

FILED  
Court of Appeals  
Division II  
State of Washington  
6/11/2019 3:01 PM

No. 52264-1-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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R.O. and K.M.,

Respondents,

v.

MEDALIST HOLDINGS, INC., et al.,

Petitioners.

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RESPONDENTS' OPENING BRIEF

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	COUNTERSTATEMENT OF ISSUES .....	4
III.	STATEMENT OF THE CASE.....	5
	A. Case Overview .....	5
	B. James Larkin and Michael Lacey Retain Ownership and Control of Backpage.com .....	8
	C. The <i>J.S.</i> Case.....	8
	D. The Backpage Defendants Engaged in a Pattern of Delay and Bad-Faith Litigation Tactics .....	10
	E. The Backpage Defendants Refuse to Produce Discovery Forcing the Trial Court to Issue Two Orders Compelling Production.....	12
	F. Joint-Defendants Carl Ferrer, James, Larkin, and Michael Lacey Are Charged by Federal Authorities .....	14
	G. The Girls Move for Sanctions Based on the Backpage Defendants’ False Discovery Responses and Bad-Faith Tactics.....	15
	H. DWT Attempts to Withdraw as Counsel for Ferrer But Insists on Continuing to Represent Larkin, Lacey, and Medalist.....	16
	I. The Backpage Defendants Refuse to Comply with the Trial Court’s January Discovery Order Forcing the Girls to File a Second Motion to Compel .....	18
	J. The Trial Court Rulings .....	19
	K. The Scope of Discretionary Review .....	23
IV.	ARGUMENT .....	25

A.	DWT Received Five-Weeks’ Notice of its Impending Disqualification and Was Fully Heard on the Issue.....	25
B.	The Trial Court’s Disqualification of DWT is Supported by the Record and Applicable Law.....	28
C.	The Court Should Decide the Conflict Issue Now.....	30
D.	The Court Properly Exercised its Discretion to Compel the Production of Responsive Documents and to Preserve Evidence.....	32
V.	CONCLUSION.....	36

**TABLE OF AUTHORITIES**

CASES

*Camicia v. Cooley*,  
No. 74048-2-I, 2017 WL 679988 (Feb. 21, 2017)..... 33

*City of Bothell v. Barnhart*,  
156 Wn. App. 531, 234 P.3d 264 (2010) ..... 24

*Foss Mar. Co. v. Brandewiede*,  
190 Wn. App. 186, 359 P.3d 905 (2015) ..... 24

*In re Estate of Barovic*,  
88 Wn. App. 823, 946 P.2d 1202, 1204 (1997) ..... 27

*In re Grand Jury*,  
138 F.3d 978 (3d Cir. 1998)..... 33

*In re Marriage of Ruff and Worthley*,  
198 Wn. App. 419, 393 P.3d 859 (2017) ..... 24

*In re Marriage of Wixom and Wixom*,  
182 Wn. App. 881 (2014) ..... 30, 31

*J.S. v. Vill. Voice Media Holdings, L.L.C.*,  
184 Wn.2d 95, 359 P.3d 714 (2015)..... 2, 8, 9, 10, 13, 14, 15

*Johnson v. Mermis*,  
91 Wn. App. 127, 955 P.2d 826 (1998) ..... 33

*Magana v. Hyundai Motor Am.*,  
167 Wn.2d 570, 220 P.3d 191 (2009)..... 24

STATUTES

47 U.S.C. § 230..... 9

RULES

CR 11 ..... 15

CR 12(b)(6)..... 11

CR 26 ..... 15, 23, 24

CR 37 ..... 5, 15, 33, 34

CR 53.3 ..... 33

RPC 1.7 .....	28, 29
RPC 1.9 .....	29

## I. INTRODUCTION

The present case illustrates the irreconcilable conflicts that can arise when an alleged criminal enterprise splinters and legal counsel insists on continuing to represent some of the alleged co-conspirators while attempting to withdraw from representing others in related civil litigation.

Before it was seized and dismantled by federal authorities last year, the website Backpage.com was the largest, most lucrative online sex-trafficking enterprise in history. Heading this alleged criminal enterprise were two men, James Larkin and Michael Lacey, who utilized a patchwork of holding companies and financial transactions to maintain ownership and control of Backpage.com throughout its existence. Collectively, *Messrs.* Larkin and Lacey along with their holding companies comprise the Appellants in this matter (“Medalist”). Medalist, along with co-defendant Carl Ferrer, who co-founded the website with Larkin and Lacey in 2004 and served as its CEO, worked collectively to grow their sex-trafficking enterprise and successfully forestall repeated legal efforts to shut down the website. This was made entirely possible by a team of attorneys at the law firm Davis Wright Tremaine LLP (“DWT”) who jointly represented Backpage.com and its owners in all matters—criminal, civil, and legislative—since at least 2012.

Prior to the website’s shutdown and forfeiture in relation to the pending criminal case, in 2015, the Washington Supreme Court issued a hallmark opinion holding that Backpage.com and its owners could be held liable to minor trafficking victims for facilitating sex trafficking on the

website. *See J.S. v. Vill. Voice Media Holdings, L.L.C.*, 184 Wn.2d 95, 359 P.3d 714 (2015). Months later, the U.S. Senate Permanent Subcommittee on Investigations issued a 50-page report documenting Backpage.com's active role in facilitating online sex trafficking and exposing the more than \$100 million in annual revenue it generated. And in April 2018, efforts culminated when Larkin, Lacey, and Ferrer were criminally charged on counts of facilitating prostitution, criminal conspiracy, and money laundering. Almost immediately thereafter, Carl Ferrer pled guilty, individually and on behalf of several Backpage.com entities, and provided incriminating testimony against Larkin and Lacey.

Following his guilty plea, DWT attempted to withdraw as counsel for Ferrer but insisted there was no conflict in it continuing to represent Larkin and Lacey. Ferrer objected and advised that he did not consent to DWT continuing to represent Medalist given the obvious conflicts created by his guilty plea. DWT responded by submitting copies of the joint-representation and joint-defense agreements between Larkin, Lacey, and Ferrer. The trial court reviewed the agreements *in camera* along with the applicable law regarding future conflicts of interest and concluded that Ferrer's guilty plea created an irreconcilable conflict of interest. Critically, the trial court noted that any prior waivers of future conflicts were inapplicable because Ferrer's guilty plea represented a "material change in circumstances" that was not addressed by the joint-representation or joint-defense agreements. Medalist and DWT were then provided five-weeks' notice to respond to the trial court's concerns before the disqualification

order was entered. All of this is chronicled in the record, which demonstrates that the trial court properly exercised its discretion and that DWT was provided ample opportunity to be heard.

The trial court also properly exercised its discretion when it sanctioned the Defendants (after failing to comply with discovery orders for nearly 6 months) and ordered them to produce 1.2 million documents the Defendants (and DWT) possessed but had refused to produce in discovery. Again, the record bears this out. First, the trial court's order compelling production of these documents was expressly directed to "the Backpage Corporate Defendants," not DWT. In fact, DWT is only referenced in the order because it admitted to being in sole possession of the documents at issue. Second, the trial court expressly stated that its disqualification of DWT would not go into effect until *after* DWT had facilitated production of the previously withheld documents. Third, even if the discovery order was solely directed to DWT, Washington law maintains that discovery obligations apply equally to parties and their counsel, and further that both a party and its counsel are subject to sanctions for violating the trial court's discovery orders.

In short, the trial court properly exercised its discretion to disqualify DWT after finding that an irreconcilable conflict of interest arose following Ferrer's guilty plea. Both Medalist and DWT were provided ample opportunity to respond to the trial court's concerns before the disqualification order was entered. The trial court also properly exercised its discretion when it ordered the production and preservation of previously

withheld documents. Accordingly, Respondents R.O. and K.M. respectfully request that the Court affirm both rulings.

In the alternative, and in the interest of conserving judicial resources and avoiding unnecessary delay in the litigation, if the Court finds that Medalist was not given sufficient opportunity to be heard prior to disqualification, Respondents ask that this Court use its authority, noted below, to decide the disqualification issue on its merits rather than remand to the trial court.

## **II. COUNTERSTATEMENT OF ISSUES**

1. Whether Medalist was provided sufficient notice and opportunity to respond to the disqualification of DWT when (a) the trial court provided more than five-weeks' notice that DWT was subject to disqualification before the disqualification order was entered; (b) DWT was permitted to remain as counsel for Medalist for at least 60 days following the disqualification order; (c) Medalist objected and moved that DWT not be disqualified prior to entry of the disqualification order; and (d) Medalist purposefully chose not to include the disqualification ruling in its motion for reconsideration?

2. Whether the trial court exercised its discretion by disqualifying DWT when the trial court (a) considered all relevant materials submitted by Medalist, including the joint-defense and joint-representation agreements lodged *in camera*; (b) found that Carl Ferrer's guilty plea represented a "material change in circumstances" that permitted him to revoke his consent to DWT continuing to represent Medalist; and (c) found

that DWT’s continued representation of Medalist created “an impermissible conflict of interest jeopardizing the effective administration of justice” in the case?

3. Whether the trial court properly exercised its discretion in ordering the production of previously withheld documents when (a) the obligation to produce the documents is squarely directed to “the Backpage Corporate Defendants,” not DWT; (b) CR 37 plainly imposes the obligations to comply with discovery along with the ability of a trial court to impose discovery sanctions applies to both a party and its attorneys; (c) DWT was not subject to disqualification until after it had facilitated Medalist’s discovery obligations; and (d) the duplication and entrustment of a two-terabyte hard drive with a neutral third party for safekeeping was reasonable and appropriate under the circumstances?

### **III. STATEMENT OF THE CASE**

#### **A. Case Overview**

Respondents R.O. and K.M. (hereinafter the “girls”) were 14 and 16 years old when they were trafficked for sex on Backpage.com. CP 77. Shortly after they were trafficked, the U.S. Senate began a two-year investigation into Backpage.com’s role in online sex trafficking. SCP \_\_.<sup>1</sup> Backpage.com resisted, going so far as to ignore Senate subpoenas for company records and forcing the Senate to hold Backpage.com in contempt

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<sup>1</sup> Filed concurrently with this brief is Respondents’ Supplemental Designation of Clerk’s Papers, which include several relevant pleadings that were omitted from Appellants’ designations. Citation to these pleadings are indicated in this brief with the placeholder “SCP \_\_.” Upon receipt of the Superior Court’s forthcoming index, Respondents will submit a substitute brief that provides pincites to the corresponding pages of each pleading.

by a 98-0 vote. SCP \_\_\_. A federal court later compelled Backpage.com to produce millions of company records that exposed, for the first time, the truth about the website’s illicit operations. SCP \_\_\_.

On January 10, 2017, the U.S. Senate’s Permanent Subcommittee on Investigations issued a 50-page report (the “Senate Report”) documenting Backpage.com’s preeminent role in online sex trafficking and exposing the more than \$100 million in annual revenue it generated. SCP \_\_\_. The Senate held a hearing the following day but Backpage.com’s three co-founders—Carl Ferrer, James Larkin, and Michael Lacey—asserted the Fifth Amendment and refused to testify. SCP \_\_\_. Several lower-level employees did cooperate and one advised that “everyone at the company knew the adult-section ads were for prostitution and that their job was to ‘put lipstick on a pig’ by sanitizing them.” SCP \_\_\_.

The U.S. Senate reached several findings key to this litigation:

- (1) Backpage.com actively promoted sex trafficking for over a decade, including trafficking of children, by sanitizing “escort” ads and instructing traffickers how to write sex ads to avoid legal scrutiny;
- (2) Backpage.com systematically removed sex trafficking terms from the website’s “escort” ads to conceal the illegal nature of the ads, and then posted the sanitized ads for a profit; and
- (3) Backpage.com was co-founded, owned, and controlled by Carl Ferrer, James Larkin, and Michael Lacey through a series of holding companies.

SCP \_\_\_.

This lawsuit was filed in January 2017. The girls named as defendants Carl Ferrer, James Larkin, and Michael Lacey, who together co-founded, owned, and operated Backpage.com, along with a network of 14

affiliated companies.<sup>2</sup> CP 78-84. Until May 2018, these 17 defendants collectively referred to themselves, at all times, as “the Backpage defendants” and were represented by the same law firm, which jointly filed pleadings, discovery responses, and other documents on their behalf.<sup>3</sup> Notwithstanding Appellants’ recent efforts to rebrand themselves as “Medalist,” this brief will continue to refer to the 17 defendants collectively as the “Backpage defendants.”<sup>4</sup>

Drawing on many of the findings in the Senate Report, the girls alleged the Backpage defendants intentionally facilitated and knowingly profited from their sexual exploitation, which occurred in 2014 and 2015. CP 89-91. Specifically, the girls alleged the Backpage defendants intentionally created and operated an online marketplace for sex. CP 89. The girls alleged the Backpage defendants knew virtually every ad appearing on the “escort” section was, in fact, an illegal sex ad. CP 91. To protect and grow their illicit revenues, the Backpage defendants helped traffickers create sex ads by developing “moderation practices” to systematically remove (*i.e.*, “sanitize”) terms and images from sex ads in order to conceal the illegal nature of ads from law enforcement. CP 92-94.

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<sup>2</sup> The girls also named as defendants the four convicted criminals who trafficked them at the street level, but these defendants are not relevant for purposes of this motion.

<sup>3</sup> *See, e.g.*, SCP \_\_ (DWT’s notice of appearance); SCP \_\_ (joint motion to sever); CP 425-32 (discovery responses); SCP \_\_ (disclosure of primary witnesses).

<sup>4</sup> Namely, Medalist Holdings Inc., Leeward Holdings, LLC, Camarillo Holdings, LLC, Dartmoor Holdings, LLC, IC Holdings, LLC, Backpage.com, 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, CF Acquisitions LLC, Carl Ferrer, Michael Lacey, and James Larkin. *See* CP 86.

The Backpage defendants and their attorneys had successfully evaded similar allegations by minor sex-trafficking victims and law-enforcement agencies for years.

**B. James Larkin and Michael Lacey Retain Ownership and Control of Backpage.com**

As noted above, the Senate Report revealed that Larkin, Lacey, and Ferrer owned and operated Backpage.com and facilitated illegal prostitution and minor sex trafficking on the website from 2004 onward. SCP \_\_. On March 20, 2018, the Backpage defendants confirmed as much in discovery responses and further revealed the ultimate ownership structure of Backpage.com: “Medalist Holdings, Inc. is a Delaware corporation, whose principal shareholders are and have always been James Larkin and Michael Lacey.” SCP \_\_. In sum, Medalist Holdings, Inc. is the parent of a network of shell companies that eventually leads down to Backpage.com. SCP \_\_. The 2015 “sale” of Backpage.com to Ferrer changed nothing—Medalist retained payment rights and security interests that allowed Larkin and Lacey to retain ultimate control over the website. CP 903-06; SCP \_\_. This is corroborated by Ferrer’s guilty plea, discussed below, which admits Medalist owned and operated Backpage.com and facilitated prostitution on the website since 2004. CP 310-12.

**C. The *J.S.* Case**

As mentioned at the outset, the factual and legal issues in this case were nearly identical to those at issues in the Washington Supreme Court’s decision in *J.S. v. Village. Voice Media Holdings, L.L.C.*, 184 Wn.2d 95,

359 P.3d 714 (2015). Initially filed in 2012, the plaintiffs in *J.S.* were three young girls who brought tort claims against the Backpage.com website for facilitating and profiting from the trafficking they endured, just like R.O. and K.M. *Id.* at 98–99. Almost immediately, Backpage.com moved to dismiss the case arguing that it was nothing more than a lawful website immune from liability under 47 U.S.C. § 230 (“Section 230”). *Id.* at 99. The trial court denied the motion to dismiss and Backpage.com appealed. *Id.* The Washington Supreme Court affirmed and ordered the case proceed to discovery:

It is important to ascertain whether in fact Backpage designed its posting rules to induce sex trafficking to determine whether Backpage is subject to suit under [Section 230] because a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct.

*Id.* at 103 (internal quotations omitted).

In discovery, Backpage.com refused to produce documents related to its business practices. SCP \_\_\_. Like the present case, the *J.S.* trial court was forced to issue multiple orders compelling Backpage.com to produce company records. SCP \_\_\_. Under court order, the parties agreed to a search methodology with specific terms designed to locate responsive documents; however, documents were limited to those dated on or before December 31, 2011. SCP \_\_\_.

In March 2017, shortly after the present case was filed, Backpage.com again moved for summary judgment dismissal of the *J.S.* case. SCP \_\_\_. The motion relied heavily on a sworn declaration from

Backpage’s general counsel, Elizabeth McDougall, insisting that Backpage.com’s business practices were intended to prevent prostitution and sex trafficking, not facilitate it. CP 405-14. A month later, McDougall testified on behalf of Backpage.com and repeated the same statements from her declaration. CP 418-23. The *J.S.* plaintiffs opposed the motion citing evidence that Backpage.com knowingly facilitated illegal commercial sex and trafficking of children on the website—evidence Backpage.com was compelled to produce. SCP \_\_\_. On May 26, 2017, the trial court denied Backpage.com’s motion, and the case settled in October 2017, shortly before trial. SCP \_\_\_.

**D. The Backpage Defendants Engaged in a Pattern of Delay and Bad-Faith Litigation Tactics**

R.O. and K.M. are represented in this matter by the same lawyers who represented the *J.S.* plaintiffs. From the outset, just like in *J.S.*, the Backpage defendants seemed to take advantage of every opportunity to stall and delay the litigation in the present case, which ultimately led the trial court to impose \$200,000 in sanctions. CP 1069-74. This misconduct is outlined below.

Beginning in **April 2017**, an attorney reached out, on behalf of all the Backpage defendants, and requested an extension to respond to the Complaint until May 2017, and, as a courtesy, the girls agreed. SCP \_\_\_.

In **May 2017**, the same lawyer confirmed he was authorized to accept service for all Backpage defendants but requested another extension for “a uniform response date for all the Backpage-related defendants.” SCP

—.

In **June 2017**, the lawyer requested another extension until July 2017, stating that the Backpage defendants would file a CR 12(b)(6) motion in the near future. SCP \_\_. Eleven days later, the lawyer claimed the Backpage defendants no longer intended to file a CR 12(b)(6) motion but would remove the case to federal court instead. SCP \_\_.

In **July 2017**, Backpage’s lawyer reversed course again claiming the Backpage defendants decided not to remove the case but would file a CR 12(b)(6) motion after all. SCP \_\_. The lawyer requested another extension until October 2017. SCP \_\_.

But in **September 2017**, days before the Backpage defendants’ supposed motion was due, the lawyer requested yet another extension. SCP \_\_. Frustrated, the girls’ counsel pointed out that no attorney had filed a notice of appearance on behalf of the Backpage defendant. SCP \_\_. The lawyer responded that he was “coordinating the defense for all the defendants affiliated with Medalist and Backpage [and] will ask counsel in Washington to enter their appearance in the case.” SCP \_\_.

In **October 2017**, Eric Stahl from David Wright Tremaine (DWT) appeared on behalf of all the Backpage defendants. SCP \_\_.

In **November 2017**, Mr. Stahl requested an extension to respond to the girls’ pending discovery requests. SCP \_\_.

And in **December 2017**, Mr. Stahl asked for another extension to file an Answer “by the end of the year,” assuring:

We are working on the Answers. Given the numerous parties involved, and the season, it is taking some time to coordinate everything, but I expect we will have them on file by the end of the year, or shortly thereafter. There is no need to move for or threaten default.

SCP \_\_\_.

Later in **December 2017**, instead of filing an Answer or serving discovery responses, the Backpage defendants filed a motion to sever, which was denied by the trial court just like it was denied by three separate courts before. SCP \_\_\_.

**E. The Backpage Defendants Refuse to Produce Discovery Forcing the Trial Court to Issue Two Orders Compelling Production**

On October 16, 2017, the girls served their first set of discovery requests asking the Backpage defendants to provide information regarding their knowledge of prostitution and sex trafficking on Backpage.com, as well as their “moderation practices.” The requests were directed separately to individual defendants Carl Ferrer, James Larkin, and Michael Lacey, all of whom uniformly asserted the Fifth Amendment and refused to answer. CP 433-47. A fourth set of discovery requests was directed to the “Backpage Corporate defendants,” which included the 14 business entities named in the Complaint. CP 86, 342, 386. The Backpage Corporate defendants jointly responded to the requests for admission with the following denials:

**REQUEST FOR ADMISSION NO. 57:** Admit that you removed “banned terms” from advertisements posted in the “seattle escorts” and “tacoma escorts” sections of Backpage.com in 2014 to mask illegal activity on the website, such as prostitution.

**RESPONSE:** Subject to their objections, Corporate Defendants deny Request for Admission No. 57.

CP 425-32.

The Backpage Corporate Defendants also denied knowing that the majority of ads appearing on the website involved illegal prostitution:

**REQUEST FOR ADMISSION NO. 11:** Admit that by January 1, 2014, you knew that the majority of the escort advertisements in the “seattle escorts” section of Backpage.com were advertisements for prostitution.

**RESPONSE:** Subject to their objections, Corporate Defendants deny Request for Admission No. 11.

CP 426.

In response to the girls’ requests for production, the Backpage Corporate defendants responded only with boilerplate objections and did not produce a single document. SCP \_\_\_. The parties met and conferred. SCP \_\_\_. Plaintiffs proposed utilizing the same search methodology ordered by the trial court in the *J.S.* case to locate and produce responsive records after 2011, but the Backpage Corporate defendants refused. SCP \_\_\_.

On January 4, 2018, the girls were forced to file the first of two motions to compel. SCP \_\_\_. The girls requested the Backpage defendants produce all records from the *J.S.* case and employ the same search methodology ordered in the *J.S.* case to locate and produce responsive records dated after 2011. SCP \_\_\_. The trial court granted the motion and ordered the relief requested in a 72-page order, CP 207-78, and specifically noted that the discovery requests and search methodology was:

[R]easonably calculated to lead to the discovery of admissible evidence and within the parameters of discovery

contemplated by the Washington Supreme Court in *J.S. v. Vill. Voice Media Holdings, LLC*.

CP 208-09.

In February 2018, two months after the trial court's first order compelling production, the Backpage defendants had still not produced any records. CP 614-15. Instead, on March 20, 2018, DWT advised it possessed two terabytes of data, which contained at least 1,120,624 responsive documents. CP 623-27. The parties met and conferred multiple times, and the girls asked the Backpage defendants to begin producing the documents on a rolling basis but, just as before, the Backpage defendants refused. CP 615.

**F. Joint-Defendants Carl Ferrer, James, Larkin, and Michael Lacey Are Charged by Federal Authorities**

In April 2018, while the Backpage defendants refused to comply with the Court's January Order, Carl Ferrer, James Larkin and Michael Lacey, among other Backpage executives, were arrested and charged with federal crimes for facilitating prostitution, criminal conspiracy, and money laundering. Ferrer pled guilty, individually and on behalf of 11 Backpage Corporate defendants, and provided the following incriminating testimony against Lacey and Larkin:

In 2004, I co-founded the website [www.Backpage.com](http://www.Backpage.com) ("Backpage"), along with M.L. [Michael Lacey] and J.L. [James Larkin]. Backpage eventually became the second-largest classified advertising in the world, during its 14 years of existence, has derived the great majority of its revenue from fees charged in return for publishing advertisements for 'adult' and 'escort' services.

I have long been aware that the great majority of these advertisements are, in fact, advertisements for prostitution services . . . . Acting with this knowledge, I conspired with other Backpage principals (including but not limited to M.L. [Michael Lacy], J.L. [James Larkin], S.S., D.H., A.P., and J.V. to find ways to knowingly facilitate state-law prostitution crimes being committed by Backpage customers. For example, I worked with my co-conspirators to create ‘moderation’ processes through which Backpage would remove terms and pictures that were particularly indicative of prostitution and then publish a revised version of the ad. . . . These editing practices were one component of an overall, company-wide culture and policy of concealing and refusing to officially acknowledge the true nature of the services being offered in Backpage’s ‘escort’ and ‘adult’ ads.

CP 310-12.

In short, Ferrer, Backpage.com’s co-founder and CEO, finally admitted the Backpage defendants’ denials were false and confirmed that Backpage.com was indeed a criminal enterprise.

**G. The Girls Move for Sanctions Based on the Backpage Defendants’ False Discovery Responses and Bad-Faith Tactics**

Following Ferrer’s guilty plea, on April 26, 2018, the girls moved for sanctions against the Backpage defendants pursuant to CR 11, CR 26(g), CR 37(c), and the trial court’s inherent equitable powers. CP 279-94. As support, the girls cited “a long pattern of bad faith litigation by the Backpage defendants,” including repeated delays, obstruction, and discovery responses that Ferrer’s guilty plea revealed were false. CP 281-87. The girls also pointed to the false statements by McDougall, Backpage’s corporate counsel, in the *J.S.* case as further evidence of the “defendants’ pattern and long history of intentional deception and misrepresentation.”

CP 283-86.

**H. DWT Attempts to Withdraw as Counsel for Ferrer But Insists on Continuing to Represent Larkin, Lacey, and Medalist**

On May 1, 2018, a week after the girls moved for sanctions, DWT filed a notice of intent to withdraw from representing Ferrer and the non-Medalst companies but, despite the obvious conflict, sought to continue representing Larkin, Lacey, and Medalist. CP 448-50. The girls objected because DWT was in sole possession of over a million unproduced documents along with a two-terabyte hard drive that presumably contained even more responsive documents. CP 601-05. In response, DWT submitted additional evidence *in camera* to support its request to withdraw, including the joint-representation and joint-defense agreements that supposedly contained valid waivers of future conflicts of interest. CP 1-75, 996-99.

Meanwhile, on April 24, 2018, Ferrer sent a letter to DWT advising he did not, in fact, consent to DWT continuing to represent Larkin, Lacey, and Medalist in light of the irreconcilable conflicts of interest created by his guilty plea and the inherent prejudice that would result. SCP \_\_. While the girls are not privy to the materials filed under seal, Ferrer's letter clearly indicates his objection to DWT abruptly withdrawing as his counsel:

DWT's sudden withdrawal threatens to irreparably harm the Backpage Clients' interests, which could remain unprotected if a default were entered against them. There is little time for all of these clients to locate new counsel and prepare responsive pleadings on such short notice, myself included. I did not receive any advance notice of your intention to withdraw, and even if withdrawal were appropriate, I would expect a reputable firm like DWT to adhere to its

professional duties when terminating the representation. Please be advised that neither I nor any other Backpage Client consent to the withdrawal of any motions that have already been filed in any pending matter.

SCP \_\_.

Mr. Ferrer also adamantly objected to DWT continuing to represent Larkin, Lacey, and Medalist given the obvious conflict of interest created by his guilty plea:

. . . DWT cannot terminate its representation of Backpage.com LLC in favor of those two individuals [Larkin and Lacey]. Moreover, as a joint client of DWT, I do not consent to DWT's continued representation of any other person or entity other than Backpage if DWT terminates its representation.

DWT cannot terminate its representation of Backpage.com LLC, the entity, in favor of other co-defendants. To my knowledge, Backpage.com LLC is the only joint client for whom DWT has secured advance consent in the event of a conflict of interest. That is what was contractually agreed among the parties to the joint representations, and a contrary result would be improper. An attorney simply cannot decide to drop one client in favor of another in the case of a concurrent conflict of interest.

SCP \_\_.

It is unclear why DWT suggests that Mr. Ferrer is the one who advocated for withdrawal or that he did not object to DWT's withdrawal when clearly the opposite is true.

Mr. Ferrer also confirmed that DWT was in sole possession of the approximately 1.2 million responsive documents but had refused Ferrer's directive that DWT produce the documents in response to the trial court's order. SCP \_\_. In fact, DWT had even refused Ferrer's request that the

documents be returned to the Backpage defendants, opting instead to continue withholding the documents on behalf of their remaining clients, Medalist. SCP \_\_. Finally, Ferrer confirmed that DWT had “already vetted the documents for relevance, privilege, and other matters.” SCP \_\_.

**I. The Backpage Defendants Refuse to Comply with the Trial Court’s January Discovery Order Forcing the Girls to File a Second Motion to Compel**

On May 10, 2018, the girls filed a second motion to compel because the Backpage defendants still refused to comply with the trial court’s first discovery order and had produced virtually no records. CP 606-13.

In response, DWT argued that they could not produce any records because the documents had still not been reviewed for privilege. CP 668. In fact, DWT admitted that it had not even attempted to review the relevant documents in its possession despite the passage of nearly seven months since the discovery requests were first issued and nearly five months since the trial court’s first discovery order. *Id.*; RP 13:24-14:7 (5/23/2018), 30:24-31:5 (6/28/2018). But the record indicated that the same documents were already reviewed for privilege by another law firm in response to subpoenas issued by the U.S. Senate. CP 941-45. Specifically, the Backpage defendants former law firm, Perkins Coie, had previously incurred over 36,000 attorney hours reviewing and producing millions of corporate records to the Senate from the same dataset that was the subject of the girls’ discovery requests. CP 979-94.

Finally, Medalist and DWT gave no explanation as to why it refused to produce the requested documents on a rolling basis as repeatedly

suggested by the girls' counsel. RP 31:23-33:24 (5/23/2018). Instead, Medalist and DWT misrepresented to the trial court that the documents had already been produced when, in fact, the only documents produced were outdated material previously produced in the *J.S.* case—not the 1.2 million documents that were the subject of the girls' motion to compel. RP 16:22-18:24 (5/23/2018).

**J. The Trial Court Rulings**

On May 23, 2018, the trial court held oral argument on DWT's motion to withdraw, the girls' motion for sanctions, and the girls' second motion to compel. *See generally* RP (5/23/2018). Contrary to Medalist's assertions, the trial court reviewed all materials submitted by the parties and entered numerous findings in support its ruling. as detailed below. App. 93-98, 105-07.

On the motion to withdraw, the trial court considered all the materials submitted by DWT, including the materials DWT submitted *in camera*. RP 60:24-61:9 (5/23/2018). The trial court granted DWT's motion to withdraw and further ruled that DWT was subject to disqualification given the serious conflicts created by Ferrer's guilty plea:

The two entities [Backpage.com and Medalist] are intertwined in such a manner that to allow Davis Wright Tremaine to continue to represent Medalist Holdings will create an injustice on the administration of justice but will also, more probable than not, create conflicts of interest that this Court will have to address moving forward.

My review has indicated that the request by Mr. Ferrer to terminate the attorney-client relationship created a—I guess the word is “revoked,” the consent given to Davis Wright

Tremaine to allow them to represent these multiple parties. There's a nature of the conflict that I saw that continued representation would be prohibited even if the other clients were to give consent. Mr. Ferrer revoked his consent because of his—I think the term used in the case law is “material changed circumstances,” the federal conviction being a major one; that and the facts pertaining to that are related to the facts intertwined in this case significantly or similar to the facts in this case.

This Court finds that there would be material detriment to the other clients and a high possibility that the lawyers would encounter conflicts proceeding forward.

RP 61:13-62:9 (5/23/2018).

Next, the trial court granted the girls' second motion to compel after noting that the Backpage defendants had failed to take reasonable steps to comply or substantially comply with the discovery order issued five months prior. RP 38:20-40:19 (5/23/2018). The trial court found that the Backpage defendants' noncompliance in discovery had severely prejudiced the girls' ability to prepare for trial scheduled five months later. RP 62:21-63:25 (5/23/2018). The trial court directed the Backpage defendants to produce the withheld documents or face a prospective sanction of \$1 per document for every 14 days of continued noncompliance. RP 65:16-21 (5/23/2018). Additionally, the trial court ordered that the two-terabyte database in DWT's possession be placed in trust with a neutral third-party arbitration and mediation service until the Backpage defendants could obtain new counsel. CP 1069.

Finally, the trial court granted the girls' motion for sanctions and outlined the Backpage defendants' collective and long-time pattern of bad

faith litigation tactics, which were plainly designed to delay and evade discovery, waste judicial resources, mislead Plaintiffs and the Court, and unfairly deny justice to the girls. RP 64:1-65:13 (5/23/2018). The trial court specifically noted the Backpage defendants' false discovery responses, noncompliance in discovery, Ferrer's guilty plea, and other pre-litigation misconduct. *Id.* Notably, the trial court rejected DWT's attempts to shift the blame from Medalist and onto Ferrer for their collective bad-faith misconduct:

The evidence presented by Plaintiffs demonstrates that the Backpage Corporate Defendants collectively operated and owned the backpage.com website and have acted collectively in all relevant respects throughout the course of this litigation, including but not limited their responses to Plaintiffs' discovery requests.

CP 1071.

The trial court then imposed \$200,000 in sanctions against the Backpage defendants along with the girls' reasonable attorney fees necessitated by the bad-faith conduct. RP 65:14-25 (5/23/2018).

On June 28, 2018, the trial court held another hearing to enter an order combining all three rulings. *See generally* RP (6/28/2018). The combined order details the trial court's findings, conclusions, and rulings articulated during the previous hearing. *See generally* CP 1063-78.

Notably, the combined order confirms that the trial court did, in fact, consider *all* materials submitted by DWT in support of its motion to withdraw, including the materials lodged *in camera*. CP 1074-75. The combined order also summarizes the trial court's application of the law to

the facts, including its finding that “material changes in circumstances” surrounding Ferrer’s guilty plea effectively revoked any prior consent or waivers obtained by DWT. CP 1075. The trial court went on to conclude:

3. Defense counsel has jointly represented all defendants in numerous lawsuits across the country that are also substantially related to the facts and claims in this litigation and the federal criminal proceedings. These past and current representations are relevantly interconnected such that defense counsel is familiar with both the Backpage.com Defendants’ and Medalist Defendants’ pattern of conduct as it relates to the claims in this litigation.

4. Given the above, the Court concludes that there is a high possibility that Davis Wright Tremaine, Davis Wright Tremaine’s attorneys, Eric Stahl, and James Grant will encounter an impermissible conflict of interest jeopardizing the effective administration of justice if they continue to represent the Medalist Defendants in this litigation.

5. The Court further concludes that the Backpage.com Defendants’ interest to preserve the confidences previously disclosed to Davis Wright Tremaine, Davis Wright Tremaine’s attorneys, Eric Stahl, and James Grant combined with the high possibility that Davis Wright Tremaine, Davis Wright Tremaine’s attorneys, Eric Stahl, and James Grant will encounter conflict if allowed to continue representing the Medalist Defendants, outweighs the Medalist Defendants’ interest in maintaining defense counsel as their attorneys in this litigation.

CP 1075-76.

The combined order also confirms that the obligation to produce the previously withheld discovery was expressly imposed on “the Backpage Corporate Defendants,” not DWT. CP 1067-69. And that DWT was not immediately disqualified but; rather, DWT was permitted to remain counsel

for the limited purpose of facilitating its clients' outstanding production of documents. CP 1076; RP 63:13-25, 68:13-17 (5/23/2018).

**K. The Scope of Discretionary Review**

Medalist moved this Court for discretionary review of the trial court's combined order disqualifying DWT, compelling discovery, and imposing sanctions on the Backpage defendants. The Court denied review of the trial court's imposition of sanctions and the bulk of the trial court's discovery rulings. CP 1330-46. The Court accepted review of the trial court's disqualification of DWT and the discovery ruling with respect to DWT's cooperation and requirement to preserve responsive unredacted documents with a neutral third party:

Review is granted as to the issues: (1) whether the superior court procedurally or substantively erred in disqualifying DWT; (2) whether the superior court could impose a requirement on DWT to respond to discovery independent of its representation of the parties; and (3) whether the superior court erred in ordering DWT to turn over documents to a third party.

CP 1345.

Upon reviewing Medalist's opening brief, Medalist attempts to improperly expand this appeal beyond the scope that discretionary review was granted. App. Br. 4 (Assignments of Error Nos. 4, 7, and 8(b)-(c)). To be clear, the only discovery rulings under review are (1) the extent to which the trial court's order requires DWT's cooperation, and (2) the requirement that a two-terabyte hard drive with unredacted copies of responsive documents be duplicated and placed in trust with a neutral third party. CP

1345. The trial court’s discovery-related findings and its order compelling production of the 1.2 million documents is not under review. CP 1345 (“The remaining issues related to the 1.2 million document production are not included in the grant of review.”).

Medalist also improperly attempts to create an issue over whether the parties held a CR 26(i) meet-and-confer conference prior to the trial court’s discovery order. App. Br. 37-39. This argument is improper because it is also not within the scope of issues for which discretionary review was granted. CP 1345.

Finally, Medalist attempts to bootstrap review of the trial court’s findings of fact in connections with its imposition of sanctions for the Backpage.com defendants’ bad-faith litigation misconduct. App. Br. 4-5 (Assignment of Error No. 8(c)). But, once again, the portion of the trial court’s order imposing monetary sanctions against the Backpage.com defendants’ is not included in this review. CP 1342.

The girls object to the extent Medalist assigns error to the trial court’s ruling that are outside of the current scope of review. Because formal motions to strike are generally disfavored, the girls would respectfully ask that the Court simply disregard and consider stricken Medalist’s Assignments of Error Nos. 4, 7, and 8(b)-(c), along with any improper argument regarding CR 26(i), on the grounds that these issues are outside the scope of this discretionary review. *See In re Marriage of Ruff and Worthley*, 198 Wn. App. 419, 424 n.6, 393 P.3d 859 (2017); *City of Bothell v. Barnhart*, 156 Wn. App. 531, 538 n.2, 234 P.3d 264 (2010).

#### IV. ARGUMENT

The trial court's order compelling the Backpage.com defendants to produce previously withheld documents and its imposition discovery sanctions is reviewed for abuse of discretion. *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 582, 220 P.3d 191 (2009). Likewise, the trial court's disqualification of DWT is also reviewed for abuse of discretion while the trial court's specific application of the RPCs to DWT's conduct is reviewed de novo. *Foss Mar. Co. v. Brandewiede*, 190 Wn. App. 186, 192, 359 P.3d 905 (2015). A trial court abuses its discretion only if its decision is "clearly unsupported by the record," "applies the wrong legal standard," or "adopts a view that no reasonable person would take." *Magana*, 167 Wn.2d at 583.

##### A. **DWT Received Five-Weeks' Notice of its Impending Disqualification and Was Fully Heard on the Issue**

The record squarely contradicts Medalist's claim that DWT was disqualified without notice or opportunity to be heard. As detailed above and summarized below, both Medalist and DWT had multiple opportunities to submit additional argument against disqualification.

**First**, and most importantly, DWT was *not* disqualified at the May 23, 2018 hearing—the trial court expressly stated that its preliminary disqualification ruling, based on the information Medalist submitted in camera in relation to DWT's request to withdraw from representing only Ferrer and certain Backpage.com entities, would not go into effect until a written order was entered. RP 68:8-69:6 (5/23/2018). The combined order disqualifying DWT was not entered until June 28, 2018, meaning Medalist

was provided more than five-weeks' notice that DWT was subject to disqualification. CP 1063-78.

**Second**, Medalist did in fact take advantage of its opportunity to be heard on the disqualification issue. As noted, Medalist submitted documents in camera for the trial court's review. In addition, Medalist submitted written objections to the proposed disqualification order stating that "there are no legally cognizable grounds for disqualification" and "[t]he record does not support any finding that DWT's continued representation of the Medalist Defendants in this action would pose any conflict." CP 1015-16. At the June 28 hearing, Medalist's counsel offered further argument against disqualification and moved to reverse the disqualification ruling, which the trial court denied:

MR. STAHL: [O]ur position, as I think was alluded to earlier, is that we don't think disqualification is warranted; it's a drastic remedy. We think it was improperly entered as a *sua sponte* order; nobody made a motion. Plaintiffs didn't seek disqualification. Backpage.com hasn't sought disqualification. I think the reasons why we think disqualification is improper are contained largely in the joint representation agreements that are in the sealed declaration. I don't want to go into those; but in general, we don't believe there is a conflict or anything impermissible about us beginning to represent the Medalist parties.

I'll also point out, again, you're dealing with parties, as a practical matter, who don't have the ability, as Mr. Grant alluded to earlier, to obtain new counsel, so disqualification is prejudicial to them at this point; so we would ask the Court to not disqualify us and for all the reasons we've stated, I think, in the objections as well.

\* \* \*

THE COURT: Thank you. I've previously made my record regarding the basis as to why Davis Wright Tremaine would be disqualified from representing the remaining defendants in this case. I don't believe I need to go back over it.

Also, my reading of the law is that a court can *sua sponte* disqualify an attorney from representing a client for the reasons that I listed when I made my previous ruling, so your objection is noted, my record stands, and we can hear the next issue.

MR. STAHL: Thank you, Your Honor.

THE COURT: So your motion is denied.

MR. STAHL: Thank you.

RP 71:18-74:1 (6/28/2018); *see also* 61:13-62:9 (5/23/2018).

**Third**, even after the combined order was entered on June 28, 2018, DWT was instructed to remain as counsel for at least 60 days after entry of the order. CP 1076. The trial court even went a step further and clarified that DWT could use the 60 days to file other motions on behalf of Medalist, RP 89:6-90:4 (6/28/2018). In fact, Medalist took full advantage of DWT continued representation by filing a motion for reconsideration on July 9, 2018. CP 1079-89. However, Medalist and DWT only sought reconsideration of the discovery related portions of the combined order and did not seek reconsideration of the disqualification ruling, presumably because Medalist had presented the entirety of the evidence and argument in support of its position against disqualification. *See id.*

Under *Barovic*, “[t]he attorney must be given a meaningful opportunity to respond *although a full-scale hearing is not required.*” *In re Estate of Barovic*, 88 Wn. App. 823, 826, 946 P.2d 1202, 1204 (1997)

(emphasis added). In *Barovic*, the attorney was disqualified on the spot, effective immediately, without any prior notice whatsoever. *Id.* at 825–26. The circumstances in *Barovic* stand in stark contrast to the present case, where Medalist and DWT were provided over five-weeks’ notice of the trial court’s impending decision and availed themselves of multiple opportunities to be heard on the issue.

**B. The Trial Court’s Disqualification of DWT is Supported by the Record and Applicable Law**

The trial court’s disqualification ruling was made after reviewing all the materials lodged by Medalist and DWT for *in camera* review, including the joint-representation and joint-defense agreements. CP 1074-75; RP 60:24-61:9 (5/23/2018). Relying on these agreements, the trial court concluded that Ferrer’s guilty plea created an irreconcilable conflict of interest such that it was impermissible for DWT to continue representing Medalist after withdrawing as Ferrer’s counsel. CP 1075-76. This conclusion was largely premised on the trial court’s finding that Ferrer’s guilty plea represented “a material change in circumstances” that effectively rendered any prior waivers inapplicable and ultimately meant Ferrer was free to revoke his consent to continued representation. CP 1075. The trial court’s conclusion is in line with Washington’s Rules of Professional Conduct.

RPC 1.7(b) governs waivers of future conflicts and, above all else, requires that clients give informed consent in writing. RPC 1.7(b)(4). What constitutes informed consent depends on the circumstances; however, “[i]f

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.” RPC 1.7 cmt. 22. Similarly, “advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable.” *Id.*

The comments to RPC 1.7 also state that a client may revoke their consent at any time and that such revocation may preclude the attorney from continuing to represent other clients:

A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer’s representation at any time. Whether revoking consent to the client’s own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, *whether the client revoked consent because of a material change in circumstances*, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

RPC 1.7 cmt. 21 (emphasis added); *see also* RPC 1.9(a) (setting forth duties to former clients).

Medalist’s reliance on the decision by the Arizona federal court is misplaced because that ruling is distinguishable on its face. Specifically, the district court held that by entering into the agreements, Ferrer waived his right to pursue or seek disqualification of DWT in the event a conflict of interest arises. *U.S. v. Lacey*, No. CR-18-00422-001 PHX, 2018 WL 4953275, at \*4 (D. Ariz. Oct. 12, 2018). Put another way, Ferrer himself is barred by the agreements from personally seeking disqualification of DWT

in the event an impermissible conflict of interest arises. *Id.* (“the content of these agreements demonstrates that Ferrer waived his right to pursue disqualification against DWT”). But this is not applicable in the present case because Ferrer never sought or pursued disqualification—instead, the trial court ordered DWT disqualified *sua sponte*.

Critically, DWT does not dispute whether Medalist’s interests are materially adverse to Ferrer’s interests in this litigation or that an actual conflict of interest has already manifested—indeed it has. For example, in opposing the girls’ motion for sanctions, DWT repeatedly attempted to shift the blame away from Medalist and onto Ferrer by asserting that he was responsible for the false information contained in the Backpage Corporate defendants’ discovery responses. SCP \_\_; RP 58:11-59:23 (5/23/2018). When the trial court pressed, DWT eventually backed down and admitted that the discovery requests were on behalf of all Backpage Corporate defendants, including Medalist. RP 60:13-23. This episode illustrates the serious and foreseeable risk that DWT will utilize information obtained during its many years representing Ferrer to the benefit of Medalist and to the detriment of Ferrer—this is precisely why the RPCs forbid this form of representations, which DWT is now asking this Court to endorse.

**C. The Court Should Decide the Conflict Issue Now**

If the Court is not inclined to affirm the trial court’s disqualification order on procedural grounds, the girls respectfully request that the Court decide whether the RPCs permit DWT to continue representing Medalist instead of remanding the issue back to the trial court for further proceedings.

Washington Appellate Courts have authority to address potential conflicts of interest and order attorney disqualification directly:

The court need not wait for one of the parties to raise the conflict or move to disqualify. A court has the authority and duty to inquire on its own initiative into whether counsel should not serve because of a conflict with another client. In cases where counsel is in violation of professional ethics, the court may act *sua sponte* to disqualify. A court has not only the right, but also the duty to safeguard ethical practice as part of its inherent power to supervise its own affairs.

*In re Marriage of Wixom and Wixom*, 182 Wn. App. 881, 904 (2014) (numerous citations omitted).

Medalist has confirmed that its sole basis for continuing to represent Medalist is the joint-representation and joint-defense agreements under seal with the Court. In the interests of judicial economy and for the reasons stated in *Wixom*, the girls would ask that the Court decide the merits of DWT's continued representation of Medalist here and now. The agreements are sealed in these proceedings making it impossible for the girls to specifically argue the effectiveness of any waiver language. Accordingly, the girls must rely on this Court's review of the agreements. Nevertheless, the respectfully suggest that the Court's analysis should be guided by the following general points of inquiry:

- Do the agreements sufficiently identify the possibility that a co-party may plead guilty and offer evidence against the other co-parties in related criminal proceedings?
- Do the agreements provide a comprehensive explanation of the potential adverse consequences a co-party would face in the event DWT withdrew following their guilty plea but continued to represent the other co-parties in ongoing civil proceedings?

- Do the agreements sufficiently identify the actual conflict of interest that has developed in this case, whereby DWT is actively utilizing information obtained in connection with its prior joint representation of the parties to benefit Medalist by attempting to shift the blame for the parties' collective misconduct and discovery violations onto Ferrer?
- Do the agreements sufficiently identify the potential conflicts of interest that are likely to develop in this case, including the risk that DWT will continue to utilize information obtained in connection with its prior joint representation of the parties to shift the ultimate issues of liability and/or damages away from Medalist and onto Ferrer?

The girls respectfully maintain that if the answer to any of these questions is “no,” then DWT’s continued representation of Medalist is impermissible under the RPCs and the trial court’s disqualification order should be affirmed.

**D. The Court Properly Exercised its Discretion to Compel the Production of Responsive Documents and to Preserve Evidence**

Medalist does not challenge the trial court’s finding that it failed to comply or even attempt to comply with the trial court’s previous discovery order—for example, by producing documents on a rolling basis. CP 1066. Also unchallenged is the trial court’s finding that Medalist’s noncompliance with the January Order was willful and has caused undue delay and substantially prejudiced the girls’ ability to prepare for trial. CP 1066-67. And Medalist does not challenge the trial court’s finding that lesser sanctions would not suffice to deter continued noncompliance. CP 1067. The issues Medalist raises are either unsupported or directly contradicted by the record and applicable law.

Medalist claims that the trial court improperly imposed discovery

obligations on DWT after disqualifying DWT from representing Medalist, but this assertion is false. As noted above and below, the trial court's order compelling the production of previously withheld documents was directed to the Backpage Corporate defendants, not DWT:

Based on the foregoing, the Court hereby ORDERS as follows:

1. Within 60 days of this Order, *the Backpage Corporate Defendants* shall produce to Plaintiffs the approximately 1.2 million responsive documents identified by Eric Stahl in his letter dated March 20, 2018, which was attached as Exhibit 2 to the Declaration of Michael T. Pfau in Support of Plaintiffs' Motion to Compel Compliance with Court's Order and Motion to Preserve Evidence.
2. If *the defendants* fail to produce the approximately 1.2 million responsive documents referenced above within 60 days of this Order, *the defendants* will be sanctioned in the amount of \$1.00 per document for every 14 days of noncompliance with this Order.
3. Within 60 days of this Order, *the Backpage Corporate Defendants* shall produce any remaining documents responsive to the January 12th Order that are in their possession, which includes documents in the possession of Davis Wright Tremaine and other legal counsel who represents any of these defendants.
5. To the extent additional records exist that defendants assert are subject to the attorney/client privilege or work product doctrine, *defendants shall provide* Plaintiffs with a privilege log that includes the basis for how *the defendants defined* their "control group" as to each withheld record. The log shall be sufficiently detailed so that Plaintiffs are able to determine whether the asserted privilege is valid as to each record, including whether any privilege may have been waived based on who sent or received the record. The privilege log shall also include the date of the record, the

time of the record (where available), who authored the record, who received the record, and a general description of the record. A privilege log shall be produced contemporaneously with the records that are produced pursuant to this Order.

CP 1067-69 (emphasis added).

But even if the trial court had imposed discovery obligations directly on DWT, doing so is entirely within the discretion of the courts to oversee the discovery process. Under Washington law, discoverable materials that are in possession of a party's law firm are considered to be in the possession of the party itself. CR 34(a)(1) (a party must produce records in its "possession, custody, or control"); *see also Diaz v. Washington State Migrant Council*, 165 Wn. App. 59, 78, 265 P.3d 956 (2011) ("Control, apart from possession, is defined as the legal right to obtain the documents upon demand. Control may also be found where an entity has access to and the ability to obtain the documents.").

Likewise, Washington law authorizes a trial court to impose sanctions and remedial measures on "a party or its attorney for (1) failure to comply with a discovery order." *Camicia v. Cooley*, No. 74048-2-I, 2017 WL 679988, at \*11 (Feb. 21, 2017) (unpub.) (quoting CR 37); *see also Johnson v. Mermis*, 91 Wn. App. 127, 132–33, 955 P.2d 826 (1998). And a trial court exercises broad discretion in imposing discovery sanctions and "may make such orders in regard to the failure as are just." CR 37(b)(2).

As established above, DWT was not disqualified until *after* it facilitated Medalist's compliance with the trial court's order. CP 1076; RP 63:13-25, 68:13-17 (5/23/2018). Thus, the dual obligations imposed under

CR 34 and 37 continued to apply to both Medalist and DWT until they complied with the trial court's order compelling the production of documents and preservation of data—only after compliance was achieved would DWT's disqualification go into effect. CP 1066-69, 1076; RP 63:13-25, 68:13-17 (5/23/2018).

If Medalist and DWT were correct, a party could give records to their attorneys and then claim they no longer possess the records. That is obviously not the law. Regardless of whether the law firm asserts it no longer represents a client, a client plainly has the legal right to obtain records possessed by its current or former attorneys. *See* CR 34(a). And the penalties for failure to comply with the trial court's discovery orders are applicable to *both* a party and its attorneys. *See* CR 37(b).

Finally, the trial court acted well within its discretion by directing DWT to duplicate the two-terabyte hard drive and place a copy in trust with a neutral third party to ensure that the data remained available until the Backpage defendants could obtain new counsel. CP 1069. This protective measure was necessary because both Lacey and Larkin were (and still are) the targets of ongoing federal criminal proceedings, meaning the two-terabyte hard drive was subject to seizure by federal authorities as evidence. RP 27:16-28:24 (05/18/2018). Duplicating the data and placing a copy in trust with a neutral third party would ensure that a copy of the data remained available in this case and could be reviewed for responsiveness once Medalist obtained new counsel. RP 17:3-18:8 (06/28/2018).

As a matter of law, placing a hard drive with a third-party arbitration

service, pursuant to a court order, does not amount to a “disclosure” under any reasonable sense—the third party would simply safeguard the data, in-trust, until the trial court orders it released to new defense counsel. CP 1069; *see also In re Grand Jury*, 138 F.3d 978, 981 (3d Cir. 1998) (“disclosure” of potentially privileged information does not occur where the material is produced involuntary pursuant to court order). Trial courts are authorized under the Civil Rules to appoint third parties to oversee discovery, including potentially privileged information. *See, e.g.*, CR 53.3 (authorizing trial courts to appoint special masters to oversee discovery matters). Medalist’s attempt to manufacture an appealable issue out of this circumstance is not well taken. Like the other terms in the discovery order, the directive that the data be placed in-trust with a neutral third-party arbitration service was well within the trial court’s broad discretion to issue discovery orders “as are just.” CR 37(b)(2).

## V. CONCLUSION

As outlined above, the trial court properly exercised its discretion to disqualify DWT after finding that an irreconcilable conflict of interest arose following Ferrer’s guilty plea. Both Medalist and DWT were provided ample opportunity to respond to the trial court’s concerns before the disqualification order was entered and, in fact, took calculated advantage of the opportunities. The trial court also properly exercised its discretion by ordering the production previously withheld documents and the safeguarding of other potentially discoverable data until the Defendants could obtain new counsel. For these reasons, the girls respectfully request

that the Court affirm the disqualification of DWT along with the trial court's discovery order and remand this case for further proceedings.

In the alternative, and in the interest of conserving judicial resources and avoiding unnecessary delay in the litigation, if the Court finds that Medalist was not given sufficient opportunity to be heard prior to disqualification, Respondents ask that this Court exercise its authority to decide the disqualification issue on its merits rather than remand to the trial court.

Respectfully submitted this 11th day of June 2019.

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused the document to which this certificate is attached to be delivered to the following as indicated:

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Declared under penalty of perjury under the laws of the State of Washington this 11th day of June 2019.

  
\_\_\_\_\_  
Alina Malamura  
Legal Assistant

**PFAU COCHRAN VERTETIS AMALA PLLC**

**June 11, 2019 - 3:01 PM**

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**Appellate Court Case Number:** 52264-1  
**Appellate Court Case Title:** R.O. and K.M., Respondents v. Medalist Holdings LLC, Petitioners  
**Superior Court Case Number:** 17-2-04897-1

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