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Division II
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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.

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

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. RESPONSE TO PLAINTIFFS’ STATEMENT OF THE CASE	2
III. THE TRIAL COURT’S DISQUALIFICATION ORDER MUST BE REVERSED.....	5
A. Plaintiffs Misstate the Standard of Review.....	5
B. The Trial Court Summarily Disqualified Counsel Without Following <i>Barovic</i> ’s Due Process Requirements.	7
C. Disqualification Was Improper Because The Parties Waived Potential Conflicts, In Express Written Agreements That Are Valid and Enforceable.	12
IV. THE TRIAL COURT’S DISCOVERY ORDER IS AN ABUSE OF DISCRETION.....	18
A. Plaintiffs Disregarded Their Meet–and-Confer Obligations for the Discovery Remedies They Sought.	18
B. The Discovery Order Imposes Improper Discovery Obligations On Putatively Disqualified Counsel.....	20
C. Ordering Counsel To Turn Over Discovery Material To A Third Party Was An Abuse Of Discretion.....	23
V. CONCLUSION.....	25

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Backpage.com, LLC v. Cooper</i> , 939 F. Supp. 2d 805 (M.D. Tenn. 2013).....	3
<i>Baker v. Firestone Tire & Rubber Co.</i> , 793 F.2d 1196 (11th Cir. 1986)	3
<i>Burnet v. Spokane Ambulance</i> , 131 Wn.2d 484, 933 P.2d 1036 (1997).....	18
<i>Camicia v. Cooley</i> , 197 Wn. App. 1074, 2017 WL 679988 (Feb. 21, 2017) (unpublished)	22
<i>Clarke v. State</i> , 133 Wn. App. 767, 138 P.3d 144 (2006)	19, 20
<i>Diaz v. Wash. State Migrant Council</i> , 165 Wn. App. 59, 265 P.3d 956 (2011)	22
<i>In re Estate of Barovic</i> , 88 Wn. App. 823, 946 P.2d 1202 (1997)	<i>passim</i>
<i>In re Firestorm 1991</i> , 129 Wn.2d 130, 916 P.2d 411 (1996).....	7
<i>Foss Mar. Co. v. Brandewiede</i> , 190 Wn. App. 186, 359 P.3d 905 (2015)	6, 7
<i>In re Grand Jury</i> , 138 F.3d 978 (3d Cir. 1998).....	24
<i>Johnson v. Jones</i> , 91 Wn. App. 127, 955 P.2d 826 (1998)	22

<i>LK Operating, LLC v. Collection Grp., LLC</i> , 181 Wn.2d 48, 331 P.3d 1147 (2014).....	14
<i>In re Marriage of Wixom & Wixom</i> , 182 Wn. App. 881, 332 P.3d 1063 (2014).....	8
<i>Morgan v. City of Federal Way</i> , 166 Wn.2d 747, 213 P.3d 596 (2009).....	24
<i>Pearce v. E.F. Hutton Grp., Inc.</i> , 653 F. Supp. 810 (D.D.C. 1987).....	3
<i>PUD No. 1 of Klickitat Cty. v. Int’l Ins. Co.</i> , 124 Wn.2d 789, 881 P.2d 1020 (1994).....	6
<i>RWR Mgmt., Inc. v. Citizens Realty Co.</i> , 133 Wn. App. 265, 135 P.3d 955 (2006).....	7
<i>In re Shared Memory Graphics LLC</i> , 659 F.3d 1336 (Fed. Cir. 2011).....	17
<i>State v. Kitt</i> , ___ Wn. App. ___, 442 P.3d 1280 (2019).....	6
<i>State v. Schmitt</i> , 124 Wn. App. 662, 102 P.3d 856 (2004).....	6
<i>State v. St. Pierre</i> , 111 Wn.2d 105, 759 P.2d 383 (1988).....	4
<i>State v. Vicuna</i> , 119 Wn. App. 26, 79 P.3d 1 (2003).....	7
<i>United States v. Caramadre</i> , 892 F. Supp. 2d 397 (D.R.I. 2012).....	18
<i>United States v. Lacey</i> , 2018 WL 4953275 (D. Ariz. Oct. 12, 2018).....	4, 13, 16, 17
<i>United States v. Vera</i> , 893 F.3d 689 (9th Cir. 2018).....	5

Visa U.S.A., Inc. v. First Data Corp.,
241 F. Supp. 2d 1100 (N.D. Cal. 2003)18

Welch v. Paicos,
26 F. Supp. 2d 244 (D. Mass. 1998)18

Rules

RAP 10.3(a)(5).....2

RPC 1.6(a).....24

RPC 1.7.....14, 15, 17

RPC 1.9.....13, 14

Other Authorities

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS
§ 122 (2000)18

I. INTRODUCTION

This Court should reverse the trial court's no-notice disqualification of Medalist's counsel ("DWT") on both procedural and substantive grounds. Procedurally, the court failed to provide notice that it was even considering disqualification, and gave no meaningful opportunity for counsel to respond, as required by *In re Estate of Barovic*. Substantively, the trial court purported to base disqualification on potential future conflicts among the defendants, without ever analyzing the parties' agreements to waive conflicts and to not seek disqualification. Those agreements fully anticipated the precise circumstances at issue here, and were entered with fully informed consent. They are entirely valid and should be enforced.

The Backpage.com Defendants never sought to disqualify DWT. Neither did Plaintiffs. But Plaintiffs now attempt, retroactively, to justify the trial court's *sua sponte* disqualification decision. In doing so, they flagrantly misrepresent both the facts and the law. Among other errors:

- Plaintiffs misstate the standard of review, incorrectly framing the issue as whether the trial court had "discretion" to disqualify DWT.

This Court's review is *de novo*. See Section III.A.

- Plaintiffs falsely suggest the trial court granted Medalist an opportunity to be heard on disqualification. They cite to proceedings that occurred *after* the court already had decided to disqualify DWT. But

Barovic plainly requires due process *before* a disqualification decision is made. *See* Section III.B.

- Plaintiffs also recklessly accuse Medalist’s counsel of violating ethical obligations to their former clients. The claim is false, and is not supported by the materials Plaintiffs cite. (Notably, the former clients have made no such claim.) Nor was there any basis for the trial court to disregard the terms of the parties’ joint agreements. *See* Section III.C.

This Court also should reverse the trial court’s discovery order. Among other things, the order imposes inappropriate discovery obligations on Medalist’s counsel – a fact Plaintiffs attempt to deny by ignoring the actual terms of the order. *See* Section IV.B. Plaintiffs also identify no precedent (there is none) for a trial court ordering a law firm to turn over unreviewed discovery material to a third party. *See* Section IV.C.

II. RESPONSE TO PLAINTIFFS’ STATEMENT OF THE CASE

Plaintiffs devote most of their brief to an argumentative and unsupported “statement of the case” that disregards this Court’s requirement of a “fair statement of the facts and procedure relevant to the issues presented for review, without argument.” RAP 10.3(a)(5); *see* Resp. Br. 5-24. The Court should bear in mind that Plaintiffs’ allegations are just that – allegations that are disputed, and far from proven. Plaintiffs’ claimed “facts” rest on inadmissible assertions and, in several instances, outright

misrepresentations of the record. Some of Plaintiffs' errors are addressed here; other are noted in the argument below.

1. Plaintiffs rely extensively on the U.S. Senate PSI report, citing it as if it rested on adjudicated facts. Resp. Br. 2, 5-7. But the report is not evidence. Rather, it is an accusatory political document, designed to create a false narrative that there was something nefarious about Backpage.com's extensive efforts to screen and block improper content.¹ See *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 814 (M.D. Tenn. 2013) (describing Backpage.com's review and barring ads violating site's terms of use). Such legislative reports reflect "heated conclusions of a politically motivated" nature, and are commonly excluded from evidence. *Baker v. Firestone Tire & Rubber Co.*, 793 F.2d 1196, 1199 (11th Cir. 1986).² Moreover, even if the PSI report were properly before this Court, it does not bear even tangentially on any of the issues in this appeal. Nor does it mention the Plaintiffs, or address any fact related to them.

2. Plaintiffs falsely assert that Medalist controls the Backpage.com website. Resp. Br. 8. In fact, the website at all times was operated by

¹ See Claire McCaskill, *Our fight against sex trafficking website Backpage*, K.C. STAR (2/14/17), <https://www.kansascity.com/opinion/readers-opinion/guest-commentary/article132727529.html> (PSI co-chair, stating hope that "our investigation will give future cases against Backpage [] legal ammunition").

² *Accord, Pearce v. E.F. Hutton Grp., Inc.*, 653 F. Supp. 810, 813-16 (D.D.C. 1987) ("[I]t is questionable whether any report by a committee or subcommittee of [Congress] could be admitted ... against a private party.").

Backpage.com, LLC. CP 683 ¶ 5; CP 903-06. Medalist Holdings, Inc. was Backpage.com, LLC's ultimate parent (several layers removed), but sold all interests in the company and website to Ferrer and other Backpage.com Defendants in 2015. *Id.* Plaintiffs' claim that Medalist controlled the website relies on a portion of the polemical PSI report discussing the ownership *before* the 2015 sale.³ Also false is Plaintiffs' assertion that the name "Medalist" is just a "rebranding" of entities that are indistinguishable from the Backpage.com Defendants. Resp. Br. 7. In fact, the Medalist parties (including Larkin and Lacey, and the entities they control) and the Backpage.com Defendants (Backpage.com, LLC and the other companies owned and controlled by Carl Ferrer) are distinct. *See* CP 903-906 (ownership structures); CP 17-18 (representation agreement separately defining and identifying the "Medalist Parties" and the "Ferrer Parties").

3. Plaintiffs also improperly attempt to impute Carl Ferrer's negotiated guilty pleas onto Medalist. Resp. Br. 14-15. Ferrer's pleas were not made by, and cannot be attributed to, Medalist or the individual Medalist defendants (Messrs. Larkin and Lacey, who both pleaded not guilty and vigorously contest the charges in *U.S. v. Lacey*). Nor are Ferrer's plea statements admissible evidence; they are hearsay, *State v. St. Pierre*, 111 Wn.2d 105, 117-18, 759 P.2d 383 (1988), and "inherently unreliable."

³ Plaintiffs know this, as their error was discussed below. RP (6/28/18) 65.

United States v. Vera, 893 F.3d 689, 692-93 (9th Cir. 2018) (summarizing cases disallowing the use of one defendant’s plea agreement against others).

4. Plaintiffs also offer as “facts” their own complaint, as well as allegations in an unrelated case (*J.S. v. Village Voice Media Holdings, LLC*). Resp. Br. 7-10. But the allegations involving Plaintiffs are disputed, and have never been supported by admissible evidence. The same is true of the allegations in *J.S.*, which settled before trial. Resp. Br. 10.

5. Plaintiffs accuse defendants of “delay and bad-faith litigation tactics,” based on a laundry list of communications between counsel early in the litigation. Resp. Br. 10-12. But the communications involved routine scheduling and procedural agreements accepted by Plaintiffs. They also are entirely irrelevant to this appeal.⁴

III. THE TRIAL COURT’S DISQUALIFICATION ORDER MUST BE REVERSED

A. Plaintiffs Misstate the Standard of Review

When a trial court imposes the “drastic sanction” of disqualifying

⁴ Plaintiffs complain that the publishing defendants moved in December 2017 to sever the claims against them from the claims against four individual defendants who had been convicted for trafficking Plaintiffs. CP 87-88 ¶¶ 2.32, 2.33. Defendants brought that motion because they believed Plaintiffs improperly joined the traffickers solely to defeat federal jurisdiction, as evidenced by the fact that Plaintiffs had done nothing to pursue claims against the traffickers. CP 1355. The trial court denied the motion. But these trafficker defendants still have not appeared in this case, and Plaintiffs have done nothing to pursue claims against them, by default or otherwise.

counsel for a purported conflict of interest, review is *de novo*. *Foss Mar. Co. v. Brandewiede*, 190 Wn. App. 186, 189, 192, 359 P.3d 905 (2015); *see State v. Kitt*, ___ Wn. App. ___, 442 P.3d 1280, 1284 (2019) (“whether the circumstances demonstrate a conflict under ethical rules is a question of law we review *de novo*”).

Plaintiffs accept that “the trial court’s specific application of the RPCs to DWT’s conduct is reviewed *de novo*,” but then claim the disqualification order here is “reviewed for abuse of discretion,” Resp. Br. 25, and they repeatedly attempt to defend the order as an exercise of the trial court’s “discretion.” *See id.* at 3, 4, 25. Plaintiffs disingenuously elide the standard of review for disqualification based on alleged conflicts (*de novo*) with the less stringent standard for disqualifications on other grounds.⁵ This case clearly involves the former situation: the trial court’s stated basis for disqualifying DWT was that the firm’s continued representation of Medalist allegedly posed “an impermissible conflict.” CP 1075-1076; RP (5/23/18) 61-62. Plaintiffs admit this. Resp. Br. 3 . Review is *de novo*, as *Foss* and

⁵ *Foss* states that “we generally review a disqualification order for an abuse of discretion,” citing two cases involving an attorney as a necessary witness. 190 Wn. App. at 192 & n.13 (citing *PUD No. 1 of Klickitat Cty. v. Int’l Ins. Co.*, 124 Wn.2d 789, 811, 881 P.2d 1020 (1994) and *State v. Schmitt*, 124 Wn. App. 662, 666, 102 P.3d 856 (2004)). But *Foss* goes on to make clear that review is *de novo* when a trial court’s order involves “whether an attorney’s conduct violates the relevant Rules of Professional Conduct.” *Id.* at 192.

numerous other cases make clear.⁶

B. The Trial Court Summarily Disqualified Counsel Without Following *Barovic*'s Due Process Requirements.

In re Estate of Barovic, 88 Wn. App. 823, 946 P.2d 1202 (1997), identifies the safeguards courts must observe before imposing the “extreme remedy” of disqualification. The attorney “must be notified of the conduct the court will rely on” and “the specific reason, preferably in writing[.]” *Id.* at 826. The attorney “must be given a meaningful opportunity to respond.” *Id.* Summary disqualification is forbidden, and disqualification orders entered without these procedures must be vacated. *Id.* at 827.

Depriving a party of its chosen counsel is a severe sanction that burdens and prejudices its ability to defend its interests. *Foss*, 190 Wn. App. at 192. The *Barovic* protections assure that a court is fully informed, and that parties have a fair chance to address the court’s concerns, before this drastic step is taken. As this Court’s commissioner recognized, due process is not satisfied merely because counsel could have asked the court to reconsider a decision *after* it had already been made; placing counsel in the position of “having to ask the superior court to change its mind” does not satisfy *Barovic*’s requirement of “a meaningful opportunity to respond to the

⁶ See *In re Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 411 (1996); *RWR Mgmt., Inc. v. Citizens Realty Co.*, 133 Wn. App. 265, 279, 135 P.3d 955 (2006); *State v. Vicuna*, 119 Wn. App. 26, 30-31, 79 P.3d 1 (2003).

disqualification issue *before* being disqualified.” CP 1341 n.14 (emphasis added); 88 Wn. App. at 826. For example, when Division Three noted that an attorney was attempting to shift responsibility for a CR 11 sanction from himself to his client, the Court “*asked [him] to address whether* he should be removed as [the client’s] attorney because of a conflict in interest,” and allowed an opportunity to be heard; the Court did not reach any decision until it had received and reviewed the response. *In re Marriage of Wixom & Wixom*, 182 Wn. App. 881, 897, 332 P.3d 1063 (2014) (emphasis added).

The court here afforded Medalist no such due process. Unlike *Wixom*, the court did not raise a concern and invite counsel to address it. Rather, like the reversed order in *Barovic*, the court simply announced, at the end of a hearing on other matters, that it was disqualifying DWT as Medalist’s counsel. RP (5/23/18) 60-62. Before that, the court had given no sign it was concerned about potential conflicts, and no notice that it was considering disqualification.

In response to this due process violation, Plaintiffs argue *Barovic* is distinguishable because there, “the attorney was disqualified on the spot, effective immediately, without any prior notice whatsoever,” whereas here, the trial court waited five weeks before reducing its May 23 decision to a written order. Resp. Br. 28. Plaintiffs are wrong, for at least five reasons.

First, Medalist did not have five weeks’ notice that the court was

considering disqualification. Resp. Br. 26, 28. It had *no* notice at all. The trial court on May 23 simply announced that DWT was disqualified as Medalist’s counsel. Opening Br. 12-14; RP (5/23/18) 61. After argument on DWT’s request to withdraw as counsel for the Backpage.com Defendants and on two other motions, the court summarily ruled, with *no* prior notice and *no* argument on the point, that DWT was disqualified. RP (5/23/18) 61 (“I am also going to disqualify [DWT] from representing Medalist Holdings in this matter.”); *id.* at 63 (“disqualification of [DWT] proceeding forward”). The court then scheduled a date for presentation of an order to reflect its rulings. *Id.* at 67-69; CP 1063.⁷ This was not a “preliminary” determination. Nor was it (as Plaintiffs pretend) notice that the court was going to take up disqualification at a later date. Resp. Br. 25. The trial court *ruled* on May 23, and it merely set a date for presentation of an order setting forth its rulings, as is customary.

Second, Plaintiffs are wrong when they assert that the timing of the disqualification in *Barovic* distinguishes it from this case. The situation there was largely the same as here: the trial court in *Barovic* disqualified counsel at a hearing on March 8, 1996, and entered its written order (later vacated by this Court) three week later, on March 29, 1996. *See Barovic*, 88

⁷ The presentation was originally scheduled for June 21, 2018, to allow time to obtain a transcript of the lengthy May 23 hearing. RP (5/23/18) 67-69. The presentation subsequently was rescheduled for June 28, 2018.

Wn. App. at 823 (“Superior Court” headnote); *id.* at 825-26. The passage of several weeks before entry of a written order memorializing an improper *sua sponte* disqualification does not make the disqualification proper.

Third, Plaintiffs disingenuously argue that Medalist “[took] advantage of its opportunity to be heard on the disqualification issue [by] “submit[ing] documents in camera for the trial court’s review.” Resp. Br. 26. But Medalist submitted documents *in camera*, at the trial court’s invitation, on May 21, 2018, concerning a completely different issue – Plaintiffs’ objections to DWT’s CR 71 notice that it was withdrawing as counsel for the Backpage.com Defendants. CP 1, 601; RP (5/18/18) 30, 31, 33 (trial court’s suggestion of providing materials on this issue *in camera*). At no time before its May 23 *sua sponte* disqualification did the trial court request materials (*in camera* or otherwise) on the issue of disqualification because, again, the court never said or suggested that it was considering the issue.⁸ Moreover, the *in camera* declaration could not have constituted Medalist’s opportunity to be heard, because it was submitted before the court had suggested disqualification was an issue.⁹

⁸ And it seems apparent the trial court did not consider the submitted *in camera* materials in connection with disqualification, as they contained the parties’ agreements expressly waiving conflicts, allowing DWT’s continued representation of Medalist, and agreeing not to seek disqualification.

⁹ Plaintiffs also cite misleadingly to an April 24, 2018, letter that Mr. Ferrer’s personal counsel sent to the trial court, suggesting that the letter

Fourth, Plaintiffs also claim Medalist received an “opportunity to be heard” on disqualification because it submitted objections to the written order that Plaintiffs presented to the trial court. Resp. Br. 26. But those objections were submitted in response to the form of proposed order Plaintiffs filed on June 20, 2018 – nearly a month *after* the trial court had already decided to disqualify DWT on May 23. CP 1008. As noted above, notice and an opportunity to be heard are required before the decision is made, not after. *Barovic*, 88 Wn. App. at 826. Similarly, Plaintiffs argue DWT could have moved for reconsideration of the disqualification order after it was entered. Resp. Br. 27. But *Barovic*’s due process requirements do not turn on the availability of a post-decision remedy; again, that case requires the court to give notice and an opportunity to be heard *before* deciding on disqualification. 88 Wn. App. at 826.¹⁰

Fifth, and finally, Plaintiffs also claim that the court permitted DWT to remain as counsel for Medalist for 60 days after entry of the written order, and suggest that *this* constituted due process notice under *Barovic*.

sought to preclude DWT’s continued representation of Medalist in this action. Resp. Br. 16. But the letter did not request or propose to disqualify DWT as counsel for Medalist; it merely asked that DWT secure an extension of time so the Backpage.com Defendants could obtain new counsel. CP 598. Ferrer and his counsel later made clear that they were *not* seeking to disqualify DWT from representing Medalist. CP 7 ¶ 21, CP 64-69; RP (6/28/18) 72.

¹⁰ The attorney subject to the disqualification order in *Barovic* did not seek reconsideration, but instead sought discretionary review, just as in this case.

Resp. Br. 27 (citing CP 1076). But the court permitted DWT to remain as counsel only “insofar as is necessary to secure the interests” of its putatively former clients – for which the court had disallowed continuing representation – and to report on the status of the discovery obligations that the court imposed on DWT. CP 1076. This also does not constitute any notice that the court was considering disqualification; rather, it shows that the court imposed additional obligations *because it had ordered disqualification*.

C. Disqualification Was Improper Because The Parties Waived Potential Conflicts, In Express Written Agreements That Are Valid and Enforceable.

The trial court also erred substantively, by ignoring the written waivers and agreements expressly permitting DWT to continue representing Medalist after its representation of Backpage.com had ended. CP 2-4, 12-33, 39-46; Opening Br. 25-36. Under the RPCs and applicable law, joint representations waiving conflicts are laudable and should be enforced where, as here, they are comprehensive, entered by sophisticated clients, and give notice of the potential conflicts. *See id.* This Court should follow the lead of the federal court in Arizona, which held the same joint representation agreements and joint defense agreement (“JDA”) at issue here (i) are “valid and enforceable,” (ii) contain waivers precluding disqualification of DWT as Medalist’s counsel, and (iii) expressly permit DWT to continue

representing Medalist after the Backpage.com Defendants' withdrawal from the joint defense. *United States v. Lacey*, 2018 WL 4953275, at *3-4 (D. Ariz. Oct. 12, 2018).

Plaintiffs argue *Lacey* is “distinguishable” because here, “Ferrer never sought or pursued disqualification[.]” Resp. Br. 29-30. This argument is specious. Ferrer *also* did not seek or pursue disqualification in *Lacey* (or, for that matter, in any other case). Disqualification in *Lacey* was sought by the Government, not Ferrer. 2018 WL 4953275, at *1. In both *Lacey* and this case, Ferrer stated that he was not seeking disqualification of DWT and would not do so. CP 7 ¶ 21, CP 64-69; RP (6/28/18) 72. Indeed, in the trial court below, his counsel stated that Ferrer *could not* seek disqualification, which is correct, because in the parties' joint representation agreements Ferrer waived all potential conflicts and agreed *not* to seek disqualification of DWT (as discussed below). *Id.* Moreover, even Plaintiffs now admit that “Ferrer himself is barred by the agreements from seeking disqualification of DWT.” Resp. Br. 29.

This admission is critical, because the purpose of the RPC provisions governing conflicts is to protect *clients*; they do not create some free-floating proscription to be used by opponents in litigation to attempt to disadvantage opposing parties by eliminating their chosen counsel. *See, e.g.*, RPC 1.9 cmt. 9 (“The provisions of this Rule are for the protection of

former clients and can be waived if the client gives informed consent”); *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 88, 331 P.3d 1147 (2014) (RPC’s purposes “can be subverted when they are invoked by opposing parties as procedural weapons.”) (citation omitted).

The rule governing this issue is RPC 1.7, which states that waivers of concurrent conflicts are expressly permitted if “each affected client gives informed consent, confirmed in writing.” RPC 1.7(b); *see also* RPC 1.9 (same for former clients). Waivers in furtherance of joint representations should be enforced when they are consistent with the parties’ reasonable expectations, anticipate the potential conflicts, and are entered by “experienced” and “independently represented” clients. RPC 1.7 cmt. 21, 22; *see also* Resp. Br. 29 (Plaintiffs’ admission that these are the relevant factors for enforcing waivers).

Rather than apply what they admit is the relevant legal standard, Plaintiffs propose a different, four-question test entirely of their own invention, requiring that the waiver provisions expressly describe “the possibility that a co-party may plead guilty and offer evidence against the other co-parties,” specifically explain all “potential adverse consequences,” and state “the actual conflict of interest that has developed in this case” (although there is no such conflict, as discussed below). Resp. Br. 31-32. RPC 1.7 requires nothing like this, and it is no surprise that Plaintiffs cite no

authority for any requirements such as these. *See* Opening Br. 31-32. The joint representation agreements entered among the Medalist and Backpage.com Defendants easily satisfy the actual RPC 1.7 criteria. *See* CP 42 ¶ 6 (second through sixth sentences, discussing the conflicts being waived); CP 42 ¶ 8 (second through fourth sentences, explaining consequences of withdrawal).

Plaintiffs' made-up test also falsely states that DWT "is actively utilizing" information from the joint representation "to shift the blame" from Medalist to Ferrer. Resp. Br. 32. To the extent Plaintiffs are attempting to argue that parties' agreements did not address the use of information after one party's withdrawal from the joint representation, they are simply wrong. *See* CP 42 ¶ 6 (third through fifth sentences). Moreover, Plaintiffs' aspersions that DWT has supposedly misused confidential information from the prior joint representation to shift the blame in this case from Medalist to the Backpage.com Defendants is baseless. Plaintiffs' only "support" for this reckless accusation is a citation to a discussion at a hearing in which DWT argued that the Plaintiffs' sanctions motion should be denied as to *all* Defendants. Resp. Br. 30 (citing RP (5/23/2018) 58:11-60:23).¹¹

¹¹ The exchange arose at the May 23 hearing in response to comments from the Court that DWT was, at that point, representing only Medalist:

MR. STAHL: We would ask that the sanction motion be denied.

Medalist agrees with Plaintiffs (Resp. Br. 30) that this Court should address the parties' conflict waivers and non-disqualification agreements now. As the federal court held in *Lacey*, the only conclusion consistent with the law and the facts is that disqualification is unwarranted, for the reasons below (all set out in the Opening Brief, and all ignored by Plaintiffs):

- As a condition of the benefits of the joint representation, the agreements explicitly waive any actual or potential conflicts of interest,

THE COURT: As to Medalist Holdings.

MR. STAHL: As to the Medalist parties, but I think that there's – *it would be grounds for the Court to deny it on behalf of all the parties* that are –

THE COURT: So who are you representing?

MR. STAHL: I'm representing the Medalist parties, Your Honor, and I want to be clear about that; *but I do think some of the grounds apply generally as well.*

RP (5/23/18) 54:3-12 (emphasis added). Shortly after this exchange, the court questioned why the Medalist and Backpage.com Defendants (when jointly represented) had previously provided a combined set of answers to Plaintiffs' written discovery. *Id.* 56:17-21; 58:21-25. Medalist's counsel pointed out that the answers explained that they were provided on behalf of all defendants, but were based on information provided by the operating entity, Backpage.com, LLC. *Id.* 59:14-22, 60:13-23; CP 683 ¶ 5. Contrary to Plaintiffs' accusations, counsel's comments did not "actively utilize[e]" confidential attorney-client information, or involve confidential information at all. Rather, counsel simply explained what the prior discovery responses said, *i.e.*, that the information came from Backpage.com, LLC. CP 685.

Plaintiffs' claim that the exchange shows DWT "asserting that [Ferrer] was responsible for the false information contained in the Backpage Corporate defendants' discovery responses," Resp. Br. 30, is specious for at least two additional reasons: (1) DWT did not characterize the discovery responses as containing "false information" (they do not); and (2) DWT did not assert Ferrer was responsible for the responses. *See* RP (5/23/18) 58:11-60:23.

including future conflicts (CP 3 ¶ 8; CP 22-23 ¶ 2.a, 2.b; CP 42 ¶ 6), and confirm a party withdrawing from joint representation could not move to disqualify counsel from continuing to represent other parties. CP 7 ¶ 21; CP 13-14; CP 26 ¶¶ 11, 12; CP 42 ¶ 8.

- The agreements comprehensively explain and anticipate the circumstances that might lead to conflicts, including that a party might withdraw from the joint representation because of divergent interests, while counsel such as DWT could continue to represent other parties. CP 42 ¶¶ 6, 8; CP 13-14, CP 26 ¶¶ 11, 12; RPC 1.7 cmt. 22.

- All the parties to the joint representation agreements (specifically including Mr. Ferrer) were experienced in legal matters and litigation, having been involved in numerous lawsuits over the prior five years, and all were independently represented. *Id.*; CP 18-21; CP 27 ¶ 20; CP 39, 40, 45.

In sum, the agreements are enforceable because they “anticipated circumstances in which a party to either agreement chose to withdraw,” and because Ferrer signed the agreements with informed consent and under the advice of counsel. *Lacey*, 2018 WL 4953275, at *4; *see also id.* at *4-5.¹²

¹² Other than their unavailing attempt to distinguish *Lacey*, Plaintiffs do not address, much less refute, any of the apposite case law cited in the opening brief. *See In re Shared Memory Graphics LLC*, 659 F.3d 1336, 1341 (Fed. Cir. 2011) (enforcing advance conflict waiver under Washington law);

The trial court also erred in finding that Ferrer “effectively revoked” his consent. CP 1075 ¶ 1. As explained previously (*see* Opening Br. 32-36) – and not addressed by Plaintiffs – a client in a joint representation or joint defense agreement who has given informed written consent has no right to retroactively extinguish his agreement to allow joint counsel to continue representing other clients. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. f & illus. 7 (2000); *see* Opening Br. 34-35.

IV. THE TRIAL COURT’S DISCOVERY ORDER IS AN ABUSE OF DISCRETION

On top of its improper disqualification order, the trial court further erred by ordering DWT to produce documents, turn over material to a third party, and otherwise facilitate discovery, notwithstanding the court’s order precluding the firm from acting as counsel in the case. CP 1067-1069, 1076. This portion of the order must be reversed as an abuse of discretion. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997).

A. Plaintiffs Disregarded Their Meet-and-Confer Obligations for the Discovery Remedies They Sought.

As an initial matter, the trial court lacked any authority to hear the Plaintiffs’ discovery motion because Plaintiffs did nothing to satisfy the meet-and-confer obligations of CR 26(i) and CR 37 prior to bringing their

Welch v. Paicos, 26 F. Supp. 2d 244, 248-49 (D. Mass. 1998); *United States v. Caramadre*, 892 F. Supp. 2d 397, 406 (D.R.I. 2012); *Visa U.S.A., Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100, 1105, 1110 (N.D. Cal. 2003).

motion to compel. *See* Opening Br. 14-16; *Clarke v. State*, 133 Wn. App. 767, 779-80, 138 P.3d 144 (2006) (superior court “lacks the authority to hear” a discovery motion when a party fails to meet and confer). This failure to confer was highly prejudicial, because Plaintiffs *never* raised the issues they argued in their May 10 motion to compel prior to filing the motion.¹³ Had Plaintiffs complied with *Clarke* and the Civil Rules, defendants would have had an opportunity to correct Plaintiffs’ misinterpretation of prior discovery correspondence,¹⁴ and to address the remedies sought in the motion.¹⁵ The failure to confer merits reversal of the discovery order.

¹³ Plaintiffs claim the parties “conferred multiple times,” Resp. Br. 14, citing only a CR 26 certification that shows the parties communicated only about a *prior* discovery order, and not the issues subsequently raised in their May 10, 2018, motion to compel. *Id.*; CP 615 ¶ 6.

¹⁴ As explained previously, Plaintiffs’ motion to compel misconstrues defendants’ March 20, 2018, letter about their discovery search efforts. The letter explained that an initial electronic search of 500 terms yielded 1,120,642 “hits,” which would take up to a year to review for responsiveness and privilege. The letter went on to request Plaintiffs’ cooperation in narrowing the search terms so as to more readily identify responsive documents. Ignoring the content of the letter, and simply accepting Plaintiffs’ mischaracterization of it, the trial court ordered that “1.2 million” documents be produced. CP 1067-1068.

¹⁵ Only *after* the motion was filed did Plaintiffs first disclose that they were seeking “the same” documents Backpage.com had produced previously in response to the Senate PSI subpoena. When Plaintiffs later said in hearings before the trial court that these were the documents they sought, the documents were produced. *See* CP 624, 678 ¶ 6, 1091 ¶ 5; Opening Br. 14-16.

Plaintiffs attempt to avoid their error by asserting that the issue is outside the scope of this Court’s grant of review. Resp. Br. 24. Plaintiffs are wrong. The issue was preserved below (CP 1010 ¶ 5), and the “meet and confer” issue is necessarily encompassed in this Court’s grant of review of the trial court’s discovery order (CP 1345) because it was a jurisdictional requirement for the trial court to hear Plaintiffs’ motion to compel. *Clarke*, 133 Wn. App. at 779-80.¹⁶

B. The Discovery Order Imposes Improper Discovery Obligations On Putatively Disqualified Counsel

This Court also should reverse the discovery order on the merits, because it improperly imposes extraordinary and unprecedented discovery obligations, including imposing requirements on (putatively disqualified) counsel to produce for parties they do not represent; assessing massive prospective sanctions of over \$1.1 million every 14 days, and ordering counsel to hand over 2 terabytes of unreviewed data (comprising many millions of documents) to a third party. CP 1067-1069, 1344-1345; Opening Br. 36-44.

¹⁶ Plaintiffs also argue that the portion of the discovery order “compelling production of 1.2 million documents” and assessing massive prospective discovery sanctions are “not under review” in this appeal. Resp. Br. 24 (emphasis added). They are wrong. The order granting discretionary review clearly states this court’s review “necessarily includes the 1.2 million document production” as well as the prospective monetary sanctions. CP 1344-1345.

Plaintiffs' response ignores the actual substance and terms of the trial court's order. First, Plaintiffs deny that the order imposes *any* discovery obligations on DWT, Resp. Br. 32-33, an absurd position given the order's plain language. *See* CP 1067-1069. Plaintiffs deceptively present the order, *see* Resp. Br. 33-34, quoting several paragraphs but omitting (without acknowledging they are doing so) the one most specifically directed to DWT:

6. Defendants and *Davis Wright Tremaine shall secure* and continue to preserve all electronic evidence in their possession, *including the two terabytes of data that Davis Wright Tremaine previously identified* as described in Plaintiffs' motion. Defendants and *Davis Wright Tremaine shall also duplicate the 2 terabytes of data and place it in trust*, with a neutral third party approved by the Court, within 60 days after this Order is entered. Unless the parties agree otherwise at the hearing on this Order, the Court approves John Cooper of WAMS as the approved neutral third party. The purpose of duplicating the data is to ensure that the Court's existing order can be honored, and in the event the federal government desires to seize the data, a copy will remain available for this litigation.

CP 1069 (emphasis added). The portions of the order that Plaintiffs do quote also *are* directed at DWT. The order compels production of the "1.2 million responsive documents" identified in DWT's March 20 letter, and other documents "in the possession of [DWT]," and imposes escalating sanctions on defendants if these are not produced. CP 1067-1068.

Plaintiffs further argue that it was proper for the trial court to impose discovery obligations directly on DWT because documents "in possession of

a party's law firm are considered to be in the possession of the party itself.”

Resp. Br. 34. But that is not the law. As Medalist pointed out in its opening brief, a litigant can be required to produce responsive information within the litigant's “control” – which, in the case of a corporation, sometimes includes corporate information held by that party's “officers, directors, employees and attorneys.” *Diaz v. Wash. State Migrant Council*, 165 Wn. App. 59, 80, 265 P.3d 956 (2011); Opening Br. 40. But the discovery obligation still rests with the party. No authority – including *Diaz*, the only case Plaintiffs cite on this issue (Resp. Br. 34)¹⁷ – holds that a litigant's discovery obligations can be imputed onto the party's attorneys, or that the court can direct non-party counsel to produce client documents. Rather, under the Civil Rules, the “party,” not its counsel, has the obligation to produce documents. CR 34 (“Any party may serve on any other *party* a request ... to produce ... [documents] in the responding *party's* possession, custody, or

¹⁷ *Diaz* did not address discovery directed to attorneys. The case involved the extent to which a corporate party is obligated to answer interrogatories based on corporate information available to its directors (and the order to compel in *Diaz* was directed to the defendant corporation, not the non-party directors). 165 Wn. App. at 67, 71, 79. Plaintiff also cites two cases in which attorneys were subject to sanctions under CR 37 for their own misconduct. These cases are inapposite; the trial court did not find any violation by, and imposed no sanction on, DWT. Resp. Br. 34 (citing *Camicia v. Cooley*, 197 Wn. App. 1074, 2017 WL 679988, at *4, *11 (Feb. 21, 2017) (unpublished) (counsel sanctioned for misrepresentations and willful silent withholding of discoverable documents); *Johnson v. Jones*, 91 Wn. App. 127, 132–35, 955 P.2d 826 (1998) (counsel sanctioned for multiple abuses, including improperly instructing deponent not to answer)).

control”) (emphasis added). The trial court abused its discretion by ordering counsel, not the litigants, to produce documents. CP 1067-1069 ¶¶ 1, 3, 6. It also erred by ordering DWT to do so *after* also purporting to disqualify the firm. *See* CP 1344 (Commissioner noting that “if fully disqualified, DWT is neither a party to the litigation nor a representative of any party”).

Finally, Plaintiffs are manifestly incorrect to claim that Medalist “does not challenge” findings that it failed to comply with the trial court’s January 2018 discovery order. Resp. Br. 32. Medalist challenged these findings below, and on appeal. CP 1010 ¶ 6; Opening Br. 4 (Assignment 8(b)); CP 1066-1067 ¶¶ 1-4. Also false is Plaintiffs’ suggestion (Resp. Br. 14) that defendants ignored the January 2018 discovery order.¹⁸

C. Ordering Counsel To Turn Over Discovery Material To A Third Party Was An Abuse Of Discretion.

Finally, the trial court abused its discretion by requiring DWT to provide to a “neutral” third party client data that has not been reviewed, and that may contain privileged information. *See* CP 624, 1069. Complying

¹⁸ As required by that order, Defendants produced 95,000 pages from *J.S.*, and searched for other records using specified search terms (and asked Plaintiffs to cooperate on further searches, as also required by the order), all before Plaintiffs filed their second motion to compel. CP 207, 623-26. Moreover, 1.1 million pages previously produced in response to the PSI subpoena also were provided to Plaintiffs, after they clarified that this was the “same” material their discovery requests sought. CP 1091¶ 5; CP 1023 ¶ 10. The trial court further erred by refusing to reconsider its June 28 discovery order after defendants produced this PSI material. CP 1259.

with this order would contravene counsel's obligations to protect client information from disclosure to third parties, and could risk waiver of privilege. RPC 1.6(a); *Morgan v. City of Federal Way*, 166 Wn.2d 747, 755, 757, 213 P.3d 596 (2009).

Plaintiffs respond that placing client data with a third party does not necessarily amount to a disclosure waiving privilege. Resp. Br. 36. But the single case they cite is not remotely apposite.¹⁹ Nor is this akin to a CR 53.3 appointment of a discovery master. That rule requires the court to fix compensation, and anticipates the court will “specify the duties of the master.” *Id.* Here, the trial court's order fails to state who is responsible for the fees and other expenses associated with the putative “trustee,” or what the third party's duties would be. CP 1069. In short, there is *no* authority supporting the discovery “trust” ordered by the trial court.

Nor is the order necessary. Plaintiffs speculate that the federal government might seize the database from DWT. Resp. Br. 35. Even if that

¹⁹ *In re Grand Jury*, 138 F.3d 978 (3d Cir. 1998) involved a suspect in a criminal investigation (who also was a lawyer). The suspect prepared notes about the case for his own defense counsel. Investigators seized the notes from the suspect's office. *Id.* at 979-80. The case holds that the attorney-suspect waived work-product protection because he waited four months to challenge the seizure. *Id.* at 982. The case expressly *declined* to decide whether the disclosure itself waived the privilege. *Id.* at 980 (“we do not determine whether Capano waived the privilege by disclosing the documents”). Nor does the case address the issue here – an attorney disclosing an outside client's documents to a third party “in trust.”

were so, Plaintiffs fail to explain why, if the government could seize data from a private law firm, it could not as easily seize data held by a third-party “neutral.” Moreover, as Plaintiffs do not dispute, DWT is preserving the documents (as the trial court ordered). CP 1012 ¶ 12, 1069 ¶ 6.

V. CONCLUSION

This Court should vacate the order disqualifying Medalist’s counsel, and hold DWT may continue to represent Medalist. 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 records to third parties; that any discovery obligations must be directed to parties, not counsel; and that Medalist is not liable for prospective discovery sanctions.

RESPECTFULLY SUBMITTED this 26th day of July, 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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