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NOV 13 2017

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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**DIVISION III COURT OF APPEALS
STATE OF WASHINGTON**

No. 352072

**Spokane County Superior Court Case No. 14-3-01703-9
The Honorable Marian Moreno
Superior Court Judge**

OPENING BRIEF

In Re:

CATHRINE ROE, FKA MARCHESSEAU, APPELLANT/PETITIONER

V.

CHAD MARCHESSEAU, RESPONDENT

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I. Facts

The parties were involved in a highly-contested dissolution custody case and trial. The trial was bifurcated with the financial issues being finalized first. This appeal is about the parenting plan trial and the mother's CR60 motion to vacate the final parenting plan because of some serious allegations regarding alleged attempts by her husband and his attorney to influence vital trial witnesses. CP 2340-2350.

Historically, the husband was an air force pilot and the wife was a former air force officer but is now a civilian who has her own investigation service. CP190 & 236. They had 3 children ages 11, 9, and 8. See PP CP 298. Because of the allegations in this case, a GAL was appointed for their children, however, was later discharged by the trial judge because of an apparent conflict of interest between she and the appellant's counsel. CP 258. (No GAL was put back on the case). During the time that the GAL was on the case, she recommended a counselor to do therapy with the parties' children.¹ Id. The counselor that was appointed by order was Joan Chase, a licensed nurse practitioner that specialized in psychiatric issues in children. Id & CP 45.

The court bifurcated the matters and set one trial for the financials and another for the parenting plan. The temporary distribution of some property inadvertently became a parenting plan issue because of the access to

¹ The GAL was dismissed because appellant's counsel had been the GAL's divorce attorney; however, no new GAL was appointed by the Commissioner or the Trial Judge, leaving the only expert the child's counselor, ironically chosen by the now dismissed GAL

alleged confidential emails between the father and his counsel because of what was on those emails about the GAL and the children's counselor Joan Chase. See CP 1081-1156. At one point in the litigation, and after receiving her laptop back from the husband, that she was awarded in the temporary orders, the wife asked the court to make her husband provide her with the memory image from its hard drive. CP-825-827. There was already another order that required the husband to give her the hard drive, but he did not honor that request. *Id.* Additionally, the husband and his attorney had apparently hired a third party to professionally delete its hard drive, cleaning off its entire system memory without telling the court or the Petitioner. CP 688-689.²

Eventually, there was another hearing on the hard-drive in which the judge found that husband and his attorney had removed the memory from this laptop [CP 646] and made findings in an order that they were both complicit in doing this attempted destruction of evidence. *Id.* In fact, this was so serious that the judge took over the hearing on the memory and stated that she was about to find someone in contempt if they did not stop arguing in open court about the missing hard-drive, and their arguments would not do any good because she had already made her decision on that issue. CP 1082-1083. The judge then articulated her orders and signed an order on the laptop hard-drive with the following findings of fact,

² The removal of the hard drive from this laptop was because it had all of the husband's personal emails on it and he and his attorney removed the memory to insure that the wife did not have access to those emails, however, any privilege for those emails was waived by their giving it to a third party to remove the memory.

“Respondent’s attorney and Respondent were complicit in hiding the original laptop’s hard drives forensic image. By giving the laptop to a 3rd party respondent waived privilege.” CP 646. (Emphasis added & see also CP 1085-1088 wherein there is a colloquy between Mr. Mason, the father’s counsel, and Judge Moreno wherein Mr. Mason did not want to turn over the lap-top hard-drive because it also contained attorney-client confidential emails on it; the judge said in that colloquy that taking this lap-top to a third party waived any privileged communications.)

To make all the facts in this case regarding emails make sense we have to go back to just after the parties separated in 2014.³ One day in 2014, after the parties had separated, and while the mother was cleaning up the house, she was picking up the Kindle mini pad that their father had given them and accidentally ran across what was called “pop-ups” of her husband’s emails. CP 1583. The mother stored this in her memory and did nothing about this because she did not know how to use the Kindle to look at the other emails, and so she continued to let the children play with this mini tablet. However, she also knew that emails were important to show how abusive her husband had been. See e.g. CP 845-866.

This laptop issue became more important because of the parenting plan bifurcated trial, wherein the judge ordered a 50/50 parenting plan schedule without any limitations on the father for his alleged domestic violence history. CP 298-307. As indicated the parenting trial portion was held separate from the property distribution trial portion on December 15, 2015 with the ruling on December 22, 2015. CP 234-278. At that parenting plan trial the court’s appointed therapist for their children named Joan Chase testified about what

³ This was obviously before the December 2015 parenting plan trial and is a date to remember in this case’s explanations.

she felt was the best parenting plan for the parties' child. CP 543-626. The judge felt that Joan Chase's testimony was completely opposite from what the mother felt was important in the case. CP 236-251. She indicated in her testimony that the father was a good dad without any indications of a domestic violence history and should be allowed as much time as possible with their child, even though the mother had been the primary parent during their marriage, and testified that he was very abusive to her and the children. CP 234-278. Ms. Chase's testimony in fact seems absolutely against the mother in almost every way, except that since she had been the primary parent for the children, she should have equal time with them, even though she was not a good person, and had done things that were inappropriate with the children about their father. CP 542-626 & 234-278.

At one point in the parenting plan trial, when Ms. Chase began to testify, the mother's attorney objected to her giving custodial recommendations, since she was only hired on as the children's therapist. CP 543-560. The court allowed Ms. Chase to testify over the mother's objections⁴. Id. She testified about who would be the "most friendly parent" and who would not interfere with the other parent's parenting time. CP 555-637. Ms. Chase clearly indicated that the mother had parenting problems such as with talking to the children about adult issues, speaking badly about the father, and that she would not be a "friendly parent", things that seemed to mimic what the father had also said about the mother in the case. Id & CP 572-573. Her

⁴ The objection was that Ms. Chase was not ordered as a forensic counselor, only for therapy purposes. This was over-ruled because the court indicated that it needed an expert to help her with the parenting decision.

testimony so slanted in favor of the father that there was no doubt she was not a fan of the mother in anyway, but it seemed that the father could do no wrong when it came to his parenting.⁵

There clearly was some evidence of a special relationship between Ms. Chase and the father, and the judge saw that she favored his version of facts and plan rather than the mother's versions. CP 234-278. The court was aware of Ms. Chase's bias toward the father. Id. It is also clear that from the cross examination of Ms. Chase by the mother's counsel that she was frustrated on how Ms. Chase seemed to defend her relationship with the father at every turn. CP 574-637. Ms. Chase seemed to be the number one fan of the father and protected him and her opinion about him from every corner. Id & CP 238-278

Even though the court seemed aware of Ms. Chase's bias, the Judge ordered and signed a final parenting plan which gave the parties 50/50 time with their children without any limitations for the father due to the alleged domestic violence history⁶. CP 234-278 & 298-307.

After the court ordered a 50/50 plan based on Joan Chase's testimony, the mother felt that the court did not understand how abusive her husband was so she already knew that Judge Moreno already found that her husband had waived any attorney-client privilege of emails between he and his attorney by delivering the hard-drive the a third party and so she wanted to

⁵ The court did recognize this bias but did not seem to consider it in its ruling. CP 234-278

⁶ The record is replete with references to the husband's domestic violence, which was considered untrue by Ms. Chase.

get to the bottom of why Joan Chase was so biased, and also find out what happened to her abuse records that were stored on the laptop that her husband had cleaned. CP 1240-1342. She also remembered that she still had the Kindles with emails, but did not know how to access them. Id. She took the Kindle to a forensic specialist who explained that the only way to get at the Kindle emails was to use a special forensic software and that the emails on their came from the same laptop that the court said that the father waived the attorney-client privilege in by giving it to a third party, and then she refuted the notion that Ms. Roe somehow “intercepted” these email since the Kindle had no software to do that task. CP 1069-1078 & 1079-1080.

Again, the mother could not get to these emails because she did not know how to do that in the Kindle, other than popups occasionally, and really did not know that these planning emails were on the Kindle from the HP laptops, nor their content.

After seeing these emails the mother filed a CR 60 motion to vacate the final parenting plan because of what she felt was a series of both illegal and unethical actions borne out by those emails that the father and his attorney were planning, and in some cases carrying out suborn of perjury, influencing witnesses, and coaching others. CP 1081-1156 (under CR60(b)(4) & 1240-1342 under CR60(b)(3).

Some of the clear reasons for this filing is because of the evidence of misrepresentation or misconduct, making the time for filing such a basis moot. For example, there was evidence that the father and his attorney

planned to send Ms. Chase a “care package” which included a lot of negative evidence about the mother, that was unknown by her or her attorney. CP 1105. That package obviously did come with any explanation by the mother for these records. CP 1105. There was also proof that they intentionally hid this “care package” delivery from the mother and her counsel since they did not want it (the care package) “spun” against them. CP 1283. All the emails showed some type of plan or scheme to influence the case in their direction with concrete plans to influence either the court, or witnesses in some way and to keep all that secret from the mother, her attorney and the court. See CP 1272 to 1321.

The next step in this process was to have a hearing on the email content and why this showed a need for a new trial. Argument on the emails, their confidentiality and significance was had with the court. See CP 1566 to 1612 which is the record of the arguments on this CR 60 matter. After argument, the court took the motion to vacate under advisement [CP 1608] and rendered a written decision on the motion to vacate.

The judge came back and denied the motion to vacate the parenting plan. Her ruling cited the RPC's and other sections of the those rules that made the emails between Mr. Mason and the husband confidential, disregarding the law of the case that the husband had waived the confidentiality of these emails by sending them to a third party. She also ruled that the wife's counsel should not have disclosed those before making Mr. Mason aware of that

ruling. Finally, that these emails allegedly showing misconduct should have been brought forward before the parenting plan trial. See CP 2196 to 2199.

The basic thrust of the court's decision was that Ms. Roe and her counsel had a duty to disclose them to the opposition, citing CR 26, however, there was no discovery as to these emails, that they were inadvertently found and could not access until the court ruled the father had waived privilege and they had to be accessed by special software that the Petitioner did not have. The judge also cited RPC 4.4(b) that her attorney should have notified the other side of these emails and not used them or filed them even though this matter was filed under CR60 (b)(4) misconduct basis. She indicated that there was no indication when Ms. Roe found them, therefore, since she had the Kindle in her position before trial she had access to them so the court did not consider their content. See CP 2196 to 2199. The judge also cited RPC 4.4 regarding respecting the rights of third parties. See CP 2198. This RPC is specifically meant for third parties and is not germane to this case and the emails found by the Petitioner. Finally, the judge did not do an "in-camera" review of these documents as was even suggested by the Respondent. See e.g. CP 1596.

Ms. Roe appeals this ruling for many reasons, first, the first-time Ms. Roe received all the emails from the Kindle was when Carol Peden, a forensic computer specialist found them was March 26, 2016. See CP 1069 to 1080. This was long after the parenting plan trial and so they could hardly have been used at trial as the judge suggests. With that in mind, and the fact that

the Appellant believes that the judge error on the application of the RPC's and the statutes regarding confidentiality and attorney-client privilege, she asks that this court overturn the ruling and grant the CR60 motion for a new trial where she can use this new information.

II. Statement of Errors by Judge

The Judge in this matter erred in this matter, as follows:

1. By failing to follow the "law of the case" regarding the husband's attorney/client emails and his implied waivers by giving his laptop to a third party to clean.
2. By failing to analyze the Appellant's CR 60(b)(4) motion properly, even though there was clear and convincing evidence of misconduct by Respondent and his counsel in this matter;
3. By failing to vacate the Final Parenting Plan and ordering a new trial with a newly appointed GAL to get to the bottom of the issues of abuse offered by the mother, as well as the issues relating to inappropriate attempts by the Respondent and his attorney to influence witnesses, namely the children's counselor;
4. By ordering the Appellant to pay attorney's fees to the Respondent for filing privileged emails between the Respondent and his attorney, emails that the judge found to have the confidentiality waived by him and his counsel;

5. By suggesting that the attorney for the Petitioner may have violated the RPC's in what she did with the emails between the Respondent and his counsel;
6. By not considering the emails that were found by the Appellant, which were clearly probative of misconduct by the Respondent and counsel, in the Petitioner's CR 60(b)(4) motion analysis because they were attorney-client privileged material;
7. By finding that she should not consider the "misconduct" emails because they were not newly discovered evidence since the parenting plan trial, ignoring the fact that this was a CR60(b)(4) motion where the discovery rule does not apply;
8. By allowing Joan Chase to testify as to the best interests of the parties' children since she was never ordered to do that task;
9. By failing to grant the Petitioner's CR60(b)(4) motion to vacate the parenting plan.
10. By relying on an RPC that is intended for protection of third parties and not this situation, in her final order dismissing the CR 60 motion;
11. By failing to follow case law as well as the Respondent's own suggestion to review the emails "in camera" to see if they related to misconduct.

III. Law & Argument

- A. The Attorney-Client privilege in Washington is not a complete bar to all attorney-client communications.

Regarding Attorney-client privilege in Washington State, RCW 5.60.060(2)(a) provides that an "attorney or counselor shall not, without the

consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment." See Dietz v. Doe, 131 Wash.2d 835, 842, 935 P.2d 611 (1997).

This privilege allows the client to freely communicate with their counsel without fear of having to tell anyone about the communication. *Id.* It applies to all communications and advice between the attorney and his/her client, and includes any documents that contain their joint communications. *Id.* This privilege can be waived. *Id.*; see also 8 WIGMORE, EVIDENCE § 2292, at 554 (1961). Although it is generally assumed that only the client can waive this privilege, the attorney, by their actions can waive this as well, or the actions of the client can also waive that privilege, by what they do with the communication. See e.g. David B. SITTERSON d/b/a DBS Financial Services, Appellant/Cross-Respondent v. EVERGREEN SCHOOL DISTRICT NO. 114, a municipal corporation, Respondent Cross-Appellant 147 Wn.App. 576, 196 P.3d 735 (2008).

A party or his attorney may also waive this privilege for inadvertent disclosure where the private communications go to a third party by how it is handle by either the attorney or his client. *Id.* This is called "inadvertent disclosure" and Washington State recognizes this kind of waiver of this privilege. *Id.* Inadvertent disclosure is when a privileged communication is disseminated to the public or third party by whatever means is used, either in written form or electronic form, such as when the disseminator does not

think about what they are doing when they disseminate the confidential material. *Id.* The burden falls on the party claiming the privilege to show that the privilege still applies even though they mistakenly sent the material in a form that third parties can see it. *Id.*; and see e.g. *VersusLaw, Inc. v. Stoel Rives, LLP*, 127 Wash.App. 309, 332, 111 P.3d 866 (2005), review denied, 156 Wash.2d 1008, 132 P.3d 147 (2006).

The *Evergreen School case*, *supra* goes on its analysis to describe the differing standards in analyzing the application of this rule. They point out that there are three distinct approaches to this privilege. First, there is the “absolute waiver” theory that requires complete waiver that is clear before it can be waived; Second, there is the “Absolute no-waiver” approach; and Third, there is the “balanced” approach. *Id.*

1. The absolute waiver approach: here inadvertent disclosure never waives this privilege. This approach was not supported by the *Evergreen* case court;
2. The no-waiver approach: this approach limits the privilege to the issues it was intended to address and that is all. The *Evergreen* court also did not support this approach either;
3. The balanced approach: this approach was favored by *Evergreen* citing the following cases to support this conclusion: “1 MCCORMICK ON EVIDENCE § 93, at 373; see, e.g., *Harp v. King*, 266 Conn. 747, 768-69, 835 A.2d 953 (Conn.2003); *Save Sunset Beach Coal. v. City & County of Honolulu*, 102 Hawai'i 465, 486, 78 P.3d 1 (Haw.2003); *Elkton Care Ctr. Assocs. Ltd. P'ship v. Quality Care Mgmt., Inc.*, 145 Md.App. 532, 545, 805 A.2d 1177 (Ct.Spec.App.2002).

The balanced approach uses a five-part analysis to determine if the inadvertent disclosure is a waiver or not. That approach comes from the federal case of *Alldread v. City of Grenada*, 988 F.2d 1425 (1993) wherein

the five factors are as follows: (1) the reasonableness of precautions taken to prevent disclosure, (2) the amount of time taken to remedy the error, (3) the scope of discovery, (4) the extent of the disclosure, and (5) the overriding issue of fairness. Citing Alldread, 988 F.2d at 1433. This approach is sent to be a flexible approach taking into consideration modern litigation and communication, such as emails, PDF's, and other newer communication modalities, as well as the size of the litigation.

In this case, using the balanced approach and the five factors to determine whether the father waived his attorney-client privilege by allowing his children to have his Kindle, which he knew had email capabilities, in his estranged wife's home, seems to mitigate in favor of the finding that he waived his privilege by what he would call this "inadvertent disclosure". First, the father made no precautions to protect the Kindle from disclosing emails to his estranged wife, especially in this highly contested matter, knowing that the Kindle had access to his emails; second, there was little or no attempts or time taken to remedy the Kindle situation by the father; third, the scope of discovery is not at issue, but if it was, the judge already ruled in this case regarding his email account, that if he gave a computer to third parties who could and did access the emails, he waived the privilege; forth, the extent of the disclosure is a little trickier, this disclosure allowed the estranged wife access to all his communications with his attorney, however, the judge in this case already ruled that any and all emails in his laptop (parenthetically the same email account from which the Kindle obtained its

messages) waived the privilege because the laptop was given to a third party for viewing and working with the emails, therefore, the extent seems irrelevant to this judge and her rulings in that regard; finally, five, although it may not be fair to have these emails, their content was important for the wife to see because it called for her estranged husband to tamper with witnesses and or influence them with secret things and papers she had no knowledge of, therefore, the fairness of this access is simply that now she sees what he was and has been doing, whereas if she did not see these emails she would have been highly prejudiced since she could not respond to the GAL and/or counselor with her version.

All in all, using the balanced approach there is no question that the Respondent's inadvertent leaving of the Kindle with his estranged wife, with its capabilities to access his email account was a waiver of this privilege, just as his giving the laptop to the computer business to remove those emails and hard-drive.

B. The Respondent's emails found by the Appellant in this matter are exceptions because of their content.

Besides inadvertent waiver of the attorney-client privilege Washington Law also allows for what best can be called "misconduct or fraud exception" waiver. The misconduct, misrepresentation, "fraud exception to the attorney-client privilege is deeply rooted in our jurisprudence" See Cedell v. Farmers Ins. Co. of Washington, 176 Wn.2d 686, 295 P.3d 239 (2013) and ROBERT H. ARONSON, THE LAW OF EVIDENCE IN WASHINGTON §

501.03[2][h][iii], at 501-24 (4th ed.2012) (see also, Craig v. A.H. Robins Co., 790 F.2d 1, 5 (1st Cir.1986)).

The analysis for this exception is a “two-step approach”. *Id.* As follows:

“The first step is to invoke an in-camera [sic] review and requires a showing that a reasonable person would have a reasonable belief that an act of bad faith tantamount to civil fraud has occurred. Barry, 98 Wash.App. at 208, 989 P.2d 1172; Escalante, 49 Wash.App. at 394, 743 P.2d 832; see also Seattle Nw. Sec. Corp., 61 Wash.App. at 740, 812 P.2d 488. The purpose of the in-camera [sic] review is to determine ‘whether the attorney client-privilege applies to particular discovery requests, and whether appellants have overcome that privilege by showing a foundation in fact for the charge of civil fraud.’ Escalante, 49 Wash.App. at 394, 743 P.2d 832. Escalante suggests if an insurer engages in bad faith in an attempt to defeat a meritorious claim, bad faith was tantamount to civil fraud. See *Id.* (citing United Servs. Auto. Ass’n v. Werley, 526 P.2d 28 (Alaska 1974)).” Cedell, *supra*.

In this case, using the two-step approach, we believe this shows that the judge should have allowed the emails in that showed this clear attempt to influence witnesses, especially the only expert, Joan Chase. First, although Ms. Roe’s attorney filed these emails, she gave them to the judge for her to review in her office before the hearing on them on the CR 60 motion. The judge then simply looks at the emails and determines if there is a clear indication of misconduct. Here, the husband and his counsel intentionally tried to influence Joan Chase with a multitude of things. Additionally, the language used and the descriptions of what was going to happen, by his attorney, and his disparagement of the court process in Spokane showed that he had a clear intent to control the outcome of the trial or at least as to

what these witnesses would say. However, case law also indicates that an “in-camera” review is only necessary if the judge feels it is necessary, as they indicated in the case of Cedell, *supra*,

The in-camera [sic] inspection is a matter of trial court discretion. Barry, 98 Wash.App. at 206, 989 P.2d 1172 (citations omitted) (citing Escalante, 49 Wash.App. at 394, 743 P.2d 832; Seattle Nw. Sec. Corp. v. SDG Holding Co., 61 Wash.App. 725, 740, 812 P.2d 488 (1991)).

However, the judge did not do an “in-camera” review of the emails. Had she done so she could clearly have seen there were issues of misconduct. Looking at them in chambers would have been appropriate, especially since the Respondent themselves asked for it. However, in this case the judge did not even consider them, not following CR 60(b)(4) that indicates that this particular motion and evidence is not time barred by sections CR 60(b)(1-3).

If we are going to say that part of what the Respondent and his attorney did was to approximate a crime of influencing a witness, we should go that crime statute to see if it fits. RCW 9A.72.120 states,

- (1) A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to:
 - (a) Testify falsely or, without right or privilege to do so, to withhold any testimony; or
 - (b) Absent himself or herself from such proceedings; or
 - (c) Withhold from a law enforcement agency information which he or she has relevant to a criminal investigation or the abuse or neglect of a minor child to the agency.

(2) Tampering with a witness is a class C felony.

(3) For purposes of this section, each instance of an attempt to tamper with a witness constitutes a separate offense.

As can be seen, “tampering with a witness” is when someone tries to induce a witness to testify a certain way. This crime has also been defined further as any attempt to “influence” a witness. See State v. Sanders, 66 Wn.App. 878, 833 P.2d 452, (Div. 1 1992); State v. Thomas, 158 Wn.App. 797, 243 P.3d 941, (Div. 2 2010) the concurring opinion indicated that attempts to influence a witness equaled tampering; State v. Skuza, 156 Wn.App. 886, 235 P.3d 842, (Div. 2 2010); State v. Carter, 154 Wn.2d 71, 109 P.3d 823, (2005) attempts to influence a witness is witness tampering. As they said in the case of Sarausad v. State, 109 Wn.App. 824, 39 P.3d 308, (Div. 1 2001),

“Moreover, to be guilty of a violation under 9A.72.090(1)(a), one must intend to “influence” the testimony of a person upon whom a benefit is conferred. “Influence” means “to affect or alter the conduct, thought or character of by indirect or intangible means; ... to have an effect on the condition or development of: determine partially: modify.” Webster’s (3rd) International Dictionary 1160 (1969). “Bribe” refers to “a price, reward, gift, or favor bestowed or promised with a view to pervert the judgment [39 P.3d 321] or corrupt the conduct[.]” *Id.* at 275. Thus, in the context of the bribery statute, to intend to influence a witness’s testimony connotes an intention to alter the truthful nature of that testimony or to thwart the ends of justice.” *Id.*

Attempting to influence a witness to steer them toward your version of the truth, no matter how subtle, or quiet, is witness tampering. The emails proffered between the husband and his counsel were all about persuading

Ms. Chase to testify in their favor, and were clearly witness tampering or at least an attempt to influence her testimony as the only professional in the case.

This was further seen in the witness's own testimony where she was clearly biased against the mother. Even the judge herself noticed it and referred to it, but did nothing about it. Seeing the extent of the Respondent's plans in this regard would have made it clear why a CR60(b)(4) motion was filed to call attention to this misconduct of trying to influence the court. And can be further surmised as intentional when looking at the comments by Mr. Mason about the court's in Spokane and how they did not know anything and did not cite the right law all the time, naming only on retired judge who did cite the law correctly, all of which were in his emails to his client, as they laid plans to influence the court and witnesses.

At a minimum, the judge should have looked at the emails to see if they fit the misconduct provisions and clarifications of the law as to witness tampering. A most egregious act in jurisprudence.

C. The emails between the Respondent and his counsel in this matter appear to clearly violate the RPC's.

Beside the clear attempts to influence the one remaining expert counselor to testify on his client's behavior, Mr. Mason may have also violated the RPC's. RPC 3.3 states,

RPC 3.3

CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by the opposing party; or

(4) offer evidence that the lawyer knows to be false.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding.

(c) If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the tribunal unless such disclosure is prohibited by Rule 1.6.

(d) If the lawyer has offered material evidence and comes to know of its falsity, and disclosure of this fact is prohibited by Rule 1.6, the lawyer shall promptly make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer may seek to withdraw from the representation in accordance with Rule 1.16.

(e) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(f) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Candor to the tribunal is a very important rule of conduct for an attorney.

Some say it is not some much about telling the truth, it is about maintaining the integrity of the court system. *In re Disciplinary Proceeding Against Carmick*, 146 Wn.2d 582, 48 P.3d 311, (2002); *In re Disciplinary Proceeding Against Tasker*, 141 Wn.2d 557, 9 P.3d 822, (2000); 124-6, *In re*

Disciplinary Proceeding Against Poole, 156 Wn.2d 196, 125 P.3d 954, (2006) [See footnotes therein].

The attorney in this case intentionally attempted to violate sections 1, 2, 3, & 4 by trying to get a witness to say his client was the best parent over the primary caretaking mother. This was done with private emails that the mother could not defend, “care packages” which included documents that showed the mother in a bad light without her follow up explanations, and requests to talk with the counselor about the mother’s “problems”.

In addition to RPC 3.3 the attorney in this matter also attempted to violate RPC 8.4 for their misconduct, which includes falsities to the court, misrepresentations about facts, attempts to influence others, etc. Clearly our courts have said this is one of the more egregious problems an attorney can have. The Respondent and his attorneys attempts to levy their version of the facts of this family, without allowing the mother to respond is clearly a form of this kind of violation and is not condoned by the courts. E.g. *In re Disciplinary Proceeding Against Jackson*, 180 Wn.2d 201, 322 P.3d 795 (2014).

The emails between the Respondent and his counsel in this matter appear to potentially violate the criminal code regarding tampering and/or influencing a witness.

D. Although sanctions are certainly appropriate to preserve the integrity of the tribunal, in this case they were inappropriate because of the past ruling in the this court about the respondent waiving attorney-client

privilege, and the reason why these emails were brought to the court's attention.

Arguably it was inappropriate for the court to sanction Ms. Roe in this matter when she and her attorney did what clearly appeared to be the right thing in pointing out the serious misconduct that Mr. Mason and the father attempted and did as to witnesses in this case. First, it was inappropriate because the judge herself had already found that the father waived these emails that were in his "laptop" by giving them to a third party, therefore, why did it matter that they came from the Kindle, they are the same emails from one email account, that she had just ruled were waived.

This sanction of \$2,500 in attorney's fees were even more unjustified because the mother and her attorney were relying on the previous ruling regarding the father and his attorney had waived the confidentiality of those emails in a prior ruling. This is further compounded by the fact that there were not two email accounts, one for the laptop and one for the Kindle; there was only one email account we are talking about here. It is also ironic that the mother's attorney also referred to the Kindle in the argument about the laptop, where the judge ordered the all the emails waived. What is the difference between the father giving the laptop to a forensic specialist third party to access those emails, versus giving his children the Kindle, which had access to those emails at the mother's house. There seems little difference which you can see in the mother's attorney's arguments. It would seem that the husband would have been even be more concerned about keeping the confidentiality of the Kindle's access to his emails, than the

laptop that was with the professional computer geeks. The wife would have obviously benefited more than a professional from access to these emails; something the husband should have considered since he knew the Kindle could access his email as well and he did nothing about it.

Again, it seems patently unfair to sanction the father for failure to disclose the memory of the laptop, hide the hard drive, be found to have been instrumental in trying to obstruct the wife's access to the laptop and also sanction the wife for pointing out that there was misconduct information in the emails that she ordered the privilege waived. The mother should not have been sanctioned for her helpful investigation and locating the father's attorneys misconduct, and especially since she knows nothing about the RPC's.

E. The Judge used the wrong standard in analyzing the wife's CR60(b)(4) motion to vacate and instead should have vacated the parenting plan, remedied the problem of bias in the counselor, potentially removed Mr. Mason from the case, and ordered a new trial.

The facts are clear, the mother's expert found emails from the father to his attorney, and visa versa, that seemed to indicate they had had a plan to influence Ms. Chase against the mother, which all was clearly to be kept secret from both the court and the Petitioner and counsel. CP 870-873, 1275-1307. It is true that one or two of these emails were at least partially located and read prior to trial on the parenting plan, and if the court rule CR 60(b)(3) was used to request a new trial, this would be an appropriate application of the law, however, if the issue is misconduct by one of the

parties, and there is evidence of such, the “newly discovered evidence” rule does not apply to a (b)(4) motion, nor does the rule indicate that the evidence must be such that it would change the outcome of the trial. Taylor v. Cessna Aircraft Co., Inc., 39 Wn.App. 828, 696 P.2d 28, (Div. 3 1985).

In the Taylor, supra, the Plaintiff had known about the alleged misconduct of Cessna before trial, and so the trial judge denied his CR60 motion to vacate, however, our Appeals Court indicated that CR 60(b)(4) misconduct motions do not require either the newly discovered evidence rule nor the rule that says the evidence must be such that it would change the outcome of the trial. The Taylor court overturned the judge’s denial of the CR60 motion. We have a similar situation here, the judge explicitly indicated that she would not consider the alleged misconduct emails because the Petitioner knew about this evidence before trial, and it would not have affected the outcome. CP 2196-2199. But the judge did not read the emails for this reason. This was error and should be a clear basis in and of itself for a new trial in this matter. Id.

F. The discovery rules under CR26 do not apply to this matter since the Appellant’s counsel did not do find the emails at issue in the discovery process, however, even if they were provided with the production of materials through that process, that does not preclude the documents from being used by the court and parties in the case.

At one point in the Judge’s discussion about why the use of these client/attorney emails was improper, she cited the court rules on discovery, where a party or their attorney finds some confidential attorney/client correspondence in the production of documents. Id. However, there are two

problems with this analysis, first, these emails were not discovered amid documents produced because of a discovery request, and secondly, The *Evergreen School District* case indicated that such an inadvertent disclosure in the discovery process can waive the confidentiality of the privileged material to the other side. *Evergreen School District*, supra.

G. Even though the Cessna Aircraft case indicates that a CR60(b)(4) motion to vacate due to misconduct does not require the “discovery of new evidence” rule, the discovery rule would not have precluded Ms. Roe from using the misconduct emails to support her motion under the due-diligence rule.

The judge found that these Kindle emails were not newly discovered evidence therefore the CR 60 motion must be denied summarily. *Id.* However, the judge did not provide any analysis under the law interpreting the application of this court rule on that issue and the issue of “due diligence” as to this evidence. *Id.*

A new trial on the ground of newly discovered evidence will not be granted unless the the evidence (1) will probably change the result of the trial (which according to *Cessna*, supra, does not apply); (2) was discovered after trial; (3) could not have been discovered before trial even with the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. See *Graves v. State, Dep't of Game*, 76 Wn. App. 705, 887 P.2d 424 (1994). Evidence is not "newly discovered" if it was known, or under the circumstances must have been known, or by the exercise of reasonable diligence should have been known by the moving party prior to the submission of the case. *Davenport v. Taylor*, 50 Wn.2d 370, 311 P.2d

990 (1957). The question as to the application of this court rule is then was their due diligence in locating the emails?

In this case, after the parenting plan trial, the court found that the husband and his attorney were “complicit” in hiding the hard-drive emails until ordered to turn them over. The record shows that the mother repeatedly claimed her husband had hidden her personal files that were on the laptop in his possession, the same laptop he used to communicate with Mr. Mason, however, she could not prove this allegation. It wasn't until the Respondent and his counsel admitted to destroying this evidence on Feb. 23, 2016, that the Court believed Cathrine's claims. In fact, the order from that February hearing on the emails, laptop and its memory, and the other matters is very explicit that they conspired to hide the hard drive, and waived the privilege as to any emails that were on the laptop (which parenthetically had to also be on the Kindle).

More specifically, Ms. Roe testified that the emails disappeared for months then reappeared. CP 1241-1329. Carol Peden’s declaration confirmed that this is possible by toggling 2-step authentication on-and-off. On February 23rd, 2016 Craig Mason opened the door to allowing the reviewing all attorney/client emails. At that same time, Mr. Mason also claimed for the first time that the Petitioner “hacked” her husband’s emails. This opened the door for a forensic examination of the Kindle to ascertain whether there was any hacking. Peden Forensics invoices and declarations on file with the court show that prior to April 25th, 2016, Peden Forensics

was only working on ascertaining whether Craig Mason's claims about "hacking" were true. Before this on April 4th, 2016, the Respondent filed a declaration claiming the Appellant fabricated emails, and was sending and receiving emails on behalf of her husband to mislead the court. This opened the door to recovery of the emails from the Kindle. Peden Forensics invoices, which were filed with the court show that Peden Forensics recovered the emails on April 25th, 2016. This recovery was in response to the husband's declaration of April 4th, 2016, and was filed to prove whether the emails were "fabricated" by the Petitioner as claimed. This clearly showed that any attempt to say that Ms. Roe was able to get these emails was false, and that even with due diligence, because of the Respondent's actions, with his attorney, it would not have been possible to provide this evidence before trial based on the court's own findings that he and his attorney hid the evidence of these emails clandestinely.⁷

H. It is inappropriate to allow someone to testify as an expert in recommending a custody order, from a due process standard, if they were never appointed to provide a forensic such an opinion.

Spokane County Local Rules as to the appointment of a Guardian Ad Litem in custody cases indicates that once there is a formal request made by either party in a custody matter, for the appointment of a GAL, there can be no attempt by either party to take the child to a counselor or therapist to

⁷ See Carol Peden's declaration which made it clear that the Kindle mini-pad was not a stand-alone email computer, that it was a "slave" to any computer that had the capability to see and send out emails, such as the laptop that was cleaned out by the Respondent. Therefore, and as they say ipso-facto, Ms. Roe could not have hacked or gotten these emails until the husband put the hard-drive back in the laptop, after the parenting plan trial.

obtain a professional opinion from that expert for use in the custody case, without a specific order. See Spokane County Superior Court Local Rule LCR 94.05(e), which states,

(e) Discovery Stay. Upon the filing of the motion pursuant to (b), no discovery directly involving the child/children, including any interview of the child/children by investigators, psychologists, psychiatrists or other professionals, shall proceed without an order of the court. If the motion is not heard within 30 days, the discovery stay order expires unless extended, for good cause, by further order of the court.

The judge in this case ordered that the original GAL withdraw from the case due to a conflict of interest with the wife's attorney's firm (used as her divorce attorney). The Judge did not however, appoint another GAL to take her place. Meanwhile, Joan Chase was appointed by court order to be the children's therapist only. In fact, this appointment was pursuant to the GAL's recommendation. Id. When Ms. Chase was appointed to be the children's counselor/therapist it would have made no sense, given the purposes of LCR 94.05(e) for her to be appointed to make a separate recommendation from the GAL, therefore, there was no order allowing her to provide her expert opinion as to placement to the court, given this local rule and its purpose. The judge should not have allowed Joan Chase to testify in this matter since doing so violated the mother's right to seek discovery about that opinion. As it stood there was nothing to put the mother and her counsel on notice that they even needed to do discovery of Ms. Chase's custodial opinion, no matter what she said at trial. Allowing this to happen, given this local rule was tantamount to trial by ambush, which was further magnified

by the father's camp constantly poisoning the well as to the mother's fitness to be the primary custodian. Had the father ever told Ms. Roe of his attempts to influence Ms. Chase, she and her counsel would have been ready for this possibility of her providing her custody opinion at trial. This should in and of itself call for a new trial, one with a new GAL, without Joan Chase in the mix, and a new untainted judge to make this even more objective.

I. If this ruling is overturned, the Appellant asks that this matter be sent to a new judge for a ruling on this matter.

The judge in this case made several errors in her ruling regarding this matter. It clearly appeared that care was not taken in the analysis of the emails, the motion bases (CR60(b)(4) and that the discovery rule did not apply to this matter, and completely ignored even the Respondent's suggestion to do an in-camera review of the emails. Given the extensiveness of this appeal, the fact that the Appellate had to make so many allegations about this judge and her decision to deny this motion, it would seem appropriate that a new judge be appointed so that a completely objective parenting plan can be ordered.

When there is evidence that a judge has made a ruling that is unjustified, and may be related to an appearance of unfairness, in so many ways that it would be hard to obtain a fair ruling on remand, the Appeals Court is authorized to order the Superior Court to assign a new judge for the remand. See e.g. *In re Marriage of Muhammad*, 153 Wn.2d 795, 108 P.3d 779, (2005).

IV. Conclusion

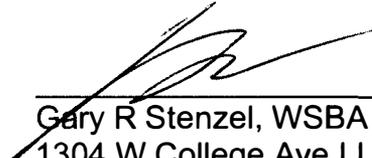
This is an appeal of a CR60 motion for a new parenting plan trial that was denied. The Petitioner's request for a new trial was based on the interception of emails that clearly appeared to describe a plan to influence the children's counselor against her, as well as emails showing that it may have worked, and most of all this plan included an attorney-client pact to keep this plan from the court, the Petitioner and her counsel. Upon the court's after trial finding that the Respondent's emails to his attorney were waived because he allowed a third party to view them, the Petitioner was then able to show this plan to the judge. However, the judge failed to use her own analysis and finding to remind the Respondent that the confidentiality of those emails was waived in her previous order. Then to compound this she found, contrary to that previous order that they were not waived. And then she compounded this by using the wrong analysis for this motion, failed to read the emails in camera and/or consider them as a clear violation of the court rules regarding alleged misconduct by an opposing counsel. Then she not only denied the CR60 motion, she sanctioned the Petitioner for filing the emails in the court file, citing RPC and discovery rules that did not apply to this situation.

In addition, the judge failed to appoint a new GAL after dismissing the appointed GAL, and allowed the children's counselor to testify, even though she was not appointed for that purpose. All of this seems to suggest a lack

of desire to hear this matter again, or to believe the Petitioner without studying it out. Each one of these errors seems to suggest that there in the Petitioner's mind is a reason that it would not be a fair trial on remand to go back to this judge. This clearly has been a reason to send the matter back to court for a new parenting plan trial.

The Appellant asks the court to vacate the court's order denying the CR60 motion and order a new trial with a new judge.

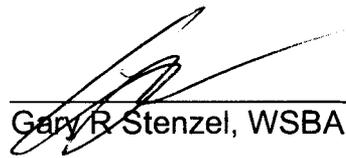
Respectfully provided this 12th day of November 2017 by,



Gary R Stenzel, WSBA #16974
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Spokane, WAS 99201
Email: stenz2193@comcast.net

Declaration of Service

I Gary R Stenzel hereby state that I will deliver a copy of this brief to the Respondent's counsel by personally serving the same on Mr. Mason's office and file the conformed cover sheet to this brief with this court. I make this statement under penalty of perjury under the laws of the state of Washington on this 12th day of November 2017.



Gary R Stenzel, WSBA #16974