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DIVISION ONE
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61912-8

NO. 61912-8-I

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

LE & ASSOCIATES, P.S., a professional service corporation,

Plaintiff/Respondent,

v.

ROBERTO DIAZ-LUONG, and LAN THI NGUYEN, husband and
wife, and the marital community comprised thereof,

Defendants/Appellants.

EDWARD K. LE and VIENNA LE,
Individually and as spouses/partners,

Third -Party Defendants.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

INTRODUCTION.....	1
STATEMENT OF THE CASE.....	2
A. The parties' relatively brief business relationship deteriorated and they chose to dissolve it over the next 4.5 months under a detailed Separation Agreement.....	2
B. Rather than abiding by their agreement to work under the Le firm's supervision for 4.5 months, the former associates actually planned to and did set up their own lawfirm – and plotted to steal the Les' clients – creating a conflict of interest that terminated the relationship.	3
C. The Le firm demanded return of client files and sought a preliminary injunction after discovering that the former associates solicited its clients and misrepresented their authority to handle cases to insurance companies.....	5
D. The trial court issued a simple and direct preliminary injunction, ordering the former associates to turn over computers and enjoining destruction of evidence.....	6
E. Rather than comply with the preliminary injunction and Litigation Hold, the former associates embarked on a troubling course of lies and evasion.	9
F. The former associates' intransigence ultimately necessitated numerous hearings, depositions and contempt motions, culminating in the trial court's June 13, 2008 Findings of Fact, Conclusions of Law and Order of Contempt.	11
G. The trial court found numerous contempts.	17
H. The former associates appealed from the trial court's contempt order, this Court denied their stay request, and Roberto withdrew his first appeal.....	19

ARGUMENT	22
A. The Standard of Review is Abuse of Discretion.....	22
B. Roberto intentionally dismissed his first appeal with full knowledge of the consequences, so the contempt findings against him are verities (and they are well supported in any event) mooting his second appeal.	23
1. Roberto knowingly and voluntarily dismissed his first appeal, so those orders, and particularly the contempt findings, are verities as to him.....	24
2. Even if Roberto could bring a second appeal on the contempt orders, he has waived any challenges.	25
3. Roberto’s second appeal is therefore moot.....	26
C. Lan did not preserve virtually any of her appellate legal arguments prior to entry of the contempt order, and the law is directly contrary to her arguments.....	27
1. Lan’s entire appeal is based on a false premise that the trial court “denied” her “request” to testify.	28
2. The trial court was not required to hear live testimony.	29
3. The standard of proof is preponderance of the evidence, and Lan never asked for a higher standard.	37
4. <i>Bagwell</i> is directly contrary to Lan’s arguments, as is every other authority for hundreds of years.	40
5. Lan never appealed from the preliminary injunction, which was wholly consistent with due process.	42

6.	The trial court did not infringe upon Lan's "constitutional right to freedom of marriage."	43
D.	All of the trial court's findings are well supported by substantial evidence.	46
E.	The sanctions and fees awards should stand, and the Le firm should be awarded fees on appeal from both Roberto and Lan.	55
	CONCLUSION	56

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Ameriquest Mortg. Co. v. State</i> , 148 Wn. App. 145, 199 P.3d 468 (2009).....	42
<i>Anderson v. Dunn</i> , 19 U.S. 204, 6 Wheat. 204, 227, 5 L. Ed. 242 (1821)	39
<i>Bloom v. Illinois</i> , 391 U.S. 194, 195-96 (1968).....	36, 41
<i>Brown v. Voss</i> , 105 Wn.2d 366, 372-73, 715 P.2d 514 (1986).....	43, 44
<i>Calof v. Casebeer</i> , 143 W.2d 1014 (2001)	22
<i>Duncan v. Louisiana</i> , 391 U.S. 145 (1968).....	36
<i>Dyke v. Taylor Implement Mfg. Co.</i> , 391 U.S. 216 (1968).....	36
<i>Ex parte Robinson</i> , 86 U.S. 505, 19 Wall. 505, 510, 22 L. Ed. 205 (1874).....	39
<i>Gompers v. Bucks Stove & Range Co.</i> , 221 U.S. 418, 442 . . . (1911).....	39
<i>In the Matter of Young</i> , 163 Wn.2d 684, 185 P.3d 1180 (2008).....	23, 32
<i>In re Dependency of A.K.</i> , 162 Wn.2d 632, 174 P.3d 11 (2007).....	33, 34, 35
<i>In re J.R.H.</i> , 83 Wn. App. 613, 616 & n.2, 922 P.2d 206 (1996)	24, 33
<i>In re King</i> , 110 Wn.2d 793, 798, 756 P.2d 1303 (1988).....	22

<i>In re Marriage of Curtis</i> , 106 Wn. App. 191, 202, 23 P.2d 13	56
<i>In re Marriage of Glass</i> , 67 Wn. App. 378, 381 n.1, 835 P.2d 1054 (1992).....	26, 47, 54
<i>In re Marriage of Rideout</i> , 150 Wn.2d 337, 340, 77 P.3d 1174 (2003)	22
<i>In re Silva</i> , 166 Wn.2d 133, 206 P.3d 1240 (2009)	34
<i>In re Welfare of T.B.</i> , ___ Wn. App. ___, ¶ 28, 209 P.3d 497 (2009).....	26
<i>Int'l Union, United Mine Workers of Am. v. Bagwell</i> , 512 U.S. 821 (1994).....	passim
<i>Levinson v. Wash. Horse Racing Comm'n</i> , 48 Wn. App. 822, 824-25, 740 P.2d 898 (1987).....	44, 45
<i>Orwick v. City of Seattle</i> , 103 Wn.2d 249, 253, 692 P.2d 793 (1984)	27
<i>R.A. Hanson Co. v. Magnuson</i> , 79 Wn. App. 497, 505, 903 P.2d 496 (1995)), <i>rev. denied</i> , 145 Wn.2d 1008 (2001).....	56
<i>Rivers v. Wash. State Conference of Mason Contractors</i> , 145 Wn.2d 674, 684, 41 P.3d 1175 (2002)	23
<i>Schaefco, Inc. v. Columbia River Gorge Comm'n</i> , 121 Wn.2d 366, 367-68, 849 P.2d 1225 (1993).....	25
<i>Seattle-First v. West Coast Rubber</i> , 41 Wn. App. 604, 612, 705 P.2d 800, <i>rev. denied</i> , 104 Wn.2d 1206 (1985)	29, 31
<i>State v. Noah</i> , 103 Wn. App. 29, 45, 9 P.3d 858 (2000), <i>rev. denied</i> sub nom., <i>Calof v. Casebeer</i>	22

<i>State v. WWJ Corp.</i> , 138 Wn.2d 595, 601, 980 P.2d 1257 (1999)	28
<i>Trummel v. Mitchell</i> , 156 Wn.2d 653, 672-73, 131 P.3d 305 (2006)	22
<i>United States v. Hudson</i> , 11 U.S. 32, 7 Cranch 32, 34, 3 L. Ed. 259 (1812)	39
<i>United States v. Mine Workers</i> , 330 U.S. 258, 303-304, 91 L. Ed. 884, 67 S. Ct. 677 (1947)	40
<i>Zubulake UBS Warburg LLC</i> , 220 F.R.D. 212 (S.D.N.Y. 2003)	10
<i>Zubulake UBS Warburg LLC</i> , 229 F.R.D. 422 (S.D.N.Y. 2004)	10

STATUTES

RCW 7.21.010(2)	34
RCW 7.21.010(3)	32, 34
RCW 7.21.020	32
RCW 7.21.030	32
RCW 7.21.030(3)	56
RCW 7.21.040	32

RULES

ER 103(a)(2)	31
Fed. Rules Civ. Proc. 11, 37	38
RAP 2.4(b)	25
RAP 2.5(a)	8
RAP 5.2(a)	24, 25

RAP 18.9(b), (c)	24
RAP 10.3(a)(5)	2
RAP 10.3(g).....	46
RAP 10.4(c).....	46
RAP 18.1(a).....	56
RAP 18.2.....	20
RPC 1.6.....	8
OTHER AUTHORITIES	
4 COMMENTARIES ON THE LAWS OF ENGLAND, Ch. 20.....	41
Karl B. Tegland, WASH. PRAC.: CIVIL PROC., § 21.33 (2003 & 2007 Supp.)	10

INTRODUCTION

Married attorneys (the “former associates”) attempted to avoid producing their computers and complying with a preliminary injunction. They took hundreds of client files from their former law firm, solicited the firm’s clients, refused to return the files, electronically copied the files while falsifying the copy dates, destroyed the first hard drive on which they copied the files, but then certified to the trial court that the second, falsified drive was the “only” computer containing firm data. When they were caught in all of these lies, they destroyed all of their computers to avoid further detection. Their contempt is blatant.

Roberto waived his appeal in numerous ways, and admitted to his contempts in any event. Lan violated repeated court orders to comply and repeatedly lied about whether other computers existed containing firm data. Lan could not “defer” to another her own compliance with court orders directly requiring her to act or not to act. Lan’s claim that she was “denied” her “right” to present testimony is entirely based on a lie: she never offered to testify.

The former associates’ contempts have totally derailed this litigation. This Court should hold that the trial court gave them much more due process than they deserve, and remand.

STATEMENT OF THE CASE

The former associates have failed to provide the Court with a fair statement of the facts, without argument. RAP 10.3(a)(5). Their statement is slanted and misleading. The trial court's findings and conclusions are well supported, as illustrated below.

A. The parties' relatively brief business relationship deteriorated and they chose to dissolve it over the next 4.5 months under a detailed Separation Agreement.

Attorneys Edward and Vienna Le, husband and wife, own the respondent lawfirm, Le & Associates ("the Le firm"). CP 157, 479 (F/F D). The Les hired appellant Lan Thi Nguyen as a part-time employee in 2003. CP 2, 479 (F/F E). Lan¹ became a full-time associate after she was admitted to the bar in May 2005. *Id.*

Lan began dating appellant Roberto Diaz-Luong in the winter of 2006. CP 2. In early 2007, Lan asked the Les to use Roberto on a contract basis. *Id.* In August 2007, the Les hired Roberto on a commissioned-salary basis. *Id.*; CP 479 (F/F E).

The Les' relationship with Lan and Roberto (collectively, "former associates") began to deteriorate in October 2007. CP 2, 479 (F/F F). Vienna Le's escrow business had hired Lan's sister,

¹ *Per* the opening brief, we refer to the appellants by their first names.

but they had a falling-out. CP 157, 479 (F/F F). This dispute carried over to the Les' relationship with the former associates. *Id.* On October 23, 2007, the parties agreed to phase-out their relationship over the next four-and-a-half months under a detailed Separation Agreement. CP 17-22, 479-80 (F/F F). The Agreement generally allowed for expeditious resolution of specific clients' cases and provided the former associates some cash flow. CP 17-22, 479-80 (F/F F & G). The former associates agreed to perform this work under the Le firm's supervision. CP 2, 17-22, 479 (F/F F).

The Le firm also agreed to pay the former associates' health insurance premiums (less COBRA payments) for six months after their disassociation date. CP 19. The former associates expressly acknowledged the Les' generosity in extending this accommodation to them. CP 20. Finally, the Les instructed the former associates to return their office keys and not to take any electronic files without advance permission. CP 2-3, 480 (F/F H); 1528-29 (F/F 10-12).

B. Rather than abiding by their agreement to work under the Le firm's supervision for 4.5 months, the former associates actually planned to and did set up their own lawfirm – and plotted to steal the Les' clients – creating a conflict of interest that terminated the relationship.

Although the former associates agreed to work under the Le firm's supervision for 4.5 months, in fact they had already begun

their own firm out of their house and made plans to rent law-office space. CP 3. Within days of signing the Separation Agreement, the former associates initiated a plot to steal the Le firm's clients, presumably to build their own practice. *Id.* This began with them downloading or copying all of the Les' electronic client files from 2004 to late 2006, including 384 client files (containing tens of thousands of pages) and the Les' personal financial information. CP 3-4, 480 (F/F H), 653, 657, 660-61, 1532 (F/F 25-27).

The Les did not give the former associates permission to download or copy these files. CP 4, 480 (F/F H), 1528 (F/F 10). These electronic files contained private and confidential information, including social security numbers, drivers license records and medical records, each of whose revelation could be detrimental to the clients. *Id.*; CP 11-12, 480-81 (F/F I). The former associates told the Les nothing about their plans or actions. *Id.*

The former associates also settled the Amber Jay case within days of signing the Settlement Agreement. CP 3. Despite telling the Les that they had done virtually no work on the Amber Jay case, the former associates had obtained a tentative settlement while actively employed by the Le firm. CP 3, 18-19. While

intentionally misleading the Les, the former associates maintained that they owed the Le firm nothing. *Id.*

Also within days of entering the Settlement Agreement, Roberto told Vienna Le that Patty Powers was terminating the Le firm to be represented by the former associates' new firm, Diaz & Nguyen, PLLC. CP 4. The former associates' false allegations about the Le firm created a material conflict of interest, so the two firms could no longer associate on any cases. CP 4-6, 481-82 (F/F K-M). Ed Le verbally terminated the Settlement Agreement on November 2, 2007, due to this conflict of interest. *Id.* The Les sent a Notice of Disassociation on November 3, 2007. CP 6.

C. The Le firm demanded return of client files and sought a preliminary injunction after discovering that the former associates solicited its clients and misrepresented their authority to handle cases to insurance companies.

The Les demanded return of all client files, whether in hard copy or electronic format, receiving no response. CP 6-7. Over 40 clients also have made written demands to the former associates to return their electronic files, receiving no response. CP 9.

The former associates urged the Le firm's clients to terminate the Le firm, to file bar complaints, and to retain them as counsel. CP 4-6, 8, 301-02, 481-82 (F/F K-M). They directly

contacted and solicited the substantial majority of existing Le-firm clients using addresses and phone information from the electronic files they downloaded. CP 8, 481-82 (F/F K-M). They criticized the Le firm's work, attempting to damage the Le firm's reputation and to coerce transfer of clients' cases. *Id.*; CP 4-6. They falsely stated to clients that they were now handling their files. *Id.* Indeed, the former associates admit calling clients to urge them to terminate the Le firm, to file bar complaints, and to retain them as counsel. *Id.*

The Les soon made further troubling discoveries. CP 7-8, 482. The former associates misrepresented to third-party insurers that they might have authority to act on behalf of the clients, even though none of the clients had signed fee agreements with the former associates. *Id.* The former associates knew the Le firm had written fee agreements with these clients. *Id.*

D. The trial court issued a simple and direct preliminary injunction, ordering the former associates to turn over computers and enjoining destruction of evidence.

In January 2008, the Le firm was forced to seek a preliminary injunction to retrieve attorney-client protected information belonging to their clients, and to prevent the former associates from misusing that information. CP 155-56. The former associate's response confirmed the Les' fears – the former

associates claimed to be representing many Le-firm clients, even though the parties had terminated the Separation Agreement. CP 18-19, 303. Roberto claimed that the Le firm's clients had "spoken," stating "Some came to Lan and me." CP 303.

The former associates asserted a "right" to continue accessing Le-firm-client files, asking the court to order the Le firm to turn over certain files. CP 303, 304. To facilitate this request, the former associates disclosed a list of 34 "former" Le-firm clients they claimed to represent. CP 303-04, 1076. Sixteen of these clients were identified in the Separation Agreement. *Compare* CP 18-19 *with* CP 303.

The former associates also sought delay, which the trial court granted to February 8, 2008, albeit while enjoining them from (among other things) accessing the electronic databases or contacting the Le firms' clients and their insurers. CP 281-82. The trial court granted the Le firm's request for a preliminary injunction on February 11, 2008. CP 478-86.

The trial court found that the Le firm had demonstrated its clear legal rights and well-grounded fears of immediate invasion of those rights, and that the former associates' actions were either resulting in or were likely to result in substantial injury to those

rights. CP 479. The trial court entered detailed findings consistent with the facts stated above, wholly rejecting the self-serving falsehoods the former associates proffered. CP 479-82.

Perhaps most significantly, the trial court found (CP 480):

At some point Defendants downloaded, without authorization from Plaintiff or clients of the Plaintiff law firm, the entire electronic client computer database covering both existing clients and . . . former clients whose cases were closed. Defendants do not deny obtaining the electronic files. . . .

The client files . . . contain confidential information and client secrets protected by RPC 1.6. . . .

The trial court therefore entered a simple and direct order:

- ◆ enjoining the former associates from possessing the Le firm's database or "any copies of any sort of the information from that data base";
- ◆ enjoining them from using, copying, modifying, adding, or deleting any part of the Le firm's database;
- ◆ permitting an IT expert to make two copies of the database taken from the Le firm, filing one with the trial court clerk, and giving the other to the Le firm's counsel;
- ◆ requiring the IT expert to destroy any trace of the Le firm's database "on any and all such computers of the defendants or their surrogates";
- ◆ requiring the former associates to file within seven days sworn statements of compliance with the trial court's orders and intent to comply with the preliminary injunction; and
- ◆ ordering the IT expert to certify that he had complied with the order or to explain why he could not do so.

CP 482-83. As the trial court expressly noted, the former associates did not seriously challenge the Le firm's right to a preliminary injunction in the trial court. CP 482 (F/F N).

E. Rather than comply with the preliminary injunction and Litigation Hold, the former associates embarked on a troubling course of lies and evasion.

Rather than comply with this simple and direct preliminary injunction, the former associates embarked on a course of deception and prevarication rarely seen in litigation with lawyers. On February 15, 2008, the former associates submitted declarations of "compliance" with the February 11 preliminary injunction. CP 487-92, 493-97. But rather than simply declaring, as directed, that they had complied with the court's order and would comply with the injunction, the former associates rehashed their arguments regarding the trial court's preliminary injunction findings. *Compare* CP 483 *with* CP 487-93, 493-97, 1527 (F/F 5). This prompted a case-management order directing the parties not to opine, argue, or editorialize in their declarations. CP 1524.

The former associates disclosed only one USB portable drive as containing the Le firm's downloaded electronic files. CP 489-90, 496, 1528 (F/F 8). They denied ever downloading or storing Le-firm files onto their laptops. CP 489, 495-96. They did

not mention a desktop computer or any other computer, electronic media, or storage device. CP 487-93, 493-97, 1528 (F/F 8).

Although the preliminary injunction enjoined the former associates from possessing and/or using any part of the Le firm's data (CP 482) they acknowledged retaining Le-firm files for the clients that they had stolen. CP 1076-79, 1492, 1499. The former associates claimed that they did not know how much of the Le firms' database they had downloaded, but admitted that they had looked at 10% of the downloaded Le-firm files. CP 489, 495; 1531 (F/F 21). They claimed that they had separated out Le-firm files for clients they had stolen from the remaining Le-firm files, which they still classified as Le-firm files. CP 1076-79, 1492, 1499.

In March 2008, the Le firm gave the former associates a Litigation Hold² based on the preliminary injunction. CP 618. This Hold required the former associates to

immediately cease all use of their laptop computers, other computers or other electronic media or devices which at any time contained, or [were] used to access or view, any files obtained from Le & Associates computers until such time as

² See generally, Karl B. Tegland, WASH. PRAC.: CIVIL PROC., § 21.33 (2003 & 2007 Supp.) (citing **Zubulake UBS Warburg LLC**, 220 F.R.D. 212 (S.D.N.Y. 2003); and **Zubulake UBS Warburg LLC**, 229 F.R.D. 422 (S.D.N.Y. 2004) (both concerning preserving electronic evidence).

a forensic image of any such computers is prepared and preserved.

Id. This Hold further explained that using the computers in any way would destroy evidence:

Notice is given that any computer system that has been used to manipulate, copy, access, or view Plaintiff's data would provide evidence of these actions by creating various records. Any computer which was used to copy, view or store data of the Plaintiff could have copies or information regarding that data, whether or not data or documents were saved to or deleted from that computer. The continued use of any such computer or media could write over or destroy such information, whether intentional or inadvertent.

CP 619-20. The Hold even gave the former associates an easy way to avoid any further problems by simply hiring their own expert to create a forensic copy:

A mirror-image of the computer system taken at the time the duty to preserve attaches should be made to insure that all documents and other information is preserved.

CP 619. The former associates continued to stonewall.

F. The former associates' intransigence ultimately necessitated numerous hearings, depositions and contempt motions, culminating in the trial court's June 13, 2008 Findings of Fact, Conclusions of Law and Order of Contempt.

In compliance with the court's order, the Le firm retained expert Michael Andrew to carry out the preliminary injunction. CP 483, 645. The former associates delivered the disclosed USB drive to Andrew on March 14, 2008. CP 647. Andrew's March 31, 2008

declaration details many inconsistencies between the forensic data he recovered from the disclosed USB drive, on one hand, and the former associates' claim that this USB drive was the only device containing Le-firm files, on the other. CP 649-66, 668.

In fine, Andrew discovered a troubling pattern of deception:

- ◆ The Le firm's database was copied onto a "Western Digital 160 Gigabyte" USB drive on October 23, 2007, and into the early morning of October 24, 2007. CP 652.
- ◆ The USB drive that the former associates disclosed was a "Western Digital 250 Gigabyte drive of a different model." *Id.*
- ◆ The disclosed USB drive was manufactured in Thailand on October 21, 2007, just two days before the former associates claimed to have used it to download files from the Le firm's computers. CP 660. It is unlikely that this drive would have even been available to them at that time. *Id.*
- ◆ The disclosed USB drive was never connected to the Le firm's computer workstations. CP 652.
- ◆ The Le firm's database, consisting of 384 folders, was actually copied onto the disclosed USB drive some time after February 13, 2008, days after the trial court entered the preliminary injunction, and nearly four months after the former associates claimed to have downloaded the database at the Le firm on October 23-24. CP 478, 653, 659.
- ◆ The 384 folders were moved off of the disclosed USB drive from February 29 through March 1, 2008. CP 653, 658-59.
- ◆ Some time after March 1, 2008, 219 of the 384 folders were re-copied back onto the disclosed USB drive using an unidentified computer system. CP 659.
- ◆ The unidentified computer system's date was manipulated to show October 23, 2007, making it appear that the 219 folders were copied on October 23, 2007, when in fact they were copied after February 13, 2008. CP 653, 659.

Based on Andrew's troubling discoveries, the Le firm moved for contempt and for an order compelling compliance with the preliminary injunction on March 31, 2008. CP 732-58.

The former associates again sought and obtained further delay, convincing the trial court to allow additional time to respond to the contempt motion. CP 1080. The former associates subsequently submitted new declarations on April 14, 2008, adding three more "former" Le-firm clients to the previously disclosed "list of former [Le firm] clients" they purported to represent. CP 1076-77, 1078. They stated that they did not "classify" files belonging to these stolen clients as Le-firm files. CP 1077, 1078-79.

Roberto gave his "unequivocal assurance that no storage device (hard drive, USB drive, computer hard drive, or any other drive) presently exists that contains any of [the Le firm's] client files," with the possible exception of his "thumb drive," which he could not find. CP 1077. Lan stated that she was "not aware of any storage device (hard drive, USB drive, computer hard drive, or any other drive) presently existing that contains any of [the Le firms'] client files." CP 1079. Both former associates made these statements with the express understanding that accessing files on a

USB drive via a laptop (or other computer) copies the files onto the computer's hard drive. CP 1077, 1079.

Roberto was deposed on March 25 and April 30, 2008. CP 1237-82. On April 30, he claimed to have destroyed the original USB drive to which the former associates downloaded the Le-firm files; this destruction occurred during the week before he disclosed a USB drive to Andrew on March 14, 2008. CP 1242-43. This rendered all of the former associates' prior declarations and certifications false by omission: they had never mentioned this destruction of evidence. *See, e.g.*, CP 1528 (F/F 8-10), 1530 (F/F 15-18), 1531 (F/F 19-22), 1532 (F/F 25-28), 1533 (F/F 28-31).

Roberto also admitted that he later destroyed the hard drives in his laptop, Lan's laptop, and the former associates' desktop computer. CP 1255-56, 1262, 1268. This occurred immediately after they received the Le firm's motion for contempt, which was filed on April 1, 2008. CP 732, 1255. Roberto asserted that Lan did not say much about his destruction of her computer. CP 1262-63. Again, these admissions rendered the former associates' April 15, 2008 declarations woefully inadequate, misleading and false. *See, e.g.*, CP 1534-36 (F/F 32-42).

The former associates then told yet another new story – in yet another series of declarations filed on May 14, 2008: Roberto claimed that back in February or March, 2008, he plugged into his laptop the original USB drive containing Le-firm files, and copied the Le firm’s entire database onto a second USB drive, rendering the former associates’ April declarations false by omission. CP 1167, 1182, 1248-53. He then attempted to remove from the copy all files belonging to clients that the former associates had stolen from the Le firm using a disk-scrubbing program called SecureClean. CP 1182. Roberto also submitted deposition “errata” noting that he was changing his prior testimony to conform to Andrew’s declaration. CP 1188-93.

The opening brief suggests that Roberto realized that intentionally copying the Le firm’s database (again) was “probably a violation of the Preliminary Injunction. . . .” BA 16-17 (citing 1182-83). Yet at the very citation their brief provides, Roberto unequivocally admits that he knew he had violated the preliminary injunction by copying the database. CP 1182-83.

Knowing that copying the USB drive violated the preliminary injunction, Roberto then intentionally attempted to destroy the evidence of his contempt: he claims to have used a screwdriver to

destroy what he claims to have thought was the illegal copy, but he instead destroyed the original USB drive, threw it away, and disclosed the copy to Andrew. CP 1182-83, 1244, 1534. In his April 30, 2008 deposition, Roberto had claimed that he destroyed this USB drive during the week prior to March 15, 2008 (when Andrew received the disclosed USB drive), again proving the departing associates' prior declarations false. CP 1241-42. Incredibly, Roberto even claimed that he destroyed all of their hard drives, and all of their files, without making any backup electronic copies. CP 1259-60. Roberto also destroyed the former associates' desktop hard drive, DVDs with the Le firm's "data" on them, and other electronic media.³ CP 1265-68.

Although Lan had not said much about the destruction of her computer, in May 2008 she claimed that she was not involved in copying the Le firm's database onto the second USB drive or in destroying the original drive. CP 1158-59. She also disavowed any involvement in destroying "any components" of the former associates' laptops and desktop. CP 1159.

³ Although Roberto claimed to run a "paperless" office and denied making any electronic copies before destroying his laptop, he admitted to printing-out paper copies, another violation of the injunction forbidding the former associates from possessing Le-firm data. CP 490, 1259-61.

G. The trial court found numerous contempts.

The trial court found the former associates' declarations in response to its preliminary injunction noncompliant, even after the series of "corrections." CP 1527-28. The former associates failed to identify any (much less all) computers containing the Le-firm data. CP 1528. The only USB drive they disclosed could contain only data copied off of a computer that the former associates failed to identify. *Id.* The trial court found both former associates' continued failure to comply with the order to disclose and certify to be contempt of court. CP 1528 (F/F 9).

Based on the Andrew forensic analysis, the trial court found false both former associates' certifications that the single disclosed USB drive contained the only copies of the Le-firm files. CP 1530 (F/F 17). A different drive was used to download the Le-firm files in October 2007. CP 1530 (F/F 18). Andrew identified at least three necessary locations for the files that both former associates failed to disclose. CP 1531 (F/F 19-21). Both former associates' continued refusal to identify computers in addition to the false USB drive were in contempt of the injunction. CP 1531 (F/F 22).

The trial court also found contempt for Roberto's formatting, reformatting and manipulating the dates relative to the disclosed

USB. CP 1532 (F/F 25-27). It also found each of the former associates' three certifications false, and each misrepresentation a contempt. CP 1532-33 (F/F 28-31).

The trial court also found Roberto's claims that he "accidentally" destroyed the original USB drive incredible, specifically rejecting his lies (CP 1534-35):

Creation of a partial copy of Le data on the second USB drive and presenting it to the IT specialist pursuant to the order was an intentional attempt to mislead . . . the Court. Defendants intentionally falsified the evidence in order to claim compliance with the Court's order and avoid any further investigation of their computers.

The trial court further found that Roberto had admitted that he had intentionally destroyed evidence protected by court order:

. . . [Roberto] has acknowledged at sometime after receiving Mr. Andrew's declaration and the Motion for Contempt before the Court, he intentionally destroyed the hard drives in his laptop computer, his wife's, and the hard drive of their desktop computer.

CP 1535. The trial court went on to expressly reject as incredible the former associates' various excuses for their spoliation of evidence, such as avoiding the IT expert's charges. *Id.* (¶ 37).

While the former associates belatedly tried to exonerate Lan and lay all the blame on Roberto, the trial court also rejected this dodge, finding:

[Lan] knew about the creation of the second drive, its false presentation to the IT expert, and the subsequent destruction of the USB and computer hard drives. Included in the facts supporting this finding are the parties were married, worked together from their home, filed identical declarations, [Lan] claimed knowledge and purchase of the USB drive, and one of the hard drives intentionally destroyed was in her personal [laptop].

CP 1536. All of this plainly violated the court's preliminary injunction and constituted a contemptuous attempt to defraud the court. CP 1532. Indeed, the trial court found that the former associates' various manipulations were an intentional attempt to conceal evidence from the court. CP 1533.

Ultimately, the trial court found that the former associates had the present ability to comply with the order, but failed to do so. CP 1536. It therefore found and concluded that, "Given the false testimony, the falsification of evidence and their refusal to comply with the Court's order, . . . serious remedial sanctions should be imposed to compel their compliance" CP 1536.

H. The former associates appealed from the trial court's contempt order, this Court denied their stay request, and Roberto withdrew his first appeal.

On June 27, 2008, the former associates filed a notice of appeal from the contempt order and from the order denying reconsideration. CP 1545. The Le firm subsequently moved for an additional contempt finding, and asked the trial court to determine

attorney fees and costs. CP 1695-1707, 1861-1911. The trial court entered a judgment for attorney fees and Andrew's costs (compensatory sanctions) (CP 2466), and \$1,000 per-day remedial sanctions to coerce compliance. CP 2472.

At about the same time, Roberto moved for leave to withdraw as a party to the appeal. Appendices A and B (Roberto's RAP 18.2 motion and declaration). The former associates' counsel advised them that they should have separate counsel on appeal. App. A 2. Although the former associates agreed, they decided that Roberto would withdraw from the appeal. App. B ¶¶ 5 & 6. Roberto acknowledged that he was knowingly, intentionally, and voluntarily waiving his appellate rights (*id.* ¶ 7):

I am fully aware that if the Court grants my request and dismisses me as a party, I will have waived my right to appeal from Judge Inveen's findings and orders

This Court granted Roberto's motion to withdraw on January 30, 2009. Appendix C (1/30/09 Letter Ruling).

The former associates filed second and third notices of appeal on February 3, 2009, from the series of orders entered to effectuate the contempt orders ("the January orders"). CP 2526-27,

2580-81.⁴ This Court denied the former associates' motion to stay enforcement of the January orders pending appeal. CP 2507-14, 2736. Commissioner Verellen later granted a partial stay as to the second appeal, which the former associates filed after the trial court entered the sanctions and fees orders. BA App. G.

Commissioner Verellen's order is substantially similar to the trial court's order, adding additional steps to allow the former associates to assert privileges before any information is turned over to the Le firm. *Compare* CP 2457-61 *with* BA App. G, at 11-13. Commissioner Verellen particularly noted his hesitation to "vary from the trial court's thoughtful order." BA App. G, at 11.

This Court consolidated all three appeals, ordering the former associates to file a single brief in all appeals.

⁴ The former associates filed two identical notices of appeal, from the January orders in the Le case and in a case in which the former associates represented Patty Powers. The Powers trial court ordered funds from that court registry paid to the Le firm to help defray the compensatory sanctions. CP 2578.

ARGUMENT

A. The Standard of Review is Abuse of Discretion.

The former associates set forth a so-called “standard of review” section, which actually solely addresses the standard of proof applicable in contempt cases. BA 31-32. Contempt orders fall within the sound discretion of the trial court and, absent abuse, will not be disturbed on appeal. *Trummel v. Mitchell*, 156 Wn.2d 653, 672-73, 131 P.3d 305 (2006); see also *State v. Noah*, 103 Wn. App. 29, 45, 9 P.3d 858 (2000) (“Contempt orders are within the discretion of the judge so ruling”), *rev. denied sub nom., Calof v. Casebeer*, 143 W.2d 1014 (2001); *In re King*, 110 Wn.2d 793, 798, 756 P.2d 1303 (1988) (“Whether contempt is warranted . . . is a matter within the sound discretion of the trial court”).

Our Supreme Court also has applied this standard where, as here, the trial court finds contempt solely on documentary evidence and affidavits. *In re Marriage of Rideout*, 150 Wn.2d 337, 340, 77 P.3d 1174 (2003). The *Rideout* Court specifically rejected an argument that a contempt order should be reviewed *de novo* when based solely on written submissions. 150 Wn.2d at 350-52. Trial courts are in a better position to weigh competing documentary

evidence and resolve conflicts when, as here, credibility is at issue – even when the record is solely written. *Id.* at 350-51.

The Supreme Court also recently noted that the “abuse of discretion standard governs review of sanctions for noncompliance with discovery orders” via a contempt order. ***In the Matter of Young***, 163 Wn.2d 684, 185 P.3d 1180 (2008) (reviewing contempt sanctions based on SPV’s refusal to comply with court-ordered mental evaluation) (*citing Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 684, 41 P.3d 1175 (2002)). No abuse occurs absent a clear showing that the discretion was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Rivers*, 145 Wn.2d at 684-85.

B. Roberto intentionally dismissed his first appeal with full knowledge of the consequences, so the contempt findings against him are verities (and they are well supported in any event) moot his second appeal.

As noted above, Roberto knowingly, intelligently and voluntarily dismissed his appeal from the contempt order on advice of counsel. App. A-C. The contempt findings against him are therefore verities here, and they are well supported in the record in any event. This renders his second appeal moot.

1. **Roberto knowingly and voluntarily dismissed his first appeal, so those orders, and particularly the contempt findings, are verities as to him.**

Roberto filed a notice of appeal from the trial court's June 5, 2008 order granting the firm's motion to strike; June 11, 2008 Findings & Conclusions and Order Denying Motion for Reconsideration; June 25, 2008 clarification order; "and all other orders on which these orders depend." CP 1545-67. This Court accepted his appeal as of right. Roberto then dismissed his first appeal. See, e.g., BA 8 n.4; App. A - C.

In doing so, Roberto expressly, knowingly, intentionally and voluntarily waived his right to appeal from the contempt orders. App. B, at 3 ("I am fully aware that if the Court grants my request and dismisses me as a party, I will have waived my right to appeal from Judge Inveen's findings and orders"). The Le firm detrimentally relied upon Roberto's representations and upon his dismissal of his first appeal in making its decision not to raise the obvious and serious conflict of interest between Roberto and Lan in a motion to dismiss the first appeal. Those Findings, Conclusions and Orders are thus final as to Roberto – he has no right to two appeals from the same orders. See, e.g., RAP 5.2(a) & 18.9(b), (c); *In re J.R.H.*, 83 Wn. App. 613, 616 & n.2, 922 P.2d 206 (1996)

(citing *Schaefco, Inc. v. Columbia River Gorge Comm'n*, 121 Wn.2d 366, 367-68, 849 P.2d 1225 (1993)).

Roberto apparently attempts to rely on RAP 2.4(b), making a vague reference to it at BA 8 n.4. This is inadequate to preserve any argument that his second notice of appeal again brings up the same orders as to which Roberto already brought – and knowingly and voluntarily dismissed – an appeal, where his second notice neither refers to nor attaches the orders he challenged in his first appeal. CP 2526-79. Since both he and this Court treated his first notice as timely, his tacit attempt to reinstate the appeal that he knowingly and intentionally waived is as untimely as it is inadequate. RAP 5.2(a). This Court should treat the above orders as final against Roberto – and in particular should treat the contempt findings against him as verities.

2. Even if Roberto could bring a second appeal on the contempt orders, he has waived any challenges.

The former associates assign error to 42 findings, but argue only five (at the end of their brief). They acknowledge that they challenge these five findings solely “as to Lan.” BA 49. They do not argue these findings as to Roberto, and they do not argue any other findings, so Roberto has abandoned any issue as to any

findings. BA 49-54. And as discussed *infra*, those five findings are well supported in any event.

A finding of fact is a verity on appeal if the appellant assigns no error to the finding. *In re Marriage of Glass*, 67 Wn. App. 378, 381 n.1, 835 P.2d 1054 (1992). A finding is also a verity if the appellant assigns error to it, but fails to argue it:

A party abandons assignments of error to findings if fact if he or she fails to argue them in his or her brief.

Glass, 67 Wn. App. at 381 n.1. This Court will not consider error assigned to findings without supporting argument because the failure to expressly argue a particular finding “prevents any meaningful review.” 67 Wn. App. at 381 n.1; *see also In re Welfare of T.B.*, ___ Wn. App. ___, ¶ 28, 209 P.3d 497 (2009).

In sum, Roberto argues no findings, so all of them are verities as to him.

3. Roberto’s second appeal is therefore moot.

If this Court determines either that (a) Roberto waived or is barred from bringing an appeal from the contempt orders, or that (b) he has waived any argument as to the trial court’s contempt findings, then Roberto’s second appeal is moot. His second appeal concerns only the sanctions and other orders consequent to the contempt orders. CP 2526-79. Roberto does not challenge those

orders beyond asserting that they must fall if the contempt order falls. BA 7-8 (AOE 6 & 7). Since Roberto has no valid appeal as to the contempt orders, his second appeal is moot because this Court cannot render any effect relief. See, e.g., *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984). As to Roberto, this Court can end its analysis here – he has no appeal.

C. Lan did not preserve virtually any of her appellate legal arguments prior to entry of the contempt order, and the law is directly contrary to her arguments.

Lan⁵ pursues five overarching appellate issues, each of which raises – at least implicitly – myriad sub-issues (BA 6-8): (a) whether the trial court had to permit live testimony (AOE 1 & 2); (b) whether contempt must be proved by clear, cogent and convincing evidence (AOE 2); (c) whether criminal-trial due process was required, including testimony and proof beyond a reasonable doubt (AOE 4); (d) whether the trial court denied due process with regard to the preliminary injunction findings (AOE 5); and (e) whether the sanctions and fees orders fall if the contempt orders fall (AOE 6 & 7). The Le firm addresses each of these issues, *seriatim*.

⁵ As explained above, Roberto waived and is barred from appealing, so this section addresses the legal arguments as brought by Lan. If this Court concludes that Roberto may bring any of these same arguments, this section responds to his arguments as well.

But as discussed below, Lan preserved virtually none of her appellate legal arguments in the trial court. Since she did not give the trial court a fair opportunity to consider these legal arguments in the first instance, her claims regarding the contempt order are waived. This Court will hear constitutional arguments not raised in the trial court only if the claimed error is a “manifest error affecting a constitutional right.” ***State v. WWJ Corp.***, 138 Wn.2d 595, 601, 980 P.2d 1257 (1999) (quoting RAP 2.5(a)). Lan has not raised this preservation argument, so this Court should not consider it.

But in any event, as discussed below, no constitutional right to a jury trial, live testimony, etc., exists in a civil contempt hearing. The trial court imposed remedial and compensatory civil sanctions, neither of which gives rise to increased civil (much less criminal) due process concerns. This Court should affirm.

1. Lan’s entire appeal is based on a false premise that the trial court “denied” her “request” to testify.

Lan’s entire appeal is based on the false premise that the trial court “denied” her “request” to testify. See, e.g., BA 3-4, 5, 6-7, 19-22, 23-24, 30, 37-38, 49-54. In her first request, at the April 14, 2008 hearing, when asked who would testify, her counsel said this:

Well, certainly the Le's [*sic*] and Mr. Andrew, to establish the alleged contempt. **Possibly** Mr. Diaz-Luong and Ms. Nguyen.

4/14 RP 30 (emphasis added). Musing that a witness might "possibly" testify is not a request to present testimony. Nor did Lan make any offer of proof as to how she (or anyone else) would testify. Lan has utterly failed to preserve these arguments. See, e.g., **Seattle-First v. West Coast Rubber**, 41 Wn. App. 604, 612, 705 P.2d 800, *rev. denied*, 104 Wn.2d 1206 (1985).

2. The trial court was not required to hear live testimony.

Lan's main appellate arguments are overwhelmingly based upon ***Int'l Union, United Mine Workers of Am. v. Bagwell***, 512 U.S. 821 (1994). See, e.g., BA 2-4, 6-8, 30, 36-49, 55-57. Quite literally, no one ever mentioned this case (or any other United States Supreme Court case) to the trial court, in writing or orally, prior to entry of the contempt order. Nor (prior to entry of the contempt order) did Lan cite any other legal authority to the trial court in support of her claims that live testimony was required. Simply put, this is devastating to Lan's claim that the trial court had to hear live testimony: her claim is wholly unpreserved.

It is true that the former associates' counsel asked for live testimony, in response to which the trial court asked for a list of

potential live witnesses. 4/14 RP 30-31. When the former associates supplied this list, it contained the names of nine Le-firm clients, none of whom had any information relevant to the former associates' contempt. See CP 1114-15 (App. D). The former associates did not list themselves, Mr. Andrew, or the Les. *Id.*⁶

Moreover, while the trial court plainly expressed a preference for handling this time-sensitive matter on declarations, it took the testimony request under advisement, and specifically ordered the former associates to produce a list of witnesses from whom they demanded testimony, state how long the testimony would take, and provide a written explanation of why live testimony would be better than declarations (or deposition transcripts):

I'm going to indicate to the extent possible, it should be declarations. If you feel there needs to be testimony, if you could indicate in your responsive pleadings which witnesses you would like to have testify and why they would be better than declarations and the amount of time you feel is needed.

4/14 RP 31. In response, the former associates listed nine witnesses who were Le-firm clients with no knowledge whatever about the former associates' contemptuous conduct. App. D. They

⁶ The former associates' claims that they wished to testify simply were not credible: with the possibility of criminal prosecution and the husband-wife privilege in play, they likely would have had to "take the fifth" and assert the privilege – or risk waiving those protections. This strains credulity.

did not explain “why they would be better than declarations” or “the amount of time . . . needed.” *Id.* This was insufficient.

Yet the opening brief claims that the former associates listed “eight new witnesses they wished to cross-examine at the hearing, **in addition to those previously identified at the April 14 hearing.**” BA 23 (citing CP 1114-15 – App. D; emphasis added)). The disclosure says no such thing. App. D. It does not refer to any witnesses “previously identified.” *Id.* It also does not list Roberto, Lan, Andrew or the Les. *Id.* While the list purports to reserve the right to supplement after seeing the Le firm’s list, the former associates never supplemented their list.

The former associates simply never preserved these arguments as to themselves, the Les or Andrew. They had no “right” to present testimony by nine witnesses with no relevant knowledge about their contemptuous conduct. In any event, they made no offer of proof as to what any witness would say. See, e.g., ***Seattle-First***, 41 Wn. App. at 608 (under ER 103(a)(2), failure to make offer of proof waives issue regarding exclusion of testimony). This issue was not preserved in the trial court.

These arguments also are legally incorrect. “A judge . . . may impose a sanction for contempt of court under this chapter.”

RCW 7.21.020. As Lan admits, the statute requires only “notice and hearing.” BA 36 (citing RCW 7.21.030). Remedial civil sanctions are those “imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform.” RCW 7.21.010(3).

Our Supreme Court has explained the essential difference between civil and criminal contempt sanctions:

Sanctions for civil contempt are remedial, RCW 7.21.030, *i.e.*, intended to coerce a party's compliance with a judgment or order and permitting the contemnor to avoid the sanction by doing something to purge the contempt. Where a remedial sanction has been imposed, the contemnor effectively “carries the keys of his prison in his own pocket.” [*Bagwell*, 512 U.S. at 828] (internal quotation marks omitted) (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 442 . . . (1911)). Conversely, sanctions for criminal contempt are punitive, RCW 7.21.040, and punish completed acts of disobedience without providing an opportunity to purge the contempt.

Young, 163 Wn.2d at n.2. Here, the trial court ordered remedial civil sanctions to coerce the former associates' compliance with the court's order to turn over the computers. CP 2472 (in the event of further noncompliance, “Defendants shall pay to the Court \$1,000 per day per Defendant for every day until the defendant fully complies with the injunction and these orders”); CP 2473 (“Remedial sanctions authorized by RCW 7.21.030 are required in

order to insure Defendants' compliance with the orders of this Court"). While the Le firm asked the trial court to consider referral to a prosecutor, the trial court refused to make that referral and specifically refused to enter punitive sanctions. CP 1538-39. Lan had the keys, but she refused to turn them over.

The only Washington case that Lan cites pertaining to live testimony in a civil contempt hearing is *In re J.R.H.*, *supra*. BA 36. That decision relies solely upon a Snohomish County Superior Court Local rule expressly stating that in "contempt matters **the accused** shall be given the opportunity to give testimony." 83 Wn. App. at 618-19 (emphasis altered). Lan cited no such rule in the trial court (or here), and indeed, there is no such King County Local Rule. Even if there was, it would not support her broad claims that she could present and cross-examine myriad witnesses having nothing to do with and no knowledge of her contemptuous acts. *J.R.H.* provides no support for Lan's arguments.

Another Washington case Lan cites, *In re Dependency of A.K.*, 162 Wn.2d 632, 174 P.3d 11 (2007), is frankly contrary to her position. *A.K.* involved unquestionably punitive criminal sanctions (increased incarceration times) imposed upon three juveniles who repeatedly ran away from their foster homes. 162 Wn.2d at 637-

38. **A.K.** is thus inapposite because the trial court here imposed only remedial civil sanctions. CP 2472-73.⁷

A.K. also contradicts Lan's arguments. Our Supreme Court explained due process for contempt hearings (and **Bagwell**) as follows, including a particularly pertinent footnote:

Due process requirements vary depending on whether the contempt is direct or indirect and whether the sanctions imposed are remedial or punitive in nature. See **Bagwell**, 512 U.S. at 831. A "remedial sanction" is one that is "imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform." RCW 7.21.010(3). It is considered civil, rather than criminal, in nature. **Bagwell**, 512 U.S. at 827. A "punitive sanction," on the other hand, is "imposed to punish a past contempt of court for the purpose of upholding the authority of the court," RCW 7.21.010(2), and it is considered criminal in nature, **Bagwell**, 512 U.S. at 828. In determining whether sanctions are punitive or remedial, courts look not to the "stated purposes of a contempt sanction," but to whether it has a coercive effect - whether "the contemnor is able to purge the contempt and obtain his release by committing an affirmative act." *Id.*

. . . In delineating the process required when exercising this authority, the United States Supreme Court has differentiated between three types of use: (1) imposition of remedial sanctions for direct contempt, **(2) imposition of remedial sanctions for indirect contempt**, and (3) imposition of punitive sanctions for direct or indirect contempt. *Id.* at 832-33 **Different procedural**

⁷ Lan also cites *In re Silva*, 166 Wn.2d 133, 206 P.3d 1240 (2009), which is similar to **A.K.** and equally inapposite.

protections are required for each of these three types of cases,(fn4)

[FN.4] In the first scenario, summary adjudication is appropriate. *Bagwell*, 512 U.S. at 832 **In the second, the contemnor must be given notice, a reasonable time to prepare a defense, and hearing before sanctions are imposed. *Bagwell*, 512 U.S. at 832 Before punitive sanctions may be imposed, the contemnor must receive full criminal due process. *Bagwell*, 512 U.S. at 833**

A.K., 163 Wn.2d at 645-46 & n.4 (emphases added; some cites omitted). Thus, our Supreme Court has interpreted *Bagwell* to hold that where, as here, the trial court imposes only remedial, coercive civil sanctions, notice and a reasonable opportunity to be heard are all the process that is due.

Bagwell, like *A.K.*, is also inapposite. It too concerns a criminal sanction – \$52 million in punitive fines against a union for repeatedly violating many provisions of a very complex injunction creating an entire code of conduct for striking union members across the State of Virginia over many months. 512 U.S. at 823-24, 837. *Bagwell* held that these “fines were criminal,” requiring the full protections of criminal due process, including a trial by jury. *Id.* at 823, 838-39. In contrast, here the trial court imposed remedial civil sanctions to coerce compliance with a very straightforward injunction requiring the departing associates to stop using and turn over their computers so that an IT expert could remove Le-firm

client files from them. *Bagwell* is inapposite. As further discussed below, it is also contrary to Lan's arguments.

For hundreds of years up to 1968, not only was there no right to full criminal-due-process protections in a civil-contempt hearing, but there was not even a right to a jury trial for serious crimes. *Bloom v. Illinois*, 391 U.S. 194, 195-96 (1968). *Bloom* was part of a trio of cases decided the same day that together held, for the first time, that jury trials would be required for (a) serious criminal offenses, and (b) serious criminal-contempt hearings, but not for (c) petty criminal-contempt hearings.⁸ *Bloom*, 391 U.S. at 195, 210. *Bloom*, like *Bagwell*, observed that no such protections have ever been required in civil-contempt hearings. See, e.g., *Bloom*, 391 U.S. 195-98 & nn. 1 & 2. This is still true today.

Here, it is simply impossible to reasonably conclude on this record that Lan was given anything less than notice, a reasonable opportunity to respond, and a hearing, much less that the trial court abused its discretion in declining to hear further from the former associates. They admittedly lied under oath in their ever-changing

⁸ The other two cases were *Duncan v. Louisiana*, 391 U.S. 145 (1968) (requiring jury trials for serious criminal offenses), and *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968) (no jury trial required for petty criminal offenses).

affidavits and defied the court's orders by hiding, copying and destroying material evidence that they were ordered to preserve. Since the actual contemptible conduct – concealing computers, copying files, and destroying evidence – was largely admitted, no more testimony was necessary.

Indeed, both of the former associates were given many continuances, many chances to respond, and every opportunity to comply with the orders and purge their contempts – over and over again. The very fact that Lan has appealed (twice) from *so many* Findings (42) and orders (10) bespeaks the amazingly patient due process that she has received. When she was asked to list witnesses, she did not list herself, Roberto, Andrew, or the Les. App. D. The trial court did not abuse its discretion because the former associates received ample due process. No case holds that this trial court had to listen to either of them lie under oath again.

3. The standard of proof is preponderance of the evidence, and Lan never asked for a higher standard.

Lan never cited any authority or argued that the proper standard of proof was clear, cogent and convincing evidence, much less beyond a reasonable doubt, prior to entry of the contempt

order. See, e.g., CP 1086-1112 (opposing contempt motion). Again, she failed to preserve this argument.

Nor does Lan cite any apposite cases so holding here. By inference she suggests that *Bagwell* does so, but it does not. As noted, *Bagwell* involved massive punitive sanctions for many violations of an incredibly complex injunction creating a code of conduct for striking workers across the State of Virginia over many months – not remedial sanctions to coerce compliance with a simple order to stop using and turn over computers. As to this kind of remedial sanction in aid of adjudication, *Bagwell* holds they are not criminal, punitive sanctions (which require a higher standard of proof) because such sanctions lie very close to the “core justification” for the contempt power:

Contempts such as failure to comply with document discovery, for example, while occurring outside the court’s presence, **impede the court’s ability to adjudicate the proceedings before it and thus touch upon the core justification for the contempt power.** Courts traditionally have broad authority through means other than contempt – such as by striking pleadings, assessing costs, excluding evidence, and entering default judgment – to penalize a party’s failure to comply with the rules of conduct governing the litigation process. See, e.g., FED. RULES CIV. PROC. 11, 37. **Such judicial sanctions never have been considered criminal, and the imposition of civil, coercive fines to police the litigation process appears consistent with this authority.** Similarly, indirect contempts involving discrete, readily ascertainable acts, such as turning over a key or

payment of a judgment, properly may be adjudicated through civil proceedings **since the need for extensive, impartial factfinding is less pressing.**

Bagwell, 512 U.S. at 833 (emphases added).

The “core justification” for this process is necessity: courts must have the ability to coerce immediate compliance with their civil-litigation orders – a judicial power necessary to the exercise of all others (*id.* at 831):

The traditional justification for the relative breadth of the contempt power has been necessity: Courts independently must be vested with “power to impose . . . submission to their lawful mandates” **Anderson v. Dunn**, 19 U.S. 204, 6 Wheat. 204, 227, 5 L. Ed. 242 (1821). Courts thus have embraced an inherent contempt authority, see **Gompers**, 221 U.S. at 450; **Ex parte Robinson**, 86 U.S. 505, 19 Wall. 505, 510, 22 L. Ed. 205 (1874), as a power “necessary to the exercise of all others,” **United States v. Hudson**, 11 U.S. 32, 7 Cranch 32, 34, 3 L. Ed. 259 (1812).

Indeed, the **Bagwell** Court expressly likened *per diem* remedial sanctions (as entered here) to coercive imprisonment, which the Court also found non-criminal and non-punitive (*id.* at 829):

A close analogy to coercive imprisonment is a per diem fine imposed for each day a contemnor fails to comply with an affirmative court order. Like civil imprisonment, such fines exert a constant coercive pressure, and once the jural command is obeyed, the future, indefinite, daily fines are purged.

In sum, **Bagwell** nowhere remotely suggests that a higher standard of proof is required where, as here, coercive remedial

sanctions (and compensatory fines)⁹ are entered in aid of seeking compliance with the trial court's orders. On the contrary, it says precisely the opposite (512 U.S. at 827, footnote omitted):

In contrast [to serious criminal-contempt sanctions], civil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard. Neither a jury trial nor proof beyond a reasonable doubt is required.

The trial court did not abuse its discretion or err in any way.

4. *Bagwell* is directly contrary to Lan's arguments, as is every other authority for hundreds of years.

As the above discussions of *Bagwell* make apparent, it does not help Lan. On the contrary, *Bagwell* is unequivocally and directly contrary to Lan's arguments. 512 U.S. at 827 (quoted immediately above). This Court should affirm.

As noted above, the common law has always viewed the power to coerce compliance with court orders as fundamental to the judicial role. Nearly 250 years ago, Sir William Blackstone noted (in a chapter entitled "Summary Convictions") that using the

⁹ Compensatory fines are non-criminal: "A contempt fine is considered civil and remedial if it either coerces a defendant into compliance with a court order [or] . . . **compensates the complainant for losses sustained.**" *Bagwell*, 512 U.S. at 829 (quoting *United States v. Mine Workers*, 330 U.S. 258, 303-304, 91 L. Ed. 884, 67 S. Ct. 677 (1947)).

contempt power against a party's disobedience to a court order – and against attorneys' dishonest conduct – “must necessarily be as ancient as the laws themselves.” 4 COMMENTARIES ON THE LAWS OF ENGLAND, Ch. 20. Thus, at ancient common law, even for indirect contempts, “if the judges upon *affidavit* see sufficient ground to suspect that a contempt has been committed, they either make a rule on the suspected party to show cause why an attachment should not issue against him, or, in very flagrant instances of contempt, the attachment issues in the first instance.” *Bloom*, 391 at 198 n.2 (quoting 4 COMMENTARIES, *supra*, at 280; emphasis added in *Bloom*). The show cause process – and extensive additional hearings – provided ample due process here.

Also directly contrary to Lan's attempts to mischaracterize *Bagwell* as broadly requiring more cumbersome procedures in this case, that opinion expressly notes that its holding applies only to a “discrete category” of unusual cases:

For a discrete category of indirect contempts, however, civil procedural protections may be insufficient. Contempts involving out-of-court disobedience to complex injunctions often require elaborate and reliable factfinding. . . . Such contempts **do not obstruct the court's ability to adjudicate the proceedings before it**, and the risk of erroneous deprivation from the lack of a neutral factfinder may be substantial. . . . **Under these circumstances**, criminal procedural protections such as the rights to counsel

and proof beyond a reasonable doubt are both necessary and appropriate to protect the due process rights of parties and prevent the arbitrary exercise of judicial power.

512 U.S. at 833-34 (emphasis added). These contempts are just the opposite: defying a simple court order to turn over computers, obstructing the trial court's ability to adjudicate these proceedings, and depriving the Le firm of material evidence crucial in this case.

As is generally the case when a party (much less an attorney) contemptuously defies court orders, it was absolutely necessary for the trial court to attempt to coerce compliance with its orders – a core judicial function. Its exercise of the contempt power was careful, measured and necessary to its orders. This is particularly true where, as here, the very persons defying the court's orders are officers of the court. This Court should affirm.

5. Lan never appealed from the preliminary injunction, which was wholly consistent with due process.

Lan purports to assign error to the preliminary injunction, even though no notice of appeal refers to that order. BA 4-5 (AOE 1-4); CP 1545-67, 2526-79. The preliminary injunction plainly was not an appealable final judgment. See, e.g., *Ameriquest Mortg. Co. v. State*, 148 Wn. App. 145, 199 P.3d 468 (2009) (granting discretionary review of a preliminary injunction). Nor does Lan make any argument with regard to these four assignments of error.

Indeed, she did not seriously challenge the Le firm's preliminary injunction request in the trial court. CP 482. This Court should not consider these assignments.

In any event, this Court reviews a trial court's decisions concerning an injunction for an abuse of discretion. *Brown v. Voss*, 105 Wn.2d 366, 372-73, 715 P.2d 514 (1986). As the facts set forth above make clear, the Le firm presented more than ample evidence that it had valid legal rights entitled to protection that the former associates threatened to – and ultimately did – infringe. Due to the former associates' contempts, the Le firm lost clients and privileged attorney/client information, as well as evidence relevant to establishing its claims that the former associates stole clients and tortiously interfered with its client relations in violation of their duties of loyalty to the Le firm. The trial court certainly did not abuse its discretion in entering the preliminary injunction in an effort to forestall the former associates' wrongful conduct.

6. The trial court did not infringe upon Lan's "constitutional right to freedom of marriage."

Lan fails to explain how holding her in contempt and sanctioning her to coerce compliance with the court's order that she must preserve and turn over material evidence could possibly

infringe upon her “freedom of marriage.” Of course, she did not raise such arguments or cite to any cases in the trial court. This claim is wholly unsupported and should be disregarded.

Moreover, there is nothing untoward in considering the former associates’ marriage as circumstantial evidence that they conspired together to defraud the trial court. BA 51. The trial court did not, as Lan suggests, consider “the mere fact that [she] was married to Roberto.” *Compare* BA 52 with CP 1536 FF 40. It also considered that they lived together in a mutually fiduciary relationship and worked out of their home as law partners, among other things. CP 1536 FF 40. This is proper circumstantial evidence that Lan knew (at the least) what Roberto was doing in her home and law office, to client files and her computers. *Id.*

Lan cites only ***Levinson v. Wash. Horse Racing Comm’n***, 48 Wn. App. 822, 824-25, 740 P.2d 898 (1987). There, Washington’s Horse Raising Commission suspended a wife’s owner’s license on the basis that her husband had been convicted of a narcotics violation over 10 years earlier. 48 Wn. App. at 824. This Court found that the regulation upon which the Commission relied was too vague and general (*i.e.*, not narrowly tailored to a specific purpose) to justify directly infringing on the wife’s right to

marriage by revoking her license simply due to her status of being married to a one-time felon. *Id.* at 824-25.

Levinson is obviously inapposite. It concerns a regulation directly infringing on the right to marriage in a broad and indiscriminate fashion, not a narrowly tailored sanctions order designed solely to achieve the important state interest embodied in the core judicial function of enforcing lawful court orders. **Levinson** has no bearing here, as there is no overbroad regulation at issue.

Nor did the trial court purport to rest its remedial sanctions against Lan on the basis that she was married to Roberto. On the contrary, the court saw the fact of their marriage (*i.e.*, that they lived together in a mutual fiduciary relationship) as one of many pieces of evidence that Lan participated in this course of deception:

Ms. Nguyen knew about the creation of the second drive, its false presentation to the IT expert, and the subsequent destruction of the USB and computer hard drives. Included in the facts that support this finding are the parties were married, worked together from their home, filed identical declarations, Ms Nguyen claimed knowledge and purchase of the USB drive, and one of the hard drives intentional destroyed was in her personal lap top.

CP 1559. The trial court then narrowly tailored its remedial sanctions to precisely accomplish what unquestionably is a fundamentally important interest (indeed a “core function”):

protecting the integrity of the judicial system and ensuring compliance with court orders by officers of the court.

The trial court found that Lan was under an order to produce her business' computers, failed to do this, and participated in an intentional course of deception. This order does not infringe upon her right to marriage. It is the inevitable consequence of her decisions to lie to the court and to obstruct justice.

D. All of the trial court's findings are well supported by substantial evidence.

The former associates make one assignment of error purporting to challenge 42 findings of fact, but discuss only five findings. BA 5, 49-54. They fail to comply with the RAPs and this Court's precedents. Substantial evidence supports the five findings they discuss, the 37 challenged findings they do not discuss, and all of the unchallenged findings. This Court should treat them all as verities, and affirm.

The former associates' single assignment of error to 42 findings does not comply with RAP 10.3(g), which requires a separate assignment of error for each challenged finding. The former associates attach copies of the findings to "comply" with RAP 10.4(c), but fail to comply with RAP 10.3(g) (such as by

highlighting their attachment). BA 4 n.2. It is impossible to tell from a single assignment of error and no argument which facts the former associates meant to challenge. This Court should treat the challenged findings as verities. **Glass**, 67 Wn. App. at 381 n.1.

In any event, substantial evidence supports all of the findings. The Statement of the Case, *supra*, includes citations to the findings and Clerk's Papers. The following are highlights from the Les' and Andrew's declarations, all of which support the findings regarding the numerous contempts:

- ◆ The Le firm never gave the former associates permission to download or copy client files. CP 4, 377, 621. Doing so would have been against firm policy. CP 377.
- ◆ Remote access to the Le firm's database did not give the former associates the right or ability to download the entire database. CP 378, 383, 622. Rather, the system was set up to prevent employees from downloading files remotely. CP 383-84. The Separation Agreement (and longstanding firm policy) provided that the Le firm would give the former associates hard copies (an "index of exhibits") with which to write settlement demands. CP 378.
- ◆ The disclosed USB drive was not the drive used to download the Le-firm database from the Le-firm computers. CP 652.
- ◆ Lan used the "Vienna" user profile on her Le-firm workstation to access the Le-firm database on October 23 and 24, 2007, at which time a large volume of client and personal files were downloaded onto an undisclosed USB device. CP 661-62.

The former associates' shifting stories also support the findings. The former associates first claimed that they downloaded

the Le firm's database remotely. CP 297, 693-94. Confronted with evidence that it is impossible to do so (CP 377-78, 383-84), they changed their story, claiming that they downloaded the Le firm database onto Lan's USB drive while at the Le firm. CP 487, 489, 493, 495. They then purported to disclose that USB drive, disclosing no other computer or storage device, but certifying compliance with the preliminary injunction. CP 490-91, 496-97.

Forensic evidence showed that the disclosed USB drive could not have been the drive they used to download the Le firm's database, prompting another new story – Roberto copied the original USB drive, manipulated the dates to make the copy appear to be the original, destroyed the original, and gave the copy to Andrew. CP 1167, 1182-83. More lies: Roberto could not copy the USB drive without putting it onto a computer first. CP 1290.

When the former associates finally notified the trial court that Roberto had destroyed the USB drive, Roberto had also destroyed the hard drives from his laptop, Lan's laptop, their desktop, and DVDs and other electronic media. CP 1267-68. Robert claims that he did so without making any electronic copies, but printing hard copies in violation of the injunction. CP 1259-60. This all occurred

two months after entry of a preliminary injunction giving the former associates only seven days to comply. CP 485, 732, 1255.

Roberto plainly acknowledged his contempts.¹⁰ He admits that duplicating the USB violated the court's order. CP 1182-83. The oft-repeated excuse that Roberto mistakenly destroyed the original USB drive misses the point: Roberto destroyed a USB drive to cover up his contemptuous duplication of a USB drive. If he did not intentionally destroy the original, he recklessly destroyed it without first ascertaining which drive was which, but that does not matter: the original duplication was contempt enough.

And then Roberto admittedly used a screwdriver to destroy laptop and desktop hard drives, DVDs, and other portable media – some of which he admits contained Le-firm data – and threw them away. CP 1267-68. As to these contempts, there is no claimed mistake. The trial court very properly held Roberto in contempt.

Lan actually discusses five findings, claiming error solely “as to Lan.” BA 49. These five findings are well supported. In findings 9 and 10, the trial court found that both former associates refused

¹⁰ Roberto and Lan even admitted to changing their deposition testimonies via errata in an attempt to conform to Andrew's devastating (and unchallenged) declarations. CP 1173-78, 1188-93.

to identify computers that once contained or accessed the Le firm's data, even though they were on notice that any computer that had accessed a hard drive or other media containing those files could still have copies on it. BA 50 (citing CP 1528, FF 9 & 10). Lan's sole excuse is that she "deferred to Roberto on computer and related technology matters." BA 50 (citing CP 1168).

Lan cannot "defer" to Roberto on her own obligations to comply with the preliminary injunction, which directly applied to her. The injunction required Lan to refrain from taking certain actions (such as contacting Le-firm clients, including "former" clients, and using the Le-firm database). It also required Lan to take affirmative steps: identify her computer, pay the IT expert, and "individually" declare her compliance with the order within seven days. CP 482-85. After the trial court entered the preliminary injunction, Lan had two months to identify her laptop, desktop, and storage devices before Roberto destroyed them. CP 478, 1494. Lan did not identify her laptop, and acknowledged that she continued using Le-firm files for "former" Le-firm clients, flatly violating the preliminary injunction. CP 489. It is no excuse if she sat idly by while her husband and law partner destroyed the evidence she was obligated to preserve and produce.

Lan's argument also defies common sense. Lan could not "look at" electronic files on a USB drive without attaching the drive to a computer – either her laptop or her desktop – both which she failed to identify. Lan could not honestly claim that she had no computer that ever had the Le-firm files on it. Roberto aside, Lan had to know that the files were on whatever computer(s) she used to access her USB drive and has no excuse for not identifying them. She was in contempt from the outset.

Lan also challenges finding 40 that she knew about the creation of the second USB drive, its false presentation to Andrew, and the subsequent destruction of the USB drive and computers. BA 50-51. As discussed above, the trial court based this finding on the following (1) the former associates are married; (2) the former associates lived together; (3) the former associates ran a law office out of their home; (4) the former associates filed identical declarations; (5) Lan claimed knowledge and purchase of the USB drive; and (6) one of the hard drives intentionally destroyed was in her laptop. CP 1536. Lan argues that the declarations are not identical and that she denied knowing Roberto intentionally destroyed the USB drives. BA 51.

Finding issue with the word “identical,” Lan plays at semantics, taking the finding out of context. Lan’s claim that she and Roberto “did not file identical declarations” for the June 6 hearing does not undercut the finding that the former associates filed identical declarations. *Compare* BA 50-51 *with* CP 1558 (F/F 40). Before that, the former associates repeatedly filed declarations with numerous virtually identical assertions. *Compare* CP 487 ¶ 1 *with* CP 504 ¶ 1; CP 488 ¶ 3 *with* CP 505 ¶ 3; CP 488 ¶ 6 *with* CP 505 ¶ 6; CP 489 ¶ 10 *with* CP 506-07 ¶ 10; and CP 490-91 ¶ 13 *with* CP 508 ¶ 13; CP 1491-97 *with* 1498-1504. The former associates’ declarations began to look significantly different around the contempt hearing, when Lan started pointing the finger at Roberto to save herself. CP 1158-60, 1179-84.

Lan did not deny “knowing” that Roberto destroyed the USB drive; rather, she denied being “involved” in its destruction. *Compare* BA 51 *with* CP 1158-59. In any event, the trial court had every reason not to believe Lan. Her disclaimers do not surmount the substantial evidence that she well knew Roberto was destroying electronic files and did nothing to stop it. Finding 40 is supported.

Lan also challenges findings 10 through 12, claiming the court found that she “attempted to mislead the court by claiming

that she and Roberto downloaded” Le-firm files to a USB drive at the Le firm with permission. BA 52. But these findings never actually say that Lan attempted to mislead the court. CP 1528-29 (F/F 10-12). As discussed above, finding 10 rejects the former associates’ claims that the Les gave them permission to download the entire Le-firm database. CP 1528. The Le firm instructed the former associates to return their office keys and not to take electronic files without prior authorization. CP 2-3. The Le firm never gave the former associates permission to download (or copy) files. CP 4, 376-77, 621. Yet Lan downloaded files into the wee hours of the night and early morning. CP 651-52, 661-63. All of this is substantial evidence supporting finding 10.

Finding 11, that Andrew is a qualified IT expert, is amply supported by his declaration. CP 646; BA 52. Lan does not challenge Andrew’s qualifications. BA 52. Nor did the former associates ever produce their own expert to challenge any of Andrew’s opinions – testimony on which the trial court largely relied in reaching its contempt findings. Finding 11 is also supported.

Finding 12 details some of Andrew’s forensic findings, including that:

- ◆ Lan used the “Vienna” user profile on her workstation at the Le firm to access the Le database on October 23 and 24, 2007;
- ◆ during that time a large volume of client and personal files were downloaded to a USB device; and
- ◆ during the October 23/24 download, the “Vienna” user profile accessed Lan’s “Gmail” account on Google, indicating that Lan was at the Le firm checking her email while downloading the Le firm’s files.

CP 1528-29. Andrew’s declaration substantially supports these findings. CP 651-52, 661-63. Lan does not actually discuss finding 12, so abandons her claimed error. *Glass*, 67 Wn. App. at 381 n.1.

Finding 12 also plainly contradicts Lan’s assertion that “[a]ll Andrew’s work established was that the USB drive he tested was not used for downloading.” BA 53. Also contrary to Lan’s suggestion, Roberto’s belated admission that he “mistake[nly]” destroyed the USB drive used to download the Le-firm files does not undercut Andrew’s forensic analysis that Lan downloaded the Le firm’s database into the wee hours of October 23-24.

The former associates’ only mention of the remaining 37 findings they challenge is that “taken as a whole” the findings improperly “lump[] together” Roberto and Lan. BA 54. The former associates tell the same story, even in their opening brief. There is no reason for the findings to detail this same story twice. The

former associates' own brief lumps them together throughout. This is not a credible challenge to the trial court's findings.

Finally, the former associates admitted from the very beginning that they intentionally withheld files from "former" Le-firm clients they solicited. CP 489, 495, 1076-79, 1492, 1499. Having stolen these clients, the former associates claimed that their files were not "classif[ied]" as part of the Le firm's electronic database. CP 1076-79. They later claimed that they "no longer" had any of that database, "except for" those files belonging to "former" Le-firm clients. CP 1492, 1499.

Yet nothing in the preliminary injunction allowed the former associates to disclose some files (or copy or destroy media containing them) and refuse to disclose files they wanted to keep using. This is contempt of the court's order in and of itself.

E. The sanctions and fees awards should stand, and the Le firm should be awarded fees on appeal from both Roberto and Lan.

As noted above, the former associates do not raise any direct argument against the trial court's remedial sanctions, but rather simply assert that if they are right that the trial court failed to give them due process, then the sanctions must fall. They received due process, so the sanctions must stand.

Moreover, this Court should award the Le firm attorney fees and costs on appeal, for both appeals, from both Roberto and Lan. RAP 18.1(a). Under RCW 7.21.030(3), a “court may, in addition to the remedial sanctions set forth in subsection (2) of this section, order a person found in contempt of court to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney’s fees.” A “party defending the appeal of a contempt order may recover attorney fees under RCW 7.21.030(3).” *In re Marriage of Curtis*, 106 Wn. App. 191, 202, 23 P.2d 13 (citing *R.A. Hanson Co. v. Magnuson*, 79 Wn. App. 497, 505, 903 P.2d 496 (1995)), *rev. denied*, 145 Wn.2d 1008 (2001). The Court should award appellate fees to the Le firm from both Roberto and Lan.

CONCLUSION

For the reasons stated above, this Court should affirm. These remedial sanctions were a necessary adjunct to the trial court’s most fundamental duties: manage the litigation in a fair and reasonably expeditious fashion to ensure a just outcome. Trial courts must have broad discretion in these (thankfully) unusual circumstances. The trial court did not abuse its broad discretion in

attempting to protect the Le firm's client files and attorney/client privileged information at the outset of this litigation, or in enforcing those protective measures against recalcitrant members of this Bar.

DATED this 29th day of July 2009.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF RESPONDENT** postage prepaid, via U.S. mail on the 29th day of July, 2009, to the following counsel of record at the following addresses:

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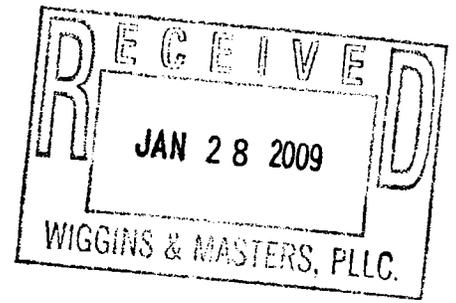
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NO. 61912-8-I

WASHINGTON STATE COURT OF APPEALS, DIVISION I

LE & ASSOCIATES, P.S., a
professional service corporation,

Respondent.

vs.

ROBERTO DIAZ-LUONG, and
LAN THI NGUYEN, husband and
wife, and the marital community
comprised thereof,

Appellants,

MOTION OF ROBERTO
DIAZ-LUONG FOR LEAVE
TO WITHDRAW AS A
PARTY TO THE PENDING
APPEAL AND FOR
CHANGE OF CAPTION

I. IDENTITY OF MOVING PARTY

Roberto Diaz-Luong, one of two Appellants herein, seeks the relief specified in Section II below.

II. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 18.2, Roberto Diaz-Luong seeks leave of this Court to withdraw as a party to this appeal, without disturbance to the appellate rights of his Co-Appellant, Lan Thi Nguyen.

Moreover, if his motion to withdraw as a party is granted, Mr. Diaz-Luong urges the Court to direct that the caption be re-configured such that his name no longer appears as a party to the appeal.

APP A

III. FACTS RELEVANT TO THE MOTION

On or about June 27, 2008, Roberto Diaz-Luong and Lan Thi Nguyen timely filed a Notice of Appeal to this Court from the King County Superior Court, seeking review by this Court of orders and findings entered in that court by Judge Laura Inveen.

At the time the Notice of Appeal was filed, Ms. Nguyen and Mr. Diaz-Luong were jointly represented on appeal by Michael B. King, then with the law firm of Talmadge Fitzpatrick PLLC, and Gregory M. Miller, then with the law firm of Reed, Longyear, Malnati, & Ahrens, PLLC. On or about August 20, 2008 for Mr. Miller, and on or about September 1, 2008 for Mr. King, Messrs. King and Miller re-located their practices to Carney Badley Spellman, P.S., and continued to represent the Appellants.

After Messrs. King and Miller moved their practices to Carney Badley Spellman and after examining further into the record in preparation of the opening brief, they advised Appellants that it would be advisable for each to have separate counsel on appeal, notwithstanding the fact that Appellants are a married couple.

As the subjoined Declaration of Roberto Diaz-Luong indicates, Appellants came to the conclusion that they did not have the financial ability to retain new counsel and have that lawyer start from scratch, get up-to-speed, and prepare a Brief of Appellant addressing the interests of one of them. The decision was made that Messrs. King and Miller would

APP A

continue to represent Ms. Nguyen, and that Mr. Diaz-Luong would withdraw as a party to the appeal.

On January 14, 2009, Cathy Norgaard, a legal secretary at the law firm of Carney Badley Spellman (counsel on appeal), contacted this Court by telephone to advise that the Appellant's Opening Brief was placed in the mail, and to advise that Mr. Diaz-Luong would be seeking leave to withdraw as a party to the appeal. Ms. Norgaard was advised that that fact should be conveyed to this Court in a letter.

On January 15, 2009, the Appellant's Opening Brief was filed in this Court, and was limited to addressing the interests of Appellant Nguyen. When the Appellant's Opening Brief was filed on January 15, 2009, Mr. Diaz-Luong's name did not appear in the caption as an Appellant.

By letter dated January 16, 2009, Gregory M. Miller, co-counsel for Ms. Nguyen, as well as counsel for Mr. Diaz-Luong, wrote to the Court to advise that a Motion for Leave to Withdraw as to Mr. Diaz-Luong only would be forthcoming.

IV. GROUNDS FOR RELIEF AND ARGUMENT

RAP 18.2 holds, in pertinent part:

...The appellate court may, in its discretion, dismiss review of a case on the motion of a party who has filed a notice of appeal, a notice for discretionary review, or a motion for discretionary review by the Supreme Court.

APP A

Roberto Diaz-Luong urges this Court to grant his request that he be dismissed as a party to the instant appeal, because he cannot afford to retain separate counsel to continue to represent his interests.

Mr. Diaz-Luong knows of no reason why this request, if granted, would prejudice in any way the interests of Lan Thi Nguyen, or the interests of Respondents.

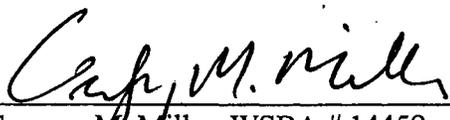
V. CONCLUSION

Appellant Roberto Diaz-Luong seeks leave of this Court to voluntarily withdraw as a party to the instant appeal. As there would be no prejudice to the interests of his Co-Appellant or the Respondents, this Court ought to grant that request.

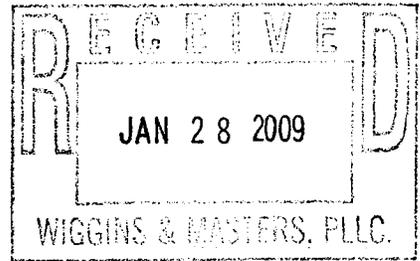
Finally, assuming this Court does grant his request for leave to withdraw, the caption for the appeal ought to be re-configured, such that his name is removed as a party. As the Court will see, when the Appellant's Opening Brief was filed on January 15, 2009, Mr. Diaz-Luong's name did not appear as an Appellant.

DATED this 27th day of January, 2009.

CARNEY BADLEY SPELLMAN, P.S.

By 
Gregory M. Miller, WSBA # 14459
Michael B. King, WSBA# 14405
Of Attorneys for Appellants Lan Thi Nguyen and
Roberto Diaz-Luong

APP A



NO. 61912-8-I

WASHINGTON STATE COURT OF APPEALS, DIVISION I

LE & ASSOCIATES, P.S., a professional service corporation,

Respondent.

vs.

ROBERTO DIAZ-LUONG, and LAN THI NGUYEN, husband and wife, and the marital community comprised thereof,

Appellants,

DECLARATION OF ROBERTO DIAZ-LUONG IN SUPPORT OF MOTION FOR LEAVE TO WITHDRAW AS A PARTY TO THE PENDING APPEAL AND FOR CHANGE OF CAPTION

STATE OF WASHINGTON)) ss. COUNTY OF KING)

Roberto Diaz-Luong hereby declares:

1. I am an attorney, licensed to practice law in the State of Washington, and doing business at 11625 Rainier Avenue So., #302, Seattle, WA 98178.

2. In the matter of Le & Associates, P.S. v. Roberto Diaz Luong & Lan Thi Nguyen, King County Superior Court No. 07-2-39131-2 SEA, King County Superior Court Judge Laura Inveen entered certain

APP B

orders and findings against Ms. Nguyen and me, from which we filed a timely Notice of Appeal.

3. At the time the Notice of Appeal was filed, on or about June 27, 2008, both Ms. Nguyen and I were represented on appeal by Michael B. King (then with Talmadge Fitzpatrick, PLLC) and Gregory M. Miller (then with Reed, Longyear, Malnati, & Ahrens, PLLC). Mr. King and Mr. Miller subsequently relocated their practices to the law firm of Carney Badley Spellman, P.S., and continued their representation of Ms. Nguyen and me in this matter.

4. Subsequent to September 1, 2008, but before January 14, 2009, when Messrs. King and Miller filed the Opening Brief of Appellant in this Court, it became clear in discussions with counsel that either Ms. Nguyen (my spouse) or I should retain separate counsel for the purpose of proceeding with the appeal.

5. While Ms. Nguyen and I agreed that that was advisable, we also concluded that with the cost of defending against the underlying lawsuit, and the cost of pursuing the appeal of Judge Inveen's findings and orders, we could not afford to hire new counsel to get up-to-speed and take on the representation of one of us.

6. In consultation with counsel, I made the decision that I would seek permission from the Court of Appeals to withdraw as a party

APP B

to the appeal, and that Carney Badley Spellman would continue to represent Ms. Nguyen.

7. I did not make that decision for any purpose of delay or evasion. While I am fully aware that if the Court grants my request and dismisses me as a party, I will have waived my right to appeal from Judge Inveen's findings and orders, nothing in this motion should be construed as a concession on my part that Judge Inveen's decisions were correct. Notwithstanding the fact that I seek to withdraw as a party to the appeal, I believe that Judge Inveen was in error.

8. Finally, if the Court sees fit to grant my request to voluntarily withdraw as a party to the appeal, it is my hope that the Court will also direct that the caption in the case be re-configured such that only Lan Thi Nguyen remains as an Appellant.

I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATE AND PLACE SIGNED

DECLARANT

to the appeal, and that Carney Badley Spellman would continue to represent Ms. Nguyen.

7. I did not make that decision for any purpose of delay or evasion. While I am fully aware that if the Court grants my request and dismisses me as a party, I will have waived my right to appeal from Judge Inveen's findings and orders, nothing in this motion should be construed as a concession on my part that Judge Inveen's decisions were correct. Notwithstanding the fact that I seek to withdraw as a party to the appeal, I believe that Judge Inveen was in error.

8. Finally, if the Court sees fit to grant my request to voluntarily withdraw as a party to the appeal, it is my hope that the Court will also direct that the caption in the case be re-configured such that only Lan Thi Nguyen remains as an Appellant.

I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

1-27-2009 Seattle, WA
DATE AND PLACE SIGNED

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DECLARANT

APP B

record for Appellants Diaz-Luong & Nguyen in the above-entitled action.

3. The foregoing signature page to the Declaration of Roberto Diaz-Luong in Support of Motion for Leave to Withdraw as a party to the Pending Appeal and for Change of Caption is a complete and legible copy, which our office received via electronic mail from Roberto Diaz-Luong on January 27, 2008.

Catherine A. Norgaard
Catherine A. Norgaard

SUBSCRIBED AND SWORN to before me this 27th day of January, 2009.

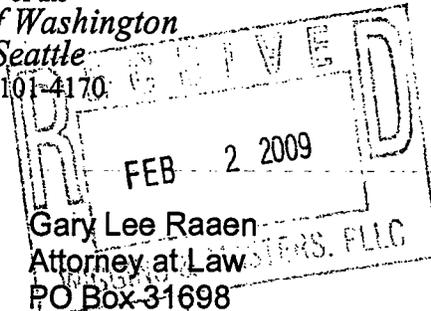


Claire Eileen Uhler
Claire Eileen Uhler (Print Name)
Notary Public in and for the State of
Washington, residing at
Bathell
My Commission Expires:
11/26/2012

APP B

The Court of Appeals
of the
State of Washington
Seattle

98101-4170



DIVISION I
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RICHARD D. JOHNSON,
Court Administrator/Clerk

January 30, 2009

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CASE #: 61912-8-I

Le & Associates, P.S., Res. v. Roberto Diaz-Luong and Lan Thi Nguyen, Apprs.

Counsel:

The following notation ruling by Commissioner William Ellis of the Court was entered on January 30, 20089, regarding appellant's motion of Roberto Diaz-Luong for leave to withdraw as a party to the pending appeal and for change of caption:

Roberto Diaz-Luong is permitted to withdraw his appeal. Although the case caption should continue to list his name, he will not be listed as an appellant.

Sincerely,

A handwritten signature in black ink, appearing to be "R.D. Johnson".

Richard D. Johnson
Court Administrator/Clerk

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APP C

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

LE & ASSOCIATES, P.S., a)
professional service Corporation,)
)
Plaintiff,)
)
v.)
)
ROBERTO DIAZ-LUONG and LAN)
THI NGUYEN,)
)
Defendants.)
_____)

No. 07-2-39131-2 SEA
REQUEST FOR LIVE
TESTIMONY

The Court has asked that the parties specify the names of witnesses whose testimony should be heard in court rather than taken by declaration. With the exception of Joan Shepard and Son Nguyen, the following individuals have had declarations prepared by Plaintiff. It is believed that they speak English as a second language and that the declarations may not accurately reflect their testimony. Defendants object to having that testimony received by declaration and request, that if the Court is to consider their testimony, that it be received in open court. It would have used all of Defendants' deposition opportunities to have taken the depositions of all these individuals. Defendants

APP D

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reserve the right to add to this list after viewing the list of witnesses proposed
by Plaintiff.

1. Chinh Pham
2. Abdisamad Jama
3. Elizabeth Do
4. Peter Spairring
5. Joan Shepherd
6. Safiyo Hashi
7. Son Nguyen
8. Lilia Hernandez
9. Peter Spairring

Dated this 14th day of May, 2008.

ROBERT J. WAYNE, P.S.


ROBERT J. WAYNE, Attorney
For Defendants
WSBA # 6131

APP D

RCW 7.21.010

Definitions.

The definitions in this section apply throughout this chapter:

(1) "Contempt of court" means intentional:

(a) Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceedings;

(b) Disobedience of any lawful judgment, decree, order, or process of the court;

(c) Refusal as a witness to appear, be sworn, or, without lawful authority, to answer a question; or

(d) Refusal, without lawful authority, to produce a record, document, or other object.

(2) "Punitive sanction" means a sanction imposed to punish a past contempt of court for the purpose of upholding the authority of the court.

(3) "Remedial sanction" means a sanction imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform.

[1989 c 373 § 1.]

RCW 7.21.020

Sanctions — Who may impose.

A judge or commissioner of the supreme court, the court of appeals, or the superior court, a judge of a court of limited jurisdiction, and a commissioner of a court of limited jurisdiction may impose a sanction for contempt of court under this chapter.

[1998 c 3 § 1; 1989 c 373 § 2.]

RCW 7.21.030

Remedial sanctions — Payment for losses.

(1) The court may initiate a proceeding to impose a remedial sanction on its own motion or on the motion of a person aggrieved by a contempt of court in the proceeding to which the contempt is related. Except as provided in RCW 7.21.050, the court, after notice and hearing, may impose a remedial sanction authorized by this chapter.

(2) If the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform, the court may find the person in contempt of court and impose one or more of the following remedial sanctions:

(a) Imprisonment if the contempt of court is of a type defined in RCW 7.21.010(1) (b) through (d). The imprisonment may extend only so long as it serves a coercive purpose.

(b) A forfeiture not to exceed two thousand dollars for each day the contempt of court continues.

(c) An order designed to ensure compliance with a prior order of the court.

(d) Any other remedial sanction other than the sanctions specified in (a) through (c) of this subsection if the court expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.

(e) In cases under chapters 13.32A, 13.34, and 28A.225 RCW, commitment to juvenile detention for a period of time not to exceed seven days. This sanction may be imposed in addition to, or as an alternative to, any other remedial sanction authorized by this chapter. This remedy is specifically determined to be a remedial sanction.

(3) The court may, in addition to the remedial sanctions set forth in subsection (2) of this section, order a person found in contempt of court to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney's fees.

(4) If the court finds that a person under the age of eighteen years has willfully disobeyed the terms of an order issued under chapter 10.14 RCW, the court may find the person in contempt of court and may, as a sole sanction for such contempt, commit the person to juvenile detention for a period of time not to exceed seven days.

[2001 c 260 § 6; 1998 c 296 § 36; 1989 c 373 § 3.]