COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

NO. 44969-2-II

ROBIN EUBANKS and ERIN GRAY
Respondents/Plaintiffs,
v.

DAVID BROWN, individually and behalf of his marital community,

Petitioner/Defendants.

&

KLICKITAT COUNTY, KLICKITAT COUNTY PROSECUTING ATTORNEY'S OFFICE;

Defendants

Brief of Petitioner David Brown

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1. Introduction.

This is an interlocutory appeal of the *Order Deciding Defendants' Motions for Expedited Hearing, to Continue Motion Hearing and for Evidentiary Hearing, and to Disqualify Plaintiff's' Counsel*, entered in the Clark County Superior Court, May 7, 2013. CP 434-436. At issue is the Court's decision to deny Petitioner/Defendant David Brown's motion to disqualify Plaintiffs' counsel Thomas Boothe from his representation of Plaintiffs Robin Eubanks and Erin Gray (hereinafter "Eubanks/Gray") in a case in which the Eubanks/Gray allege sexual harassment and other claims against Mr. Brown and Klickitat County.

Mr. Boothe does not dispute the Trial Court's Finding that David Brown and Thomas Boothe had an attorney-client relationship in May and June 2010. CP 435, Conclusion of Law 3. It is established, again without dispute from Mr. Boothe, that Mr. Brown discussed the potential for the litigation of claims that might be made by Eubanks/Gray against Mr. Brown with Mr. Boothe while Mr. Boothe was acting as Mr. Brown's attorney. CP 435, Findings of Fact 1, 2 and Conclusion of Law 3. Mr. Boothe admits vaguely that whatever might have been discussed regarding the Eubanks/Gray claims was merely a one-way conversation beginning and ending with Mr. Brown, and that Mr. Boothe merely listened. After he was approached by Eubanks/Gray, who worked in the office of the

Klickitat County Prosecuting Attorney with Mr. Brown, Mr. Boothe assumed their representation against Klickitat County. However, Mr. Boothe accepted Eubanks/Gray as clients only after consulting various resources regarding a possible conflict of interest stemming from his representation of Mr. Brown. Notwithstanding his own reservations that led him to consult those various resources about a potential conflict, Mr. Boothe now vehemently protests any suggestion that he has a conflict of interest in representing the Eubanks/Gray against a former client and Mr. Brown's demand that he should either resign or be disqualified.

After a hearing, the Trial Court concluded that an attorney-client relationship did exist between Mr. Brown and Mr. Boothe (CP 435-436) but only regarding specific election issues. Regarding sexual harassment claims the Trial Court concluded that while the attorney-client relationship existed between Mr. Boothe and Mr. Brown, the "current action [this lawsuit] is not 'a substantially related matter' [to the] issues on which Boothe and Brown consulted, for purposes of RPC 1.9(a). CP 436. The Court also concluded that Mr. Brown was only a "prospective client" under RPC 1.18(a) regarding the sexual harassment claims (CP 436) and that Mr. Brown failed to meet his burden to disqualify Mr. Browne from representing Eubanks/Gray because he did not "show that the attorney [Boothe] received information from the prospective client [Brown] that

could be significantly harmful to the prospective client in the matter." *Id.* Therefore, Mr. Brown's motion to disqualify Mr. Boothe from representing Eubanks/Gray was denied. CP 436. This appeal followed.

When faced with the specter of a conflict of interest an attorney and the court should be driven by an abundance of caution. Here, the Trial Court concluded that Mr. Brown and Mr. Boothe did in fact have an attorney-client relationship as to certain issues but not as to sexual harassment claim issues which, as Mr. Brown submits, were discussed with Mr. Boothe at the same time. Splitting that hair, the Trial Court determined that the entirety of the relationship was defined by specific issues rather than the expectations of the client. For the following reasons, Appellant David Brown respectfully submits that the Trial Court committed reversible error when it denied his motion to disqualify Mr. Boothe from the Eubanks/Gray representation.

2. Assignments of Error.

A. The Trial Court erred when it denied Defendant Brown's *Motion to Disqualify Attorney.*

Issues Pertaining to Assignment of Error.

1. When presented an issue regarding the existence of the attorney-client relationship, is the Court limited to an analysis of the

specific issues involved in the asserted representation or should the Court give weight to the contemporaneous understanding of the client?

2. If an attorney gains confidences from an existing client that are unrelated to the subject matter of the then existing attorney-client relationship, can that same attorney subsequently represent individuals adverse to the former client in a lawsuit relating to the subject matter of the confidences shared?

3. Is a prospective client seeking to disqualify an attorney pursuant to RPC 1.18 required to disclose the substance of the confidences shared with that attorney?

3. Statement Of The Case.

David Brown is a former deputy prosecutor in the Klickitat County Prosecuting Attorney's Office. CP 1. In late 2009, Mr. Brown made the decision to run for the office of Klickitat County Prosecuting Attorney. *Id.* During Mr. Brown's preparation for announcing his candidacy for the 2010 election, he became concerned that the Hatch Act precluded him from running for office while being employed as a deputy prosecutor. CP 2. Mr. Brown was also concerned about what legal protections he had as an employee in an "at will" and FLSA-exempt position. *Id.* To address these concerns, Mr. Brown sought legal counsel and was eventually directed to attorney Thomas Boothe of Portland, Oregon. CP 3.

Mr. Boothe's law office phone number at all times relevant was 503-292-5800. CP 75. In May 2010, Mr. Brown contacted Mr. Boothe for legal advice (CP 3-4) and in the month of May 2010 the two had a number of phone conversations totaling over 75 minutes (CP 3-4, 47-48, 52-53, 69-71 and 73) and exchanged numerous e-mails. CP 8-19. Those phone calls and e-mails primarily concerned Mr. Brown's decision to run for prosecuting attorney, but also touched on other employment issues. *Id.*

Also during that time period, on May 28, 2010, two employees (Robin Eubanks and Erin Gray) submitted a grievance alleging that Mr. Brown had sexually harassed them. CP 48, 382. After being notified and interviewed about the allegations (CP 368-370) Mr. Brown was recommended for "sensitivity and team building training" on June 15, 2010. CP 371. Mr. Brown called Mr. Boothe on June 21, 2010. CP 4, 48, 71 "Item 1190." During that 15 minute conversation, Mr. Brown advised Mr. Boothe that Eubanks and Gray had accused him of sexual harassment and that the accusations came shortly after he announced his candidacy for prosecuting attorney. CP 4. Mr. Boothe advised Mr. Brown to do his best to limit his exposure to any "discovery fishing expedition" that might occur later. CP 4.

On December 17, 2010, Eubanks and Gray sued Klickitat County and Mr. Brown, asserting a claim of sexual harassment. On June 21, 2011

Mr. Boothe was contacted by Seattle counsel for the purpose of referring the Eubanks/Gray suit to him. CP 94, ¶ 45. On July 28, 2011, Mr. Boothe was formally substituted as counsel for Eubanks and Gray. CP 96, ¶ 52. On August 12, 2011, Mr. Boothe was informed by counsel for Mr. Brown that Mr. Brown considered Mr. Boothe to have a conflict of interest in representing one or both of Eubanks or Gray. CP 96, ¶ 54; CP 151. Within 15 minutes Mr. Boothe accused Mr. Brown of lying. CP 151.

On January 4, 2013, Brown brought a motion to disqualify Mr. Boothe from representing Eubanks/Gray. CP 44-45, 27-36, 20-23, 37-43, 1-19. Klickitat County joined in that motion. CP 46-51, 52-75. Mr. Boothe opposed that motion.

In an order dated May 7, 2013 (CP 434-436), the Trial Court correctly concluded that Brown had an attorney-client relationship with Mr. Boothe "on the Hatch Act and other election issues." The Trial Court also correctly found that as part of that attorney-client relationship, Mr. Brown discussed the sexual harassment allegations made against Brown by Eubanks and Gray. However, even though Mr. Brown and Mr. Boothe had an existing attorney-client relationship, the Trial Court concluded that Mr. Brown was only a "prospective client" of Boothe as to the sexual harassment claims that were discussed at that time. CP 436. The Trial Court then held that since Brown refused to disclose the substance of the

confidences shared with Mr. Boothe regarding the sexual harassment claims, the *Motion to Disqualify* was insufficient and was therefore denied.

4. Argument

A. The Standard Of Review.

The question of whether an attorney's conduct violates the relevant rules of professional conduct is a question of law. *Eriks v. Denver,* 118 Wn.2d 451, 457-458, 824 P.2d 1207 (1992). The court's decision to grant or deny a motion to disqualify counsel is a legal question subject to de novo review. *Id.*; *Sanders v. Woods,* 121 Wn.App. 593, 597, 89 P.3d 312 (2004). The purpose of the Rules of Professional Conduct is to protect the public from attorney misconduct, and the Rules should be interpreted broadly to achieve that purpose. *Eriks v. Denver,* 118 Wn.2d at 458-459.

The Trial Court correctly found that Mr. Boothe and Brown "formed an attorney/client relationship...." CP 435, Conclusion of Law 3. The Trial Court likewise made a factual finding that during that attorney-client relationship, Mr. Brown "mentioned to Boothe that other employees were making sexual harassment allegations against him." CP 435, Finding of Fact 2. Despite the fact that the "other employees" who made the sexual harassment allegations are the same people that Mr. Boothe now represents in this sexual harassment lawsuit against Mr. Brown, the Trial

Court refused to disqualify Mr. Boothe because Mr. Brown was only a "prospective client" regarding the sexual harassment allegations. As a "prospective client" the Trial Court required Brown to divulge the confidences that he had shared with Boothe. When Mr. Brown refused, the Trial Court refused to disqualify Mr. Boothe from representing Eubanks/Gray in their lawsuit against Mr. Boothe's former client.

The Trial Court's refusal to disqualify Mr. Boothe absent a disclosure of the very confidences that Mr. Brown is attempting to protect is clear and obvious error for the following reasons. First, the Trial Court erroneously analyzed the case under RPC 1.18 ("Duties to Prospective Clients"), as opposed to RPC 1.9 ("Duties to Former Clients"). Since Mr. Brown is in fact Mr. Boothe's former client (CP 435, Conclusion of Law No. 3) Mr. Brown was not required to disclose the substance of the confidences he shared with Mr. Boothe. Second, even if Mr. Brown was only a "prospective client" under RPC 1.18, Mr. Brown was not required to disclose the substance of the confidences he shared with Mr. Boothe

B. The Existence Of The Attorney-Client Relationship Is Determined, In Large Part, By The Subjective Intent Of The Client.

This issue was determined by the Trial Court in a vacuum. While Mr. Brown has demonstrated through his Affidavit (CP 1-19) that he firmly believed that he was consulting with his lawyer when he discussed

the Eubanks/Gray claims, the Trial Court analyzed the situation from a more detached viewpoint. That is, the Trial Court academically analyzed whether the relationship existed under RPC 1.18 or 1.9 in May and June 2010 while it largely ignored what Mr. Brown thought at that critical time.

Case law is clear that the existence of an attorney-client relationship "turns largely on the client's subjective belief that it exists." *In re Disciplinary Proceeding Against Egger*, 152 Wash. 2d 393, 410-11, 98 P.3d 477 (2004). The caveat is that the client's belief must be "reasonable." *Id.* In this case, the reasonableness of Mr. Brown's belief that he had an attorney-client relationship with Mr. Boothe regarding the harassment allegations is best evidenced by the fact that Brown shared those confidences with Boothe during an existing and functioning attorney-client relationship. Mr. Brown's belief that the confidences he shared with his then-attorney would not later be used by that attorney to prosecute a case against him is unquestionably "reasonable." Indeed, it was as a result of that attorney-client relationship that Mr. Brown felt comfortable sharing the confidences about the harassment allegations with Mr. Boothe:

> I was shocked to learn the Mr. Boothe, the same attorney I shared confidences with, relied upon for legal advice and felt was in a privileged attorney-client relationship with, was taking over the [Eubanks/Gray'] case. I always believed that I had an attorney-client relationship with Mr. Boothe and that is way I shared

> confidences with him, including confidences about the allegations made against me by his clients.

CP 5.

> It was because of my belief that I had an attorney-client relationship with Mr. Boothe that I felt comfortable sharing confidences with him about the sexual harassment allegations made against me by the very persons Mr. Boothe now represents in this lawsuit against me.

See, *Petitioner David Brown's Reply In Support of Motion for Discretionary Review, Appendix A-1* (July 5, 2013).

The evidence submitted to the Trial Court shows that both Mr. Brown and Mr. Boothe believed that the attorney-client relationship extended to the claims being brought by Eubanks/Gray Eubanks and Gray. Mr. Boothe's self-serving *Affidavit* (CP 77-173) confirms the point of the attorney-client relationship being dependent on the client's interpretation of events rather than the attorney's. As Mr. Boothe's *Affidavit* demonstrates, the attorney is in a better position to selectively manage information gleaned from the client and make whatever entries in his or her records that the attorney sees fit to make while all the while gathering information from the client.

Mr. Boothe split hairs in his description of events when he contends that Mr. Brown did not make "reference to Eubanks/Gray or their complaints about Brown," and that he "never identified a female

coworker by name, and he never made any reference to any of the four women who are now Eubanks/Gray in this lawsuit." CP 89 ll. 15-17. This does not eliminate the fact that Mr. Brown provided information to Mr. Boothe regarding pending or threatened claims. Rather, it merely shows that Mr. Brown used discretion in his relation of events to Mr. Boothe; it does not mean that he did not discuss the claims with Mr. Boothe. CP 89, ll. 13-19. Mr. Boothe repeats this claim at p. 15 ll. 21-25 (CP 91) and yet cannot convincingly deny that Mr. Brown did in fact tell Boothe about the accusations.

Mr. Boothe's "practice . . . [of] open listening" as explained at p. 15, ll. 10-17 (CP 91) of this *Affidavit* is completely self-serving and indeed deceptive to the client. That "powerful listening tool" allows an attorney to pick up the phone, listen to the client, confirm what the client just said, and then ask "what do you want me to do?" without creating any type of attorney-client relationship. According to Mr. Boothe, this is nothing more than allowing the client to "vent" frustrations and counsel himself (CP 91, ll. 15-17) – a truly remarkable method by which the attorney can shield himself or herself from later being called out in a situation of obvious conflict. This, coupled with Mr. Boothe's "practice" of two-fold retainers (CP 79) and keeping notations in various "Amicus" computer files (CP 78-79) would make it quite easy for Mr. Boothe to later deny

representing a person who had provided Mr. Boothe with confidential information. Under that system Mr. Boothe can merely deny that any conversation of a privileged nature ever occurred, because he was merely "listening" and made no record of the conversation in his computer.

That possibility of manipulation is clear when one considers Mr. Boothe's represented "practices" in light of the record herein. The record shows that when counsel for Mr. Brown again raised the conflict issue with Mr. Boothe, Mr. Boothe represented to counsel that:

> As an employment attorney, if he [Brown] had raised any employee based questions, no matter how tangentially, I would have processed this as an attorney-client matter and sent him a retainer, even if my effort had been only to obtain insurance or employer representation for him, or I would have sent him a letter making clear that I would not representing (*sic*) him on the matter did neither (*sic*) . . ..

CP 160-161, letter from Mr. Boothe to counsel McFarland dated November 21, 2012. However, Mr. Boothe's submissions herein show that Mr. Brown did in fact raise very specific "employee based questions" in his email to Mr. Boothe during the critical time, on May 14, 2010 (CP 111-112) and Mr. Boothe did nothing to reject representation even though he claims that he would have "[made it] clear that I would not representing (*sic*) him."

As further evidence of Mr. Boothe's own subjective belief of the danger of representing Eubanks/Gray, consider further from his *Affidavit*.

Mr. Boothe contends that through May 2011 he knew nothing of any harassment claims made against Mr. Brown. CP 92-93, ¶¶ 42-43. He contends that he discussed Klickitat County employee retention matters with Mr. Brown "in May of 2011" (CP 93, ¶ 43) and then, remarkably, in June 2011 he received the referral of the Eubanks/Gray' case from a lawyer in Seattle. CP 94, ¶ 45. Mr. Boothe admits that he was concerned with a conflict of interest based upon his prior conversations with Mr. Brown. *Id.* He "briefly reviewed" the Rules of Professional Conduct regarding client conflict issues (*Id.*) and did some "preliminary research" into the determination of an attorney-client relationship "and what commonality is required for an attorney to be disqualified due to an impermissible conflict." *Id.* This apparently was a "permissible conflict."

Even though Mr. Boothe had satisfied himself that he had no "impermissible conflict," he held off accepting the referral even though he was being "pressed" to take the case. CP 94, ¶ 46. Mr. Boothe performed further research into the RPCs and then called the Washington State Bar Association "Ethics Hotline" and left a message. CP 95, ¶ 47. Mr. Boothe was "advised" by the Bar Association that "both RPC 1.9 and 1.18 could be implicated." *Id.* Mr. Boothe was "advised" by the Bar Association that he was not receiving legal "advice" from the Bar but rather was receiving information that might assist him in making an "informed conclusion." *Id.*

Mr. Boothe then re-read and researched RPC 1.9 and 1.18 "and cases interpreting each of them" and he became "confident that there was no conflict." His decision was made. Yet, because of "extreme caution" he contacted a lawyer friend of his "whom I knew as an ethics expert" and consulted further. It is unknown whether Mr. Boothe's expert/friend employed the powerful "open listening" tool during their conversations. Based upon what Mr. Boothe had told his "ethics expert" lawyer friend, Mr. Boothe was advised that there *had never been* an attorney-client relationship with Mr. Brown. CP 95, ¶ 48. Mr. Boothe was advised that he had nothing to worry about. As we now know the Trial Court disagreed with that conclusion. CP 435, Conclusion of Law 3.

It therefore took seven days for Mr. Boothe to determine, in his own mind, that there was no conflict or even the appearance of a conflict of interest. CP 94-95, ¶¶ 45-49. During that time Mr. Boothe "quickly reviewed" applicable Rules of Professional Conduct, performed "preliminary research," consulted with the Washington State Bar Association Ethics Hotline, consulted with a friend and colleague who he knew to be an "ethics expert," performed additional research and analysis, and finally decided to take the Eubanks/Gray' case.

For such a clear-cut decision Mr. Boothe's analysis was quite involved. That analysis by Mr. Brown is a bright indicator of just how

reasonable Mr. Brown's expectations really were, as were his beliefs that confidences had been shared with Mr. Boothe as part of an attorney-client relationship. In his analysis Mr. Boothe did not objectively analyze his prior relationship with Mr. Brown, but actively worked to "confirm [his] initial assessment" that he did not have a conflict of interest. CP 94, ¶ 46. In other words the decision was made and then Boothe researched the issue to justify his decision.

Also, it is noteworthy that Mr. Boothe's July 13, 2011 letter to Mr. Brown's present counsel herein simply glosses over the nature and extent of conversations between Mr. Boothe and Mr. Brown. CP 136-137. Again, this is only Mr. Boothe's version of events. Yet in an objective analysis Mr. Brown's belief – that he could share confidences with his attorney and that his attorney would not thereafter "switch sides" to represent persons claiming against him – was absolutely reasonable. The Trial Court failed to make that objective analysis, instead looking at the perceived distinctions of the claims themselves. This ignores Washington law, which recognizes:

> [T]he underlying concern is the possibility, or the appearance of the possibility, that the attorney may have received confidential information during the prior representation that would be relevant to the subsequent matter in which disqualification is sought.

Sanders v. Woods, 121 Wn.App. 593, 599, 89 P.3d 312 (2004), citing *Trone v. Smith,* 621 F.2d 994, 999 (9th Cir.1980). The analysis turns on whether there is an *appearance* or the *possibility of an appearance* that the attorney received information from the client which could be used against the client upon switching sides. It is an objective analysis that requires little to prompt disqualification – the "possibility of an appearance." Therefore, there was no need for Mr. Brown to divulge to the Trial Court what it was that he told Mr. Boothe in confidence.

The attorney-client privilege is thought to derive from the original concept of an attorney's implicit oath of loyalty to his client and is the oldest of the common law privileges. 8 John Henry Wigmore, Evidence § 2290 (McNaughton Rev.1961); cited in *In re Disciplinary Proceeding Against Schafer,* 149 Wash.2d 148, 160, 66 P.3d 1036 (2003) n. 4.

> It is a "fundamental principle in the client-lawyer relationship ... that the lawyer maintain confidentiality of information relating to the representation." ABA, Model Rules of Prof'l Conduct R. 1.6 cmt. 4 (1991). Indeed, "lawyers are regarded as people who know how to keep secrets, as much as they are regarded as litigators ... or drafters of contracts." 1 Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering § 9.2 (3d ed.2002). This perception is founded on more than 300 years of the practice of confidentiality.

Id. While this case does not necessarily involve the application of that privilege as applied to inquiry from outside the relationship, the *Schafer* case does involve the concept of confidentiality and the prevention of a

lawyer using client confidences to that client's later detriment. The same principals should apply here.

The Trial Court erred when it limited its analysis to the specific issues involved in the asserted representation and drawing distinctions therefrom while at the same time dismissing the contemporaneous understanding of the client, Mr. Brown. See CP 435, *Conclusion of Law* 3. While the Trial Court did find that an attorney-client relationship existed, it did so only to specific claims. Mr. Brown thought his conversations with Mr. Boothe were in confidence. Mr. Brown's subjective belief was controlling, and not the specific nature of the claims.

C. Since Brown Was Boothe's Former Client, Boothe's Duties Are Controlled By RPC 1.9.

The Trial Court correctly determined that Mr. Brown "formed an attorney/client relationship with Mr. Boothe on the Hatch Act and other election law issues," for the following five reasons. First, the confidences that Mr. Brown shared with Boothe were made in the context of an established and existing attorney-client relationship. Mr. Brown was not a person unknown to Mr. Boothe who was exploring the possibility of retaining counsel. Rather, by the time Mr. Brown shared the confidences with Mr. Boothe, Mr. Brown had already "formed an attorney client/client relationship with Boothe." CP 435, Conclusion of Law 3. But for the

existence of that established attorney-client relationship, Mr. Brown would never have shared those confidences with Boothe, his attorney. Since the confidences were shared in the context of an established and existing attorney-client relationship, the proper analysis for the Trial Court was pursuant to RPC 1.9.

Second, the confidences Mr. Brown shared with Mr. Boothe on June 21, 2010 are "substantially related" to the claims being pursued against Mr. Brown in this lawsuit. The fact that the subject matter of the then-existing attorney-client relationship (i.e., "Hatch Act and other election issues") is arguably different than the subject matter of this litigation (sexual harassment) is not dispositive. What is dispositive is the fact that the subject matter of the confidences shared by Mr. Brown to his then-attorney is substantially related to the subject matter of this litigation. As a result of Mr. Boothe's prior representation of Mr. Brown, Boothe became privy to confidences that are substantially related to the claims being pursued against Mr. Brown herein. RPC 1.9 precludes Boothe from gaining confidences from Mr. Brown that he could not and would not have gained but for his attorney-client relationship with Mr. Brown, then turning around and representing clients whose interests are adverse to Mr. Brown and whose claims are based upon the same subject matter as was the confidences Mr. Brown shared with Mr. Boothe. Mr. Brown submits

that the proper comparison is not whether the two matters are "substantially related," but whether Mr. Boothe obtained confidences from Mr. Brown as a result of the former representation that are "substantially related" to the pending litigation. Using this comparison, Mr. Boothe is clearly disqualified from representing Eubanks/Gray in this matter.

Third, whether or not an attorney-client relationship was created when Mr. Brown shared confidences with Mr. Boothe about the sexual harassment claims depends upon Mr. Brown's subjective and reasonable belief that Boothe was his attorney relating to those issues. *In re Disciplinary Proceeding Against Egger,* 152 Wash.2d 393, 410, 411, 98 P.3d 477 (2004). Mr. Brown reasonably believed he had an attorney-client relationship with Mr. Boothe regarding the sexual harassment issues CP 3-4. Apparently Mr. Boothe did as well, since he pursued a significant analysis of his relationship with Brown (CP 94-95, ¶¶ 45, 46, 47, 48) but only to "confirm my [Boothe's] initial assessment" that he did not have a conflict. CP 94, ¶ 46. The Trial Court's conclusion that Mr. Brown was only a prospective client ignored Mr. Brown's reasonable belief that Mr. Boothe was his attorney on all of the employment issues, including the sexual harassment allegations.

Fourth, pursuant to RPC 1.9(c), the current action does not have to be "substantially related" to Boothe's prior representation of Mr. Brown to

preclude Mr. Boothe from representing Eubanks/Gray herein. Rather, pursuant to RPC 1.9(c), because Mr. Boothe obtained "information" from Mr. Brown as part of his prior representation of Mr. Brown, Boothe is now precluded from using that information "to the disadvantage of" Brown:

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

Unlike RPC 1.9(a), the litigation brought by Eubanks/Gray does not have to be "substantially related" to the prior representation to require disqualification. Instead, all that is required is prior representation in "a matter." Once that prior representation is established, the attorney is precluded from using *any* information relating to that representation to the disadvantage of the former attorney. Since it has been determined that Mr. Boothe "formerly represented a client [Brown] in a matter" (CP 435, Conclusion of Law 3) and that Boothe gained "information" from Brown during his representation of Mr. Brown about the sexual harassment allegations that are the subject matter of this litigation (CP 435, Findings of Fact 2), RPC 1.9(c) requires the disqualification of Mr. Boothe from the representation of Eubanks/Gray. The content or sensitivity of the information is irrelevant to the inquiry.

Fifth, the Trial Court's refusal to extend the attorney-client relationship between Mr. Boothe and Mr. Brown to the sexual harassment allegations discussed was clearly based, at least in part, upon Mr. Brown's refusal to disclose the substance of the confidences he shared with Boothe. CP 436, Conclusion of Law 5. That ruling is both contrary to well-established case law and is internally inconsistent. Specifically, case law could not be any clearer that pursuant to RPC 1.9, a former client is not required to disclose the substance of the confidences shared with his or her former attorney in order to have that attorney disqualified. Mr. Brown was Mr. Boothe's client when he shared with Boothe information about the sexual harassment claims. Mr. Brown cannot be made to now disclose the substance of the confidences he shared with his then-attorney in order to establish that the confidences were made as part of the attorney-client relationship.

"A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter." *RPC 1.9, Comment 3*. As a former client of Boothe's, Mr. Brown does not have to "prove that actual confidences were divulged." *Teja v. Saran*, 68 Wash. App. 793, 800, 846 P.2d 1375, 1379 (1993). "The plain language of RPC 1.9 indicates actual proof of disclosure of confidential

information is not necessary if the matters are substantially related. The weight of authority from other jurisdictions similarly interprets the rule as not requiring proof of disclosure of confidential information." *Id.*

> The rule's presumption of prejudice makes it unnecessary for the former client to prove that the attorney divulged actual confidences. It thereby preserves the attorney-client relationship by eliminating the need for the trial court to inquire into those client's confidences.

State v. White, 80 Wash. App. 406, 415, 907 P.2d 310 (1995); See also, *Sanders v. Woods*, 121 Wash. App. 593, 599, 89 P.3d 312 (2004) ("It makes no difference whether actual confidences were disclosed to Mr. Ivey"). *Oxford Sys., Inc. v. CellPro, Inc.*, 45 F. Supp. 2d 1055, 1061 (W.D. Wash. 1999) ("Thus, proof of disclosure of confidential information is not necessary if the matters are substantially related").

As noted by the Court of Appeals in *Teja v. Saran*, other jurisdictions are entirely in accord:

> To compel the client to show, in addition to establishing that the subject of the present adverse representation is related to the former, the actual confidential matters previously entrusted to the attorney and their possible value to the present client would tear aside the protective cloak drawn about the lawyer-client relationship. For the Court to probe further and sift the confidences in fact revealed would require the disclosure of the very matters intended to be protected by the rule.

Westinghouse Elec. Corp. v. Gulf Oil, 588 F.2d 221, 224 (7th Cir. 1978). Also, please consider:

> To compel the client to show, in addition to establishing that the subject of the present adverse representation is related to the former, the actual confidential matters previously entrusted to the attorney and their possible value to the present client would tear aside the protective cloak drawn about the lawyer-client relationship. For the Court to probe further and sift the confidences in fact revealed would require the disclosure of the very matters intended to be protected by the rule. It would defeat an important purpose of the rule of secrecy- to encourage clients fully and freely to make known to their attorneys all facts pertinent to their cause. Considerations of public policy, no less than the client's private interest, require rigid enforcement of the rule against disclosure. No client should ever be concerned with the possible use against him in future litigation of what he may have revealed to his attorney. Matters disclosed by clients under the protective seal of the attorney-client relationship and intended in their defense should not be used as weapons of offense. The rule prevents a lawyer from placing himself in an anomalous position. Were he permitted to represent a client whose cause is related and adverse to that of his former client he would be called upon to decide what is confidential and what is not, and, perhaps, unintentionally to make use of confidential information received from the former client while espousing his cause. Lawyers should not put themselves in the position "where, even unconsciously, they might take, in the interests of a new client, an advantage derived or traceable to, confidences reposed under the cloak of a prior, privileged relationship."

T. C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 269 (S.D.N.Y. 1953). The last statement in *T.C. Theater Corp.* is worth considerable weight: That lawyers should not take advantage of a former client based in part upon information gleaned from the former client in another matter. Mr. Boothe is being allowed to unilaterally determine what his representation of Mr. Brown actually involved by splitting hairs. Leaving that determination entirely up to the lawyer destroys the intent of

the protection of confidentiality. The prudent thing to do would be to resign the case, which Mr. Boothe refuses to do.

"No actual receipt of confidences must be shown; such a standard would place an unreasonable burden on the moving party." *Rogers v. Pittston Co.*, 800 F. Supp. 350, 354 (W.D. Va. 1992) *aff'd sub nom. Rogers v. Pittston Coal Co.*, 996 F.2d 1212 (4th Cir. 1993).

> As we have stated, the underlying concern is the possibility, or appearance of the possibility, that the attorney may have received confidential information during the prior representation that would be relevant to the subsequent matter in which disqualification is sought. The test does not require the former client to show that actual confidences were disclosed. That inquiry would be improper as requiring the very disclosure the rule is intended to protect. The inquiry is for this reason restricted to the scope of the representation engaged in by the attorney. It is the possibility of the breach of confidence, not the fact of the breach, that triggers disqualification.

Trone v. Smith, 621 F.2d 994, 999 (9th Cir. 1980)

Once the Trial Court concluded that Brown and Boothe had an attorney-client relationship in which Mr. Brown shared confidences about the subject matter of the pending litigation (CP 435, Finding of Fact 2, Conclusion of Law 3), Mr. Boothe's disqualification should have followed without further inquiry. It was clear and obvious error for the Trial Court to have denied Mr. Brown's motion merely because Mr. Brown refused to disclose the substance of the confidences entrusted to Mr. Boothe that

Brown is trying to protect. The law simply does not require Mr. Brown to divulge that information in these proceedings.

D. Even Assuming Brown Was A "Prospective Client," Boothe Should Be Disqualified.

While Mr. Brown submits that RPC 1.9 controls in this case, the fact is that the confidences learned by Mr. Boothe from Brown preclude Boothe's representation of Eubanks/Gray pursuant to both RPC 1.9 and RPC 1.18.

RPC 1.18 prohibits lawyers who have discussions with prospective clients from using or revealing information learned in the consultation:

> (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client or except as provided in paragraph (e).

In addition:

> (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter...

RPC 1.18. Mr. Boothe received confidences from Mr. Brown regarding the subject matter of the pending lawsuit: "In a telephone conversation on June 12, 2010 (*sic*), Mr. Brown mentioned to Boothe that other employees were making sexual harassment allegations against him." CP 435, Finding

of Fact No. 2 (the date was June 21, 2010; CP 4, 48, 71 "Item 1190.") Despite this finding, the Trial Court denied the motion to disqualify because Mr. Brown did not establish that the information shared with Mr. Boothe could be significantly harmful to Brown:

> So the rules under 1.18 apply. If a person who is a prospective client wants to disqualify an attorney, they have to show that the confidences or secrets that they shared with the attorney during their conversations where he was trying to get him to be his attorney would cause substantial harm to him now. And there is no such showing. Therefore, I deny the request to for disqualified.

CP 432, p. 17 ll. 9-17.

> That's if there's an attorney-client relationship. If I don't find there's an attorney-client relationship, then he's only a prospective client. Then he has to show how what it is he shared, in the course of trying to determine whether there was going to be an attorney-client relationship, substantially would harm him in these proceedings now.

CP 429, p. 5 ll. 17-24.

In order to establish that the information he shared with Mr. Boothe regarding the sexual harassment claims "could be significantly harmful" to him, Mr. Brown would by necessity have to disclose the substance of those communications. Requiring Mr. Brown to disclose the substance of the confidences shared with Boothe is obvious error.

RPC 1.18 was adopted effective September 1, 2006. There are no published Washington cases analyzing an attorney's duties under RPC 1.18, and no Washington cases discussing whether a prospective client

must disclose the substance of the confidences in order to seek disqualification. Mr. Brown respectfully submits that for all the policy reasons that a former client need not disclose confidences in order to disqualify his or her former attorney, a prospective client likewise need not disclose the confidences he or she shared with the prospective attorney. Requiring a prospective client to disclose the confidences shared with a prospective attorney forces prospective clients into a prejudicial and incurable Catch-22. Obviously, if the prospective client refuses to disclose the confidences shared, the prospective attorney remains on the case and can use those confidences to the detriment of the prospective client. Conversely, if the prospective client discloses the confidences shared, the prospective attorney may be disqualified, but the new attorney who takes over for the disqualified attorney will now know those confidences and can use them to the detriment of the prospective client. The Trial Court put Mr. Brown in that exact prejudicial dilemma.

The public policy protecting such disclosures is too great to require a prospective client to choose one of the two prejudicial options.

> It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as

> permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

RPC 1.18 Comment 3 (emphasis added). As this comment explains, Boothe is prohibited from "using or revealing [the] information" he learned from Mr. Brown "regardless of how brief [their] initial conference" might be. Contrast that with Mr. Brown's situation, in which confidences were shared in the context of *an existing and ongoing attorney-client relationship.* Mr. Brown was not a prospective client making cold calls to attorneys looking for representation. The confidences were not shared "prior to the decision about formation of a client-lawyer relationship." To the contrary, *Brown was already represented by Boothe,* and as part of the privilege shared between any attorney and client, Mr. Brown disclosed to Mr. Boothe confidences which are now at the heart of the claims against Brown. Certainly, if a prospective client who makes a "brief" initial disclosure in a cold-call scenario is protected against that attorney revealing those confidences, Mr. Brown is entitled to protection from Boothe using those confidences. Requiring Mr. Brown to disclose the confidences he is attempting to preclude Boothe from using defeats the entire purpose and protection of RPC 1.18. Yet the Trial Court required just that, on an open record, before it would consider Mr. Brown's request that Mr. Boothe be disqualified from representing Eubanks/Gray.

Cases from other jurisdictions certainly support Brown's position in this regard. *See, Factory Mutual Ins. Co. v. Apcompower, Inc.,* 662 F.Supp.2d 896 (W.D.Mich. 2009) (Where a potential client consults with an attorney, the consultation establishes a relationship "akin to that of an attorney and existing client," in which the attorney is "bound by the attorney-client privilege and the duty of confidentiality..."); *O Builders & Associates, Inc.,* 206 N.J. 109, 19 A.3d 966 (New Jersey, 2011) ("Plain language" of RCP 1.18 compels disqualification of a lawyer who has been consulted by a former prospective client where the matter is related and the information is harmful to the former prospective client); *Zalewski v. Shelroc Homes, LLC,* 856 F.Supp.2d 426 (N.D.New York, 2012) (disqualifying attorney based upon motion brought by former prospective client, and adverse party in litigation); *Sturdivant v. Sturdivant,* 367 Ark. 514, 241 S.W.3d 740 (Ark., 2006) ("...the duty [the lawyer] owed...a prospective client under Rule 1.18(b) would be coextensive with the duty an attorney owes to a former client under Rule 1.9(c)...regardless of how brief the initial conference may have been and regardless of the fact that no client-attorney relationship ensued"); *Allen v. Steele,* 252 P.3d 476 (Colo., 2011) ("[T]he Colorado Rules of Professional Conduct, which state that the only ethical duties attorneys owe to prospective clients are to keep their information confidential and to avoid conflicts of interest").

In *Rose Ocko Found., Inc. v. Liebovitz,* 155 A.D.2d 426, 547 N.Y.S.2d 89 (1989), the court found that it was not necessary to disclose the substance of the confidences shared to support disqualification:

> It was not necessary for the plaintiff, in support of its motion to disqualify, to disclose the information provided to Liebovitz's counsel with specificity. Such a requirement would breach the very confidence sought to be protected. Although the parties dispute what was actually disclosed, as stated above, *any doubt must be resolved in favor of disqualification.* Thus, because the plaintiff has alleged the disclosure of the type of information that could, even inadvertently, provide a strategic advantage to Leibovitz, disqualification is necessary to avoid the appearance of impropriety.

Liebovitz, 155 A.D.2d at 428 (citations omitted; emphasis added).

Mr. Boothe is prohibited by RPC 1.18 from revealing Mr. Brown's confidences. Forcing Mr. Brown to disclose those confidences in order to protect against Mr. Boothe using those confidences defeats the purpose of RPC 1.18. Mr. Brown submits that once a prospective client establishes that he or she did in fact share confidential information regarding the subject matter of the current litigation (as it has been established in this case), disqualification of the attorney must follow and without the requirement of disclosure of the confidences. The Trial Court's decision not to disqualify Mr. Boothe for refusing to disclose the confidences he is seeking to protect was clear/obvious error.

5. Conclusion.

The Trial Court specifically found that Mr. Brown "believed that he had an attorney-client relationship with Mr. Boothe concerning Hatch Act and election law issues." CP 436, Finding of Fact No. 3. The only evidence that would support that finding was the Affidavit of David Brown. CP 1-19 and *Petitioner David Brown's Reply In Support of Motion for Discretionary Review, Appendix A-1* (July 5, 2013). The Trial Court concluded that the existence of an attorney-client relationship depends substantially upon the subjective belief of the client. CP 435, Conclusion of Law No. 2. "The purported client's belief must be reasonable under the circumstances." *Id.* In this case, on this issue, Mr. Brown provided the Trial Court with specific testimony and documentation of communication between himself and Mr. Boothe.

On the other hand, Mr. Boothe merely denied recalling events or denied that discussions were ever had, and explained in great detail his office practices and the extraordinary "tool" of merely listening. CP 77-173. The vast majority of the information that Mr. Boothe submitted was irrelevant to the issue at hand. CP 114-135, 139-150, 153-159, 166-173, 311-367, 372-381, 386-403. Now Mr. Boothe claims that disqualification would prejudice his clients. He was put on notice almost immediately that Mr. Brown considered his representation of Eubanks/Gray to be a conflict.

CP 96, ¶ 54; CP 151. When Mr. Boothe decided to forge ahead with the Eubanks/Gray' representation, Boothe put Eubanks/Gray at risk of the hardship that he claims on their behalf if he is forced to step aside. Mr. Brown is seeking to prevent his former attorney from using confidences gained during a period of trust against him in this litigation, and specifically confidences about the claims made in this lawsuit. If allowed to continue Boothe could and probably will work an incurable prejudice on Brown.

Regardless, the Trial Court split the difference based upon a "claim specific" analysis – regardless of the subjective belief of the client Mr. Brown – and found that while Mr. Brown and Mr. Boothe did in fact have an attorney-client relationship for certain issues, they did not for the claims herein *even though all of the claims were presented to Boothe during the same time period.* Therefore the Trial Court concluded that Mr. Brown was only a "prospective client" for the harassment claims requiring Mr. Brown to disclose the confidences he shared with Mr. Boothe in order to have Boothe disqualified. CP 435-436, Conclusions of Law Nos. 3, 4, 5.

The Trial Court erred in these decisions. Since Boothe and Brown had an attorney-client relationship "on a matter" and since Brown shared information with Mr. Boothe regarding the harassment charges (CP 435, Finding of Fact No. 2), Mr. Boothe cannot now represent clients whose

interests are adverse to Mr. Brown regarding those claims. It matters little whether that analysis is performed pursuant to RPC 1.9(a), RPC 1.9(c) or RPC 1.18. Under all of those rules Mr. Boothe has an ethical obligation not to represent parties adverse to Mr. Brown after he had obtained confidences from Brown which could conceivably be used against Brown. It is the "appearance" of a conflict that drives the decision to disqualify (*Sanders v. Woods,* 121 Wn.App. 593, 599, 89 P.3d 312 (2004)) and not the specific nature of the claim. One can only imagine the mischief that is possible by attorneys interviewing "prospective clients" and then recruiting the parties making claims against them.

The Trial Court was in error in denying Mr. Brown's motion to disqualify based upon Mr. Brown's refusal to disclose the confidences that he is trying to protect. Under the facts presented and the Rules of Professional Conduct, Mr. Boothe is now and has always been disqualified from representing Eubanks/Gray in this case. As attorneys we are guided by the following maxims:

> Each lawyer must find within his or her own conscience the touchstone against which to test the extent to which his or her actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of the legal profession and the society which the lawyer serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principals, the law will continue

> to be a noble profession. This is its greatness and its strength, which permit no compromise.

Washington *Rules of Professional Conduct* (amended 2006), "Fundamental Principals of Professional Conduct."

The ethics rules are designed to protect both the public and the integrity of the profession of practicing law. *Hizey v. Carpenter,* 119 Wn.2d 251, 263, 830 P.2d 646 (1992). David Brown is as deserving of the protection of our ethical rules as any client. Mr. Brown respectfully submits that the Trial Court Order entered May 7, 2013 (CP 434-436) should be reversed and that Mr. Boothe should be disqualified from representing Plaintiffs Eubanks and Gray in this matter.

DATED this 26th day of November, 2013.

MICHAEL E. MCFARLAND, WSBA # 23000
PATRICK M. RISKEN, WSBA#14632
Attorneys for Petitioner David Brown

DECLARATION OF SERVICE

On said day below, I e-mailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of **Brief of Petitioner David Brown** in Court of Appeals Cause No. 44969-2-II to the following parties:

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

DATED this 26th day of November, 2013, at Spokane, Washington.

Jan R. Hartsell, Paralegal
Evans, Craven & Lackie, P.S.

EVANS CRAVEN & LACKIE PS

November 26, 2013 - 12:31 PM

Transmittal Letter

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Brief of Petitioner David Brown

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