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The slip opinion that begins on the next page is for a published opinion, and it has since been revised for publication in the printed official reports. The official text of the court's opinion is found in the advance sheets and the bound volumes of the official reports. Also, an electronic version (intended to mirror the language found in the official reports) of the revised opinion can be found, free of charge, at this website: https://www.lexisnexis.com/clients/wareports.

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FILED
MAY 27, 2025
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STEPHANIE TAYLOR, as Personal Representative of the ESTATE OF BERT S. STENNES; and ROBERTO CASTRO, as Personal Representative of the Estate of EVELYN L. STENNES, Appellants, v. DAVID EBENGER, individually, and DAVID EBENGER and "JOHN or JANE DOE EBENGER," a martial community, and, RUSSELL SPEIDEL, individually and RUSSELL SPEIDEL and JEAN SPEIDEL, a martial community, and, DAVID BENTSEN, individually, and DAVID BENTSEN and LINDSAY BENTSEN, a martial community, and, SPEIDEL BENTSEN, LLP, a Washington Limited Liability Partnership,	)	No. 39262-7-III OPINION PUBLISHED IN PART

)
and,)
ALEXANDER THOMASON and)
ALEXANDER THOMAS and KATY)
THOMASON, a martial community;)
VALOR LAW GROUP, P.S. (formerly)
known as Thomason Justice P.S.), a)
Washington Professional Services)
Corporation; and ALEX GROUP, LLC, a)
Washington Limited Liability)
Corporation; and PJA HOLDINGS, INC.,)
a Washington corporation;)
)
and,)
CODY GUNN, individually; CODY)
GUNN, as Personal Representative of the)
Estate of Bert S. Stennes; CODY GUNN)
and AMBER GUNN, a martial)
community; and GUNN CAPITAL)
MANAGEMENT, LLC, a Washington)
Limited Liability Corporation,)
)
and,)
GARLAND CAPITAL MANAGEMENT,)
INC., a Washington corporation.)
)
Respondents.)

COONEY, J. — The Estate of Bert Stennes (Estate) filed a lawsuit against attorney Alexander Thomason alleging legal malpractice, negligence, breach of fiduciary duty, undue influence, fraud, unjust enrichment, and constructive fraud. Mr. Thomason had represented and advised Bert Stennes (Bert) and Bert's son, Michael Stennes (Mike),[1] on

[1] Bert Stennes and Mike Stennes are referred to by their first names throughout this opinion for clarity. No disrespect is intended.

various legal matters. Bert and Mr. Thomason also engaged in business transactions prior to Bert's death. The Estate alleged Mr. Thomason and Bert had an attorney-client relationship prior to and during the time of their business relationship.

During the pendency of the lawsuit, Mr. Thomason brought a motion for in camera review (motion) of Mike's confidential client file. Mr. Thomason alleged the contents of Mike's client file would disprove that he represented Bert in the years prior to their business relationship. Mike appeared before the court to oppose the motion, asserting the materials Mr. Thomason sought to disclose were privileged and to contest personal jurisdiction. Mike requested CR 11 sanctions against Mr. Thomason or an award of attorney fees on equitable grounds. The court denied the motion on jurisdictional grounds and declined to award Mike attorney fees.

Mike appeals, arguing the court erred in denying his request for attorney fees. Mr. Thomason cross appeals, arguing denial of his motion based on a lack of personal jurisdiction was error. He also urges us to reach the merits of the motion.

In the published portion of this opinion, we reverse the trial court's ruling that it lacked personal jurisdiction over Mike and hold that Mr. Thomason is precluded from disclosing Mike's confidential client file under the Rule of Professional Conduct (RPCs). We affirm the trial court's order on attorney fees in the unpublished section.

BACKGROUND

Mr. Thomason represented Bert and Mike on various matters prior to Bert's death in August 2017. Mr. Thomason represented Mike in a dissolution of marriage proceeding between 2012 and 2016.[2] Bert paid the attorney fees billed for Mike's divorce even though many invoices were addressed to Mike.

In 2013, Mr. Thomason and Bert engaged in a transaction wherein Bert loaned Mr. Thomason approximately $400,000 to finance Mr. Thomason's purchase of real property in Pateros, Washington. Bert forgave the loan a few years later. Though Mr. Thomason did legal work for Bert, the parties dispute whether Mr. Thomason represented him on or before the 2013 business transactions.

Litigation ensued between Mike and the Estate in 2019.[3] Bert's other son, Eric Stennes (Eric), had motioned the court for an order directing discovery and requiring the personal representative of the Estate, Daniel Appel, a close personal friend of Mr. Thomason, to disclose files related to Bert's business dealings during the years leading up

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[2] Mike and his spouse reconciled and remain married.

[3] The facts in this subsection are primarily gleaned from this court's opinion in *Matter of the Estate of Stennes*, No. 37555-2-III, 2021 WL 4549145 (Oct. 5, 2021) (unpublished), https://www.courts.wa.gov/opinions/pdf/375552_unp.pdf; *Castro v. Thomason,* No. 39847-1-III, 2024 WL 4235192 (Sept. 19, 2024) (unpublished), https://www.courts.wa.gov/opinions/pdf/398471_unp.pdf; *Castro v. Thomason,* No. 37995-7-III, 2021 WL 5467390 (Nov. 23, 2021) (unpublished), https://www.courts.wa.gov/opinions/pdf/379957_unp.pdf; and *Thomason v. Stennes*, No. 37037-2-III, 2021 WL 321225 (Feb. 1, 2021) (unpublished), https://www.courts.wa.gov/opinions/pdf/370372_unp.pdf.

to his death. The court granted Eric's motion and ordered Mr. Appel not to disclose the documents to Mr. Thomason.

Mike later petitioned to remove Mr. Appel as the personal representative of the Estate. Mike's motion was based on his assertion that Mr. Appel was failing to investigate and pursue potential claims the Estate had against Mr. Thomason for taking financial advantage of Bert. Mike's petition "detailed factual allegations underlying claims of undue influence, abuse of a vulnerable adult, and violation of attorney-client privilege." Clerk's Papers (CP) at 554.

Even though Mr. Thomason was not a party to the litigation, he filed a response to Mike's motion to remove Mr. Appel as the personal representative of the Estate. In it, Mr. Thomason sought relief from the court's discovery order that precluded Mr. Appel from disclosing the files of Bert's attorneys to him. Mr. Thomason's position was that Mike's allegations against him were to "distract and conceal" Mike's own wrongdoing with respect to his father's business transactions. CP at 553. To support his position, Mr. Thomason filed a declaration and attached over 600 pages of documents from Mike's client file from his abandoned dissolution of marriage proceeding, including confidential receipts, bank records, and check images. Mike moved for an order sealing the documents related to Mr. Thomason's prior representation of him and for an award of attorney fees. The court granted Mike's motion to seal the documents and awarded him $41,211.50 in attorney fees.

Mr. Thomason appealed to this court, arguing the superior court erred in awarding Mike attorney fees. Mr. Thomason claimed RPC 1.6(b)(5) permitted him to disclose Mike's attorney-client confidences to defend himself against Mike's accusations. We disagreed and affirmed the award of attorney fees. We reasoned that "the protected documents submitted by [Mr. Thomason] did not establish a claim or defense between [Mr. Thomason] and Mike. Rather, the protected documents helped establish a claim by [the Estate] against Mike." *Stennes*, No. 37555-2-III, slip op. at 20; CP at 566. The opinion recognized "Bert's Will reflects that [Mr. Thomason] and Bert had other business dealings that, perhaps, need to be investigated." *Id.*

In 2020, Bert's daughter, Stephanie Taylor, the successor personal representative of the Estate, filed a lawsuit against Mr. Thomason and others. The complaint alleged Mr. Thomason did legal work for Bert beginning in 2013, and that during the period he was Bert's attorney, namely 2013, he entered into business dealings with Bert. The complaint contained numerous causes of action against Mr. Thomason, including legal malpractice, negligence, breach of fiduciary duty, undue influence, fraud, unjust enrichment, and constructive fraud. During the pendency of the 2020 litigation, Mike and other beneficiaries of the Estate entered into a joint prosecution agreement with the Estate.[4]

[4] The actual agreement is not part of the record. However, the parties do not dispute the existence of the agreement.

In 2022, Mr. Thomason filed a "Motion for Leave to Submit Documents for an *In Camera* Review For Determination that Certain Documents and Information Can Be Disclosed Under RPC 1.6(b)(5)." CP at 11-31. In the motion, Mr. Thomason sought "an Order allowing *in camera* inspection of communications and other documents related to Thomason's representation of Bert Stennes and non-party Mike Stennes" and "an Order allowing Thomason to reveal these documents under the self-defense exception" of RPC 1.6(b)(5). CP at 12.

Mr. Thomason desired to reveal the "receipts, bank records, and check images" that were attached to his declaration from the earlier litigation, as well as "contextualize the invoices sent to 'Mr. Mike Stennes' in 2012 and 2013." CP at 20 (quoting *Stennes*, No. 37555-2-III, slip op at 3). Mr. Thomason also represented that he wanted to submit information and documents to the court demonstrating, "(1) Thomason started representing Bert in 2014; (2) Bert had sufficient mental capacity and was not vulnerable in the years before his death, and (3) other relevant issues that cannot be described in this Motion without potentially revealing the nature of the information." CP at 24.

Mr. Thomason's attorneys e-mailed Mike a copy of the motion "for your copies" on April 28, 2022. CP at 673. The motion was scheduled for a hearing on May 5, 2022. Mike retained counsel for the limited purpose of responding to the motion. Thereafter, Mike's counsel requested Mr. Thomason disclose the documents he intended to reveal to the court so that she could "respond knowledgeably to the Motion." CP at 258. Mr.

Thomason refused to disclose the documents unless "the Court allows us to submit them *in camera*."[5] CP at 696.

Mike then filed an objection to Mr. Thomason's motion, asserting the court lacked personal jurisdiction over him thus precluding it from rendering a decision regarding disclosure of his confidential client file. Mike also argued the RPCs did not authorize the disclosure of his confidential information because the Estate brought the claims against Mr. Thomason, and Mike was not a party to that action. Mike further requested CR 11 sanctions against Mr. Thomason as well as equitable fees because:

> For the second time, [Mike] has had to protect himself against his own former attorney even though, pursuant to RPC 1.6(c), RPC 1.6's Comment 15, and RPC 19, Thomason himself should be protecting his client's confidences. And even though this Court already specifically pointed out that very obligation to Thomason in its 12/16/19 Order, Conclusion of Law #7.

CP at 543.

A hearing on the motion was originally scheduled for May 5, 2022, but was continued to August 2, 2022, due to the unavailability of Mike's attorney. Ultimately, the court ruled it did not have personal jurisdiction over Mike to "cause him to give up his right to attorney-client privilege." Rep. of Proc. (RP) at 31. Thus, it denied Mr. Thomason's motion. The trial court found Mr. Thomason's motion was not frivolous and

[5] The implication of the in camera motion, and Mr. Thomason's counsel's responses to Mike and his counsel, is that Mr. Thomason's attorneys have already reviewed Mike's privileged client file.

denied Mike's request for an award of attorney fees.

In its written order, the court entered a finding stating, "that it lacks jurisdiction over Mike Stennes and therefore cannot decide the merits of the Thomason Defendants' Motion for Leave to Submit Documents for an In Camera Review. Accordingly, the Motion is DENIED." CP at 1186 (emphasis in original). The court ordered, "Mike Stennes' motion for attorneys' fees and sanctions is DENIED." *Id*.

We granted Mike discretionary review on the issue of attorney fees, and Mr. Thomason cross appealed denial of his motion for an in camera hearing.

ANALYSIS

WHETHER THE COURT ERRED WHEN IT DENIED MR. THOMASON'S MOTION ON JURISDICTIONAL GROUNDS

Mr. Thomason argues on cross appeal that the trial court erred in denying his motion on jurisdictional grounds. He further urges us to reach the merits of his motion if we determine the trial court's jurisdictional ruling is incorrect.

We conclude the trial court had jurisdiction to decide issues related to the attorney-client privilege between Mr. Thomason and Mike and that, under the facts of this case, RPC 1.6 does not provide an exception to RPC 1.9's general prohibition against disclosing confidential client information.

When the underlying facts relevant to jurisdiction are undisputed, we review the trial court's decision on personal jurisdiction de novo. *Pruczinski v. Ashby*, 185 Wn.2d

492, 499, 374 P.3d 102 (2016). Similarly, we review a challenge to the court's authority de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

A court's decision on whether to conduct an in camera hearing to determine the scope of discovery of privileged records is reviewed for an abuse of discretion. *State v. Diemel*, 81 Wn. App. 464, 467, 914 P.2d 779 (1996). "A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons." *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard." *Id.*

Personal Jurisdiction

Mr. Thomason advances a variety of arguments in support of his contention that the trial court had personal jurisdiction over Mike. Primarily, Mr. Thomason argues a client has standing in any proceeding to assert their privilege, and the court therefore has the authority to decide whether or not privilege applies. Mr. Thomason further argues that Mike voluntarily consented to jurisdiction by appearing before the court to assert his privilege. Mike responds that the trial court did not have personal jurisdiction over him to decide whether his confidential client file was subject to disclosure because he is a nonparty and was never properly served or subpoenaed. We hold the superior court had jurisdiction to decide whether Mike's attorney-client privilege applied.

Personal jurisdiction refers to the court's power over a person or defendant. *Downing v. Losvar*, 21 Wn. App. 2d 635, 653, 507 P.3d 894 (2022). A court typically does not have personal jurisdiction over an individual or entity not designated as a party or made a party by service of process. *Martin v. Wilks*, 490 U.S. 755, 761, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989); *City of Seattle v. Fontanilla*, 128 Wn.2d 492, 502, 909 P.2d 1294 (1996); *State v. G.A.H.*, 133 Wn. App. 567, 576, 137 P.3d 66 (2006). However, an individual can consent to personal jurisdiction by taking an action that fairly invites the court to resolve the dispute between them and another party. *Worden v. Smith*, 178 Wn. App. 309, 328, 314 P.3d 1125 (2013). In other words, an individual waives their claim of lack of jurisdiction by "consent[ing], expressly or impliedly, to the court's exercising jurisdiction." *In re Marriage of Steele*, 90 Wn. App. 992, 997-98, 957 P.2d 247 (1998). If a court lacks personal jurisdiction, any order entered against that individual is void. *G.A.H.*, 133 Wn. App. at 576.

Here, it is undisputed that Mike was never served with the motion, was not issued a subpoena, and was not added as a party to the litigation. Instead, Mr. Thomason simply e-mailed the motion to Mike a few days prior to the hearing "for [his] copies." CP at 673. Further, Mike argued from the onset that the court could not exercise personal jurisdiction over him, contrary to Mr. Thomason's argument that Mike consented to the court's jurisdiction by appearing. Mike appeared before the court to both declare that the trial court lacked personal jurisdiction over him and to assert that the information Mr.

Thomason sought to disclose was privileged. Mike never engaged in any conduct indicating he consented to the court's jurisdiction.

Notwithstanding, we hold the trial court need not have personal jurisdiction over Mike in order for Mike to assert his attorney-client privilege or for the court to decide whether disclosure of his client file was permissible. Although Washington State is shy of any case law directly on this point, we find *Mylan Laboratories v. Soon-Shiong* persuasive. 76 Cal. App. 4th 71, 90 Cal. Rptr. 2d 111 (1999).

In *Mylan*, there was a dispute between Mylan Laboratories and its directors. *Id.* at 75. Mylan Laboratories owned stock in another company, VivoRx, Inc. Mylan Laboratories became concerned about allegations of the misappropriation of funds and assets of VivoRx by one of Mylan Laboratories' directors, Patrick Soon-Shiong. *Id.* Mylan Laboratories and VivoRx later entered into an agreement to deal with the allegations of misconduct and to ensure similar misconduct did not reoccur. *Id.* A lawsuit was subsequently filed by VivoRx against Patrick Soon-Shiong, but it was voluntarily dismissed. *Id.* Mylan Laboratories disagreed with the dismissal, resulting in a deterioration in the relationship between the two companies. *Id.* Mylan then filed suit against Terrence and Gregory Soon-Shiong, [6] then directors of Mylan, alleging a breach of their fiduciary duties. *Id.*

[6] Terrence, Gregory, and Patrick are all brothers.

Prior to the filing of the lawsuit, an employee of Mylan Laboratories found a memorandum authored by an attorney who represented VivoRx at the time the memo was written. *Id.* at 76. Mylan Laboratories claimed the memo was evidence of fraud or crime, and that it also involved personal advice of a business nature for Patrick Soon-Shiong. *Id.* The memo was attached as an exhibit to Mylan Laboratories' complaint. *Id.* Patrick Soon-Shiong was not named as a defendant in the lawsuit. Patrick Soon-Shiong then filed a motion to intervene as a party in order to "gain proper standing to protect the privileged [memo] from being utilized in this particular action." *Id* at 77. The superior court denied his motion. *Id.*

On appeal, Patrick Soon-Shiong argued the court erred in denying his motion to intervene. *Id.* at 78. The Court of Appeals disagreed with Patrick Soon-Shiong:

> [T]he holder of the attorney-client privilege has standing to assert the privilege in a proceeding to prevent disclosure simply by virtue of the fact that he or she is the holder of the privilege, and that there is no need to intervene to become an actual party to the lawsuit in order to be able to assert the privilege.

Id. at 80. In reaching its decision, the court relied on California Evidence Code section 594 that defines the attorney-client privilege, the holder of the privilege, and who can claim the privilege. *Id.* It states, in relevant part, "the client, *whether or not a party*, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer." CAL. EVID. CODE § 954 (emphasis added). The court reasoned the "Evidence Code did not anticipate that the client would have to

intervene to become a party as a prerequisite to asserting privilege." *Mylan*, 76 Cal. App. at 80. A more recent California case, *League of California Cities v. Superior Court*, reached the same conclusion. 241 Cal. App. 4th 976, 985, 194 Cal. Rptr. 3d 444 (2015) ("[T]he holder of the attorney-client privilege has standing to assert the privilege in a proceeding to prevent disclosure and there is no need to intervene to become an actual party to the lawsuit in order to be able to assert the privilege.").

Mike argues we should not rely on *Mylan* because it based its decision on California Evidence Code section 954 that overtly states a client need not be a party to assert privilege. CAL. EVID. CODE § 954. Notwithstanding Mike's supposition, we have earlier applied Washington authority to related circumstances. In *Olson v. Haas*, we analyzed whether the attorney-client privilege could be asserted by an attorney where the client was not a party to the proceedings but their attorney was a party. 43 Wn. App. 484, 486, 718 P.2d 1 (1986). There, we concluded that privilege could be asserted by the attorney, holding that "[t]he rule uniformly applied is that the privilege is personal to the client, however, the client's lack of standing as a party is not a bar to assertion of the attorney/client privilege by his attorney." *Id.* at 487.

In *Olson*, we cited *McCormick on Evidence* § 92 (Edward W. Cleary ed., 3rd ed. 1984) which states, "it is clear that the client may assert the [attorney-client] privilege even though he is not a party to the cause wherein the privileged testimony is sought to

be elicited." Further, 5D KARL B. TEGLAND, WASHINGTON PRACTICE: COURTROOM HANDBOOK ON WASHINGTON EVIDENCE, ch. 5, pt. 5 (2024-2025 ed.) provides:

> The [attorney-client] privilege may be asserted even though neither the attorney nor the client is a party to the litigation in which the communication is offered as evidence. Thus, for example the privilege may be asserted when . . . privileged communications are sought by means of discovery in an action involving other parties.

Collectively, we find these cases and sources persuasive and hold that Mike need not be added as a party to the litigation to assert his attorney-client privilege.

Here, Mike was not a necessary party to the Estate's action. Indeed, a necessary party under CR 19(a) is one who "'has sufficient interest in the litigation that the judgment cannot be determined without affecting that interest or leaving it unresolved.'" *Henry v. Town of Oakville*, 30 Wn. App. 240, 245, 633 P.2d 892 (1981) (quoting *Harvey v. Bd. of County Comm'rs of San Juan County*, 90 Wn.2d 473, 474, 584 P.2d 391 (1978)). Mike was given notice of Mr. Thomason's motion and appeared before the court to assert his attorney-client privilege. As the holder of the privilege, Mike was not required to intervene or be properly served or subpoenaed to assert the privilege. The trial court had jurisdiction to decide whether Mike's attorney-client privilege applied.

RPC 1.6

Despite the fact that the trial court did not decide Mr. Thomason's motion, he urges us to reach the merits. He argues RPC 1.6 authorizes him to disclose Mike's client

confidences to defend himself against Mike's allegation that he represented Bert in 2012. We agree to proceed to the merits because the issue presented is a question of law, is likely to reoccur on remand, and the parties have adequately briefed the issue. Under the facts before us, RPC 1.6 does not provide an exception to RPC 1.9's general prohibition against revealing client confidences.

"In the interest of judicial economy, an appellate court may consider an issue that is likely to occur following remand if the parties have briefed and argued the issue in detail." *Loun v. U.S. Bank Nat'l Ass'n*, 26 Wn. App. 2d 228, 239, 525 P.3d 1280 (2023) (quoting *State ex rel. Haskell v. Spokane County Dist. Ct.*, 198 Wn.2d 1, 16, 491 P.3d 119 (2021)).

We interpret court rules in the same fashion as statutes, approaching the rules as though they have been drafted by the legislature and applying the principles of statutory construction. *Plein v. USAA Cas. Ins. Co.*, 195 Wn.2d 677, 685, 463 P.3d 728 (2020). Our ultimate objective is to ascertain and carry out the drafter's intent. *Wrigley v. Dep't of Soc. & Health Servs.*, 195 Wn.2d 65, 71, 455 P.3d 1138 (2020). We construe the rule as a whole, giving effect to all of the language used and interpret provisions in relation to one another. Only where the meaning of a rule is ambiguous may the court resort to the rule's construction, history, and relevant case law to discern the drafter's intent. *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010).

In part, RPC 1.9 provides:

> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter *shall not thereafter*:
>
> (1) *use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require* with respect to a client, or when the information has become generally known; or
>
> (2) *reveal information relating to the representation except as these Rules would permit or require* with respect to a client.

(Emphasis added.) Though RPC 1.9 generally prohibits a lawyer from disclosing client confidences, RPC 1.6 allows an attorney to disclose client confidences in certain situations. RPC l.6 states, in relevant part:

> (b) A lawyer to the extent the lawyer reasonably believes necessary:
>
> . . . .
>
> (5) *may reveal information relating to the representation of a client to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client*, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, *or to respond to allegations in any proceeding concerning the lawyer's representation of the client*. . . .

(Emphasis added.)

Mr. Thomason argues he is permitted to disclose Mike's confidential, privileged client file in *defense* of Mike's *claim* that he was representing Bert in 2012 and 2013. Mr. Thomason argues he may disclose Mike's client confidences under RPC 1.6(b)(5) because he is in *controversy* with Mike and because the proceeding concerns his representation of Mike. We disagree.

Mr. Thomason's argument focuses on his defense to Mike's *claim* against him rather than a defense to the *controversy* between he and the Estate. Under the unambiguous terms of the rule, an exception to the general prohibition against revealing client confidences arises in a controversy between the attorney and the client. A controversy between the client and the attorney must exist before the attorney can disclose information to establish a defense to a claim by the client. Here, there is a controversy between the Estate and Mr. Thomason. However, Mike is merely a witness for the Estate who has submitted declarations in support of the Estate's position regarding Mr. Thomason's representation of Bert. In his briefing, Mr. Thomason recognized, "Mike is providing testimony in that lawsuit against Mr. Thomason." Resp't Reply Br. at 30.

Mr. Thomason directs us to the joint prosecution agreement as evidence that he and Mike are in controversy within the meaning of RPC 1.6(b). We disagree. Again, Mr. Thomason seems to recognize the joint prosecution agreement is not "a skeleton key, granting access to privileged material of all its signatories" and that by signing it, Mike is going to provide "key testimony for [Bert's Estate], and is entitled to share in any proceeds." Resp't's Reply Br. at 31. The joint prosecution agreement does not ascend Mike beyond his status as a witness for the Estate.

Mike and Mr. Thomason are not in controversy within the meaning of RPC 1.6(b)(5).

Mr. Thomason next argues disclosure under RPC 1.6(b)(5)'s "to respond to allegations in any proceeding concerning the lawyer's representation of the client" exception applies. We disagree.

The allegations in the Estate's complaint do not concern Mr. Thomason's representation of *Mike* but instead concern his representation of *Bert.* The Estate alleges Mr. Thomason represented Bert in 2012 and 2013, prior to and while the two engaged in substantial business transactions with one another. Mr. Thomason alleges he only represented Mike during this time, and he attempts to use his defense (that he only represented Mike) to satisfy the portion of RPC 1.6(b)(5) requiring the proceeding concern "the lawyer's representation of the client." However, no one is disputing that Mr. Thomason represented Mike during 2012 and 2013; the only dispute is whether he represented Bert during this time period. Thus, the allegations in this proceeding concern Mr. Thomason's representation of *Bert.* RPC 1.6(b)(5) does not allow Mr. Thomason to reveal the contents of Mike's client file.

Finally, as Mike points out, this is Mr. Thomason's second attempt to disclose Mike's confidential client file. *See Stennes*, No. 37555-2-III, slip op. at 1-22. Mr. Thomason argues *Stennes* does not control the outcome of this case. To that point, we agree.

In *Stennes*, this court found Mr. Thomason's disclosure of "over 600 pages from [Mike's] divorce file" violated the attorney-client privilege. *Id.* at 20. We found Mr.

Thomason was permitted to defend himself, under RPC 1.6(b), against Mike's "serious allegations" outlined in his petition to remove the personal representative of Bert's Estate. *Id.* However, we also found Mr. Thomason's disclosure did not establish a claim or defense between he and Mike but instead was an attempt to establish a claim by the Estate against Mike. *Id.* Though we reasoned Mr. Thomason was entitled to defend himself against Mike's "serious allegations," there is a key distinction between that case and the matter now before us. *Id.* In *Stennes*, it was Mike who brought the petition to remove the personal representative of the Estate, and it was that petition that contained the allegations against Mr. Thomason. *Id.* at 7. Here, the Estate is bringing the claims against Mr. Thomason. Mike is simply a witness for the Estate.

RPC 1.9 prohibits Mr. Thomason from revealing Mike's confidential client communications. Under the facts before us, RPC 1.6(b) does not provide an exception to RPC 1.9's general prohibition. A controversy does not exist between Mr. Thomason and Mike nor do the allegations in these proceedings concern the representation of Mike.

The superior court had jurisdiction to rule on whether Mike's confidential client file could be disclosed. Based on the facts before us, RPC 1.6(b) does not allow disclosure of Mike's confidential client file. We reverse the trial court's jurisdictional ruling and remand for further proceedings consistent with this opinion.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder,

having no precedential value, shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

WHETHER THE TRIAL COURT ERRED WHEN IT DENIED MIKE'S REQUEST FOR FEES UNDER CR 11

Mike argues the court erred when it declined to award him CR 11 sanctions for Mr. Thomason bringing the motion for an in camera hearing. We disagree.

A trial court's decision on whether to award CR 11 sanctions is reviewed for an abuse of discretion. *Eugster v. City of Spokane*, 110 Wn. App. 212, 231, 39 P.3d 380 (2002). Even if a court finds that a party violated CR 11, it still maintains the discretion on whether to impose sanctions. *Id.*

"The purpose of [CR 11] is to deter baseless filings and curb abuses of the judicial system." *Skimming v. Boxer*, 119 Wn. App. 748, 754, 82 P.3d 707 (2004). Washington courts have consistently held that a baseless filing is one that is not well grounded in fact, not warranted by existing law, or is not a good faith argument for changing existing law. *MacDonald v. Korum Ford*, 80 Wn. App. 877, 883-84, 912 P.2d 1052 (1996). A motion is frivolous if there are "no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility" of success. *In re Recall Charges Against Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741 (2003).

CR 11 requires an attorney to sign all pleadings, certifying the attorney read the pleadings, and that the pleading meets the following requirements to the best of the attorney's knowledge:

> (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

CR 11(a), which further provides that:

> [i]f a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

"A trial court may not impose CR 11 sanctions for a baseless filing 'unless it also finds that the attorney who signed and filed the [pleading, motion, or legal memorandum] failed to conduct a *reasonable inquiry* into the factual and legal basis of the claims.'" *MacDonald*, 80 Wn. App. at 884 (emphasis in original) (quoting *Bryant v. Joseph Tree Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992)). In imposing sanctions, "[t]he court must make explicit findings as to which pleadings violated CR 11 and as to how such pleadings constituted a violation of CR 11. The [trial] court must specify the sanctionable conduct in its order." *N. Coast Elec. Co. v. Selig*, 136 Wn. App. 636, 649, 151 P.3d 211 (2007). "Without relevant findings" regarding the attorney's prefiling inquiry, "there can be no objective evaluation of the reasonableness of the attorney's prefiling conduct."

Doe v. Spokane & Inland Empire Blood Bank, 55 Wn. App. 106, 111-12, 780 P.2d 853 (1989).

Mike argues Mr. Thomason violated CR 11 because the motion was frivolous, had no legal or factual basis, and was brought for an improper purpose. Br. of Appellant at 26. Even if we were to determine the motion violated CR 11, the court still had the discretion to decline to award sanctions. Because the trial court's decision was not based on untenable grounds or reasons, we decline to disturb its decision.

The court stated in its oral ruling:

> The Court is not going to grant attorneys' fees or any other sanctions because I think . . . [u]nlike the last time, apparently, when the documents were just simply filed with the Court and then it was determined that they shouldn't have been, the only mechanism available really to Mr. Thomason is to bring a motion like this and to ask the Court permission beforehand, and that's what they've done.
>
> And so I don't think it's appropriate. I don't think this motion was frivolous at all. I think, again, there's a lack of case law on exactly this fact pattern, so if they decided to take it up to the Court of Appeals, I think that would be completely fair.

RP at 34-35. The court did not make specific findings as to Mike's attorney fees request. Instead, the court simply stated in its order, "Mike Stennes' motion for attorneys' fees and sanctions is DENIED." CP at 1184.

Mike argues the motion was frivolous, meritless, and had no legal or factual basis because the trial court did not have jurisdiction over him. However, as discussed above, personal jurisdiction is not necessary for an individual to assert their attorney-client

privilege. Further, the court recognized that there was little to no precedent on the issues presented in the motion. Mr. Thomason's motion was therefore not frivolous.

Mike next argues the motion violated CR 11 because Mr. Thomason misrepresented the RPCs to the trial court. In Mr. Thomason's motion, he wrote:

> [RPC 1.6(b)(5)] allows attorneys to reveal confidential client information to defend against a claim in "a controversy between the lawyer and the client," "in any proceeding concerning the lawyer's representation of the client …" or "*in a controversy between a third party and the lawyer*." (emphasis added). This is an exception to RPC 1.6 that requires attorneys to hold information gathered from clients in confidence.

CP at 13 (emphasis in original). The emphasized portion of the statement, though in quotation marks, does not appear in RPC 1.6(b)(5). However, Mr. Thomason noted in his reply brief that the quotation marks around the emphasized statement were "inadvertently added." CP at 439. Mr. Thomason acknowledged and corrected the mistake, and there was therefore no violation of CR 11 for his misstatement.

Mike also contends Mr. Thomason violated CR 11 because he had no valid factual basis to demand disclosure of Mike's client confidences. He argues Mr. Thomason did not need to disclose Mike's client file in order to prove he did or did not represent Bert during the relevant time frame. Though we agree disclosure of Mike's client file is unnecessary and impermissible under the rules, Mr. Thomason's position is not completely baseless. Mr. Thomason made a sensible, yet unpersuasive, argument for why disclosure of Mike's privileged material was necessary. Though we disagree, the motion was not without any valid factual basis.

Finally, Mike argues the motion was brought for an improper purpose: to harass and insinuate that it was Mike who contributed to the Estate's losses. He contends Mr. Thomason had no legitimate purpose for bringing the motion. However, as the trial court found, "the only mechanism available really to Mr. Thomason is to bring a motion like this and to ask the Court permission beforehand." RP at 34. Mr. Thomason's purpose in bringing the motion was to defend himself against the Estate's claims. Though we hold that he is not permitted to disclose Mike's client file under these circumstances, we do not agree the motion was brought for an improper purpose. Further, even if the motion was brought for an improper purpose in violation of CR 11, the court retained discretion to deny sanctions.

The court did not abuse its discretion in denying Mike's request for CR 11 sanctions. The trial court is afforded wide latitude when it comes to its decision to grant or deny attorney fees or sanctions. Here, the court's decision was based on sound reasoning.

WHETHER THE TRIAL COURT ERRED WHEN IT DENIED MIKE'S REQUEST FOR FEES ON EQUITABLE GROUNDS

Mike next argues the court erred when it denied his request for attorney fees on equitable grounds. We disagree.

We apply a two-part standard of review to the trial court's decision to award or deny equitable attorney fees. *Gander v. Yeager*, 167 Wn. App. 638, 647, 282 P.3d 1100 (2012). This court reviews "de novo whether there is a legal basis for awarding attorney

fees . . . in equity" and applies the abuse of discretion standard of review to a trial court's "discretionary decision to award or deny attorney fees and the reasonableness of any attorney fee award." *Id.*

Attorney fees can be awarded if "authorized by statute, contract, or recognized ground of equity." *Gray v. Pierce County Hous. Auth.*, 123 Wn. App. 744, 759, 97 P.3d 26 (2004). Washington recognizes three types of bad faith conduct warranting attorneys fees: "(1) prelitigation misconduct, (2) procedural bad faith, and (3) substantive bad faith." *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 927, 982 P.2d 131 (1999). At issue here are the latter two types of equitable bad faith.

Procedural bad faith refers to "vexatious conduct during the course of litigation," and is unrelated to the merits of the case. *Id.* at 928 (quoting Jane P. Miller, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C.L. REV. 613, 632-46 (1983)). Substantive bad faith occurs when "a party intentionally brings a frivolous claim, counterclaim, or defense with an improper motive." *Id.* at 929. Advancing a frivolous motion is not enough. *Id.* Instead, there must be evidence of an "'intentionally frivolous [claim] brought for the purpose of harassment.'" *Id.* (quoting *In re Pearsall-Stipek*, 136 Wn.2d 255, 259, 961 P.2d 343 (1998)).

Mike argues the motion was brought in bad faith. Specifically, he argues Mr. Thomason's conduct warranted equitable fees for procedural and substantive bad faith.

In his response to the motion, Mike requested that the court:

> [Order] Thomason and his attorneys to pay the reasonable fees and costs incurred by Mike Stennes. For the second time, Mike has had to protect himself against his own former attorney even though, pursuant to RPC 1.6(c), RPC 1.6's Comment 15, and RPC 19, Thomason himself should be protecting his client's confidences. And even though this Court already specifically pointed out that very obligation to Thomason in its 12/16/19 Order, Conclusion of Law #7.

CP at 542-43. Mike argues the court did not address his request for fees on equitable grounds. But the record reflects the court declined "to grant attorney's fees or any other sanctions." RP at 34; CP at 1184. Mike seems to posit the court's oral ruling and its order on the motion only related to his request for CR 11 sanctions. However, the court's oral and written rulings appear to encompass Mike's overarching request for attorney fees either under CR 11 or on equitable grounds. Thus, Mike's argument that the trial court did not consider his request for attorney fees on equitable grounds is unpersuasive.

Turning to the merits, Mike argues Mr. Thomason engaged in procedural bad faith when he claimed that Mike's client file needed to be disclosed, in part, for reasons "that cannot be described in this Motion without potentially revealing the nature of the information." CP at 24. He contends this argument deprived Mike and the Estate of the ability to counter his claim that in camera review was necessary. We disagree this conduct amounted to procedural bad faith. As Mr. Thomason points out, and the court recognized, the motion was an attempt to request permission from the court to reveal privileged documents without actually first revealing the documents. Thus, it was not improper for Mr. Thomason to decline to release the contents of the documents, or

disclose exactly what the documents would prove or disprove. Ultimately, because we held Mr. Thomason cannot disclose Mike's client file under the circumstances of this case, the lack of information regarding the contents of the documents in the motion means Mike's confidences were not unnecessarily revealed.

Mike further argues Mr. Thomason's conduct amounted to substantive bad faith because he brought the motion for the improper purpose of harassing Mike. We disagree. First, as discussed above, the motion was not frivolous. Substantive bad faith requires that the motion, claim, counterclaim, or defense be frivolous. There were debatable issues within the motion on which reasonable minds could differ. Further, even if the motion was frivolous, Mike must also establish the motion was brought in bad faith. Again, we concluded the motion was not brought in bad faith. Although this matter has been contentious and the parties differ vastly on the application of RPC 1.6, we are not persuaded the motion was brought in bad faith.

The court did not abuse its discretion when it declined to award equitable attorney fees against Mr. Thomason.

ATTORNEY FEES ON APPEAL

Pursuant to RAP 18.1(a), Mike requests his reasonable attorney fees and costs for bringing this appeal. He argues he is entitled to attorney fees as a matter of equity. He also alleges he is entitled to fees because Mr. Thomason's cross appeal is frivolous. We decline to award Mike his attorney fees on appeal.

First, as discussed above, Mr. Thomason did not act in procedural or substantive bad faith so Mike's argument that equitable fees are proper fails. Further, Mr. Thomason's cross appeal is not frivolous. Though we concluded that Mr. Thomason is not entitled to disclose Mike's client file under RPC 1.6, we agreed with him that the trial court did not need personal jurisdiction to rule on whether Mike's privileged documents could be disclosed. We decline to award Mike attorney fees on appeal.

CONCLUSION

We reverse the trial court's jurisdictional ruling, conclude RPC 1.6(b) does not permit the disclosure of Mike's confidential client file, affirm the trial court's order on attorney fees, and remand for further proceedings consistent with this opinion.

Cooney, J.

WE CONCUR:

Murphy, M.

Staab, A.C.J.