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**IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

ESTATE OF MICHAEL DEMPSEY, by and through its Personal Representative, ELLEN SMITH, and ELLEN SMITH,

Appellants,

v.

Spokane Washington Hospital Company d/b/a DEACONESS MEDICAL CENTER,

and

ROCKWOOD CLINIC and Michael Wukelic, M.D.,

Respondents.

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

When an attorney communicates with their retained testifying expert, they do so under civil rules protection. By exercising a privilege, one does not waive the privilege. Here, a trial court order has improperly ordered the disclosure of all attorney-expert communications by holding that civil rule protections for attorney work product and attorney-to-expert communications are inapplicable once an expert is designated as a testifying expert. The ruling is plain error. It ignores this state's Civil Rule 26. This state's CR 26 is consistent with Federal Civil Rule of Procedure 26, and with longstanding precedent in the State of Washington and in the federal courts, which protect all such attorney-to-expert communications, with certain specific exceptions which are explicit within each Rule. An attorney is allowed to communicate freely with their testifying expert without fear of disclosure of legal theory, impressions and opinions. The trial court's holding that by exercising that privilege, an attorney waives it, is plain error.

At best, the trial court's order revisits a previous federal encroachment which was stopped in its tracks by the Federal Rules Advisory Committee in 2010. Washington has never adopted such encroachment, nor that now rejected federal theory, and the theory should not be adopted here. The order of the trial court requiring production of all attorney-expert communications should be reversed, the Defendant's motion to compel such

communications denied, and the Appellant Estate's motion to quash granted against this improperly issued subpoena duces tecum.

II. ASSIGNMENTS OF ERROR

1. When an attorney communicates with a retained testifying expert, the attorney's communications are protected from disclosure by Civil Rule 26(b)(4) and (b)(5).

2. Washington should not adopt a rejected federal theory of intrusion into work product privileges.

3. A subpoena duces tecum to the other party's retained expert demanding all communications that expert received from, or engaged in, with the retaining attorney is improper and must be quashed.

III. STATEMENT OF THE CASE

The Appellant Estate of Michael Dempsey retained medical expert Dr. Steve Simons to testify on its behalf in a wrongful death medical negligence trial. *CP 63:8-9.* On March 4th, Defendant/Appellee Dr. Michael Wukelic's counsel issued a subpoena duces tecum (SDT) to Dr. Simons. *Id., CP 77, 82.* The SDT demanded production from Dr. Simons on April 28, 2016 of all attorney-expert communications, by demanding production of: "2. All letters or correspondence, either written or electronic,

whether received or sent by you, concerning Michael Dempsey which are not otherwise part of the record and chart." *CP 78 at ¶ 2.* The latter is to include production of any and all records received by the expert from any source, "including Plaintiffs' counsel." *CP 78 at ¶ 1.* The SDT demands "Any and all notes, memos, either written or electronic, which you have made while performing work on this case...This is meant to include handwritten notes concerning conversations with...Plaintiffs' counsel..." *CP 78 at ¶ 5.* This SDT is an order to Dr. Simons that he produce all attorney-expert communications, or "be deemed guilty of contempt of court." *RP 78:25-26.*

On March 18, 2016, the Estate objected to SDT's demand for protected attorney–expert communications, citing work product privilege. The Estate agreed to produce all other requests. *CP 84-85.*

On April 13th, unsatisfied with the proposed production, Wukelic moved to compel all of the Estate attorney's communications with her expert. *CP 22-23.* On April 18th, the Estate responded by counter-motion, requesting that an appointed discovery master quash Wukelic's SDT on grounds of attorney-expert communication and work product privilege. *CP 52-55.* On April 24, 2016, the Estate fulfilled Wukelic's SDT as it had indicated that it would, producing all requirements of Civil Rule 26(b)(5)'s expert discovery rule, including nearly sixty pages of Dr. Simons'

materials, work product, his internal notes, and his outlines of the case. *CP 128-185.* The Estate did not produce its counsel's communications with the expert. *Id.*

After hearing, the discovery master concluded that an attorney's work product privilege is "inapplicable" to a testifying expert. *CP 189:4-10.* The discovery master concluded that the "accepted rule" is that "opposing counsel is entitled to know the communications between the Plaintiff's counsel and their testifying expert." *Id.,* at 10-12. It held that "opposing counsel is entitled to know what that information or communication may have been provided to the testifying expert (sic)." *CP 189:15-18.* The discovery master ordered production of all correspondence in any form which Plaintiff's counsel sent and/or exchanged with Dr. Simons "concerning Michael Dempsey." *CP 190:1-5.* The discovery master ordered disclosure of <u>all</u> communications of <u>any</u> kind between the expert and retaining counsel. *CP 190:6-11.*

The Estate appealed the discovery master's order to the Superior Court. *CP 62-72.* It cited the work product privilege of CR 26(b)(4) and the limitation of expert discovery under CR 26(b)(5). *RP 65:6-9.* The Superior Court affirmed the order of its discovery master. *CP 275-276.* During argument, the trial court stated that a work product privilege exists, but the privilege is waived as to a testifying expert, and all communications between the lawyer and a testifying expert are thus discoverable. *CP 229-*

268, Report of Proceedings, filed Nov. 27, 2016, at CP 263:1-7 ("when you disclose that work product to an expert as a testifying expert, you have waived the privilege.."); CP 266:2-6("when the Court of Appeals says once you give your attorney work product to a testifying expert you waive that privilege of work product. I think Washington law is clear on that"). The Superior Court ordered the undersigned counsel to produce all communications with her expert, and, inconsistently, to also prepare a privilege log identifying what communications should or should not be disclosed. But because the court's decision holds that no privilege exists with a testifying expert, a privilege log would be contrary to its order—the court has ruled that there is no privilege to assert.

The Superior Court denied reconsideration of its ruling on June 29, 2016. *CP 223-274(motion), and CP 290-293(order).* It holds that if an attorney intends to discuss potential legal theories with their testifying expert, "the court merely suggested they don't put it in writing." *RP 293.*

The Estate filed an interlocutory Notice of Discretionary Review on July 12, 2016. *CP 287.* On August 9, 2016, this Court's Commissioner denied interlocutory review, concluding that an "absence of authority" precluded a conclusion that the trial court's ruling is obvious or probable error. On October 26, 2016, this Division III court granted this interlocutory review.

IV. ARGUMENT

A. **Washington's Civil Rules 26(b)(4) and (5) prohibit discovery of an attorney's communication with a retained expert.**

i. Both this state's and the federal civil rules' Rule 26 are similar in protecting attorney-expert communications.

The language of the applicable sections of this state's CR 26 and the Federal Rule of Civil Procedure 26 are in many ways identical, and in such circumstances, "analyses of the federal rule provides persuasive guidance as to the application of our comparable state rule." *Soter v. Cowles Pub. Co.,* 162 Wn.2d 716, 739 (2007). The relevant portions of both venues' rules are thus included in Appendices A and B, and control the ensuing rules analysis:

Federal Rule of Civil Procedure (FRCP)

FRCP 26(b)(3)(A), the work product rule;
FRCP 26(b)(4)(B), the drafts rule; and,
FRCP 26(b)(4)(C), the communications rule.

Washington's Rules of Civil Procedure:

CR 26(b)(4), the work product rule; and
CR 26(b)(5), the expert discovery limitation rule.

ii. Discovery of an attorney's work product is prohibited by CR 26(b)(4).

Washington's Civil Rule 26 protects intrusion into an attorney's work product via subpart CR 26 (b)(4). Section (b)(4) prohibits discovery of documents prepared in anticipation of litigation or for trial by the other party's attorney, absent a showing of substantial need. But even where that substantial need is shown, the attorney's "work product" within those documents is still protected: "In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *CR 26(b)(4).* In other words, under civil rule, in no circumstance may an attorney's work product be properly subpoenaed or ordered disclosed. Attorney work product is unequivocally protected from discovery in *all* respects.

iii. Discovery of an expert's work product is limited by CR 26(b)(5).

CR 26(b)(5) then limits discovery into the expert's work product. The intent to limit discovery's explicit in the rule's plain language: "Discovery of facts known and opinions held by experts ... may be obtained *only* as follows...." *Matter of Firestorm 1991,* 129 Wn.2d 130, 137 (1996),

citing *CR 26(b)(5)(emphasis in original)*. This language has been construed to be as limiting as it reads. "The rule does not contemplate discovery of experts outside of its explicit requirements." *Id.* Instead, by the Rule's use of the term "only," then "CR 26(b)(5) carves out a world unto itself for expert work product." *In re Det. of West,* 171 Wn.2d 383, 406 (2011).

By limiting discovery into the expert's facts known or opinions held, CR 26(b)(5) necessarily protects attorney communications, unless those communications become part of the "facts known or opinions held" by the expert. *See section IV(A)(vii), infra.* [1]

The *West* court makes clear that the expert discovery rule of CR 26(b)(5) is not able to be used to gain access to the "mental impressions, conclusions, opinions, or legal theories of an attorney ... concerning the litigation," through CR 26(b)(4). *Id.*, at 407. CR 26(b)(5) allows discovery into only "facts known and opinions held by *experts.*" *Id.*, at 407, *emphasis in original.* These two civil rules "define the extent to which parties' trial preparation materials are exempt from discovery." *State v. Parvin,* 184 Wn.2d 741, 757, (2015), *referencing CR 26(b)(4) – (5)*, referencing in part *Hickman v. Taylor, 329 U.S. 495, 511(1947) (wherein the "Supreme Court*

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[1] Washington's Evidence Rule 705 applies the same limitations as Washington's CR 26(b)(5), because an expert may be required to disclose "the underlying facts or data on cross examination." *ER 705, and see Tegland, 5B Wash. Prac., Evidence, Law and Practice, § 703.7 (5th Ed.).*

adopted the work-product doctrine in, which held that ''work product of the lawyer'' is exempt from discovery under the Federal Rules of Civil Procedure.").

In sum, Washington's CR 26(b)(4) unequivocally protects attorney work product, and it protects attorney-expert communication through the implicit limitation of expert discovery under 26(b)(5).

iv. Federal Rule of Civil Procedure 26 is consistent with this state's CR 26 in protecting attorney work product. The federal rule is explicit in protecting communication in the form of draft reports, and of all "communications," but the same end is achieved as that of CR 26.

Federal Rule of Civil Procedures 26(b)(3) and (4) impose the same result as this state's CR 26(b)(4) and (b)(5), but by more explicit means. Three federal rules relate to this issue—one rule protects work product in general, one rule protects draft reports, and one rule protects attorney-expert "communications." *FRCP 26(b)(3)(A) (work product); FRCP 26(b)(4)(B) (drafts); and FRCP 26(b)(4)(C) (communications).* FRCP 26(b)(3)(A)'s work product rule is the equivalent of Washington's CR 26(b)(4)'s work product rule. Documents prepared by the attorney cannot be obtained without a showing of substantial need, but even where that showing is made, FRCP 26(b)(3)(B) will still prevent disclosure of the attorney's work

product within such documents.[2] This federal work product rule also explicitly protects "drafts" exchanged by the attorney with the expert through FRCP 26(b)(4)(B) which is not made explicit under Washington's CR 26(b)(4). Federal Rule 26(b)(4)(C) also explicitly protects the attorney's "communications" with a testifying expert. *FRCP 26(b)(4)(C), and Appendix B.* Three exceptions to the latter communication rule exist, but the relevant two are similar to Washington's CR 26(b)(5), that is, attorney-expert communication information can be produced if a part of that communication becomes:

> (ii).... facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
> (iii) ...assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed."

FRCP 26(b)(4)(C).

In sum, Washington's Civil Rule 26 does not contain an explicit rule protecting attorney expert "communications" per se, but it achieves the same result by limiting inquiry into expert testimony through CR 26(b)(5), and by protecting attorney work product under CR 26(b)(4). Conversely, the federal discovery rule does not limit expert discovery per se, but it

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[2] FRCP 26 (b)(3)(A) states: "If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation."

explicitly protects all drafts and attorney communication with the expert. *Fed. R. Civ. P. 26(b)(4)(C).* The same end is achieved by different means. In both venues, the only parts of any communication between an attorney and their testifying expert that is rendered discoverable are specific facts or assumptions provided within such a communication that an expert ultimately considers for or relies upon in forming their opinions. *FRCP 26(b)(4)(C), and CR 26(b)(5).*

v. Neither state nor federal civil rule protections are waived because an expert is a testifying expert; the rules specifically control disclosure with testifying experts.

Nowhere in any of the foregoing civil rules are the privileges and limitations waived because the expert testifies. The rules apply directly to testing experts by their explicit terms. *CR 26(b); FRCP 26(b).*

vi. Neither state nor federal rules allow a party to issue a subpoena duces tecum to an expert for attorney-expert communications and work product.

Under CR 26(b)(5)(A)(1), discovery into expert opinions may be performed "only" by interrogatory. While a party may depose the expert, the deposition is limited to the confines of the rule, that is, that any deposition is also "subject to the provisions of this rule." Any deposition is thus likewise limited to the subject matter on which the expert is expected

to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion, along with "such other information about the expert as may be *discoverable* under these rules." *CR 26(b)(5)(A)(i), emphasis added.* Rule 45s' subpoena rule also protects privileged materials. A court by which a subpoena issues "shall" quash or modify the subpoena if it requires disclosure of privileged or other protected matter, and no exception or waiver applies. *CR 45(c)(3)(A)(iii).* Moreover, with any subpoena for evidence at a deposition, "a party may be held to produce evidence at a deposition...only in accordance with Rule 34." *CR 45(a)(3).* CR 34 requires that any requests made be "within the scope of Rule 26(b)." *CR 34(a).* In other words, all rules loop back to the limited expert discovery of Rule 26(b)(4) and (5). CR 45(a)(3) requires adherence to CR 34, and CR 34(a) requires that any request for production be within the scope of Rule 26(b). Wukelic's SDT was improperly issued under all of these rules, and the trial court was required to quash or modify that subpoena. *CR 45(c)(3)(A).*

vii. <u>Where inquiry into attorney-expert communications is a permissible inquiry into "discoverable" communications, i.e. those parts of communications upon which the expert relies for his conclusions, then a privilege log may identify the privilege within any such discoverable portions of those</u>

communications.

Limited inquiry can be made for attorney-expert communications in conformance with CR 26(b)(5) by asking for facts and assumptions within such communications, if any, which formed the basis of any "summary of the grounds for each opinion." *CR 26(b)(5).* It is those facts and assumptions used by the expert that constitute "discoverable" information. Had a subpoena properly issued for those *discoverable* communications, then if any facts or assumptions conveyed by the attorney were identified by the expert as having formed a part of the expert's opinion, per CR 26(b)(5), then the portions of those communications would be considered "discoverable." If the attorney then also identified work product within those discoverable communications, then those parts of the "fact and assumption" communication which might still be asserted as work product could be identified and placed on a privilege log for possible further protection, such as redaction of the work product, while disclosing the facts or assumptions relied upon. *CR 26(b)(4).* Section (b)(4) and (b)(5)(A)(i) are consistent. Where facts or assumptions within certain communications are part of the expert's grounds for an opinion, then that *portion* of the communication conveying those facts or assumptions are "discoverable." That *portion* of the communication, and *only* that portion, may be discoverable, and by use of a privilege log, those discoverable communications may now be listed,

with the CR 26(b)(4) privilege asserted as to those portions, if any, of the communications that are still not discoverable. The court must now protect any work product within those communications, per use of a privilege log and, usually, redaction, while allowing discovery of the facts and assumptions conveyed which were used by the expert. The federal rule is similar in allowing *portions* of relevant and discoverable communication to be disclosed to the "extent" that the communication implicates one of three categories. *FRCP 26(b)(4)(C).*

Wukelic's demand for all attorney expert correspondence in no way comports with CR 26(b)(4) and (b)(5)'s protection of attorney work product or communication privilege, however, and the Estate was entitled to an order quashing the subpoena duces tecum. *CR 45(c)(3)(A)(iii).* The trial court's holding that no privilege existed with a testifying expert in no way comports with either CR 26(b)(4) or (b)(5), and is plain error.

viii. <u>The trial court ignored this state's civil rules, its work product protections, and its limitations on expert discovery in ordering disclosure of all attorney-expert communication with a retained expert by erroneously holding that no attorney-expert work product or communication privilege exists with a testifying expert.</u>

The trial court's holding is unprecedented and plain error under civil

rules. It holds that all communications with an expert must be disclosed on the grounds that "any information provided" may have had "an effect on their opinion." *CP 285.* That is not the standard created under the work product protection of CR 26(b)(4). Even when any inquiry is made into any "document" generated by an attorney, there must first be a showing of substantial need to obtain such a document. *CR 26(b)(4).* A party's claim that such documents "may have had an effect on (the expert's) opinion" is not the required showing. *CP 285.* And even where any such document is ordered because of the showing of substantial need, then the work product within those documents must still be protected. *Id., CR 26(b)(4).* Moreover, an adverse party has *no* right to an attorney's mental impressions, legal theories or opinions under any circumstance. *CR 26(b)(4).* It is plain error for the trial court to order production of all attorney communications with their expert to the defense because the attorney's mental impressions or theories "may have had an effect" on an expert's opinion under the language of CR 26(b)(4) and (b)(5). All that is discoverable are facts or assumptions within a communication that an expert uses in forming an opinion. *CR 26(b)(5).*

ix. <u>Longstanding Washington and federal precedent enforces the civil rule limitations on expert discovery.</u>

Precedent establishing the attorney communication/work product

privilege goes back to *Hickman v. Taylor,* 329 U.S. 495 at 510-511, wherein the United States Supreme Court held that "[N]ot even the most liberal of discovery theories cannot justify unwarranted inquiries into the files and mental impressions of an attorney." In *United States v. Nobles,* 422 U.S. 225, 237-38 (1975), the Supreme Court explained that the work product doctrine "shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." In *Upjohn Co. v. United States,* 449 U.S. 383, 400 (1981), the Supreme Court reiterates Rule 26's restrictions—the rule "accords special protection to work product revealing the attorney's mental processes."

Washington has adopted the federal system's theory of attorney work product. *See Pappas v. Holloway,* 114 Wn.2d 198, 210-211 (1990), citing *Hickman,* 329 U.S. at 511. In 1996, our state's State Supreme Court clarified and reinforced the attorney-expert communication privilege by reiterating the limitations of CR 26(b)(5). *Matter of Firestorm 1991,* 129 Wn.2d at 137. In *Soter v. Cowles Pub. Co.,* 162 Wn.2d at 739, our Supreme Court cites the federal law in *Upjohn*, when it clarifies the privilege with witnesses in general. *Soter* also cited its ruling in *Limstrom v. Ladenburg,* 136 Wn.2d 595 (1998) as granting heightened protection to an attorney's notes regarding interviews, i.e. discussions with witnesses. The Supreme Court's ruling in *Limstrom,* it notes, provides "almost absolute protection

for a legal team's notes prepared from oral communications,..." *Soter,* 162 Wn.2d at 741. It is only in the "rare circumstance" where the revealing of an attorney's notes reflecting oral communications will be allowed. *Soter*, at 740–41. *Soter* holds that this privilege and protection is a matter of "strong public policy." The work product doctrine facilitates "the need for an attorney to work without fear of having to turn his notes over to opposing counsel." *Id.,* at 737, citing *Upjohn at 398.* Notes are permeated with an attorney's inferences, as well as clues as to the portions of statements the attorney believes to be important. *Id.,* relying on *Upjohn,* 449 U.S. at 399–400*; Hickman,* 329 U.S. at 513, 516-517. Once an attorney's notes are allowed to be revealed, then "attorneys will hesitate to keep such notes, leading to inefficiencies in the practice of law." *Soter* at 742-743, citing *Hickman,* 329 U.S. at 510–11. ("Were [the work product of an attorney] open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten"). *Soter* at 742-43, quoting from *Hickman,* 329 U.S. 510-511. In other words, the end result warned against by the United States Supreme Court in favor of protecting such communications is the end result that this trial court enforced upon the Estate as necessary if it intended to keep work product safe. *CP 286("don't put it in writing"), and see CP 264:23-25 ("Don't put anything in writing, but if you put it in writing and you put them on the witness list, it's*

discoverable... ").

Our state's Supreme Court in *In re Det. of West,* again reinforced the plaint language of privilege with testifying experts through the limitation of expert discovery. *171 Wn.2d at 406.* Attorney communication with an expert is simply not an area of allowable discovery.[3] Our state's Supreme Court again reiterates the point in *State v. Parvin,* which again reinforces the limitation of expert discovery under CR 26(b)(5). *184 Wn.2d at 714.*

In sum, no precedent in this state holds that an adverse party may properly subpoena all of an attorney's communications with their testifying expert. Once Defendant Wukelic issued his SDT demanding all attorney-expert communications, that subpoena was in violation of CR 26(b)(4) and (b)(5) and the longstanding rule of law, and it should have been quashed. *CR 45(c)(3)(4)(iii).*

x. <u>The 2002 Appellate Court ruling in *Limstrom v. Ladenburg* does not apply the concept of waiver to attorney-expert communication.</u>

The trial court cited to the later remanded ruling of *Limstrom v. Ladenburg*, 110 Wn.App. 133, 145 (2002), *as corrected* (Feb. 15, 2002) for

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[3] In *West*, the work product made discoverable was the expert's work product, not the attorney's. *See West* at 171 Wn.2d at 407.

its holding that attorney work product and communication privileges are waived with a testifying expert, but that is not what *Limstrom* says. The *Limstrom* court addressed the issue of waiver, but it was in the context of an attorney who had disclosed documents *to their adversary.* In *Limstrom,* the argument was that a prosecutor waived his work product protection for documents he had provided to an adversary in a criminal case. *Id.* If an attorney hands over their notes to the opposing party, waiver would be presumed. This sort of waiver is the type that may also occur in the type of inadvertent disclosure which gives rise to "claw back" requests. *See Sitterson v. Evergreen Sch. Dist. No. 114*, 147 Wn.App. 576, 584 (2008). But these are not remotely the facts here. The Dempsey Estate did not hand over attorney-expert communications to the defense. The Estate specifically resisted doing so. Moreover, in *Limstrom,* even in the instance of the prosecutor's outright intentional disclosure to the adversary, work product privilege was held to have not been waived, because the disclosure was done under another criminal rule that mandated certain disclosures, i.e. CrR 4.7. In no way does *Limstrom* hold what the trial court held here—that because an attorney communicates their mental impressions to their own expert, they waive the attorney work product privilege in doing so. Use of *Limstrom* to support such a ruling is plain error.

xi. A privilege log must be based on a valid privilege. Because the court has ruled that there is no valid attorney work product privilege between an attorney and a testifying expert, presenting a privilege log would be contrary to the court's order.

Once this trial court ruled that any work produce privilege is waived with, or inapplicable to a testifying expert, then its ensuing order directing that an attorney present a privilege log is contrary to its own ruling. Without a viable privilege to cite, a party cannot properly present a privilege log. There is no valid privilege to assert. As discussed above, had the SDT been quashed, and an ensuing demand reissued to conform to CR 26(5) by seeking only facts or assumptions of the attorney used by the expert in his opinion, then any work product existing among those otherwise "discoverable" facts or assumptions conveyed could be identified in a privilege log for redaction as necessary, per CR 26(b)(4). But without a valid privilege, which the court ruled was the case here, then presenting a privilege log would violate the law of the case.

B. This state's expert discovery rule has not evolved to a theory rejected by the federal system in 2010, and that rejected theory should not be adopted here.

At best, the trial court adopts the same position that caused the Federal Rules Advisory Committee to amend the federal expert discovery rule in 2010 to stop encroachment into attorney expert communications. Key to this understanding is *Elm Grove Coal Co. v. Dir., O.W.C.P.*, 480 F.3d 278, 301 (4th Cir. 2007), which was cited by Respondents in the Commissioner's processes. *Elm Grove* and similar rulings led to the Committee amending the federal expert discovery rule in 2010. Prior to the 2010 amendment, a growing majority of rulings on the expert discovery provisions of FRCP 26 were evolving into a "majority" opinion, which applied a bright-line rule whereby matters considered by a testifying expert in formulating his or her opinion, including attorney work product, were automatically discoverable. *Chevron Corp. v. Shefftz,* 754 F. Supp. 2d 254, 264 Nte 71 (D. Mass. 2010), citing *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.,* 257 F.R.D. 607, 612 (E.D.Cal.2009) (the latter case collecting cases on majority interpretation). "In contrast, a minority interpretation held that the disclosure of core work product to a testifying expert did not abrogate the protection accorded to such information." *Id, citing to S. Yuba* at 613. The Federal Rules Advisory Committee rejected the evolving "majority" interpretation in 2010 because it created

"undesirable effects." *Id.*[4] The majority view was detrimental to the litigation privilege process. Attorneys were not simply refraining from writing things down, as the trial court here directs; instead, they and their experts were devising new ways of communicating in writing, but the necessity of doing so was impeding work. *Id.* The Rules Committee acted by amending Rule 26: "Importantly, the amended Rule 26 now explicitly protect communications between a party's attorney and reporting experts." *PacifiCorp v. Nw. Pipeline GP,* 879 F. Supp. 2d 1171, 1212 (D. Or. 2012). The "historical evolution of the rule, its current structure, and the Committee's explanatory notes" all make clear that the 2010 amendments were "to protect opinion work product—i.e., attorney mental impressions, conclusions, opinions, or legal theories—from discovery." *Republic of*

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[4] The 2010 note states, in relevant part:

> "In 1993, Rule 26(b)(4)(A) was revised to authorize expert depositions and Rule 26(a)(2) was added to provide disclosure, including--for many experts--an extensive report. Many courts read the disclosure provision to authorize discovery of all communications between counsel and expert witnesses and all draft reports. *The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects.* Costs have risen. Attorneys may employ two sets of experts--one for purposes of consultation and another to testify at trial--because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses. *At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.*"

Fed. R. Civ. P. 26, 2010 note, emphasis added.

Ecuador v. Mackay, 742 F.3d 860, 870 (9th Cir. 2014). Draft reports and attorney-expert communications were targeted by the Committee as "the areas most vulnerable to the disclosure of opinion work product," and protecting these areas allows an attorney to "confer and strategize with their experts." *Id.* Other aspects of the discovery rules still allow for an adversary to obtain "sufficient information to engage in meaningful cross-examination and prepare a rebuttal.." *Id.,* at 870–71.

Washington's CR 26(b)(4) and (b)(5) have never allowed for this pre-2010 rejected federal line of reasoning. While discovery in general is liberal, CR 26(b)(1), discovery into expert opinions is specifically limited in this state by *CR 26(b)(5),* and work product is not discoverable at all, per *CR 26(b)(4).* These rules apply to testifying retained experts. Washington should not now adopt such a rejected line of reasoning to encroach into the attorney-expert communication privilege. There is no cause to do so, and certainly none has been shown here. No interest has been cited by Wukelic that should result in universal disclosure of attorney work product, or attorney-expert communication, in violation of CR 26(b)(4) and (5)'s limitations.

C. <u>The reason privileges exist is to protect communication; a ruling that by communication, one waives the communication privilege, is plain error.</u>

Ultimately, this trial courts' ruling is counter to the very reasons privileges exist. It holds that an attorney waives an attorney-expert communication privilege by engaging in the communication. Such reasoning then also means that, e.g. a husband waives marital privilege by talking to his wife; or that a penitent waives priest-penitent privilege by talking to a priest. Privileges exist to *protect* those very communications. Exercising them does not waive them. Such a theory is plain error.

Washington law and federal law, the civil discovery rules of both Washington State and the federal courts, all consistently protect attorney expert communications to ensure a proper litigation process. This court should so rule.

D. <u>RAP 18.1 Attorney Fees and Expenses:</u>

RAP 18.1 grants a party the right to recover reasonable fees and expenses on review where applicable law grants that right. The discovery master declined to award sanctions on behalf of, or against, any party. *CP 189:19-27, and CP 191:1-2.* The trial court upheld the order of the discovery master. *CP 276:24.* Under CR 37, where a motion for an order compelling discovery is brought, which Wukelic here brought, *CP 22-24,* then if the motion is denied, which it should have been, the court "shall" require the moving party to pay to the party who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the

court were to find that the making of the motion was substantially justified or that other circumstances made an award of expenses unjust. *CR 37(a)(4).* There is no substantial justification for Wukelic's motion to compel compliance with an improper subpoena duces tecum demanding *all* attorney expert communications in violation of the plain language of Civil Rule 26(b)(4) and 26(b)(5). The rules cannot be more clear.

Moreover, under CR 45(c)(3)(A)(iii), the trial court was required to grant the Estate's motion to quash the subpoena because that subpoena required disclosure of privileged or protected matter in violation of the rule, and no waiver applies. Per Rule 45(c)(1), the trial court "shall" as well enforce the duty of a party issuing a subpoena to avoid imposing undue burden or expense on a person subject to that subpoena. Where breach of that duty occurs, the court's enforcement is to include "an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee." *Id.* Both remedies should have applied here to reimburse the Estate for its expenses.

The Estate requests that the trial court be directed to award sanctions and the fees required by CR 37(a)(4) and CR 45(c)(1) as earlier requested by the Estate, and further, that the Estate requests fees on appeal pursuant to RAP 18.1.

V. CONCLUSION

This court should reverse the decision of the trial court deeming the attorney expert communication privilege either inapplicable and/or waived as to a testifying expert, direct that Defendant Wukelic's motion to compel be denied, that the Estate's counter-motion to quash the subpoena duces tecum issued by Wukelic be granted, direct that fees and sanctions be awarded at the trial court level, and award fees and costs in favor of the Estate for this appeal.

DATED this **13th** day of **February, 2017**.

Respectfully submitted,

MARY SCHULTZ LAW, P.S.

/s/**Mary Schultz**

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the **13th** day of **February, 2017**, the foregoing document was delivered to the following persons in the manner indicated below:

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APPENDIX A

Appendix A (Bold added)

Superior Court Civil Rules
RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
(1) *In General.* Parties may obtain discovery regarding any matter, **not privileged**, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
...

(4) *Trial Preparation: Materials.* **Subject to the provisions of subsection (b)(5) of this rule,** a party may obtain discovery of documents and tangible things **otherwise discoverable under subsection (b)(1)** of this rule and prepared in anticipation of litigation or for trial **by** or for another party or by or for **that other party's representative (including a party's attorney,** consultant, surety, indemnitor, insurer, or agent) **only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.**

.....
(5) *Trial Preparation: Experts.* Discovery of **facts known and opinions held by experts,** otherwise discoverable under the provisions of subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, **may be obtained only as follows**:
(A)(i) A party may through **interrogatories** require any other party to identify each person whom the other party expects to call as an expert witness at trial, **to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to state such other information about the expert as may be discoverable under these rules.**
(ii) A party may, subject to the provisions of this rule and of rules 30 and 31, depose each person whom any other party expects to call as an expert witness at trial.
(B) A party may discover facts known or opinions held by an expert who is not expected to be called as a witness at trial, only as provided in rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(6) *Claims of Privilege or Protection as Trial-Preparation Materials for Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, 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.

Wash. Super. Ct. Civ. R. 26

APPENDIX B

APPENDIX B (bold added)

Federal Rules of Civil Procedure Rule 26

(a) Required Disclosures.

.....

(2) ***Disclosure of Expert Testimony.***
(A) *In General*. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.
(B) *Witnesses Who Must Provide a Written Report*. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:
(i) a complete statement of all opinions the witness will express and the basis and reasons for them;
(ii) the facts or data considered by the witness in forming them;
(iii) any exhibits that will be used to summarize or support them;
(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
(vi) a statement of the compensation to be paid for the study and testimony in the case.

...

(b) Discovery Scope and Limits.

(1) ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding **any nonprivileged matter** that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

....
(3) ***Trial Preparation: Materials.***
(A) *Documents and Tangible Things*. Ordinarily, **a party may not discover documents** and tangible things that are **prepared in anticipation of litigation or for trial by** or for another party or its representative (including **the other party's attorney**, consultant, surety, indemnitor, insurer, or agent). **But, subject to Rule 26(b)(4), those materials may be discovered if:**
(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has **substantial need** for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) ***Protection Against Disclosure.*** **If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.**

.....

(4) ***Trial Preparation: Experts.***

.....

(B) *Trial-Preparation* ***Protection for Draft Reports*** *or Disclosures.* **Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.**

(C) ***Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.*** **Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:**
(i) relate to compensation for the expert's study or testimony;
(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

.....

(5) ***Claiming Privilege or Protecting Trial-Preparation Materials.***
(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:
(i) expressly make the claim; and
(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

Fed. R. Civ. P. 26