

No. 44969-2-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

ROBIN EUBANKS, ERIN GRAY, ANNA DIAMOND,
and KATHY HAYES,

Respondents

v.

KLICKITAT COUNTY and DAVID BROWN, individually and on behalf
of his marital community,

Appellants

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DIVISION II
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BRIEF OF APPELLANT KLICKITAT COUNTY

Francis S. Floyd, WSBA No. 10642
ffloyd@floyd-ringer.com
John A. Safarli, WSBA No. 44056
jsafarli@floyd-ringer.com
FLOYD, PFLUEGER & RINGER, P.S.
200 West Thomas Street, Suite 500
Seattle, Washington 98119-4296
(206) 441-4455 (phone)
(206) 441-8484 (fax)

Attorneys for Appellant Klickitat County

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INTRODUCTION

Appellant Klickitat County (“County”), a defendant in the proceedings below, respectfully requests that this Court (1) reverse the lower court’s denial of co-appellant and co-defendant David Brown’s motion to disqualify Plaintiffs’¹ counsel, Thomas Boothe, and (2) order the lower court to disqualify Boothe as to Plaintiffs’ claims against both Brown and the County. In the proceedings below, the County filed a joinder to Brown’s motion. Plaintiffs did not respond or object to the joinder. Because of this abstention, and for other reasons set forth in this brief, the County has standing to pursue this appeal. Pursuant to Rule of Appellate Procedure (“RAP”) 10.1(g), the County files this brief and adopts by reference the balance of arguments in Brown’s brief.

In late 2009, Brown was a Deputy Prosecuting Attorney at the Klickitat County Prosecuting Attorney’s Office. He decided to run for the partisan elected office of Prosecuting Attorney. After becoming concerned about legal issues surrounding his candidacy, Brown’s friend and fellow attorney referred him to Boothe. Throughout May 2010, Brown and Boothe exchanged multiple emails and spent a cumulative total of 60 minutes speaking on the phone about Brown’s concerns regarding his campaign.

¹ Unless otherwise designated, “Plaintiffs” refers to Respondents Robin Eubanks, Erin Gray, Anna Diamond, and Kathy Hayes. Initially, Eubanks and Gray sued the County, Brown, and the Klickitat County Prosecuting Attorney’s Office. Diamond and Hayes joined the lawsuit later, and Plaintiffs’ Amended Complaint removed the Klickitat County Prosecuting Attorney’s Office as a defendant. This explains the discrepancies among the captions in various pleadings below. *Compare* Clerk’s Papers at 44 *with* Clerk’s Papers at 428.

On June 8, 2010, the County's Personnel Division interviewed Brown about a grievance that then-employees Robin Eubanks and Erin Gray filed against him. The grievance accused Brown of inappropriate and intimidating behavior. During the interview, the County's Personnel Manager advised Brown that the grievance "came from the employees when they realized you would be running for office and could become their boss."

On June 15, the Personnel Manager issued her "Grievance Investigation Findings." She recommended training but concluded that Brown did not engage in any wrongdoing. On June 21, Brown spoke again with Boothe on the phone. Boothe contests the substance of this conversation, but Brown submitted evidence in the proceedings below—and the lower court found—that Brown and Boothe discussed the grievance as it related to Brown's campaign.

In December 2010, Eubanks and Gray sued Brown and the County for Brown's alleged harassment. The attorneys representing Eubanks and Gray at that time are not associated with this appeal. But on August 1, 2011—about 13 months after his last conversation with Brown—Boothe substituted as counsel for Eubanks and Gray. Then Boothe filed an amended complaint on behalf of Eubanks, Gray, and two additional Plaintiffs: former Prosecuting Attorney's Office employees Anna Diamond and Kathy Hayes. Their allegations repeated the claims in Eubanks and Gray's grievance.

Brown subsequently moved to disqualify Boothe under Rule of Professional Conduct (“RPC”) 1.9(a) and 1.18(b). The County joined the motion. The lower court declined to disqualify Boothe under RPC 1.9(a), concluding (1) that Brown and Boothe formed a relationship in 2010, but (2) the representation did not concern the “same or a substantially related matter” to Plaintiffs’ current action. The lower court also refused to disqualify Boothe under RPC 1.18(b).

Brown and the County both sought discretionary review, which a Commissioner of this Court granted. The Commissioner concluded, among other things, that “the trial court committed probable error in its analysis of Boothe’s duties to Brown, as a former client under RPC 1.9.” This Court should now reverse the lower court’s denial of the disqualification motion and order the lower court to disqualify Boothe as to Plaintiffs’ claims against both Brown and the County.

ASSIGNMENTS OF ERROR

- 1) The lower court erred by concluding that “[t]he current action is not ‘a substantially related matter’ to the Hatch Act and election law issues.” Clerk’s Papers at 436 (Conclusion of Law No. 3).
- 2) The lower court erred by concluding that “Brown did not form an attorney/client relationship with Boothe on any sexual harassment matter.” Clerk’s Papers at 436-37 (Conclusion of Law No. 3).
- 3) The lower court erred by denying the motion to disqualify Boothe. Clerk’s Papers at 436.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Appellant and defendant David Brown had been a Klickitat County Deputy Prosecuting Attorney since September 2007. Clerk's Papers ("CP") at 1. In late 2009, he decided to run for Prosecuting Attorney, a partisan elected office. *Id.* Brown knew that Chief Deputy Prosecuting Attorney Craig Juris was running for the same position. CP at 2. Brown also knew that the current Prosecuting Attorney Timothy O'Neill was "an active and vocal supporter" of Juris. *Id.* As an "at will" and "FLSA^[2]-exempt" employee, Brown was concerned about his "general rights" and "legal protections." *Id.*

Brown's concerns increased when O'Neill fired Lori Hocht, another Deputy Prosecuting Attorney. *Id.* O'Neill terminated Hocht after she announced her own intention to run for Prosecuting Attorney. *Id.* Brown believed that O'Neill let Hocht go because "having two candidates running for the [P]rosecuting [A]ttorney's position was too disruptive for the well[-]being and functioning of the office." *Id.* Brown's concerns were further heightened because several employees of the Prosecuting Attorney's Office (including all four Plaintiffs) openly supported Juris's campaign. *Id.*

Brown had separate concerns about violating the Hatch Act, 5 U.S.C. §§ 1501-1508, which prohibits candidates for partisan elected

² Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219.

office from participating in certain activities if those candidates are employed in government positions that receive federal funds. CP at 2. Brown was “very unfamiliar with the [Hatch Act] and its requirements and penalties.” *Id.* Brown reached out to the U.S. Office of Special Counsel (“OSC”) for clarification. *Id.* Brown created a new email account specifically for communicating with the OSC. CP at 4. OSC advised Brown that the “elected official in charge of the political entity in question [*i.e.*, O’Neill] would need to formally request an Advisory Opinion from the Office of Special Counsel.” CP at 2. Brown, however, was hesitant to reveal his political ambition to O’Neill. CP at 3.

Facing these circumstances, Brown believed that he “needed to consult with an attorney to discuss [his] options” and “needed answers to all these complex and inherently interrelated issues concerning [his] employment, legal viability as a candidate for partisan office and what to do depending upon different scenarios.” CP at 2-3.

Brown contacted a colleague “for advice concerning an attorney with expertise in employment law and related issues.” CP at 3. Brown’s colleague referred Brown to Tom Boothe. *Id.* Throughout May 2010, Brown and Boothe spoke on the phone for a cumulative total of 60 minutes. CP at 3, 47-48, 69-71, 73.

Among other things, they discussed: (1) the possible applications of the Hatch Act to Brown’s campaign (Boothe agreed with Brown that Brown was “employed in a [Hatch Act-]covered position”); (2) the potential legal repercussions if O’Neill terminated Brown (including

whether Brown would have a “claim for damages if he was terminated”); and (3) a Juris campaign staff member’s apparent use of County resources to support Juris’s candidacy. CP at 3-4. According to Brown, Boothe and Brown also “spoke of many other matters regarding [his] employment.” CP at 4.

Using the email address he created to communicate with OSC, Brown exchanged multiple emails with Boothe during this period. CP at 8-19. Boothe “agreed” with Brown’s decision to create a separate email address to communicate with the OSC, as Boothe believed this measure would “limit[] any ‘discovery fishing expedition’ that might take place for some reason at a later date.” CP at 4.

After this period of consultation and reflection, Brown advised O’Neill of his intention to run for Prosecuting Attorney. CP at 4. Afterwards, on May 28, 2010, Robin Eubanks and Erin Gray—employees of the Prosecuting Attorney’s Office and open supporters of Juris’s campaign—filed a formal grievance with the Personnel Division against Brown. CP at 382. The grievance claimed that Brown engaged in inappropriate and intimidating behavior. *Id.*

On June 4, Brown received a request from the Personnel Division for an interview on June 8. CP at 368. During the interview, the County’s Personnel Manager advised Brown that the grievance “came from the employees when they realized you would be running for office and could become their boss.” CP at 371. On June 15, the Personnel Manager issued her “Grievance Investigation Findings.” CP at 371. She

recommended training but concluded that Brown did not engage in any wrongdoing. *Id.*

On June 21,³ Brown called Boothe and spoke with him for approximately 15 minutes. CP at 48. Brown informed Boothe about the grievance. CP at 4. As the lower court found, “Boothe commented that these types of allegations could be expected in an election.” CP at 435. According to Brown, “Boothe did not seem surprised and said something to the effect that if [Brown] was to win the election, these same accusers were just as likely to come and tell [Brown] that they had been encouraged by the other side to make the accusations in order to keep their jobs.” CP at 3. Brown also believes that Boothe may have mentioned that the grievance was part of ““opposition research”” that is “utilized to denigrate and marginalize opponents” in political campaigns. *Id.*

Based in part on the “input” that Brown received from Boothe, Brown resigned from his position as Deputy Prosecuting Attorney in July 2010. CP at 5. Hctor went on to defeat Brown and Juris to become Prosecuting Attorney. *Id.*

In December 2010, Eubanks and Gray—represented at the time by Karen Lindholt and Marletta Giles-Ward—sued Brown and the County. CP at 20. Only 13 months after his last conversation with Brown—Boothe replaced Lindholt and Giles-Ward and appeared on behalf of Eubanks and Gray. CP at 96. After Boothe became Plaintiffs’ counsel,

³ In the proceedings below, the County mistakenly referred to this date as June 12. *Compare* CP at 48 *with* CP at 71. This was based on a good faith accidental misreading of the date that juxtaposed the two digits.

two former employees, Anna Diamond and Kathy Hayes, joined the lawsuit. *Id.* Plaintiffs' claims repeated the accusations contained in Eubanks and Gray's grievance. *See* CP at 366-69.

II. PROCEDURAL HISTORY

On January 7, 2013, Brown moved to disqualify Boothe, arguing that his representation of Plaintiffs violated RPC 1.9(a) and 1.18. CP at 27-36, 44. Brown filed a declaration describing his relationship and interactions with Boothe. CP at 1-19. Brown's counsel also filed a declaration, which outlined the procedural history of the conflict. CP at 20-26. Additionally, attorney Peter R. Jarvis submitted an expert affidavit in support of the motion. CP at 37-42.

The County filed a joinder to Brown's motion, which contained additional supporting evidence, namely telephone records the County obtained with Brown's consent. CP at 46-50, 52-76. The County urged the lower court to disqualify Boothe as to Plaintiffs' claims against both Brown and the County. CP at 49.

Plaintiffs opposed the motion with a 56-page response. CP at 174-229. Plaintiffs, however, did not specifically respond to the County's joinder by, for example, disputing that the County had the right to seek Boothe's disqualification.

In his lengthy accompanying declaration, Boothe did not deny that he communicated with Brown in May and June 2010, but he disputed the

contents of the conversations and the nature of his relationship with Brown. *See* CP at 77-101.

The lower court denied the disqualification motion. CP at 434-36. The lower court's order is styled, in part, as "Order Deciding *Defendants'* Motions,"⁴ which indicates that the lower court grouped together Brown's motion and the County's joinder. CP at 434 (emphasis added).

In its order, the lower court found that Brown and Boothe communicated by telephone and email in May and June 2010 regarding "the applicability of the Hatch Act to Brown's decision to run for Klickitat County Prosecuting Attorney" and "other election law issues." CP at 435 (Finding of Fact ("FF") No. 1). The lower court further found that "[i]n a telephone conversation on June 12, 2010, Brown mentioned to Boothe that other employees were making sexual harassment allegations against him." *Id.* (FF No. 2).

The lower court then found that "Boothe commented that these types of allegations could be expected in an election." *Id.* Finally, the lower court found that "Brown believed that he had an attorney-client relationship with Boothe concerning Hatch Act and election law issues." *Id.* (FF No. 3).

Turning to RPC 1.9(a), the lower court concluded that "Brown formed an attorney/client relationship with Boothe on the Hatch Act and other election law issues," but "Brown did not form an attorney/client

⁴ Brown also filed several other procedural motions (*e.g.*, a motion for an expedited hearing). CP at 434, 436. Hence the lower court's reference to "Motions" in the plural.

relationship with Boothe on any sexual harassment matter.” CP at 435-36 (Conclusion of Law (“CL”) No. 3). The lower court then concluded that “[t]he current action is not ‘a substantially related matter’ to the Hatch Act and election law issues on which Boothe and Brown consulted.” CP at 436 (CL No. 3).

Next, the lower court analyzed RPC 1.18 and concluded that even if Brown was Boothe’s “prospective client,” Brown had not “presented any evidence that Boothe received information that could be significantly harmful to him in this matter.” CP at 436 (CL No. 5).

Brown and the County filed separate notices of discretionary review. CP at 437-448. Plaintiffs did not seek cross-review under RAP 5.1(d) of any part of the lower court’s order, including the conclusion that “Brown formed an attorney/client relationship with Boothe on the Hatch Act and other election law issues.” CP at 441 (FF No. 3). Plaintiffs also did not file a subsequent notice of discretionary review under RAP 5.2(f).

On August 30, 2013, a Commissioner of this Court granted Brown and the County’s request for discretionary review, concluding that “the trial court committed probable error in its analysis of Boothe’s duties to Brown, as a former client under RPC 1.9” and that this error “substantially limits Brown and Klickitat County’s ability to defend against the sexual harassment action.”⁵ *Spindle* (Ruling Granting Review at 11-12).

⁵ The Commissioner also concluded that the County was an “aggrieved party” under RAP 3.1 because (1) the County filed a joinder to Brown’s motion in the proceedings below, and (2) the lower court grouped Brown’s motion with the County’s joinder and referred to the motion to disqualify in the plural. *Spindle* (Ruling Granting Review at 6 n.2).

The Commissioner explained:

Although Brown's disclosures about the sexual harassment allegations did not directly relate[] to the narrow Hatch Act issue, it appears that Brown thought disclosing the information was necessary to Boothe's overall representation of Brown, presumably because it pertained to Brown's employment with the Klickitat County Prosecuting Attorney's Office and how it could affect his candidacy for Prosecuting Attorney.

Spindle (Ruling Granting Review at 10).

The Commissioner then concluded that "Boothe's response to Brown that such allegations could be expected in an election indicates that the sexual harassment allegations and the election issues are interconnected." *Spindle* (Ruling Granting Review at 10) (internal citation omitted). "On that basis," continued the Commissioner, "there is a factual overlap between the prior representation and the current sexual harassment matter, such that the two matters are sufficiently similar to trigger a conflict of interest." *Id.*

ARGUMENT

The County is an “aggrieved party” under RAP 3.1 that may pursue this appeal. This Court should reverse the lower court and order it to disqualify Boothe as to Plaintiffs’ claims against both Brown and the County. As the lower court concluded, Brown and Boothe formed an attorney-client relationship as to the “Hatch Act and other election law issues.” CP at 435 (CL No. 3). These issues are the “same” or “substantially related” to the current action. RPC 1.9(a). Accordingly, the lower court should have automatically disqualified Boothe because judgment has not been entered in this case. *State v. White*, 80 Wn. App. 406, 414-15, 907 P.2d 310 (1995).

I. STANDARD OF REVIEW

“Review of a court’s decision to grant or deny a motion to disqualify counsel is a legal question that is reviewed de novo.” *Sanders v. Woods*, 121 Wn. App. 593, 597, 89 P.3d 312 (2004).

II. THE COUNTY IS AN AGGRIEVED PARTY THAT HAS STANDING TO PURSUE THIS APPEAL

The County has standing to pursue this appeal of the lower court’s denial of the disqualification motion. RAP 3.1 provides that “[o]nly an aggrieved party may seek review by the appellate court.” An “aggrieved party” is one whose “proprietary, pecuniary, or personal rights are substantially affected.” *Cooper v. Tacoma*, 47 Wn. App. 315, 316, 734 P.2d 541 (1987); *see also State v. A.M.R.*, 147 Wn.2d 91, 95, 51 P.3d 790 (2002) (“When the word ‘aggrieved’ appears in a statute, it refers to ‘a

denial of some personal or property right, legal or equitable, or the imposition upon a party of a burden or obligation.”) (quoting *Sheets v. Benevolent & Protective Order of Keglers*, 34 Wn.2d 851, 854-55, 210 P.2d 690 (1949)).

The County filed a joinder to Brown’s disqualification motion in the proceedings below. CP at 46-76. Plaintiffs did not oppose the County’s joinder. Additionally, the lower court grouped Brown’s motion with the County’s joinder and styled its order, in part, as an “Order Deciding *Defendants’* Motions.” CP 434 (emphasis added). The lower court later ruled, “The *Defendants’* Motion to Disqualify Plaintiffs’ Counsel is denied.” CP at 436 (emphasis added). The lower court’s order indicates that it grouped Brown’s motion with the County’s joinder and treated them collectively. When Brown and the County filed their separate notices of discretionary review, Plaintiffs failed to seek cross-review under RAP 5.1(d) of the lower court’s collective treatment of Brown’s motion and the County’s joinder. And Plaintiffs did not file a subsequent notice under RAP 5.2(f).

Furthermore, the Commissioner ruled that the County was “an aggrieved party under RAP 3.1 and thus has standing to seek discretionary review.” *Spindle* (Ruling Granting Review at 6 n.2). Plaintiffs did not file a motion to modify this ruling under RAP 17.6.

Additionally, because the phrase “aggrieved party” surely has the same definition for purposes of both a discretionary review and an appeal, this Court should consider the Commissioner’s ruling persuasive authority

when determining whether the County has standing pursue this appeal. *Cf. Medcalf v. Dep't of Licensing*, 133 Wn.2d 290, 300-01, 944 P.2d 1014 (1997) (“When the same word or words are used in different parts of the same statute, it is presumed that the words of the enactment are intended to have the same meaning.”)

Additionally, the lower court’s denial of the joint disqualification motion has “substantially affected” the County’s rights. *Cooper*, 47 Wn. App. at 316. The failure to disqualify Boothe has obliged the County to defend against a lawsuit that, at best, raises serious ethical concerns and, at worst, permits an ongoing violation of RPC 1.9(a) or 1.18.

Brown, moreover, did not resign from the Prosecuting Attorney’s Office until July 2010. CP at 5. Thus, Boothe’s representation of Brown during May and June 2010 occurred while Brown was an employee of the County, which could have created the conditions for Boothe to gain unique confidants that may be potentially harmful to the County.

Lastly, disqualifying Boothe only as to Plaintiffs’ claims against Brown would lead to an unsustainable result. Even if Boothe continued to represent Plaintiffs for their claims only against the County, Boothe conceded he would be a “testifying witness and violating a separate ethical obligation to not make [himself] a witness in a case which [he] [is] the attorney.” CP at 430.

For these reasons, and because Plaintiffs have abstained from challenging the County’s standing, this Court should hold that the County is an “aggrieved party” that has standing to pursue this appeal. RAP 3.1.

III. THE LOWER COURT ERRED BY REFUSING TO DISQUALIFY BOOTHE UNDER RPC 1.9(a) BECAUSE BOOTHE AND BROWN FORMED AN ATTORNEY-CLIENT RELATIONSHIP REGARDING MATTERS THAT ARE THE “SAME” AS OR “SUBSTANTIALLY RELATED” TO THE CURRENT ACTION

The lower court correctly concluded that Brown and Boothe formed an attorney-client relationship regarding “the Hatch Act and other election law issues.” CP at 435 (CL No. 3). Plaintiffs have not sought review of this conclusion and have therefore conceded it on appeal.

The lower court, however, erred by concluding that the “current action” is not “a substantially related matter” to “the Hatch Act and election law issues.” CP 436 (CL No. 3). The lower court is mistaken because the two matters overlap factually and are “relevantly interconnected.” *Sanders*, 121 Wn. App. at 599 (quoting *State v. Hunsaker*, 74 Wn. App. 38, 44, 873 P.2d 540 (1994)). Because the two matters are “substantially related” and because judgment has not been entered in this case, the lower court should have “automatic[ally]” disqualified Booth. *White*, 80 Wn. App. at 415.

A. By Failing to Seek Review of the Lower Court’s Conclusion of Law 3, Plaintiffs Have Conceded It For Purposes of Appeal

In Conclusion of Law 3, the trial court ruled, in part, that “Brown formed an attorney/client relationship with Boothe on the Hatch Act and other election law issues.” CP 435. Because Plaintiffs have not sought review of this ruling, they have conceded it on appeal.

Under RAP 2.4(a),

[t]he appellate court will grant a respondent *affirmative relief* by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case.

(Emphasis added). “Affirmative relief” includes a partial reversal of a lower court’s order. *State v. Sims*, 171 Wn.2d 436, 442, 256 P.3d 285 (2011) (analyzing RAP 2.4(a) and holding that “[b]ecause the State is seeking partial reversal of a trial court order, not just advancing an alternative argument for affirming the trial court, it is seeking affirmative relief.”).

When Brown and the County filed their separate notices of discretionary review, Plaintiffs did not file a cross-review under RAP 5.1(d), and Plaintiffs did not file a subsequent notice of discretionary review under RAP 5.2(f). Accordingly, Plaintiffs cannot now ask this Court to grant them the “affirmative relief” of reversing the lower court’s conclusion that “Brown formed an attorney/client relationship with Boothe on the Hatch Act and other election law issues.” CP 435.

Plaintiffs’ failure to file a cross-review also prevents them from invoking the “necessities of the case provision.” *Singletary v. Manor Healthcare Corp.*, 166 Wn. App. 774, 787, 271 P.3d 356 (2012) (declining to address respondent’s request for partial reversal because “[a]lthough appellate courts may grant affirmative relief to a respondent who did not

file a cross appeal ‘if demanded by the necessities of the case,’ we are unaware of any published case reversing the trial court in favor of the respondent absent a cross appeal.”) Thus, Plaintiffs are foreclosed from disputing the existence of Boothe’s attorney-client relationship with Brown “on the Hatch Act and other election law issues.” CP at 435.

B. Even If Plaintiffs Are Not Barred from Disputing the Lower Court’s Conclusion of Law 3, the Lower Court Correctly Ruled that Brown and Boothe Formed an Attorney-Client Relationship As to the “Hatch Act and Other Election Law Issues”

Assuming, without conceding, that this Court allows Plaintiffs to challenge the lower court’s ruling that Brown and Boothe had an attorney-client relationship, this Court should affirm that ruling because Brown had a subjective belief that Boothe represented him as to the “Hatch Act and other election law issues.” CP at 435 (CL No. 3). Brown, moreover, “reasonably formed” this subject belief “based on the attending circumstances.” *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992). The evidence that Brown and the County submitted below satisfies the evidentiary “burden of proving the existence of the [attorney-client] relationship.” *Dietz v. Doe*, 131 Wn.2d 835, 844, 935 P.2d 611 (1997).

1. The “attending circumstances” confirm the objective reasonableness of Brown’s subjective belief that he had an attorney-client relationship with Brown as to the “Hatch Act and other election law issues”

It is undisputed that Brown subjectively believed he had an attorney-client relationship with Brown as to the “Hatch Act and other election law issues.” CP at 435 (CL No. 3). Brown submitted an affidavit in the proceedings below stating as much. CP at 5 (“I always believed that I had an attorney-client relationship with Mr. Boothe and that is why I shared confidences with him, including confidence about the allegations made against me by his clients.”). Thus, the only question is whether this subjective belief was “reasonably formed based on the attending circumstances.” *Bohn*, 119 Wn.2d at 363. This Court should answer this question in the affirmative.

The following “attending circumstances,” *Bohn*, 119 Wn.2d at 363, establish the reasonableness of Brown’s subjective belief that he had an attorney-client relationship with Boothe as to the “Hatch Act and other election law issues,” CP at 435: Several months before he first communicated with Boothe, Brown decided to run for Prosecuting Attorney. CP at 1, 3. Afterwards, the current Prosecuting Attorney fired another Deputy Prosecuting Attorney because, Brown believed, of her intention to run for Prosecuting Attorney. CP at 2. This—along with many Prosecuting Attorney’s Office employees openly supporting another candidate—amplified Brown’s existing concerns about his status as an

“at will” and “FLSA-exempt” employee. CP at 2. Brown was also apprehensive about violating the Hatch Act. CP at 1-2.

Under these circumstances, Brown felt a “need for legal counsel” and intentionally sought out an attorney to discuss and receive advice about his circumstances. CP at 2-3; *Bohn*, 119 Wn.2d at 363 (“The essence of the attorney/client relationship is whether the attorney’s advice or assistance is sought and received on legal matters.”). Brown’s colleague referred him to Boothe as “an attorney with expertise in employment law and related issues.” CP at 3. Using an email address that Brown created specifically to communicate with the U.S. Office of Special Counsel about the Hatch Act, Boothe and Brown exchanged multiple emails throughout May 2010. CP at 8-19. Boothe opined that Brown’s establishment of a separate email address was prudent and would avoid future “discovery fishing expedition[s].” CP at 4.

Boothe and Brown also spent a cumulative total of 60 minutes talking on the phone during that month. CP at 3, 47-48, 69-71, 73. These conversations concerned the Hatch Act, O’Neill’s potential termination of Brown, and “many other matters regarding [Brown’s] employment.” CP at 3-4. Brown and Boothe discussed, among other things, whether Brown “might have any claim for damages” if O’Neill terminated Brown, and whether the Hatch Act applied to Brown’s position as Deputy Prosecuting Attorney (Boothe agreed with Brown that it did). CP at 3-4; *Bohn*, 119 Wn.2d at 363 (“The essence of the attorney/client relationship is whether

the attorney's advice or assistance is sought and received on legal matters.").

On May 28, Eubanks and Gray filed their grievance against Brown. CP at 382. On June 8, the County's Personnel Manager interviewed Brown. CP at 368. During the interview, she told Brown that the grievance "came from the employees when they realized you would be running for office." CP at 371. On June 15, the Personnel Manager issued her "Grievance Investigation Findings." *Id.*

Six days afterwards, Brown and Boothe spoke over the telephone regarding the grievance. CP at 4, 48. As the lower court found, "Boothe commented that these types of allegations could be expected in an election." CP at 441. Brown averred that Boothe "did not seem surprised" and may have described the grievance as "opposition research" intended to "denigrate and marginalize" Brown. CP at 4. Brown further believed that Boothe "said something to the effect that if [Brown] was to win the election, [Eubanks and Gray] were just as likely to come and tell [Brown] that they had been encouraged by the other side to make the accusations in order to keep their jobs." *Id.* Based in part on Boothe's "input," Brown decided to resign from his position as Deputy Prosecuting Attorney in July 2010. CP at 5.

These "attending circumstances," *Bohn*, 119 Wn.2d at 363, firmly demonstrate the objective reasonableness of Brown's subjective belief that he had an attorney-client relationship with Boothe as to "the Hatch Act and other election law issues." CP at 447.

2. Boothe failed to show that Brown's subjective belief was unreasonable

In the proceedings below, Boothe disputed Brown's version of their communications and the nature of their relationship. CP at 77-101. But Boothe's account rests, in part, on his own interpretation of the circumstances. *See, e.g.*, CP at 86 ("I viewed the email as background information"); "I considered the question rhetorical"); CP at 91 ("With Brown, I practiced what is referred to as open listening.") Boothe's personal understanding is immaterial because it is the "client's subjective belief" that "control[s]," provided that it is reasonable. *Bohn*, 119 Wn.2d at 363.

Moreover, this Court should construe factual discrepancies and draw inferences in Brown's favor. *Oxford Sys., Inc. v. CellPro, Inc.*, 45 F. Supp. 2d 1055, 1066 (W.D. Wash. 1999) (analyzing RPC 1.9 and ruling that "the Court should resolve any doubts in favor of disqualification"). Thus, to the extent that Boothe and Brown disagree about objective facts (*e.g.*, contents of telephone conversations), this Court should find for Brown.

Lastly, Brown's subjective belief need not be compelling; instead it must be only "reasonably formed." *Bohn*, 119 Wn.2d at 363. The body of evidence submitted during the proceedings satisfies this threshold. Accordingly, the lower court properly ruled that "Brown formed an attorney/client relationship with Boothe on the Hatch Act and other election law issues." CP 435 (CL No. 3).

C. Boothe Represented Brown on Matters that Are the “Same” as or “Substantially Related” to the Current Action

Although the lower court correctly concluded that “Brown formed an attorney/client relationship with Boothe on the Hatch Act and other election law issues,” the lower court then erred by ruling that “[t]he current action is not ‘a substantially related matter’ to the Hatch Act and election law issues on which Boothe and Brown consulted, for purposes of RPC 1.9(a).” CP at 442 (CL 3).

Under RPC 1.9(a), matters are “substantially related” if there is a “substantial risk that confidential information as would normally have been obtained in the prior representation would materially advance the [current] client’s position in the subsequent matter.” RPC 1.9(a), cmt. 3.

“To determine whether the two representations are substantially related, [this Court] must: (1) reconstruct the scope of the facts of the former representation, (2) assume the lawyer obtained confidential information from the client about all these facts, and (3) determine whether any former factual matter is sufficiently similar to a current one that the lawyer could use the confidential information to the client’s detriment.” *Sanders*, 121 Wn. App. at 599.

“[T]he 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.” *Sanders*, 121 Wn. App. at 599 (quoting *Trone v. Smith*, 621 F.2d 994, 999 (9th Cir. 1980)). Thus,

“‘[s]ubstantially related’ requires only that the representations ‘are relevantly interconnected.’” *Sanders*, 121 Wn. App. at 599 (quoting *Hunsaker*, 74 Wn. App. at 44).

The current action is “relevantly interconnected” to the matters on which Boothe represented Brown. *Sanders*, 121 Wn. App. at 599 (internal quotation omitted). When the County’s Personnel Manager interviewed Brown on June 8 regarding Eubanks and Gray’s grievance, the Personnel Manager told Brown that the grievance “came from employees when they realized *you would be running for office* and could become their boss.” CP at 371 (emphasis added). According to the Personnel Manager, Brown’s candidacy was the impetus for Eubanks and Gray to come forward with their allegations. Brown’s candidacy was the very matter for which Boothe and Brown had an attorney-client relationship.

Additionally, when Brown called Boothe six days after the Personnel Manager issued her findings, Boothe “commented that these types of allegations could be expected in an election.” CP at 435. This reaction further establishes that the two matters are “relevantly interconnected.” *Sanders*, 121 Wn. App. at 599 (internal quotation omitted).

Moreover, as the Commissioner pointed out, “the trial court appears to have failed to consider whether there was a *substantial risk* that confidential information was obtained by Boothe during his representation of Brown that could materially advance Eubanks’ and Gray’s position in the current matter.” *Spindle* (Ruling Granting Review at 10) (emphasis

added). Indeed, a disqualifying conflict under RPC 1.9(a) requires only the “appearance of the possibility” that the client provided “confidential information during the prior representation.” *Sanders*, 121 Wn. App. at 599. The record demonstrates the “appearance” of such a “possibility,” especially because Boothe’s representation of Brown involved “complex and inherently interrelated issues” regarding Brown’s employment and candidacy. CP at 3. The grievance was yet another intersection of these matters.

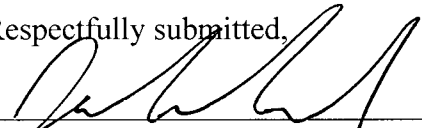
Because the current action is the “same” or “substantially similar” to the matters on which Boothe represented Brown, the lower court should have disqualified Boothe. RPC 1.9(a). Under RPC 1.9(a), if a judgment has not been entered (as in here), then the prejudice is “presum[ed]” and disqualification is “automatic.” *White*, 80 Wn. App. at 414-15. Accordingly, this Court should reverse the lower court and order the lower court to disqualify Boothe as to Plaintiffs’ claims against both Brown and the County.

CONCLUSION

For the reasons set forth above and in Brown's opening brief, the County respectfully asks this Court to (1) reverse the lower court's denial of the disqualification motion and (2) order the lower court to disqualify Boothe as to Plaintiffs' claims against Brown and the County. The County adopts the balance of the arguments in Brown's brief. RAP 10.1(g).

November 25, 2013

Respectfully submitted,



Francis S. Floyd, WSBA No. 10642
John A. Safarli, WSBA No. 44056

Attorneys for Appellant Klickitat County

CERTIFICATE OF SERVICE

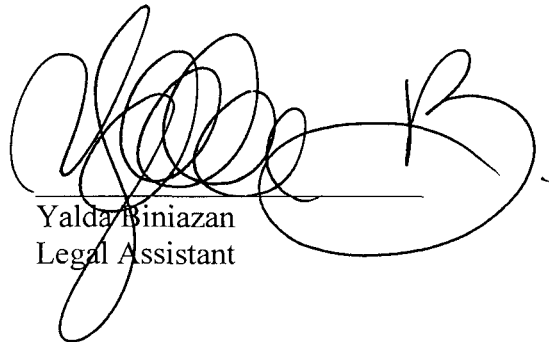
This is to certify that on the 25th day of November, 2013, I caused to be served a true and correct copy of the foregoing to be served.

Phillip A. Talmadge
Sidney C. Tribe
TALMADGE/FITZPATRICK
18010 Southcenter Pkwy
Tukwila, WA 98188
 Via Messenger
 Via Email
 Via Facsimile
 Via FedEx

Thomas S. Boothe
ATTORNEY AT LAW
7635 SW Westmoor Way
Portland, OR 97225-2138
 Via Messenger
 Via Email
 Via Facsimile
 Via FedEx

Michael E. McFarland
EVANS, CRAVEN & LACKIE, P.S.
West 818 Riverside Avenue, Suite 250
Spokane, WA 99201
 Via Messenger
 Via Email
 Via Facsimile
 Via U.S. Mail

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Yalda Biniazan
Legal Assistant