IN THE DISTRICT COURT OF APPEAL FOR FLORIDA'S FOURTH DISTRICT

CASE NO.: 4D22-1620

L.T. CASE NO.: FMCE 17-013097

QUIN HEARN,

Appellant,

v.

ANTHONY HEARN

Appellee.

_____/

APPELLEE'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

This appeal arises from the trial court's order disqualifying Lubell & Rosen from representing the Appellant, the Ex-Wife in a divorce modification proceeding. Lubell & Rosen was substituted for Appellant's former counsel on the eve of trial, triggering immediate objection by the Appellee, the Ex-Husband. Previously, Lubell & Rosen represented both Husband and Wife in effectuating the sale of the marital home pursuant to the terms of the Mediated Settlement Agreement incorporated into the Final Judgment for dissolution of marriage in this same litigation (the "Divorce Action"). In addition, the Ex-Husband previously worked at Lubell & Rosen, and the firm and Ex-Husband have a complicated set of collateral disputes involving confidential information. Lubell's appearance for the Ex-Wife came within weeks of these disputes reaching an impasse. The Circuit Court disqualified Lubell on two distinct grounds: i) because of its prior representation of the Ex-Husband (jointly with the Ex-Wife) in this same Divorce Action; and ii) because of generalized appearance of impropriety attributable to the firm's evident motivation to secure otherwise confidential financial records from the Ex-Husband for use in the collateral disputes. Record references

follow Appellant's Initial Brief using the Appendix filed with it and citing it as "A-___," coupled also with references to the hearing transcript cited as "Trans. at ___."

a. <u>Procedural History</u>

Appellant Ex-Wife and Appellee Ex-Husband resolved the first phase of their marital dissolution through a mediated settlement before third-party neutral, Joyce Julian, on March 9, 2018. A-075. The terms of their settlement, including the division of the marital estate and parenting plan are memorialized in a Mediated Settlement Agreement ("MSA") attached to a Final Order of Dissolution of Marriage entered in Case Number FMCE17013097 (the "Divorce Action") pending in the Seventeenth Circuit Court in and for Broward County, Florida, on April 16, 2018. A-075.

Appellant, Ex Wife, filed on March 13, 2020, her Verified Supplemental Petition to Modify Parenting Plan, Timesharing and Child Support (the "Modification Action"). A-075. Appellant alleges that the marital estate was divided improperly, marital debts accounted for through improper deduction from Former Husband's monthly child support obligation, and that she should escape

payment of the marital debts through modification of the child-support obligation. Id.

Appellant and Appellee both have net negative assets. Despite this, the Modification Action has spanned two and a half years, two mediations, several rounds of discovery, and the Appellant has been represented by four law firms. A-065- A-076. The Appellant's third law firm, Lubell & Rosen, LLC ("Disqualified Firm"), noticed its appearance through a Stipulation for Substitution of Counsel ("Substitution") on November 19, 2021. A-003. On November 30, 2021 Ex-Husband filed an Objection to the Substitution raising, *inter alia*, Disqualified Firm's prior representation of Appellee. A-003. Initially, Disqualified Firm denied the prior representation and accused Appellee of manufacturing the attorney-client relationship. A-031, ¶¶ 5-7. The Substitution was granted and the trial court advised Appellee at hearing on his objection to file an appropriate motion for disqualification.

Appellee filed Former Husband's Motion to Disqualify Lubell & Rosen, LLC ("Motion to Disqualify") on February 2, 2022. A-006. In it, Appellee identified three discrete bases warranting disqualification. A-006 – A-019. First, the Appellee was a former

client *in the same matter* and did not waive Disqualified Firm's conflict of interest. A-010- A-013. Second, Disqualified Firm is an interested party so deeply conflicted that neither Appellant nor Appellee could waive its conflicts. A-013-A-016. Third, Disqualified Firm's participation created the appearance of impropriety. A-016-A019.

b. <u>Relationships between Appellee and Disqualified Firm</u>

i. Attorney-Client Relationship of Husband/Wife During Divorce Action

One of the significant obstacles between Appellant and Appellee in the Divorce Action was the division of the marital estate. A-097. Because of the significant student loan debt Appellee accrued attending law school, the marital home had to be sold. *Id.* The Final Judgment resolving the Divorce Action commanded the sale of the marital home and the division of any proceeds. *Id.* Appellee provided William Phillipi, partner at the Disqualified Firm, a copy of the MSA and instruction to conduct the sale of the marital home in strict accordance with its terms. *Id.* No engagement letter was executed defining the scope of Disqualified Firm's representation. *Id.* Over the course of the next several weeks,

Appellee worked with attorney Phillipi to finalize and conclude the sale and distribute the proceeds as dictated by the Mediated Settlement Agreement and Final Judgment. A-097 – A-098.

ii. Partnership and Ex-Husband's Relationship to It

What is truly noteworthy about this disqualification proceeding is that the parties were not just related to Lubell Rosen by virtue of the firm's work on their Divorce. Instead, the Ex-Husband has a very complicated and contentious relationship to the firm that is entirely independent of the Divorce, the facts of which follow and form a separate basis for disqualification. Appellee joined Disqualified Firm as a non-equity partner July 21, 2018. A-021 – A-027. The terms of his partnership are set forth in the Partnership Agreement ("Agreement"). A-021 – A-027. Under the terms of the Agreement, in pertinent part, Appellee was entitled to payment in the amount of $200,000.00 in the first year and 60% of the fees generated on matters he originated A-021.

In addition to the terms of Appellee's remuneration, the Agreement articulates provisions intended to survive termination of Agreement. A-027, ¶ 12. Those provisions include covenants

shielding from disclosure the identities of clients and client confidences. A-025, ¶¶ 6.2, 6.5. The Agreement further proscribes disparaging remarks by either Disqualified Firm against Appellee, or *vice versa*. *Id.* ¶ 6.6. Disqualified Firm published several false and disparaging remarks about Appellee as part of its response to Appellee's Motion to Disqualify. *See* A-045 ¶ 6. Appellee was summarily terminated by Disqualified Firm prior to the expiration of the one-year period following months-long disputes over billing practices and the roles of associates. *See* A-107, ¶ 10. Appellee was owed payment of salary and expenses under the terms of the Agreement following what he maintains was his wrongful termination, and litigation of those issues is expected. A-091, line 1 – A-092, line 10.

iii. Competing Fee Claims

While the Ex-Husband was a partner at Lubell Rosen, he performed legal services on a complex contingent fee matter pending in Miami-Dade County. *See* A-045 (providing incorrect style but otherwise identifying the litigation) ("Collateral Litigation"). Following Appellee's departure, Disqualified Firm filed a Notice of Attorney Charging Lien in that matter. *See* A-094, lines 9-23. The

parties to the matter entered into a confidential contingent settlement agreement in July 2021. A-101, line 17 – A-102, line 10. The contingencies within the settlement were not satisfied until after the hearing on Motion to Disqualify. *See* A-092, lines 11-16.

Throughout the months of September through October 2021, Appellee conferred with the partners of Lubell Rosen regarding its fee claim. A-091, line 8 – A-092, line 3. Lubell Rosen sought to combine the issues of its attorney lien claim with the disputes surrounding the Agreement. A-091 – A-092. It became clear that that no amicable resolution could be reached and Appellee advised Mark Rosen and Steve Lubell that litigation would be required to resolve the issues. *Id.* One month later, Disqualified Firm entered its appearance to represent the Ex-Wife in the Modification Action. *Id.*

c. <u>Hearing on Motion to Disqualify</u>

The trial court heard arguments on Appellee's Motion to Disqualify on March 24, 2022. A-079. The court heard testimony from Appellant (A-098 – A-114) and Appellee (A-087 – A-108) and admitted the Partnership Agreement (A-093, lines 20-21) and the

Declaration of William Phillipi (A-090, lines 2-4) into evidence. No other evidence was admitted. (A-093, line 16 – A-094, line 7).

i. Evidence Requiring Disqualification Under Florida Rule of Professional Responsibility 4-1.9

The Ex-Husband offered evidence that he was a past client of Lubell Rosen in the Divorce Action. A-087, line 20 – A-089, line 4. Appellee offered evidence that his interests are materially adverse to Disqualified Firm's current client, Appellant. A-095, lines 18-20. Appellee further offered evidence that he did not waive the conflicts. A- 095, lines 21-23. Although the trial court found her testimony completely without credibility, the Appellant testified only that her selection of Disqualified Firm was borne of random "Google searches." A-109, line 16.

ii. Evidence Supporting the Trial Court's Conclusion that Disqualified Firm has Unwaivable Conflicts of Interest or Creates the Appearance of Impropriety

Appellee Ex-Husband presented evidence that he and Lubell Rosen were engaged in a legal dispute relating to the breach of Agreement. A-092, line 4 – A-095, line 17. Evidence was presented that Appellee was actively litigating attorney's lien fee disputes adverse to Disqualified Firm. A-091, line 1 – A-092, line 16.

(collectively, Agreement dispute and attorney's charging lien disputes referred to as "Collateral Disputes"). Appellee offered testimony that Disqualified Firm appeared in the Modification Action mere weeks after resolution talks relating to the Collateral Disputes reached impasse. A-091, line 21 – A-092, line 3.

Evidence was presented that Lubell Rosen was appearing in the Divorce Action to conduct discovery to aid in the Collateral Disputes. A-095, lines 9-17. During the hearing, Lubell Rosen directly investigated Appellee who was under oath regarding the terms of the confidential settlement in the Collateral Litigation. A-101, line 13 – A-105, line 9. The court sustained Appellee's confidentiality objection to end Lubell Rosen's inquisition relating to the Collateral Disputes. *Id.* Appellant Ex-Husband presented evidence that Lubell Rosen disclosed none of these matters to the Ex-Wife and that she was unaware of Lubell Rosen's interests until the hearing. A-111, lines 4 – 17; A-113, lines 4-9.

d. Trial Court's *Ore Tenus* and Written Findings

After reviewing the papers, hearing testimony from the parties, and considering the evidence presented, the trial court found that "Mr. Hearn was a former client" (*Id.* lines 2-3) in the "same or

substantially related [] matter." A-004 ¶ 8. The court also found that Appellee "has not waived any conflict of interest with Lubell & Rosen, LLC, nor has Lubell & Rosen, LLC sought a conflict waiver from the Former Husband." A-004, ¶ 10.

The court further found that Lubell Rosen had an improper purpose and agenda in the Modification Action, and was an interested party. A-131, lines 5-14. The court acknowledged that disqualification is an extraordinary remedy and overused by litigants, commenting, "usually there is nothing much there, but unfortunately this is disturbing." A-130, line 22 – A-131, line 1. The trial court continued that in addition to Lubell Rosen's conflict, Appellant Ex-Wife's testimony was, "most disturbing." A-131, lines 15-23. The court found that she was "very, very, very not credible" when testifying that her decision to bring Lubell Rosen into the Modification Action was randomly the product of internet searches. A-131, line 15. The Court specifically opined:

> . . . she [Appellant] lives in Broward, but out of all the law firms in the world, she just landed on a Miami law firm where her former husband used to work, and chose that firm to retain, just coincidentally . . .. if she would have said, you know what, I was really happy with the firm when Disqualified Firm's [sic], I would assume

> he's a partner, when the handled our post-dissolution matter abut selling the house, and since I really was happy with their representation and getting that done for me, I decided I was going to call up or look and see who does family law, and I saw that was Mr. Segall, so I called that firm. **But to tell me that it was coincidental with that many firms in the South Florida area, I find disturbing.**

A-132, Transcript lines 1-14 [emphasis added].

Based on its findings, the Court ordered, "Norman S. Segall, Esq. and Lubell & Rosen, LLC shall be disqualified as Former Wife's counsel in this matter. A-004 ¶ 6. Appellant Ex-Wife retained and engaged substitute counsel who entered their appearances in the Modification Action on June 23, 2022 and the matter is now set for a final hearing in November.

SUMMARY OF ARGUMENT

The Court confronts a most unusual non-final appeal from disqualification of counsel. A husband and wife undergoing divorce used the husband's law firm (Lubell & Rosen) as part of the underlying Divorce Action to dispose of the marital home pursuant to a Marital Settlement Agreement and Final Judgment. Three years later, the Ex-Husband and Lubell Rosen are locked in a complicated, and confidentiality-challenged, set of disputes over his

termination and continency fees. The Ex-Wife has a pending modification proceeding in the same Divorce Action. Shortly before the final hearing, and shortly after the Ex-Husband's and Lubell Rosen's collateral disputes boil over, Lubell Rosen purports to appear in the Divorce Action for the Ex-Wife.

After an evidentiary hearing, the Circuit Court disqualified Lubell Rosen for two distinct reasons. First, the Court found the firm was conflicted as former counsel to the Ex-Husband (jointly) in the same Divorce Action for its work to sell the marital home. Second, it disqualified the firm for the general appearance of impropriety because it appeared to be using the Divorce Action to acquire confidential financial information useful in its collateral litigation.

This simple understanding of the proceedings below largely refutes the Ex-Wife's Brief. That Brief fails to include a standard of review because it would require a showing of abuse of discretion – something that is not even attempted and cannot be done. There was ample evidence showing prior representation in the same litigation. And each of the Brief's minor points – such as "we got no confidential information" are legal nullities. Florida law imposes an

irrefutable presumption of confidential information, and the duty of loyalty separately bars such arguments as "our representation was so *de minimis* that we can appear…" There is no abuse of discretion on prior representation disqualification.

The Ex-Wife's Brief side-steps the second rationale – generalized appearance of impropriety – by making it appear as improper grounds for prior representation disqualification. Not so. When the Court ruled from the bench, it took pains to label these point "1" and "2" and otherwise signal that they were distinct. Lubell Rosen's incentives and the Ex-Wife's lack of credibility ***do not*** factor into point 1 and were ***not*** announced at that point orally. They ***do*** factor into point 2 and ***were*** announced then. Simply put, Lubell Rosen is endeavoring to represent the Ex-wife to further its interests in the collateral litigation, and the Circuit Court acted within its discretion to prevent the appearance of impropriety in that regard by disqualifying the firm.

Rationales 1 and 2 are independent and either can support disqualification. Neither is an abuse of discretion, and the Initial Brief makes no effort to prove otherwise.

We apologize for the length of this Brief, but the issue is of critical importance to the ex-Husband. In the absence of affirmance here, he will face the prospect of ongoing disputes with his ex-Wife being masterminded by his ex-law partners who have a separate axe to grind and would be well-positioned to bend this litigation to their own purposes.

STANDARD OF REVIEW

Appellant's Initial Brief fails to include the mandatory standard of review section. It is outcome determinative of this appeal. In places, Appellant averts to "departure from the essential requirements of law" – the well-known *certiorari* requirement. But that is not the standard of review for the discrete issue raised – whether by *certiorari* or direct appeal. Disqualification is now handled via non-final appeal. Regardless, even when disqualification was handled via *certiorari*, departure from the essential requirements still required, and requires now, a showing of abuse of discretion. This point is so important, and Appellant is recreating an error already expressly rejected by the Florida Supreme Court, that it requires elaboration.

Young v. Achenbach, 136 So.3d 575, 580-81 (Fla. 2014) reversed the Third DCA for granting *certiorari* to quash disqualification. The Court noted "[i]n this case, the Third District's review below should have been limited to whether the trial court abused its discretion in granting the disqualification motion." *Citing Applied Digital Solutions, Inc. v. Vasa*, 941 So.2d 404, 408 (Fla. 4th DCA 2006). In *Vasa*, this Court noted that: "[t]he standard of review for orders entered on motions to disqualify counsel is that of an abuse of discretion. While the trial court's discretion is limited by the applicable legal principles, the appellate court will not substitute its judgment for the trial court's express or implied findings of fact which are supported by competent substantial evidence." (citation omitted). *Id.* Nor is there any concern that the shift to non-final appeals has changed the standard. *See, e.g., Kemp Investments North, LLC v. Englert,* 314 So.3d 734, 736 (Fla. 5th DCA 2021) (post rule-change case noting "[t]he standard of review for orders entered on motions to disqualify counsel is that of an abuse of discretion."

"When the trial court's decision is based on live testimony, the appellate court defers to the trial court's determination as to the credibility of witnesses." *Evans v. Thornton*, 898 So.2d 151, 152 (Fla.

4th DCA 2005). "It is not the function of an appellate court to reevaluate the evidence and substitute its judgment for that of the finder of fact." *Credit Counseling Found., Inc. v. Hylkema*, 958 So.2d 1059, 1061 (Fla. 4th DCA 2007). "Under the abuse of discretion standard of review, a ruling will be upheld unless the ruling is 'arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court.'" *Banks v. State*, 46 So.3d 989, 997 (Fla. 2010).

ARGUMENT

I. APPELLANT FAILS TO MENTION, LET ALONE PROVE, ABUSE OF DISCRETION FOR DISQUALIFYING A FIRM DIRECTLY INVOLVED IN AN EARLIER PHASE OF THE DIVORCE.

Appellate briefs must demonstrate error to secure relief because a "trial court's rulings come before this Court with a presumption of correctness." *Priskie v. Missry*, 958 So.2d 613, 614 (Fla. 4th DCA 2007). It is only by demonstrating error that an appellant secures relief. *Allegro v. Pearson*, 287 So.3d 592, 597 (Fla. 4th DCA 2019). That process starts with acknowledging the standard of review and then marshalling facts and law to meet that standard. Here,

Appellant fails even to mention the standard of review, much less demonstrate that the Circuit Court abused its discretion. The Court held an evidentiary hearing, acknowledged the correct test, and even commented that motions to disqualify are overused and usually meritless. The Court nonetheless concluded that Lubell Rosen had to be disqualified. Lubell Rosen does not demonstrate how the Circuit Court erred, but rather seeks to have this Court second guess the Circuit Court's assessment of the evidence. This is precisely what the Supreme Court rejected in *Young v. Achenbach*, 136 So.3d 575, 580-81 (Fla. 2014), citing with approval this Court's *Vasa* decision.

The core of Lubell's argument fails to address the facts confronted by the Circuit Court. Instead, Lubell mischaracterizes them as a "closing on a house wherein an attorney with the Lubell Rosen firm represented the Former Husband and Former Wife as sellers." Brief at 7. That is technically true, but so misleading and divorced of context as to render the ensuing argument meaningless.

Both Ex-Husband and Ex-Wife Testified that Lubell Rosen disposed of the family house ***as part of the Divorce Proceedings and pursuant to the Marital Settlement Agreement and Final Judgment***. See Transcript at 19 A097 (Ex-Husband explaining

Lubell Rosen's handling of home sale and contemporaneous discussion with Ex-Husband and Ex-Wife of Marital Settlement Agreement); Transcript at 34 A-112 (Ex-Wife confirming home sale was pursuant to court order and marital settlement agreement). The Ex-Wife and Lubel Rosen's written submissions confirmed Lubell Rosen's role – it is undisputed.

Nor is there any question that the Ex-Husband made the point throughout these proceedings that Lubell Rosen was trying to appear in the same proceedings adverse to him. This began in his disqualification moving papers. See, e.g, A-010 (Motion to Disqualify at 5 and Argument Heading "LUBELL ROSEN MUST BE DISQUALIFIED UNDER RULE 4-1.9 FOR REPRESENTING BOTH SIDES IN THIS LITIGATION"). Further, counsel for the Ex-Husband was clear in his closing argument that Lubell Rosen was acting adverse to the Ex-Husband ***in the same case***, i.e. in the divorce matter between himself and his Ex-Wife:

> Now, immediately upon that [Lubell's appearance], the former husband filed an objection. The basis for the objection is the same basis for this disqualification.· Mainly of which is that the former husband was a prior client of Lubell & Rosen **in this matter and the underlying divorce, where he had the marital**

> **settlement agreement final judgment**, and Mr. **William Phillippi actually handled the distribution and sale of the marital home pursuant to that.**

A-114-15, Transcript at 36-7. Counsel for the Ex-Husband made clear that the issue was counsel appearing adverse to a former client in the same matter:

> There was a duty of loyalty there, and they breached it by now taking on adverse client, Ms. Quin Hearn, **in the same matter**.· Although they are going to say it's post-judgment, Your Honor, it's different; **it's the same thing.· It's a dissolution matter.**· In fact, they did it after the final judgment.· **We're after the final judgment now, so in reality, we're discussing the same thing**.

Trans. at 36-7. A-114-15. (emphasis added). Just as it does now, Lubell Rosen argued to the Circuit Court merely that it was not "appearing" in the "same" matter because the firm never technically "appeared" and the sale was "collaborative." Transcript at 48-9 A-126-7.[1]

1 Specifically, in closing, counsel for Lubell Rosen stated "[n]ow, they try to make this house closing into the same matter as the divorce, which it clearly is not. It's admitted that Lubell Rosen never appeared. It's admitted that the house closing was a collaborative effort between the two parties without any dispute." Transcript at 47-8 A126-7.

The Circuit Court rejected Lubell Rosen's take on the facts, and rejected the notion that there were two separate "matters" – *one* a "house closing" and the *other* divorce proceedings or post-dissolution proceedings. In fact, when the Court pronounced its oral ruling, it expressly rejected the notion that the Ex-Husband was merely a client of Lubel Rosen for an unrelated, collateral house closing:

> Well, I'm going to tell you that I find -- you know, I hear numerous motions to disqualify law firms, and you know, like you said the other day, usually there is nothing much there, but unfortunately this is disturbing. Number 1, it's disturbing that Mr. Hearn was a **former client on some level in a post-dissolution matter**.

A130-31 Transcript at 52-3 (Circuit Court's Oral Ruling) (emphasis added).

Simply placing Lubell Rosen's brief in context shows why it does not even attempt to make the required showing of abuse of discretion. The Ex-husband argued, and the Circuit Court accepted, that he was a client of Lubell Rosen's in this same matter. Specifically, for purposes of their assistance with selling the family home pursuant to the Marital Settlement Agreement, Lubell Rosen represented the Ex-Husband and Ex-Wife in this same matter. The Circuit Court heard corroborating testimony to this effect from both Ex-Husband

and Ex-Wife, and admitted documentary evidence, various pleadings, and Affidavits. The Circuit Court's conclusion is supported by competent, substantial evidence and is *not* "arbitrary" or a view that "no reasonable person would take…" i.e., it is *not* an abuse of discretion. *Banks,* 46 So.3d at 997. Lubell Rosen's unelaborated request for this Court to take the opposite view is a request to do precisely what the Supreme Court in *Young v. Achenbach*, 136 So.3d 575, 580-81 (Fla. 2014) and this Court in *Vasa* inveighed against – substitute its view for that of the trial court.

Lubell Rosen's current brief recycles its trial court tactic, but in so doing, fails to make even a *prima facia* claim of abuse of discretion. Instead of argument, analysis and citation, the brief asserts "[t]o the contrary, this post-judgment matter (contempt, child support and timesharing modification) is not arguably the same or substantially related to the House Closing." Initial Brief at 7. It is only by treating the "closing" as distinct from the divorce action that this can be written with a straight face. But Lubell Rosen's Brief cites no law or facts to make this claim. It is simply asserted. More to the point, it is precisely this claim that was rejected by the Circuit Court. Appellant then bore the burden to show *why* the Circuit Court's

rejection was somehow unsupported by competent substantial evidence and was otherwise an abuse of discretion – i.e. "arbitrary" and something "no reasonable person would accept." Not only was this not done, but it was also not even *attempted*. Nor, plainly could such a showing be made considering the hearing evidence. Affirmance is warranted on the face of Lubell Rosen's Brief alone.

The balance of Lubell Rosen's Brief makes a handful of disconnected arguments, none of which address the core concern of whether the Circuit Court abused its discretion on either of the two elements of the 4-1.9 test. Each is addressed in turn regardless.

Lubell Rosen argues that the Ex-Husband variously represented himself and had other counsel in the divorce action. Brief at 7-8. True, but irrelevant. Nothing prevents litigants from retaining multiple legal counsel, or, at discrete times, from representing themselves (which the Ex-Husband did as a stop-gap when seeking new counsel Trans. 9-14 A-099). The presence of other counsel does not reduce the competent, substantial evidence supporting Lubell Rosen's role as determined by the Circuit Court.

Next, Lubell Rosen argues that "[n]o attorney with Lubell Rosen ever ***appeared*** on his [Ex-Husband's] behalf in the divorce or post-

judgment proceeding until counsel who is subject of the disqualification." Brief at 7 (emphasis added). Again, true, but irrelevant. It is axiomatic that an attorney-client relationship can be formed short of counsel formally "appearing" in a matter. Florida law is stocked with cases where attorney client relationships are formed outside of formal court appearances. Regardless, the mere lack of *appearance* does not strip the Circuit Court's conclusion of competent, substantial evidence or render it an abuse of discretion.

Next, Lubell argues that the "house was sold on a cooperative basis…" Brief at 8. Again, true, but not relevant and certainly not probative of any issue. This fact does not undermine the substantial, competent evidence supporting the Circuit Court's conclusion that Lubell Rosen represented the Ex-Husband, even if it was a joint representation. Lubell's implicit contention is that joint representation does not impart the same type or level of ethical prohibitions on later appearing adverse to a client. Lubell only implies this and cites nothing. It is flatly not the case.

Joint representation – even where it is joint representation of a husband and wife – imparts the same ethical bars on later adverse representations. This point is perhaps best illustrated by *Florida Bar*

v. Dunnagan, 731 So.2d 1237 (Fla. 1999). In *Dunnagan*, an attorney jointly represented a husband and wife in various business dealings. *Id.* at 1238-9. Later, the same attorney represented the husband in his divorce from the wife and was disciplined for violating, *inter alia*, Rules 4-1.7 and 4-1.9. *Id.* at 1240-41. The issues in the business representations were involved in the divorce. *Id.* *Dunnagan* is distinct from the current case in the sense that the initial representation (i.e. business dealings) was pre-divorce-suit, but the general doctrinal point that can still be applied here is that joint representation of a husband and wife does not diminish one or the other spouse's expectations of the duty of loyalty or ethical protections of Florida law. It bears emphasis, because Appellees do not receive a Reply Brief, that *Dunnagan* is the archetype of adversity through a prior counsel attacking prior transaction work in *new* litigation. The Ex-husband is not citing it for this broader proposition, but rather only the narrower point that joint representation – contrary to Lubell's insinuation – does not diminish ethical expectations. See also *Florida Bar v. Wilson*, 714 So.2d 381 (Fla. 1998)(attorney who jointly represented husband and wife in declaratory judgment suit for lottery winnings ethically barred from subsequently representing just

husband in dissolution action)(again, an archetypal transactional representation followed by litigation representation to attack the transaction, but cited, again, for the narrower proposition that joint representations still engender ethical duties to each spouse individually going forward).

Next, Lubell claims that it is not "changing sides" in the ongoing divorce action. This is neither true nor relevant. It is not true because Lubell now purports to be able to appear *adverse* to the Ex-Husband. The hearing testimony was that Lubell was appearing *adverse* to the Ex-Husband, and nobody disputes this. See, e.g. Transcript at 17 A-95. Lubell *is* plainly "changing sides." Nor is it relevant because Lubell never urged this as a basis to avoid disqualification in front of the lower court. Arguments not raised below are waived. *Sunset Harbour Condo Ass'n v. Robbins,* 914 So.2d 925, 928 (Fla. 2005)("As a general rule, it is not appropriate for a party to raise an issue for the first time on appeal.") Even if it had not been waived, it is unavailing; Lubel *is* plainly "changing sides" in the sense that the Ex-Husband expected to rely on Lubell's services at one point yet now would be adverse to the firm.

Next, Lubell argues that "prior representation alone does not create a conflict of interest." Brief at 8 citing *Herschowscky v. Guardianship of Herschowschy*, 890 So.2d 1246, 1248 (Fla. 4th DCA 2005). Again, true but irrelevant. The test for disqualification under Rule 4-1.9 requires two steps, one of which is prior representation, and the other of which is that the prior representation be in the same or substantially related matter. The Circuit Court's judgment was not predicated on "prior representation alone," but rather both steps in the analysis. In an abundance of caution, Ex-Husband will point out that the facts of *Herschowscky* render it irrelevant. There, the decision to disqualify was brought at the urging of a third party that wanted counsel for a probate ward removed. *Id.* at 1247. Incredibly, the Circuit Court disqualified counsel despite the fact that "the probate judge conceded at the hearing on the motion to disqualify that there was no conflict of interest in this case." *Id.* at 1248. That is manifestly not the case here, and *Herschowscky* does not remotely help Lubell show abuse of discretion on the part of the current Judge.

Lubell's reliance on *Frank Weinberg & Black, P.A. v. Effman*, 916 So. 2d 971 (Fla. 4th DCA 2005) is just as unavailing. *Frank Weinberg* does nothing to inform situations in which firms undertake

representations in the course of litigation and then seek to appear adverse to one of their joint clients. Instead, *Frank Weinberg* is a standard fact pattern involving two ***separate*** lawsuits with ***different clients*** years apart that had a common factual nucleus. The defendant sought to disqualify Adorno and Yoss as plaintiff's counsel because they had previously represented the plaintiff **12 years prior** in a suit brought by the defendant's departing shareholders. Based on the specific facts at hand, this Court concluded that the "trial court did not depart from the essential requirements of law in ruling that the 1991 and 2003 suits were not 'substantially related' within the meaning of the rule." *Id.* at 973. Affirming one trial court's determination that two suits between different sets of litigants 12 years apart were not "substantially related" does nothing to establish abuse of discretion *here*.

Finally, throughout Lubell's Brief, it makes the argument that "no confidential information was involved in the House Closing." Brief at 10 citing A.57 ¶8. There are both factual and legal problems with this position. Factually, the Circuit Court did not agree. Lubell did urge this position on the Circuit Court, but it is legally foreclosed. Florida law expressly prevents counsel from defending

disqualification challenges by compelling their former clients to prove prejudice or explain the amount, nature or extent of confidences imparted. Were it otherwise, clients would have to expose their reasons for expecting loyalty and confidentiality in open court – precisely what legal ethics seeks to guard against. As the Supreme Court explained in *State Farm Mut. Auto Ins. Co. v. KAW*, 575 So. 2d 630, 634 (Fla. 1991) "we disagree with the court below that actual proof of prejudice is a prerequisite to disqualification." Further, the Court established the rule going forward that "the existence of this relationship [prior counsel] raised the irrefutable presumption that confidences were disclosed." *Id.* In other words, Lubell cannot defend by asserting that they possess no confidential information. See also *Phillip Morris USA, Inc. v. Caro*, 207 So. 3d 944, 948 (Fla. 4th DCA 2016) (quoting *KAW*); *Achenbauch*, 136 So. 3d 575, 580 (Fla. 2014) (disqualifying law firm relying on irrefutable presumption).

Another point has to be made in response to Lubell Rosen's overall tactic. The firm wants to leave the Court with a sense of that their initial involvement in the Divorce Action (disposition of the marital home) was somehow *de minimis* and unlikely to impinge on the current proceedings. Setting aside the irrefutable

presumption of confidences from *KAW*, Lubell is ignoring the duty of loyalty which is also implicated by Rule 4-1.9. Simply put, regardless of prejudice or how a client complains, legal counsel cannot later appear adverse to a client because of the duty of loyalty. Most persuasively, a decision from the Middle District that reached the same conclusion did so in the face of the attorney's argument that the prior representation was very limited in time and scope. In *United States v. Culp,* 934 F. Supp. 394 (M.D.Fla.1996), a lawyer was disqualified based upon his prior representation of a material witness in the case who would be testifying against the lawyer's present client. The court's analysis appears to squarely apply here:

> [Counsel] states in his affidavit, however, that due to the limited nature of his representation of [the former client], he learned no information during the course of that representation which he could now use against [him]…. *This argument ignores the fact that under the ethical canons a duty of loyalty exists apart and distinct from the duty to maintain client confidences.* Compare Model Rules, Rule 1.6 with Rules 1.7 & 1.9. One need only compare Model Rule 1.6, which outlines the lawyer's duty of confidentiality, with Model Rule 1.9(a), which imposes a blanket prohibition on the representation of clients with interests adverse

> to those of a former client without the former client's consent. *The prohibition set forth in Rule 1.9 applies without regard to whether the prior representation entailed the disclosure of confidential communications. The rule thereby furthers two purposes simultaneously; it promotes the attorney's duty of loyalty to his clients while furthering the objectives of rules protecting confidential communications between attorney and client by obviating the need for intrusive judicial fact-finding that would require the disclosure of such communications.* The policies underlying this rule are equally relevant here, …

Id. at 398 (emphasis added); *see also Brent v. Smathers*, 529 So. 2d 1267, 1270 (Fla. 3d. DCA 1988) (disqualifying law firm for breaching Rule 4-1.9 duty of loyalty after representing co-trustees of an estate and then accepting the representation of one trustee against the other in subsequent litigation reasoning "'[c]ommon representation does not diminish the rights of each client in the lawyer-client relationship. Each has a right to loyal and diligent representation … and the protection of rule 4–1.9….' Rules Regulating the Florida Bar, rule 4–2.2 comment.").

The only thing that legally matters is whether the Circuit Court here abused its discretion by concluding, consistent with all the evidence, that Lubell represented the Ex-Husband in the divorce case

in 2018. Lubell's effort to disavow confidential information is barred by *KAW* and its progeny, ignores the duty of loyalty espoused in *Culp* and *Brent*, and, in any event, fails to speak at all to the propriety of the Circuit Court's decision.

There was no abuse of discretion, Lubell's brief fails to recognize the need to show one and fails even to address itself to the core of the Circuit Court's reasoning – Lubell's work at an earlier stage of this same case bars it from representing either side now. There was ample evidence to support this conclusion, and Lubell's Brief does not even try to contend otherwise. Instead, it sets up a straw man and flails away at it. The straw man argument is that the different phases of the divorce litigation must be treated as different "matters" and the Ex-Husband has to show that issues in one will infect the other. Under this approach, Lubell expects the Court to treat the house sale as an unrelated transaction occurring before the divorce, when the facts show just the opposite – it was an important aspect of the divorce litigation itself.

Lubell's Brief fails to show abuse of discretion or even address it. Lubell cannot alter this by arguing for abuse of discretion for the first time in reply because arguments raised for the first time in reply

are forfeit. *D.H. v. Adept Community Services, Inc.*, 271 So.3d 870, 880 (Fla. 2018)(" Claims of error not raised by an appellant in its initial brief are deemed abandoned.") "An issue not raised in an initial brief is deemed abandoned." *J.B. v. State*, 304 So.3d 352, 355 (Fla. 4th DCA 2020). An argument may not be raised for the first time in a reply. *Jones v. State*, 966 So.2d 319, 330 (Fla. 2007); *United Auto. Ins. Co. v. Hollywood Injury Rehab. Ctr.*, 27 So.3d 743, 744 n.1 (Fla. 4th DCA 2010); s*ee Allegro v. Pearson*, 287 So.3d 592, 597 (Fla. 4th DCA 2019) (declining review of undeveloped position and noting "[w]hen points, positions, facts and supporting authorities are omitted from the brief, a court is entitled to believe that such are waived, abandoned, or deemed by counsel to be unworthy").

II. THE JUDGMENT OF DISQUALIFICATION CAN BE INDEPENDENTLY AFFIRMED ON THE BASIS OF APPEARANCE OF IMPROPRIETY WHERE LUBELL IS USING THE DIVORCE LITIGATION TO FURTHER ITS COLLATERAL INTERESTS

The Circuit Court separately found a very strong appearance that Lubell & Rosen represented the former wife with a hidden agenda, using that representation to advance its own legal disputes with the former husband. The court stopped short of articulating a finding of collusion between the former wife and Lubell, but

expressly determined that the former wife's testimony regarding her selection of Lubell was "disturbing" and "very, very, very not credible." Trans. at 53 A-131 lines 15-23. In other words, the court determined that, whatever the subjective intent of the former wife and Lubell may have been, the situation smelled to high heaven because it certainly ***looked*** for all the world as though Lubell had obtained the ex-wife (a prior joint client in this matter) as a client in order to use its representation of her to the firm's own advantage in its ongoing disputes with the ex-husband (the other joint client from prior representation in this matter). Based on these findings, the court disqualified Lubell on the independent basis of creating the appearance of impropriety—using one joint client to attack the other joint client.

Rather than address the trial court's findings directly, the disqualified firm attempts misdirection, arguing at page 10 of its Brief that the findings of misconduct are irrelevant to a prior representation analysis. But the court did not make those findings to further the prior representation analysis; it made those findings to support the second basis for disqualification. Lubell simply ignores the court's "appearance of impropriety" rationale and has accordingly

failed to provide even a scintilla of an argument that the trial court did not abuse its discretion on this second, independent basis for disqualification.

The Florida Bar has set certain Professionalism Expectations, the very first of which is a "Commitment to Equal Justice Under the Law and to the Public Good." The primary expectation in this regard is that "A lawyer should avoid the appearance of impropriety." See https://www.floridabar.org/prof/regulating-professionalism/professionalism-expectations-2/.

Courts have routinely disqualified lawyers or firms in order to prevent the appearance of impropriety. In *K.A.W.*, the Florida Supreme Court disqualified a law firm due to the appearance of impropriety in order to preserve "the fair and impartial administration of justice." 575 So. 2d at 631; *see also Brent v. Smathers*, 529 So. 2d 1267, 1270 (Fla. 3d. DCA 1988). The Florida Supreme Court in reversing the lower court's denial of the motion to disqualify explained that *actual impropriety* was not required, reasoning:

> While these facts neither indicate nor imply any departure from professional conduct or breach of any ethical canon, we cannot escape the

> conclusion that this is a situation rife with the possibility of discredit to the bar and the administration of justice. Obviously Mr. Turkewitz cannot erase from his mind the confidences he received from his former client or the plan of defense he envisaged. Though we do not dispute his good faith or the good faith of the firm representing plaintiff, both the possibility of conflict of interest and the appearance of it are too strong to ignore.

Id. at 634-35; *see also Zarco Supply Co. v. Bonnell*, 658 So. 2d 151, 154-55 (Fla. 1st DCA 1995) ("possibility of conflict of interest and the appearance of it are too strong to ignore."); *Campbell v. American Pioneer Sav. Bank,* 565 So.2d 417 (Fla. 4th DCA 1990) (holding that disqualification based on appearance of impropriety was proper in mortgage foreclosure proceeding where petitioner showed that respondent's current attorney had previously represented petitioner). "In every case where a specifically identifiable appearance of impropriety exists the court must weigh the likelihood of public suspicion against the social interests in obtaining counsel of one's choice." *Lee v. Gadasa Corp.*, 714 So. 2d 610, 612 (Fla. 4th DCA 1998) (citing *Cox v. American Cast Iron Pipe Co.*, 847 F. 2d 725, 731 (11th Cir. 1988)).

This proof of the legal basis for disqualification based on the catch-all broad category of "appearance of impropriety" is actually somewhat unnecessary. Appellee has waived any contrary position and focused instead on denying at a factual level, the appearance of impropriety. See, e.g., A-040 (Response to Motion to Disqualify, argument addressing appearance of impropriety by denying factual existence of impropriety but tacitly conceding appropriateness of general legal inquiry); Tran. at 39 A-116-7 (summarizing response argument on this point). Given Appellee's singular focus on rebutting the factual – rather than legal – basis for appearance of impropriety disqualification, the only question is whether there was an evidentiary basis for it.

a. The Court Found an Appearance of Impropriety Based on Competent, Substantial Evidence

The concern for Lubell using the Divorce Action to develop discovery to benefit itself in the collateral litigation was more than theoretical. It was on full display at the hearing on the motion itself. At the hearing, Lubell manifested its agenda of investigating the former husband once he was sworn before the court on

unrelated confidential settlement agreements in which the law firm has a claim for attorney's fees:

> Q. Well, that litigation, as far as Lubell Rosen is concerned, is there a [sic] claim of lien for fees, right?
>
> A. One would think, but they played a role because they had a specific posture. And I apologize, Your Honor, but I'm speaking as generally as I can because I am bound by confidentiality agreements in this matter.
>
> BY MR. SEGALL:
> Q. Well, it's public record –
>
> A. They played a role at mediation to reach a resolution of the case because they have the outstanding attorney lien.
>
> Q. The –
>
> A. They [Steve Lubell & Mark Rosen] are aware that there is confidentiality in this case, and that discussing it in these pleadings is a breach of my client's confidentiality, their past client's confidentiality, to say nothing of my confidentiality of [sic] a past client –

A-104: 4-24. The trial court heard that the named partners of Lubell & Rosen, Mark Rosen and Stephen Lubell, reached impasse on discussions of how to resolve the charging liens and partnership

agreement disputes only three weeks before Lubell appeared on behalf of the former wife in this matter. A-017 ¶ 43; Trans. at 13, line 21 through 14, line 3. The firm's investigation into its own legal interests continued:

> Q. You have a dispute, let's put it that way, with Lubell –
>
> A. This is an angle to obtain the terms of that settlement agreement.
>
> Q. Well, are you entitled to fees under that settlement agreement?
>
> A. I'm sorry?
>
> Q. Are you entitled to a fee resulting from that settlement agreement?
>
> MR. BASIT: Your Honor, I'm going to object as to the relevance as to what this has to do with the disqualification. Now he's trying to delve into this one matter and get into the terms and settlement agreement of that.
>
> THE COURT: I thought Mr. Hearn said it was a confidential agreement.
>
> MR. SEGALL: Well, he –
>
> THE WITNESS: It is, Your Honor.
>
> MR. SEGALL: He said that –

> THE WITNESS: It is, but it's the (indiscernible) with this law firm as well.
>
> MR. SEGALL: He said that what I'm trying to do in this case is find out that I would be entitled to find out how much he is making in that, and how much he is making on anything is relevant in the proceedings concerning a supplemental petition for modification.
>
> MR. BASIT: And this is exactly one of the reasons why we're trying to get a disqualification because they're using this matter to try to circumvent all of the other unrelated matters that they have, and that's one of the bases for disqualification, Your Honor.
>
> THE WITNESS: And I would like to –
>
> THE COURT: Why don't you go to the next question?

A-105:12 – A-106:22. The trial court also heard testimony that Lubell's interests in pursuing its collateral investigation were so compelling that it was willing to and had already in its response to Appellee's Motion to Disqualify breached surviving provisions of its partnership agreement with the Appellee as part of its pursuit. A-004, ¶ 9; A-107: 25 – A-108:14.

Specifically, Lubell filed declarations from witnesses never made available for cross-examination asserting that Appellee

proposed that an associate of Lubell "manipulate her time," to "increase his payment under the Partnership Agreement," and, separately, "attempt[ed] to strong-arm an associate." A-045, ¶ 6. Lubell's statements are actionable on a stand-alone basis in Florida, but also breach the Partnership Agreement ¶ 6.6. A-026.

Hearing the testimony of the witnesses and observing first-hand as Lubell investigated collateral confidential agreements of its own interest within an unrelated proceeding, the Circuit Court found the appearance of impropriety:

> Number 2, it's disturbing that he is involved with your law firm in – whether it's pre-suit litigation or whether it's a partnership dispute, somehow he used to work at your firm, and now there has been a falling out and there is [sic] issues related to, I guess, income, payment, et cetera, and lo and behold, what do you find out in a post-dissolution of marriage, child support, mandatory disclosure based thing, financial issues, and what his income, everything, is [sic].

A-131. Simply put, the court found the strong appearance that Lubell improperly appeared on behalf of Appellant against Appellee for the self-serving ulterior motive of obtaining for itself sneak-peek discovery *in other disputes* through the mandatory financial disclosures required by Florida Family Rule of Procedure 12.285(e).

From the court's finding it is plain that Lubell has positioned itself to also bill the Appellee from its position of conflict while forcing him to defend multiple disputes in one action.

In passing, it is important to note the manner in which the Court recited these issues. The Court prefaced this entire section by saying "Number 2." This was in counterpoint to "Number 1" wherein the Court recited the more basic facts of Lubell's representation of the Former Husband in the Divorce Action and the need to disqualify under Rule 4-1.9. This is important because Lubell is now arguing that the Circuit Court conflated Lubell's inherent conflict with the collateral litigation, and the Ex-Wife's lack of credibility, with the basics of prior representation and Rule 4-1.9. Not so. These issues pertain to this secondary issue of overall appearance of impropriety as an additional basis requiring disqualification.

b. Having Found an Appearance of Impropriety, the Court then Found that—to the Extent that the Former Wife Offered any Valid Testimony—Former Wife's Right to Choose her Counsel did not Outweigh the Risk of Public Suspicion

Consistent with the rule espoused in *Gadasa*, after finding an appearance of impropriety the trial court then weighed its finding against testimony elicited from the Former Wife.

> Q. Ms. Hearn, how did you come about retaining my office?
>
> A. I just basically did some Google searches and contacted several attorneys, and you were one of them.

Trans. at A-110 lines 14-17. The court also heard the former wife testify that Lubell did not disclose any of its ongoing disputes with the Former Husband. Trans. at A-109 lines 21-24. After hearing the myriad collateral disputes between Lubell and the former husband that had reached impasse only weeks before Lubell's appearance, the relationship between Lubell and former husband, that Mr. Segall was Mr. Hearn's office neighbor in a different city than where the former wife lived, the court found:

> But most disturbing was Ms. Hearn's testimony. It's very, very, very not credible when she testified that she was Googling around, and she just lives in Broward, but out of all the law firms in the world, she just landed on a Miami law firm where her former husband used to work, and chose that firm to retain, just coincidentally. **She stated it was not any kind of a purposeful choice**, and that I didn't find to be credible.

A-131. [emphasis supplied]. Accordingly, on balance, the Court concluded that the wife's right in choosing counsel of her own election did not overcome the risk of public suspicion of Lubell's appearance of impropriety, offering:

> If she would have said, you know what, I was really happy with the firm when Lubell & Rosen's [sic], I would assume he's a partner, when the partner handled our post-dissolution matter about selling the house, and since I really was happy with their representation and getting that done for me, I decided I was going to call up or look and see who does family law, and I saw that was Mr. Segall, so I called that firm.
>
> But to tell me that it was coincidental with that many firms in the South Florida area, I find disturbing.

15-23 – A-132; 1-14. In its brief, Lubell encourages this Court to speculate what things the Former Wife could have said that would have led the trial court to believe that she had a legitimate interest in bringing Lubell into her dissolution proceedings. Brief at 11. Incredibly, Lubell & Rosen suggest that the Former Wife could have testified that she sought their firm because of their conflicts. *Id.* But appellate courts don't review the hypothetical testimony that counsel *might* have coached their witness to say; they review the actual testimony. And that is not the way the former wife *actually testified*.

Lubell's suggestion of what she could have said only further emphasizes the problem with the actual testimony.

In the end, the Circuit Court had every reason to understand Lubell's sudden appearance as engendering the appearance of impropriety. The Divorce Action was ongoing for years, about to go to a final hearing, and Lubell appears shortly after a set of collateral disputes with the Ex-Husband comes to a boil. Lubell could both disclose confidential information in the litigation and use it to discover confidential information. The appearance of using the Ex-Wife as a cat's paw to disadvantage the Ex-Husband is palpable. When looking for an innocent explanation to dispel this appearance, the Court was confronted with what it deemed extreme non-credibility in the face of being able to watch the witness's testimony. The Circuit Court was well within its discretion to disqualify Lubell Rosen for this reason alone and to prevent these proceedings from being used to benefit the firm collaterally, thereby minimizing the appearance of impropriety.

CONCLUSION

For these reasons, the judgment below should be affirmed.

Dated: August 29, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2022, a true and correct copy of this Appellee's Answer Brief was served via the Florida Electronic Portal on the following: Mr. Norman Segall, Esq., *Attorney for the Petitioner*, nss@lubellrosen.com; jenny@lubellrosen.com, 1 Alhambra Plaza #1401, Coral Gables, FL 33134.

Erik W. Scharf

CERTIFICATE OF COMPLIANCE

I certify that the typeface used in the foregoing is 14-point Bookman Old Style, complying with Fla. R. App. P. 9.045(b) and (e). The word count is 8866 out of the allowed 13,000 word limit.

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