IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COW CREEK BAND OF UMPQUA TRIBE OF INDIANS, et al.,

Plaintiffs,

v.

U.S. DEPARTMENT OF THE INTERIOR, et al.,

Defendants.

Case No. 1:24-cv-03594-APM

COQUILLE INDIAN TRIBE'S AND JENNER & BLOCK LLP'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION TO DISQUALIFY KEITH HARPER AND JENNER & BLOCK

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"[A]re they ever going to hire us?" That was the question Jenner & Block LLP ("Jenner") partner Charlie Galbraith texted the Karuk Tribe's in-house counsel Ray Martin on October 6, 2022, many months after Karuk and the other Plaintiffs in this case now claim they engaged Jenner to represent them. Mr. Martin texted his response: "Trying."

The disqualification argument advanced by Plaintiffs Cow Creek Band of Umpqua Tribe of Indians ("Cow Creek"), the Karuk Tribe ("Karuk"), and Tolowa Dee-ni' Nation ("Tolowa") (collectively, "Plaintiffs" or the "Tribes") assumes, without evidentiary support, its own conclusion that the Tribes had engaged the firm and were clients of Jenner. That October 6 communication, along with abundant other evidence described in this opposition and in the possession of the Tribes, shows that they were not clients of Jenner. On the contrary, despite Jenner's efforts to persuade the Tribes to actually hire Jenner, the Tribes took advantage of several months of business development efforts by Jenner but never once took steps to engage Jenner until November 2022, when they finally informed Jenner they wanted to engage the firm. When they did that, Jenner analyzed a potential conflict issue and declined the representation out of an abundance of caution. Now, the Tribes seek again to take advantage of Jenner's business development efforts by using them as a sword to deprive the Coquille Indian Tribe ("Coquille") of its chosen counsel. Because the Tribes never engaged Jenner—never signed an engagement letter, never reached agreement with Jenner on the any terms of an engagement, and were never billed by Jenner—their disqualification motion should be denied.

INTRODUCTION

The Tribes' argument for disqualification rests on the incorrect statement that they were clients of Jenner in 2022, and therefore Jenner violated District of Columbia Rule of Professional Conduct 1.9 by undertaking the representation in this action of Coquille adverse to the Tribes. That

assumption is belied by the evidence concerning the relationship between Jenner and the Tribes. A relationship between attorney and client arises when the attorney offers to represent the client and the client agrees to be represented by the attorney on mutually acceptable terms. Notably, the Motion provides no support for its claim that it actually hired Jenner to do anything. The Motion does not disclose how, when, or by whom any contractual relationship between attorney and client was formed. The Tribes do not define the terms of Jenner's supposed representation of them, the subject matter of the engagement, or any of the other terms customarily included in an engagement, particularly with a large firm like Jenner. The Tribes do not present evidence these issues were even discussed, let alone agreed upon between them and Jenner.

The Tribes knew how to hire Jenner, had that been their desire. When Jenner and one of the Tribes (Karuk) considered retention in July 2022, the firm sent two separate comprehensive written engagement letters that Karuk would need to sign before the firm would agree to represent the Tribe. In those letters, the firm offered to represent the Tribe in connection with federal lobbying. There is no mention in either letter of representing the Tribe in litigation. Karuk declined to sign either letter. And, when Cow Creek finally asked Jenner to represent it in a November 29, 2022 email from Cow Creek's counsel to Jenner, that email refutes the Tribes' oft-repeated assertions in the Motion that it already was a Jenner client: Cow Creek informed Jenner in that email of a new development—that its governing body had decided to hire Jenner and requested Jenner send it an engagement letter for its consideration. Even so, the Tribe acknowledged that issues would need to be resolved before the engagement could begin, including Jenner addressing any conflict issues. Ultimately, Jenner chose not to accept the Tribe's offer to represent them because of potential conflict concerns and, contrary to the picture they seek to paint that Jenner had been their counsel for more than six months at that point, the Tribes fail to disclose

that Jenner never billed them a penny and the Tribes never paid anything for the firm's supposed work as their counsel for six months.

The complete factual record makes clear that for reasons known only to the Tribes, the Tribes chose not to engage Jenner as their legal counsel on the Coquille matter. While the firm met with the Tribes in an effort to be retained, the Tribes never hired the firm. In October 2022, near the end of this odyssey, Charlie Galbraith, the Jenner lawyer heading the business development effort with the Tribes, texted Ray Martin, who was in-house Tribal Attorney for the Karuk Tribe (and who has now submitted a declaration in support of the Tribes' position that the Tribes hired Jenner months earlier). Exasperated after months of back and forth with the Tribes about whether they were or were not going to hire the firm, Mr. Galbraith asked the Tribes' lawyer "are they ever going to hire us?" In response, Mr. Martin did not say that the Tribes had already hired the firm, their current position in the Motion. Instead, he responded with "Trying." Yet Mr. Martin has now submitted a declaration supporting his Tribe's position that it was a client of Jenner long before this time. That declaration misleadingly fails to disclose Mr. Martin's own text, which belies the premise of the Motion that the Tribes had already engaged Jenner. As the texts show, Karuk, like the other Tribes, had *not* hired Jenner.

Contrary to the Tribes' assumption that they hired Jenner at some unspecified earlier date, the evidence shows that the Tribes contacted Jenner about a potential lobbying representation, the firm expressed interest and tried to show its range of capabilities to the Tribes as part of its business development efforts, and the parties engaged in a long but intermittent process of communications about whether the Tribes wanted to hire Jenner and whether the firm would agree to the representation. Those discussions centered on whether Jenner could assist the Tribes with

lobbying, not the administrative review litigation now before the Court which the Tribes filed 24 months after the Tribes and Jenner ceased discussions.

The Motion claims Jenner has a conflict based on District of Columbia Rule of Professional Conduct 1.9, which sets forth the standards that apply when a law firm is adverse to a former client.[1] But Rule 1.9 is irrelevant because the Tribes have failed to sustain their heavy burden of proof on a motion to disqualify an adverse party's counsel to demonstrate they were, in fact, clients of Jenner. It is Rule 1.18, which addresses a different scenario, that applies here. It deals with conflicts involving a prospective client, and not an actual client—that is, someone who may have considered entering into, but did not enter into, an attorney-client relationship. Rule 1.18 permits a law firm that had discussions with a prospective client to be adverse to that prospective client where it had not entered into an attorney-client relationship.

Rule 1.18 applies here, as the Tribes were *prospective clients* whose contacts did not evolve into an actual representation. Under Rule 1.18, a law firm may be adverse to a former prospective client, even if that potential client provided confidences to the law firm, as long as the firm does not use any confidences obtained from the prospective client and the attorney who received the confidences is screened from the matter. Here, out of an abundance of caution that the Tribes might one day claim Mr. Galbraith received confidential information from the Tribes, Jenner imposed a Rule 1.18 screen which screened him from the firm's representation of Coquille in this matter—and it did so promptly upon being retained by Coquille.[2]

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[1] The Tribes' reliance on Rule 1.10 to impute the purported conflict to the entire law firm is equally misplaced because Rule 1.10 assumes the applicability of Rule 1.9.

[2] Jenner has continued to honor that screen. Mr. Galbraith has not communicated with firm lawyers representing Coquille about this brief. He worked with the firm's Office of General Counsel on his declaration. No communications with the Tribes that could be claimed to be confidential were shared with the Coquille team or are disclosed in this response.

Jenner has followed the Rules of Professional Conduct, and the Court should deny the Tribes' Motion for Disqualification.

BACKGROUND

A. Initial contacts

Beginning in the summer of 2022, counsel for Cow Creek and Charlie Galbraith, a partner at Jenner, began discussions about whether the firm could provide lobbying services in connection with a proposed casino project of Coquille. Ex. 1, C. Galbraith Decl. ¶ 2. Those discussions continued off and on over the next six months. *Id.* During those discussions, the Tribes suggested that Jenner might represent some or all of the Tribes, or a yet-unformed organization, the Rogue Valley Chairpersons' Association, that would consist of leaders from several tribes. *Id.* ¶ 3. There were often lengthy gaps between communications, and the discussions did not proceed with urgency. *Id.* ¶ 4.

On June 16, 2022, Mr. Martin, Karuk's in-house counsel, and Gabe Galanda and Anthony Broadman, counsel for Cow Creek, communicated with Mr. Galbraith to set up a call for the following week about lobbying in connection with the proposed Coquille casino. *Id.* ¶ 5. The dispute about that project had been going on for a decade, and the Tribes already had other lawyers representing them in the matter. They were looking for assistance in lobbying Congress and officials with the Department of the Interior ("DOI"), to oppose the Coquille project. *Id.* ¶¶ 5-6. Mr. Galbraith involved Craig Williams, a Jenner lobbyist, to assist in the efforts to establish a relationship with the Tribes. *Id.* ¶ 6.

Mr. Galbraith saw this as a business development opportunity. The firm sought to demonstrate to the Tribes the Firm's lobbying capabilities. In addition, the firm was aware that if it were retained to handle this lobbying project, it might be able to demonstrate to the Tribes its

abilities in other areas, and therefore might be well positioned to take on additional work, perhaps including litigation should the Tribes need representation in litigation. *Id.* ¶ 8. Mr. Galbraith asked members of the firm's lobbying practice, including Mr. Williams, to become involved in the business development effort. *Id.* ¶¶ 6, 8.

B. To demonstrate its lobbying abilities, Jenner arranges DOI meeting

Consistent with its business development approach for potential lobbying clients, Jenner attempted to demonstrate its lobbying capabilities to the Tribes by arranging a meeting between the Tribes and a DOI official to discuss the casino project. The declaration of Ray Martin submitted in support of the Motion refers to a June 23, 2022 meeting attended by multiple representatives of the Karuk and Tolowa Tribes with Paula Hart of DOI. In arranging the meeting, Mr. Williams advised DOI official by email that he was requesting the meeting "on behalf of the Rogue Valley Chairpersons' Association." Ex. 2, C. Williams Decl. ¶ 4. We address that meeting in this response. While certain Jenner lobbyists attended the meeting, they did not lead the substantive discussion about the Tribes' concerns. *Id.* ¶ 5. Their purpose was to make introductions, not to lead the meeting for the Tribes. *Id.* ¶ 6. As Mr. Williams relates, the firm was not in a position to speak effectively on behalf of the Tribes because the firm at that early point did not know the details of the Coquille controversy. *Id.* ¶ 5. Because of this, Jenner could make introductions, but the substance of the meeting was carried by the numerous representatives of the Tribes.[3] *Id.* ¶¶ 5-6. In facilitating the Tribes' lobbying effort, it was apparent to Jenner that it was not the only lobbying firm the Tribes had approached.

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[3] The Tribes assert that Rob Harmala and Jon Sobel, former Jenner lobbyists, were at the meeting. Both left Jenner's employ long before the current litigation was filed, and any knowledge they might have had cannot operate to disqualify the firm. Mr. Harmala did not address the substance of the Tribe's concerns at DOI meeting. *See* Ex. 2, C. Williams Decl. ¶¶ 5-6.

C. Jenner offers to represent the Karuk Tribe

Prior to the June 23 meeting, Mr. Martin had suggested that Jenner prepare a formal "pitch" to describe its capabilities. Ex. 1, ¶ 9. Approximately one month after the meeting with DOI, Jenner attorneys for the first time prepared internal paperwork necessary to send a proposed engagement letter to the Karuk Tribe, which was a firm requirement to enter into an attorney-client relationship with a new client. At that point, the Tribes had not retained Jenner or stated that they were prepared to enter into an attorney-client relationship. *Id.* ¶ 10.

On July 20, 2022, Jenner sent a proposed engagement letter to Mr. Martin, counsel for the Karuk Tribe. *Id.* ¶ 11. The letter identified the work to be performed as limited to lobbying and did not refer to any potential litigation work by Jenner. *Id.* ¶ 12. The letter contained detailed financial terms and other firm requirements for a representation. *Id.* As is common in lobbying engagements, Jenner proposed a monthly retainer. *Id.*

Karuk did not sign the engagement letter. *Id.* ¶ 13. Instead, it asked Jenner to reduce the monthly retainer proposed in the engagement letter. *Id.* After internal consideration, the firm sent a second engagement letter that lowered the proposed monthly retainer that Karuk had questioned. *Id.* Karuk did not sign the revised letter at that time—or ever. *Id.* Karuk and Jenner never entered into an engagement letter or otherwise agreed to terms that would govern a purported representation. *Id.* ¶ 14.

D. Continuing, sporadic discussions do not result in an attorney-client relationship

Intermittent discussions continued between representatives of the Tribes and Jenner before and after Jenner's failed effort to be engaged by the Karuk Tribe in late July 2022 for lobbying services. *Id.* ¶ 15. Indeed, Jenner partner Keith Harper, who chairs Jenner's Native American Law practice group, emailed Mr. Martin on July 6 to follow up and see if there was any additional

information needed and offered to pull together biographies for a potential litigation team and meet with tribal leadership—not an email that would be sent by a firm that had already been engaged. Ex. 3, K. Harper Decl. ¶ 5. At one point, Mr. Galbraith was on the West Coast, and he traveled to California to meet with the Tribes. Ex. 1, ¶ 16. The purpose of that meeting, which took place on or about July 21, 2022, included a discussion of whether a lobbying engagement could move forward. *Id.* Jenner lobbyists participated by phone in a call to describe the firm's lobbying capabilities. *Id.* Mr. Harper, a litigator, also joined the meeting by phone to describe the firm's other capabilities and to promote the effectiveness of the government relations team. *Id.* At that point, the Tribes had not hired Jenner to perform any services. *Id.* ¶ 17. In their Motion, the Tribes do not identify any communications between the Tribes and the firm between the meeting in late July and September 9, 2022, in which they supposedly engaged Jenner to undertake lobbying work, much less litigation work that would involve Mr. Harper.

On September 9, 2022, Mr. Harper contacted Mr. Martin to check in on the status of the Tribes' consideration of engaging Jenner. Ex. 3, ¶ 8. He asked about the possibility of "potential litigation," explained he would be on the West Coast in the near future, and offered to meet with the Tribe for additional conversations. *Id.* Wondering whether the Tribe may have decided not to proceed to hire Jenner, he added that if it was no longer likely that the Tribes would engage Jenner, a meeting was not necessary. *Id.* As of that point, the Tribes still had not told Jenner that they wished to engage the firm to perform lobbying or any other services as firm clients.

On October 6, 2022, Mr. Galbraith, in exasperation, texted Mr. Martin, asking if the Tribes "are [] ever going to hire us." Ex. 1, ¶ 18. Mr. Martin did not ask what Mr. Galbraith meant or say that the Tribes had already hired the firm, which is what they now contend in their Motion. *Id.* Instead, he tellingly responded: "Trying." *Id.* And then on November 1, after another month had

passed without the Tribes engaging Jenner, Mr. Martin told Mr. Galbraith that the council was split on whether to hire Jenner and was dragging its feet—hardly an indication that the Tribes were already clients of Jenner. *Id.* ¶ 19.

On November 3, 2022, Mr. Galbraith and Mr. Martin engaged in email communications regarding a potential need for counsel. *Id.* ¶ 20. At that time, Mr. Galbraith knew that the Tribes had not engaged Jenner to do any work for them, and he did not know if the firm would ever be engaged. *Id*. He believed at that time that Karuk remained on the fence about whether to retain the firm due to a split in its governing council on the topic, which was manifested by Karuk's decision not to agree to the two engagement letters for lobbying work that Jenner had sent to Karuk back in July. *Id.* ¶ 21. Mr. Galbraith hoped that Cow Creek might finally take action and ask Jenner to join its team along with its other lobbyists. *Id.* ¶ 22. At that time, however, it was not clear whether Jenner would be retained. *Id*.

E. Cow Creek attempts to retain Jenner

Cow Creek first sought to engage Jenner to consider representing it in late November 2022. As recited in its Motion, Cow Creek states Mr. Broadman, then and now its outside counsel, invited Mr. Galbraith to send Cow Creek an engagement letter. The same day, Mr. Galbraith advised Cow Creek that Jenner might have a conflict that it would need to work through. *Id.* ¶ 25.

On November 29, 2022, Cow Creek's counsel, Mr. Broadman, sent an email to Mr. Galbraith, with copies to Mr. Martin and Mr. Galanda (Mr. Broadman's law partner at Galanda Broadman, PLLC) who has appeared in this action as counsel for Cow Creek and who now argues in the Motion that the Tribes had already retained Jenner months earlier. In that email, Mr. Broadman stated that "per direction from the Tribe, ***we'd like to move forward with engaging you to represent Cow Creek*** with us in connection with Coquille's project in Medford. If and once

you have ascertained how to manage any potential conflicts can you please send us a proposed engagement letter attention Chair Carlo Keene, then we can discuss next steps." *Id.* ¶ 23 (emphasis added).[4] The November 29 email was the first time Cow Creek asked Jenner to represent it. *Id.* ¶ 24. Significantly, this email suggests the Tribe had finally taken formal action required to retain Jenner ("per direction from the Tribe"), which it had not previously stated. *Id.* ¶ 23. The November 29 email is the first instance in which anyone from the Tribes purported to act with authority from tribal leadership, as is ordinarily necessary for a tribe to retain counsel. *Id.* ¶ 24. The letter makes clear there that even then a condition of an attorney-client relationship in which Cow Creek would become a Jenner client was that Jenner address any conflict issues it may have and, having addressed them, the parties could pursue a mutually acceptable engagement letter: "[P]lease send us a proposed engagement letter … then we can discuss next steps." *Id.* ¶ 23; *see also id.* Ex. B. Jenner had previously raised potential conflicts with Mr. Martin. *See* Ex. 1, ¶ 25.

The November correspondence does not discuss any of the other fundamental aspects that would need to be resolved for an attorney-client relationship to be formed. There was no mention of the scope of the representation, staffing, fees, expenses, payment terms, or the other financial aspects made a part of the retention of an attorney. Those issues had been addressed in the July

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[4] The email is attached to Mr. Galbraith's Declaration. The Tribes declined to submit it to the Court ostensibly to preserve "any privilege, immunity, or protection." Martin Decl. ¶ 16. This document is not privileged, and the Tribes' Motion has waived any privilege by placing the facts disclosed in the document in issue. *See United States v. Legal Servs. for New York City*, 249 F.3d 1077, 1081 (D.C. Cir. 2001) ("Courts have consistently held that the general subject matters of clients' representations are not privileged. Nor does the general purpose of a client's representation necessarily divulge a confidential professional communication, and therefore that data is not generally privileged[.]") (internal citations omitted)); *United States ex rel. Barko v. Haillburton Co.*, 74 F. Supp. 3d 183 (D.D.C. 2014) ("[T]he mere fact of consultation about an issue is generally neither privileged nor protected."). Nonetheless, in recognition of the Tribes' concerns, the Exhibits to the Declarations are being filed under seal.

2022 engagement letters Jenner sent to Karuk; but as to Cow Creek, they remained to be addressed, as established by Mr. Broadman's request for a "proposed engagement letter."

In the weeks that followed, Mr. Galbraith corresponded with counsel for the Tribe about the steps necessary for Jenner to work through potential conflicts. Ultimately, Jenner determined it would not represent the Tribes due to an abundance of caution over potential conflict concerns. On December 20, 2022, Jenner declined the requested representation of the Tribes. *Id.* ¶ 26. The Tribes do not claim they ever asserted to Jenner, when it declined to represent them in connection with the Coquille project in December 2022, that Jenner was already representing them or had previously agreed to serve as their lobbying or litigation counsel.

At no time during the long courtship between the Tribes and the firm did any Jenner lawyer bill any time to any of the Tribes. The Tribes have never paid the firm a penny for any services. *Id.* ¶ 27.

F. Role of Mr. Harper

Mr. Harper is a Jenner litigation partner who heads Jenner & Block's Native American Law practice. Earlier in his career, he served as the U.S. Ambassador and Permanent Representative to the United Nations Human Rights Council in Geneva, Switzerland. He was not involved in the lobbying discussions that took place in the summer of 2022. Ex. 2, ¶ 10. As a litigator, Mr. Harper participated in meetings and in various emails to demonstrate Jenner's capabilities should litigation be called for in connection with the representation of the Tribes. As is often the case with a potential client, the firm hoped that if it was retained to perform lobbying work, it could also interest the Tribes in hiring the firm to provide additional services. As an experienced litigator and head of the firm's Native American practice, Mr. Harper was well positioned to describe the firm's capabilities to the Tribes. Ex. 1, ¶ 16; *see also* Ex. 3, ¶¶ 1, 11.

G. Coquille representation

Coquille retained Jenner in May 2024. When entering into that engagement, Jenner promptly implemented a Rule 1.18 screen to preclude communications between Mr. Galbraith and the firm's representation of Coquille. Ex. 1, ¶ 28. As shown in the declaration of Chair Brenda Meade of the Coquille Indian Tribe, the Tribe's chief executive officer, Coquille joins in this opposition to the Motion. It strongly desires that Jenner represent it in this matter. *See* Ex. 4, Decl. Tribal Chair B. Meade.

ARGUMENT

Disqualification negates a party's right to choose its own counsel and is therefore disfavored by the courts. A party moving to disqualify counsel "bear[s] the burden of establishing the existence of a prior attorney-client relationship and that the current litigation is substantially related to the prior representation." *Butler v. Enterprise Integration Corp.*, 459 F. Supp. 3d 78, 111 (D.D.C. 2020) (citing *Derrickson v. Derrickson*, 541 A.2d 149, 151-52 (D.D.C. 1988)). The burden the Tribes bear is a heavy one. "Although it is true of course that disqualification of an attorney is a matter which rests within the sound discretion of the trial court, it is also true that disqualification of an attorney is a serious step." *Headfirst Baseball LLC v. Elwood*, 999 F. Supp. 2d 199, 204 (D.D.C. 2013) (internal quotations and citations omitted). "This is because disqualification may severely affect the monetary interest and reputation of an attorney, and also negates a client's right to freely choose his counsel." *Id.* As such, disqualification "is a drastic measure that is disfavored by the courts, and disqualification motions should be subject to particularly strict judicial scrutiny." *Konarski v. Donovan*, 763 F. Supp. 2d 128, 135-36 (D.D.C. 2011) (internal quotations and citations omitted). "Strict scrutiny is warranted because disqualification negates a client's right to freely choose his counsel and because such motions may

be used as procedural weapons to advance purely tactical purposes." *Ambush v. Engelberg*, 282 F. Supp. 3d 58, 62 (D.D.C. 2017) (internal quotations and citations omitted).

As shown below, the Tribes fail to carry their substantial burden.

I. THE DISQUALIFICATION MOTION SHOULD BE DENIED BECAUSE THE TRIBES WERE NOT JENNER CLIENTS.

The Motion rests entirely on the contention that the Tribes were at one time actual clients of Jenner such that Jenner's representation of the Coquille Indian Tribe violates the firm's lawyers' obligations under Rule of Professional Conduct 1.9, a violation that is imputed to the firm under Rule 1.10. That contention is flatly wrong—they were never Jenner clients. Not only does the Motion fail to sustain the Tribes' strict burden to prove they were Jenner's clients, the facts (many of which were known to the Tribes but which they have not disclosed in the Motion) *refute* the assertion that the Tribes ever were clients of the law firm. At all times relevant to this case, the Tribes, which have been continuously represented by other counsel, were (at most) prospective clients of Jenner. They engaged in conversations with Jenner, yet they never entered into an engagement agreement or otherwise retained Jenner as their counsel to do anything, and indeed deferred any decision on engaging Jenner for six months. The factual basis for the application of Rules 1.9 and 1.10 is incorrect. The Motion should be denied.

A. The Tribes Failed to Prove They Were Jenner Clients.

Agreements to retain counsel are contracts that require offer and acceptance. In the attorney-client context, such agreements are often evidenced by the client's expression of desire to form an attorney-client relationship, willingness of the attorney to do so, and, in many cases, a formal engagement agreement. *See United States v. Crowder*, 313 F. Supp. 3d 135, 145 (D.D.C. 2018).

The Motion presents no evidence showing the formation of the attorney-client relationship upon which the argument for disqualification necessarily rests. There is no factual support in the Tribes' declarations, nor argument in its Motion, demonstrating that the Tribes, individually or collectively, retained Jenner to provide legal services. They point to no document or communication establishing the relationship. If there is such a relationship, it must have terms, and there is no evidence in the Tribes' papers as to what those terms are. The Tribes point to no evidence that Jenner accepted their request to represent them. They provide no evidence as to what they would pay for Jenner's services. Was it a monthly retainer? An hourly fee? Some combination? Even accepting every statement made by the Tribes, which Coquille does not do, there is no basis for concluding an attorney-client relationship existed.

B. The Evidence Shows the Tribes Were Not Jenner Clients.

The factual declarations submitted with this brief fill in the gaps in the Tribes' incomplete and highly misleading description of events. Although Coquille bears no burden here, the declarations demonstrate that the Tribes in fact did not retain Jenner to provide legal services.

The Tribes contacted Jenner about the possibility of providing lobbying services. But even there, the record indicates that no engagement was ever consummated. As described in the Motion, Jenner lawyers arranged a meeting with officials from DOI. Mot. at 7. The purpose for arranging that meeting was to demonstrate the firm's capabilities —a typical business development activity. *See* Ex. 1, ¶¶ 6, 8. In arranging the meeting, Mr. Williams advised the staff members he contacted that he was reaching out "on behalf of the Rogue Valley Chairpersons' Association." *See* Ex. 2, ¶ 4. He did not say that he or others from Jenner had been engaged as lobbyists (much less lawyers) on behalf of the Tribes.

After that meeting, Jenner sent the Karuk Tribe an engagement letter proposing that the Tribe retain Jenner to provide lobbying services. Ex. 1, ¶ 11. The letter proposed a monthly retainer, as is common for lobbying services. Although it persuaded the firm to lower its monthly retainer, the Tribe still never accepted the firm's offer to take on Karuk as a client. *Id*. ¶ 13. As of the end of July, when communications fell off, Jenner had not been retained by the Karuk Tribe, the Cow Creek Tribe, any of the Tribes, or the Rogue Valley Chairpersons' Association. The Tribes had not agreed to pay any amount of legal fees. The nature of any engagement had not been defined, much less agreed upon, at that time. *Id.* ¶ 14. At that time, the Tribes plainly chose not to become Jenner clients.

The next time a formal engagement was discussed was in November 2022. At that time, Mr. Galbraith had been told that Karuk was "on the fence" about whether it would retain lawyers. He had been told there was a split in the views of the governing body of the Karuk Tribe as to whether it even wished to hire new lawyers, let alone Jenner. As to Cow Creek, Mr. Galbraith thought that Cow Creek might add Jenner to its legal team. Ex. 1, ¶ 22. The Tribe did not request that Jenner represent it until November 29, when its own outside counsel, Mr. Broadman, informed Jenner that that Tribe had finally decide to proceed with an engagement to become a Jenner client. At that time, Mr. Broadman wrote Mr. Galbraith and requested that the firm prepare an engagement letter, should the firm be able to resolve any conflict issues. *Id.* ¶ 23. As recited in the Motion, the parties were unable to reach agreement.

Significantly, when Mr. Broadman asked to engage Jenner on November 29, he did not suggest there was an existing attorney-client relationship between the Tribes and Jenner that only needed to be memorialized in writing. Nor could he, because the Tribes and the firm had never gotten to the point of negotiating the terms of a possible engagement. Moreover, the November

communication was the first mention of tribal authority, a prerequisite to an engagement. Mr. Boardman invited the firm to propose an engagement agreement. And his request noted there were issues to be resolved, notably potential conflicts, before the parties could enter into an attorney-client relationship and the Tribe retain Jenner, establishing that there was no attorney-client relationship. There were other things left unstated, but which also needed to be resolved prior to an agreement: the economic terms, the limits of the engagement, the work to be performed, and any necessary conflict waivers.

Between the failed July engagement letter and the failed November retention, the parties had sporadic discussions about working together, but the firm was never retained. This is notably demonstrated by Mr. Galbraith's question to Mr. Martin in October 2022. Speaking of Mr. Martin's client, the Karuk Tribe, he asked, "are they ever going to hire us?," to which Mr. Martin responded he was "Trying." There were other communications and offers to meet in person that were ignored. The complete record demonstrates that at no time did the Tribes, individually, in combination, or otherwise, retain Jenner.

That conclusion is further supported by what the record and the disqualification motion do not include. There is no evidence that the Tribes' governing bodies had ever authorized retaining new lawyers. In November 2022, Mr. Galbraith was told the Karuk Tribe's governing body was undecided about whether to retain counsel. Ex. 1, ¶ 19. There is no suggestion that the parties reached agreement on the services to be provided, the staffing, the structure of the fee, a retainer, or other aspects of forming an attorney-client relationship. Further, it is undisputed that Jenner never charged any time to a client matter for the Tribes or billed the Tribes for anything. This is no mere triviality. It should be obvious that if Jenner had actually been engaged by the Tribes, it would have billed the Tribes for its efforts, rather than chalk it up to business development.

In sum, the Tribes have failed to prove that they engaged Jenner. The facts show there never was an attorney-client relationship between the Tribes and the firm. As a result, there is no basis for the relief sought in the Motion.

C. The Events the Tribes Disclose Do Not Make the Tribes Jenner Clients.

The Tribes offer two reasons in support of their argument that Jenner was counsel to the Tribes. *First*, the Tribes contend Jenner was the Tribes' attorney because the firm received confidential information. *Second*, the Tribes contend that by arranging lobbying meetings in July 2022 the firm created an attorney-client relationship. As shown in this section, both arguments are incorrect.

1. The Tribes' Argument that an Exchange of Confidential Information Created an Attorney-Client Relationship Is Incorrect.

The receipt of confidential information would be insufficient to create an attorney-client relationship. Even if it were relevant, factually it is unproven.

Legally, the receipt of confidential information from a person who is not a client is insufficient to create an attorney-client relationship. This point is demonstrated by Rule 1.18, which protects law firms that receive confidential information, and their later clients, in the context of communications that did not culminate in an attorney-client representation. The suggestion that the receipt of confidential information transforms a prospective client that is the subject of a business development inquiry into a client is inconsistent with Rule 1.18, and would make that Rule superfluous.

While courts can consider whether confidential information has been exchanged when deciding whether an attorney-client relationship exists, it is not the receipt of confidential information that is relevant to an attorney-client relationship, but the submission of confidential information *with the reasonable belief that the attorney is acting as the attorney for the purported*

client. *See e.g., Westinghouse Elec. Corp. v. Kerr McGee Corp*., 580 F.2d 1312, 1312, 1321 (7th Cir. 1978) (an attorney client relationship exists when the lay party submits confidential information "with reasonable belief that the latter is acting as the former's attorney"); *Pain Prevention Lab, Inc. v. Electronic Waveform Labs, Inc*., 657 F. Supp. 1486, 1495-97 (N.D. Ill. 1987) (same). Here, any communications took place in the context of dealing with a prospective client that declined to sign an engagement letter, acknowledged that it was still "trying" to retain Jenner as its counsel, and only sought to hire Jenner as counsel on November 29, 2022, again acknowledging that any engagement would depend on working out conflict issues. The Tribes could not have transmitted any information to Jenner with a reasonable belief that Jenner was acting as their attorneys.

The court's decision in *In re Johore Inv. Co. (U.S.A.), Inc*., is factually similar to our case. 157 B.R. 671 (D. Haw. 1985). There, a debtor moved to disqualify a creditor's counsel based on an alleged prior professional relationship between counsel and debtor. *Id.* at 673. Reversing the bankruptcy court, the district court found that no attorney-client relationship existed. In support of its finding, the court noted there was no express attorney-client relationship given that the firm never initiated its standard procedures for opening a new client file, the time spent in a brief meeting with counsel was not billed, and no payment was received. *See id.* at 677-78. The assertion that confidential information had been received did not lead to a different result. *Id.* at 678.

In light of the Tribes' actions—including not signing engagement letters, not requesting an engagement letter until November 29, 2022, and never directing the firm to provide legal services—the Tribes' supposed subjective belief that there was an attorney-client relationship would be unreasonable. And, even if the Tribes had a reasonable subjective belief that the firm

represented them, that belief cannot create an attorney-client relationship. "[T]he attorney-client relationship does not rest on the client's view of the matter; rather, the Court considers the totality of the circumstances to determine whether an attorney-client relationship existed." *Butler,* 459 F. Supp. 3d at 111 (citing *In re Fay*, 111 A.3d 1025, 1030 (D.C. 2015)).

Factually, and as a threshold matter, the Tribes have not presented evidence that they provided *any* confidential information to Jenner, and certainly not information that would be relevant to this pending litigation. Jenner is not able to evaluate the Tribes' assertion that Jenner received confidential information about the Tribes' position and strategy, as the facts are not recited in the Motion. It is difficult for Jenner to refute the assertion that the firm received confidences when none are identified. Still, it is apparent from the record that the firm did not in fact receive disqualifying confidences.

Even if Mr. Galbraith did receive confidential information, that could not result in the disqualification of the firm or its lawyers under Rule 1.18 because he has been screened from the firm's representation of Coquille from the outset. *See* Ex. 1, ¶ 28. Thus, the Tribes must establish that Mr. Harper, who *is* involved in representing Coquille, received confidential information, as he is the only lawyer the Tribes contend had confidential communications with the Tribes in which litigation was discussed.

The Motion does not provide a basis for the Court to conclude that any information Mr. Harper received should result in disqualification. Mr. Harper did not attend the lobbying meeting with DOI officials on July 23, 2022, and was not involved in any lobbying engagement of the firm in the summer of 2022. And the limited meetings and communications in which Mr. Harper participated did not involve confidential information.

The Tribes assert that Mr. Harper participated in meetings and exchanged emails with the Tribes. As shown in the declaration of Mr. Harper, those communications were part of the firm's effort to persuade the Tribes to engage Jenner. Mr. Harper was involved due to his role as the head of the firm's Native American practice and to showcase Jenner's litigation capabilities, should the Tribes be interested in that service. He did not obtain confidences—he merely explained Jenner's capabilities and willingness to represent the Tribes should they ultimately decide to pursue a litigation strategy. Ex. 3, ¶¶ 11-12.

Mr. Martin states that Mr. Harper met with certain Tribal officials on June 24, 2024. The details of that meeting are redacted from Mr. Martin's declaration. Martin Decl. ¶ 9. Mr. Harper recalls that the Tribal officials were in Jenner's office in connection with the lobbying meeting. Mr. Harper recalls his meeting with the Tribes was brief and he participated in small talk. He was asked by the lobbying team to attend the meeting to provide another example of the firm's expertise in Native American law. Ex. 3, ¶ 3.

Next, Mr. Harper communicated with Mr. Martin and others by email on July 6 and 7, 2024. Martin Decl. ¶ 11. Those communications disclose no confidences. Ex. 3, ¶¶ 5-6, 12. As part of his effort to prove the firm's capabilities, Mr. Harper asked Mr. Martin whether the Tribes were interested in him assembling a team to present the firm's litigation capabilities or sending biographies of Jenner lawyers. Those are typical business development efforts to prove a law firm's capabilities. *Id.* ¶ 6. While he was trying to interest the Tribes in the firm's litigation prowess, the Tribes did not pursue it. They did not take up either of his offers, so he of course neither made the presentation nor sent the biographies. Other than that, the emails describe only efforts to schedule a meeting. *Id.* ¶¶ 5-6.

Mr. Martin states that Mr. Harper attended a meeting, by telephone, on July 21, 2022. Martin Decl. ¶ 12. Mr. Martin refers to meeting minutes which Jenner lawyers have never seen and therefore cannot address. Mr. Harper recalls dialing in to part of the meeting at the request of Mr. Galbraith. The meeting focused on the lobbying efforts that did not involve Mr. Harper. To the extent that Mr. Harper participated in the discussion, it was to describe Jenner's litigation capabilities. He recalls no disclosures of confidences at the meeting. Ex. 3, ¶ 7.

Finally, Mr. Martin refers to a September 9, 2022 email from Mr. Harper. Martin Decl. ¶ 13. That was the first communication the Tribes mention after a six-week gap in communications. Mr. Harper recalls reaching out to the Tribes to state that he was going to be on the West Coast and, if the Tribes wanted him to visit, he would extend his trip. Ex. 3, ¶ 8. At the time, it was unclear to Jenner if the Tribe wanted to retain new counsel, including whether it wished to assemble a litigation team, as Mr. Harper had previously suggested. Mr. Harper added that if the Tribe decided it was not going to engage the firm, he would not trouble them with a meeting. The Tribes never took him up on the invitation, and there was no further meeting. *Id.* ¶ 9.

Far from being an exchange of confidences, the communications reflect efforts of a lawyer to demonstrate his firm's capabilities to a potential client.

2. Arranging a Lobbying Meeting Did Not Create an Attorney-Client Relationship.

Nor does Jenner's participation in the limited lobbying efforts identified in the Motion constitute a disqualifying conflict. As made clear in Mr. Williams's declaration, the firm's limited involvement with the Tribes did not create an attorney-client relationship. As is frequently the case, the firm set up a meeting for Tribal officials with DOI to show the contacts that the firm had and could call upon for those needing lobbying assistance. Ex. 2, ¶¶ 2-3. At those meetings, the Tribes did the talking about substance, mainly because they were the only ones who were in a

position to explain in depth the concerns that they had with the proposed Coquille project. The discussions in the meeting were neither confidential nor privileged, as the Tribal leaders' statements to the government officials were designed to persuade the Department to agree with the Tribes. *See id.* ¶ 9. Mr. Williams, who arranged the meetings "on behalf of the Rogue Valley Chairpersons' Association," did not discuss the merits of the matter. *Id.* ¶¶ 4-6. Nor could he, as Mr. Williams had only recently become aware of the matter and lacked knowledge of the points the Tribes wished to make. At that point, the firm had not been retained, and the lobbyists involved treated it as a business development opportunity, not a representation.

In these circumstances, the firm's involvement in arranging a meeting was insufficient to create any justification for disqualification in this lawsuit. Such limited actions are insufficient to give rise to an attorney-client relationship. *See Capacchione v. Charlotte-Mecklenburg Bd. of Educ.*, 9 F. Supp. 2d 572, 579-81 (W.D.N.C. 1998) (law firm was not disqualified from representing the plaintiff in a desegregation suit against a school system because of an educational briefing one of the firm's attorneys had given the system's superintendent and the board of education before the suit was filed about developments in school-desegregation law); Restatement (Third) of the Law Governing Lawyers § 14 (2000) ("Formation of a Client-Lawyer Relationship") ("[T]he client-lawyer relationship contemplates legal services from the lawyer, not, for example, real-estate-brokerage services or expert-witness services. A client-lawyer relationship results when legal services are provided even if the client also intends to receive other services. A client-lawyer relationship is not created, however, by the fact of receiving some benefit of the lawyer's service.").

It is evident that there was no attorney-client relationship in this case, as the Tribes continued to discuss whether to retain Jenner for many months after DOI meeting. By the Tribe's

conduct, it is clear that no party to the discussions could reasonably conclude an attorney-client relationship existed as of the June meeting with DOI.

II. THE DISQUALIFICATION MOTION SHOULD BE DENIED BECAUSE JENNER FOLLOWED RULE OF PROFESSIONAL CONDUCT 1.18 REGARDING PROSPECTIVE CLIENTS.

The Motion for Disqualification should be denied for several additional reasons.

First, the Motion is based on Rule 1.9, which is inapplicable because the Tribes have failed to meet their burden of proving that they were Jenner clients and are now former Jenner clients. Thus, Rule 1.9 does not apply, and the Motion for Disqualification is groundless.

Second, at most, the Tribes were prospective clients of Jenner. The firm, out of an abundance of caution, immediately screened Mr. Galbraith from the Coquille representation upon being engaged by Coquille approximately 18 months after the firm declined the representation of Cow Creek. Ex. 1, ¶ 28. Pursuant to that screen, any information obtained by Mr. Galbraith during the business development efforts have not been shared with the litigation team. *Id.*

Rule 1.18(a) defines a "prospective client" as "a person who consults with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter." That is what the Tribes did, and no attorney-client relationship ever existed. The rule provides a "safe harbor" in Rule 1.18(d)(2) to address situations like the one here, and Jenner adhered to the Rule's requirements.

Rule 1.18 recognizes that prospective clients often share confidential information with lawyers as part of the process of deciding whether to retain those lawyers. If the firm receives such confidences, the firm is not subject to disqualification should it later take a position adverse to the prospective client. Otherwise, a potential client could thrust a disqualification upon a firm, or a firm may be unable to evaluate whether it can take on a matter for fear of being disqualified from other matters simply because the prospective client decided to share what it now asserts is

confidential information with a lawyer it never hired. Under the Rule, a firm is not disqualified if it takes prophylactic steps to protect that information within its firm by screening the attorney who received it from the subsequent matter adverse to the former prospective client. Rule of Professional Conduct Rule 1.18(d)(2) provides that the lawyer who received such confidences must be timely screened from any participation in the matter on behalf of the client that is adverse to the former prospective client. Out of an abundance of caution, Mr. Galbraith, who was at the center of discussions with the Tribes, was timely screened from the firm's representation of the Coquille Tribe since its inception. Ex. 1, ¶ 28. Compliance with Rule 1.18 precludes disqualification of other members of the firm. *See* Rule 1.18(d).

Third, disqualification is a discretionary remedy. It is not required, and is only imposed where, in the judgment of the court, special circumstances justify disqualification. "The D.C. Circuit has cautioned that, even where a violation is found, disqualification is warranted only rarely in cases where there is a serious question as to counsel's ability to act as a zealous and effective advocate for the client or the substantial possibility of an unfair advantage to the current client because of counsel's prior representation of the opposing party." *Ambush*, 282 F. Supp. 3d at 62 (D.C.C. 2017) (citing *Koller By & Through Koller v. Richardson–Merrell Inc*., 737 F.2d 1038, 1056 (D.C. Cir. 1984), vacated on other grounds, 472 U.S. 424, 440-41 (1985)). Even if the Tribes had not entirely failed to carry their burden here, disqualification would be inappropriate in this case. As shown in the declaration of Chair Meade, the Coquille Tribe desires that Jenner represent it in this case. Granting the Motion to Disqualify would deprive Coquille of counsel of their choice.

At the same time, matters at issue in this lawsuit have progressed far beyond anything the firm did as part of its business development activities in 2022. There could be no prejudice to the

Tribes from Jenner's representation of Coquille. The Tribes seek a temporary restraining order and preliminary injunction primarily based on their contention that the environmental impact statement issued in November 2024 was insufficient. Obviously, a 2024 environmental impact statement was not the subject of discussions in 2022. Similarly, the Tribes challenges a 2025 decision by DOI as being issued in error because it does not address certain separation-of-powers principles set forth in a 2024 decision of a panel of the District of Columbia Circuit. Again, a 2024 decision was not the subject of discussions in 2022.

Jenner does not know exactly what specific evidence the Tribes are now contending they disclosed to Jenner while considering whether to hire it in 2022 that has an impact on the resolution of this case because the Tribes have not disclosed this "evidence" to Jenner. Still, the legal issues before the Court are at best tangential to the business development discussions that took place in 2022. As a result, the Motion appears to be a strategic ploy to deprive the Coquille Indian Tribe of counsel of their choice. In these circumstances, disqualification is neither required nor warranted.

CONCLUSION

The Tribes' Motion to Disqualify Jenner & Block LLP and its lawyers should be denied.

Dated: January 17, 2025

Respectfully submitted,

/s/ Keith M. Harper

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2025, I caused the foregoing document to be electronically filed with the Clerk of the Court for the District Court for the District of Columbia by using the CM/ECF system. I further certify that, because the document was filed under seal, service was accomplished by email to the following parties:

- Richard Armstrong, armstrong@gaminglawpc.com;
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/s/ Keith M. Harper _________ Keith M. Harper