



WSBA
OFFICE OF DISCIPLINARY COUNSEL

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April 21, 2008

Tim Connor
1016 S. Buena Vista Dr.
Spokane, WA 99224

Re: Grievance of Tim Connor against Duane Swinton
WSBA File No. 07-01172

Dear Mr. Connor:

This letter is to advise you that we have completed our investigation of your grievance against lawyer Duane Swinton 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, insufficient evidence exists to prove unethical conduct by Mr. Swinton by a clear preponderance of the evidence in this matter. Therefore, we are dismissing the grievance. Our decision to dismiss the grievance is based on a review of your original grievance received on July 20, 2007, Mr. Swinton's August 7, 2007 response, your August 21, 2007, September 8, 2007, January 11, 2008, January 17, 2008, January 19, 2008, and January 27, 2008 comments and materials. We also conducted interviews of Duane Swinton, Elizabeth "Betsy" Cowles and Stacey Cowles.

You are a journalist investigating whether there was anything improper in the fact that at various points in the 1996 – 1999 time frame as part of his representation of the Cowles Company,¹ Mr. Swinton also represented its wholly owned subsidiary River Park Square LLC, which developed a redevelopment project in downtown Spokane. Among other things, Cowles Company publishes the Spokesman Review newspaper that from time to time published news articles related to the affairs of River Park Square LLC. As part of his representation, Mr. Swinton assisted his River Park Square LLC client in keeping certain business information confidential by negotiating and drafting confidentiality agreements between various entities, including governmental units.

¹ Formerly known as Cowles Publishing Company.

You allege that Mr. Swinton had a conflict of interest under RPC 1.7² because his other client, Cowles Company, owned a newspaper that you believe had a public duty to report on the information that Mr. Swinton was helping his River Park Square LLC client keep confidential.

In determining whether there has been a violation of RPC 1.7, the first step is to determine whom the lawyer represents. In the matters you have cited, Mr. Swinton was at all times representing the Cowles Company.³ Cowles Company is owned by members of the Cowles family, individually and through various Cowles Family Trusts, with Betsy Cowles as Chairman and her brother Stacey Cowles as President. As part of his representation of Cowles Company, Mr. Swinton also represented a number of other entities that were wholly owned by the Cowles family interests. These included River Park Square LLC, a limited liability company, of which Betsy Cowles is President and Stacey Cowles is Vice President.

To establish the conflict of interest under RPC 1.7 that you have alleged, we would first have to show that Cowles Company and River Park Square LLC should be treated as separate entities for the purpose of conflicts of interest. Your grievance references ABA Formal Opinion 95-360, which discusses potential conflicts of interest that may arise between affiliated corporations. Although that opinion recognizes that in some situations there can be conflicts of interests between affiliated corporations, the opinion notes that this is not the case when “a complete identity of managements and boards of directors could call for treating the two corporations as one.” The ABA Opinion goes on to note that “whole ownership may well entail not merely a shared legal department but a management so intertwined that all members of the corporate family effectively operate as a single entity.” That appears to be the relationship between Cowles Company and River Park Square LLC, which would preclude us from establishing that for the purposes of a legal conflict of interest, the two were anything other than two different facets of the same entity. During the time frame in question, Cowles Company and River Park Square LLC were completely controlled by the same group of individuals, led by Betsy Cowles and Stacey Cowles, under whose direction and control Mr. Swinton at all times operated, regardless of whether the representation was nominally of River Park Square LLC or Cowles Company. As such, we consider Mr. Swinton to have had only one client (hereinafter “Cowles”) regarding the matters you have raised. While that one client, at given points in time, may have had competing internal interests to balance between its real estate interests and its role as the publisher of the local newspaper, those were issues for Betsy Cowles and Stacey Cowles and their staff to resolve. Mr. Swinton’s duty of loyalty ran to that one client, Cowles. My interview of the Cowles principals confirms that at all times Mr. Swinton took direction from Cowles regarding all of the matters at issue.

² The Rules of Professional Conduct were substantially amended effective September 1, 2006. All references are to the rule that was in effect at the time of the conduct.

³ The representation was provided by Mr. Swinton and other members of his law firm, Witherspoon, Kelley, Davenport & Toole. For the purposes of considering a conflict of interest, under RPC 1.10 representation by any member of the firm is imputed to all other members of the firm. You styled your grievance as being against Mr. Swinton and his law firm of Witherspoon, Kelley, Davenport & Toole. The Rules of Professional Conduct and the purview of our disciplinary system under the Rules for Enforcement of Lawyer Conduct extend only to the conduct of individual lawyers. As such, we do not open grievances against law firms, only against individual lawyers.

In your August 21, 2007 comments regarding Mr. Swinton's August 7, 2007 response, you assert that Mr. Swinton violated RPC 1.7 by representing both R. W. Robideaux and the Cowles interests in the River Park Square transactions. Mr. Robideaux was an independent contractor who served as project manager for that development. Mr. Swinton's "representation" of Mr. Robideaux was limited to representing him in his capacity as the agent for the Cowles interests in that development. Cowles was Mr. Swinton's actual client. He did not represent Mr. Robideaux in any individual or personal capacity with respect to the River Park Square development. Even if one considers this to have been a representation for the purposes of RPC 1.7, it would have been a violation only if Mr. Robideaux had an interest adverse to the Cowles interests regarding those transactions, or if Mr. Swinton's representation of either of them would have materially limited his representation of the other. Because it appears that as the agent of the Cowles interests regarding the River Park Square development, Mr. Robideaux's interests were one and the same as the Cowles interests regarding the transactions you have questioned, we do not believe we could meet our burden to prove by a clear preponderance of the evidence a conflict of interest in Mr. Swinton's representation of Cowles as well as its project manager regarding the transactions you have questioned.

You have cited the May 5, 2007 report of the Washington News Council entitled "An Independent Analysis of the Spokesman-Review's Coverage of and Role in the Spokane River Park Square Redevelopment Project," which stated that "[n]o matter how they might try to avoid conflicts, Duane Swinton and the firm of Witherspoon, Kelley project the perception of a conflict of interest, particularly with respect to stories involving the Cowles Co.'s." That report, however, dealt with journalistic conflicts of interest which are quite different from lawyer conflicts of interest.⁴ Lawyer conflicts of interest, as set forth in RPC 1.7, derive from lawyers' duties to clients, whereas journalistic conflicts of interests derive from journalists' duties to the reading public.

Because we could not establish a violation of the Rules of Professional Conduct by Mr. Swinton, we are dismissing this matter under ELC 5.6(a). 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,



Randy Beitel
Senior Disciplinary Counsel

cc: Duane M. Swinton

⁴ The Washington News Council's report recognizes this distinction, noting that "[f]rom an attorney's perspective, Swinton is probably correct that he did not have a formal conflict of interest on RPS, since throughout the whole project he was only representing one client – Cowles Co."