No. 90475-8

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Respondents,

v.

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

Petitioner,

and

KLICKITAT COUNTY, KLICKITAT COUNTY PROSECUTING ATTORNEY'S OFFICE,

Defendants.

ANSWER TO PETITION FOR REVIEW OF DAVID BROWN

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A. INTRODUCTION

If the case caption seems familiar to the Court, it is because this Court less than two months ago ruled against petitioner David Brown in his first interlocutory appeal. The petition under consideration by this Court represents the latest procedural maneuver by Brown – an experienced lawyer and public employee accused of heinous sexual harassment – to forestall the day when he will have to face his accusers.

Brown's first pre-trial appeal in this case was a venue challenge. He brought that challenge all the way to this Court, and lost. While Brown's first interlocutory appeal was pending, he moved to disqualify the trusted trial counsel of Robin Eubanks, Erin Gray, Anna Diamond, and Kathy Hayes ("the harassed women"). He did not succeed, so then commenced a second interlocutory appeal. Now, he again seeks this Court's review, hoping to deprive the harassed women of their chosen and trusted counsel, and delay trial for another two years a.

There is no genuine issue raised in Brown's petition that should be of concern to this Court. The Court of Appeals' opinion is narrowly drawn to the facts, and appropriately applies controlling precedent. This Court should deny review.

B. ISSUES PRESENTED FOR REVIEW

The harassed women acknowledge the issues that Brown presents for review, but believe they are more appropriately formulated as follows:

(1) Should this Court deny review because the Court of Appeals' opinion correctly applied Washington law on belated disqualification motions?

(2) Should this Court deny review because the Court of Appeals' opinion in this private dispute does not implicate the public interest?

C. RESPONSE TO BROWN'S STATEMENT OF THE CASE

The Court of Appeals decision summarizes the facts of this case, which the harassed women incorporate by reference. The following additional facts are pertinent to this Court's consideration.

In his petition, Brown makes no mention of the harassed women's claims. The women worked at the Klickitat County Prosecuting Attorney's Office ("the County"), and Brown was their attorney-supervisor. *Eubanks v. Brown*, 170 Wn. App. 768, 770, 285 P.3d 901 (2012) ("*Eubanks I*"). Brown sexually harassed them at work. *Id.* The harassed women allege that Brown positioned himself in the doorway to his office so that they would need to rub against his body when they left the office; he regularly sat in their shared office with his pants unzipped and his legs spread open; he gave unwanted gifts to Eubanks; he stood in their doorways without speaking for extended periods and watch them; and he stared at Gray's breasts during conversations. *Id.*; CP 322-63. The

County later fired three of the harassed women for complaining about Brown's actions, one was constructively discharged when the stress made her too ill to continue working. *Id.*

Although the harassed women filed their complaint in December 2010, they have not yet had their day in court. After Brown lost his venue challenge at the trial court, he sought discretionary review at the Court of Appeals. *Eubanks I,* 170 Wn. App. at 769. He lost, then petitioned this Court for review. *Eubanks v. Brown,* ___ Wn.2d ___, 327 P.3d 635 (June 19, 2014) ("*Eubanks II*"). While that petition was pending, Brown moved in the trial court to disqualify the harassed women's counsel, Thomas Boothe. *Eubanks v. Klickitat Cnty.*, ___ Wn. App. ___, 326 P.3d 796, 798 (June 3, 2014) ("*Eubanks III*"). The trial court denied Brown's motion. Appendix A. That denial began this second interlocutory appeal. *Id.*

In addition to this procedural history, it is important for this Court to note that the trial court resolved Brown's disqualification motion without resolving any factual disputes, including the two most critical disputed facts here: whether Boothe represented Brown regarding his Hatch Act questions, or whether they ever discussed Brown's alleged sexual harassment. *Eubanks III,* 326 P.3d at 797; Appendix A.

Instead, the trial court accepted the facts as Brown presented them, ruling on summary judgment that disqualification was not warranted. *Id.*;

RP 4, 15. At the trial court motion hearing, Brown's counsel admitted that the material facts *were* disputed and argued that the trial court needed to hold a hearing to resolve credibility issues. RP 4. The trial court responded that a credibility determination was unnecessary because even assuming all of Brown's allegations were true, disqualification was not warranted. *Id.* at 4, 15. The trial court did just that, relying in its order on Brown's affidavit for its factual underpinning, declining to resolve any disputed issues of fact, and ruling summarily. CP 434-35.

Thus, Brown's claim (Petition at 11) that the "trial court explicitly found that an attorney client relationship existed" is misleading. The trial court's "finding" of an attorney-client relationship was based solely on the facts as Brown presented them. Whether Boothe represented Brown on the Hatch Act question is a disputed fact not resolved below. It is undisputed, however, that Boothe never issued an engagement letter or fee agreement to Brown, no emails between the attorneys contained any evidence of legal advice sought or given, Boothe never sent Brown an invoice for his services, and Brown never paid Boothe a dime for his alleged representation.[1] CP 106.

[1] Brown's claim that Boothe represented him for free is concerning. Brown stated that Boothe, like "attorneys before," had represented him for free as a "professional courtesy" given the fact that Brown was a "modestly compensated public servant." CP 5. Despite claiming familiarity with ethical precepts, Brown does not

It is also disputed that Brown ever mentioned sexual harassment allegations in any of their conversations. CP 91-93. Brown learned of the sexual harassment allegations in May 2010. CP 4. Brown was called to appear at a County administrative hearing in early June. CP 368-71. Brown did not contact Boothe, seek Boothe's advice, or solicit his representation in relation to those proceedings. *Id.* He called Boothe on June 21, *after* he had been disciplined. The subject of that phone call is disputed. CP 4, 88-89. Brown's only email to Boothe after Brown was contacted about the complaints against him came on June 23, 2010, and it merely forwarded links to two articles about the Hatch Act issue from two local papers. CP 113. Again, no mention was made of the sexual harassment matter. *Id.*

In December 2010, the harassed women filed a complaint against Brown and Klickitat County. CP 5. Again, Brown did not contact Boothe or seek his representation in defense of that complaint.

In June 2011, Boothe was asked by the harassed women's first lawyer to associate on the case. CP 238.[2] In a surplus of caution, Boothe

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explain how such gifts of legal services do not violate RCW ch. 42.52 the Ethics in Public Service Act, which prohibits gifts to public officers.

[2] Although that lawyer's affidavit states that she approached Boothe in 2012, it is clearly a typographical error. There is no dispute that Boothe appeared in July 2011. CP 136.

consulted with WSBA ethics counsel about his previous conversations with Brown. CP 95. On the advice of the WSBA counsel, Boothe sought advice from ethics expert, Lee Ripley, who concluded that no conflict existed. *Id.*[3] Boothe agreed to take the case and appeared in July 2011. CP 96.

In a July 2011 letter to Brown's counsel, Boothe immediately disclosed that he had spoken to Brown about unrelated matters in 2010. CP 136; Appendix B. He disclosed the nature of the conversations, and that in an abundance of caution he had consulted with the WSBA and private counsel regarding the matter. *Id.*

Brown claims he waited until January 2013 to bring his disqualification motion "[g]iven Boothe's representation that he would seek his clients' approval to dismiss Brown if Brown prevailed on the venue issue." Pet. at 4. The Court of Appeals cited Brown's claim as a basis for observing that there was "no indication" Brown delayed filing his motion for tactical reasons. *Eubanks III,* 326 P.3d at 799.

However, the claim that until January 2013, Boothe had led Brown to believe Brown might be dismissed after the venue decision is *patently false.* In November 2011, 13 months before Brown brought his

[3] Brown's affidavit and the history of the written communications between the two attorneys was analyzed in detail by Ripley for the trial court. CP 241-71.

disqualification motion, Boothe sent a letter to Brown's counsel. CP 154; Appendix C. In that letter, Boothe stated:

> When we conclude discovery we can revisit trial arrangements and determine whether the case should go forward in Clark County, stay pending the appeals, *or separate into separate actions against the county and Mr. Brown.*

Id. (emphasis added).[4] Boothe was clear as of *November 2011* that Brown would not be dismissed from the case based on venue concerns. Brown still took no action.

Brown's counsel's heated claims that Boothe called Brown a "liar" and threatened "war" over the disqualification issue are assertions, not established facts, and should be taken with a grain of salt. In the first affidavit Brown's attorney filed in support of the disqualification motion, he recounted Boothe's response to the disqualification issue thus: "Mr. Boothe adamantly denied that he had a conflict of interest and advised me that if Mr. Brown moved to disqualify him, he would vigorously oppose the motion." CP 21. Only in a *second affidavit in reply* – after Brown reviewed Boothe's response to his motion – did Brown's counsel include

[4] For this reason among others, the harassed women dispute the Court of Appeals' suggestion that Brown's decision to delay was not tactical. *Eubanks III,* 326 P.3d at 799. There is no reasonable basis on this record to conclude that Brown was not acting tactically when he delayed filing his motion to disqualify.

the inflammatory "liar" and "war" language in his recounting of Boothe's response. CP 474.

Between July 2011 to January 2013, all parties conducted extensive trial preparation. CP 96-100, 454-67. Boothe invested over 450 hours of his own preparation time, and over 600 hours of paralegal time, including written discovery, document review, depositions, and motions practice. CP 100.[5]

Although Boothe appeared in July 2011, and although Brown knew by November 2011 he would not be dismissed from the lawsuit regardless of his venue challenge, CP 154, Brown did not move to disqualify Boothe until January 2013. CP 27, 44.

The trial court heard arguments on Brown's motion to disqualify. RP 1. Brown refused to offer any evidence to support the proposition that he disclosed any information to Boothe that could lead to substantial harm. RP 10. The trial court informed Brown that, even viewing all of the evidence in the light most favorable to Brown, there was no evidence of an attorney-client relationship between Boothe and Brown regarding the sexual harassment claims. RP 15-16. The trial court further stated that at most, Brown was a prospective client regarding the sexual harassment

[5] The major discovery event that has not taken place is Brown's deposition. He has justified avoiding that deposition by bringing the current appeal.

claims, and that under RPC 1.18 Brown had the burden to indicate what information Boothe had that could do Brown substantial harm. RP 17.

Although ruling summarily, the trial court entered "findings and conclusions"[6] that, taking the facts the light most favorable to Brown, he had not made the requisite showing to support his motion for disqualification. CP 446-48.

Brown moved for discretionary review. CP 437. The Court of Appeals ruled that Brown had waived his right to seek Boothe's disqualification by his inordinate delay in bringing the motion. *Eubanks III,* 326 P.3d at 800. The Court of Appeals did not reach the questions regarding the claimed conflict of interest. *Id.*[7]

Just two weeks after the Court of Appeals ruled against Brown in his disqualification challenge, on June 19 this Court affirmed both the trial court and the Court of Appeals in Brown's venue challenge, holding that venue was proper and this case could at last proceed to trial. *Eubanks II,*

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[6] Even if this Court should accept review and reverse, it cannot give Brown the remedy he seeks – disqualification. Again, the critical facts on the conflict issue were not resolved by the trial court, which accepted as true Brown's version of events. CP 434-35. Thus, the case must be remanded for findings of fact after an evidentiary hearing. Also, Brown has not challenged the Court of Appeals' decision not to reach the conflict issue.

[7] Brown relies on the order of the Commissioner of the Court of Appeals on the decision to grant discretionary review. Pet. at 5-6, 10-11. While the harassed women have the utmost respect for the Commissioner's role in this process, any findings or holdings of the Commissioner in the context of an order granting discretionary review are not relevant here, where the judge of the Court of Appeals did not reach a decision on the merits.

327 P.3d at 641. However, on June 30, Brown filed the present petition for review to this Court.[8] Brown seeks to extend the interlocutory review process for another two years.

D. ARGUMENT WHY REVIEW SHOULD BE DENIED[9]

(1) The Court of Appeals' Ruling Does Not Conflict With Any Opinion of This Court or the Court of Appeals

Brown claims that review is warranted under RAP 13.4(b)(1),[10] arguing that the Court of Appeals' opinion conflicts with *Matter of Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 411 (1996); and *First Small Bus. Inv. Co. of California v. Intercapital Corp. of Oregon*, 108 Wn.2d 324, 738 P.2d 263 (1987). Pet. at 9-15.[11] He misreads these cases to

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[8] Although the County did not timely file a petition for review, on July 17 the County filed a pleading purporting to "join" in Brown's petition and adopting by reference all of Brown's arguments. Appendix A. There is no provision in the RAP for an untimely "joinder" of this nature. The County has waived its right to relief by failing to timely file its own petition. RAP 13.4.

[9] This Court is fully familiar with the criteria for review set forth in RAP 13.4(b). Review by this Court of a Court of Appeals decision terminating review is a matter of discretion. RAP 13.3(a). This Court will accept Brown's petition for review only if the decision of the Court of Appeals is in conflict with a decision from this Court, or if the petition involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(1), (4). RAP 13.4(b)(2) and (3) do not apply here.

[10] Although Brown also cites to RAP 13.4(b)(2), he cites only three opinions of this Court that give rise to the alleged conflict of law. Pet. at 9-15.

[11] Brown also cites *In re Disciplinary Proceeding Against Carpenter*, 160 Wn.2d 16, 155 P.3d 937, 941 (2007). Pet. at 12-13. It is unclear how this disciplinary case regarding advising clients about known conflicts of interest relates to the Court of Appeals' ruling here, where the issue of conflict was not reached. To the extent these two pages of the petition might be read to suggest Brown is challenging the trial court's

suggest that under Washington law, a party claiming a conflict of interest can *never* waive the issue through delay, and therefore the Court of Appeals created a conflict with existing precedent by finding waiver here. *Id.*

Neither *First Small Bus.* nor *Firestorm* prohibits a court from finding that a party has waived the right to obtain disqualification of an opposing party's attorney, even if the basis for disqualification is a claimed conflict of interest. In fact, in *First Small Bus.*, this Court held that the issue could be waived through delay alone.

As Brown reluctantly notes in his petition, for over 25 years under *First Small Bus.*, it has been the law in Washington that a party who delays acting can waive the right to seek disqualification of opposing counsel, *even when* the claimed basis for disqualification is a conflict of interest and access to privileged information. *First Small Bus.*, 108 Wn.2d at 336-37. In that controlling case, as here, a party claimed that opposing counsel should be disqualified on the basis of a claimed conflict of interest. *Id.* The moving party had waived several years to bring the motion. *Id.* The trial court had found the evidence of a conflict to be

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finding that there was no conflict, the harassed women reserve the right to argue the issue in their supplemental brief should review be granted on that issue.

weak, but this Court held that it did not matter because "delay alone" was sufficient grounds for denying the motion to disqualify:

> The moving parties had reason to know of the existence of the basis for the potential disqualification for several years before they filed their disqualification motion. A failure to act promptly in filing a motion for disqualification may warrant denial of a motion.

First Small Bus., 108 Wn.2d at 337.

Brown suggests that under *First Small Bus.*, the Court of Appeals was prohibited from finding waiver because of its statement that it could not find any "indication" that Brown's eighteen-month delay was tactical. Pet. at 13.[12]

Despite Brown's attempt to paint the case otherwise, *First Small Bus.* contains no holding that a court *must* find the delay was tactical in order to find waiver. *First Small Bus.*, 108 Wn.2d at 337. The only relevant fact the court cited was knowledge of the grounds for disqualification, and a failure to promptly bring the motion. *Id.* The Court cited language that serves as the rationale for the rule – that it is subject to tactical abuse – but did not mandate any finding that there was a colorable excuse for delay. *Id.*

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[12] This observation does not really constitute a "finding" of fact by the Court of Appeals, but if it did, this Court should note that the Court of Appeals is generally not empowered to make findings on disputed issues of material fact. The harassed women disagree with the Court of Appeals' characterization of Brown's efforts. He has sought

Also, Brown's explanation for his "non-tactical" delay is flatly contradicted by indisputable evidence in the record. Brown's claim is that he delayed seeking disqualification based upon Boothe's statement in a July 13, 2011 letter that he might dismiss Brown from the action if Brown prevailed in the venue action. Pet. at 13-14. Boothe wrote nothing of the sort in his July 13 letter. He stated that if he reviewed the motion and believed it had merit, it *might* influence his decision regarding whether or not to dismiss Brown as a defendant. CP 137. And again, in November 2011 Boothe unequivocally communicated to Brown that even if the venue issue were resolved in Brown's favor, litigation against Brown would continue in the new venue. CP 154.

Moreover, trial litigation did not cease while the venue issue was being considered. On December 19, 2011, Brown's counsel emailed the harassed women's counsel, noting that Boothe had stated his intention to move forward with discovery involving Brown, despite continued litigation of the venue issue. CP 158.

Despite all of this litigation activity, Brown did not pursue the disqualification issue for *eighteen months*. His now-professed belief that the matter would resolve itself if a change in venue was ordered is mystifying. Brown's assertions that he delayed his motion as a "professional courtesy" to Boothe and to avoid unnecessary conflict contrast starkly with his current claim that Boothe is a deceitful and unethical lawyer. Brown claims he disclosed sensitive and damaging confidences to Boothe that could harm him in the sexual harassment litigation, and he fears Boothe will use those confidences against him. *Id.*

Brown is a sophisticated lawyer represented by competent counsel. If he believed his confidences were truly at risk, he was obliged to move to disqualify Boothe with reasonable promptness. He chose not to do so. In the meantime, Boothe invested hundreds of hours into this case, and the harassed women developed a strong relationship and trust with Boothe regarding the sensitive and deeply emotional issues and information at stake. *Eubanks III,* 326 P.3d at 799; CP 100.

As Brown also concedes, *Firestorm* is distinguishable from this case, and as a matter of logic cannot be in conflict with it. Pet. at 9-10. In *Firestorm,* this Court held that a 9-month delay in moving to disqualify counsel was excessive, and that the delay constituted waiver of the issue. *Firestorm,* 129 Wn.2d at 142. This Court noted that "[d]isqualification of

counsel is a drastic remedy that exacts a harsh penalty from the parties as well as punishing counsel; therefore, it should be imposed only when absolutely necessary." *Id.* at 140. This Court acknowledged that sometimes, there is a claim that opposing counsel has "access to privileged information" that might warrant disqualification *Id.* However, that issue was not before the *Firestorm* court.

Brown quotes language from the *Firestorm* opinion suggesting that any assertion that a conflict of interest exists mandates disqualification, regardless of the moving party's delay. Pet. at 10. However, the statement is merely an explanation of why disqualification *might* sometimes be warranted, but was not warranted in *Firestorm*. *Id.* at 140. It is not a statement of any bright-line rule regarding the disposition of disqualification motions.[13]

It is also relevant and fascinating to note that the language Brown quotes from *Firestorm* was borrowed from a Court of Appeals disqualification case that was ultimately overruled by this Court.

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[13] The idea that *no* amount of delay could justify a finding of waiver is a pernicious one. The rule that Brown would have this Court announce is that a party could wait until the morning of trial and then move to disqualify.

Firestorm, 129 Wn.2d at 140, citing *Intercapital Corp. of Oregon v. Intercapital Corp. of Wash.*, 41 Wn. App. 9, 16, 700 P.2d 1213 (1985).[14]

The Court of Appeals' conclusion here that Brown's delay was excessive – and the issue was thus waived – does not conflict with *Firestorm*. That case makes no statement and contains no holding that there can never be a waiver of a claimed conflict of interest if the moving party significantly delayed filing the motion. *Firestorm* simply holds that in the context of the discovery violation at issue in that case, the penalty of disqualification was too harsh. *Id.* at 145.

Brown's attempt to disqualify Boothe after eighteen months was purely tactical decision that, if successful, would have harmed the harassed women. Brown's claims that that his conversations with Boothe exposed confidences that could hurt him in the present litigation are belied by his long delay in bringing his motion while the parties were engaging in discovery, depositions, and motions practice, and even interlocutory appeals. The length of the delay alone in moving to disqualify – only after

[14] The procedural history of the case is somewhat convoluted, and this Court did initially deny review. *Intercapital Corp. of Oregon v. Intercapital Corp. of Wash.*, 104 Wn.2d 1015 (1985). However, after remand, other disqualification issues arose and the multiple disqualification issues went back up on review to this Court in *First Small Bus.* 108 Wn.2d at 327. As previously noted, this Court held that delay could justify denial of a disqualification motion even if the moving party raised a conflict of interest concern. *Id.* at 337.

he lost in the Court of Appeals in *Eubanks I* – betrays the tactical basis for Brown's actions.

A tactical goal of delay is easy to imagine – forestall resolution of the case on the merits and drive up the harassed women's legal expenses and stress in the hope that they will settle their cases cheaply.

The Court of Appeals, although mistaken about the tactical nature of Brown's delay, correctly applied this Court's precedent on waivers of disqualification. Review is not warranted here under RAP 13.4(b)(1).

(2) There Is No Substantial Public Interest Threatened by the Court of Appeals' Ruling

Brown claims that a substantial public interest will be served if this Court accepts review. Pet. at 15-20. He is mistaken. The Court of Appeals' opinion does not implicate a substantial public interest meriting this Court's review.

The criteria generally considered to determine if an issue is of substantial public interest "are the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question." *See, e.g., Hart v. Dep't of Soc. & Health Servs.*, 111 Wn.2d 445, 448, 759 P.2d 1206 (1988); *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972).

This Court in *Hart* engaged in robust discussion of the public interest exception as it has been applied in moot cases. *Hart,* 11 Wn.2d at 448-51. It closely examined those cases, and noted that the substantial public interest doctrine is reserved for cases where there is an unresolved, broad constitutional or statutory question, or an important public issue such as campaign finance or the environmental impact of large construction projects. *Id.*

Rather than address the factors for evaluating a "substantial public interest," Brown makes an amorphous argument about the public's confidence in the legal profession. Pet. at 15. Brown suggests that denial of review by this Court is tantamount to an endorsement of unethical behavior. *Id.* at 16. Brown argues that he should not have had to timely move to disqualify Boothe. *Id.* at 19. Instead, he argues that public policy demanded Boothe bring the motion himself, even though Boothe had sought and received expert ethical advice confirming that no conflict existed. *Id.*

There is little argument that the issue Brown raises is entirely private. He is accused of sexual harassment and wants his opponents' attorney disqualified after working on the case for eighteen months. He attempts to invoke the public interest exception by talking about confidence in the legal profession in general, but this argument could be

made about almost any issue involving lawyers or the practice of law. Brown's argument – that the public interest is implicated in any civil appeal involving legal ethics – would mean that every civil or criminal appeal in which any party raised an accusation of an ethical violation – no matter how spurious, untimely, or seemingly pretextual – would merit this Court's review.

Also, there is no need for additional authoritative guidance from this Court on the issue Brown raises. This Court already decided the issue in *First Small Bus.* That case does not differ from the present case, factually or legally, yet the public remains confident in the legal profession 25 years later. Brown presumably does not think this Court violated the public trust and undermined the integrity of the legal profession by issuing that decision.

Brown also ignores other public interest at issue in this case: the right of victims of sexual harassment – a highly embarrassing and emotionally difficult subject – to retain the trusted counsel of their choice. Clients have a reasonable right to the counsel of their choosing. *First Small Bus.*, 108 Wn.2d at 335. The decision to disqualify counsel has substantial impacts on both the lawyer and the client. *Firestorm,* 129 Wn.2d at 140.

The impact of the decision to disqualify counsel is especially harsh where, as here, the clients have developed a trusting relationship with their lawyer in an emotionally charged case. Given the highly personal, embarrassing, and serious nature of the issues, the harassed women have suffered severe emotional distress. CP 317-21. They were so intimidated by Brown, they did not even want to be deposed with Brown in the same room. CP 100. That distress has been compounded by the threat of removal of their attorney of over two years, whom they have grown to trust and rely. CP 101.

The Court of Appeals' opinion will not undermine parties' faith in the legal profession. An ethical issue is raised untimely in a civil sexual harassment case is not an issue of public concern.

Review is not warranted under RAP 13.4(b)(4).

E. CONCLUSION

Nothing in Brown's petition supports the proposition that the Court of Appeals incorrectly decided the waiver issue. The Court of Appeals decision was correct. Brown should not be rewarded with further delay of the harassed women's day in court when Brown himself slept on his claim, increasing the harm to the women. This Court should decline to revisit the Court of Appeals' decision, and deny review.

DATED this 24th day of July, 2014.

Respectfully submitted,

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APPENDIX

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SCOTT G. WEBER, CLERK
CLARK COUNTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

ROBIN EUBANKS, ERIN GRAY, ANNA DIAMOND, and KATHY HAYES, Plaintiffs, vs. KLICKITAT COUNTY and DAVID BROWN, individually and on behalf of his marital community, Defendants.	NO. 11-2-00802-2 ORDER DECIDING DEFENDANTS' MOTIONS FOR EXPEDITED HEARING, TO CONTINUE MOTION HEARING AND FOR EVIDENTIARY HEARING, AND TO DISQUALIFY PLAINTFFS' COUNSEL

THIS MATTER came before the undersigned judge of the above-entitled court, for hearing on February 22, 2013, on Defendants' Motions to Disqualify Plaintiffs' Counsel, for an Expedited Hearing, and to Continue Motion Hearing and For Evidentiary Hearing. Defendant David Brown appeared through his attorney Michael E. McFarland, Jr., of Evans, Craven & Lackie, P.S., and Defendant Klickitat County appeared through its attorney Francis S. Floyd of Floyd, Pflueger & Ringer, P.S. Plaintiffs appeared through their attorney Thomas S. Boothe.

The court considered the arguments of counsel, the records and files herein, and the materials submitted in connection with the motions. The court relied primarily on the

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0-000000434

Affidavit of David Brown and Defendant Brown's Memorandum Supporting Motion to Disqualify for the factual basis for the motion. In ruling on the defendants' motions, the court makes the following:

I. FINDINGS OF FACT

1. In May and June 2010, David Brown and Thomas Boothe communicated, by telephone and by email. They discussed the applicability of the Hatch Act to Brown's decision to run for Klickitat County Prosecuting Attorney. They also discussed other election law issues.

2. In a telephone conversation on June 12, 2010, Brown mentioned to Boothe that other employees were making sexual harassment allegations against him. Boothe commented that these types of allegations could be expected in an election. No other evidence was presented by Brown concerning this conversation, and Brown did not want to present testimony concerning this conversation at an evidentiary hearing.

3. Brown believed that he had an attorney-client relationship with Boothe concerning Hatch Act and election law issues.

II. CONCLUSIONS OF LAW

1. The party seeking the disqualification of counsel bears the burden of proof for purposes of a motion to disqualify.

2. Whether or not an attorney/client relationship exists is based substantially upon the subjective belief of the client. The purported client's belief must be reasonable under the circumstances.

3. Brown formed an attorney/client relationship with Boothe on the Hatch Act and other election law issues. Brown did not form an attorney/client relationship with Boothe on

any sexual harassment matter. The 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).

4. Assuming, for purposes of the motion to disqualify, that Brown was attempting to form an attorney/client relationship with Boothe in regard to the sexual harassment accusations, he was a prospective client as defined by RPC 1.18(a).

5. Pursuant to RPC 1.18, a prospective client who wishes to disqualify an attorney must show that the attorney received information from the prospective client that could be significantly harmful to the prospective client in the matter. Brown has not presented any evidence that Boothe received information that could be significantly harmful to him in this matter.

III. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED, ADJUDGED and DECREED as follows:

1. The Defendants' Motion for an Expedited Hearing is granted.
2. The Defendants' Motion to Continue Hearing and for an Evidentiary Hearing is denied.
3. The Defendants' Motion to Disqualify Plaintiffs' Counsel is denied.
4. The May 10, 2013, hearing for presentation of this order is stricken. All counsel's objections to the form and substance of the order are noted and preserved.
5. The court shall provide a conformed copy of the order to each attorney.

DONE IN OPEN COURT this 7th day of May, 2013.

Honorable Robert Lewis

B

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July 13, 2011

VIA FAX – (509) 455-3632
-and-
Via First-Class Mail

Mr. Michael McFarland
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Re: ***Eubanks, et al. v. Klickitat County, et al.***
Clark County Superior Court Case No. 11-2-00802-2

Dear Mr. McFarland:

This letter is to introduce myself as the new trial attorney for plaintiffs in the above-referenced matter. I have received retainer agreements from each of the women, and I anticipate receiving a signed Substitution of Counsel signed by predecessor counsel in the coming days. Upon receipt, I will subscribe it and file it in Clark County.

Just as I am awaiting delivery of the Substitution of Counsel form, I am also awaiting delivery of my predecessors' files in this matter. To date, I have seen some documentation, but not all of it. I have had a chance to confer with plaintiffs, but I still have much to do in the matter.

Would you please take the motion off the calendar for July 22? My first reaction in the matter was to query why Dave Brown was a named party to begin with. It is my general preference to sue the organization rather than the individual, although I have handled cases both ways in the past. As it is, I may not even receive the files, let alone have a chance to review them, by the noted date. If your motion is well-taken, that will make my decision to dismiss Mr. Brown even easier. In any event I ask the courtesy of a brief extension. If you oppose, I will move for an extension from the court.

Also, I want to alert you that I spoke to Dave Brown in May and June of 2010 when he called to inquire about Hatch Act. Because the Hatch Act is outside of my practice area, having

not even crossed my mind since the spring of my third year in law school (1978), I explained that I was the wrong person to call for assistance. Nonetheless, Mr. Brown and I discussed it a few times after he said he would just welcome thoughts from an outside attorney. I never represented him or gave any advice of any kind. We were, instead, two colleagues conversing. I still have my original Amicus time entries through which I track what I do every day, and they remain unchanged since the time they were entered more than a year ago. I also had occasion to talk with Mr. Brown as a potential witness in May of this year after I was approached Muriel Oberfell about a possible case against Klickitat County. Ultimately, I decided against taking the case. In the May of 2011 discussion, Mr. Brown and I had a very brief conversation regarding whether he saw or heard anything to suggest that Ms. Oberfell had been subjected to age discrimination. Again, nothing touched on the facts regarding Ms. Eubanks or Ms. Gray. In an abundance of caution, however, I conferred with both the Washington State Bar Ethics Hotline and private counsel. I did so because I my ethical obligations very seriously, and I did not want to take any action that might violate our professional standards. I disclosed these facts to each of the plaintiffs prior to going any further with them so they could make a fully informed decision about representation, as well. I share this with you to alert you of the facts because I prefer open and cooperative communications in matters such as this.

I should be in my office most of this afternoon, all day Thursday, and Friday afternoon. Please call me at your convenience if you wish to discuss any of this in greater detail.

Very truly yours,

Tom

Thomas S. Boothe

TSB:mms

C

Thomas S. Boothe
ATTORNEY AT LAW
7635 S.W. WESTMOOR WAY
PORTLAND, OREGON 97225-2138
TELEPHONE (503) 292-5800
FAX (503) 292-5856
E-MAIL tsb@boothehouse.com

November 28, 2011

VIA EMAIL – mmcfarland@ecl-law.com

Mr. Michael McFarland
Evans, Craven & Lackie, PS
Suite 250
818 West Riverside Ave.
Spokane, WA 99201-0910

Re: *Eubanks, et al. v. Klickitat County, et al.*
Clark County Superior Court Case No. 11-2-00802-2

Dear Mick:

Following-up on our courtroom and main floor lobby conversations of November 18, I suggest that we stipulate that Mr. Brown will participate in discovery proceedings in this case as if he were a party, but that by his participation does not waive any arguments he may have in opposition to venue for trial of this matter in Clark County. I further suggest that we stipulate that the appellate court's ruling on Mr. Brown's pending venue appeal apply equally to venue as to Anna Diamond and Kathy Hayes without need of Mr. Brown filing any supplemental materials with the Court of Appeals. A proposed form of stipulation is attached in Word to facilitate your comments. Such a stipulation should keep costs down for the parties and consume fewer judicial resources.

When we conclude discovery we can revisit trial arrangements and determine whether the case should go forward in Clark County, stay pending the appeals, or separate into separate actions against the county and Mr. Brown.

I look forward to your response.

Very truly yours,

Thomas S. Boothe

TSB:mms
cc: James Baker
Clients

DECLARATION OF SERVICE

On said day below, I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the Answer to Petition for Review of David Brown in Supreme Court Cause No. 90475-8 to the following parties:

Francis S. Floyd
John A. Safarli
Floyd, Pflueger & Ringer, P.S.
200 W. Thomas St., Suite 500
Seattle, WA 98119-4296

Michael E. McFarland, Jr.
Kimberley L. Mauss
Evans, Craven & Lackie, P.S.
818 W. Riverside Avenue #250
Spokane, WA 99201-0910

Thomas S. Boothe
7635 SW Westmoor Way
Portland, OR 97225

Original E-filed with:

Washington Supreme Court
Clerk's Office
415 12th Street W.
Olympia, WA 98504-0929

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: July 25, 2014, at Seattle, Washington.

Roya Kolahi, Legal Assistant
Talmadge/Fitzpatrick

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, July 25, 2014 9:35 AM
To: 'Roya Kolahi'
Cc: tsb@boothehouse.com; ffloyd@floyd-ringer.com; jsafarli@floyd-ringer.com; mmcfarland@ecl-law.com; Kimberley Mauss
Subject: RE: Answer to Petition for Review

Rec'd 7-25-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Roya Kolahi [mailto:Roya@tal-fitzlaw.com]
Sent: Friday, July 25, 2014 9:34 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: tsb@boothehouse.com; ffloyd@floyd-ringer.com; jsafarli@floyd-ringer.com; mmcfarland@ecl-law.com; Kimberley Mauss
Subject: RE: Answer to Petition for Review

My apologies. Here is the attachment.

Sincerely,

Roya Kolahi
Legal Assistant
Talmadge/Fitzpatrick, PLLC
206-574-6661 (w)
206-575-1397 (f)
roya@tal-fitzlaw.com

From: OFFICE RECEPTIONIST, CLERK [mailto:SUPREME@COURTS.WA.GOV]
Sent: Friday, July 25, 2014 9:30 AM
To: Roya Kolahi
Cc: tsb@boothehouse.com; ffloyd@floyd-ringer.com; jsafarli@floyd-ringer.com; mmcfarland@ecl-law.com; Kimberley Mauss
Subject: RE: Answer to Petition for Review

Please resend as there is no attachment to the e-mail.

From: Roya Kolahi [mailto:Roya@tal-fitzlaw.com]
Sent: Friday, July 25, 2014 9:21 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: tsb@boothehouse.com; ffloyd@floyd-ringer.com; jsafarli@floyd-ringer.com; mmcfarland@ecl-law.com; Kimberley Mauss
Subject: Answer to Petition for Review

Good Morning:

Attached please find the Answer to Petition for Review of David Brown in Supreme Court Cause No. 90475-8 for today's filing. Thank you.

Sincerely,

Roya Kolahi
Legal Assistant
Talmadge/Fitzpatrick, PLLC
206-574-6661 (w)
206-575-1397 (f)
roya@tal-fitzlaw.com