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NO. 52264-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

R.O., et al.,

Respondents,

v.

MEDALIST HOLDINGS, INC., et al.,

Appellants.

BRIEF OF APPELLANTS MEDALIST HOLDINGS, INC., LEEWARD
HOLDINGS, LLC, CAMARILLO HOLDINGS, LLC, JAMES LARKIN
AND MICHAEL LACEY

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Appellants Medalist Holdings, Inc., Leeward Holdings, LLC, Camarillo Holdings, LLC, James Larkin and Michael Lacey (collectively, “Medalist”), defendants below, appeal a trial court order that (1) disqualified Medalist’s longtime law firm, without prior notice or an opportunity to be heard, and (2) simultaneously imposed discovery obligations on the putatively disqualified law firm that are contrary to the Civil Rules and the Rules of Professional Conduct.

This Court should reverse the trial court’s *sua sponte* disqualification order because it was procedurally improper and substantively baseless. First, the trial court disqualified Medalist’s counsel without warning or an opportunity to respond. This Court has held squarely that it is reversible error to disqualify counsel where, as here, these basic due process protections are ignored. *In re Estate of Barovic*, 88 Wn. App. 823, 946 P.2d 1202 (1997). *See* Section V.A.1, *infra*.

Second, the trial court’s purported basis for disqualification was wrong as a matter of law, and failed to properly apply, or even to address, the applicable rules governing disqualifiable conflicts and client consent. The court’s order rested on its belief that conflicts potentially could arise between Medalist and another group of defendants previously represented by the same counsel. But the court completely ignored the parties’ written

representation agreements, in which the former clients, with fully informed consent, waived any conflicts and expressly agreed to counsel's continued representation of Medalist. A federal court examining the same representation agreements among the same parties recently concluded that the agreements are "valid and enforceable" and preclude disqualification of Medalist's counsel. *See United States v. Lacey*, 2018 WL 4953275, at *4 (D. Ariz. Oct. 12, 2018) ("*U.S. v. Lacey*"). The conflict waivers are binding and entirely proper under the Rules of Professional Conduct ("RPC") because (among other things) they were entered among sophisticated, fully informed, independently represented litigants, and they comprehensively described the potential conflicts being waived. *See* Section V.A.2, *infra*.

Third, this Court also should reverse the trial court's discovery order. *After* disqualifying Medalist's counsel, the court ordered the law firm to produce a massive volume of unreviewed documents, ignoring the rule that discovery obligations rest with parties (not their lawyers). Worse, the court combined this overbroad order with additional rulings that (i) imposed an escalating prospective discovery sanction on Medalist that it knew Medalist could not pay; (ii) unnecessarily required Medalist's (putatively disqualified) counsel to hand over all data and records to a third party "in trust," even though the materials were already being preserved; and (iii) refused to revisit its order even after Medalist produced substantially all

of the material Plaintiffs were seeking. Combined, these unprecedented discovery rulings create intractable problems regarding attorney-client privilege and professional responsibility, and constitute a plain abuse of discretion. *See* Section V.B, *infra*.

Absent this Court's intervention, Medalist will be forced to proceed to trial without its counsel of choice, in the face of multi-million dollar discovery sanctions imposed by the trial court. It also would be forced to turn over documents that have not been reviewed for privilege or responsiveness. This Court should reverse, and (i) hold that Medalist may retain its current counsel, and (ii) vacate the trial court's discovery order and hold that counsel is not required to produce data to third parties and that discovery obligations must be directed to parties, not counsel.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in the portion of its June 28, 2018 Combined Order (CP 1063, 1074) ("Order") in which it disqualified Appellant's counsel.

2. The trial court erred in finding, in the Order, that "continued representation of [Appellants] by Davis Wright Tremaine is impermissible pursuant to the Rules of Professional Conduct" or posed a possibility of impermissible conflicts. CP 1074, 1075.

3. The trial court erred in finding, in the Order, that the

Backpage.com Defendants had “effectively revoked” the consent they previously granted in written agreements allowing defense counsel to continue representing other parties in the litigation in the event some defendants withdrew from joint representation. CP 1075

4. The trial court erred in compelling defendants to produce over 1 million documents under pain of a discovery sanction of \$1 per document every 14 days, also pursuant to the Order. CP 1067.

5. The trial court, in its Order, erred in directing defense counsel to produce documents in response to discovery directed to defendants in this action. CP 1068.

6. The trial court, in its Order compelling discovery, erred in compelling counsel to provide, to a third party, client documents that have not been reviewed for privilege or responsiveness. CP 1069.

7. The trial court erred in denying reconsideration of the portion of its Order compelling discovery. CP 1259.

8. The trial court erred in entering (a) findings 1-5 in support of the portion of the Order that disqualified counsel (CP 1075-1076); (b) findings 1-5 in support of the portion of the Order compelling discovery (CP 1066-1067); and (c) findings 1-11 of the portion of the Order imposing

sanctions (CP 1069-1073).¹

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err procedurally in disqualifying Appellants' counsel without prior notice or an opportunity to respond?

(Assignments of Error Nos. 1, 8.)

2. Did the trial court err substantively in disqualifying Appellants' counsel based on a perceived conflict of interest with counsel's former clients, given that all of the clients involved were parties to joint representation and joint defense agreements in which the former clients expressly agreed to waive conflicts; to not seek disqualification; and that counsel could continue to represent defendants? (Assignments of Error Nos. 2, 3, 8.)

3. Did the trial court err in imposing discovery obligations on a putatively disqualified law firm, including by ordering it (a) to produce documents in response to discovery directed to the parties; (b) to disclose client documents that had not been reviewed for privilege or responsiveness, under pain of a prospective sanction of \$1.1 million every 14 days; and (c)

¹ Medalist assigns error to the trial court's findings on sanctions only to the extent they form the basis of, or are used to justify, the portion of the Order disqualifying counsel or compelling discovery. The sanctions portion of the trial court's combined Order (CP 1073) is not itself the subject of the instant appeal. *See* CP 1330, 1342 (ruling partially granting motion for discretionary review).

to copy and turn over unreviewed client documents to a third party “in trust,” notwithstanding that the firm was already maintaining the documents pursuant to a preservation order? (Assignments of Error Nos. 4-8.)

IV. STATEMENT OF THE CASE

A. Case Overview.

Plaintiffs, two pseudonymous teenagers, filed this action in January 2017, and filed their operative First Amended Complaint (“FAC”) in May 2017. CP 76. Although there have been substantial pretrial proceedings, the trial court has not considered any dispositive motion, nor adjudicated any of the accusations in the FAC. The claims against Medalist are unproven, and remain disputed.

Plaintiffs sued three distinct sets of defendants. First, Plaintiffs allege that four individual defendants² physically assaulted and “actively solicited adults to have sex” with them. FAC ¶¶ 2.32, 2.33 (CP 76, 87-88). These defendants, who all have been convicted of various crimes arising from the same facts alleged in this case, allegedly created and posted ads about Plaintiffs on various websites, including Backpage.com. *Id.* ¶¶ 4.2, 5.2 (CP 97-98); CP 109. Plaintiffs seek to hold these traffickers directly liable for exploiting and assaulting them. FAC ¶¶ 6.25, 6.27 (CP 104).

² These four defendants are Curtis Escalante, Mikel Zachary Williams, Michael Williams and Keyon Simmons. Though named in both the initial complaint and the FAC, none of these four defendants has appeared.

The second set of defendants are the “Backpage.com Defendants,” which owned and operated the website Backpage.com prior to its seizure by the federal government in April 2018 (discussed below). The Backpage.com Defendants are Backpage.com, LLC, the entity that operated the website; its CEO, Carl Ferrer; and ten other companies Mr. Ferrer owned and controlled.³ Plaintiffs seek to hold the Backpage.com Defendants vicariously liable based on their operation of or relationship to one of the websites on which the four individual trafficker defendants allegedly chose to post ads. FAC ¶¶ 4.8, 5.8 (CP 97, 99).

The third set of defendants are the Appellants here, the Medalist parties. Although Plaintiffs do not distinguish between Medalist and the Backpage.com Defendants (and assert the identical claims against both groups of defendants), they are in fact distinct. Among other things, Medalist sold all interests in Backpage.com, LLC and the website to Ferrer and other Backpage.com Defendants in April 2015; Medalist holds payment rights and security interests arising from that transaction, but did not operate

³ The ten other companies are Dartmoor Holdings, LLC; IC Holdings, LLC; UGC Tech Group C.V.; Website Technologies, LLC; Atlantische Bedrijven C.V.; Amstel River Holdings, LLC; Lupine Holdings LLC; Kickapoo River Investments LLC; CF Holdings GP LLC; and CF Acquisitions LLC. FAC ¶¶ 2.16, 2.18 (CP 80-81); CP 903-906.

the website.⁴ CP 903-906.

B. Defendants' Joint Representation and Joint Defense Agreements.

The Backpage.com Defendants and Medalist initially were represented jointly in this case by Davis Wright Tremaine LLP (“DWT”). CP 2-3 ¶ 5-7 (5/21/18 Declaration of James Grant, lodged *in camera*).⁵ DWT had represented these clients and related entities in numerous cases around the country. The representation dates to 2012, when Backpage.com LLC’s then-parent company (Village Voice Media Holdings, LLC) retained DWT for its recognized expertise on First Amendment issues and the rights of Internet publishers.⁶ DWT has represented these entities primarily in cases concerning public officials’ censorship efforts, such as Backpage.com’s successful challenges, under the First Amendment and Section 230 of the Communications Decency Act (47 U.S.C. § 230), to state

⁴ Before April 2015, Medalist Holdings, Inc. was Backpage.com, LLC’s ultimate parent (several layers removed), but Backpage.com, LLC has always been the operating entity. CP 683 ¶ 5; CP 903-906.

⁵ As explained further below, this declaration describes and attaches attorney-client representation agreements that are privileged and subject to confidentiality provisions. The declaration was lodged *in camera* and sealed by the trial court. CP 996, 1000. This Court accepted the filing *in camera* and under seal. See 8/14/18 letter ruling by Commissioner Bearse; GR 15(g). The sealed declaration is in the record at CP 1-75.

⁶ See, e.g., *Best Law Firms for Litigation – First Amendment*, U.S. News & World Rep., https://bestlawfirms.usnews.com/search.aspx?practice_area_id=54&page=1 (visited March 22, 2019).

laws imposing felony liability for online publishers based on ads posted by third parties. *See, e.g., Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012).⁷ DWT also has defended civil claims related to the website, including, for example, *Doe v. Backpage.com, LLC*, 104 F. Supp. 3d 149 (D. Mass. 2015), *aff'd*, 817 F.3d 12 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622 (2017). In that case and others prior to Medalist's April 2015 sale of the website to Ferrer, DWT jointly represented Backpage.com, LLC and its then-parent companies (including Village Voice Media Holdings, LLC and New Times Media, LLC), which at the time were under common ownership. *Id.*; CP 2 ¶ 5, n.2.

In 2016, the State of California filed a criminal complaint against Mr. Ferrer and the individual Medalist parties (Messrs. Larkin and Lacey), *People v. Ferrer*, No. 16FEO19224 (Sacramento Cty. Super. Ct.). CP 3 ¶ 6. While each defendant was represented individually by his own personal counsel, DWT represented the defendants jointly on legal matters common to all of the parties. *Id.* ¶ 7. In connection with these and other cases, the parties entered joint representation agreements (CP 3 ¶¶ 6, 8, CP 11-15, 16-32), in which they agreed that DWT would act as joint counsel, given the

⁷ DWT also successfully represented Backpage in an action against the Sheriff of Cook County, Illinois, after he “embarked on a campaign ... to crush Backpage” by making threats to Visa and MasterCard to terminate use of their cards on the website. *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230 (7th Cir. 2015), *cert. denied*, 137 S. Ct. 46 (2016).

firm's experience and prior successful representation of Backpage on First Amendment and Internet free speech issues. *See* CP 3 ¶ 7, CP 12, 17-33. DWT's joint representation of Medalist and the Backpage.com Defendants in this action was pursuant to these agreements. CP 3-4 ¶ 9. In these joint representation agreements, as well as in a joint defense agreement (CP 5 ¶ 16, 39-46) ("JDA"), the parties and their respective counsel agreed to work together and to share information to advance common defenses.

Because the agreements are subject to confidentiality provisions and contain details about DWT's representation that are privileged, they are described in this brief only generally. *See supra* n.5. In general (and as set out further in § V.A.2.a, *infra*), these agreements recognized that the parties shared mutual interests in defending claims related to Backpage.com, and provided for joint representation, sharing of information (while maintaining its confidentiality) and waiver of putative conflicts. CP 2-4 ¶¶ 5-9.

C. The Trial Court's Disqualification Order.

On April 5, 2018, in a federal criminal case in Arizona, Backpage.com Defendant Carl Ferrer entered a personal guilty plea to one count of conspiracy (18 U.S.C. § 371) and entered a guilty plea on behalf of Backpage.com LLC (and other Backpage.com Defendants he controls) to one count of conspiracy to commit money laundering, agreeing to cooperate

with the government in its efforts to prosecute the individual Medalist defendants (Messrs. Larkin, Lacey) and others. CP 299-315. In connection with the plea agreements, federal authorities seized and shut down the Backpage.com website. *Id.* DWT did not represent Mr. Ferrer or his companies in connection with his pleas, and had no involvement in his pleas (or any knowledge of them until a week after they were entered); Mr. Ferrer was represented in those proceedings by his personal counsel, Nanci Clarence. CP 314; RP (5/18/18) 6-7. Messrs. Larkin and Lacey have both pleaded not guilty to the charges against them in *U.S. v. Lacey*.⁸

Shortly after entering his pleas and cooperation agreements with the government, Mr. Ferrer indicated that he was withdrawing from the joint representation agreements and JDA noted above. CP 5 ¶¶ 14, 16; *U.S. v. Lacey*, 2018 WL 4953275, at *1. As a result, DWT no longer could represent the Backpage.com Defendants. On April 20, 2018, DWT notified Mr. Ferrer that it was withdrawing as their counsel, including in this case. CP 6 ¶ 18. The Backpage.com Defendants did not object (and have never objected) to DWT's withdrawal, in this or any other matter. *Id.* ¶ 18-20.

⁸ *See* Exhibits A, B to Declaration of Eric M. Stahl, filed with this Court on September 7, 2018. These not-guilty pleas were not part of the record before the trial court in this case because they were entered in August 2018, after Medalist had filed its motion for discretionary review to this Court. But the pleas are judicially noticeable, because they are adjudicative facts generally known and readily verifiable by “sources whose accuracy cannot reasonably be questioned.” ER 201(b).

On May 1, 2018, DWT filed a Notice of Intent to Withdraw as counsel for the Backpage.com Defendants in this case. CP 448. Plaintiffs filed objections on May 10, 2018. CP 601. By rule, the objections required DWT to seek a court order to effectuate its withdrawal. *See* CR 71(c)(4).⁹ At a hearing on May 18, 2018, the court accepted DWT’s proposal to provide an *in camera* submission concerning the reasons for its withdrawal. RP (5/18/18) 30, 33. At the hearing, the court indicated it would review the declaration and “have a decision as to whether or not I’ll be granting your motion to withdraw” on May 23. *Id.* at 31. At no time during the May 18 hearing (or at any time prior to announcing its disqualification order) did the trial court give any indication that it was considering whether to disqualify DWT. Nor had Plaintiffs moved for or otherwise suggested disqualification. *See id.* at 3-41.

⁹ At the same time, DWT sought a brief continuance on a pending sanctions motion, in order to allow defendants sufficient time to sort out the representation issues caused by Plaintiffs’ objections to DWT’s Notice of Intent to Withdraw. CP 455-461. That motion was brought on an emergency basis before Presiding Judge Nelson, because the assigned judge (Judge Whitener) was unavailable. Plaintiffs opposed DWT’s request, and Judge Nelson rejected the emergency continuance. CP 665; RP (5/11/18) 3-5. Judge Whitener subsequently agreed to continue the hearing from May 18 to May 23, 2018. RP (5/18/18) 31-32. In a ruling on May 23, Judge Whitener granted the sanctions motion and penalized both the Backpage.com Defendants and Medalist, notwithstanding that the Backpage.com Defendants were unrepresented. RP (5/23/18) 64. (The Backpage.com Defendants did not secure new counsel until June 19, 2018.) The sanctions imposed on Medalist are baseless. *See* n.12, *infra*.

On May 21, DWT lodged its *in camera* declaration, detailing the reasons for its withdrawal as counsel for the Backpage.com Defendants and including the joint agreements noted above. CP 1-75, 996. The declaration focused on the specific reasons why DWT was required to withdraw as the Backpage.com Defendants' counsel. *See* CP 7-10.

At the subsequent hearing, on May 23, 2018, the trial court approved DWT's withdrawal as counsel for the Backpage.com Defendants. RP (5/23/18) 61. Then – without any prior notice to or request from any party – the court abruptly announced that it *also* was disqualifying DWT as Medalist's counsel. *Id.* The court's stated reason was its view that Medalist and the Backpage.com Defendants “are intertwined,” and that allowing DWT to continue representing Medalist posed a “high possibility” of “conflicts proceeding forward.” *Id.* at 61-62. In its written Order (drafted by Plaintiffs' counsel, who never requested disqualification), the trial court found DWT's continued representation of Medalist was “impermissible pursuant to the Rules of Professional Conduct” (“RPCs”) based on Mr. Ferrer's “revoked” consent (CP 1074, 1075 ¶ 1) – apparently a reference to a letter his personal counsel had sent to the court stating that Mr. Ferrer did not consent to joint representation by DWT going forward. CP 595-600. Although the parties' joint representation agreements and JDA had been submitted to the court *in camera* before it announced its ruling (CP 2-3, 11-

17, 38-46), the court gave *no* indication that it had considered them; nor did it ask for any explanation of them or analyze the enforceability of their express conflict waivers and provisions precluding disqualification of counsel.

With Mr. Ferrer’s cooperation, the federal government has brought criminal charges against Messrs. Larkin and Lacey (the individual Medalist parties, and owners of the Medalist entities), and pursued criminal, civil and administrative forfeiture and seizure of their bank accounts, other financial assets, and real property. CP 1272-1299. As a result, Medalist has no practical ability to engage new counsel. *See, e.g., id.*; RP (6/28/18) 25-27.¹⁰

D. The Trial Court’s Discovery Order.

Nine days after DWT had filed its Notice of Intent to Withdraw as Counsel for the Backpage.com Defendants, on May 10, 2018, Plaintiffs filed a motion to compel (without any meet and confer as required by CR 26(i), *see infra*, § V.B.1), demanding production of some “1.2 million” documents that Plaintiffs claimed had been identified as “responsive,” but had not been produced. CP 606-612. The motion was based on a flagrant

¹⁰ The trial court acknowledged that its disqualification decision raised an “appealable issue” and that an interlocutory appeal was “a legitimate course of action.” RP (6/28/18) 27, 80. The court nevertheless denied Medalist’s request for a stay of further proceedings in the trial court to facilitate this appeal. CP 1259. But the appellate commissioner subsequently granted a stay of the trial court proceedings. CP 1345.

mischaracterization of a letter from defendants' counsel explaining that an initial computerized search for over 500 words and terms provided by Plaintiffs resulted in 1,120,642 document "hits," which would take up to a year to review and produce in discovery. CP 623-627. The letter sought Plaintiffs' cooperation in narrowing the search to one more reasonably calculated to identify responsive documents.¹¹ *Id.* Plaintiffs did not substantively respond to this proposal, and instead moved to compel production of *all* of the records, on the false premise that all 1.1 million documents were "responsive." CP 606-612, 678 ¶ 6. But the documents have never been reviewed for responsiveness; nor have they been reviewed for privilege. CP 623-626. In its Order, the court accepted Plaintiffs' mischaracterization, and ordered that all of the "approximately 1.2 million" unreviewed documents be produced within 60 days. CP 1067. The court added a prospective sanction (against all defendants) of "\$1.00 per document for every 14 days of noncompliance," *i.e.*, over \$2.2 million a month. CP 1067-1068.

Additionally, the trial court ordered disclosure of a two-terabyte database of records that had been collected from Backpage.com. CP 1069.

¹¹ Many of Plaintiffs' search terms were extraordinarily broad (*e.g.* "terms of use," "posting rules," "moderat*," "guideline*," "banned," "requirement*," and "filter") and resulted in hundreds of thousands of "hits" for documents irrelevant to this matter. CP 624-625.

The court imposed that obligation not on the parties, but on DWT – which it had already disqualified – requiring the firm to turn over the data to a “neutral third party” within 60 days to hold “in trust.” *Id.* This was *in addition to* requiring DWT to preserve the data. *Id.*

In an attempt to comply with the Order, in July 2018 DWT provided to Plaintiffs approximately 553,000 documents (1.1 million pages) that Backpage.com previously had produced in 2016 in response to a subpoena from the U.S. Senate Permanent Subcommittee on Investigations (“PSI”). CP 1091 ¶ 5. Although Plaintiffs did not request the PSI materials in discovery nor mention them in their motion to compel, in the hearings that led to the Order Plaintiffs for the first time asserted that these were “the same documents” sought by their discovery requests and their motion. RP (5/23/18) 8, 9; CP 1023 ¶ 10 (Plaintiffs’ claim that the PSI production “comprise[d] virtually all of the 1.2 million documents”). In light of Plaintiffs’ representations, DWT provided the PSI material to Plaintiffs, and Medalist moved for reconsideration of the discovery Order. CP 1079-1088. The Court denied the motion. CP 1259.

E. Subsequent Proceedings

The trial court announced its orders on disqualification and discovery, as well as other rulings, at its hearing on May 23, 2018. RP (5/23/2018) 60-66. Plaintiffs subsequently presented a proposed order

purporting to memorialize the court’s decision, to which Medalist submitted written objections. CP 1008-1017. Medalist objected to the proposed order on all of the grounds it raises in the instant appeal. *Id.* As to disqualification of counsel, Medalist’s objections included that “the decision was made without prior notice and without an opportunity for the Medalist Defendants or DWT to respond,” that “there are no legally cognizable grounds for disqualification,” and that “[t]he record does not support any finding that DWT’s continued representation of the Medalist Defendants in this action would pose any conflict with respect to Mr. Ferrer or the Backpage.com Defendants[.]” CP 1015, 1016. As to the discovery ruling, Medalist objected that no legal authority supported an order “directing ... counsel to submit client documents to a third party” or “directing discovery obligations to counsel, rather than to the litigants.” CP 1012.

After the Court entered its written Order on June 28, 2018, Medalist moved for discretionary review of the disqualification and discovery portions described above, as well as an additional portion of the Order imposing sanctions. CP 1300.¹² On December 11, 2018, Commissioner

¹² Plaintiffs had moved for these sanctions against both the Backpage.com Defendants and Medalist, arguing primarily that statements Carl Ferrer made in his plea agreements contradicted statements Backpage.com, LLC made in a prior Washington civil case, *J.S. v. Village Voice Media Holdings, LLC*, No. 12-2-11362-4 (Pierce Cty. Super. Ct.). CP 279-293. The trial court granted the motion and awarded a \$200,000 sanction (plus attorneys’

Bearse entered a 17-page ruling partially granting the motion for discretionary review. CP 1330-1346. First, the Commissioner accepted review of the disqualification portion of the Order, finding that “the superior court probably abused its discretion by not giving DWT a chance to contest disqualification before it fully disqualified the law firm” as required by *Barovic*, and that judicial economy favored granting review of both “the notice issue” and “the merits of the disqualification[.]” CP 1339-1341; CP 1345 (review granted on “whether the superior court procedurally or substantively erred in disqualifying DWT”).

fees) against *both* the Backpage.com Defendants *and* Medalist, notwithstanding that (i) Medalist was not a party to Mr. Ferrer’s pleas, (ii) none of the Medalist parties accept or admit any of the statements he made in his plea deal, and (iii) four of the Medalist parties (including Messrs. Larkin and Lacey) were not even parties in *J.S.* CP 695 ¶ 8. The sanctions order essentially assumed, without trial, admissible evidence, or any due process, that Mr. Ferrer’s plea statements were true, and that his previous denials of these same assertions were not only false but both sanctionable and imputable on Medalist. CP 1070-1072; RP (5/23/18) 64-65 (finding that Ferrer’s pleas revealed “pre-litigation conduct” and reflected that all defendants’ positions were “untruthful”). The Order ignores that Mr. Ferrer’s plea statements made in his deal with federal prosecutors are not just hearsay, *State v. St. Pierre*, 111 Wn.2d 105, 117-18, 759 P.2d 383 (1988), but “less credible than ordinary hearsay,” *Lee v. Illinois*, 476 U.S. 530, 541 (1986), and “inherently unreliable.” *United States v. Vera*, 893 F.3d 689, 692-93 (9th Cir. 2018) (defendants signing plea agreements “may adopt facts the government wants to hear” and point fingers at others to obtain leniency).

Second, the Commissioner denied review on the sanctions order, finding “the superior court did not so significantly abuse its discretion so as to require discretionary review.” CP 1342.

Third, on the discovery portion of the Order, the Commissioner granted review in part. Finding “a significant percentage of the requested documents are now in the [Plaintiffs’] possession,” the Commissioner held “this court will not exercise its discretion to grant review of the issues whether the prospective sanctions are ‘draconian’ and whether the production timeline is unrealistic[.]” CP 1345. But the Court granted discretionary review with respect to whether the superior court erred in (i) requiring DWT to remain involved in the litigation for purposes of producing documents, even after putatively disqualifying the firm, and requiring it to respond to discovery “independent of its representation of the parties,” (ii) assessing prospective, multi-million dollar discovery sanctions on Medalist based on discovery-related obligations imposed on its putatively disqualified counsel; and (iii) directing DWT to turn over unreviewed documents in its possession to a third party. CP 1344-1345.

The Commissioner also entered a stay of trial court proceedings pending resolution of the appeal. CP 1345. The stay remains in effect.

V. ARGUMENT

A. The Trial Court's Disqualification Order Was Reversible Error, Both Procedurally and Substantively.

Attorney disqualification is an “extreme remedy,” and this Court has instructed that a trial court must be “slow to use its authority to employ such a sanction on any basis.” *Barovic*, 88 Wn. App. at 827. Disqualification “exact[s] a harsh penalty from the parties as well as punishing counsel.” *In re Firestorm 1991*, 129 Wn.2d 130, 140, 916 P.2d 411 (1996); *see also In re Marriage of Wixom*, 182 Wn. App. 881, 905, 332 P.3d 1063 (2014) (noting “delay and financial hardship” that disqualification imposes); *Foss Mar. Co. v. Brandewiede*, 190 Wn. App. 186, 189, 359 P.3d 905 (2015) (“Disqualification of counsel is a drastic sanction, to be imposed only in compelling circumstances”); *Optyl Eyewear Fashion Int’l Corp. v. Style Cos.*, 760 F.2d 1045, 1050 (9th Cir. 1985) (disqualification is subject to “particularly strict judicial scrutiny”). As the Commissioner recognized in granting discretionary review, the trial court’s disqualification order in this case “significantly altered the status quo by removing Medalist’s chosen counsel.” CP 1341.

The trial court’s disqualification of DWT must be reversed for two independent reasons. First, the court disqualified DWT as Medalist’s counsel without notice or an opportunity to be heard, in violation of

Barovic. See Section 1, *infra*. Second, the purported basis for disqualification – the court’s belief that DWT’s continued representation of Medalist presented potential conflicts – ignored the parties’ agreements providing fully informed consent to waive conflicts and to permit DWT’s continued representation of Medalist. Those agreements are valid and enforceable under the Rules of Professional Conduct. See Section 2, *infra*.

The standard of review on both issues is *de novo*. Where, as here, disqualification is based on a purported conflict of interest,¹³ review is *de novo*. See *In re Firestorm 1991*, 129 Wn.2d at 135; *RWR Mgmt., Inc. v. Citizens Realty Co.*, 133 Wn. App. 265, 279, 135 P.3d 955 (2006) (“Whether circumstances demonstrate a conflict under ethical rules is a question of law we review *de novo*.”) (citing *State v. Vicuna*, 119 Wn. App. 26, 30-31, 79 P.3d 1 (2003)); accord *Foss Mar. Co.*, 190 Wn. App. at 192; cf. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995) (Division II; reviewing *de novo* ineffective assistance of counsel claim based on alleged attorney conflict).¹⁴

¹³ CP 1075-1076; RP (5/23/18) 61-62

¹⁴ Plaintiffs have asserted previously that the standard of review for disqualification is abuse of discretion, citing *State v. Schmitt*, 124 Wn. App. 662, 666, 102 P.3d 856 (2004). But *Schmitt* involved review of an order disqualifying an attorney *as a necessary witness*. That standard is inapposite here.

1. Reversal Is Required Because The Trial Court Disqualified Medalist’s Counsel Without Notice Or An Adequate Opportunity To Be Heard.

The trial court’s order disqualifying Medalist’s counsel was entirely without notice and without any meaningful opportunity for Medalist or DWT to respond. As detailed above, the court announced its decision out of the blue, disqualifying DWT at the end of a hearing on other matters (the sanctions and discovery motions, and DWT’s withdrawal as Medalist’s counsel). RP (5/23/18) 60-62. The court did so without *any* prior indication that it was considering disqualifying DWT as Medalist’s counsel, and without the benefit of *any* answer or explanation from DWT or Medalist regarding the purported grounds for disqualification. *Id.* Under *In re Estate of Barovic*, 88 Wn. App. 823, disqualification cannot be ordered in this manner.

In *Barovic*, a superior court judge recused himself based on an attorney’s affidavit of prejudice, and “then noted what he felt were violations of the [RPCs]” by the attorney and disqualified him *sua sponte*. 88 Wn. App. at 825-26. This Court granted discretionary review and reversed. *Id.* at 824, 826. The Court held that courts “should be slow” to disqualify counsel, and that disqualification is subject to the same protections as revocation of permission to appear *pro hac vice*: the attorney “*must be notified* of the conduct the court will rely on” and “the specific

reason, preferably in writing” and “*must be given* a meaningful opportunity to respond.” *Id.* at 826 (emphasis added) (quoting *Hallmann v. Sturm Ruger & Co.*, 31 Wn. App. 50, 55, 639 P.2d 805 (1982)). Disqualification without these procedures must be vacated. *Id.* at 827; *Am. States Ins. Co. v. Nammathao*, 153 Wn. App. 461, 469, 220 P.3d 1283 (2009) (disqualifying attorney for alleged incompetence requires “the same due process rights to notice and opportunity to be heard that were provided in *Hallmann.*”); accord *United States v. Tillman*, 756 F.3d 1144, 1152 (9th Cir. 2014) (“Ninth Circuit law does not permit a summary disqualification of counsel; for the court to sanction an attorney, procedural due process requires notice and an opportunity to be heard.”) (internal quotation marks omitted).

Notably, no party in this case – not Plaintiffs, nor the Backpage.com Defendants – moved for disqualification.¹⁵ Although disqualification on a court’s own initiative may be permissible, the only appellate decision in Washington doing so was one in which Division Three expressly noted that its action was “unusual,” and arose only after the Court had identified “an actual conflict” between the attorney and the client he was representing on

¹⁵ Indeed Mr. Ferrer and Backpage.com affirmed that they did not seek to disqualify DWT and *could not do so* (RP (6/28/18) 72) – presumably an acknowledgement of the parties’ joint representation agreements in which Mr. Ferrer expressly waived conflicts or any objection to DWT’s continued representation of Medalist.

appeal, which the attorney refused to address. *Wixom*, 182 Wn. App. at 885, 904. Even then, the Court notified the attorney of its concerns, and gave him an opportunity to respond, before ordering disqualification. *Id.* at 897.¹⁶

The trial court's disqualification here, ordered without giving Medalist or DWT any notice or opportunity to be heard, violates the basic standards of due process required by *Barovic* and *Wixom*. Contrary to *Barovic*, the trial court provided no notice (written or otherwise) that it was considering the "extreme remedy" of disqualification. The court gave no opportunity to respond to its unilateral view that DWT's continued representation of Medalist would create some conflict in violation of the RPCs (which, as discussed next, was wrong as a matter of law). The court raised the issue while addressing DWT's request to withdraw as the Backpage.com Defendants' counsel, and immediately and summarily ruled that DWT would be disqualified as Medalist's counsel, without any argument. RP (5/23/18) 61; CP 1075-1076. This was reversible error, and the disqualification Order must be vacated.

¹⁶ *Wixom* involved an appeal of a CR 11 sanction, entered jointly against both a litigant and his counsel. On appeal, the attorney argued that if the sanctions were affirmed, the court should absolve the attorney and assess the award solely against the client. 182 Wn. App. at 897. After inviting the attorney "to address whether he should be removed ... because of a conflict in interest," Division Three disqualified him based on the clear violation of RPC 1.7(a), finding the attorney's self-serving "advocacy before this court is directly adverse to [the client's] interests." *Id.* at 897, 899.

2. The Disqualification Order Was Error Because The Parties Expressly Waived Any Conflict, In Written Agreements That Are Valid And Enforceable.

The trial court also erred substantively. Disqualifying DWT was unwarranted because Mr. Ferrer and the other Backpage.com Defendants expressly consented, in their joint representation agreements and the JDA, to waive any potential conflict of interest, and to permit DWT to continue representing Medalist even if other parties withdrew from the joint representation. These consents are valid and enforceable under the RPCs.

The trial court's stated reason for its surprise disqualification order was that allowing DWT to continue as counsel for Medalist would, "more probable than not, create conflicts of interest that this Court will have to address moving forward," and that Mr. Ferrer had "revoked" his consent to DWT continuing "to represent these multiple parties." RP (5/23/18) 61. In its written order, the trial court found DWT's continued representation of Medalist was "impermissible pursuant to the Rules of Professional Conduct" (CP 1074), that Mr. Ferrer had "effectively revoked his consent allowing [DWT] to jointly represent the multiple Defendants in this lawsuit because of material changes in circumstances" (CP 1075), and that "there is a high possibility that [DWT] will encounter an impermissible conflict of interest ... if they continue to represent" Medalist. CP 1075-1076.

All of these rulings were erroneous, for at least three reasons. First, the court ignored the joint representation agreements and JDA, including the terms expressly waiving conflicts and agreeing DWT could continue to represent Medalist under the precise circumstances here. *See* Section a, *infra*. Second, the court failed to appreciate that agreements such as these are contemplated by and enforceable under the RPCs. *See* Section b, *infra*. Third, the court erred in finding Mr. Ferrer could validly “revoke” his consent to DWT’s ongoing representation of Medalist; permitting a former client to extinguish prior consent in this manner is contrary to the RPCs, and to case law recognizing that such agreements in aid of joint representation arrangements are to be encouraged. *See* Section c, *infra*. Accordingly, this Court should both vacate the trial court’s disqualification order, and hold that DWT’s continued representation is permitted and entirely consistent with the RPCs.

a. The Disqualification Order Is Contrary To The Terms Of The Parties’ Joint Representation And Joint Defense Agreements.

In disqualifying DWT, the trial court failed to apply, or even to acknowledge, the terms of the joint representation agreements and JDA governing the relationship between the firm and both groups of Defendants. Those agreements had been submitted *in camera* to the court before its disqualification order (CP 1-75, 996), but the court did not consider the

agreements, or allow any argument about or explanation of them, before disqualifying DWT. This was error, because in those agreements the Backpage.com Defendants expressly consented to DWT's joint representation of them and Medalist; waived any future conflicts; agreed DWT could continue representing its remaining clients in the event that one or more of the other clients withdrew from the joint arrangement; and agreed not to seek disqualification of DWT or other joint counsel. CP 2-4, 12-14, 19-26, 39-42. The effect of the two joint representation agreements and the JDA was to:

- spell out that the parties retained joint counsel. *See, e.g.*, CP 12, 22-24.
- waive any actual or potential conflicts of interest, including future conflicts, in order to allow for the joint representation and joint defense. *See, e.g.*, CP 3 ¶ 8, CP 22-23 ¶ 2.a, .b; CP 42 ¶ 6.
- allow the parties to share confidential information with one another and with joint counsel, including attorney-client communications and work product. *See, e.g.*, CP 3 ¶ 8, CP 13-14, 23-25, 39-41.
- confirm that a party could withdraw from the joint representation but could not move to disqualify counsel from

continuing to represent other parties, including on the basis of possible conflicts of interest. *See, e.g.*, CP 7 ¶ 21; CP 13-14; CP 26 ¶¶ 11, 12; CP 42 ¶ 8.

A federal court in Arizona construing the same agreements recently noted that Mr. Ferrer – on behalf of himself and the Backpage.com Defendant entities – “waived his right to seek disqualification of counsel in the event that he withdrew from either of the confidential agreements.” *U.S. v. Lacey*, 2018 WL 4953275, at *3. The same conclusion applies here: the agreements preclude disqualification, and waive conflicts, based on the circumstances that led to DWT’s withdrawal as the Backpage.com Defendants’ counsel in this case.

b. The Parties’ Joint Agreements Are Enforceable, And Preclude Disqualification.

The trial court further erred by failing to analyze the validity of the joint representation agreements and JDA under the applicable Rules of Professional Conduct. Indeed, the court failed even to identify the rule it believed required DWT’s disqualification. In *U.S. v. Lacey*, the federal court held the parties joint agreements “are valid and enforceable” under Arizona’s version of RPC 1.7 and RPC 1.9. *See* 2018 WL 4953275, at *4.

Washington RPC 1.7 and 1.9 are materially identical to the Arizona rules,¹⁷ and accordingly, this Court should reach the same conclusion.

Under RPC 1.7, “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest,” meaning a conflict where “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.” RPC 1.7(a). But the rule expressly permits waivers of concurrent conflicts when “each affected client gives informed consent, confirmed in writing.” RPC 1.7(b).¹⁸ The rule’s commentary specifically authorizes prospective waivers of future conflicts, and sets out the circumstances under which such waivers are enforceable. Comment 22 to RPC 1.7 (which the Washington Supreme Court adopted effective Sept. 1, 2018, *see* 2018 Wash. Court Order 0013) states that conflict waivers in furtherance of joint representation agreements waiving conflicts should be enforced where they are “comprehensive,” anticipate the potential conflicts at issue, and are entered by sophisticated, “experienced” clients with

¹⁷ Compare Ariz. Rule of Prof. Cond. Ethical R. 1.7, 1.9 (*quoted in U.S. v. Lacey*, 2018 WL 4953275, at *3) with Wash. RPC 1.7, 1.9.

¹⁸ Similarly, RPC 1.9 permits a lawyer to represent a client in a matter adverse to a former client, if the former client has provided “informed consent, confirmed in writing.” RPC 1.9.

informed consent who are “independently represented.”¹⁹ *See also* RPC 1.7 cmt. 21 (consents more likely to be enforced where they address possible consequences).

All of these factors are present here. The joint agreements among DWT and the Medalist and Backpage.com Defendants expressly anticipated the circumstances leading to DWT’s withdrawal as counsel for the Backpage.com Defendants – that is, the possibility that one or more of the parties might withdraw from the joint representation because of divergent interests. CP 42 ¶ 6; *see also* CP 13-14, CP 26 ¶¶ 11, 12. All the parties were experienced in litigation and legal services, having been

¹⁹ The full comment states:

The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.

RPC 1.7 cmt. 22.

involved in numerous cases over the prior five years. *See, e.g.*, CP 18-21; CP 39; *see also* Section IV.B, *supra*. Mr. Ferrer was independently represented by his own counsel. *See, e.g.*, CP 27 ¶ 20; 40, 45.

Under these circumstances, courts routinely hold that advance conflict waivers and agreements to not seek disqualification are valid and enforceable. In *U.S. v. Lacey*, for example, the court denied a government motion to disqualify DWT as counsel for Messrs. Larkin and Lacey (two of the Medalist parties) in the Arizona criminal proceedings. Reviewing the same agreements and same circumstances at issue here, the court held that the express terms of the joint representation agreements and JDA entered by Mr. Ferrer “are fatal to the Government’s argument for disqualification because the content of these agreements demonstrates that Ferrer waived his right to pursue disqualification against ... DWT[] and other parties identified in these agreements.” 2018 WL 4953275, at *4. The court found these agreements enforceable, because, among other things, they specifically “anticipated circumstances in which a party to either agreement chose to withdraw,” and because Mr. Ferrer signed the agreements with informed consent and under the advice of counsel. *Id.* at *4-5. The court concluded that “allowing ... DWT to continue their participation in this case will not run afoul of the interests of justice” and will not threaten “the integrity of the trial process.” *Id.* at *5.

Other decisions are consistent. *See In re Shared Memory Graphics LLC*, 659 F.3d 1336, 1341 (Fed. Cir. 2011) (enforcing advance conflict waiver under Washington law). “With one distinguishable exception, we find no cases where consent of a former client, represented at the time of consent by independent counsel, was held insufficient under Rule 1.9.” *Welch v. Paicos*, 26 F. Supp. 2d 244, 248-49 (D. Mass. 1998); *see also United States v. Caramadre*, 892 F. Supp. 2d 397, 406 (D.R.I. 2012) (that defendant had the opportunity to discuss conflict waiver with separate counsel supported conclusion that he had knowingly consented); *Visa U.S.A., Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100, 1105, 1110 (N.D. Cal. 2003) (enforcing prospective waiver where client was sophisticated user of legal services and client gave fully informed consent). Accordingly, under this authority, Mr. Ferrer’s agreements and waivers are valid and enforceable.

c. A Court Cannot Disqualify Joint Counsel Based On Unilaterally “Revoked” Consent To An Otherwise Valid Defense Arrangement.

Finally, the trial court’s finding that disqualification was required because Mr. Ferrer “effectively revoked” his consent under the parties’ joint agreements (CP 1075 ¶ 1) is wrong as a matter of law. The court failed to apply the appropriate legal standard; and its reasoning, if not reversed by this Court, would irreparably undermine joint representation and joint defense agreements.

As discussed above, the trial court disqualified DWT without even considering the parties' joint agreements. Instead, it relied on an unsolicited letter dated April 24, 2018 from Mr. Ferrer (which his personal counsel sent to the trial court in this case), stating he "do[es] not consent to DWT's continued representation of any other person or entity other than Backpage [*i.e.*, Medalist], if DWT terminates its representation." CP 599. The April 24 letter, however, simply disregarded the terms of the joint representation agreements and JDA – a point DWT addressed in subsequent communications with Mr. Ferrer (which were also before the court *in camera*, and which the court also ignored). CP 7 ¶ 21, 64-69.²⁰

Mr. Ferrer was not entitled simply to "revoke" his consent and thereby deprive Medalist of its chosen counsel. A party to a joint representation or joint defense agreement has no right to retroactively extinguish his conflict waivers or his agreement to allow joint counsel to continue representing other clients. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. f (2000) (courts refuse "to permit a client to repudiate informed consent previously given when the situation that later

²⁰ Notably, although the court purported to be protecting Mr. Ferrer from potential conflicts arising from DWT's continued representation of Medalist, Mr. Ferrer did not seek the firm's disqualification. His letter dated April 24 did not demand disqualification, nor demand that DWT withdraw as counsel for Medalist; rather, the letter asked that DWT "secure a 30 day extension of time for the [Backpage.com Defendants] to locate new counsel" in this and other civil matters. CP 598. His new civil counsel subsequently confirmed that the Backpage.com Defendants could not "move for [or] support disqualification" of DWT, presumably because Mr. Ferrer's prior agreements expressly precluded him from doing so. RP (6/28/18) 72.

was said to constitute an impermissible conflict was in fact reasonably contemplated and thus within the objecting client’s previous consent”); *id.* illus. 7 (a client’s revocation of consent to his own representation does not prevent the lawyer from continuing to represent other jointly represented clients, where revocation was not because of actions of the lawyer or the other jointly represented clients, and material detriment to them would result); *accord* RPC 1.7 cmt. 21. When a client chooses to withdraw from joint representation, the lawyer may continue representing the other clients when, as here, they have provided prior “informed consent, confirmed in writing.” RPC 1.9(a) (former client); RPC 1.7(b)(4) (current client).

Under the trial court’s view, conflict waivers and commitments not to seek disqualification could be disregarded whenever, and as soon as, any one client decides to cast aside the benefits of joint representation. Accepting such a rule would spell the end of joint representation and joint defense arrangements; among other things, no rational client would want to share information and defense strategies with other parties – even those with whom it has substantial common interests – if it meant losing its counsel of choice any time one of the other jointly represented parties chose to jump ship.²¹

²¹ The threat of such a rule would be particularly grave in the case of joint defense agreements (that is, arrangements among parties that are represented by separate counsel, but agree to share information of common benefit to their mutual defense). Such an agreement “allows defendants to share information so as to avoid unnecessarily inconsistent defenses that undermine the credibility of the defense as a whole. In criminal cases where discovery is limited, such collaboration is necessary to assure a fair trial in

That result would be contrary to the law, which respects and upholds conflict waivers entered in support of joint representation. Washington’s RPCs “recognize that in certain circumstances it is not only proper but beneficial for parties to contractually consent to a waiver of future conflicts of interest.” *In re Shared Memory Graphics LLC*, 659 F.3d at 1341 (enforcing advance conflict waiver under Washington law); *U.S. v. Lacey*, 2018 WL 4953275, at *4 (“It is well settled that waivers of rights in joint defense agreements are valid to cure conflicts with the ethical rules.”); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. d (2000) (recognizing the potentially “substantial” benefits of advance conflict waivers to facilitate joint representation); AM. LAW INSTITUTE – AM. BAR ASS’N, TRIAL EVIDENCE IN FEDERAL COURTS: PROBLEMS & SOLUTIONS at 35 (1999) (model JDA providing for advance waiver of conflicts and precluding disqualification if a signatory party decides to withdraw and cooperate with the government).

As noted above, joint representation agreements waiving conflicts are enforceable when – as here – they are comprehensive, entered by

the face of the prosecution’s informational advantage gained through the power to gather evidence by searches and seizures.” *United States v. Stepney*, 246 F. Supp. 2d 1069, 1086 (N.D. Cal. 2003) (citation omitted). Any holding that allows one withdrawing client to force co-defendants in a joint defense agreement to drop their counsel – even after promising in writing, after fully informed consent, not to do so – would be a tremendous disincentive to forming such agreements at all. It also would give the government a draconian tool to disadvantage criminal defendants: by persuading one party to take a plea deal, prosecutors could deprive all other defendants of their counsel of choice.

sophisticated clients, and anticipate the potential conflicts at issue. The trial court considered none of these factors, and failed even to address the terms of the parties' agreements. For all of the foregoing reasons, this Court should vacate the trial court's disqualification Order, and hold that DWT has no disqualifiable conflict and can continue to represent Medalist.

B. The Court's Discovery Order Was Reversible Error, Because It Imposed Improper Obligations On Counsel In Disregard of the Civil Rules and Rules of Professional Conduct.

This Court also should reverse the trial court's discovery Order, which imposes extraordinary burdens on Medalist and its counsel. Appellate courts will reverse a trial court's discovery order as an abuse of discretion where it is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997); *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 684, 41 P.3d 1175 (2002). Similarly, this court reviews a trial court's denial of a motion for reconsideration for abuse of discretion. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 497, 183 P.3d 283 (2008).

This Court accepted discretionary review of the portions of the discovery Order that (i) required DWT to remain involved in the litigation for purposes of producing documents, even after putatively disqualifying the firm, (ii) assessed massive prospective discovery sanctions on Medalist

based on discovery-related obligations imposed on its putatively disqualified counsel; and (iii) directed DWT to hand over millions of pages of unreviewed documents to a third party. CP 1344-1345. The Court now should reverse. First, no pre-filing conference of counsel regarding the issues raised by Plaintiffs' discovery motion ever took place; this Court's precedent requires reversing the Order for that reason alone. *See* Section 1, *infra*. Second, there is no basis for imposing discovery obligations on DWT, as opposed to the parties. As the Commissioner correctly noted, if DWT is disqualified from representing Medalist, it is "neither a party to the litigation nor a representative of any party," and thus is not subject to discovery in this case. CP 1344 (citing CR 34(a)(1)). And, regardless of whether the firm continues to represent Medalist, no legal authority permits a court to direct discovery obligations to a party's counsel (as distinct from a party) in the manner provided by the Order. *See* Section 2, *infra*. Third, the Order requiring counsel to produce documents to a third party is factually and legally baseless, and disregards counsel's confidentiality obligations. *See* Section 3, *infra*.

1. The Parties Did Not Meet And Confer.

As a threshold matter, the trial court erred in granting Plaintiffs' motion to compel because they did not seek to meet and confer on the requested relief, as required by CR 26(i) and CR 37. This Court has held

such conferences are mandatory: a “trial court ***lacks the authority*** to hear a motion” under these rules if the parties do not certify that they conducted “a conference ***before*** attempting to obtain a court order.” *Clarke v. State*, 133 Wn. App. 767, 779-80, 138 P.3d 144 (2006) (emphasis added); *accord Thongchoom v. Graco Children’s Prods., Inc.*, 117 Wn. App. 299, 308, 71 P.3d 214 (2003) (“Because there was no compliance with CR 26(i), the court could not rule on the motion to compel.”); CR 26(i) (“The court ***will not entertain any motion*** or objection with respect to rules 26 through 37 unless counsel have conferred with respect to the motion or objection.”) (emphasis added).

The CR 26 certification Plaintiffs submitted with their motion to compel rests on (unspecified) communications the parties had about an earlier discovery order. CP 608, 615 ¶ 6. This is inadequate; the certification requirement cannot be satisfied by general discussions between counsel. Rather, the meet and confer must be “a contemporaneous two-way communication” about the issue raised in the motion. *Clarke*, 133 Wn. App. at 780.

The parties had ***no*** communication about the relief requested in Plaintiffs’ motion to compel: prior to the motion’s filing, they never conferred over any demand that DWT turn over unreviewed documents to a third party, or that the firm remain responsible for discovery after its

putative disqualification under penalty of a multi-million dollar prospective sanction. CP 678 ¶ 6. (In fact, Plaintiffs’ motion to compel did not seek any monetary sanction at all. *See* CP 606-613. This was another remedy the trial court announced *sua sponte* for the first time at the May 23, 2018 hearing. RP (5/23/18) 65; CP 1009 ¶ 3; CP 1067.) And it was not until the hearing on the motion that Plaintiffs indicated, for the first time, that their discovery requests sought “the same” documents Backpage.com had produced previously in response to the Senate PSI subpoena. *See* RP (5/23/18) 8, 9; *see also* Section IV.D, *supra*. Had Plaintiffs complied with their meet-and-confer obligation by making this clear before filing their discovery motion, the motion would have been unnecessary – as evidenced by the fact that DWT provided the PSI material to Plaintiffs after their requested relief became clear. *Id.*; *see also* CP 1079-1088.

The trial court’s failure to apply CR 26(i) and to hold Plaintiffs to their meet-and-confer obligations require reversal of the discovery portion of the Order.

2. The Obligation To Produce Documents In Discovery Runs To Litigating Parties, Not Their Attorneys.

The trial court also erred because there simply is no authority permitting a court to impose document production obligations on counsel, rather than litigants, as the trial court did in requiring DWT to disclose two

terabytes of unreviewed records previously collected from its former client, Backpage.com. CP 1069. Under the Civil Rules, the obligation to produce documents rests with a “party,” not its counsel. CR 34 (“Any party may serve on any other *party* a request ... to produce ... [documents] in the responding *party*’s possession, custody, or control”) (emphasis added); CR 37(a)(2) (motions to compel must be directed to the opposing “party.”). In some circumstances, a client may need to produce responsive documents held by its attorneys, because those documents are in the client’s “control.” *Diaz v. Wash. State Migrant Council*, 165 Wn. App. 59, 78, 265 P.3d 956 (2011). But the discovery obligation is on the party to which the discovery was directed; no authority supports imputing it onto the party’s attorneys.²²

The trial court in effect treated Plaintiffs’ document requests *to defendants* as also being directed *to their counsel*. But Plaintiffs did not

²² Compounding this error, the trial court imposed a draconian penalty on the defendants – more than \$1.1 million every 14 days that all of the documents are not produced by (putatively disqualified) counsel. The sanction is manifestly unfair, particularly given that the court ordered the escalating sanctions to begin accruing after 60 days for a production that, the record shows, would take up to a year to complete. CP 624. Further, the court left its *in terrorem* discovery sanction in place even after Plaintiffs were provided the 1.1 million pages of PSI materials that Plaintiffs belatedly acknowledged were the “same” records sought in their motion. CP 1091 ¶ 5; CP 1023 ¶ 10; RP (5/23/18) 8, 9; CP 1259. The sanction is an abuse of discretion because it is far from “the least severe sanction that will be adequate” under the circumstances, as required by Washington law. *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 355-56, 858 P.2d 1054 (1993).

serve any discovery on opposing counsel. And it would have been entirely objectionable for them to have done so: a party's attorneys are subject to discovery only under "rare" circumstances, and only upon a heightened showing that Plaintiffs did not even purport to satisfy here. *Handlin v. On-Site Manager, Inc.*, 2018 WL 1907520, at *6 (Wn. App. Div. 1, Apr. 23, 2018) (unpublished) (trial court properly quashed subpoena seeking opposing counsel's deposition, where information was available through other means) (citing *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986)), *rev. denied*, 191 Wn.2d 1020 (2018). Here, the trial court simply disregarded that the obligation to produce documents falls to parties, not counsel. No authority permits a court to order counsel to produce vast amounts of unreviewed material simply because it was collected in connection with litigation. The court's order is all the more untenable because it purported to impose these obligations on DWT at the same time that it also found DWT could not act as counsel in the case at all. CP 1344. The discovery Order is an abuse of discretion.

3. Counsel Cannot Be Required To Provide Unreviewed Discovery Material To A Third Party.

Likewise unsupported by any precedent is the trial court's Order that DWT turn over client data to a "neutral third party" within 60 days to hold "in trust" (over and above ordering DWT to preserve the data). CP 1069.

Complying with this Order would contravene counsel's obligations to protect client information from disclosure to third parties. RPC 1.6(a). The requirement is particularly flawed because the material has not been reviewed, and may contain information protected by the attorney-client privilege, such that disclosure arguably could constitute a waiver of the privilege. CP 624; *see, e.g., Morgan v. City of Federal Way*, 166 Wn.2d 747, 755, 757, 213 P.3d 596 (2009) (privilege does not apply to information disclosed to third party).

At the same time, ordering that documents be turned over to a third party is unnecessary, as DWT committed to (and the trial court ordered) preservation of all records and data related to this case. *See* CP 1012 ¶ 12 (“Medalist Defendants have no objection to the [portion of the proposed order] requiring preservation of electronic evidence.”); CP 1069 ¶ 6 (Order requiring DWT to “secure and continue to preserve all electronic evidence in their possession”). Neither DWT nor any party has objected to those preservation obligations, which remain in effect.²³

²³ In their discovery motion, Plaintiffs suggested that preservation was not sufficient, and that copying the data to a third party was required because “the data could be seized by the federal government.” CP 611. This supposed threat of governmental seizure of the documents is entirely speculative. But even if the threat were real, the solution imposed by the Order does not address it: if the government could seize data being preserved by DWT, it could at least as easily seize data held by a third-party “neutral.”

The proposed “trust” arrangement (which was not the subject of any meet-and-confer between counsel) is problematic for additional reasons. The Order fails to address numerous impracticalities regarding its implementation. It fails to state who is responsible for the fees and other expenses associated with the putative trustee. CP 1069. It does not describe the third party’s duties, or the conditions under which the data would be maintained. *Id.* Indeed, the Order does not even provide that the third party is required to maintain the database’s confidentiality, or protect privileged material in the data. *Id.*

Finally, the portion of the Order requiring that DWT and defendants “produce ... the approximately 1.2 million responsive documents identified [in a letter from defense counsel] dated March 20, 2018” (CP 1067) is an abuse of discretion, because it rests on a demonstrably erroneous premise. There are not 1.2 million “responsive” documents identified in the referenced letter. Rather, the trial court simply accepted, uncritically and without regard for the letter’s actual content, Plaintiffs’ mischaracterization of it. The letter from defense counsel explained that an initial electronic search of some 500 terms provided by Plaintiffs resulted in 1,120,642 “hits.” CP 624. As that same letter explains, none of these documents has been reviewed for responsiveness or privilege; the point of counsel’s letter was to note that the search terms requested by Plaintiffs were vastly overbroad

(likely encompassing hundreds of thousands of irrelevant documents), and that reviewing the documents would take up to a year. *Id.* The trial court disregarded the facts and instead ordered that all “1.2 million” documents are “responsive” and must be produced. CP 1067-1068.

The court’s discovery Order is unprecedented under Washington law; no reported case has ever held (or suggested) that a court may compel a party or its (putatively disqualified) counsel to produce unreviewed documents based on an opposing party’s assertion that they are or may be responsive, under threat of a ruinous sanction. For all the foregoing reasons, the Order is “manifestly unreasonable” and rests on “untenable grounds.” *Burnet*, 131 Wn.2d at 494. As such, it must be reversed as an abuse of discretion.

VI. CONCLUSION

This Court should vacate and reverse the trial court’s Order disqualifying Medalist’s counsel, and hold that DWT is entitled to continue representing Medalist in this action. The Court also should vacate and reverse the portion of the discovery Order imposing obligations on DWT, and hold that the firm is not required to produce documents or data to third parties; that any discovery obligations must be directed to parties, not counsel; and that Medalist is not liable for the prospective discovery sanction imposed by the Order.

RESPECTFULLY SUBMITTED this 8th day of April, 2019.

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DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the state of Washington that on this day, he electronically filed the foregoing document with the Washington State Court of Appeals, Division II, which will send notification of such filing to the attorneys of record listed below.

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