

No. 74601-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION I

M. CASEY LAW, PLLC, et al

Appellants,

vs.

COLE WATHEN LEID & HALL, PC, et al

Respondents.

RESPONDENTS' BRIEF

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I. IDENTITY OF RESPONDENTS

Respondents, Rick Wathen and Cole Wathen Leid & Hall PC (CWLH), were counsel for Allstate in the underlying matter.

II. ASSIGNMENT OF ERROR

A. Respondents assign no error to the decisions of the trial court below.

B. Respondents request all reasonable attorneys' fees and expenses on appeal.

III. STATEMENT OF FACTS

A. Procedural History.

This lawsuit arises out of two insurance claims submitted by the underlying plaintiff, Ms. Alvarez, which were denied by Allstate. Allstate concluded that Ms. Alvarez had misrepresented material facts. Plaintiff filed her suit against Allstate Insurance Company. Additionally, plaintiff filed suit against Allstate's attorney, individually, as well as counsel's law firm.

Respondents advised plaintiff's four attorneys that Respondents considered the lawsuit against counsel and the law firm to be frivolous and not well grounded in existing law or fact. Respondents requested that plaintiff's counsel dismiss these causes of action. Plaintiff's counsel refused. Respondents filed a

motion for summary judgment seeking dismissal of the causes of action and requesting sanctions under CR 11. CP 258-281. The court granted summary judgment.

1. That plaintiff's counsel misrepresented the factual record to the trial court;

2. Plaintiff's counsel violated CR 11 by bringing causes of action against Respondents which were not well grounded in existing fact or law. Attached as Appendix A is a copy of the Verbatim Transcript of Proceedings, CP 693 -731, see pages 722-728.

Thereafter, Appellants filed a motion for reconsideration. CP 510 – 522. In support of the motion for reconsideration, Appellants offered new declarations from various other attorneys purporting to support bringing the causes of action. However, in Appellants' motion for reconsideration, they failed to offer any evidence, declarations, etc. as to why this information was not available at the time of the original motion for summary judgment. CP 591-603. After full briefing by both parties, the trial court denied the motion for reconsideration.

///

B. Background.

The plaintiff was evicted from her premises for nonpayment of rent in September of 2013. At that time, she was living in a subsidized house. Apparently, she was unable to pay her portion of the rent. As a result, the landlord initiated eviction proceedings. The eviction proceedings culminated with an order whereby the plaintiff abandoned all of her personal property to the landlord in exchange for the landlord not pursuing claims for the extensive damage caused at the premises by the plaintiff. CP 440:5-17. According to the plaintiff, her children were then sent to live with other relatives. The plaintiff herself moved elsewhere. CP 259.

During the relevant timeframe, the plaintiff owned a 2002 Kia Sedona minivan. According to the plaintiff, the minivan had not been operational for several years due to problems with the engine. The vehicle had a flat tire, dead battery and could not be started over the intervening years prior to her eviction. CP 259.

The plaintiff had purchased a renter's policy of insurance which provides coverage pursuant to the terms and conditions of that policy and not otherwise. CP 115-163.

Following plaintiff's eviction, she claims that she placed numerous items inside the broken down Kia Sedona for storage.

She claimed these items included flat screen TVs, computers, and even plaintiff's jewelry. Then, in mid-November of 2013, plaintiff reinstated an Allstate automobile policy for full coverage on the automobile which she conceded was not operational and had admittedly significant mechanical problems. CP 259.

Plaintiff then claims shortly after purchasing insurance on the van, that some identified individual stole the van and stole all the valuables contained therein. This theft was purportedly discovered on December 2, 2013. But, the plaintiff didn't report the theft to the police or Allstate for another two weeks. *Id.* See also CP 247-257.

Allstate began the process of investigating the claims. This investigation included obtaining a recorded statement of the plaintiff herself. CP 247-257. Initially, plaintiff claims that the reason why the loss was reported late was because she was hospitalized between the timeframe of discovering the alleged theft and when she was able to report the loss. CP 252. She later changed her story and indicated the reason why the claim was reported late was because she was actually visiting relatives in Eastern Washington. CP 211-243, see CP 221, at 36:6-16, CP 224, 48:7- 49:11.

After the vehicle was recovered, plaintiff was asked to identify damage to the van she was claiming as a result of the theft.

Plaintiff claimed multiple areas of damage on the vehicle which appeared to have been older damages. Plaintiff was also questioned at length about the contents claim being submitted. CP 260.

As a result of the highly suspicious claim being submitted by the plaintiff, Allstate exercised its statutory and contractual right to request an examination under oath. As a result of the information gleaned through the totality of the investigation, Allstate concluded that Ms. Alvarez had misrepresented and concealed numerous material facts under the policies of insurance, thereby voiding coverage.

C. Allstate Retains Counsel To Conduct the Examination Under Oath.

Allstate retained the undersigned to take the examination under oath of the plaintiff. The undersigned had no oral communication with the plaintiff.¹ For this reason, the trial court had an exact "transcript" of the communications made by the undersigned to the plaintiff. The entirety of the communication with plaintiff is documented in CP 35-41 which constitute the only three

¹ The only potential exemption to this would be an exchange of pleasantries off the record before the examination under oath was conducted and the transcribed examination.

letters directly sent to the plaintiff in this matter. All remaining communication was through plaintiff's counsel.

D. Plaintiff Retains Counsel.

By letter dated June 9, 2014 the undersigned was notified that the plaintiff had retained counsel. CP 42-43. It is important to note that this letter was sent directly to the undersigned's client. Again, there were no oral communications with opposing counsel. But rather, the entirety of the communication between counsel is documented in written correspondence.²

A dispute arose between counsel concerning plaintiff's attempt to characterize the undersigned as not really the attorney representing Allstate. Plaintiff's counsel believed that RPC 4.2 did not apply. As a result, after numerous correspondences back and forth, the undersigned was forced to file a formal complaint with the Washington State Bar Association. The Bar Association investigated and rendered its decision. Attached as **Appendix B** is a copy of the letter. CP 244-246. At all times material, Ms. Labourr was represented in the Bar dispute by Mr. Casey, one of the other plaintiff's attorney in this matter. Believing the matter had been

² Again, the only exception to this would be exchange of pleasantries off the record prior to the beginning of the examination under oath.

sufficiently addressed by the Bar Association, the undersigned did not pursue the matter further.

Thereafter, plaintiff's counsel disputed plaintiff's obligations under the policy of insurance. The trial court was provided with the entire record of all communication between counsel. CP 35-95, CP 97-99, CP 285-293, CP 294-300.

The gist of the "dispute" was that plaintiff's counsel did not believe that the plaintiff had an obligation to submit to an examination under oath. In response, the undersigned provided certified copies of the policies, and provided citations to the specific provisions in the policies authorizing such examinations. The undersigned also provided to plaintiff's counsel citations to Washington statute authorizing examinations under oath. CP 45-46, 47, 61-62. The examination was taken on July 30, 2014. CP 424-455.

E. Plaintiff Sues Opposing Counsel.

After the claims were denied, Plaintiff filed suit against Allstate. Plaintiff then also sued the undersigned in his personal capacity and the undersigned's law firm. The two causes of action asserted against the undersigned and his firm were for violations of

the Consumer Protection Act and for the tort of negligent misrepresentation.

F. The Defense Counsel Complied With *MacDonald v. Korum Ford*, 80 Wn. App. 877, 912 P.2d 1052 (1996) Prior To Bringing Their Motion.

The undersigned had requested, on three separate occasions, in writing, that the plaintiff's attorney dismiss the cause of action prior to bringing their motion for summary judgment and for CR 11 sanctions. In each instance, the undersigned provided the relevant case law which clearly shows that these causes of action are frivolous. CP 98-99.

In particular, the undersigned provided the citation to the decision of *Manteufel v. Safeco Ins. Co. of Am.*, 117 Wn. App. 168, 68 P.3d 1093 (2003) in which the court found CR 11 sanctions under nearly the identical circumstances once before. Despite being advised on three separate occasions and requesting dismissal, plaintiff's counsel steadfastly refused. CP 98-99.

G. Procedure After Summary Judgment.

Thereafter, the deposition of the plaintiff, Ms. Alvarez was taken on June 9, 2015. During the deposition, Ms. Alvarez conceded that certain responses to Requests for Admissions provided by her attorneys were incorrect. CP 784-798. During the

deposition, she also conceded that much of the information provided to Allstate was not true. The undersigned then requested, on two separate occasions, that plaintiff's counsel voluntarily agreed to dismiss the remaining causes of action. Rather than dismiss the lawsuit, the four Appellants in this matter filed notices of intent to withdraw. CP 802-804.

Thereafter, Ms. Alvarez voluntarily dismissed her remaining causes of action thus eliminating the need for further motion for summary judgment and a further request for sanctions.

IV. ARGUMENT AND AUTHORITY

A. Standard of Review

Decisions either denying or granting sanctions under CR 11 are reviewed for an abuse of discretion. *Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 388, 858 P.2d 1054 (1993). In order for the decision to be an abuse of discretion, the trial court's decision must be manifestly unreasonable or based upon untenable grounds, otherwise, the sanction should be upheld. *Servis v. Land Resources, Inc.*, 62 Wn. App 888, 894, 815 P.2d 840 (1991) *rev. denied*, 118 Wn.2d 1020, 827 P.2d 1012 (1992). Additionally, a Washington court has the inherent power to assess litigation expenses, including attorneys' fees, against attorneys for bad faith

litigation conduct. *Wilson v. Henkle*, 45 Wn. App 162, 173, 724 P.2d 1069 (1986). RCW 2.28.010(5).

The facts of this case reveal that the causes of action asserted by the Appellants were not well grounded in existing law or fact and were brought for an improper purpose. Additionally, Appellants misrepresented material facts to the trial court. Under these circumstances, the decisions of the trial court are reviewed for an abuse of discretion giving substantial deference to the trial court.

B. The Trial Court Did Not Abuse its Discretion by Awarding CR 11 Sanctions

Civil Rule 11 provides:

Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record. . . .The signature . . . of an attorney constitutes a certificate by the . . . attorney that the . . . attorney has read the pleading, motion, or legal memorandum; that to the best of the . . . attorney's knowledge, information, and belief, formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase

in the cost of litigation If a pleading, motion , or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it . . . an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

Civil Rule 11 deals with two types of filings: baseless filings, those lacking factual or legal basis, and those made for improper purposes. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 217, 829 P.2d 1099 (1992). A filing is “baseless” when it is not well grounded in fact, not warranted by existing law, or not warranted by a good faith argument for the alteration of existing law. *Hicks v. Edwards*, 75 Wn. App. 156, 163, 876 P.2d 953 (1994), *review denied*, 125 Wn.2d 1015 (1995). The purpose behind Civil Rule 11 is to deter baseless filings, not filings which may have merit. *MacDonald v. Korum Ford*, 80 Wn. App. 877, 884, 912 P.2d 1052 (1996) (citing *Bryant v. Joseph Tree*, 119 Wn.2d at 220). In addition, CR 11 was designed to reduce “delaying tactics, procedural harassment, and mounting legal costs.” *Bryant*, 119

Wn.2d at 219 (quoting 3A L. Orland, Wash. Prac., *Rules Practice* § 5141 (3d ed. Supp. 1991)).

A trial court may not impose sanctions for a baseless filing unless it finds that the attorney who signed and filed the pleading failed to conduct a reasonable inquiry into the factual and legal basis of the claims. *Bryant*, 119 Wn.2d at 219-20. When reaching its decision, the court applies an objective standard, asking whether a reasonable attorney could believe his or her actions to be factually and legally justified. *Bryant*, 119 Wn.2d at 220. *See also*, *Madden v. Foley*, 83 Wn. App. 385, 390, 922 P.2d 1364 (1996); *MacDonald*, 80 Wn. App. at 883.

C. Plaintiff Had No Cause Of Action Against Rick Wathen or Cole, Wathen, Leid & Hall P.C. Under the CPA.

The courts of this state have squarely addressed this exact issue in *Manteufel v. Safeco Ins. Co. of Am.*, 117 Wn. App. 168, 68 P.3d 1093 (2003) and awarded CR 11 sanctions.. In *Manteufel*, the insured filed suit against counsel representing Safeco.³ In *Manteufel*, suit was brought against the insurer's attorney for

³ The undersigned was the attorney representing Safeco.

alleged violations of the Consumer Protection Act, as well as tort causes of action.

The *Manteufel* court specifically stated: “[w]e reject Manteufel’s argument that Wathen violated the CPA and acted in bad faith.” *Id* at 174. The court expressly recognized the Washington Supreme Court’s decision in *Haberman v. Washington Pub. Power Supply Sys., et. al.*, (1987) 109 Wn.2d 107, 744 P.2d 1032, amended 109 Wash.2d 107, 750 P.2d 254, reconsideration denied, appeal dismissed 109 S.Ct. 35, 488 U.S. 805, 102 L.Ed.2d 15:

In which it expressly held that Washington law does not allow claims against attorneys under the CPA and specifically does not allow claims directed at the attorney’s competency or strategy. *Id*, at 169.

The *Manteufel* court held:

Accordingly, the trial court followed ***the clear law of this state*** in granting summary judgment to Wathen and dismissing Manteufel’s actions against him, his wife, and his law firm for Wathen’s actions as Safeco’s attorney in trying to resolve Manteufel’s claim of loss for the piano.

117 Wash. App., at 174, emphasis added.

In doing so, the *Manteufel* court recognized the *Haberman* decision “... in which the court held the CPA does not involve

lawsuits against an attorney on grounds of competency to practice law or legal strategy..." *Id*, at 176.

The court further went on to hold, "***the frivolousness*** of Manteufel's suit would have been clear to Manteufel had he simply read the cases Wathen provided." *Id*, at 177. Emphasis added.

The exact same line of cases and the *Manteufel* decision were provided to the Appellants. The rule of law is clear and unambiguous. An opposing party cannot freely file suit against an opposing party's attorney based upon allegations arising out of an insurance contract, violations of the CPA claim, or various tort claims.

The court in *Jeckle v. Crotty*, 120 Wash. App. 374, 85 P.3d 931 (2004) held:

Specifically, allowing a plaintiff to sue his or her adversary's attorney under a consumer theory infringes on the attorney-client relationship. The Connecticut court has "declined to recognize the right of the client's opponent to sue the attorney under CUTPA [*Connecticut Unfair Trade Practices Act*] on the basis of the professional services the attorney had rendered for the client." *Larsen Chelsey Realty Co. v. Larsen*, 232 Conn. 480, 496, 656 A.2d 1009 (1995); see also *Jackson v. R.G. Whipple, Inc.*, 225 Conn. 705, 627 A.2d 374, 385 (1993).

In a recent case, the Connecticut court held a consumer protection action did not lie in a case involving an attorney's execution of a judgment against the plaintiff. *Suffield Dev. Assocs. v. Nat'l Loan Investors, L.P.*, 260 Conn. 766, 781-82, 802 A.2d 44 (2002). The court quoted an earlier decision as follows: "Providing a private cause of action under CUTPA to a

supposedly aggrieved party for the actions of his or her opponent's attorney would stand the attorney-client relationship [*385] on its head and would compromise an attorney's duty of undivided loyalty to his or her client [***14] and thwart the exercise of the attorney's independent professional judgment on his or her client's behalf." *Id.* at 783-84 (quoting *Jackson*, 225 Conn. at 727).

Given the potential for affecting the existing attorney/client relationship, we conclude a CPA action does not lie under these facts. See *Larsen*, 232 Conn. 480; *Jackson*, 225 Conn. 705; *Suffield*, 260 Conn. 766.

The issue is whether the trial court erred in dismissing Dr. Jeckle's remaining tort claims under *CR 12(b)(6)* and concluding the attorneys and law firms have absolute immunity from liability for acts arising out of representing their clients.

Id., at 384.

Similar approaches to naming individuals in insurance disputes have been flatly rejected by the courts of this state. In the decision of *International Ultimate Inc. v. St. Paul Fire and Marine Ins. Co.*, 122 Wn. App. 736, 87 P.3d 774 (2004), the Court of Appeals addressed the same claims brought against a claims adjuster in her personal capacity. The claims in *International Ultimate* were similar to the claims at bar. The Court of Appeals again clearly articulated the unambiguous law in the state of Washington in its holding:

To be liable under the CPA, there must be a contractual relationship between the parties. Here, the

contractual relationship was between IUI and its insurance providers. We dismiss IUI's claims against Zeller because the CPA does not contemplate suits against employees of insurers.

We also dismiss IUI's common law negligence claim. IUI cites to *Dodson v. Economy Equipment Co.* [188 Wash. 340, 62 P.2d 708 (1936)] for the proposition that as an agent, one can be held personally liable. But *Dodson* and its progeny have all limited its application to circumstances where the tortfeasor was a corporate officer who actively participated in a conversion.

Id. at 758.

The Washington Supreme Court has made it abundantly clear that claims directed at opposing attorneys are not actionable under the Washington Consumer Protection Act. *Haberman v. Washington Pub. Power Supply Sys., et. al.*, (1987) 109 Wn.2d 107, 744 P.2d 1032, amended 109 Wash.2d 107, 750 P.2d 254, reconsideration denied, appeal dismissed 109 S.Ct. 35, 488 U.S. 805, 102 L.Ed.2d 15.

In *Haberman*, Plaintiffs filed suit against WPPSS for various causes of action. Plaintiffs also brought suit against all of the professionals employed by WPPSS in connection with the sale of certain bonds. The trial court dismissed the causes of action against the respondent professionals for Plaintiffs' failure to state a

claim upon which relief can be granted pursuant to CR 12(b)(6). *Id.*

at 114. The court stated:

Intervenors' bald assertions that the respondent investment advisors were, by definition, engaged in entrepreneurial aspects for their business are without merit. In their professional malpractice claims against the respondent advisors, intervenors attack the advisors' exercise of professional judgment, not the entrepreneurial aspects of their services. Therefore, we affirm the trial court's dismissal of intervenors' CPA claims against respondent professionals.

Id. at 170.

The Supreme Court addressed the issue in *Short v. Demopolis*, 103 Wn.2d 52, 691 P.2d 163 (1984). Again, the Supreme Court recognized that certain claims under the Consumer Protection Act against attorneys are properly dismissed pursuant to CR 12(b)(6). *Id.* at 61. Causes of action based upon allegations of negligently gathering essential facts and evaluating settlements, allegations of untimely responses, and actual motion practices are not actionable under the CPA. *Id.* These claims are concerned with the actual practice of law, and as such simply are not actionable under the CPA. *Id.* at 61-62.

Washington Court of Appeals has clearly recognized and stated that claims directed at the competence of or the strategy of an attorney are not actionable under the Consumer Protection Act. *Quinn v. Connelly*, 63 Wn. App. 733, 742, 821 P.2d 1256 (1992). Such claims are exempt under the Consumer Protection Act. *Id.* See also *Demopolis v. Peoples National Bank*, 59 Wn. App. 105, 119, 796 P.2d 426 (1990). (The Consumer Protection Act does not apply to claims directed to the competence of strategy employed by attorneys; attorneys defamatory allegation is neither an entrepreneurial nor a commercial endeavor and as such, cannot give rise to a Consumer Protection Act claim.)

There is no legal cause of action as against Allstate's attorneys of record. The case of *Gruenberg v. Aetna Insurance Company*, 9 Cal.3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973) stands as the seminal case of insurance bad faith law in the country.⁴ The *Gruenberg* decision has been cited by over 2000 court decisions and legal authorities. CP 100-113.

Gruenberg established the tort of insurance bad faith. The very first insurance bad faith case recognized that the attorneys

⁴ The *Gruenberg* decision has been cited favorably in *Wickswat v. Safeco Ins. Co.*, 78 Wn. App. 958, 904 P.2d 767 (1995)

who are not parties to the insurance contract are not subject to the implied duty of good faith and fair dealing. In dismissing the tort claims as against the attorneys, the court stated, "obviously, the noninsured defendants were not parties to the agreements for insurance; therefore, they are not, as such, subject to an implied duty of good faith and fair dealing." *Id.* at 1039. Moreover, corporate agents and employees acting for and on behalf of the corporation cannot be held liable for inducing a breach of the contract since being in a confidential relationship to the corporation, their action in this respect is privileged. *Id.*

In this case, Allstate's attorneys owed no direct duty to Plaintiff. There is no contractual relationship between Allstate's attorneys and the plaintiff. As such, there is no duty owed by Allstate's attorney to Plaintiff. There is no cause of action available to Plaintiff against Allstate's attorneys.

The courts of this state and others have made it abundantly clear that one may not simply file suit against one's opposing counsel for violations of the Consumer Protection Act or various tort causes of action arising out of representing an insurance carrier.

The rule of law in Washington is clear and well settled. No cause of action is available to plaintiff for her complaints regarding the strategy employed by opposing counsel or the competence of opposing counsel in the practice of law. Thus, under the clear and unambiguous decisions of the courts in this state, no cause of action lies under the Consumer Protection Act. In other words, the causes of action were not well grounded in existing law or fact, therefore, they were frivolous and in violation of CR 11.

D. No Cause of Action for Negligent Misrepresentation.

Plaintiff Alvarez also filed suit against the undersigned and the firm for unsubstantiated allegations of misrepresentation. At best, the plaintiff's argument was simply a disagreement between counsel as to the law. At worst, it is intentional retaliation brought for the sole purpose of harassing counsel. Appellants asked the court to open a Pandora's box of endless litigation. Whenever one attorney disagrees with the opposing attorney, the floodgates of civil litigation would be opened allowing attorneys to sue attorneys based upon differences of opinion of law and interpretation of fact. This is simply not the law in this state nor does it support any rational or good faith extension of law.

To begin with, it is important to keep in mind that negligent misrepresentation must be proven by clear, cogent, and convincing evidence. *Westby v. Gorsuch*, 112 Wn. App. 558, 576, 50 P.3d 284 (2002). Washington has adopted a Restatement (Second of Torts) with respect to the elements of misrepresentation. *Id.* The Restatement requires:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused by them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Id.

Additionally, unless the party making the representation has a public duty to provide the information, the liability is further limited as follows:

(A) By the person or one of a limited group of persons for whose benefit the guidance he intends to supply the information; and

(B) And reliance upon it in a transaction which he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction. *Id.* at 576-577 citing

Restatement (Second) of Torts, § 552(2). See also Restatement (Second) of Torts § 552(3).

The undersigned does not owe a public duty to provide any of the alleged information concerning the private transaction involving the plaintiff and her insurer Allstate. Plaintiff had no evidence of any of the necessary elements of negligent misrepresentation. In the Verbatim Transcript of Proceedings, Appellants couldn't articulate any basis for the claim. Appellants failed to present any evidence that false representations were made. As set forth in the Declaration of Wathen, the entirety of communication directly with Ms. Alvarez consists of three letters, along with the questions and answers in the examination under oath.⁵ CP 35-41. The remainder of the communication was through counsel.

In *Madden v. Foley*, 83 Wn. App. 385, 387-388, 922 P.2d 1364 (1999) the plaintiff sought damages against her former companion for breach of contract and for tortious conduct for alienation of affection. The trial court imposed CR 11 sanctions against the plaintiff's counsel and his law firm on the basis that the

⁵ The exclusion of this would be introductory greetings at the examination under oath and the examination under oath transcript itself.

tort causes of action against defendants were grounded in alienation of affection, a cause of action that no longer exists in Washington. *Id.* at 390. The Court of Appeals upheld the imposition of CR 11 sanctions and found that plaintiff's counsel violated CR 11 by failing to conduct a reasonable investigation into whether the complaint filed against defendants had a proper foundation in fact or law.

The court emphasized that it was difficult to conceive of any reasonable argument that would allow alienation of affections to remain as a viable tort in homosexual relationships after it has been abolished in cases involving traditional marital relationships. The court further noted that a complaint is legally frivolous if it is not based on a plausible view of the law and concluded that the trial court did not abuse its discretion in imposing CR 11 sanctions. *Id.*

In *MacDonald v. Korum Ford*, 80 Wn. App. 877, 912 P.2d 1052 (1996) the plaintiff Myrna MacDonald worked as a salesperson in the used car division of Korum Ford and was terminated due to lack of production. *Id.* at 880. MacDonald's attorney John Cain caused a complaint to be filed against Korum Ford, alleging sexual discrimination and wrongful discharge. Subsequently, MacDonald provided deposition testimony that

undermined the factual bases for her claims. Cain, however, continued to prosecute the case. *Id.* at 881.

Korum Ford later prevailed on summary judgment and moved for attorneys' fees and costs pursuant to Civil Rule 11. The trial court granted the motion, holding that Cain's decision to continue to prosecute the case after the deposition was frivolous and sanctionable under CR 11. In reaching its decision the trial court found:

(1) after MacDonald's deposition, Cain continued to rely "almost exclusively" on MacDonald's assurances that she could provide witnesses and develop evidence supporting her case; (2) Cain failed to conduct an "adequate independent investigation"; and (3) Cain failed to advise his client, as the evidence developed, that she should abandon the litigation.

Id. at 882-883.

The Court of Appeals found that CR 11 sanctions were appropriate for the time period after the deposition because MacDonald failed to provide evidence establishing each element necessary to prove her claims. *Id.* at 888-890. In reaching its decision, the court rejected Cain's argument that after MacDonald's

deposition, he continued to investigate the factual basis of the cause of action. The court noted:

[T]he appropriate level of pre-filing investigation is . . . tested by “inquiring what was reasonable to believe at the time the pleading, motion or legal memorandum was submitted.” [Citations omitted.] An attorney’s “blind reliance” on a client . . . will seldom constitute a reasonable inquiry.” [Citations omitted.]

Id. at 890.

Thus, the court was not persuaded by Cain’s claim that he attempted to work with two private investigators, nor his knowledge of another lawsuit by two former Korum Ford employees. *Id.*

In addition, when reaching its decision on whether to impose CR 11 sanctions, the court applies an objective standard, asking whether a reasonable attorney could believe his or her actions to be factually and legally justified. *Id.* Given the clear state of the law on these types of claims no reasonable attorney could believe that his actions were legally justified under the facts of this case.

CR 11 attorney fees are limited to those amounts reasonably expended in responding to the sanctionable filings. *Id.* at 891 (citation omitted). This award, however, should not exceed those

fees which would have been incurred had notice of the violation been brought promptly. *Biggs v. Vail*, 124 Wn.2d 193, 201, 876 P.2d 448 (1994). In this case, the offending filing is the complaint as well as related pleadings in which Alvarez continued to assert her causes of action against Wathen and the firm. Respondents satisfied their duty when they notified Appellants that a motion for sanctions would be filed. Ample notice was given to Alvarez's attorneys to investigate more carefully their client's assertions and to deter litigation abuse. See *MacDonald*, 80 Wn. App. at 891.

What sanctions should be and against whom they should be imposed is a question that is the trial court's function. In addressing an issue concerning sanctions for abuse of discovery under CR 26(g), the Washington Supreme Court recognized that the imposition of sanctions upon attorneys is a difficult and disagreeable task for a trial judge, but that it is necessary if our system is to remain accessible and responsible. *Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 355, 858 P.2d 1054 (1993) (finding sanctions should be imposed for abuse of discovery for giving evasive or misleading responses). As the *Fisons* court further noted:

“Misconduct, once tolerated, will breed more misconduct and those who might seek relief against abuse will instead resort to it in self-defense.”

Schwarzer, 104 F.R.D. at 205.

Id., at 355 (quoting Schwarzer, *Sanctions Under the New Federal Rule 11 -- A Closer Look*, 104 F.R.D., 181, 205 (1985)). The court continued:

In making its determination, the trial court should use its discretion to fashion “appropriate” sanctions. The rule provides that sanctions may be imposed upon the signing attorney, the party on whose behalf the response is made, or both.⁴ ...

The purpose of sanctions orders are to deter, to punish, to compensate and to educate. Where compensation to litigants is appropriate, then sanctioned should include a compensation award. ... In the present case, sanctions need to be severe enough to deter these attorneys and others from participating in this kind of conduct in the future.

Id. at 355-56.

⁴ Both Civil Rule 11 and Civil Rule 26(g) provide that the court may impose sanctions upon the person who signed the response, a represented party, or both.

Here, Respondents promptly notified Appellants of the possibility of sanctions. There was no legal basis for naming Wathen and the firm. Such conduct should be deterred and is the type of conduct which is subject to CR 11 sanctions. Accordingly, Respondents are entitled to an award of fees incurred in responding to such filings.

E. Appellants Misrepresented the Record to the Trial Court.

In Washington, attorneys' fees may be awarded only if authorized by contract, statute or recognized ground in equity. *Bowles v. Department of Retirement Sys.*, 121 Wn.2d 52, 70, 847 P.2d 440 (1993) (citation omitted). In granting an award based upon equitable grounds, a court may award attorneys' fees where the actions of the losing party suggest procedural bad faith or substantive bad faith. See *Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 928, 982 P.2d 131, review denied, 140 Wn.2d 1010 (2000). "Procedural bad faith is unrelated to the merits of the case and refers to 'vexatious conduct during the course of the litigation.'" *Id.* at 928 (citation omitted). "Sanctions may be appropriate if an act affects 'the integrity of the court and, [if] left unchecked, would encourage future abuses.'" *State v. S.H.*, 95 Wn. App. 741, 747, 977 P.2d 621 (1999) (citation omitted). Substantive bad faith

occurs when a party intentionally brings a frivolous claim with improper motive. *Hiller*, 96 Wn. App. at 929 (citation omitted).

The trial court found that the Appellants had misrepresented the record to the court. Specifically, Appellants asserted in the pleadings that the Bar Association had dismissed the complaint against Ms. Labourr as “unfounded.” See, Verbatim Transcript of Proceedings, CP 699:14 – 701:23; 711:16-712:13. Additionally, it was pointed out that Appellants had misrepresented the factual record with respect to the Plaintiff’s declaration regarding whether or not the theft occurred from a residence versus theft from an apartment. *Id.*, and CP 745-746.⁶ The undersigned also pointed out misrepresentations concerning discovery conferences.

Additionally, in Appellants’ motion for reconsideration, Appellants provided further incorrect information to the trial court in an attempt to avert sanctions. See CP 596:3-18. Given the court’s inherent authority, the court has broad discretion in fashioning an

⁶ One of the material issues with respect to the underlying coverage claims against Allstate was whether or not Ms. Alvarez had abandoned her property by virtue of the settlement agreement reached with the landlord. Stated another way, if the property was left on the “premises” then Allstate’s coverage determination was correct. In order to do so, Allstate established that the van in question was abandoned on the real property owned by the landlord. Appellants misrepresented that Ms. Alvarez lived in an apartment thus inferring that only the property left within the premises, i.e. the apartment, was abandoned, not property located elsewhere. CP 719:15-25.

appropriate sanction for misrepresenting facts to the trial court. Appellants have failed to establish that the trial court did not appropriately assess sanctions based upon the misconduct presented and misrepresentations to the trial court.

F. The Court Did Not Abuse its Discretion in Denying Appellants' CR 56(f) Motion.

Appellants fail to establish how the trial court abused its discretion in denying his motion for a continuance. Appellants failed to set forth any compelling reason justifying a continuance of the summary judgment hearing. They failed to establish what additional evidence would be established through additional discovery. They also failed to set forth any argument or other evidence which would show that the desired evidence would give rise to a genuine issue of material fact. Appellants simply failed to establish the burden as set forth in *Pitzer v. Union Bank of California*, 141 Wn.2d 539, 9 P.3d 805 (2000). As such, the Court did not abuse its discretion in denying Appellants' motion for a continuance.

G. The Court Did Not Abuse its Discretion in Denying the Motion for Reconsideration.

The Appellants filed a motion for reconsideration and offered declarations from other practicing attorneys all of whom suggest the claims were appropriate.

An objective standard applies, not the subjective belief of counsel. Whether or not an attorney's *prefiling* inquiry satisfies the requirements of CR 11 is measured against the objective standard. *Bryant v. Joseph Tree Inc.*, 57 Wn. App. 107, 119-120, 786 P.2d 829, amended. 57 Wn. App. 107, 791 P.2d 537 (1990), *aff'd* 119 Wn.2d 210, 829 P.2d 1099 (1992). As the court stated in *Fisons*, "Conduct is to be measured against the spirit and purpose of the rules, not against the standard of practice of the local bar." *Fisons*, 122 Wn.2d, at 345.

Initially, Appellants failed to offer declarations justifying their subjective belief in filing the complaint. Thereafter, on the motion for reconsideration, Appellants offered the declarations of several practicing attorneys allegedly supporting the cause of action. As the Supreme Court has made it clear, the opinions of attorneys do not provide the appropriate objective standard required by the court. But, perhaps most troubling is the Declaration of Mr. Strait. CP 611-619. Mr. Strait holds himself out as a professor of legal ethics teaching students of the law. Mr. Strait argues that it is appropriate

for an attorney to file suit and then begin the process of gathering facts to support the allegations. He states: "I thought he would need to be prepared to develop facts to affirmatively prove his allegations." CP 616. This assertion belies the plain language of CR 11 as well as all controlling authority interpreting CR 11. CR 11 imposes the burden upon the attorney to conduct the investigation *before* filing suit, not after, as Mr. Strait suggested.

H. Public Policy Strongly Favors the Court's Decisions in this Matter

One of the premises of our legal system is that parties are free to retain counsel. Counsel is charged with the duty and obligation to represent their client's interests and advocate the client's position when disputes arise. Our legal system clearly contemplates that counsel for the parties will set forth their client's position in lieu of the client being forced to advocate its own position as though it were unrepresented. In this lawsuit, Appellants sought to impose the liability of the client upon the attorney. Appellants' advocated rule of law must be firmly rejected by this Court.

Appellants' proposed rule of law will be akin to opening a Pandora's box. The rule of law advocated by counsel is that if you

are unhappy with the opposing party's attorney, then you can simply file suit against the opposing attorney. In retaliation, the sued attorney will be forced to file suit against the initiating attorney. Then, the parties will be forced to retain new counsel. Then, new counsel, if dissatisfied with their opponent can simply file suit against their opponent. The progression of satellite litigation would go on unchecked. It would then become common practice for attorneys to sue and be sued based upon their respective client base. It would then become an issue in which attorneys would not represent certain clients out of fear of their own personal exposure to liability. This would effectively limit many defendants ability to retain any attorney at all.

Public policy does not support the conduct advocated by Appellants nor does any common sense rational understanding of our current legal system. The trial court properly recognized that Appellants' conduct was not well grounded in existing law or fact. As a result, the trial court properly imposed CR 11 sanctions. The purpose of which is to deter and educate Appellants to discontinue these types of inappropriate litigation tactics.

I. Respondents Request this Court Award Further Sanctions, Terms and Attorneys' Fees on Appeal

Pursuant to RAP 18.9(a), Respondents request this Court enter an order awarding further attorneys' fees and expenses to Respondents in this matter. Respondents believe this appeal is frivolous and is in furtherance of the wrongful conduct of Appellants in this matter. For the reasons stated herein, Respondents respectfully request an award of further attorneys' fees in this matter.

Dated this 18th day of August, 2016.

COLE | WATHEN | LEID | HALL, P.C.



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APPENDIX A

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE COUNTY OF KING

3 -----
4 BONNIE JEAN ALVAREZ,)

) NO. 14-2-31774-3 SEA

6 Plaintiff,)

7 vs.)

) 2-20-15

9 ALLSTATE INSURANCE COMPANY, a foreign)

10 entity licensed to sell insurance in)

11 Washington, et al.,)

13 Defendants.
14 -----

15 VERBATIM TRANSCRIPT OF PROCEEDINGS
16 -----

17 Heard before the Honorable Catherine Shaffer, at King County
18 Courthouse, 516 Third Avenue, Dept. 11, Seattle, Washington

19 APPEARANCES:

20 MARSHALL CASEY, ESQ., JEANNA LABOURR, ESQ., YOUNG-JI HAM,
21 ESQ., representing the
22 Plaintiff;

23 RICK J. WATHEN, ESQ., representing the
24 Defendants.

25 REPORTED BY: Kevin Moll, RMR, CRR, CCP

1 (2-20-15)

2 THE COURT: Be seated, everybody. Welcome. All
3 right, folks, I think I've had the chance to read all the
4 briefing, including the additional last-minute briefs,
5 motions to strike and response to motion to strike.

6 Given the issues in this case, which, in the court's
7 view, including ongoing RPC issues, I'm going to allocate
8 15 minutes per side to argue, and so I'm happy to hear
9 from the moving party, Mr. Wathen, if you're arguing for
10 case or counsel on behalf of Mr. Wathen.

11 MR. WATHEN: Good morning, your Honor. Would you like
12 me to approach the bench?

13 THE COURT: Of course. Tell me upfront how much time
14 of your 15 minutes you want to reserve for rebuttal.

15 MR. WATHEN: Five minutes.

16 THE COURT: Go ahead.

17 MR. WATHEN: May it please the court, my name is Rick
18 Wathen. I'm here in my individual capacity and in my
19 capacity as representing my firm. As the court has had
20 an opportunity to review the pleadings, I won't spend too
21 much time on the facts, other than to say this is a case
22 where an opposing counsel has filed suit against me
23 individually under the Consumer Protection Act and
24 against my firm for these various causes of action.

25 I've been unfortunate enough to have been in this same

1 situation in 2003, in the *Manteufel vs. Safeco* decision.
2 You'll see that I am counsel of record in that case.

3 THE COURT: I noticed that.

4 MR. WATHEN: And I've argued this issue before. This
5 is very clear, black letter law, in the state of
6 Washington. One party cannot sue your opposing attorney
7 under the Consumer Protection Act.

8 As our court stated, in awarding CR 11 sanctions, the
9 trial court followed the clear law of this state, citing
10 numerous other decisions, including the *Haberman* Supreme
11 Court decision from the state, and I've also provided
12 this court with the subsequent history, again reiterating
13 the CPA causes of action are simply not available against
14 your opposing party.

15 I believe this was done in retaliation, because of the
16 complaint that I filed with the bar association, which
17 the court has had an opportunity to review, and although
18 the bar association did not take action, which was fine
19 with me --

20 THE COURT: I'm not sure that's true. That's not
21 exactly how I would characterize the bar's ruling. They
22 indicated they're keeping this file open for five years.

23 MR. WATHEN: I would agree with you, your Honor. I
24 had the option to pursue it further and chose not to,
25 believing that most reasonable attorneys would have taken

1 that letter from the bar association to heart and not
2 doubled down and filed suit against your opposing party.

3 Your Honor, I could go through each and every one of
4 the cases. I believe they are clear, black letter clear,
5 that you cannot file suit against your opposing party.

6 In response we've heard broad statements of the law
7 that really have nothing to do with this case at all,
8 talking about the entrepreneurial aspects of the practice
9 of law.

10 Well, this lawsuit has nothing to do with my
11 entrepreneurial aspects of the law. Ms. Alvarez is not
12 my client. I did not advertise to her. I did not sign
13 her up under a retainer agreement. That line of cases
14 simply does not apply to the facts of this case.

15 Next we have the negligent misrepresentation.

16 THE COURT: You do agree with the defendant, I assume,
17 that under Panang, you don't have to have a direct
18 contractual relationship for a CPA claim?

19 MR. WATHEN: I would agree that, in general terms,
20 that is the case, your Honor; however, it still requires
21 proximate cause and evidence of damage to business or
22 property, under Hangman Ridge.

23 Again, those are elements that have not been satisfied
24 in response to this motion for summary judgment. There
25 is no evidence before this court of any of those

1 elements, whatsoever.

2 Your Honor, moving on to a negligent misrepresentation
3 case. Again, I've cited the court to the case law,
4 showing the credibly high burden of clear, cogent, and
5 convincing evidence.

6 Initially, this was all an argument about whether or
7 not Ms. Alvarez was required to submit to an examination
8 under oath. I think that we are clear on that, that
9 there is a statute on point, policy provisions on point,
10 U.S. Supreme Court decisions on point, as well as
11 Washington Supreme Court and Court of Appeals decisions
12 directly on point, reiterating that she has an obligation
13 to submit to the examination under oath that was
14 conducted.

15 Once we filed our briefing, then the focus changed to
16 a typographical error that I will own. When my staff
17 types in a case citation, it automatically links to a
18 case citation. Unfortunately, because my assistant typed
19 Downey, D-O-W-N-E-Y, it pulled up that case, as opposed
20 to D-O-W-N-I-E, which is the Washington case.

21 We corrected that at a later date, and the case that I
22 cited and the proposition that I cited for is exactly
23 what *Downie vs. State Farm* stands for. So I don't
24 believe that under any circumstances that a typographical
25 error is actionable under the standard of clear, cogent,

1 and convincing evidence.

2 Moreover --

3 THE COURT: I have trouble seeing how anybody
4 justifiably relied on it anyway.

5 MR. WATHEN: Absolutely. I was going to get to
6 justifiable reliance, proximate cause and damages.
7 There's a complete failure of any of that evidence.

8 Your Honor, this is a frivolous lawsuit and sanctions
9 are warranted. I should not have to be here.

10 THE COURT: I assume you're asking for sanctions from
11 the point that you put counsel on notice of your Rule 11
12 claim?

13 MR. WATHEN: Yes, Your Honor. I believe that's the
14 appropriate standard under *MacDonald vs. Korum Ford*, that
15 my obligation is to put them on, and, quite frankly, I'm
16 only obligated to do that once. I tried three times, and
17 provided all the case law. I believe CR 11 sanctions are
18 appropriate, and would respectfully request this court
19 dismiss the lawsuit and award CR 11 sanctions. Thank
20 you, your Honor.

21 THE COURT: I have a couple of questions about RPC
22 concerns that I have here, and I want to hear your
23 response, and then I'm going to want to hear from
24 opposing counsel. And this is why I'm allowing
25 15 minutes per side, to what would otherwise be a much

1 shorter argument time.

2 The first RPC I'm concerned with is the requirement
3 that counsel follow court rules, and, frankly, failure to
4 follow Rule 11, to my way of thinking, doesn't always
5 rise to an RPC violation, but can. So that's one concern
6 I have.

7 There is some additional failure to follow the court
8 rules, with regard to the motion practice before me on
9 this motion, for example, the failure to provide a 56 F
10 affidavit. But the major RPC violation I'm thinking
11 about is the apparent violation of Rule 11.

12 The second RPC violation I'm thinking about, which,
13 frankly, I view as equally serious, is the requirement
14 that counsel not misrepresent to the court. I have two
15 misrepresentations that bother me.

16 Misrepresentation number one is that your grievance
17 was dismissed by the bar as unfounded, which appears in a
18 signed response from the plaintiff.

19 The second RPC concern I have with regard to this is
20 your allegations in your reply that the affidavit
21 prepared for the client is untruthful in at least a
22 couple of respects. So I want to hear from you on that,
23 because if I feel as though it's appropriate here, I may
24 be asking you to make another referral to the bar.

25 MR. WATHEN: Thank you, your Honor. To address the

1 Rule 11 argument, your Honor, I've never been in a
2 situation where I've had to address that, so I'm speaking
3 off the cuff, but I do believe this is a serious matter.

4 I didn't want to jam anybody up by filing my bar
5 complaint, but I'm compelled to do that to protect myself
6 and my client.

7 A reasonable attorney would have taken that letter
8 from the bar association and said, okay, we were wrong,
9 and taken that to heart. Instead this led to the filing
10 of this lawsuit, and I've provided clear and unequivocal
11 case law on three separate occasions showing that this
12 lawsuit is frivolous.

13 What that indicates to me is an absolute lack of
14 professionalism and an absolute lack of what we, as a bar
15 association, should strive to be, and I believe that it
16 does warrant a further bar association referral, and if
17 the court does find CR 11 sanctions, I believe it is
18 appropriate, and perhaps the bar association could
19 undertake or mandate additional training or some type of
20 a remedial program to address this type of conduct.

21 To address the misrepresentations that were made to
22 the court, I put the bar association letter in front of
23 the court so you could read it verbatim, without my
24 interpretation.

25 I think it is clear that what the bar association said

1 is, this is the first time we're going to give you every
2 conceivable benefit of the doubt, but this better not
3 happen again. That's the way I read that letter.

4 When I read that the bar association's going to place
5 that in a file for five years, that's a very serious --
6 although it is not a finding of a -- it is about as close
7 as you're going to get.

8 With respect to the misrepresentations to this court,
9 I believe they are substantial, because they go to the
10 very heart and merits of this case. They represented
11 that she was not evicted from an apartment. I have
12 provided you with court documents showing that there was
13 a court proceeding. I've provided you with her
14 testimony, showing it was not an apartment, it was, in
15 fact, a rental house. And that is significant, because
16 it is material to the very issue of whether or not she
17 even owned the property at the time of the loss.

18 Counsel was present during the examination under oath.
19 She heard her own client's testimony. This affidavit
20 that's submitting to somehow make this seem something
21 other than it was is a serious matter, your Honor, and I
22 think it does warrant further findings of sanctions and
23 perhaps a further bar referral.

24 THE COURT: Thank you.

25 MR. WATHEN: Thank you, your Honor.

1 THE COURT: You have 15 minutes to respond. Go right
2 ahead. I will tell you that now would be the time to
3 talk to me about why I should or should not make a
4 referral to the bar for additional RPC violations, in
5 addition to responding to the motion to dismiss and for
6 Rule 11 sanctions.

7 MR. CASEY: Thank you, your Honor. I'd be glad to
8 address those issues. First of all, it sounds like
9 there's a -- you're kind of going towards this is not the
10 entrepreneurial aspects and that these were not
11 transactions done outside of his practice and profession.

12 THE COURT: I hear the allegation, but I'm having
13 trouble connecting it up with the facts in front of me.

14 MR. CASEY: Okay. Well, let me work that up then, if
15 I may, your Honor. First of all, the law is clear that
16 the entrepreneurial aspects of it, of a person's practice
17 and how they gain clients, is an element of the CPA, and
18 that's clear underneath the CPA.

19 We've alleged three things in our complaint, and I --
20 forgive me for not putting the complaint in front of you.
21 We alleged three main issues, three separate from our
22 allegations against all state, and I think that's where
23 this confusion has been.

24 Mr. Wathen has tried to say these are allegations
25 against Allstate. I was merely acting as their counsel.

1 Our allegations against him are, first of all, he
2 performed the investigation aspect, and I think it's
3 clear underneath the Streiker (phonetic) case, or
4 Streiker (phonetic) case, and, if I may, your Honor, may
5 I hand a demonstrative exhibit up?

6 THE COURT: Sure.

7 MR. CASEY: If we go through this, your Honor, these
8 are the three areas that we see in here, and underneath
9 the practice of law, that's been well defined in Jones
10 vs. Allstate as three things; representation in court or
11 similar proceedings, providing legal advice for fees,
12 drafting and choosing legal documents.

13 The reason we focused so much on the examination under
14 oath was to show that it was not representation in a
15 court proceeding. It was, as stated -- as stated in
16 *Cedell*, the *Cedell* opinion -- and if you'd like me to
17 show you, your Honor, the CPA actions that actually go
18 towards Mr. Wathen's firm are stated. There's three
19 clear things we state and claims we state.

20 The first one is that he participated in the
21 investigation, violating the good faith and fair dealing
22 requirements of the statute.

23 I think there's sufficient evidence of -- and we're
24 not arguing his advice to Allstate at all. Allstate
25 stands on its own there. What we're arguing is he sent

1 three letters to an unrepresented party, stating the
2 contract requires her to show up for an examination under
3 oath, and quoting case law that doesn't apply.

4 There may be issues with justifiable reliance, like he
5 said, but that has not been raised in this matter.

6 THE COURT: Well, it is whenever a motion to dismiss
7 is proffered, Counsel. If he says there's no basis for a
8 claim against him and his firm, that puts you on notice
9 that you need to defend the factual basis for your
10 claims, or give me a good reason to think that I'd
11 actually would order some discovery that would get you
12 there, which wouldn't include things like invading the
13 attorney/client privilege.

14 MR. CASEY: We're not asking for invading the
15 attorney/client privilege, your Honor. What I've asked
16 for -- the purpose of the deposition was really to go
17 into those two other elements, if you look at them, which
18 are how he advertises to get examinations under oath.
19 What's he representing to Allstate? What's he
20 representing to these companies? Is he representing to
21 them that he's going to help them breach their good faith
22 and fair dealing duties? And we see that clear
23 distinction between an attorney performing those actions,
24 and we see that in *Cedell*.

25 The court comes out and says an examination under oath

1 is performance of the quasi fiduciary duties of the
2 insurance company, not the practice of law. We see that
3 very clearly.

4 And just like the person in -- so if he's out there
5 advertising to get examinations under oath, if he's going
6 to help breach that fiduciary duty, then I think that's a
7 clear entrepreneurial aspect and I think that's clear
8 that that's what we're going for.

9 THE COURT: The advertising here would be to Allstate,
10 right?

11 MR. CASEY: Correct.

12 THE COURT: And other insurance companies?

13 MR. CASEY: Correct, your Honor.

14 THE COURT: So whether or not a contractual
15 relationship is required, it's certainly not an
16 advertisement to you and your client?

17 MR. CASEY: Correct. There is no contractual
18 relationship required. *Panang* is very clear.

19 THE COURT: Yes, but it requires some connection, not
20 nothing. Whatever's going on with entrepreneurial
21 aspect, even if I bought that -- and I don't think you
22 have proof of that, I think you just have a suspicion --
23 something that would be Allstate's claim, not your
24 client's.

25 MR. CASEY: Not necessarily, your Honor. If Allstate

1 -- if they're going out there and committing the wrongful
2 act, which is further denied under the *Panang*, it's not
3 just an unfair deceptive practice, it's also a wrongful
4 practice, something that violates a public interest,
5 which here is the good faith and fair dealing duty.

6 THE COURT: What's the wrongful act, enforcing their
7 rights under the state statute, to have a statement of
8 their insured under oath?

9 MR. CASEY: No. Their wrongful act is that he's
10 coming in here and doing an examination under oath -- and
11 I don't think it's a statutory one, if you read through
12 *Staples* --

13 THE COURT: I start with the statute, not the case.
14 The statute entitles an insurance company to require a
15 statement under oath from their insured.

16 MR. CASEY: It allows it to be put into the contract.
17 *Staples* clearly analyzes it as springing forward from the
18 contract, and that kind of thing has actually been
19 rejected by the 9th Circuit Supreme Court in a similar
20 case that Mr. Wathen did.

21 He argued the same thing right before *Staples*, and
22 then *Staples* came out and said "under the contract is
23 where that right springs from."

24 And it was clear it was never in the automobile
25 policy. And as we said, she could have changed her

1 opinion --

2 THE COURT: It appears to have been in the rental
3 policy.

4 MR. CASEY: It was, and she could have pursued only
5 her automobile claim, if she wanted to. But he's got a
6 duty.

7 THE COURT: Did she only file a claim under the auto
8 insurance policy, or did she file one under the rental
9 insurance policy, too?

10 MR. CASEY: She alerted them to the problems, and they
11 chose the claims to open for her, as typically happens in
12 insurance.

13 THE COURT: So she admittedly had a contractual
14 relationship with Allstate, under a rental policy that
15 clearly calls for examinations under oath and
16 cooperation, correct?

17 MR. CASEY: Correct.

18 THE COURT: In addition to that, Counsel, in every
19 contract, including insurance contracts, there's the duty
20 of good faith and fair dealing, which requires that you
21 not frustrate the other party's performance. Frustrating
22 an insurance company's investigation of your claim, it
23 seems to me, would fall within that area, pretty
24 obviously.

25 I'm really having trouble with the idea that she can

1 refuse an examination under oath and that merely asking
2 for it is a deceptive or unfair act under, either, the
3 CPA, or a deceptive act under the negligent
4 misrepresentation tort, since that seems to be the
5 argument you're making to me.

6 MR. CASEY: No. I'm sorry, that is not the argument
7 I'm making.

8 THE COURT: Tell me what the argument is you are
9 making.

10 MR. CASEY: The argument that Mr. Wathen, if he is
11 going out to insurance companies, one of my arguments,
12 saying, "I will help you deny claims, hiring me will help
13 you deny claims." That's an unfair and deceptive act
14 done in trading commerce.

15 How that hurts my client is if the insurance companies
16 are actually hiring him to do that and that's what he
17 does, then he is breaching -- he is assisting them in
18 breaching their duty of good faith and fair dealing in
19 coming forward and hurting my client.

20 THE COURT: I see. But your client doesn't have any
21 duty of good faith and fair dealing that would include
22 cooperating with an investigation of her claim?

23 MR. CASEY: Show does have a duty of good faith and
24 fair dealing to cooperate in investigating her claim.
25 Whether or not there's a contractual right to an

1 examination under oath, I think, is a separate thing.

2 Our problem is when you're an attorney and I'm going
3 out, communicating to a third party, we don't mind the
4 communications to us. We're attorneys. We're not
5 claiming those are any of the problem.

6 Those first three letters that he sends out to us, he
7 says unilaterally you need to show up at this point in
8 time. He then says, "I have a right underneath the car
9 policy." Doesn't address the renter's policy. I have a
10 right, underneath the car policy, for you to show up and
11 give this examination under oath. Doesn't tell her the
12 requirements of *Staples*, that it further is governed by
13 the good faith and fair dealing, doesn't tell her the
14 scope of the examination, doesn't tell her anything like
15 that.

16 And then he comes back and says, "and this case allows
17 me to deny your insurance." Okay. I'm not that far from
18 law school. I remember people wandering in and off the
19 street and looking up cases.

20 THE COURT: How far are you all from law school? That
21 is one question I have in mind when I look at this?

22 MR. CASEY: I have five years.

23 THE COURT: How about your co-counsel, who's writing
24 all these letters? How far out are you folks?

25 MS. LABOURR: Four.

1 THE COURT: Four years out.

2 MS. LABOURR: Uh-huh.

3 THE COURT: That helps to explain some of this. Okay.

4 MR. CASEY: Your Honor, and I have talked with more
5 senior counsel than me about this case beforehand. I
6 talked with John Budlong regarding it. My dad's Greg
7 Casey. He's been practicing for over 40 years. I
8 bounced this off him.

9 This was not a, hey, random, here I go. I have
10 consulted other people in regards to this. And so it's
11 not like I'm way out there on, hey, this is me going in a
12 vacuum. I do make sure that I bounce this off mentors.

13 I'm trying to think of a few other counsel. I talked
14 with Amos Hunter, over in Spokane, who's done a few of
15 these, in regards to this.

16 THE COURT: Are any these people who have done this
17 got a published case or any opinions supporting this
18 theory of a cause of action? I have to say I've never
19 seen anything like this, ever, and I've been around for a
20 while, too.

21 MR. CASEY: Is the problem that -- because I think
22 it's clear that we allege --

23 THE COURT: Problem one, suing opposing counsel;
24 problem two, alleging a CPA claim for which you don't
25 seem to have a factual or legal basis at this point;

1 problem three, alleging an alleged misrepresentation
2 claim for which you, at this point, don't seem to have a
3 legal or factual basis; problem four, basing your claim
4 mostly over a disagreement on a point of law in which so
5 far the court's inclined to see it the way opposing
6 counsel's seeing it. I'm not going to rule on that
7 because it's not in front of me, but I'm really having
8 trouble seeing how you get a lawsuit out of a
9 disagreement about how you read the statute and its
10 application to an insurance policy.

11 Problem four, a very serious problem in my view, is
12 that if, in fact, you filed this lawsuit on notice that
13 you had no factual or legal basis, I'm going to be
14 awarding Rule 11 sanctions and considering an RPC
15 referral for violation of the court rules.

16 And last but not least problem is at least two
17 significant areas of apparent misrepresentation, first in
18 the briefing, then the affidavit.

19 MR. CASEY: What was the briefing, your Honor?
20 Forgive me?

21 THE COURT: The complaint, "dismissed as unfounded."

22 MR. CASEY: I believe that was dismissed as unfounded.

23 THE COURT: Where is it unfounded? Because WSBA never
24 told you that. WSBA told me your interpretation of legal
25 representation as not including investigation was flat

1 wrong.

2 MR. CASEY: If I may --

3 THE COURT: WSBA said, "Although this letter is not a
4 finding of misconduct or discipline, we wish to put Ms.
5 Labourr on notice that her understanding of RPC 4.2 is
6 not correct, and that impeacher's such conduct must be
7 avoided.

8 Although we are dismissing this matter, we believe
9 that good cause exists for long-term retention of the
10 file materials, and we will oppose any request by Ms.
11 Labourr for destruction of the file, under ELC 3.6V,
12 until five years from the date of this letter. That's
13 kind of the opposite of unfounded.

14 MR. CASEY: I guess, forgive me, where I was going
15 with unfounded is they did not find sufficient evidence
16 to pursue it further.

17 THE COURT: They accredited the sworn statement Ms.
18 Labourr made, under oath, that she didn't the know that
19 Mr. Wathen had identified himself as counsel, that's what
20 saved you from further disciplinary proceedings. This is
21 a very strong letter, in terms of telling you how wrong
22 your view of Mr. Wathen's representation is.

23 MR. CASEY: If I may, your Honor, I think it was even
24 inappropriate to put it in front of this court.

25 THE COURT: Maybe so, but in that case you probably

1 shouldn't have argued to me that the grievance was
2 unfounded, because then I'm going to look.

3 MR. CASEY: If you look at ECL, it says -- ECL 5.8, it
4 says, "Advisory letters may only be issued by a review
5 committee." This one was not. And that's the reason we
6 --

7 THE COURT: Different issue, Counsel. I'm wondering
8 why I shouldn't be thinking about this as a
9 misrepresentation to the court.

10 MR. CASEY: Okay. Because my interpretation of
11 unfounded is when someone decides, much like a
12 prosecutor, much like anyone else, there's not sufficient
13 evidence to pursue this claim, even to a hearing, that to
14 me is unfounded.

15 THE COURT: Okay. How about the statements in your
16 client's affidavit?

17 MR. CASEY: Statements in my client's affidavit, that
18 it's an apartment?

19 THE COURT: Counsel's identified a couple as flat
20 untrue.

21 MR. CASEY: That it's an apartment building?

22 THE COURT: Whatever the statements are, tell me why
23 they are true, in fact. That's also statements you're
24 putting in front of me that really need to be truthful.

25 MR. CASEY: The statements I put in front of you were

1 from her testimony.

2 THE COURT: Uh-huh.

3 MR. CASEY: From her testimony, until -- we're here on
4 a summary judgment motion, and I'm allowed to take her
5 testimony and go with that, and say, "This is the
6 inference." The inference is on my side. I'm allowed to
7 go with that.

8 THE COURT: True.

9 MR. CASEY: And that's what I went with. I took her
10 testimony from the EUL, that's literally what I quote to
11 you, they've now started trying to raise Allstate's
12 claims, which we -- which were clear in the summary
13 judgment they were not going to do.

14 THE COURT: Okay. Well, I'm not ruling on Allstate's
15 claims --

16 MR. CASEY: I know, but that's what they're trying to
17 do here, your Honor. They're now arguing an Allstate
18 claim.

19 And I think one of the other things, your Honor --

20 THE COURT: Counsel, how sensible does it sound to
21 you? You're complaining to me that counsel led Allstate
22 to breach their duties, in other words, that Allstate was
23 wrong to deny the claim, and yet you're simultaneously
24 arguing that counsel can't respond that they had reasons
25 to deny their claim, that he was correct in advising them

1 to deny the claim? I'm not tracking you.

2 MR. CASEY: No. Forgive me, your Honor.

3 THE COURT: Okay.

4 MR. CASEY: I must have framed my case wrong for you
5 in the beginning. Can I step back and start reframing
6 for you where I see my case going?

7 THE COURT: Okay.

8 MR. CASEY: I've alleged three wrongful acts. One, in
9 the investigation.

10 THE COURT: Uh-huh.

11 MR. CASEY: That --

12 THE COURT: Under the complaint, I've taken a look at
13 that.

14 MR. CASEY: That he individually breached his duty of
15 good faith and fair dealing. I think the duty of good
16 faith and fair dealing, under Coventry is clear, that you
17 must make a full investigation, that he must weigh the
18 facts equally.

19 In his examination under oath, he clearly tells
20 Ms. Alvarez that she did not send in these documents, yet
21 there's a letter in April showing the documents existed,
22 and he continues to examine her under that.

23 Very one-sided. Does not look after her interests,
24 whatsoever. I think that is a CPA claim under Streiker,
25 or the Skeller (phonetic) case, I keep mismentioning it,

1 Styrk vs. Cornerstone, that's another commercial
2 activity. That case is very clear. Even an attorney
3 performing escrow, closing agent, those are other
4 commercial activities, they can be Consumer Protection
5 Act violations. That's my case law, that's where I'm
6 going, those are my facts, to begin with.

7 And we've gotten absolutely no discovery here, your
8 Honor. We've tried. They won't even -- they won't even
9 schedule a CR 26I with me.

10 THE COURT: That's something I would consider on a
11 motion to compel, in relationship to a protective order,
12 that I'm not thinking about today.

13 MR. CASEY: That's where I wanted to talk to you
14 about, that's where we are on that.

15 THE COURT: Frankly, I'd have a lot of trouble
16 authorizing discovery of an attorney as to their dealings
17 with their client.

18 MR. CASEY: I'm not asking about their dealings with
19 their client. I don't intend to, your Honor. I think
20 they gave advice to Allstate that I think is wrong, but I
21 don't care about that.

22 What I care about is his conduct in the examination
23 under oath, his three letters before that. That's the
24 framing of our case. I care about if he's getting
25 examinations under oath by representing to insurance

1 companies that he's going to help them breach their good
2 faith duty, which is really my second allegation in
3 there.

4 Their advertisement, he does say, "I performed
5 thousands of examinations under oath, and depositions."
6 He's clearly out there doing it. The reason we put up
7 the *Staples* case, they were counsel of record in the
8 court, Supreme Court case, yet what did they advertise
9 out to insurance companies? They advertise out to
10 insurance companies the appellate court case, saying it's
11 a matter of right, which our Supreme Court directly
12 disagreed with. And that's -- and we want to know more
13 about those communications, how they're getting these
14 examinations under oath. That's what we're looking for
15 in discovery.

16 We're not looking for communications on here's how we
17 -- you know, here's how we -- here's what we advise you
18 to do, here's what they asked us. We don't care about
19 that.

20 We're looking for communications on how are you
21 getting these examinations under oath, and are you
22 encouraging insurance companies to breach their good
23 faith dealing? That's the second piece.

24 And our third wrongful act is -- and there's case law
25 right on point in the trustee -- Deed of Trust Act stuff,

1 when an attorney owes a good faith -- owes a fiduciary
2 duty to Allstate and takes on a good faith duty to my
3 client, that is simply a conflict. And if he is doing
4 that to maintain his relationship with Allstate, as we
5 see in *Eriks vs. Denver*, where they breached their duty
6 to disclose, to keep a client, and that was ruled to be
7 an entrepreneurial aspect, those are the three things
8 we're alleging here.

9 THE COURT: Okay.

10 MR. CASEY: I think we've put sufficient evidence to
11 say they're done with in trading commerce, because that
12 was the only element he raised.

13 THE COURT: Wind up, Counsel. I let you run long,
14 because I interrupted you with a question.

15 MR. CASEY: Okay. So your Honor, we think we've got
16 sufficient basis of law and facts. We were aware of
17 *Haberman* when we wrote this, and we specifically wrote
18 with the entrepreneurial aspects in mind, so that's where
19 we went with that.

20 I specifically -- I briefed out entrepreneurial stuff
21 to the Court of Appeals on CPA claims, on an appraiser
22 case that I'm doing. But I think we did focus it on
23 that.

24 They've tried to refocus it on other stuff, and I
25 don't think CR 11 is warranted here, because of the fact

1 that we have -- I mean, their complaint is we quote too
2 much case law.

3 Well, we've got a lot of case law in there, because of
4 the fact that, yes, we are striding into a new area here.
5 But I think *Cedell* versus -- the *Cedell* case is clear.
6 An attorney who is giving opinions is acting like an
7 attorney. An attorney taking an examination under oath
8 and communicating out the benefits of insurance, is
9 acting within the insurance transaction in the quasi
10 fiduciary duties.

11 THE COURT: Thank you.

12 MR. CASEY: Thank you.

13 THE COURT: Briefly, Counsel, because you only have
14 about five minutes left.

15 MR. WATHEN: I'll be very brief, your Honor. I'm very
16 troubled by the ongoing misrepresentations to this court.
17 When you pointed out the misrepresentations that we
18 pointed out in our brief, Counsel just said to you, I
19 took, verbatim, her transcript testimony, and I cited it
20 to you.

21 If we look at page two of their brief, "Ms. Alvarez's
22 van was park near her apartment for several years." EUC
23 transcript, page 30. I have page 30. I gave it to the
24 court. It doesn't say that.

25 THE COURT: I know.

1 MR. WATHEN: You just heard counsel, as an officer of
2 this court, tell you there has been no discovery
3 conference and they have not received discovery.

4 That is a blatant misrepresentation to this court. I
5 have confirming letters of our CR 26 conference. As an
6 officer of this court, I will represent to the court we
7 have responded to their discovery and we have provided
8 them with a copy of the complete claims file.

9 THE COURT: So a few questions I have for you.
10 Question number one is, at the time that you finally got
11 to examine this insured under oath, was she represented
12 at that point?

13 MR. WATHEN: Yes, Your Honor. She was represented --
14 there were three letters, and then she was represented,
15 and I believe, if memory serves me correctly, the
16 examination under oath occurred several months after the
17 date of representation.

18 THE COURT: That's my understanding, too. Another
19 question I have for you is the denial of the claim here,
20 was it only under the auto insurance policy or was it
21 also under the rental insurance policy?

22 MR. WATHEN: It was under both policies, citing
23 misrepresentations contained in both policies, and also
24 asserting that she did not have an insurable interest in
25 the policy based upon the prior court action.

1 THE COURT: Do you want to respond at all to counsel's
2 arguments that the way you represent your services to
3 Allstate gives rise to a CPA claim by an insured, if
4 Allstate then subsequently breaches their duties to the
5 insured?

6 MR. WATHEN: Your Honor, I believe that has absolutely
7 been addressed by the courts repeatedly, over and over
8 again. I cited the court to the *Gruenberg* decision. It
9 is the very first bad faith decision in the country.
10 It's been cited and followed by every jurisdiction since
11 then. 2,000 some odd citations to that case, all holding
12 that the attorney does not have the duty of good faith
13 and fair dealing in the insurance context. The
14 attorney's relationship flows to the client. That's what
15 our deal is, as attorneys who represent our clients.

16 As for the whole argument about, well, under the
17 escrow company case, that somehow there is dual
18 obligation, that somehow --

19 THE COURT: No, I understand the attorney wasn't
20 acting as counsel.

21 MR. WATHEN: Thanks, your Honor.

22 THE COURT: You know, folks, I really haven't had much
23 question about this case since I read the response. The
24 response really -- I have to tell counsel for
25 plaintiff -- dug you into a very deep hole with this

1 court.

2 The real debate I've been having with myself, since I
3 started reviewing the materials in this case, has been
4 what to do with counsel. You all seem to be reinforcing
5 each other, in terms of the behavior that I'm seeing
6 here, and even the very close brush with disciplinary
7 action by the bar seems to have left everybody undeterred
8 in your pursuit of this strategy of attacking insurance
9 companies by personally suing their attorney and his law
10 firm; and I really don't know what to do with you all,
11 frankly, given that determination.

12 You all seem like bright young people, perhaps a bit
13 overconfident, given your level of experience, but hard
14 working and dedicated to your client, and normally I
15 would applaud you in attempting to be aggressive in
16 representing a client, but I don't understand the
17 behavior that I've been seeing here, because basic
18 professional requirements seem to have gone completely by
19 the boards. Let me begin with elementary concepts here.

20 Whether or not you think Allstate acted properly here,
21 and that is a matter still to be litigated in this
22 lawsuit, you normally have no cause of action,
23 whatsoever, against opposing counsel or an opposing law
24 firm. There are only rare exceptions to this rule.

25 The cases you've cited to me dealing with counsel who

1 are not actually acting as counsel. We do not parse
2 counsel's relationship with the client to find out the
3 point at which they marketed to their client, the
4 opposing party, nor do we allow opposing counsel to have
5 depositions of clients, to investigate how it is that
6 counsel came to be retained.

7 You know, normally these discussions are privileged,
8 folks. You need a really clear case of somebody who is
9 acting outside their role as a lawyer, or who is acting
10 solely on the business side of their practice, before you
11 have any hope of pursuing them for improper business
12 practices.

13 Now, I'm sorry to say that I agree with you that there
14 are lawyers out there -- and they're reflected in the
15 published cases that we have -- who have abandoned their
16 basic duties to be honorable and truthful in their
17 dealings with the public, and that has given rise to CPA
18 claims. But this is not the norm.

19 If you could bring a cause of action against an
20 attorney who represents an insurance company because you
21 think the insurance company has acted in bad faith toward
22 your client, we would have reams of case law supporting
23 this theory. It's absolutely unsupported.

24 There is nothing in the CPA that gives you the basis
25 to sue opposing counsel because you think that the

1 insurance company they represent has, in bad faith,
2 denied your claim. That's the first problem here.

3 The second problem here is that there's no basis
4 anywhere, in any case law I can find, of any sort, that
5 gives you a basis to sue opposing counsel for negligent
6 misrepresentation. I have to say how you could bring
7 such a claim just puzzles me, because basic law, really
8 basic law, tells you you don't have a claim for
9 misrepresentation without justifiable reliance.

10 Assuming what is not before me, which is any statement
11 by your client that she relied on what Mr. Wathen said in
12 her examination under oath, even assuming that existed,
13 how could I find that to be justifiable, if she was
14 represented by you at the time? How ridiculous to say my
15 client relied on the opposing attorney and the statements
16 he made as opposed to me, and therefore I have a cause of
17 action against him for negligent misrepresentation? And
18 where would we not have a cause of action then against
19 opposing counsel for any statement made in a deposition
20 or any other interchange with the client?

21 Really, this lawsuit, among other things, throws the
22 basic requirements, justifiable reliance, right out the
23 window.

24 In addition to the fact that there isn't case law that
25 supports your effort to sue opposing counsel and his

1 firm, there is the fact that the meat of the claim seems
2 to be that this agreement about whether or not there was
3 an ability to examine the insured under oath. Now, I'm
4 not going to revisit with all of you some really basic
5 ideas about insurance law, which is that although we are
6 really strictly insurance companies, we scrutinize what
7 they do very closely, we tend to construe things in favor
8 of the insured and we are normally protective of the
9 insured, nonetheless, there are some duties that fall on
10 an insured, including the need to explain their claims to
11 the company they're making the claim to. And defying
12 that, obstructing it, refusing to work with the insurance
13 company that's attempting to find the factual basis for,
14 frankly, what looks like an unusual and in some ways
15 dubious claim in this case, strikes me as odd.

16 The unwillingness to read the statute for what it
17 actually says here strikes me as odd. The unwillingness
18 to view the fact that we have two insurance policies
19 here, and one of them clearly requires cooperation by
20 this very insured with this very insurance company,
21 strikes me as odd.

22 And oddest of all, I think, is the willingness to
23 elevate this dispute over what the law seems to require
24 of the insured into a basis for a cause of action against
25 a lawyer you disagree with on a legal opinion.

1 This case doesn't have any basis in the law for the
2 claims made here against counsel. But worse, from my
3 point of view, is it has no basis in the facts, either,
4 and it never did.

5 Even now, when presented with this motion to dismiss,
6 which requires you to come forward with the basis that
7 you had to sign this complaint and sue this lawyer and
8 his firm, you've produced nothing to me except argument.

9 You haven't even attempted to show a factual basis for
10 any element of the CPA claim here. Nor, frankly, have
11 you made any serious effort to show a basis, factually,
12 for the negligent misrepresentation claim, including any
13 factual basis for a claim of justifiable reliance.

14 This is a very cavalier way to view Rule 11 and your
15 obligations as counsel. What disturbs me most, in
16 addition to that, is that you got a big warning shot
17 across your bows a month before you filed this lawsuit,
18 in the form of the October 15, 2014, letter from the bar.

19 Really, the bar doesn't have to assemble its formal
20 disciplinary staff and committee to tell you things that
21 you should be listening to, when they tell you about your
22 obligations as lawyers.

23 I mean, you folks are supposed to be attentive to what
24 the bar tells but what the RPCs mean. That's why we have
25 RPCs. And when you're explained, in great detail, that

1 you are completely wrong in your understanding of RPC
2 4.2, and also specifically warned that in the future such
3 conduct must be avoided, I'm at a total loss to
4 understand why, within less than two months, you are
5 bringing a lawsuit that is founded, in many respects, on
6 the same parsing of a legal relationship that the bar
7 told you was wrong.

8 Mr. Wathen represents Allstate. He represents them at
9 all points in this litigation that I can see. I have
10 read all of the attachments and documents you gave me, as
11 well as all of the attachments and documents he gave me.
12 He advised, from the very beginning, in his very first
13 communication, that he represented Allstate, and Allstate
14 doesn't need to file a lawsuit for him to represent them.
15 When he conducts an examination under oath, he is
16 representing Allstate. When he writes you a letter, he
17 is representing Allstate. When he requests documents and
18 other information from you and your client, he is
19 representing Allstate, just like you are, when you
20 represent your client and you seek information in order
21 to investigate a case.

22 The very reason that Rule 11 requires a reasonable
23 investigation by counsel is because you're acting as a
24 lawyer when you investigate.

25 Why do I have to tell you this, four and five years

1 out of law school? Why didn't all of your mentors tell
2 you this? And why didn't it sink in, when you got the
3 letter from Mr. Wathen telling you that if you went
4 forward, he would be bringing Rule 11 sanctions against
5 you? Why did I listen for 20 to 25 minutes of a strained
6 legal defense for a lawsuit that doesn't have any
7 foundation in existing law or the facts?

8 I don't like shipping young lawyers off to the bar
9 association. I don't usually shift anybody off to the
10 bar association. I've done it in a handful of cases. I
11 can count them on the fingers of one hand. And every
12 single lawyer that I've sent has been disbarred.

13 So when I tell you that I think that your conduct
14 warrants another look by the bar association, I think
15 this time you need to listen to me. This is really not
16 what I want to see.

17 I think that it's wonderful for all of you to be
18 aggressive in defending your insured as to Allstate, and
19 if Allstate acted wrongly here, Allstate will answer in
20 damages. Maybe Allstate will or won't be happy with
21 their legal representation. I don't know. Maybe they'll
22 have a claim as to something their lawyer did to them
23 entrepreneurially, I don't know. But you don't.

24 And this kind of approach to a lawsuit needs to stop
25 now, because otherwise I fear none of you will keep your

1 tickets for very long.

2 Here's the ruling by the court. The motion to dismiss
3 the claims as to counsel and his law firm are granted.
4 The Rule 11 motion is granted. Sanctions are awarded for
5 the reasonable amount of attorneys fees expended by
6 counsel and his firm in defending this suit, from the
7 time that counsel put you on notice to today.

8 I'm going to require an attorneys fee affidavit, and
9 I'm going to allow plaintiff's counsel a chance to
10 respond, with regard to the reasonableness of the billing
11 rate and hours represented. And if you would like to,
12 you may reply, and then I will issue a monetary order as
13 to the sanctions payable here. They are payable by
14 counsel, not the client. It's clear to me who is
15 responsible.

16 I'm directing counsel for the defendant here to make
17 another referral to the bar on two specific points, point
18 one being the Rule 11 finding the court's making; and
19 point two being the statements that counsel made in their
20 brief that WSBA found the 4.2 allegation to be unfounded.

21 What I want WSBA to look at is whether or not the Rule
22 11 violation is serious enough to be a violation of the
23 RPC against violation of court rules, and I want WSBA to
24 look with regard to the statement in the brief about
25 whether or not WSBA views that as a misrepresentation to

1 the court. And then we'll see where that goes.

2 MR. CASEY: May I, your Honor?

3 THE COURT: No. That's as far as I'm pursuing that
4 issue. Future counsel will be dealing with your claims
5 against Allstate, discovery against Allstate, and
6 Allstate's behavior. That's what this lawsuit will be,
7 going forward. We're in recess, folks.

8 MR. CASEY: Your Honor --

9 THE COURT: We're done.

10 (Adjourned)

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APPENDIX B



WSBA

OFFICE OF DISCIPLINARY COUNSEL

Joanne S. Abelson
Senior Disciplinary Counsel

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October 15, 2014

Rick J. Wathen
303 Battery St
Seattle, WA 98121-1419

Re: Grievance of Rick J. Wathen against Jenna Labourr
ODC File No. 14-01414

Dear Mr. Wathen:

This letter is to advise you that we have completed our investigation of your grievance against lawyer Jenna Labourr and to advise you of our decision. The purpose of our review has been to determine whether sufficient evidence exists on which to base a disciplinary proceeding. Under the Rules for Enforcement of Lawyer Conduct (ELC), a lawyer may be disciplined only on a showing by a clear preponderance of the evidence that the lawyer violated the Rules of Professional Conduct (RPC). This standard of proof is more stringent than the standard applied in civil cases.

Based on the information we have received, we have determined to take no further action in this matter and are dismissing the grievance. Our decision to dismiss the grievance is based on a review of your original grievance received on August 6, 2014, Ms. Labourr's response, though counsel, received September 11, 2014, and your reply received September 29, 2014.

You represent Allstate Insurance in a claim brought by one of its insureds, Bonnie-Jean Alvarez, regarding the theft of her vehicle and the belongings inside it. On May 6, 2014, you wrote Ms. Alvarez stating that you represented Allstate and advising her that Allstate was requesting an examination under oath before it admitted or denied coverage. Ms. Alvarez then hired Ms. Labourr. According to Ms. Labourr's sworn declaration, Ms. Alvarez did not give her a copy of your letter. Instead, she gave her your name and the name of two individuals at Allstate who also had contacted her.

On June 9, 2014, Ms. Labourr sent a letter to you and the two Allstate representatives in which she noted her representation and made certain demands for information. This letter is the subject

of your grievance.

In response to Ms. Labourr's June 9, 2014 letter, you wrote her asking why she "chose to violate Rules of Professional Conduct 4.2 by directly communicating with your client." A series of letters ensued regarding Ms. Labourr's obligations under RPC 4.2 under the circumstances. Among other things, Ms. Labourr indicated she was unsure about who you represented. In response to this grievance, she stated that she did not understand that you represented Allstate until July 9, 2014, when you sent her a copy of your May 6, 2014 letter to her client. Once that issue was cleared up between the two of you, Ms. Labourr asserted that RPC 4.2 was inapplicable because "no adversarial action has been filed allowing you to appear as an attorney for Allstate" and because you were not acting as Allstate's attorney but as an investigator. Nonetheless, she did not directly contact Allstate representatives again after her initial letter.

You filed this grievance because you perceived that Ms. Labourr did not understand her obligations under RPC 4.2. Based on her letters to you and her position with respect to your grievance, we understand your concerns. By copy of this letter to her counsel, we advise Ms. Labourr of our analysis.

RPC 4.2 provides in relevant part, "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter" absent consent of counsel. The rule, like any RPC, should be construed broadly. In re McGlothlen, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983).

First, contrary to Ms. Labourr's assertion, RPC 4.2 is not premised on the filing of an adversarial action. Although some out-of-state cases suggest that the degree of adversity may be a factor in determining whether the rule applies, those cases involve issues not applicable here—namely, whether an organization's right to representation by counsel would preclude informal investigative contacts with the organization's constituents. See, e.g., S.E.C. v. Lines, 669 F.Supp.2d 460, 465 (S.D.N.Y. 2009). But, even in such cases, the filing of an adversarial action is not required for the rule to apply. See Id. (indicating that a "ripening adverse relationship" would suffice).

Moreover, RPC 4.2 is not confined to litigation settings at all. A lawyer would run afoul of RPC 4.2 if, absent consent of counsel, he or she communicated with a represented party in, for example, a transaction or negotiation. As recognized by the Commentary to the RPC, one of the purposes of RPC 4.2 is to protect the lawyer-client relationship from interference from other lawyers participating in the matter. RPC 4.2 cmt [1]. This reasoning would apply to any number of settings. We therefore agree with your observation that the distinction between a lawyer whose representation includes investigation and a lawyer whose representation includes litigation is not material to the operation of RPC 4.2.

Further, as to the fact of representation, whether an attorney-client relationship exists depends on the reasonable expectations of the client. In re Carmick, 146 Wn.2d 582, 597, 48 P.3d 311 (2002). You advised Ms. Labourr that you were representing Allstate. It was not up to her to decide otherwise on her own. Id. at 598 ("[w]here there is a reasonable basis for an attorney to believe a party may be represented, the attorney's duty is to determine whether the party is in fact

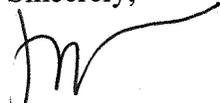
represented”).

As discussed above, from the available evidence, we share the concern you have expressed about the conduct of Ms. Labourr. We have given careful consideration as to whether further investigation or disciplinary action is warranted. We note that RPC 4.2 requires actual knowledge of the representation. RPC 4.2 cmt [8]. Here, Ms. Labourr stated in her sworn declaration that she had not seen your May 6, 2014 letter to her client and did not have knowledge of your role as Allstate’s lawyer when she wrote her June 9, 2014 letter. Although knowledge may be inferred, *id.*, and this is a close case, under the circumstances we decline to make that inference here. In addition, Ms. Labourr did not continue to send copied correspondence to your client after your objection. For these reasons, we are dismissing this matter under ELC 5.7(a).

Although this letter is not a finding of misconduct or discipline, we wish to put Ms. Labourr on notice that her understanding of RPC 4.2 is not correct and that, in the future, such conduct must be avoided. Although we are dismissing this matter, we believe that good cause exists for long-term retention of the file materials and we will oppose any request by Ms. Labourr for destruction of the file under ELC 3.6(b) until five years from the date of this letter.

If you do not mail or deliver a written request for review of this dismissal to us within **forty-five (45) days** of the date of this letter, the decision to dismiss your grievance will be final.

Sincerely,



Joanne S. Abelson
Senior Disciplinary Counsel

cc: Marshall Casey

No. 74601-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION I

M. CASEY LAW, PLLC, et al

Appellants,

vs.

COLE WATHEN LEID & HALL, PC, et al

Respondents.

RESPONDENTS' BRIEF – Certificate of Service

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I, Kathleen Forgette, the undersigned, certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct.

I certify that on August 1, 2016, I had Respondent's Brief delivered to the Court of Appeals Division One via e-filing; and a copy of the same was e-mailed and sent out for service by US Postal Service to be served on the following:

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RESPECTFULLY SUBMITTED this 1st day of August, 2016.

COLE | WATHEN | LEID | HALL, P.C.


Kathleen Forgette
Legal Assistant