

FILED

Oct 09 2020

Disciplinary
Board

Docket # 008

DISCIPLINARY BOARD
WASHINGTON STATE BAR ASSOCIATION

In re

MARK CONLIN JOBSON,

Lawyer (Bar No. 22171).

Proceeding No. 20#00024

ODC File No(s). 16-01555

RESIGNATION FORM OF MARK CONLIN
JOBSON (ELC 9.3(b))

I, Mark Conlin Jobson, declare as follows:

1. I am over the age of eighteen years and am competent. I make the statements in this declaration from personal knowledge.

2. I was admitted to practice law in the State of Washington on November 9, 1992.

3. I was served with a Formal Complaint and Notice to Answer in this matter on September 9, 2020.

4. I have voluntarily decided to resign from the Washington State Bar Association (the Association) in Lieu of Discipline under Rule 9.3 of the Washington Supreme Court's Rules for Enforcement of Lawyer Conduct (ELC).

5. Attached hereto as Exhibit A is Disciplinary Counsel's statement of alleged

1 misconduct for purposes of ELC 9.3(b). I am aware of the alleged misconduct stated in
2 Disciplinary Counsel's statement, but rather than defend against the allegations, I wish to
3 permanently resign from membership in the Association.

4 6. I consent to entry of an order under ELC 13.9(e) assessing expenses of \$1,500 in
5 this matter.

6 7. I agree to pay any additional costs or restitution that may be ordered by a Review
7 Committee under ELC 9.3(g).

8 8. I understand that my resignation is permanent and that any future application by me
9 for reinstatement as a member of the Association is currently barred. If the Washington Supreme
10 Court changes this rule or an application is otherwise permitted in the future, it will be treated as
11 an application by one who has been disbarred for ethical misconduct. If I file an application, I
12 will not be entitled to a reconsideration or reexamination of the facts, complaints, allegations, or
13 instances of alleged misconduct on which this resignation was based.

14 9. I agree to (a) notify all other states and jurisdictions in which I am admitted of this
15 resignation in lieu of discipline; (b) seek to resign permanently from the practice of law in all
16 other states and jurisdictions in which I am admitted; and (c) provide Disciplinary Counsel with
17 copies of this notification and any response(s). I acknowledge that this resignation could be
18 treated as a disbarment by all other jurisdictions.

19 10. I agree to (a) notify all other professional licensing agencies in any jurisdiction from
20 which I have a professional license that is predicated on my admission to practice law of this
21 resignation in lieu of discipline; (b) seek to resign permanently from any such license; and (c)
22 provide disciplinary counsel with copies of any of these notifications and any responses.

23 11. I agree that when applying for any employment, I will disclose the resignation in

1 lieu of discipline in response to any question regarding disciplinary action or the status of my
2 license to practice law.

3 12. I understand that my resignation becomes effective on Disciplinary Counsel's
4 endorsement and filing of this document with the Clerk, and that under ELC 9.3(c) Disciplinary
5 Counsel must do so promptly following receipt of this document.

6 13. When my resignation becomes effective, I agree to be subject to all restrictions that
7 apply to a disbarred lawyer.

8 14. Upon filing of my resignation, I agree to comply with the same duties as a disbarred
9 lawyer under ELC 14.1 through ELC 14.4.

10 15. I understand that, after my resignation becomes effective, it is permanent. I will
11 never be eligible to apply and will not be considered for admission or reinstatement to the practice
12 of law nor will I be eligible for admission for any limited practice of law.

13 16. I certify under penalty of perjury under the laws of the State of Washington that the
14 foregoing is true and correct.

15
16 OCT. 2, 2020
Date and Place
17 Grand, OR

15
16 Mark Conlin Jobson
Mark Conlin Jobson, Bar No. 22171

18 ENDORSED BY:

19
20 Marsha Matsumoto
Marsha Matsumoto, Disciplinary Counsel
21 Bar No. 15831

EXHIBIT A

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7 DISCIPLINARY BOARD
8 WASHINGTON STATE BAR ASSOCIATION
9

10 In re

11 **MARK CONLIN JOBSON,**

12 Lawyer (Bar No. 22171).

Proceeding No. 20#00024

ODC File No(s). 16-01555

13 STATEMENT OF ALLEGED
14 MISCONDUCT UNDER ELC 9.3(b)(1)

15 The attached formal complaint, filed on August 27, 2020 in Proceeding No. 20#00024,
16 constitutes Disciplinary Counsel's statement of alleged misconduct under Rule 9.3(b)(1) of the
17 Washington Supreme Court's Rules for Enforcement of Lawyer Conduct (ELC).

18 DATED this 18th day of September, 2020.

19 

20 Marsha Matsumoto, Bar No. 15831
21 Managing Disciplinary Counsel
22
23

FILED

Aug 27 2020

Disciplinary
Board

Docket # 002

DISCIPLINARY BOARD
WASHINGTON STATE BAR ASSOCIATION

In re

MARK CONLIN JOBSON,

Lawyer (Bar No. 22171).

Proceeding No. 20#00024

FORMAL COMPLAINT

Under Rule 10.3 of the Washington Supreme Court's Rules for Enforcement of Lawyer Conduct (ELC), the Office of Disciplinary Counsel (ODC) of the Washington State Bar Association charges the above-named lawyer with acts of misconduct under the Washington Supreme Court's Rules of Professional Conduct (RPC) as set forth below.

ADMISSION TO PRACTICE

1. Respondent Mark Conlin Jobson was admitted to the practice of law in the State of Washington on November 9, 1992.

FACTS REGARDING COUNTS 1, 2, and 3

2. On March 22, 2014, a major landslide occurred near Oso, Washington (Oso Landslide).

1 3. The Oso Landslide engulfed the neighborhood of Steelhead Haven, resulted in the
2 deaths of 43 people, and caused extensive flooding and disruption.

3 4. On or about July 1, 2014, certain Oso Landslide victims and others filed an action
4 in King County Superior Court against the Washington State Department of Natural Resources
5 (DNR) and Snohomish County. The lawsuit was captioned, Pszonka et al. v. Snohomish
6 County et al., No. 14-2-18401-8-SEA.

7 5. Additional lawsuits were filed, and included claims against the Washington State
8 Department of Transportation (DOT) and Grandy Lake Forest Associates, LLC (a timber
9 company).

10 6. The State was represented by a legal team under the Attorney General's Office
11 (AGO). The legal team consisted primarily of lawyers Mark Jobson (Respondent), Rene
12 Tomisser, Robert Christie, and paralegal Diane Hoosier.

13 7. Respondent served as lead counsel for the Oso matter until he retired from State
14 employment in September 2015.

15 8. In October 2015, Respondent returned to work as a Special Assistant Attorney
16 General, and resumed the role of lead counsel with respect to expert preparation and discovery.

17 **State's Experts**

18 9. Shortly after the Oso Landslide, the AGO began assembling a team of experts to
19 determine the cause(s) of the landslide.

20 10. Respondent was responsible for identifying the potential consulting and testifying
21 experts, researching their backgrounds, and retaining them.

22 11. In 2014, the State retained several consulting experts, including J. David Rogers,
23 Jonathan Bray, Arne Skaugset, Marvin Pyles, and Rune Storesund.

1 12. Respondent informed them that, as consulting experts, their notes and preliminary
2 opinions were protected from discovery.

3 13. On or about March 23, 2015, the State's experts met at a SeaTac hotel (SeaTac
4 meeting).

5 14. The meeting was attended by DNR personnel and the State's legal team, including
6 Respondent.

7 15. At some point during the meeting, the experts discussed how to handle emails sent
8 amongst them. The experts agreed that not all emails needed to be retained, and those that did
9 not need to be retained could be deleted (email agreement).

10 16. Respondent was aware of the experts' discussion regarding email deletions, and did
11 not advise or instruct the experts otherwise.

12 17. In or around April 2015, the State began designating its testifying experts, and
13 continued designating testifying experts as the case developed.

14 18. The State's testifying experts included Rogers, Bray, Skaugset, Pyles, Storesund,
15 Gunnar Schlieder, and Kenichi Soga.

16 19. Because Schlieder and Soga were retained after the SeaTac meeting, the email
17 agreement was communicated to them by other members of the expert team.

18 **Expert Discovery**

19 20. When the Oso litigation started, Superior Court Civil Rule (CR) 26 applied to
20 expert discovery because the case was filed in state court.

21 21. On or about March 17, 2015, the parties agreed to abide by the Federal Rules of
22 Civil Procedure (FRCP) on discovery and executed a CR 2A agreement to that effect.

23 22. In November 2015, the Oso Plaintiffs issued a subpoena duces tecum to Rogers

1 calling for the production of "[a]ll documents reflecting any communications between you and
2 any vendor, consultant or other expert (disclosed in this matter or not) relating to the Hazel
3 Landslide or Oso Landslide."

4 23. On or about November 27, 2015, Rogers sent Respondent and Tomisser an email
5 asking about the materials he was required to produce. Rogers wrote, "I have not been
6 archiving e-mails. Do I need to make a statement to this effect?"

7 24. On or about November 30, 2015, Respondent replied, "[y]ou do not need to make a
8 statement about not archiving emails."

9 25. The State produced Rogers's materials on or about December 1, 2015. The
10 production did not include any email communications between Rogers and the State's expert
11 team.

12 26. When Rogers appeared for his December 20, 2015 deposition, he testified that the
13 expert team regularly communicated with each other by email, including "daily email
14 correspondence with pictures and drawings."

15 27. Plaintiffs' counsel requested the production of all email communications between
16 Rogers and the other experts.

17 28. When Hoosier forwarded the request to Rogers, he responded, "[w]e do not
18 archive email messages."

19 29. Respondent was copied on Rogers's email to Hoosier, but did not advise or direct
20 Rogers or the State's other experts to retain their email communications.

21 30. On or about February 2, 2016, Plaintiffs' counsel Emily Harris sent defense
22 counsel an email proposing a protocol for producing expert materials in lieu of issuing
23 individual document subpoenas.

1 31. The proposal provided, in part, that 14 days prior to an expert's deposition date, the
2 lawyer who retained the expert will produce "[d]ocuments provided to, considered by or created
3 by the expert that contain facts or underlying assumptions that the expert considered in forming
4 his or her opinion" and "[c]ommunications between the expert and any other expert in the case
5 relating to the Hazel Landslide or the Oso Landslide."

6 32. On or about February 12, 2016, Plaintiffs' counsel sent Respondent an email,
7 "Mark, does the State agree?"

8 33. On or about February 16, 2016, the State agreed.

9 34. Respondent was aware of the agreement and of Plaintiffs' request for
10 communications between the experts, but did not advise or direct the experts to retain their
11 email communications.

12 35. On or about March 30, 2016, Hoosier sent Bray an email stating that, in lieu of a
13 subpoena, the parties had agreed to produce documents, including "[c]ommunications between
14 the expert and any other expert in the case relating to Hazel Landslide or the Oso Landslide."

15 36. On or about May 26, 2016, Bray sent Hoosier an email stating, "[t]oday, I am
16 mailing you hard copies of my notes and marked up printed out documents and a thumb drive
17 with me [sic] electronic files."

18 37. In response, Respondent directed Hoosier, "Jon [Bray] knows that he is not
19 supposed to save or produce any email traffic w/ us or members of the team and he is not
20 supposed to have copies of Dave Rogers' meeting notes. When we get this from him we need to
21 be sure we are not providing same to OC."

22 38. On or about June 3, 2016, Pyles sent Respondent an email with questions about
23 responding to discovery.

1 39. Respondent interlineated his answers (in red):

2 Mark,

3 While I am traveling, I may have time to work on assembling the material
4 requested as a part of discovery. I do need a bit of guidance. Please answer the
5 following questions:

6 1. Does preliminary draft work have to be included, or only final work that is the
7 basis of my opinions?

8 only the final

9 2. Can I or should I go through my current list of emails and select those that are
10 the basis of my opinions, or do I have to include all emails to any expert. I have
11 routinely deleted emails long the way, but I haven't done so in a couple of weeks,
12 hence there is a lot of stuff there that isn't the basis for my opinions, and some that
13 probably is.

14 do not collect all emails, only those that you consider essential to the opinion or
15 report

16 3. I have requested a detailed list of documents with bates numbers from Diane - I
17 presume that this can be provided.

18 yes

19 4. Does the phrase "considered in forming his or her opinion" include items that I
20 have rejected in forming my opinion.

21 No it does not

22 5. Along the lines of 4 above, I have a number of documents that I received, but
23 have not read [because I have not had time to do so] - do these need to be
24 produced.

25 No do not produce

26 6. Are communications to or from someone that includes you, Rene, or Bob
27 Christie on the address list or cc list open to discovery.

28 Those are protected and not discoverable

29 7. Are communications to or from you, Rene, or Bob Christie to be included

30 Those are not discoverable

31 8. Are communications between myself and Tom Badger or Bob Grandorff to be
32 included.

33 They are discoverable, unless of course they were in emails that have
34 since been deleted.

35 I may have more questions as I go along, but this should get me started - I am
36 probably looking at a week long process. Just so you will know, I assume this
37 prep is to be billed at the deposition and deposition preparation rate - please
38 confirm.

39 Have a nice weekend.

40 Regards,

1 Marv

2 40. In or around May 2016, Respondent directed the State's experts to copy the State's
3 lawyers on their email messages.

4 41. Respondent informed the experts and Hoosier, who processed the State's discovery
5 responses, that any email messages sent or copied to the lawyers did not have to be disclosed to
6 Plaintiffs in response to discovery requests.

7 42. Respondent did not inform the experts that emails between the experts and the
8 State's legal team were subject to disclosure if they: 1) related to compensation for the expert's
9 study or testimony; 2) identified facts or data that the State's lawyer(s) provided and that the
10 expert considered in forming the opinions to be expressed; and/or 3) identified assumptions that
11 the State's lawyer(s) provided and that the expert relied on in forming the opinions to be
12 expressed.

13 43. Consequently, the experts did not include emails exchanged with the State's
14 lawyers in the materials they produced for disclosure and/or discovery.

15 **Plaintiffs' Discovery of Email Agreement**

16 44. As discovery proceeded, Plaintiffs' counsel learned that the State's experts had
17 been deleting expert-to-expert emails and that the State had failed to disclose the deletions
18 despite Plaintiffs' requests for the communications.

19 45. On or about June 30, 2016, Hoosier sent Respondent and Tomisser an email stating
20 that she found a ".txt doc" among the materials Storesund had provided for discovery. The .txt
21 doc contained the following:

22 At the onset of this case, the State of WA experts instituted a policy of deleting
23 any email communication. I did not engage in any USPS mail exchange. The
majority of information sharing occurred via in-person meetings,
teleconferences, and/or online Webex Meetings. All draft materials were

1 discarded upon finalization of our Preliminary and Interim Expert Reports.

2 Rune Storesund
3 June 22, 2016

4 46. The State did not produce the .txt doc to Plaintiffs.

5 47. On or about August 2, 2016, Plaintiffs deposed Storesund. Respondent appeared
6 for the State.

7 48. When Storesund was asked why he did not produce emails as part of his
8 disclosures, Storesund testified:

9 The expert group decided at the beginning that we would delete all emails in the
10 exchange between the experts, and so that's what I did. I deleted all of my emails.
11 And I believe in my disclosure I included a note in there explaining that policy.

12 49. On or about August 7, 2016, Plaintiffs' counsel asked where Storesund's note could
13 be found in the materials produced before his deposition.

14 50. When the State did not respond, Plaintiffs' counsel again asked where Storesund's
15 note could be found.

16 51. The State then produced the .txt doc containing Storesund's note.

17 52. On or about June 30, 2016, Schlieder sent Hoosier and Respondent an email
18 stating, in part:

19 For Section 4:

20 I made an Outlook file of those emails between myself and other experts that
21 concern technical things and that I have left. They're mostly from mid-January to
22 mid-May. I've been deleting things since then and/or including attorneys on the
23 emails. The file is currently up-loading to GD. Still has almost an hour left at my
slow internet speeds

24 53. On or about August 10, 2016, the State produced an Outlook PST file for Schlieder
that contained 278 email messages between the State's experts.

25 54. On or about August 17, 2016, Plaintiffs deposed Schlieder. Respondent appeared

1 for the State.

2 55. Schlieder confirmed that the State's experts agreed to delete emails with each
3 other.

4 56. When asked why he did not produce any emails after May 19, 2016, Schlieder
5 explained:

6 We obtained clarification from Mark [Respondent] regarding which emails
7 needed to be included in discovery. And as part of that instruction - or as part of
8 that, we were instructed that only - that emails that included a state attorney as a
9 CC or as a recipient did not need to be disclosed. So since that time, essentially
10 all the experts as far as I know, are sending things - are sending them and
11 including a state attorney.

12 57. On or about August 18, 2016, Plaintiffs' counsel asked the State to produce all
13 "communications between, with or from the State's experts that are in your possession," noting
14 that cc'ing a lawyer on an email does not necessarily make it privileged or exempt from
15 discovery.

16 58. On or about August 18, 2016, Plaintiffs deposed Pyles. Respondent appeared for
17 the State.

18 59. Prior to his deposition, Pyles produced only one email that predated 2016. When
19 asked why, Pyles testified:

20 The people on the expert team, we agreed up front that we would not retain
21 emails during the course of our work because there's a number of - an array of
22 outdated and irrelevant kinds of things that are included in those that don't end up
23 being in our final deliberations and opinions.

24 60. Pyles also testified that he was instructed, likely by Respondent, not to produce
25 emails if they had been copied to one of the State's lawyers.

26 61. On or about August 19, 2016, Plaintiffs' counsel informed Respondent that they
27 intended to file a motion with respect to the destruction of emails by the State's experts.

1 62. Respondent replied that the State did not believe Plaintiffs were entitled to
2 production of the emails.

3 63. On or about August 22, 2016, the State's lawyers declined to produce missing or
4 withheld emails.

5 **Plaintiffs' Motion for Sanctions**

6 64. On or about August 23, 2016, the Oso plaintiffs filed a motion for sanctions
7 against the State.

8 65. The motion alleged that the State's lawyers had committed discovery fraud by
9 approving an agreement among the State's experts to systematically delete their emails and by
10 withholding information about the email deletions during discovery.

11 66. On or about September 6, 2016, the State filed a response to the plaintiffs' motion.

12 67. The State responded, in part, that the State's lawyers failed to make it clear to the
13 experts that, if they engaged in substantive email communications, they must preserve their
14 emails, regardless of whether the emails ultimately had to be produced.

15 68. As a preliminary step, the court ordered the State to produce emails sent amongst
16 the AGO and the State's experts related to their knowledge of the email deletion agreement.

17 69. The Court also appointed a Special Master, Judge Paris Kallas (Ret.), to review
18 expert communications recovered by the State and by the State's forensic consultant, Celerity
19 Consulting Group.

20 **October 4, 2016 Order**

21 70. On or about October 4, 2016, having reviewed the parties' submissions,
22 declarations, and certain email communications and having consulted with the Special Master,
23 the court entered a Second Supplemental Order on Motion for Sanctions.

1 71. The court found, in part, that the State's experts had been deleting their email
2 traffic since at least March 2015; that Respondent intended and encouraged such deletion; that
3 the State had resisted the plaintiffs' requests for deleted information by claiming the plaintiffs
4 were not entitled to it, the State did not have it, or the State was looking for it; and that
5 Respondent's request for expert witnesses to copy him on email communications, beginning in
6 May 2016, was specifically made to shield those communications from production.

7 72. The court concluded that the violations of discovery rules and the spoliation of
8 evidence were willful, and that there was substantial prejudice to Plaintiffs' ability to prepare for
9 trial.

10 73. The court announced its intention to impose monetary sanctions against the State
11 and to give an adverse inference instruction at trial. However, the court deferred a final ruling
12 on sanctions until the Special Master completed her work and the court could assess the
13 potential prejudice to the plaintiffs.

14 74. While recovery of the emails was still ongoing, the State agreed to settle Plaintiffs'
15 tort claims for \$50 million.

16 **October 10, 2016 Order and Stipulated Judgment**

17 75. On or about October 10, 2016, the court entered a Final Order on Motion for
18 Sanctions and a Stipulated Judgment.

19 76. The court ordered the State to pay \$788,664.04 in sanctions.

20 77. The court also ordered the State to pay the costs of the forensic recovery, the costs
21 of the Special Master, and \$394,332.02 to the plaintiffs' counsel for costs and attorney fees to
22 investigate and litigate the issue of the deleted emails.

23 78. On or about November 10, 2016, the court entered a Stipulated Judgment on Order

1 for Sanctions, entering a judgment against the State in the amount of \$1,182,996.06.

2 79. The judgment was paid. The State did not appeal.

3 80. On or about September 30, 2016, Respondent's contract with the State expired and
4 was not renewed.

5 **COUNT 1**

6 81. By unlawfully obstructing another party's access to evidence and/or unlawfully
7 altering, destroying, and/or concealing a document or other material having potential
8 evidentiary value and/or by counseling and/or assisting another person to do any such act,
9 Respondent violated RPC 3.4(a), RPC 8.4(a), and/or RPC 8.4(d).

10 **COUNT 2**

11 82. By failing to make reasonably diligent effort to comply with a legally proper
12 discovery request by an opposing party, Respondent violated RPC 3.4(d) and/or RPC 8.4(d).

13 **COUNT 3**

14 83. By failing to act with reasonable diligence and promptness in representing a client,
15 Respondent violated RPC 1.3.

16 THEREFORE, Disciplinary Counsel requests that a hearing be held under the Rules for
17 Enforcement of Lawyer Conduct. Possible dispositions include disciplinary action, probation,
18 restitution, and assessment of the costs and expenses of these proceedings.

19 Dated this 27th day of August, 2020.

20 

21 Marsha Matsumoto, Bar No. 15831
22 Managing Disciplinary Counsel
23