

NO. 42290-5-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

TROY DANA,
Appellant,

v.

SUSSMAN SHANK, LLP; JOHN MCCORMICK, JANE DOE
MCCORMICK, DALLAS THOMSEN AND JANE DOE THOMSEN
("SUSSMAN SHANK")
Respondents.

and

RICK PIPER & PIPER GROUP INTERNATIONAL,
Other Respondents.

12 FEB 29 PM 1:08
STATE OF WASHINGTON
DEPUTY
THOMSEN

COURT OF APPEALS
DIVISION II

SUSSMAN SHANK RESPONDENTS' BRIEF

Patrick N. Rothwell
WA State Bar No. 23878
DAVIS ROTHWELL EARLE &
XÓCHIHUA, P.C.
Attorneys for Sussman Shank Sussman
Shank, LLP; John McCormick and Dallas
Thomsen
5500 Columbia Center
701 Fifth Avenue
Seattle, WA 98104-7097
(206) 622-2295

ORIGINAL

TABLE OF CONTENTS

	<i>Pg.</i>
A. INTRODUCTION.....	1
B. RESPONSE TO ASSIGNMENTS OF ERROR.....	1
C. COUNTERSTATEMENT OF THE CASE.....	1
1. Identity of Parties Involved.....	1
2. Decisions Below.....	2
3. History of Litigation and Present Appeal Issues.....	2
D. ARGUMENT.....	6
1. Troy Dana Only Timely Appellant.....	6
2. Summary of Dana’s Claims of Legal Malpractice.....	6
3. Discretionary Rulings, No Abuse of Discretion.....	8
4. <i>Pappas v. Holloway</i> and Related Cases.....	9
5. Summary of Cushman Firm File Reviewed <i>In Camera</i> by Trial Court.....	15
6. Trial Court Reviewed Above and Ordered Documents Produced, Depositions Allowed and Disqualified Cushman Law Firm.....	30
E. CONCLUSION.....	40

TABLE OF AUTHORITIES

Pg.

CASES

<i>Bieter Co. v. Beatta Blomquist</i> , 156 FRD 173 (U.S. Dist. Ct. Minn., 1994).....	14
<i>1st Security Bank of Wash. v. Eriksen</i> (WD Wa., 2007).....	15
<i>Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc.</i> , 189 Ill.2d 579, 727 N.E.2d 240 (2000).....	14, 15
<i>Hearn v. Rhay</i> , 68 FRD 574 (FD Wa., 1975).....	11, 12
<i>Microsoft Corp. v. Immersion Corp.</i> (WD Wa., 2008).....	42
<i>Pappas v. Holloway</i> , 114 Wn 2d 198, 787 P.2d 30 (1990).....	10, 11
<i>Rutgard v. Haynes</i> , 185 FRD 596 (US Dist. Ct., Cal. 1999).....	12, 13
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 26, 482 P.2d 775 (1971).....	8, 9
<i>Ward v. Gradin</i> , 147 Ohio App.3d 325 (2001).....	13, 14

COURT RULES

RAP 5.2(f).....	7
RPC 1.10.....	38
RPC 3.7.....	37

A. INTRODUCTION

This case involves discretionary rulings relating to a motion to compel and a motion to disqualify counsel. There was no abuse of discretion.

B. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial Court did not abuse her discretion in granting the defendant attorneys' motion to compel the Cushman law firm's file in its representation of Troy Dana in Dana's litigation with CMN, Inc. and in allowing the depositions of the Cushman firm attorneys.

2. The trial Court did not abuse her discretion in granting the defendant attorneys' motion to disqualify the Cushman law firm.

C. COUNTERSTATEMENT OF THE CASE

1. Identity of Parties Involved

Sussman Shank Sussman Shank, LLP; John McCormick and Dallas Thomsen ("Sussman Shank") were sued by Troy Dana ("Dana") and his wife, Pamela Dana, for alleged legal malpractice. Co-defendants Rick Piper and Piper Group International joined in the Sussman Shank motions at issue. Pamela Dana did not join in Troy Dana's Motion for Discretionary Review of June 23, 2011. The plaintiffs later attempted to add Pamela Dana through an untimely Amended Notice of Discretionary Review.

2. Decisions Below

The Order granting Sussman Shank's Motion to Compel (the production of the Cushman law firm file) was dated February 25, 2011. Clerk's Papers 255-257. The Order Denying Dana's Motion for Reconsideration (of the production of the Cushman firm file) was dated March 11, 2011. Clerk's Papers 294-295. The Order Clarifying Protective Order was also dated March 11, 2011. Clerk's Papers 292-293.

The trial Court's Order denying Dana's Second Motion for Protective Order (the motion attempting to bar depositions of the Cushman attorneys) was dated May 27, 2011. Clerk's Papers 433-434. The trial Court also granted Sussman Shank's Motion to Disqualify the Cushman law firm. That written Order, with findings and conclusions, was dated May 27, 2011. Clerk's Papers 435-440.

3. History of Litigation and Present Appeal Issues

Dana was a shareholder in Hodges Gilliam & Dana Real Estate Investment, Inc. ("Hodges"). He wanted to sell the company, but ended up instead selling stock shares in Hodges to a buyer named CMN, Inc. Sussman Shank represented the corporation, Hodges, in the stock sale, although Dana asserts the Sussman Shank firm also represented Dana personally in the stock sale. The sale also involved an Employment Agreement for Dana and other related agreements. Clerk's Papers 106-117.

Dana alleges in his legal malpractice complaint that Sussman

Shank "failed to protect him" and put him at a "disadvantage" in the CMN, Inc. stock sale transaction. Clerk's Papers 11. Dana also alleges in the legal malpractice complaint that the relationship between CMN, Inc. and Dana rapidly deteriorated shortly after the stock sale closed. Clerk's Papers 11. Dana alleges that he was eventually fired, provided no buyout and his remaining stock in Hodges became worthless. Clerk's Papers 11. In answers to discovery, Dana claimed he lost his stock equity in Hodges and lost commissions in the stock sale to CMN, Inc. due to this unidentified "failure to protect" by Sussman Shank. Clerk's Papers 41, 52-57. Dana seeks \$5.5 million in damages in this legal malpractice lawsuit. Clerk's Papers 41, 54.

Before the present legal malpractice lawsuit was filed, Dana filed a lawsuit against CMN, Inc. in Thurston County in 2009. Clerk's Papers 41, 60-64. In that complaint, just as in this legal malpractice lawsuit, Dana described a falling out between Dana and CMN, Inc., which allegedly occurred shortly after the stock sale transaction closed. Dana alleged in the *CMN, Inc.* lawsuit that misrepresentations were made by CMN, Inc. concerning the Employment Agreement and misrepresentations were made about the assistance CMN, Inc. would provide to Hodges after the stock sale to help Hodges succeed. Clerk's Papers 60-64. Just as in the present legal malpractice lawsuit, in his lawsuit against CMN, Inc., Dana claimed the same damages arising out of alleged breach of his Employment Agreement by CMN, Inc., loss of stock equity in the

company, and losses related to the alleged failure of CMN, Inc. to live up to its obligations under the stock purchase agreement to help Hodges succeed. The Cushman law firm represented Dana in the *CMN, Inc.* lawsuit.

The *CMN, Inc.* lawsuit was resolved pursuant to a Settlement Agreement. Clerk's Papers 41, 67-75. In that settlement, CMN, Inc. agreed to pay approximately \$108,000 to Dana and to pay certain future commissions of approximately \$150,000 to Dana. After that settlement, Troy Dana filed this legal malpractice lawsuit.

In December, 2010, Sussman Shank filed a Motion to Compel the Cushman law firm file in its representation of Dana in the *CMN, Inc.* litigation. Clerk's Papers 106-117. Dana objected, asserting attorney-client privilege and arguing the trial Court should conduct an *in camera* review of the file materials before ruling. Dana argued the *in camera* review would allow the trial Court the ability to determine if the file materials were relevant and unavailable from other sources. Clerk's Papers 188. The trial Court agreed to conduct an *in camera* review of the Cushman law firm file and considered the various arguments raised by Dana on this appeal. The trial Court granted the Motion to Compel production of the Cushman law firm's file. The trial Court concluded that the file materials were relevant and, by filing this legal malpractice lawsuit, both Troy Dana and Pamela Dana waived the attorney-client privilege that applied to the Cushman law firm file as to the *CMN, Inc.*

litigation. Clerk's Papers 256. Troy Dana and Pamela Dana filed a motion for reconsideration of that ruling, but that reconsideration was denied in March, 2011. Clerk's Papers 294.

After the Cushman firm file was produced, it became apparent to Sussman Shank that depositions of the Cushman attorneys would be required in this legal malpractice lawsuit and that the lawyers at the Cushman firm would be key witnesses in this lawsuit. Even Dana conceded the relevance of these depositions in his second motion for protective order to bar the attorney depositions:

Indeed, it would also seem to be clear that any deposition testimony that sheds further light on the documents would be just as relevant as the documents themselves.

Clerk's Papers 335. Sussman Shank also filed a motion to disqualify the Cushman law firm. Clerk's Papers 296-300.

The trial Court denied Dana's second motion for protective order to bar the depositions that Dana had conceded were "just as relevant" as the file materials, and disqualified the Cushman law firm from continuing to represent Dana in this litigation. Clerk's Papers 434, 435-440. The trial Court gave Dana five months to find substitute counsel to pursue this legal malpractice lawsuit.

While Dana lists multiple orders on this appeal, including orders denying motions for reconsideration, the only real issues on appeal concern the trial Court's granting of the motion to compel the production of the Cushman law firm file, the denial of Dana's motion for protective

order (attempting to prohibit the Cushman attorney depositions) and the granting of the motion to disqualify the Cushman law firm. Thus, in this response brief, Sussman Shank primarily address those rulings.

D. ARGUMENT

1. Troy Dana Only Timely Appellant

There is an initial procedural problem with Dana's appeal. There are two plaintiffs in this legal malpractice lawsuit, Troy Dana and Pamela Dana. The applicable orders at issue applied to both plaintiffs. Nonetheless, only Troy Dana filed a Notice for Discretionary Review on June 23, 2011. The discretionary rulings compelling production and disqualifying the Cushman firm would still apply as to Pamela Dana, regardless of the outcome of this appeal as to Troy Dana. After Sussman Shank's response brief on Dana's motion for discretionary review was filed on July 20, 2011, and Sussman Shank noted the failure of Pamela Dana to seek review, plaintiffs attempted to add Pamela Dana in an Amended Notice filed July 26, 2011. That belated amendment attempt was untimely under RAP 5.2(f), as it was not filed within 14 days of the original June 23, 2011 Notice, nor within 30 days of the entry of the decision(s) subject to review.

2. Summary of Dana's Claims of Legal Malpractice

As to the substance of the appeal, there was no abuse of discretion as to the motion to compel, the denial of Dana's second motion for protective order, or the motion to disqualify. Although Dana never

identified how Sussman Shank failed to "protect" him or put him at a "disadvantage" with CMN, Inc., the only possible claim Dana could have is that his position in the dispute with CMN, Inc. was somehow adversely affected by one or more terms in the documents prepared or reviewed by Sussman Shank at the time of the stock sale. Lawyers involved in putting together business transactions cannot guarantee that the parties will never have a dispute. The issue becomes, if there later is a dispute, was there something the attorneys negligently did that placed the (asserted) former client at a disadvantage, causing damage to the former client?

Dana's only possible argument is that he ultimately settled with CMN, Inc. for less than he would have, because of the alleged negligence of Sussman Shank in their work on the closing documents for the stock sale from Hodges to CMN, Inc. The Cushman attorneys cannot legitimately argue, as they attempt to do, "We did the best job we could but our hands were tied by the work of Sussman Shank in the stock sale transaction" without allowing Sussman Shank to discover what Dana's attorneys did and why they handled the *CMN, Inc.* litigation in the manner that they did. Sussman Shank was entitled to discovery as to how any term in the 2007 transaction allegedly put Dana at a "severe disadvantage" with CMN, Inc. and therefore resulted in a diminished recovery in the claims asserted by Dana against CMN, Inc.

Sussman Shank was also entitled to discovery as to what limitations, if any, in the recovery against CMN, Inc. were the result of

the work of the attorneys representing Dana in the *CMN, Inc.* litigation (the Cushman firm) and if that firm contributed to any diminished settlement value by their own conduct. Sussman Shank alleged an affirmative defense of fault of others. Clerk's Papers 16. If Sussman Shank were denied this discovery, its defense would be clearly be prejudiced.

3. Discretionary Rulings, No Abuse of Discretion

All the rulings at issue involve trial Court discretion. There is an abuse of discretion only when the discretion exercised is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Here, the trial Court's ruling on the motion to compel was neither exercised on untenable grounds nor for untenable reasons. Dana conceded this point in his motion for reconsideration. Dana argued in his motion for reconsideration:

There is substantial room for a difference of opinion because the only binding Washington authority does not directly address the issue, and persuasive authorities from other jurisdictions are not unanimous in their rulings.

Clerk's Papers 264. Even though Dana asserted there was "substantial room for a difference of opinion" on the ruling compelling production of the file materials, now Dana asserts that ruling was manifestly unreasonable and untenable. This is so even though the trial Court followed Dana's suggestion to conduct an *in camera* review of the Cushman materials before ruling on the motion.

Dana also admitted the Cushman attorney depositions were just as relevant in discovery as the file materials (Clerk's Papers 335), yet now argues on appeal that the trial Court abused her discretion in allowing the depositions. Lastly, Dana told the trial Court that if she allowed the depositions of the Cushman attorneys, the Cushman firm "would be required to seek new counsel" (Clerk's Papers 336), yet argues on appeal the trial Court abused her discretion in disqualifying the Cushman firm and requiring new counsel.

4. *Pappas v. Holloway* and Related Cases

Approximately 22 years ago, the Washington Supreme Court held that when an attorney is sued for malpractice, that attorney is entitled to discovery of the files of other attorneys representing the former client in the same legal matter, *Pappas v. Holloway*, 114 Wn 2d 198, 787 P.2d 30 (1990). In that case, Pappas represented the clients in litigation involving the sale by the clients of some allegedly infected cattle. Pappas then withdrew. Other attorneys worked on the same litigation after Pappas withdrew. The litigation continued on to trial with other attorneys. After the trial, the claim was settled. Pappas then sued the former clients for unpaid fees and, as often happens when a lawyer sues for fees, the former client counterclaimed for legal malpractice.

Pappas then sought the file materials of the other attorneys who had represented the former client. The former client refused the file production, asserting attorney-client privilege. Pappas filed a motion to

compel. The trial Court granted the motion to compel and the Washington Supreme Court affirmed. The Supreme Court held that the former client waived the attorney-client privilege with respect to other attorneys representing the client in the underlying litigation. As the Supreme Court noted, the file materials of the other attorneys were necessary for Pappas to defend the legal malpractice claims because the information involved examining decisions made by the attorneys and the former client at various stages in the underlying litigation. 114 Wn.2d at 209. The Supreme Court held that this information was particularly important in the defense of the legal malpractice claim because Pappas had not tried the underlying case (he had already withdrawn before the trial) and was not involved in the settlement of the underlying case. 114 Wn 2d at 209. The Supreme Court held that neither the attorney-client privilege nor the work product doctrine applied, and therefore the file materials were discoverable by Pappas.

Just as with *Pappas*, the defendant attorneys in this case did not represent plaintiff Troy Dana in the litigation with CMN, Inc. The defendant attorneys were not participants in the settlement of the litigation, just as in *Pappas*.

The *Pappas* Court relied on a three part test set out in *Hearn v. Rhay*, 68 FRD 574 (WD Wa., 1975). The attorney-client waiver test from *Hearn* involves these questions: (1) does the assertion of privilege result from some affirmative act, such as filing suit? Here it does, as Dana filed

this lawsuit. (2) Through the act of filing suit, has the party asserting the privilege put the otherwise protected information at issue by making it relevant? Here, Dana clearly made the information relevant, as the trial Court found and as discussed in more detail below. (3) Would application of the privilege deny the opposing party information vital to its defense? Here, as the trial Court found, and as discussed below in detail, the Cushman file materials and the testimony at deposition of the Cushman attorneys is vital to the defendant attorneys' defense. As to this third *Hearn* element, Dana again argues on appeal, as he did with the trial Court, that the information sought was available from other sources. However, noticeably absent from Dana's presentation to the trial Court or on this appeal is the identify of these "alternate sources" of the Cushman file materials or the Cushman attorney depositions.

Courts in other jurisdictions have reached similar results. For example, in *Rutgard v. Haynes*, 185 FRD 596 (US Dist. Ct., Cal. 1999), the defendant attorneys filed a motion to compel production of the law firm file of the attorney representing plaintiff in his underlying malicious prosecution suit. The defendant attorneys were sued for malpractice for advice given to the plaintiff, which allegedly resulted in the plaintiff being sued for malicious prosecution. The federal Court cited to the *Pappas v. Holloway* case and held at the law firm file of the attorneys representing the plaintiff in the malicious prosecution case was relevant to the attorney defendants affirmative defense and that the plaintiff waived any attorney-

client privilege by filing the legal malpractice lawsuit. As the Court stated in *Rutgard*, the plaintiff was trying to recover damages in the amount of the settlement he paid in the malicious prosecution suit. The defendant attorneys needed access to the law firm file to determine whether the amount paid to settle the malicious prosecution suit was reasonable or whether the amount paid resulted from some negligence by the attorneys representing plaintiff in that malicious prosecution suit.

In the present case, Dana settled the *CMN, Inc.* lawsuit. He necessarily claims that the amount he received in settlement was diminished because of some alleged negligent work by the defendant attorneys in preparing the stock sale documentation. Just like in *Rutgard*, the defendant attorneys are entitled find out what happened in the underlying litigation with CMN, Inc., to find out if the amount Dana recovered in settlement of that case was reasonable and, if the attorneys representing Dana in that case contributed to any diminished settlement value by their own conduct.

In *Ward v. Gradin*, 147 Ohio App.3d 325 (2001), the plaintiff filed a legal malpractice complaint asserting that the defendant attorneys committed malpractice in preparing a stock redemption agreement and that the defendant attorneys had a conflict of interest. The defendant attorneys sought the law firm file from a firm representing the plaintiff in that transaction. Plaintiff tried to avoid disclosure of the law firm file and asserted the attorney-client privilege, just like Dana, but the Ohio Court

disagreed, finding that the plaintiff waived any attorney-client privilege by suing the defendant attorneys for malpractice. The Court ordered production of the law firm's file to give the defendant law firm an opportunity to find out what advice plaintiff had been given.

In *Bieter Co. v. Beatta Blomquist*, 156 FRD 173 (U.S. Dist. Ct., Minn. 1994), the defendant attorneys in a legal malpractice lawsuit sought the attorney file of another firm that represented plaintiff in a related matter. The plaintiff argued that there was no attorney-client waiver for the other attorneys representing plaintiff. The defendant attorneys argued that there had been a waiver of the attorney-client privilege with respect to any attorneys who had participated in providing legal services, which, in part, involved the legal malpractice claim. The federal Court, citing to *Pappas*, agreed with the defendant attorneys and held that the plaintiff had waived the attorney-client privilege with respect to other attorneys representing the plaintiff in the related matter. The federal Court held that the file was needed by the defendant attorneys to defend the legal malpractice claim.

Dana cites to *Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc.*, 189 Ill.2d 579, 727 N.E.2d 240 (2000) in his brief. There, the Illinois appellate Court apparently reviewed some limited attorney file materials and determined that the material sought was not relevant or vital to the attorney malpractice defense, distinguishing *Pappas v. Holloway*. 189 Ill.2d at 589. That appellate Court also determined that the particular

claim of legal malpractice at issue did not justify finding a waiver of the attorney-client privilege. Of course, every case like this involves the unique claims at issue and the unique documents subject to discovery. As discussed in detail below, unlike in *Fischel & Kahn*, here the Cushman file materials, and discussions between Dana and the Cushman attorneys, are directly at issue, as the trial Court found after she reviewed these materials *in camera*, at Dana's suggestion.

This same relevance issue was discussed in the unpublished federal Court decision also cited by Dana, *1st Security Bank of Wash. v. Eriksen*, (W.D. Wash. 2007). Depending on the claims at issue and the documents to be produced, judges, like the judge in *Eriksen*, may reach different conclusions. That does not, however, in any way show this trial Court abused her discretion in compelling production of these file materials at issue.

The documents comprising the file materials that were reviewed *in camera* are part of the record on this appeal. Confidential Clerk's Papers 445-1735. Dana requested that the trial Court conduct this *in camera* review to determine, among other things, the relevancy of the material. Clerk's Papers 188. The trial Court then found the file materials were relevant. Noticeably absent from Dana's brief is any discussion about any of the 1,300 pages of material produced pursuant to the motion to compel or how the documents support any of Dana's arguments on appeal.

In this response brief, Sussman Shank will discuss, in detail, what

is contained in the material produced by the Cushman firm pursuant to the motion to compel and why the trial Court properly ruled it discoverable. The following summary of that material (contained in Confidential Clerk's Papers 445-1735) is from an exhibit submitted by Dana in his second motion for protective order to prohibit the Cushman attorneys' deposition, Clerk's Papers 310-319, and was part of the Declaration of Sussman Shank's counsel, Clerk's Papers 307-308, Dana never disputed any of the facts below summarized concerning what these file materials show. Clerk's Papers 357. The following not only supports the trial Court's ruling on the motion to compel, but also supports the trial Court's ruling denying Dana's second motion for protective order, seeking to bar depositions of the Cushman firm attorneys involved in the *CMN, Inc.* litigation, and her ruling disqualifying the Cushman law firm.

**5. Summary of Cushman Firm File Reviewed *In Camera*
by Trial Court**

The materials produced pursuant to Sussman Shank's motion to compel included an e-mail of May 29, 2009 from Jon Cushman outlining the complaint the Cushman firm was going to file against *CMN, Inc.*, the projected cost of that *CMN, Inc.* lawsuit, the potential for recovery, complications involved in the pursuit of the claim, and the cost of arbitration. In handwritten notes of the meeting in May, 2007 with the Cushman attorneys, there was a discussion concerning filing this *CMN, Inc.* complaint "as a negotiating tactic". Sussman Shank is entitled to

discovery from these attorneys concerning the *CMN, Inc.* lawsuit, the discussions as to the potential for recovery, the perceived complications, and whether filing the complaint against CMN, Inc. was really only “a negotiating tactic”.

The e-mails from the materials produced by the Cushman firm pursuant to the motion to compel indicate there were discussions about an Independent Contractor Agreement that Dana signed in 2008, after the 2007 closing. Sussman Shank’s work ended in 2007 and it did not provide any legal advice to Dana in 2008 concerning that 2008 Independent Contractor Agreement. Dana cannot legitimately assert the Employment Agreement contained an onerous noncompete provision that somehow harmed him or put him at a disadvantage with CMN, Inc., but ignore the fact that he later dated an Independent Contractor Agreement, which had a much more onerous noncompete provision. Discussions about the reason for the signing this 2008 noncompete agreement, circumstances surrounding that Agreement, and the effect on Dana’s claims against CMN, are directly relevant to this case.

In a November 24, 2009 e-mail, included in the materials produced, Clydia Cuykendall (a former Cushman firm attorney) discussed with Dana this noncompete provision in the Independent Contractor Agreement. She states that the Cushman firm did not even consider the Independent Contractor Agreement when drafting a settlement letter to CMN, Inc. of November 10, 2009, so likewise, it would appear the

Cushman firm did not consider the Independent Contractor Agreement when it filed the 2009 Thurston County complaint against CMN, Inc. Ms. Cuykendall discusses with Dana the ambiguity with respect to the noncompete created by the fact that Dana signed this separate Independent Contractor Agreement in 2008 after signing the 2007 Employment Agreement. There is also a series of e-mails in November, 2009 between Clydia Cuykendall and Dana, as well as Jon Cushman, concerning why Dana signed the Independent Contractor Agreement on March 28, 2008, and its effect. Dana cannot claim legal malpractice relating to the terms of the 2007 Employment Agreement and try to bar discovery as to the terms of the superseding 2008 Independent Contractor Agreement.

In answer to discovery, Dana asserted he entered into an "onerous Employment Agreement with Hodges" due to some undisclosed legal malpractice by Sussman Shank. Neither Dana nor the Cushman firm ever identified in what way the Employment Agreement was "onerous", or how Sussman Shank would possibly be liable to Dana simply because Dana, or his attorneys, later opined that one of the terms of the Employment Agreement was unfavorable. It is possible Dana asserts the Employment Agreement contained an unfavorable noncompete provision. It is clear from the Cushman firm's file materials, that the Employment Agreement was discussed in detail on many occasions between the Cushman firm and Dana, as well as attorney Scott Johnson (who also represented Dana). To the extent there was some provision that was "onerous" and thus put Dana

at a disadvantage with CMN, Inc. that is directly relevant to this legal malpractice lawsuit. Dana cannot legitimately assert that he was put at a disadvantage in the CMN, Inc. litigation because of some "onerous" provision in the Employment Agreement, and try to bar discovery about this asserted claim. This issue about how Dana allegedly was put at a disadvantage with CMN, Inc. goes directly to the Cushman attorneys' opinions and advice and cannot be addressed by simply taking the deposition of a non-lawyer, Dana.

In addition, in his e-mail of January 22, 2010, Scott Johnson (one of Dana's attorneys) told CMN, Inc.'s attorney, Scott Kee, that "it will not take much under the circumstances to invalidate these noncompete provisions". The e-mail states that CMN, Inc./Colliers was not enforcing these noncompete provisions against anyone. This e-mail, and Scott Johnson's testimony about these issues, is highly relevant to this legal malpractice claim and the damages sought by Dana. If CMN, Inc. could not enforce the non-compete provision in the Employment Agreement, that is relevant to Dana's claims of legal malpractice in Sussman Shank's asserted negligent review of that Employment Agreement in the 2007 transaction. If Dana had such a strong case against CMN, Inc./Colliers, as Scott Johnson stated, and if CMN, Inc./Colliers damaged Dana, then it naturally follows that Dana should have further pursued his claims with CMN, Inc. instead of settling as he did and then trying to obtain millions in this legal malpractice lawsuit, claiming some "disadvantage" or

“shortfall” caused by Sussman Shank.

In a September 24, 2009 e-mail (contained in the Cushman file materials), Clydia Cuykendall notes that the Cushman firm did not even have a complete copy of the shareholder agreement, months after filing the *CMN, Inc.* lawsuit. According to this email, the Cushman firm's copy of the shareholder agreement ended at page 11. Thus, even after the Cushman firm filed the 2009 lawsuit against CMN, Inc., the lawyers in the Cushman firm apparently did not even know of the terms of the shareholder agreement. This is relevant to whether any of those terms the shareholder agreement adversely affected Dana in his dispute with CMN, as now claimed by Dana, and is relevant to the affirmative defense of fault of others (6th affirmative defense in Sussman Shank's answer). Clerk's Papers 16.

In answer to interrogatory 8 of the first set of discovery requests, Dana state he was damaged by some undisclosed malpractice relating to a “one way call option” in that very same 2007 shareholder agreement. Clerk's Papers 52-57. Article 11 of that shareholder agreement sets out both Put and Call Rights. There was no “one way call option”, but to the extent the Cushman firm provided advice (erroneously) to Troy Dana while representing him in 2009 in the dispute with CMN, Inc. as to such option rights, such evidence is highly relevant. If the Cushman firm failed to even obtain a complete copy of the 2007 shareholder agreement, perhaps that failure resulted in a diminished recovery against CMN, Inc.,

not some legal work of Sussman Shank two years earlier in 2007, at the time of the stock sale transaction.

Dana has alleged as one of the claims in this legal malpractice lawsuit that Sussman Shank failed to disclose conflicts of interest to Dana. Clerk's Papers 10. In answer to Sussman Shank's first set of discovery requests, Dana stated he was given an "inadequate disclaimer" of the conflict of interest. This relates to the allegation (denied by Sussman Shank) that Sussman Shank law firm represented Dana individually as well as represented the company, Hodges, Gilliam & Dana (Hodges), during the 2007 transaction. In Dana's discovery responses, he indicated the Cushman firm represented both Hodges and Dana on numerous occasions over a period of more than 10 years. According to the discovery responses, the Cushman firm represented Hodges in at least three matters – the Stacie Galdavy matter, the TJ Guyer matter, and the Valko independent contractor termination matter. Clerk's Papers 365. The Cushman firm also represented Dana personally on at least nine matters, starting in 1999. Clerk's Papers 365.

To the extent Dana now claims that he did not understand the nature of the conflict disclosed by Sussman Shank in writing, and acknowledged by Dana, the Cushman firm's advice over the years as to such conflicts is relevant to this issue. Whether the written disclaimers provided by Sussman Shank were adequate or inadequate in large part depends upon the knowledge of the recipient of the disclaimers. Evidence

as to the recipient's background and history with the conflict issue, gained through other legal representation, is thus highly relevant. Sussman Shank is entitled to question the Cushman firm attorneys concerning conflict of interest discussions that took place with Dana before the 2007 stock sale transaction.

Further, the file materials produced from the Cushman law firm included an e-mail dated September 23, 2009 where Dana referred to Sussman Shank law firm as the firm "who represented Hodges in the stock sale". That, of course, is what Sussman Shank maintains in this lawsuit. Discussions between Dana and the Cushman firm concerning whether Dana understood Sussman Shank firm was representing Hodges, as Dana indicated in his e-mail, are highly relevant to Dana's conflict of interest claim.

The file materials produced pursuant to the motion to compel also included an e-mail from Cushman firm attorney Clydia Cuykendall, dated February 9, 2009, concerning the discussion she had with Dana about modification of the shareholder agreement and negotiating a return of Hodges to Dana. This topic of discovery is highly relevant. The opportunity Dana and the Cushman attorneys had in early 2009 to restructure the 2007 stock sale transaction is obviously relevant to any damages allegedly incurred because of the wording of the 2007 transaction documents.

In this present legal malpractice lawsuit, Dana has asserted that his

damages against Sussman Shank include “damage to his career” of over \$1,000,000 and “emotional distress” damages of \$500,000. Clerk’s Papers 55. Yet, the file materials produced from the Cushman file indicate discussions between Dana and his Cushman lawyers in 2009 and 2010 that the conduct of CMN, Inc./Colliers “ruined him and defamed him” and he suffered emotional distress damages based on the conduct of CMN, Inc./Colliers. In an e-mail of January 22, 2010, attorney Scott Johnson states that Colliers destroyed and damaged Dana's reputation, which would result in "significant damages against Colliers". Sussman Shank is entitled to conduct discovery by taking the depositions of the involved attorneys on this \$1.5 million damage component.

In answer to Sussman Shank’s first set of discovery, interrogatory 15, Dana asserted as damages against Sussman Shank \$1.6 million in lost commissions relating to a company called Plum Creek. Clerk’s Papers 54. In answer to interrogatory 6 of the Sussman Shank’s second set of discovery, Dana stated the Cushman firm represented Dana with respect to the “lost commissions on Plum Creek”. Clerk’s Papers 54. Clearly, the Cushman firm’s work on this specific Plum Creek lost commissions matter, as well as the Cushman firm’s work in representing Dana in the litigation with CMN, Inc. are directly relevant to the \$1.6 million lost commissions claim asserted against Sussman Shank in this legal malpractice lawsuit. What lost commissions on Plum Creek did the Cushman firm pursue? What was the legal basis for that lost commission

claim and who was allegedly responsible? How did the work of the Sussman Shank attorneys adversely affect Dana's ability to collect this lost commission from CMN, Inc.?

The Cushman file materials produced pursuant to Sussman Shank's motion to compel also included an e-mail dated January 15, 2010 from Dana to Scott Johnson. In that e-mail, Dana discussed in detail this Plum Creek account and what would happen to the Plum Creek account if he were to settle with CMN, Inc. In another e-mail dated January 16, 2010, there is a discussion about settling with CMN, Inc. by providing a 20% referral fee to CMN, Inc. on Plum Creek closings under contract. Dana also discussed the fact that Plum Creek was interviewing firms for their account in January 2010, and he wanted to insure the CMN, Inc. settlement occurred quickly to take advantage of pursuing Plum Creek as a client. Jon Cushman of the Cushman firm was involved in these discussions about Plum Creek, as shown in a series of e-mails on January 18, 2010. Obviously, discussions about the Plum Creek account, and the resolution of the commission claim relating to Plum Creek, are highly relevant to the \$1.6 million damages claim asserted against Sussman Shank in the legal malpractice lawsuit, and those discussions are clearly discoverable.

The Cushman file materials produced, pursuant to Sussman Shank's motion to compel, show Dana told Scott Johnson that he settled with Colliers based upon expectation that he "would take up where he left

off with Plum Creek”. Did Dana really lose \$1.6 million in Plum Creek commissions due to some legal work by Sussman Shank firm in 2007? How did Dana lose this \$1.6 million – was it poor timing in the CMN, Inc. settlement, or some other cause? Dana cannot make a claim of million of dollars and then try to bar discovery directly relevant to that claim.

Further, the Cushman file materials produced pursuant to Sussman Shank’s motion to compel included a discussion between Scott Johnson and Dana in November, 2009 concerning this very same Plum Creek account and CB Bain. This discussion concerned the potential for Dana to sue a third party, CB Bain, over lost Plum Creek commissions. Obviously, since Dana seeks \$1.6 million in damages relating to lost commissions from Plum Creek in the present legal malpractice lawsuit against the Sussman Shank attorneys, this discussion between Dana and Scott Johnson with respect to Dana’s expectations about Plum Creek from the 2010 CMN, Inc. settlement, and the issues under consideration in Dana’s suit against CB Bain over the lost Plum Creek commission, are clearly relevant and discoverable. If he expected in 2010 to “take up where he left off” as to Plum Creek, how was he damaged by the legal work of Sussman Shank in 2007? What would be asserted against CB Bain in the contemplated lawsuit? This is clearly relevant and discoverable.

A November 5, 2009 e-mail (from the Cushman file materials produced pursuant to Sussman Shank’s motion to compel) concerns other

asserted unpaid commissions that were allegedly due from CMN, Inc. In his interrogatory answer in this legal malpractice lawsuit, Dana asserted lost commissions from other clients of \$50,000 due to the alleged legal malpractice of Sussman Shank. The discussions between Dana and Scott Johnson, as well as discussions on that subject with the Cushman firm leading up to 2010 settlement as to this \$50,000 lost commissions claim, are highly relevant and discoverable. It is clear from the file materials of the Cushman firm, as well as Scott Johnson's law firm, that lost commissions were discussed on numerous occasions and became the basis for numerous communications between the Cushman firm and the CMN, Inc. lawyers. There is no indication that any of the 2007 transaction documents hampered Dana's ability to recover any lost commissions, but that will be confirmed in the attorney depositions.

In the present legal malpractice lawsuit, the Cushman firm asserted on page 4 of its response to the Sussman Shank's motion to compel that, after the lawsuit against CMN, Inc. was ordered into arbitration, no arbitration occurred "as Dana could not afford it". Clerk's Papers 175. Dana is apparently maintaining that somehow he could not fully litigate his dispute with CMN, Inc. because he was required to participate in AAA arbitration, the cost of that AAA arbitration was prohibitive, and this somehow is the fault of Sussman Shank. The file materials produced pursuant to Sussman Shank's motion to compel clearly show that there were alternatives to AAA arbitration being discussed with the Cushman

firm and the attorney for CMN, Inc. The file materials produced included e-mails between Jon Cushman and Scott Kee, a member of the law firm representing CMN, Inc. in that litigation. Those e-mails from September, 2009 discuss the potential for selection of a local arbitrator. There is no indication that CMN, Inc. was demanding only AAA arbitration. Further, the Cushman firm's materials indicate that the actual cost of initiating the AAA arbitration was, in fact, not nearly as significant as Jon Cushman had projected in his May, 2009 advice to Dana. The amount was no doubt far less than the Cushman firm spent in pursuing the ill-advised Thurston County lawsuit against CMN, Inc. apparently filed as a "negotiating tactic" (discussed above), despite the clear arbitration provision applicable.

In answer to interrogatory 14 of the second set of discovery requests, when asked if Dana invoked his rights under Article 12.3(d) of the shareholder agreement for a valuation of his 20% stock interest in Hodges, the Cushman firm answered that Dana had "no options given the documents drafted and reviewed by Sussman Shank, and its attorneys". Clerk's Papers 366. The opportunity to invoke the stock share valuation rights was clearly a topic of discussion between the Cushman firm, as well as Scott Johnson and Dana. There is no indication in the materials provided pursuant to the motion to compel how any provision in the shareholder agreement interfered with Dana's ability to invoke his right under Article 12.3 of that agreement, but this will be covered in the

attorney depositions.

Sussman Shank is entitled to this discovery to find out in what way the 2007 shareholder agreement allegedly hampered Dana's ability to invoke his stock valuation rights. Dana cannot make this assertion about having "no options" due to some undisclosed negligence of Sussman Shank, and then try to bar discovery directly relevant to that assertion. It is clearly insufficient to simply question Dana, a non-lawyer, about his opinions as to why there was "no option" to exercise this share valuation right under Article 12.3(d) of the shareholder agreement.

Dana answered interrogatory 15 of the first set of discovery stating that he incurred "lost equity" damages of \$1.3 million due to the undisclosed negligence of Sussman Shank in reviewing the 2007 transaction documents. Clerk's Papers 361. Dana had a 20% equity interest in Hodges after the 2007 stock sale, and that equity interest was clearly discussed by members of the Cushman firm and Scott Johnson on numerous occasions with Dana. The documentation produced pursuant to the Sussman Shank's motion to compel indicated numerous conversations with the attorneys that Dana lost equity after the 2007 stock sale due to various misrepresentations and misconduct of individuals at CMN, Inc. From this material, it appears Dana apparently never told his lawyers the lost equity was due to any "unfavorable" provision in the Employment Agreement or shareholder agreement. Specifically, the documents in the Cushman file included correspondence from Dana stating that the reason

he lost equity was due to CMN, Inc./Colliers' failure to purchase a company called Prime Locations, and Colliers' allowing a Mr. Gorman to interfere with the operation of the Hodges Olympia office. The file materials produced show Dana also told his lawyers he lost equity because of CMN, Inc./Colliers' changing the name of the company prematurely and failing to financially back the Hodges Olympia office operation.

Dana told the Cushman firm that, because of this interference and misconduct by CMN, Inc./Colliers, he lost equity that would have been worth \$2,250,000 to \$2,700,000. Obviously, discussions about how and why Dana lost equity, and the causes for the loss of equity, are all subject to discovery. Discussions between Dana and the Cushman firm, as well as Scott Johnson, on this topic are clearly relevant. Dana cannot assert a lost equity claim against Sussman Shank of \$1.3 million and then try to bar discovery directly relevant to that claim.

The Cushman file materials include notes from Clydia Cuykendall referring to a meeting in December 29, 2008 where there was a discussion about the fact that Hodges, under majority control by CMN, Inc., did not acquire a company called Prime Locations, and misrepresented how long Dana would be able to operate the Olympia office independent of CMN, Inc./Colliers' management. The notes included statements by Dana to the Cushman attorneys concerning the involvement of Sussman Shank law firm in the 2007 transaction. Obviously, statements by Dana to his lawyers about Sussman Shank work in 2007, and the causes of equity

losses of the business post closing, are highly relevant to the negligence and damage lawsuit filed by Dana in this legal malpractice lawsuit.

The materials produced pursuant to the motion to compel show Dana also claimed, in discussions with the Cushman firm, that had Prime Locations been purchased by CMN, Inc., Dana would have "real equity in a growing enterprise, not stock in a shell company". Obviously, to the extent Dana claimed his equity losses resulted from mismanagement or other misdeeds by CMN, Inc./Colliers' employees relating to the failure of Colliers to purchase Prime Locations in 2008, the losses were not the result of any legal work by Sussman Shank in 2007. Discussions between Dana and his attorneys are highly relevant to this issue of damages.

The Cushman file materials produced pursuant to the Sussman Shank's motion to compel indicate in February, 2009, there were discussions between Dana and the Cushman firm concerning a lawsuit that Dana was contemplating filing against Mr. Gorman for \$1.9 million, apparently for this very same diminished equity in Hodges. Obviously, discussions with the attorneys about the Gorman lawsuit, the merits of that lawsuit, the \$1,900,000 damages allegedly caused by Gorman, go to whether any of the terms of the 2007 closing documents affected the millions of dollars in damages Dana is now claiming in this legal malpractice lawsuit against Sussman Shank. Did the losses asserted in this legal malpractice claim involve the same losses in this contemplated \$1.9 million lawsuit against Mr. Gorman?

**6. Trial Court Reviewed Above and Ordered Documents
Produced, Depositions Allowed and
Disqualified Cushman Law Firm**

It is clear from the above that the trial Court's *in camera* review of these 1,300 pages of file materials supported her discretionary decision to compel the Cushman firm's production of the file materials. This was not some arbitrary, unreasoned decision with no support, to be reversed by this Court as an abuse of discretion. Dana spends no time in his opening brief even discussing these file materials contained in Confidential Clerk's Papers 445-1735, and for good reason. The materials show the Order granting the motion to compel and denial of Dana's second motion for protective order (to try to bar the Cushman attorney depositions) were proper.

This assignment of error as to the Order on the motion to compel is also, in large part, moot, as Dana himself recognized in one of his many briefs:

Immediate review is vital because once the documents are disclosed, pursuant to the Order, the proverbial cat is out of the bag and appeal of this issue becomes moot. Once the communications have been disclosed, no ruling by an appellate Court after final disposition of the case in this Court can bring the information back.

Clerk's Papers 265.

Dana argued to the trial Court, and continues to argue on appeal, that the defendants' motion to compel should have been denied because the defendant attorneys did not show that the information requested (the

file material) was unavailable "from alternative sources". How could the defendant attorneys obtain discovery of the file materials of the attorneys representing Dana in the litigation with CMN, Inc. other than by requesting a copy of the file materials in this litigation through a request for production and subsequent motion to compel? How would the defendant attorneys find out about the advice given, and strategy of, the Cushman attorneys in the *CMN, Inc.* litigation other than through these attorney files and depositions? Further, this argument as to "alternate sources" applies only to the work-product doctrine, not the attorney-client privilege. CR 26(b)(4).

Dana argues throughout his appellate brief that the trial Court ordered the Cushman file materials produced because they were "simply relevant to damages". That is not what the trial Court ruled. After reviewing the Cushman file *in camera*, the trial Court ruled the materials were relevant to damages and liability. When Dana made this same relevance-to-damages-only assertion at the trial Court level, Judge Pomeroy quickly responded:

It's very clear to me what I said. I said they are all relevant, and if they don't go to liability they will at least go to damages. I did not say, which has been I think intimated in these pleadings, that it only goes to damages. That's not what I said. It clearly would go to damages, but it also could go to liability.

RP Hearing of March 11, 2011, at page 14, CP 294.

Likewise, the trial Court did not abuse her discretion in granting

Sussman Shank's motion to disqualify the Cushman firm attorneys. Dana's attorneys conceded in his second motion for protective order that, if the trial Court denied the motion to bar the Cushman attorney depositions (which the trial Court did), the Cushman law firm would need to withdraw. Clerk's Papers 336. The Cushman firm told the trial Court **"plaintiff would be required to seek new counsel and get them up to speed on the case"**. Clerk's Papers, 336 [bold added].

The Cushman firm argues the opposite on appeal. Now, the Cushman firm argues that the Cushman attorney depositions could go forward, without the law firm's withdrawal, with some other lawyer in the law firm working on the case. Dana's attorneys had it right the first time when they told the trial Court that disqualification would follow the denial of their second motion for protective order.

The reasons for the decision disqualifying the Cushman law firm are set out in detail in the trial Court's 6-page findings of fact and conclusions of law. Clerk's Papers 435-440. The trial Court spent months (1) reviewing the 1,300 page Cushman firm's file, (2) reviewing lengthy briefing on multiple motions, and ultimately issued an Order with extensive findings and conclusions. This case certainly does not involve a trial judge acting in a manifestly unreasonable or untenable, arbitrary manner. Judge Pomeroy orally ruled as follows as to the depositions of the Cushman attorneys and the motion to disqualify:

I'm ready to rule. The objection to depositions is because the attorneys who are now representing a client will

become witnesses. **I find that there is a clear conflict of interest. There is no question in my mind.** And I am requiring the Cushman firm to withdraw. This potential conflict of interest was known months ago when we began this. I find that the rationale behind this pleading by the plaintiff was intent to harass by the defense counsel in order to disqualify. No, I don't see that. I think there is a real issue here.

What I will do is I will find that all attorneys, not just Ben Cushman, not just John Cushman, not just Ms. [Cuykendall], all attorneys, that the Cushman law firm has a conflict of interest. Second of all, I will give the Cushman law firm time to withdraw as counsel and Mr. Dana to seek other counsel. And realistically, it's got to be five months at the minimum. It's got to be five months. I don't even know where we are in terms of case schedule. All discovery will be stayed for five months giving Mr. Dana time to seek other counsel. That is a realistic amount of time for another attorney to get on board and get up to here.

RP Hearing of April 11, 2011, at pages 14-15 [bold added], CP 433. The trial Court did not abuse her discretion in finding, after her *in camera* review of the Cushman law firm's file, that the Cushman attorneys may have to provide testimony adverse to Dana and in finding that the Cushman attorney testimony is directly relevant to the affirmative defense of fault of others. Clerk's Papers, 435-440. These findings and conclusions support the trial Court's conclusion that the depositions should be allowed, and that there were impermissible conflicts of interest supporting the discretionary disqualification decision.

It is a fundamental principle that a lawyer cannot act as both an advocate at trial as well as a witness. This is also set out in RPC 3.7. The comments to RPC 3.7 provide:

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

The comments to RPC 3.7 also provide the following in considering a motion to disqualify: "It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness." RPC 3.7, Comment [4]. These Cushman attorneys knew about this disqualification issue for months, as the trial Court found. Clerk's Papers 439.

Dana cites no case where attorneys from one law firm were allowed to act as both key witnesses as well as advocates for one of the parties in a legal malpractice case like this one, particularly where the law firm is handling the matter on a contingency fee basis (as the Cushman firm is) and the attorneys testifying at trial have a direct financial stake in the outcome. This is certainly not a situation where an attorney from one party's law firm is called as a witness at trial to simply verify the authenticity of a document. As the trial Court found in her May 27, 2011 Order, these Cushman attorneys' testimony is central to the legal malpractice claims presented in the multimillion dollar legal malpractice lawsuit.

If the attorneys from the Cushman firm were allowed to provide the “central testimony” in this legal malpractice lawsuit, while the same Cushman firm continued to represent Dana at trial, as Dana now argues on appeal, it is difficult to imagine how there would ever be a situation in which any law firm would ever be disqualified – the lawyer can always simply say that another lawyer in the firm will try the case. Such lawyers could always just hire a new lawyer, and say the new lawyer will be trying the case, so everything is fine. Having another attorney in the same law firm try the case is not the magic solution, and at a minimum, a trial Court exercising discretion is not required to agree to such an arrangement. The other lawyers in the firm have the same conflicts under RPC 1.10. The trial Court, after reviewing the Cushman file materials, determined that the firm was disqualified, not just one or two lawyers in the firm.

Dana argues on appeal that the trial Court erroneously made certain findings of fact in the Order granting the defendant attorneys’ motion to disqualify the Cushman law firm. Dana argues that the finding by the trial Court that the Cushman law firm attorneys’ testimony would be central to legal malpractice claims presented was erroneous. This is so, even though the trial Court reviewed some 1,300 pages of material from the Cushman law firm file before making this finding. Dana does not offer any analysis of the 1,300 pages of material to dispute this relevance finding of fact by the trial judge. There is simply no basis to claim the finding was “erroneous”, nor should it lead to a reversal of the trial Court’s

discretionary decision to disqualify the Cushman firm. The same applies to Dana's argument about the finding the Cushman lawyers would be witnesses and advocates defending their own handling of the *CMN, Inc.* litigation. As described in detail above, the trial Court acted within her discretion in making this finding, based upon a review of the 1,300 pages of law firm file material. Dana simply pronounces that these findings "are based on a fundamental misunderstanding of the issues". Dana's Opening Brief at page 26. There is no such misunderstanding by the trial Court, and no abuse of discretion in ordering the disqualification.

The trial Court also found in its Order disqualifying the Cushman firm that it was likely Dana's testimony may differ in the areas set out in the defendant attorneys' response to plaintiff's second motion for protective Order. The trial Court found that the attorneys may well have to present testimony that is disadvantageous to Dana. Clerk's Papers 438. In other words, the Cushman attorneys testimony would be prejudicial to Dana. On appeal, the Cushman attorneys simply state that they submitted a declaration saying that they did not think their testimony would be prejudicial or disadvantageous to Dana. They suggest on appeal that the trial Court was somehow bound to agree. However, the depositions of the Cushman attorneys have not yet been taken and the trial Court had the benefit of reviewing the 1,300 pages of file materials from the Cushman firm, and was not required to accept the assertions by one or two Cushman law firm attorneys. Certainly, the findings of fact and decision

disqualifying the Cushman law firm was not an abuse of discretion, simply because the trial Court disagreed with assertions made by one or two Cushman law firm attorneys.

Dana also argues on appeal the disqualification was an abuse of discretion because it will cause undue hardship. The Cushman law firm was representing plaintiff on a contingency fee basis. Clerk's Papers 438. Thus, plaintiff had not paid any attorney fees to the Cushman firm at the time of the disqualification Order. As the trial Court found, Dana and the Cushman attorneys asserted that Dana might not be able to find another attorney to represent him on a contingency fee basis, but Dana presented no evidence that he even tried to find alternate counsel, as the trial Court found. Clerk's Papers 438. The trial Court also specifically found that, because Dana presented a claim of \$5.5 million, it was difficult to accept the assertion that no other competent attorney would be willing or interested in representing Dana on a contingency fee basis. Thus, since no fees had been paid to date, and there was no evidence plaintiff would be unable to retain alternate counsel, and Dana was given 5 months to find new counsel, the trial Court properly found that the disqualification would result in, at most, minor prejudice to Dana. Clerk's Papers 438.

As the trial Court noted in the order granting the disqualification, Sussman Shank alleged fault of others as an affirmative defense. These Cushman attorneys are both witnesses and advocates for their own firm's handling (or mishandling) of the *CMN, Inc.* litigation. The testimony of

about the Cushman attorneys' handling of the *CMN, Inc.* litigation has a direct impact on any amount Dana may recover. Any fault allocated to the Cushman firm reduces Dana's recovery, if any, against Sussman Shank. Absent disqualification, the Cushman attorneys will act as both advocates and defenders of their own conduct.

The trial Court also properly concluded that it was inappropriate to allow the Cushman law firm attorneys to present the evidence to the jury, with their financial interest directly at stake, by way of the contingency fee arrangement. Clerk's Papers 439. The trial Court concluded that, based on the claims presented and the review of the materials, a different law firm should have been retained by plaintiff's from the start. Clerk's Papers 439. As the trial Court concluded, if that had happened, this predicament created by the Cushman law firm would not have arisen. Clerk's Papers 439.

Dana cites to another unpublished federal Court decision, *Microsoft Corp. v. Immersion Corp.* (WD Wa., 2008) in his brief on this disqualification. In that case, Microsoft sought to disqualify a particular law firm. The trial Court determined that Microsoft had not shown enough to warrant disqualification. The trial Court also found that Microsoft did not show disqualification of the entire law firm was required. The trial Court noted that, if it was shown later that the particular attorneys were necessary witnesses, Microsoft was free to move again to disqualify those attorneys at that time.

As discussed above with respect to the trial Court's ruling on the motion to compel, all these type of cases involve specific claims and specific discovery. Here, the trial Court reviewed the 1,300 pages of the Cushman law and materials and made her decision as to the relevance and as to disqualification of the Cushman law firm. Another judge, in another case, involving different claims and different law firm files might or might not disqualify certain lawyers or law firms.

In his brief, Dana quibbles about the wording of the 6 page Findings and Conclusions, arguing that there was an abuse of discretion requiring reversal here because the trial Court did not mention the name of every Cushman law firm attorney in the Order. That was not required, nor does that asserted failure support a conclusion that the trial Court abused her discretion.

The Cushman attorneys also attempt to convince this Court that there was an abuse of discretion by suggesting the disqualification ruling was made after a "two-page motion for disqualification" was submitted. This is a gross distortion of the record before the trial Court at the time of her May, 2011 decision. By that time, the trial Court had conducted the *in camera* review of the entire Cushman 1,300 page law firm's file, and reviewed and considered multiple legal briefs over a period of several months. The need for the Cushman attorney testimony had been set out in detail in Sussman Shank's Response to Dana's Second Motion for Protective Order. There was no "bald assertion" of necessity, as urged by the Cushman attorneys, or any "lack of a factual basis" for

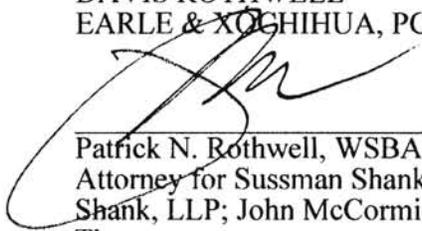
disqualification, also as urged by the Cushman attorneys. The extensive summary above concerning what is contained in the 1,300 pages of file materials shows the complete lack of merit in this argument by Dana.

E. CONCLUSION

The trial Court conducted an *in camera* review of the Cushman law firm file from the *CMN, Inc.* litigation at Dana's suggestion. Following that review, the trial Court properly granted the defendant attorneys' motion to compel the file material. As Dana told the trial Court, the depositions of the Cushman attorneys are just as relevant as the file materials, so Dana cannot show the trial Court abused her discretion in denying Dana's second motion for protective order (which sought to prohibit all such depositions). Finally, once it was clear the Cushman attorneys, handling this matter on a contingency basis, were key and central witnesses, the trial Court did not abuse her discretion in issuing the six page Findings and Conclusions and ordering the disqualification of the Cushman firm. Certainly the trial Court did not abuse her discretion in such ruling when the Cushman firm had admitted its withdrawal would be required.

RESPECTFULLY SUBMITTED this 28th day of February, 2012.

DAVIS ROTHWELL
EARLE & XOCHIHUA, PC



Patrick N. Rothwell, WSBA No. 23878
Attorney for Sussman Shank Sussman
Shank, LLP; John McCormick and Dallas
Thomsen

DECLARATION OF SERVICE

I, Laura Bilderback, hereby declare under penalty of perjury under the laws of the State of Washington that on this date I sent a copy of SUSSMAN SHANK'S RESPONSE TO PETITIONER'S OPENING BRIEF to all counsel of record as follows:

<i>Via ABC Legal Messenger</i>	<i>Via U.S. Mail</i>
Jon E. Cushman Kevin Hochhalter Cushman Law Offices, P.S. 924 Capitol Way S Olympia, WA 98501	Frank H. Lagesen Cosgrave Vergeer Kester LLP 888 SW Broadway, 5th Floor Portland, OR 91205
Counsel for Dana	Counsel for Rick Piper & Piper Group International

DATED at Seattle, Washington, on this 28th day of February,
2012.



Laura Bilderback

Troy Dana Appellant v. Sussman Shank
et al Respondents, and Rick Piper and
Piper International Group Other
Respondents No. 42290-5-II

Wed 2/29/2012 11:50 AM

I represent Rick Piper and Piper Group International who are shown as Other Respondents on the Sussman Shank Respondents' Brief. In the Trial Court we simply joined in the motions and briefing filed on behalf of Sussman Shank. We do not intend to file anything separate in the Court of Appeals either as again we are joining in Sussman Shanks' position and adopt their Brief. Please let me know if you need anything else. Thanks.

Frank H. Lagesen - Partner
Cosgrave Vergeer Kester LLP
500 Pioneer Tower
888 SW Fifth Avenue
Portland, OR 97204

p: 503.323.9000 | d: 503.219.3823
f: 503.323.9019 | w: [Bio](#) | [Email](#) | [LinkedIn](#)

COSGRAVE VERGEER KESTER LLP
Attorneys
