but not identical, to the corresponding federal rule, FRE 502.

Karl B. Tegland, 5A WASHINGTON PRACTICE, EVIDENCE LAW AND PRACTICE §502.1 (5th ed. 2007, Supp. 2015) ("Tegland"). Pertinent parts of the Drafters' Comments state:

> **Purpose**: This suggested amendment would fill a gap in Washington law regarding the inadvertent disclosure of privileged communications or work product. . . .
>
> # # #
>
> The current suggested amendment would fill that gap by providing the substantive law to resolve such waiver claims. The amendment would add a new Rule of Evidence 502 based closely on Federal Rule of Evidence FRE 502, which was signed into law on September 19, 2008. . . .
>
> # # #
>
> Suggested new ER 502 would be consistent with RPC 4.4(b) and would complement and work in concert with the pending suggested "claw back" amendments to CR 26 and CR 45.
>
> Suggested new ER 502 would also be consistent with the Washington Court of Appeals' recent use of the new federal rule to resolve a claim of an inadvertent waiver. *Sitterson v. Evergreen School District No., 147* Wn.App. 576, 196 P.3d 735 (2008), was the first appellate ruling in

> Washington deciding whether inadvertent production waives the attorney-client privilege. . . .[3]

Tegland, 2015 Supp., *supra,* §502.1. Professor Tegland concludes his comments by stating:

> For the most part, ER 502 codified existing law. The so-called claw-back provision mentioned in the Drafters' Comment (above) have [sic] been adopted, and now ER 502 completes the picture by providing the court with guidelines for determining whether a waiver has, or has not, occurred with respect to materials that have been clawed back.

Tegland, 2015 Supp., *supra,* §502.1.

There are no Washington appellate decisions applying ER 502(b)(2). The only other Washington case than *Sitterson* to address inadvertent disclosure, *Zink v. City of Mesa,* 162 Wn. App. 688, 256 P.3d 384 (2011) (analyzing disclosure by a third party under *Sitterson*) is discussed at RB pp. 8-9.

[3] As noted in the Drafters' Comments, *Sitterson* adopted the "balanced" approach which was adopted in a recent amendment to the federal rules. *See Sitterson,* 147 Wn.App. at 587-89. If the Court decides ER 502(b)(2) does not apply–which in itself would be important for the Bench and Bar to know–then it should consider application of *Sitterson* and its factors. Brandewiede contends that analysis under those factors too would require a holding that any claim to privilege was waived for purposes of this litigation for the same reason that Foss failed to take any precautions to prevent disclosure, much less reasonable steps.

(c) The Court should grant review and use this case to explain that ER 502(b)(2) applies in these circumstances and remind parties and their counsel of their obligations in order to maintain privilege.

This case will allow the Court to remind parties and their lawyers what they must do to maintain privilege and that it is their obligation to guard against disclosures–they must take reasonable steps. Here, under the plain text of the rule and the admitted facts, the Court can explain there was a waiver of any privileged information Mr. Vorwerk may have had because Foss took no steps to prevent disclosure of any such information when it provided his direct contact information to Mr. Welch.

Most employers, including Foss, would have many options in such situations to protect themselves against disclosures by their ex-employee, including a disgruntled one. The simplest is to arrange for the deposition of the ex-employee. Here, that would have given Foss' counsel the opportunity to meet with Mr. Vorwerk beforehand, ask what documents he had, and make assertions of privilege at that time if questions and answers got to that point. Counsel could have examined any documents he would give opposing counsel in advance for privilege.

This case is a good vehicle for discussing meaningful application of the rule because of the nature of the ex-employee's role in the workplace that led to the litigation. Mr. Vorwerk was the former project manager for the project at the center of the litigation.

He was listed as a witness for Foss and would be a key witness, as the former project manager. In this context the Court can vividly demonstrate how the "reasonable steps to prevent disclosure" part of ER 502(b) applies. Brandewiede suggests that, since Mr. Vorwerk had been fired by Foss before the start of the litigation in July, 2012,[4] and he had written a 38-page "Wrongful Termination" letter to Foss also before the start of the litigation, its failure to take any affirmative steps to prevent disclosure of communications Mr. Voerwerk may have had in September, 2013, at the time it gave the direct contact information was not reasonable as a matter of law and the waiver rule applies under ER 502(b).

Under ER 502(b), any privileged information must be deemed waived as to the 38-page letter because Foss admittedly did not take any steps to prevent disclosure following its provision of Mr. Vorwerk's direct contact information, much less reasonable steps.[5]

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[4] Whatever steps Foss may have taken when Mr. Vorwerk was fired in May, 2012, as to company materials in his possession at that time (*i.e.*, company computer files) that would have been subject to the company's confidentiality policies or to any company efforts made at an "exit interview", they would not protect or apply to Mr. Vorwerk's 38-page "Wrongful Termination" letter. That letter was written by Mr. Vorwerk, after he was fired and after any exit interview (although there is no evidence in the record of any exit interview of Mr. Vorwerk).

[5] The same goes for the thumb drive. Even assuming Foss took some steps to retrieve its files from Mr. Vorwerk when he was fired (there is no such evidence in the record), Foss nevertheless took no steps in September, 2013, to protect against disclosure of any company materials (or information in his head) Mr. Vorwerk may have had when it provided Mr. Welch his direct contact information.

There is no need to get into a fairness analysis and this Court can determine as a matter of law that the privilege was waived given the lack of any protective steps.

F. CONCLUSION

The Court should grant review so it can state clearly for the Bench and Bar how ER 502(b) applies to inadvertent disclosures of allegedly privileged information during discovery, particularly in this context involving ex-employees who are material witnesses in the upcoming litigation.

Resolution of this issue also makes a material different to Brandewiede. If the rule is simply applied by its terms to the admitted facts, there is no basis for a renewed disqualification motion on remand. Nor is there any issue on the use of the Vorwerk materials at trial, particularly the 38-page Wrongful Termination letter. Reaching and resolving this issue will materially speed resolution of this matter, in addition to educating the Bench and Bar on application of the rule.

Petitioners Brandewiede therefore respectfully ask this Court to grant review and schedule argument at the earliest opportunity.

Respectfully submitted this 15th day of October, 2015.

CARNEY BADLEY SPELLMAN, P.S.

By _____
Gregory M. Miller, WSBA No. 14459
Attorneys for Petitioner Brandewiede

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

FOSS MARITIME COMPANY, Respondent, v. JEFF BRANDEWIEDE and JANE DOE BRANDEWIEDE and the marital community comprised thereof; BRANDEWIEDE CONSTRUCTION, INC., Appellants, CORE LOGISTIC SERVICES; LISA LONG and JOHN DOE LONG and the marital community comprised thereof; FRANK GAN and JANE DOE GAN and the marital community comprised thereof, Defendants.	No. 71611-5-I PUBLISHED OPINION FILED: September 14, 2015

VERELLEN, A.C.J. — Disqualification of counsel is a drastic sanction, only to be imposed in compelling circumstances because it "exacts a harsh penalty from the parties as well as punishing counsel."[1] The trial court here disqualified Jeff Brandewiede's counsel for accessing and reviewing an opponent's privileged communications. But the trial court failed to consider on the record the principles and

[1] In re Firestorm 1991, 129 Wn.2d 130, 140, 916 P.2d 411 (1996).

guidelines of In re Firestorm 1991[2] and Washington State Physicians Insurance Exchange & Ass'n v. Fisons Corp.[3] regarding (1) prejudice, (2) counsel's fault, (3) counsel's knowledge of privileged information, and (4) possible lesser sanctions. We reverse the trial court's disqualification order and remand for further proceedings consistent with this opinion.

FACTS

This case arose from a contract dispute for the renovation of the vessel *Alucia*. Foss Maritime subcontracted with Core Logistic Services to do the work. A key question in the underlying dispute is whether Jeff Brandewiede and Brandewiede Construction, Inc. were affiliated with Core Logistic Services or were an independent contractor.

Foss terminated Van Vorwerk, the project manager, in May 2012. In July 2012, Foss sued Core Logistic Services and Brandewiede for breach of contract, unjust enrichment, and fraud. During discovery, Foss identified Vorwerk as a person "likely to have discoverable information" and "who prepared, assisted with, or furnished information" used to prepare Foss's discovery response.[4] Foss did not indicate that Vorwerk was no longer employed by Foss. Foss listed Vorwerk as a potential witness and identified his contact information as in care of Foss's counsel.

In September 2013, Brandewiede's counsel John Welch contacted Foss's counsel John Crosetto about setting Vorwerk's deposition. Crosetto explained that

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[2] 129 Wn.2d 130, 916 P.2d 411 (1996).

[3] 122 Wn.2d 299, 858 P.2d 1054 (1993).

[4] Clerk's Papers (CP) at 135.

Vorwerk no longer worked for Foss and gave Welch contact information for Vorwerk. In late September 2013, Welch met Vorwerk for an interview "in lieu of sitting for a deposition."[5] Foss agrees the interview itself was proper.

During the interview, Vorwerk gave Welch a copy of a "wrongful termination" letter that Vorwerk drafted and gave to Foss after his employment was terminated. Vorwerk's letter recited facts about his work on the project. The letter included several e-mails between Vorwerk, Foss's in-house counsel Frank Williamson, and several other Foss employees. The e-mails were not designated as attorney-client privileged communications but did contain some privileged information. Brandewiede later identified the letter as a proposed trial exhibit. At the interview, Vorwerk offered to provide copies of his other e-mails with Foss management about the project.

In late October 2013, Welch again met with Vorwerk. Vorwerk gave Welch a thumb drive containing e-mails about all of his work as a project manager for Foss.

About two weeks later, Welch informed Crosetto of the materials he received from Vorwerk, stating he had "only reviewed a portion" of them.[6] The record is unclear how much Welch reviewed. In his declaration, Welch stated he became aware that the termination letter contained "potential attorney-client communications" when Crosetto alerted him.[7] Once Crosetto asserted that the thumb drive contained privileged information, Welch stopped further review.

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[5] CP at 114.

[6] CP at 200.

[7] CP at 116.

Crosetto was concerned that Vorwerk had provided Welch with privileged information. On November 12, 2014, Crosetto requested that Brandewiede give Foss "all documents provided by Mr. Vorwerk."[8] Three days later, Welch gave Crosetto the thumb drive. Although Welch claims he stopped any further review of Vorwerk's materials on November 12, 2013, he e-mailed Crosetto on November 22, 2013, stating that he wanted to read Vorwerk's termination letter again.

On November 22, 2013, Foss filed a motion to disqualify Welch and his firm. Foss argued that Vorwerk's materials contained privileged information and that Welch's possession and use of the documents prejudiced Foss in violation of both RPC 4.2 and 4.4(a). Foss also sought a CR 26(b) discovery sanction excluding all evidence "tainted" by Vorwerk's and Welch's "wrongful conduct."[9]

The trial court heard the parties' argument on Foss's motion to disqualify counsel and for sanctions.[10] Foss filed the allegedly privileged documents under seal with a privilege log per the trial court's order.

The trial court reviewed the documents in camera and issued an order disqualifying Welch and his firm. The trial court determined that "Brandewiede's counsel did not address case law cited in [Foss's] brief and that "some (but not all) documents he reviewed were clearly attorney-client communications."[11] The trial court also excluded evidence "tainted" by Welch's "wrongful conduct," including

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[8] CP at 82.

[9] CP at 45.

[10] While not at issue on appeal, both parties filed motions for CR 37 discovery sanctions. The trial court denied both parties' motions.

[11] CP at 277.

Vorwerk's letter, the thumb drive, and any further information containing or derived from privileged information belonging to Foss that might be in Brandewiede's, his counsel's, or Vorwerk's possession, unless Brandewiede obtained the information from a source "untainted by the wrongful conduct."[12] The trial court neither identified what conduct was wrongful nor made findings or entered conclusions identifying what discovery or ethical rules were violated.

Brandewiede sought discretionary review of the trial court's order disqualifying counsel and excluding evidence. This court granted discretionary review and a temporary stay.

ANALYSIS

We generally review a disqualification order for an abuse of discretion.[13] But to the extent this case involves questions of law regarding "the application of a court rule to a set of particular facts,"[14] and "whether an attorney's conduct violates the relevant Rules of Professional Conduct,"[15] our review is de novo.[16]

Burnet

Brandewiede contends the trial court erred in not conducting an on-the-record analysis of the Burnet v. Spokane Ambulance factors before disqualifying his counsel

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[12] CP at 277.

[13] Pub. Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co., 124 Wn.2d 789, 812, 881 P.2d 1020 (1994); State v. Schmitt, 124 Wn. App. 662, 666, 102 P.3d 856 (2004).

[14] Firestorm, 129 Wn.2d at 135.

[15] Eriks v. Denver, 118 Wn.2d 451, 457-58, 824 P.2d 1207 (1992).

[16] Firestorm, 129 Wn.2d at 135; Lyons v. U.S. Bank Nat'l Ass'n, 181 Wn.2d 775, 783, 336 P.3d 1142 (2014).

and excluding evidence.[17] Specifically, Brandewiede contends Burnet and its progeny apply not only to discovery sanctions under CR 37(b) but also to discovery sanctions based on a CR 26(b) violation. We disagree.

CR 26(b)(1) limits the scope of discovery, allowing for discovery of anything material and relevant to the litigation except for privileged matters.[18] CR 26(b)(6) also imposes obligations on attorneys who receive information an opposing party claims is privileged:

> If information produced in discovery is subject to a claim of privilege . . . , the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; and must take reasonable steps to retrieve the information if the party disclosed it before being notified. Either party may promptly present the information in camera to the court for a determination of the claim. The producing party must preserve the information until the claim is resolved.

The trial court here neither made findings nor entered conclusions as to whether any discovery or ethical rules were violated. The trial court determined Vorwerk's and Welch's conduct was wrongful but did not state what conduct was wrongful and whether that conduct violated any rules.

Burnet and its progeny constrain a trial court's discretion to order "dismissal, default, and the exclusion of testimony" as a CR 37(b)(2) discovery sanction.[19] In Burnet, the trial court imposed a protective order limiting discovery under

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[17] 131 Wn.2d 484, 933 P.2d 1036 (1997).

[18] Dana v. Piper, 173 Wn. App. 761, 770, 295 P.3d 305 (2013).

[19] Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 690, 132 P.3d 115 (2006); see also Jones v. City of Seattle, 179 Wn.2d 322, 338, 314 P.3d 380 (2013).

CR 37(b)(2)(B).[20] Burnet specifically involved a CR 26(f) violation, which triggered sanctions under CR 37(b)(2). Burnet held that before imposing "'one of the harsher remedies allowable under CR 37(b),'" the trial court must consider on the record (1) whether a lesser sanction would probably suffice, (2) whether the violation at issue was willful or deliberate, and (3) whether the violation substantially prejudiced the opposing party's ability to prepare for trial.[21]

Mayer v. Sto Industries, Inc. held that a trial court need not apply the Burnet factors when imposing lesser sanctions, e.g., monetary sanctions, but must do so when imposing severe sanctions under CR 37(b).[22] Mayer refused to apply Burnet to a CR 26(g) violation because Fisons governed CR 26(g) violations, and Burnet is limited to CR 37(b)(2) violations.[23] CR 37(b)(2) does not list disqualification of counsel as a sanction.

Washington courts have applied Burnet to a trial court's orders excluding witnesses,[24] dismissing claims,[25] and granting a default judgment.[26] But "nothing in

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[20] Burnet, 131 Wn.2d at 490-91.

[21] Id. at 494 (quoting Snedigar v. Hodderson, 53 Wn. App. 476, 487, 768 P.2d 1 (1989)).

[22] 156 Wn.2d 677, 688-90, 132 P.3d 115 (2006) (concluding that Burnet's reference to "'harsher remedies allowable under CR 37(b)'" applies to "sanctions that affect a party's ability to present its case." (quoting Burnet, 131 Wn.2d at 494)).

[23] Id.; Wash. Motorsports Ltd. P'ship v. Spokane Raceway Park, Inc., 168 Wn. App. 710, 716, 282 P.3d 1107 (2012).

[24] Jones, 179 Wn.2d at 335-37; Teter v. Deck, 174 Wn.2d 207, 212, 274 P.3d 336 (2012); Blair v. TA-Seattle E. No. 176, 171 Wn.2d 342, 346, 254 P.3d 797 (2011) (Blair II); In re Dependency of M.P., 185 Wn. App. 108, 114-18, 340 P.3d 908 (2014).

[25] Rivers v. Wash. State Conference of Mason Contractors, 145 Wn.2d 674, 683, 41 P.3d 1175 (2002) (dismissing claims for violating discovery orders).

Burnet suggests that trial courts must go through the Burnet factors every time they impose sanctions for discovery abuses."[27] And no case law suggests that a trial court must apply Burnet for discovery sanctions based on a CR 26(b) violation. Burnet is limited to CR 37(b)(2) sanctions. Although some similar concerns apply to a disqualification of counsel, we conclude that Burnet does not apply here.

Firestorm and Fisons

Firestorm and Fisons define the standard for disqualification of counsel here. Fisons established the principles that trial courts must follow in imposing discovery sanctions for CR 26(b) violations.[28] Firestorm expressly addressed disqualification.[29] When disqualifying counsel based on access to privileged information, we conclude a trial court must consider (1) prejudice; (2) counsel's fault; (3) counsel's knowledge of claim of privilege; and (4) possible lesser sanctions.[30]

Prejudice. In many discovery disputes, prejudice focuses upon the opposing party's ability to prepare for trial when improperly denied discovery.[31] But for purposes of disqualification of counsel for access to privileged information, prejudice

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[26] Magaña v. Hyundai Motor Am., 167 Wn.2d 570, 581-82, 220 P.3d 191 (2009) (ordering default judgment for discovery violations); Smith v. Behr Process Corp., 113 Wn. App. 306, 315, 54 P.3d 665 (2002) (same).

[27] Mayer, 156 Wn.2d at 688.

[28] Firestorm, 129 Wn.2d at 142 (citing Fisons, 122 Wn.2d at 355-56).

[29] Id. at 139-45.

[30] Foss contends we should adopt the six-factor test enunciated by the Texas Supreme Court to determine whether an attorney's receipt of privileged information merits disqualification. In re Meador, 968 S.W.2d 346, 351-52 (Tex. 1998). Although several concepts in the Meador test overlap with our four factors, we decline to adopt Meador here.

[31] See, e.g., Magaña, 167 Wn.2d at 588-90.

turns on the significance and materiality of the privileged information to the underlying litigation. Access to inconsequential information does not support disqualification, but review of information material to the underlying litigation weighs in favor of disqualification.[32]

Fault. Counsel's access to privileged information may range from an innocuous, inadvertent disclosure by the opposing party to serious ethics violations. The level of fault or misconduct by counsel is an important factor in deciding whether disqualification is appropriate.[33] A trial court may also consider the "'wrongdoer's lack of intent to violate the rules'" in fashioning sanctions.[34] One example of fault would be "trolling" for an opponent's former integral employees to take advantage of opposing counsel.[35]

Counsel's Knowledge of Claim of Privilege. If an attorney reviews materials clearly designated as privileged information or continues review once the attorney becomes aware there are claims of privileged information, disqualification may be warranted.[36]

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[32] Kurbitz v. Kurbitz, 77 Wn.2d 943, 947, 468 P.2d 673 (1970) ("[A]ccess to confidential information which is material to the present suit" supports disqualification. (emphasis omitted)).

[33] Firestorm, 129 Wn.2d at 139-45; Fisons, 122 Wn.2d at 339-42; Richards v. Jain, 168 F. Supp. 2d 1195, 1208 (2001).

[34] Firestorm, 129 Wn.2d at 142 (quoting Fisons, 122 Wn.2d at 355-56). Additionally, the trial court may also consider the moving party's fault, such as its failure to timely apprise the court of the misconduct. See id. at 144-45.

[35] Id. at 143.

[36] See Richards, 168 F. Supp. 2d at 1205-06 (different case if counsel, "when first reviewing the documents with the plain and clear warning of 'attorney-client' and 'privileged' markings had . . . stopped all work and sealed or destroyed the documents").

Lesser Sanctions. Discovery sanctions serve to deter, punish, compensate, educate, and ensure that the wrongdoer does not profit from the wrong.[37] Generally, the trial court should impose the least severe sanction adequate to serve the sanction's particular purpose, but not so minimal as to undermine the purpose of discovery.[38] Similarly, the harsh sanction of disqualification of counsel should only be imposed if it is the least severe sanction adequate to address misconduct in the form of improper access to privileged information.[39]

No one factor predominates or has greater importance than others. It is best practice to enter written findings and conclusions identifying the specific grounds relied upon for disqualification and applying the four factors above.[40] At a minimum, the record must permit us to evaluate the trial court's consideration of those four factors.[41]

Foss contends mere access to privileged communications requires disqualification under Firestorm. But Firestorm did not establish a per se rule that mere access to privileged information taints the judicial process and requires disqualification, regardless of the circumstances. Rather, Firestorm requires disqualification when counsel has access to an opposing party's privileged information *in a conflict of interest setting.*[42] In Firestorm, counsel violated

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[37] Fisons, 122 Wn.2d at 356.

[38] Id. at 355-56.

[39] Firestorm, 129 Wn.2d at 139-45; Fisons, 122 Wn.2d at 339-42.

[40] Magaña, 167 Wn.2d at 583; see Burnet, 131 Wn.2d at 494.

[41] See Blair v. TA-Seattle E. No. 176, 150 Wn. App. 904, 909, 210 P.3d 326 (2009), rev'd on other grounds, Blair II, 171 Wn.2d at 352.

[42] Firestorm, 129 Wn.2d at 140.

CR 26(b)(5) by conducting an ex parte interview of an expert hired by opposing counsel. The court noted the "limited applicability" of the disqualification sanction.[43] The cases cited in Firestorm supporting its holding that counsel be disqualified upon access to an opposing party's privileged information all involve conflicts of interest.[44]

A disqualification based on a conflict of interest reinforces an attorney's fiduciary duty to protect his or her former clients' confidential information. But Welch's alleged discovery and ethical violations do not present the same concerns as a conflict of interest.

Further, CR 26(b)(6) provides that once a party has been notified that it has access to an opposing party's privileged information, that party "must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; and must take reasonable steps to retrieve the information if the party disclosed it before being notified." Nowhere does CR 26(b)(6) state that an attorney must be disqualified for acquiring an opposing party's privileged information. To the contrary, CR 26(b)(6) permits either party to "promptly present the information in camera to the court for a determination of the claim" of privilege. We reject any suggestion that an attorney's mere access to an opposing party's privileged information compels disqualification.

Foss attempts to distinguish Firestorm, but Firestorm and Fisons control. As in Firestorm, the trial court here neither made findings nor entered conclusions

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[43] Id.

[44] Id. (citing First Small Bus. Inv. Co. v. Intercapital Corp., 108 Wn.2d 324, 337, 738 P.2d 263 (1987); Teja v. Saran, 68 Wn. App. 793, 798-99, 846 P.2d 1375 (1993); Intercapital Corp. v. Intercapital Corp., 41 Wn. App. 9, 16, 700 P.2d 1213 (1985)).

supporting its disqualification order. And as in Firestorm, Welch was not trolling for Vorwerk or attempting to "create delay or confusion" by interviewing Vorwerk.[45]

Therefore, because the trial court did not expressly apply the four factors of prejudice, counsel's fault, counsel's knowledge of claim of privilege, and possible lesser sanctions, we reverse the trial court's disqualification order and remand for further proceedings consistent with this opinion.

Practical Concerns in Arguing Prejudice

We note there are practical concerns in reviewing the disputed materials in order to effectively argue prejudice. Before appeal, Welch accessed and reviewed significant portions of Vorwerk's termination letter. But Brandewiede's counsel on appeal intentionally avoided reviewing any of Vorwerk's materials to preclude any suggestion of impropriety. As a consequence, he is unable to articulate the presence or absence of prejudice informed by the contents of the alleged privileged communications. In such a setting, it may be appropriate for the trial court to enter a protective order allowing special counsel to review the alleged privileged materials solely for the purpose of presenting argument in the trial or appellate court regarding prejudice.[46]

Such an order would be similar to a "quick-peek" agreement, where "counsel are allowed to see each other's entire data collection before production and

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[45] Id. at 144.

[46] CR 26(c) permits a trial court to issue a protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

designate those items that they believe are responsive to the discovery requests."[47] Such an agreement does not constitute a waiver of privilege.[48] Using a similar approach in this context will insulate the privileged information and enable special counsel to address the significance and materiality of the privileged information to the underlying litigation.

Tainted Records

The trial court's disqualification order, as drafted by Crosetto, excludes evidence "tainted" by Vorwerk's and Welch's "wrongful conduct."[49] This vague language is problematic, but Foss has made several concessions on appeal.

First, Foss concedes that "Brandewiede can offer the Vorwerk Letter (properly redacted to remove privileged communications)."[50] We read this as a concession that once the few pages that include an e-mail exchange with Foss's general counsel about potential liability from the *Alucia* project have been redacted, Foss will not object to the admission of the remainder of the letter based upon any claim of misconduct by Welch.

Second, Foss concedes that Brandewiede can also offer "non-privileged, non-proprietary, and non-confidential information on the thumb drive (all of which Foss

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[47] Richard Van Duizend, *Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information—What? Why? How?*, 35 W. ST. U. L. REV. 237, 252 n.36 (2007).

[48] Laura Catherine Daniel, Note, *The Dubious Origins and Dangers of Clawback and Quick-Peek Agreements: An Argument Against Their Codification in the Federal Rules of Civil Procedure*, 47 WM. & MARY L. REV. 663, 667 (2005).

[49] CP at 277.

[50] Resp't's Br. at 40-41.

has already produced in discovery)."[51] We read this as a representation that Foss has already produced all documents on the thumb drive except those for which Foss in good faith asserts a claim of privilege. The trial court has already conducted an in camera review of the Vorwerk letter and documents on the thumb drive and has concluded that "some (but not all) documents" reviewed by Welch "were clearly attorney-client communications."[52] The trial court may need to expressly determine which of the documents on the thumb drive are subject to attorney-client privilege. For those documents that Foss claims are not subject to discovery based upon proprietary or other confidential information, the trial court may conduct an in camera review to determine whether there is any valid basis for Foss to decline to produce them.

Moreover, there are significant distinctions between attorney-client privilege and proprietary or other confidential information. This appeal only concerns the unauthorized disclosure of privileged information. Because the briefing does not extend to other forms of proprietary or confidential information, those issues are beyond the scope of this appeal.

Lastly, Brandewiede suggests the trial court may have imputed Vorwerk's wrongful conduct in sanctioning Brandewiede and his counsel, but any claim against Vorwerk is beyond the scope of this appeal.

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[51] Id. at 41.

[52] CP at 277.

CONCLUSION

We conclude the trial court's order of disqualification does not satisfy the principles and guidelines of Fisons and Firestorm. We therefore reverse the trial court's order of disqualification. On remand, 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. We reverse the existing order of disqualification and remand for further proceedings consistent with this opinion.

WE CONCUR: