Richard D. Monkman
Alaska Bar No. 8011101
rdm@sonosky.net
Sonosky, Chambers, Sachse,
Miller & Monkman, LLP
302 Gold Street, Suite 201
Juneau, Alaska 99801
Telephone: 907.586.5880
Facsimile: 907.586.5883

Robert P. Lynch
Alaska Bar No. 1305020
rplynch@anthc.org
Alaska Native Tribal Health Consortium
4000 Ambassador Drive,
Anchorage, Alaska 99503
Telephone: 907.729.8218
Facsimile: 907.729.2015

Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JOAN WILSON and PAUL FRANKE, M.D., Plaintiffs, v. ALASKA NATIVE TRIBAL HEALTH CONSORTIUM; ANDREW TEUBER; and ROALD HELGESEN, Defendants.	)	Case No. 3:16-cv-00195-TMB

[PROPOSED] REPLY IN SUPPORT OF MOTION TO DISQUALIFY [Dkt. 32]

CONTENTS

ANTHC's *Motion to Disqualify* at Dkt. 32 argues that disqualification of plaintiffs and their counsel is warranted for three reasons: (1) plaintiff Joan Wilson has a conflict of interest and violated Alaska Rule of Professional Conduct ("ARPC") 1.9(a) because this case is substantially related to matters in which Wilson formerly represented ANTHC; (2) Wilson violated ARPC 1.9(c) by using and revealing ANTHC's confidences and secrets; and (3) Wilson abused the judicial process by misappropriating documents and confidential ANTHC information for plaintiffs' use in this lawsuit.

In their *Opposition* at Dkt. 57 plaintiffs confuse ARPCs 1.9(a), 1.9(c) and 1.6(b)(3); do not substantively respond to the misappropriation argument; and devote substantial space arguing that Wilson was wrongfully terminated as a factual matter. The latter argument is both wrong and irrelevant to the current motion.[1] We address plaintiffs' arguments below, referencing the appropriate Rules.

I. WILSON IS DISQUALIFIED UNDER ARPC 1.9(a).

Under ARPC 1.9(a) disqualification is warranted if (1) a lawyer formerly represented a client in a matter; (2) the lawyer "thereafter represent[s] another person;" (3) "in the same or a substantially related matter;" (4) the "person's interests are materially

[1] Plaintiffs provide an overstated narrative comprised entirely of self-serving opinions by Wilson to the effect that she was a superlative compliance officer and was wrongfully terminated. Dkt. 57 at 5-16. In Wilson's opinion, she was superb; everyone else at ANTHC was a villain. *Id*. Needless to say, ANTHC and many of its staff and officers dispute Ms. Wilson's favorable opinion of herself and her unfavorable opinions of others. Wilson was "terminated . . . because she failed to perform her [Compliance Officer] duties adequately and because her unprofessional behavior and improper responses to problems [caused her supervisor to] question her judgment and fitness for the [Compliance Officer] position." *Roald Helgesen Aff.*, Dkt. 52 at 5-6 ¶¶ 12-13.

adverse to the interests of the former client;" and (5) the former client did not give informed written consent.[2] Plaintiffs do not dispute elements one, three, four, and five. Plaintiffs only dispute element two, the subsequent representation element.

A. ARPC 1.9(a): Breach of attorney-client privilege is not an element. Plaintiffs open their argument by confusing the provisions of APRC 1.9 and misstating ANTHC's argument. Plaintiffs first assert that "ANTHC makes general claims that Ms. Wilson violated her ethical obligations to ANTHC by disclosing documents protected by the attorney-client privilege, and other confidentiality restrictions."[3] ANTHC does not make that argument regarding ARPC 1.9**(a)**, since it is not an element of that rule, but rather regarding ARPC 1.9**(c)**, discussed below.[4]

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[2] ARPC 9.1(r) (defines "substantially related matters" for ARPC 1.9(a) purposes); *Moore v. Olson*, 351 P.3d 1066, 1073 (Alaska 2015) ("We have explained that '[t]he substantial relationship test for determining disqualification of an attorney is a prophylactic rule which obviates the need for the former client to demonstrate that confidential information was actually disclosed in the course of the prior representation.'") (quotations omitted); MODEL RULES OF PROF'L CONDUCT r. 1.9 cmt. [3] (AM. BAR ASS'N 2015) ("Matters are 'substantially related' for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.").

[3] Dkt. 57 at 16.

[4] Dkt. 33 at 16-19, 22-24; *see Marx v. Benzel*, 66 P.3d 735, 736 (Alaska 2003) ("If there is former representation on a substantially related matter the former client is entitled to the protection of Rule 1.9(a) without showing that confidential information was actually disclosed."); *Griffith v. Taylor*, 937 P.2d 297, 301 (Alaska 1997) ("The substantial relationship test for determining disqualification of an attorney is a prophylactic rule which obviates the need for the former client to demonstrate that confidential information was actually disclosed in the course of the prior representation. 'For the Court to probe further and sift the confidences in fact revealed would require disclosure of the very matters intended to be protected by the rule [of confidentiality].'") (quoting *T.C. Theatre Corp. v. Warner Bros. Pictures,* 113 F. Supp. 265, 269 (S.D.N.Y.1953)).

Plaintiffs' only substantive ARPC 1.9(a) arguments are that the second element of the rule, subsequent representation, is not satisfied because (1) Wilson did not "represent" the United States as a *qui tam* relator, and (2) even if she once did, representation ceased when plaintiffs dismissed the *qui tam* allegations.[5]

B. ARPC 1.9(a): *Qui tam* relators represent the United States. Plaintiffs argue that "Ms. Wilson does not represent any party in the instant case."[6] Plaintiffs seem to argue that the term "represent" in ARPC 1.9(a) means a formal entry of appearance as counsel in a litigation matter.[7] That is not the ARPC 1.9(a) standard.

For example, it is entirely immaterial to the representation element that the Department of Justice is by statute "counsel" to the United States. As the Department of Justice very carefully pointed out in this action, the False Claims Act authorizes relators such as Wilson to "bring *qui tam* claims *on behalf of* the United States." [8] In a *qui tam* action, "[t]he government, not the relator, is considered the real plaintiff."[9] The relator sues "'in the name of the Government' and if successful obtains a civil judgment for the

[5] Plaintiffs do not dispute that Wilson formerly represented ANTHC as outside counsel in the pharmacy matter. This is sufficient for disqualification under ARPC 1.9(a). ANTHC's points about Wilson's representation of ANTHC as an employed lawyer in the context of ARPC 1.9(c) apply to her violation of ARPC 1.9(a) also.

[6] Dkt. 57 at 21.

[7] *Id.* at 20.

[8] *United States' Statement of Interest*, Dkt. 56 at 2 (emphasis added).

[9] CORNELL L. SCH. LEGAL INFO. INST., *Qui tam action*, https://www.law.cornell.edu/wex/qui_tam_action, Legal Information Institute (last visited Jan. 29, 2019).

government."[10] The *qui tam* decision binds the United States as *res judicata*.[11] The real party in interest in a *qui tam* case is not the relator, it is the United States.[12] The Ninth Circuit has made clear that for RPC 1.9(a) purposes, "*qui tam* relators are not prosecuting only their 'own case' *but also representing the United States* and binding it to any adverse judgment the relators may obtain."[13] "The nature of a *qui tam* action is that the relator . . . *represents* the United States."[14]

Because a relator represents the United States, ARPC 1.9(a) disqualifies lawyer/relators who switch sides and sue former clients. This is exactly what the District Court for the Southern District of New York held in *Quest*.[15] Plaintiffs agree that *Quest* involved a New York rule of professional conduct that is "nearly identical" to ARPC 1.9(a), but argue that the Second Circuit affirmed without reaching that issue. But, the only reason the Circuit panel did not reach the 1.9(a) issue is because it had already ruled that dismissal was appropriate under 1.9(c).[16]

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[10] *Alaska Bldg., Inc. v. Legislative Affairs Agency*, 403 P.3d 1132, 1139 (Alaska 2017) (citing 31 U.S.C. § 3730).

[11] *Stoner v. Santa Clara Cty. Office of Educ.*, 502 F.3d 1116, 1126-27 (9th Cir. 2007) (emphasis supplied); accord, *Timson v. Sampson*, 518 F.3d 870, 873 (11th Cir. 2008).

[12] *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994).

[13] *Stoner*, 502 F.3d at 1126-27 (emphasis added); FED. R. CIV. P. 17(a).

[14] *United States ex rel. Schwartz v. TRW Inc.*, 118 F. Supp. 2d 991, 993 (C.D. Cal. 2000) (emphasis added).

[15] *United States ex rel. Fair Lab. Practices Assocs. v. Quest Diagnostics Inc.*, No. 05 CIV. 5393 (RPP), 2011 WL 1330542, at *7 (S.D.N.Y. Apr. 5, 2011).

[16] *United States v. Quest Diagnostics Inc.*, 734 F.3d 154, 165 (2d Cir. 2013) ("Because we affirm the judgment of the District Court on the grounds that Bibi violated N.Y. Rule 1.9(c),

The District Court's 1.9(a) ruling in *Quest* remains good law, and its reasoning has been adopted by Ninth Circuit courts. As Senior U.S. District Court Judge John Coughenour recently explained, the District Court's opinion in *Quest* is squarely on point because it "explicitly held that a *qui tam* plaintiff 'represents' the United States within the meaning of the side-switching rule," and "is consistent with Ninth Circuit authority, which states that '*qui tam* relators are not prosecuting only their "own case" but also representing the United States.'"[17] That is exactly what has occurred here. Under ARPC Rule 1.9(a), a side-switching lawyer/relator is subject to Rule 1.9(a) disqualification. Wilson switched sides, and brought an action representing the United States against her former client, ANTHC, in violation of ARPC 1.9(a), seeking damages for the United States and a personal reward.[18]

C. ARPC 1.9(a): Wilson's violation was not cured. Plaintiffs argue in a footnote, without citation, that Wilson is not disqualified under ARPC 1.9(a) because their

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we need not consider whether Bibi also violated N.Y. Rule 1.9(a)—the 'side-switching' rule—by participating in this *qui tam* action.").

[17] *In re Examination of Privilege Claims*, Nos. MC15-0015-JCC-JPD & C12-2091-JCC, 2015 WL 13735797, at *2 (W.D. Wash. Dec. 1, 2015) (quoting *Quest*, 2011 WL 1330542, at *7; *Stoner*, 502 F.3d at 1126-27).

[18] Plaintiffs attempt to distinguish *United States ex rel. Holmes v. Northrop Grumman Corp.*, 642 F. App'x 373 (5th Cir. 2016), asserting that the Fifth Circuit affirmed disqualification "based on the attorney's violation of a protective order in a separate arbitration, a violation of a conflict of interest (based on concurrent representation) and the attorney's lack of candor to the court." Dkt. 57 at 25. In fact, disqualification was appropriate based on the lawyer/relator's violation of "no less than four ethical duties," including the lawyer's "duty of loyalty by taking a position in the *qui tam* suit that was contrary to the interests of his [former] client." 642 F. App'x at 376-78.

"operative complaint" dropped the *qui tam* allegations.[19] This does not cure the ARPC 1.9(a) violation. As this Court recognized, the United States continues to have an "interest in the instant case under 31 U.S.C. [§] 3730."[20] And Wilson remains the vehicle advancing the Government's interests.[21]

ANTHC has not located any case where a lawyer/relator avoided Rule 1.9(a) by the transparent expedient of dropping *qui tam* allegations after the Department of Justice's FCA declination. If the United States later intervenes, Wilson will certainly hold out her hand to receive a *qui tam* relator's reward.[22] Even though plaintiffs dropped the *qui tam* claims, Wilson still represents the United States' interests in a manner that directly conflicts with her duties to her former client. Regardless, the ARPC 1.9(a) damage was done when

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[19] Dkt. 57 at 20 n.98.

[20] *TMB TEXT ORDER re: Abeyance of civil matters*, Dkt. 65.

[21] The Department of Justice is served with all pleadings and deposition transcripts and has the right, at any time, to intervene. *See* Dkt. 56; 31 U.S.C. § 3730(c)(2), (3).

[22] Plaintiffs argue an attorney is entitled to sue a former client in order to "assert personal rights," and that Wilson may proceed on this basis. Dkt. 57 at 25-26. Plaintiffs incorrectly rely on *Doe v. A Corp*., 709 F.2d 1043, 1046-47 (5th Cir. 1983). The attorney/class plaintiff in *Doe* was disqualified as class representative because "information Doe acquired about A Corporation's affairs was protected by the attorney-client privilege [and because] he apparently gained other information that was not privileged." *Id*. The Circuit noted that "[T]here is a conclusive and irrebuttable presumption that permitting the lawyer who has switched loyalties to represent the adversary of a former client in substantially related litigation will lead to disclosure and misuse of confidential information obtained during the previous representation." *Id.* at 1047 (citation omitted); *accord Dynamic 3D Geosolutions LLC v. Schlumberger Ltd*., 837 F.3d 1280, 1291 (Fed. Cir. 2016) (citing *Doe* and affirming disqualification: "All aspects of the case were contaminated by [the former attorney's] actions, from the purchase of the '319 patent, to preparation for suit against Schlumberger, to the actual filing of the suit.").

the case was first filed. Plaintiffs cannot now "unring a bell that should never have been rung in the first place."[23]

II. WILSON IS DISQUALIFIED UNDER ARPC 1.9(c).

ARPC 1.9(c), the confidentiality rule, "provides that information acquired by the lawyer in the course of representing a client may not subsequently be *used* or *revealed* by the lawyer to the disadvantage of the client."[24] While the plaintiffs confuse and conflate the provisions of ARPC 1.9, the rule is straightforward. A lawyer violates ARPC 1.9(c) if she (1) "formerly represented a client in a matter," (2) thereafter uses the client's "confidences and secrets to the disadvantage of the former client" or simply reveals the "confidences and secrets," and (3) the lawyer's use or disclosure does not fall within an exception to the rule. Plaintiffs argue that Wilson's disclosure of ANTHC's confidential information was permissible despite ARPC 1.9(c) because Wilson's specific legal advice to ANTHC was not revealed and Wilson supposedly acted to "prevent a future or ongoing crime or fraud."[25]

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[23] *Bostic v. State*, 805 P.2d 344, 348 (Alaska 1991); *United States v. Quest Diagnostics Inc.*, 734 F.3d 154, 167 (2d Cir. 2013); *United States ex rel. Holmes v. Northrop Grumman Corp.*, 642 Fed. App'x 373, 377 (5th Cir. 2016).

[24] ARPC 1.9 cmt. (emphasis added).

[25] Dkt. 57 at 19-20. Plaintiffs' assertion that "ANTHC has failed to establish that any information disclosed by Ms. Wilson violated the attorney-client privilege or the work product rule" is incorrect and misleading. *ANTHC's Privilege Log*, Dkt. 33-2 (describing many attorney-client communications between Wilson and ANTHC officers); *Martina Ruhle Aff.*, Dkt. 36 at 3 ¶ 5(b) (identifying 435 pages of attorney-client and work product protected documents taken by Wilson without ANTHC's consent and disclosed to the Department of Justice); Dkt. 56 at 2 n.1 (confirming that plaintiffs took and disclosed ANTHC attorney-client privileged materials: "[t]he Department of Justice attorney who received these materials sequestered the production without reviewing any privileged

A. ARPC 1.9(c) element one: Wilson formerly represented ANTHC in all matters alleged. Wilson admits that she formerly represented ANTHC as outside counsel in the $160 million pharmacy matter.[26] Thus, there is no dispute that the first element of ARPC 1.9(c) is satisfied regarding Wilson's outside counsel work. The question is whether Wilson represented ANTHC on the other issues as an employed lawyer.

This question is answered both by Wilson's own sworn statements and ANTHC's privilege log. Wilson avers that at ANTHC she "was using [her] legal skills – reviewing laws, writing policies, addressing permissible billing under the law."[27] Wilson avers that in so doing, she "addressed all the issues in the versions of the complaints filed in [this] case," not just the pharmacy matter.[28] ANTHC's privilege log emails show that Wilson held herself out as a lawyer to ANTHC managers and employees, gave legal advice to management on various matters, and, as averred by ANTHC's General Counsel, frequently worked as an integral part of ANTHC's in-house legal team.[29]

> When Ms. Wilson specifically worked at the direction of myself or other ANTHC counsel, I considered her work to be legal work for ANTHC subject

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documents and asked relator to reproduce only non-privileged materials."); *Letter from Dillon & Findley* (Jan. 29, 2018), Dkt. 34-4 at 1 (ANTHC laptop taken by Wilson, "imaged," and information provided to Department of Justice and State of Alaska).

[26] *Joan Wilson Dec.*, Dkt. 58 at 5-6 ¶ 7.

[27] *Id.* at 14 ¶ 22.

[28] *Id.* at 4-5 ¶ 6 (lists issues).

[29] Dkt. 33-2 (examples of rendered legal advice); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (AM. LAW INST. 2000) (a lawyer-client relationship is formed when (1) "a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person" and (2) the lawyer either (a) "manifests to the person consent to do so" or (b) "fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services.").

> to the rules of professional responsibility. When Ms. Wilson acted independently to provide legal advice, with or without the prior knowledge of me and other in-house counsel, it is my belief that ANTHC executives and managers relied on her status and expertise as an attorney by sharing confidential information with her, seeking and relying on her legal advice, and expecting her to abide by the same professional standards that applied to its other counsel.[30]

Conclusively, Wilson swore under oath to the Alaska Judicial Council that she was continually in "the active practice of law" while employed at ANTHC.[31] Wilson now avers that her sworn statement to the Alaska Judicial Council[32] was (perhaps) in error, because it was based on "a provision interpreting [AS 22.05.070(3)] to extend to federal contractors, but [she] could not locate it at the time of this writing."[33] Putting aside the unsettling aspect of an experienced attorney trying to walk back sworn statements she made while pursuing

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[30] *Nacole Heslep Aff.*, Dkt. 37 at 5 ¶ 14; *see also id.* at 4-5 ¶¶ 12-13.

[31] *See Alaska Judicial Council Application for Judicial Appointment*, Dkt. 33-1 at 1 (Wilson states she has been in the active practice of law for 19 years and 10 months immediately preceding application), 4 ("Legal Experience"; lists ANTHC as "legal employment" and "responsible for ANTHC compliance with all applicable law), and 14 ("Over my twenty years as an attorney, I have worked in public and private practice. I have served inhouse as a chief ethics and compliance officer. I have appeared before the district, superior, appellate, federal district [courts] and Office of Administrative Hearings.").

[32] Alaska Judicial Council applications are made under oath and notarized. *See* ALASKA JUDICIAL COUNCIL, *Application for Judicial Appointment*, http://www.ajc.state.ak.us/sites/default/files/imported/selection/application12-2018.pdf (last visited Jan. 31, 2019).

[33] Dkt. 58 at 14 ¶ 22. AS 22.05.070(3) provides that "The active practice of law includes … (3) rendering legal services to an agency, branch, or department of a civil government within the United States . . . in an . . . employed capacity." ANTHC is a tribal governmental organization, formed by tribal governments pursuant to, *inter alia*, § 325 of Pub. L. 105-83, P.L. 93-638, 25 U.S.C. § 5301 *et seq.*, 25 U.S.C. § 1601, *et seq.*, and § 121 of Pub. L. 94-437; *see Barron v. Alaska Native Tribal Health Consortium*, No. 3:18-cv-00118-SLG, 2019 WL 80889 (D. Alaska Jan. 2, 2019) (ANTHC is an arm of tribal governments and entitled to tribal sovereign immunity).

of a judicial appointment, Wilson was in fact "rendering legal services" to ANTHC, a tribal government entity, as its employee. Regardless whether Wilson was practicing law under AS 22.05.070(2) or .070(3), ANTHC was Wilson's client.[34]

In a final effort, Wilson claims: "While working at ANTHC, I was an attorney without a client. If my client was anyone or anything it was the required compliance with the law."[35] This stunning statement is contradicted by Wilson's assertion above that she was "rendering legal services *to an agency* . . . of a civil government" under .070(3) and by the facts in the record. Wilson expounds at great length on how she "dealt with, worked on, and addressed all of the issues in the versions of the complaints filed in my case."[36] Wilson did not send free-floating legal advice and opinions out into the ether, and she was not without a client. She was hired and paid by ANTHC. Her legal advice to the ANTHC Board of Directors was "direct[ed]" and "guid[ed]" by her interpretation of various statutes[37] and she claims that she "worked tirelessly to ensure ANTHC complied with the law. Her work directly benefited ANTHC and the thousands of individuals who received

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[34] "'Client' denotes a person, a public officer or *agency*, or a corporation, association, organization, or *other entity, either public or private*, who receives professional legal services from a lawyer." ARPC 9.1(b) (emphasis added).

[35] Dkt. 58 at 14 ¶ 23. Wilson cites no authority (and ANTHC knows of none) for the proposition that an attorney providing legal advice and rendering other legal services to her employer represents not her employer but "compliance with the law."

[36] *Id.* at 4 ¶ 6.

[37] Dkt. 57 at 19; *Waggoner v. Snow, Becker, Kroll, Klaris & Krauss*, 991 F.2d 1501, 1505 (9th Cir. 1993); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (AM. LAW INST. 2000).

care at ANTHC's facilities."[38] ANTHC is not alone in characterizing Wilson's employment in this manner. In her application to the Alaska Judicial Council, Wilson, herself, swore that her ANTHC position was "legal employment," that she was "responsible for ANTHC compliance with all applicable law," and that she was in the "active practice of law" throughout her time at ANTHC.[39] Wilson also admitted by her conduct that she was bound by the ARPCs in connection with her ANTHC employment when she "sought advice from Bar Counsel as to [her] next best step" for resolving her ANTHC workplace concerns.[40] On these facts, the conclusion that Wilson's work at ANTHC precisely fit the "practice of law" definitions in AS 22.05.070(2)[41] and Alaska Bar Rule 63(b)(ii)[42] is inescapable.

B. ARPC 1.9(c) element two: Wilson used and revealed ANTHC's confidences and secrets. Plaintiffs next argue (incorrectly) that the second element of ARPC 1.9(c) is not satisfied because, they assert, the information Wilson used and disclosed were not communications protected by the attorney-client privilege.

1. ARPC 1.9(c) covers more than attorney-client protected information. ARPC 1.9(c) covers both "confidences" and "secrets." A "confidence" is "information protected

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[38] Dkt. 58 at 4 ¶ 5.

[39] Dkt. 33-1 at 1, 4.

[40] *Email from Joan Wilson* (May 31, 2016), Dkt. 57-12 at 3 n.2.

[41] "The active practice of law includes . . . (2) being actually engaged in advising and representing clients in matters of law." AS 22.05.070.

[42] "'[P]ractice of law' is defined as . . . for compensation, providing advice or preparing documents for another which effect legal rights or duties." AK Bar R. 63(b)(ii).

by the attorney-client privilege under applicable law," while a "secret" includes all "other information gained in the professional relationship if the client has requested it be held confidential or if it is reasonably foreseeable that disclosure of the information would be embarrassing or detrimental to the client."[43] ARPC 1.9(c) "applies not only to matters communicated in confidence by the client but also to *all information* relating to the representation, whatever its source."[44] The pharmacy matter and the other matters Wilson disclosed were highly sensitive *compliance* issues, matters that prompted concerns by ANTHC about potential legal and financial exposure. ANTHC had an expectation of confidentiality regarding these issues and had the right to have Wilson maintain that confidentiality.[45]

Plaintiffs cite *Pederson v. Barnes* for the proposition that Wilson's disclosure of ANTHC's confidences and secrets was permissible. The case says no such thing.[46] The Alaska Supreme Court in *Pederson* did, however, cite with approval and apply the *Restatement (Third) of The Law Governing Lawyers*, which defines the scope of information protected by ARPC 1.9(c) as "all information relating to representation of a client," including:

> information acquired by a lawyer in all client-lawyer relationships, including functioning as inside or outside legal counsel, government or private-practice lawyer, counselor or litigator, advocate or intermediary. . . . The definition

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[43] ARPC 1.6(a).

[44] MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. [3] (AM. BAR ASS'N 2015) (emphasis added).

[45] *Kay Gouwens Aff.*, Dkt. 35 at 5-6 ¶ 13; Dkt. 37 at 3-4 ¶¶ 7-9.

[46] Dkt. 57 at 27 n.126 (citing 139 P.3d 552, 557 (Alaska 2006)).

> includes information that becomes known by others, so long as the information does not become generally known.[47]

Plaintiffs admit that Wilson worked on all "issues . . . included in the complaints" either at ANTHC or as outside counsel.[48] Thus, the second element of ARPC 1.9(c) is satisfied.

2. Wilson disclosed attorney-client protected information. Even as to client confidences, plaintiffs do not seriously dispute that Wilson revealed attorney-client-privilege-protected information. First, Wilson disclosed a wide range of attorney-client advice and confidences to the State of Alaska, the U.S. Department of Justice, and to her co-plaintiff with the full knowledge and admission by her counsel.[49] Second, the Department of Justice confirms that plaintiffs and their counsel disclosed attorney-client privileged ANTHC documents to it.[50] Third, plaintiffs and their counsel still hold "over 800 documents that Ms. Wilson and Dr. Franke did *not* provide to the Department of Justice."[51] From the context it appears that these 800 documents contain even more attorney-client privileged communications.

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[47] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 (AM. LAW INST. 2000).

[48] Dkt. 57 at 8–9 (lists eight issue areas found in complaints: "Ms. Wilson's office had open files for each of these issues, and she discussed the same with ANTHC executives.").

[49] Dkt. 33-2 (examples of attorney-client communications between Wilson and ANTHC officers); Dkt. 36 at 3 ¶ 5(b) (at least 435 pages of attorney-client and work product protected documents taken by Wilson). If requested, ANTHC can submit the privilege log documents to the Court for *in camera* review. Plaintiffs already have copies: Wilson took them with her when she left ANTHC.

[50] Dkt. 56 at 2 n.1 (confirms that plaintiffs took and disclosed ANTHC attorney-client privileged materials: "The Department of Justice attorney who received these materials sequestered the production without reviewing any privileged documents and asked relator to reproduce only nonprivileged materials.").

[51] Dkt. 57 at 29 (emphasis original).

C. ARPC 1.9(c) element three: Wilson's disclosures do not fall under an exception. The ARPCs contain exceptions that permit a lawyer to disclose confidential client information without consent in limited situations. Plaintiffs argue three exceptions apply: (1) ARPC 1.9(c), because "the information has become generally known;" (2) ARPC 1.6(b)(2), the "crime or fraud" exception; and (3) ARPC 1.6(b)(6), "to comply with other law or a court order." None of these exceptions apply here.

1. ARPC 1.9(c): the "generally known" exception does not apply. Plaintiffs' main ARPC 1.9(c) argument is that Wilson did not reveal ANTHC's confidences and secrets because plaintiffs' complaint reveals only "information that is publicly known by state and federal regulators" and ARPC "1.9(c)(1) makes clear that a lawyer can use information that is 'generally known.'"[52]

This contention misreads the rule. ARPC 1.9(c)(1) only permits a lawyer to use a former client's information to the client's detriment if the information has become "generally known." But "[t]he 'generally known' exception to the duty of former-client confidentiality is limited. It applies . . . only to the *use*, and *not the disclosure* or revelation, of former-client information."[53] ARPC 1.9(c)(2) governs a lawyer's *disclosure* of former-client information and contains no such exception.

Plaintiffs rely exclusively on the theory that if ANTHC asked for legal advice about its billing practices on the pharmacy issue, this means that ANTHC must have "explained

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[52] Dkt. 57 at 27.

[53] ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 479 (2017) (emphasis added).

the issues to regulators."[54] This is pure supposition, without a scintilla of evidence behind it. There is no evidence whatsoever that ANTHC "publicly disclosed" anything relating to the matters alleged in plaintiffs' complaints. And, even if the information disclosed by Wilson was known by government regulators, that does not make the information "generally known."[55] Plaintiffs proposed application of the exception would functionally swallow the rule and render it nearly meaningless.

2. ARPC 1.6(b)(3): the crime or fraud exception does not apply. The very limited "crime or fraud" exception only applies where the client used the lawyer's services "in furtherance of" a crime or fraud.[56] In other words, the lawyer must have played a role in accomplishing or concealing the client's crime or fraud, *e.g.*, when a lawyer unwittingly completes a false loan application that her client uses to defraud a bank.[57] The exception

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[54] Dkt. 57 at 4.

[55] The "generally known" exception applies "only if the information has become (a) widely recognized by members of the public in the relevant geographic area; or (b) widely recognized in the former client's industry, profession, or trade." ABA Formal Op., *supra* note 53. Not even plaintiffs contend that this is the case here. *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (AM. LAW INST. 2000) ("Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense.").

[56] ARPC 1.6(b)(3) ("A lawyer may reveal a client's confidence or secret to the extent the lawyer reasonably believes necessary . . . to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services."); *see* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS, LAW. DESKBK. PROF. RESP. § 1.6-12(f)(1) (2018-2019 ed.) ("[I]f the client has misused the lawyer's services to commit a fraud, and the lawyer discovers this fact, the lawyer may disclose to rectify the damage.").

[57] *See, e.g., Pallon v. Roggio*, Nos. 04-3625(JAP) & 06-1068(FLW), 2006 WL 2466854, at *4-5 (D.N.J. Aug. 24, 2006) (" To invoke the exception, the party must make a prime facie showing that (1) the client was committing or intending to commit a fraud or crime

applies only "in the narrow case where the client has misused the lawyer's services to perpetrate the fraud."[58] Then, the client's "serious abuse of the client-lawyer relationship . . . forfeits the protection" of the attorney's confidentiality.[59] Wilson does not even attempt to argue that ANTHC misused her legal services to perpetrate any fraudulent acts. Indeed, plaintiffs assert the direct opposite: that Wilson advised ANTHC against illegal acts.

Second, when a lawyer represents an organization, ARPC 1.13 "supplements Rule 1.6(b)."[60] ARPC 1.13 does not allow disclosure of "client confidences and secrets relating to a lawyer's representation of an organization when the lawyer's job is to investigate and prevent alleged violations of law."[61] This was exactly Wilson's role as outside counsel representing ANTHC in the pharmacy matter and exactly Wilson's role at ANTHC.[62] Disclosure is not authorized in these circumstances.

Third, even where ARPC 1.6(b)(3) applies, the lawyer may only reveal the "client's confidence or secret *to the extent the lawyer reasonably believes necessary*" to "prevent, mitigate, or rectify" the financial injury.[63] No more than the minimum necessary may be

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and (2) the attorney-client communications were in furtherance of that alleged crime or fraud.") (internal citations omitted); Maryland State Bar Ass'n, Ethics Op. 2001-18 (2001) (lawyer who discovers evidence that client misappropriated funds may not disclose this unless lawyer's services used to further misappropriation).

[58] ROTUNDA & DZIENKOWSKI, *supra* note 56.

[59] MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. [7] (AM. BAR. ASS'N 2015).

[60] ARPC 1.13 cmt. (emphasis added).

[61] ARPC 1.13(d) cmt.

[62] Dkt. 58 at 4 ¶ 6 ("I dealt with, worked on, and addressed all of the issues in the versions of the complaints filed in my case.").

[63] ARPC 1.6(b)(3) (emphasis added).

disclosed: "the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then *only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury* to the organization."[64] None of these requirements and limitations was satisfied here. In an analogous situation, the Southern District of New York described the proper course for a lawyer to take:

> Doe's proper course of conduct was to have brought to the attention of the defendants the fact that their conduct was wrongful. Such disclosures are permitted under Canon 4 since they are to the clients themselves and not to third persons. He should have endeavored to persuade his clients to rectify their wrongs. If the clients refused to do so, he should have severed his relations with them. But to attempt to enforce A Corp.'s rights independently in court is a clear violation of the attorney's duty not to disclose confidential information.[65]

ARPC 1.13 emphatically requires that "[a]ny measures taken should, to the extent practicable, *minimize the risk of revealing client confidences and secrets* to persons outside the organization."[66] The Commentary notes that "[i]f the disclosure will be made in connection with a judicial proceeding, the lawyer should ask the tribunal to limit access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable."[67] Here, plaintiffs did not move to keep the case under seal to protect

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[64] ARPC 1.13 cmt. (emphasis added).

[65] *Doe v. A Corp.*, 330 F. Supp. 1352, 1356 (S.D.N.Y. 1971) (citation omitted).

[66] ARPC 1.13 cmt.

[67] ARPC 1.6 cmt.

ANTHC's confidential information, did not move to proceed under pseudonyms, and did not seek a protective order "to the fullest extent practicable."[68] Instead, plaintiffs' disclosures were intended to reveal ANTHC's confidences and secrets to the *maximum* extent possible in order to achieve the highest amount of personal gain.[69]

Fourth, even where ARPC 1.6(b)(3) applies, it permits only disclosure, and does not countenance adverse action against the former client. "Once use or disclosure of information has been made to prevent, rectify, or mitigate loss . . . the lawyer is not further warranted in actively assisting the victim on an ongoing basis in pursuing a remedy against the lawyer's client or in any similar manner aiding the victim or harming the client."[70]

3. ARPC 1.6(b)(6): the court order exception does not apply. Last, plaintiffs argue that Wilson's "disclosure of information on the ANTHC computer" did not violate ARPC 1.9(c) because disclosures necessary to comply with a court order are allowed under ARPC 1.6(b)(6).[71] Plaintiffs have not shown a court order that required or permitted Wilson to disclose ANTHC's confidences and secrets.[72]

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[68] Plaintiffs' inaction in this case is in stark contrast with *Doe v. A Corp.*, 709 F.2d 1043, 1045 n.1 (5th Cir. 1983).

[69] This is confirmed by plaintiffs' threats before the *qui tam* seal was lifted that, absent a quick, quiet and highly lucrative settlement, ANTHC would suffer "bad press and public scrutiny." *Dillon & Findley Demand Letter* (Jan. 19, 2018), Dkt. 34-3 at 3.

[70] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 67 cmt. f (AM. LAW INST. 2000).

[71] Dkt. 57 at 28.

[72] To the extent plaintiffs are referencing the warrant, Wilson's disclosures preceded the warrant's issuance and her disclosures to counsel, her co-plaintiff, and the public exceed the warrant's scope.

III. WILSON'S MISAPPROPRIATION REQUIRES DISMISSAL.

Wilson irreparably harmed the Court's ability to administer this case in a fair and orderly manner by misappropriating two laptop computers and thousands of records belonging to ANTHC, making copies of those records for plaintiffs' use in this litigation, and disclosing the records directly to her co-plaintiff, plaintiffs' counsel, the State of Alaska and the Department of Justice, and indirectly to the public through the complaints. Dismissal is necessary to cure the harm to ANTHC and maintain the public's confidence in the judicial system.[73]

A. Wilson acted willfully and in bad faith. In *Xyngular*, the Tenth Circuit found clear and convincing evidence of bad faith where the plaintiff misappropriated records without even "attempt[ing] to use the proper procedures" and "did so anticipating litigation."[74] Plaintiffs' only response is that Wilson's misappropriation was somehow different because Wilson filed a False Claims Act action based on the misappropriated materials, and Wilson disclosed the misappropriated files to State regulators after receiving

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[73] Before ordering dismissal, a District Court must find "willfulness, fault, or bad faith," *must* consider "less severe alternatives" than outright dismissal, and should consider the following five factors: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006) (quotation omitted). Because the first two of these five factors "favor the imposition of sanctions in most cases, while the fourth cuts against a default or dismissal sanction, . . . the key factors are prejudice and availability of lesser sanctions." *Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir. 1990).

[74] *Xyngular v. Schenkel*, 890 F.3d 868, 874 (10th Cir. 2018), *cert. denied*, No. 18-479, 2019 WL 113129 (U.S. Jan. 7, 2019); *accord*, *Jackson v. Microsoft Corp.*, 211 F.R.D. 423, 431-32 (W.D. Wash. 2002), *aff'd*, 78 F. App'x 588 (9th Cir. 2003).

a warrant—a warrant which, ANTHC learned and plaintiffs do not deny, she affirmatively encouraged the State to obtain and serve.[75]

Xyngular rejected nearly identical arguments. The plaintiff argued he acted in good faith because "he gathered documents as a whistleblower with the intent to report illegal conduct to government authorities." The court noted that "even if he engaged in protected whistleblowing activity, … he was also acting as a potential litigant."[76] Misappropriation to support anticipated litigation is evidence of bad faith "not immunized by separate whistleblowing activity. . . . Federal courts have been leery to protect whistleblowers who improperly acquired their employers' property."[77]

B. ANTHC suffered irreparable prejudice. Wilson's actions have deprived ANTHC of the right to object to the discovery of and obtain protection for the thousands of misappropriated documents. ANTHC permanently lost its ability to keep plaintiffs from seeing the approximately 435 pages of records covered by attorney-client privilege or work product protections,[78] the thousands of other records taken by Wilson, including confidential and privileged records from executive sessions of ANTHC's Board of Directors.[79] This damage cannot be undone.[80]

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[75] Dkt. 57 at 30; Dkt. 37 at 6-7 ¶¶ 16-20. No action was instituted based on the warrant. *Id*.

[76] *Xyngular Corp. v. Schenkel*, 200 F. Supp. 3d 1273, 1318 (D. Utah 2016).

[77] *Id.* (collecting cases, including *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763 (9th Cir. 1996)).

[78] Dkt. 36 at 3 ¶ 5(b).

[79] *Id.* at 4 ¶ 5(f).

[80] Dkt. 33 at 26; *Xyngular v. Schenkel*, 890 F.3d 868, 874 (10th Cir. 2018); *Jackson v. Microsoft Corp.*, 211 F.R.D. 423, 432 (W.D. Wash. 2002) ("Microsoft has been prejudiced

C. Lesser sanctions than disqualification are insufficient. First, courts consistently hold that sanctions less than dismissal are insufficient where one party misappropriates another party's confidential and privileged records.[81] Second, dismissal is justified when the misappropriating party refuses to disclose the true extent of the misappropriation—e.g., Wilson's continued refusal to account for the 824 pages of documents that plaintiffs possess but claim not to have produced to the Department of Justice.[82] Because plaintiffs have not been forthcoming about the scope of the misappropriation, the Court cannot be confident that a lesser sanction would remedy it completely. Third, "any sanction short of dismissal would incentivize future litigants to similarly misappropriate documents in anticipation of litigation."[83] Fourth, given Wilson's

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in its ability to fairly defend itself in this litigation. Mr. Jackson has obtained a vast number of confidential documents. . . . . [E]ven assuming that Mr. Jackson has now returned all purloined documents, the damage to Microsoft has been done.").

[81] *Jackson*, 211 F.R.D. at 432 ("The Court can conceive of no sanctions which would cure plaintiff's extensive access to defendant's privileged and confidential materials and which would assure plaintiff's honesty in the proceedings to come."); *Eagle Hosps. Physicians, LLC v. SRG Consulting, Inc.*, No. 1:04-CV-1015-JOF, 2007 WL 2479290, at *6 (N.D. Ga. Aug. 28, 2007), *aff'd*, 561 F.3d 1298 (11th Cir. 2009).

[82] Dkt. 36 at 2 ¶ 4; *Jackson*, 211 F.R.D. at 432 ("Had plaintiff come forward early and cured his own misconduct, perhaps alternate sanctions would be appropriate. Instead, plaintiff has been evasive and untruthful at every turn."); *Bradley J. Delp Revocable Tr. v. MSJMR 2008 Irrevocable Tr.*, No. 3:14 CV 591, 2015 WL 9592531, at *12 (N.D. Ohio Dec. 31, 2015), *aff'd*, 665 F. App'x 514 (6th Cir. 2016) ("Courts have granted dismissal with prejudice as a sanction for a party's evident refusal to fully disclose the nature and extent of his or her theft of documents from an opposing party."); *Eagle Hosps. Physicians*, 2007 WL 2479290, at *6 ("[N]either the parties nor the court will ever know the extent of Dr. Gerst's activities, substantially prejudicing Plaintiff's strategic position in the litigation.").

[83] *Xyngular*, 890 F.3d at 875.

history of noncompliance with rules governing her behavior—from the ARPC to this Court's seal order—the Court can have no confidence that any sanction less than dismissal will be adequate.[84] Lesser sanctions would "undermine the public's confidence in the fairness of judicial proceedings."[85] As one District Court put it, "a litigant cannot be permitted to say 'oops, you've caught me,' and thereafter be 'allowed to continue to play the game' [because] such blatant disregard of the judicial process would 'erode the public's confidence in the outcome of judicial decision, call into question the legitimacy of courts, and threaten the entire judicial system.'"[86]

D. Disqualification of plaintiffs' counsel is required. Plaintiffs barely oppose disqualification of their counsel, simply asserting that under ARPC 8.4, if Joan Wilson did not violate ethical duties to her former client, Dillon & Findley did not either. It follows from this argument, of course, that if the Court finds Wilson did violate the rules Dillon & Findley must equally be disqualified under ARPC 8.4.[87]

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[84] *See Ponte v. Sage Bank*, 255 F. Supp. 3d 344, 351 (D.R.I. 2015) ("Ponte's admission that, in violation of this Court's order, he did not return all of the information to Sage and that some of it remains in Richard's possession is further proof that an order of the Court cannot ensure that Ponte will litigate his case against Sage honestly and within the rules.").

[85] *Xyngular Corp. v. Schenkel*, 200 F. Supp. 3d 1273, 1322 (D. Utah 2016); *see also Bradley J. Delp Revocable Tr.*, 2015 WL 9592531, at *13 ("Dismissal with prejudice is properly entered here as 'the first and only sanction' for Brad's misconduct, because the alternative is fundamentally unfair and would debase the judicial process.").

[86] *Rhodes v. LaSalle Bank, N.A.*, No. 02 C 2059, 2005 WL 281221, at *3 (N.D. Ill. Feb. 1, 2005) (spelling error corrected; citations and internal quotation marks omitted).

[87] ARPC 8.4(a) ("It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another"); ARPC 1.16(a) ("[A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client

More than that, however, plaintiffs' counsel's actions were highly improper. Counsel knowingly received, used and disclosed thousands of misappropriated ANTHC documents. Counsel knew that hundreds of these documents contained privileged attorney-client communications and all contained client confidential information. Counsel were informed by the Department of Justice that they had disclosed privileged documents, which the Department sequestered, and yet counsel took no remedial steps.[88] And counsel broke the Court's False Claims Act seal order—knowingly and intentionally—in an attempt to obtain a lucrative settlement from ANTHC.[89]

IV. CONCLUSION

For the foregoing reasons, and those stated at Dkt. 33, plaintiffs and their counsel should be disqualified, and this matter dismissed.

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if: (1) the representation will result in violation of the rules of professional conduct or other law . . . .").

[88] *See United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, Nos. CV 08-1885-GHK (AGRx) & CV 08-6403-GHK (AGRx), 2013 WL 2278122, at *2-3 (C.D. Cal. May 20, 2013) (disqualifying relator and counsel for nearly identical conduct) ("As the Ninth Circuit has explained, '[t]he path to [an] ethical resolution is simple: when in doubt, ask the court.'") (quoting *Gomez v. Vernon,* 255 F.3d 1118, 1134-35 (9th Cir. 2001) ("the receipt of privileged communications imposes a duty on counsel to take some reasonable remedial action") and *United States ex rel. Frazier v. IASIS Healthcare Corp.,* No. 2:05-cv-766-RCJ, 2012 WL 130332, at *15 (D. Ariz. Jan. 10, 2012) (explaining in *qui tam* case that "Counsel did breach an ethical duty to seek a ruling from the Court about the privileged documents and breached their duty to contact [the defendant] about the documents after the complaint was unsealed")).

[89] Dkt. 34-3 at 3.

DATED February 1, 2019, at Juneau, Alaska.

SONOSKY, CHAMBERS, SACHSE,
MILLER & MONKMAN, LLP

/s/ Richard D. Monkman
By:_____
Richard D. Monkman,
Alaska Bar No. 811101
rdm@sonosky.net
302 Gold Street, Suite 201
Juneau, Alaska 99801
Telephone: 907.586.5880
Facsimile: 907.586.5883

ALASKA NATIVE TRIBAL HEALTH
CONSORTIUM

Robert P. Lynch,
Alaska Bar No. 1305020
rplynch@anthc.org
Alaska Native Tribal Health Consortium
4000 Ambassador Drive,
Anchorage, Alaska 99508
Telephone: 907.729.8218
Facsimile: 907.729.2015

Counsel for Defendants

Certificate of Service

I certify that on February 1, 2019, a copy of the foregoing document was served via ECF on:

Margaret Simonian, meg@dillonfindley.com
Molly C. Brown, molly@dillonfindley.com
Nicholas C. Perros, nicholas.c.perros@usdoj.gov
Richard L. Pomeroy, richard.pomeroy@usdoj.gov

/s/ Richard D. Monkman
By:_____
Richard D. Monkman