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

Reply Brief of Petitioner David Brown

EVANS, CRAVEN & LACKIE, P.S.
Michael E. McFarland Jr., WSBA #23000
Patrick M. Risken, WSBA#14632
818 W. Riverside, Suite 250
Spokane, WA 99201-0910
(509) 455-5200
ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

I. INTRODUCTION..........1

II. ARGUMENT IN REPLY..........2

A. Standard Of Review..........2

B. Respondents' Assault On The Findings And Conclusions Is Untimely..........4

C. Brown Did Not Waive His Right To Seek Disqualification..........9

D. Disqualification Is Warranted Under RAP 1.9. 14

E. Disqualification Is Warranted Under RAP 1.18. 22

III. CONCLUSION..........25

TABLE OF AUTHORITIES

Page(s)

Cases

Bohn v. Cody,
119 Wash. 2d 357, 832 P.2d 71 (1992)....14, 15, 16, 17

Central Milk Producers Coop. v. Sentry Food Stores, Inc.,
573 F.2d 988 (8th Cir.1978)....9, 11

Dietz v. Doe,
131 Wash. 2d 835, 935 P.2d 611 (1997)....8

In re Disciplinary Proceeding Against Egger,
152 Wash. 2d 393, 98 P.3d 477 (2004)....14

In re Disciplinary Proceeding Against Schafer,
149 Wash.2d 148, 66 P.3d 1036 (2003)....1, 14

Eriks v. Denver,
118 Wn.2d 451, 824 P.2d 1207 (1992)....2, 3, 4

Matter of Firestorm 1991,
129 Wash. 2d 130, 916 P.2d 411 (1996).... *passim*

First Small Bus. Inv. Co. of California v. Intercapital Corp. of Oregon,
108 Wash. 2d 324, 738 P.2d 263 (1987)....9, 10, 11

Intercapital Corp. v. Intercapital Corp.,
41 Wash.App. 9, 700 P.2d 1213, *review denied,* 104 Wash.2d 1015 (1985)....25

Kurbitz v. Kurbitz,
77 Wash.2d 943, 468 P.2d 673 (1970)....18, 19

Marquardt v. Fein,
25 Wn.App. 651, 612 P.2d 378 (1980)....3

McKasson v. State,
55 Wn.App. 18, 776 P.2d 971 (1989) 1

Pixton v. Silva,
13 Wn.App. 205, 534 P.2d 135 (1975) 6

Richard B. v. State Dept. of Health and Social Services,
71 P.3d 811 (Alaska 2003) 11

Sanders v. Woods,
121 Wn.App. 593, 89 P.3d 312 (2004) 2, 3, 4, 7

Sims v. Sims,
171 Wn.2d 436, 256 P.3d 285 (2011) 6

Singletary v. Manor Healthcare Corp.,
166 Wn.App. 774, 271 P.3d 356 (2012) 7

St. Luke's Evangelical Lutheran Church of Country Homes. v. Hales,
13 Wn.App. 483, 534 P.2d 1379 (1975) 6

State v. Goodman,
150 Wn.2d 774, 83 P.3d 410 (2004) 6

State v. Greco,
57 Wn.App. 196, 787 P.2d 940 (Div. II 1990), *review denied*
114 Wn.2d 1027, 793 P.2d 974 (1990) 4

State v. Hunsaker,
74 Wn. App. 38, 873 P.2d 540 (1994) 20, 21

Strickland v. Washington,
466 U.S. 668, 104 S.Ct. 2052 (1984) 1

Stroud v. Beck,
49 Wn.App.. 279, 742 P.2d 735 (1987) 3

Teja v. Saran,
68 Wash. App 15

Teja v. Saran,
68 Wn.App. 793, 846 P.2d 1375 (Div. I 1993) 4, 15, 16, 22

Other Authorities

CR 26(b)(5) 8

CR 56 5

RAP 1.9 14

RAP 1.18 22

RAP 2.4(a) 7

RAP 2.5 7

RAP 10.3(g) 5, 6

RPC 1.6 14

RPC 1.9 .... 2, 20, 21

RPC 1.9(a) 19, 22

RPC 1.9(b) 20

RPC 1.9(c) 20

RPC 1.9(c)(1) 20

RPC 1.18 .... 2, 23, 24

RPC 1.18(a) 22

I. INTRODUCTION

While Respondents Robin Eubanks and Erin Gray (hereinafter collectively "Eubanks") claim that "Washington courts do not take lightly the issue of disqualifying the chosen counsel of parties," it is equally true that courts do not protect counsel that operate in a clear conflict of interest situation. An attorney's loyalty to his or her client and any real or apparent conflict of interest is a matter of great public importance and the integrity of the profession and the protection of the public is paramount.

There is no question that attorneys owe their clients a duty of loyalty to avoid conflicts of interest. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984).

> 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.

In re Disciplinary Proceeding Against Schafer, 149 Wash.2d 148, 160, 66 P.3d 1036 (2003). It is vital for clients to be able to rely on the unqualified loyalty of their chosen attorney. *McKasson v. State*, 55 Wn.App. 18, 30, 776 P.2d 971 (1989). These fundamental and time-

honored rules are ignored by Eubanks. Rather, she interprets the Rules of Professional Conduct with razor thin distinctions and a limited focus on the her own circumstances, which of course were created solely by attorney Boothe's decisions. Likewise, Eubanks' concerns regarding Boothe's time and effort are inconsequential since the protections afforded by RPC 1.9 and 1.18 are not for the benefit of lawyers, but for clients.

Throughout Eubanks' Brief, Respondents refer to themselves as victims and their injuries and damages as already proven. Those hyperbolic statements have nothing to do with the issue herein, being whether Washington law will condone a lawyer's ongoing conflict of interest. Petitioner David Brown respectfully submits that for the reasons set forth herein and in Brown's initial brief, this Court should not tolerate Boothe's continuing conflict of interest.

II. ARGUMENT IN REPLY

A. Standard Of Review

Eubanks challenges the decision in *Sanders v. Woods,* 121 Wn.App. 593, 597, 89 P.3d 312 (2004) by her not-so-gentle suggestion that Division III did not understand the decision in *Eriks v. Denver,* 118 Wn.2d 451, 824 P.2d 1207 (1992), when it ruled that review of an order denying attorney disqualification is reviewed *de novo.* First, it should be noted that *de novo* review concerns the method of review of the trial

court's resolution of an issue of law, and not whether disqualification is in fact such an issue. *Eriks v. Denver,* 118 Wn.2d 451, 824 P.2d 1207 (1992) examined precedent holding that an alleged breach of a professional conduct rule is a question of law for the Court, citing with approval *Marquardt v. Fein,* 25 Wn.App. 651, 656, 612 P.2d 378 (1980) (conflict of interest), and *Stroud v. Beck,* 49 Wn.App.. 279, 288, 742 P.2d 735 (1987) (breach of fiduciary duty). The *Eriks* Court held:

> We have never addressed the question of whether the determination of a violation of the CPR is a question of law or fact. Since an attorney's fiduciary duty to a client arises from the same rules of conduct that proscribe an attorney from representing multiple parties with conflicting interests, it is logical to extend the holdings from *Marquardt* and *Stroud* to the determination of whether an attorney's conduct violates the relevant rules of professional conduct. Thus, we hold that the question of whether an attorney's conduct violates the relevant rules of professional conduct is a question of law. *See, e.g. Burnette v. Morgan,* 303 Ark. 150, 794 S.W.2d 145 (1990); *McCall v. Dist. Court,* 783 P.2d 1223 (Colo.1989); *Atty. Grievance Com. of Maryland v. Korotki,* 318 Md. 646, 569 A.2d 1224 (1990); *State v. Romero,* 563 N.E.2d 134 (Ind.App.1990); and *Bonanza Motors, Inc. v. Webb,* 104 Idaho 234, 657 P.2d 1102 (App.1983).

Eriks v. Denver, 118 Wn.2d at 457-458. The *Sanders* Court fully understood *Eriks.* Eubanks challenges *Sanders* to distract the Court from the issue at hand: whether Boothe was entangled in a conflict of interest by first representing Brown and later Eubanks in claims against Brown.

Many Washington decisions recognize the standard of review as well, such as *Teja v. Saran,* 68 Wn.App. 793, 846 P.2d 1375 (Div. I 1993), wherein the Court held that "because an attorney/client relationship existed, [attorney's] actions are governed by the Rules of Professional Conduct. The determination of whether an attorney has violated the Rules of Professional Conduct is a question of law and reviewed de novo." *Teja v. Saran,* 68 Wn.App. at 796, citing *Eriks v. Denver,* 118 Wn.2d at 457-458, and *State v. Greco,* 57 Wn.App. 196, 200, 787 P.2d 940 (Div. II 1990), *review denied* 114 Wn.2d 1027, 793 P.2d 974 (1990). Since *Sanders v. Woods,* 121 Wn.App. 593, 597, 89 P.3d 312 (Div. III 2004) recognizes that standard of review as well, all three Divisions of our Court of Appeals understand the rule in *Eriks v. Denver* very clearly.

B. Respondents' Assault On The Findings And Conclusions Is Untimely.

While Eubanks acknowledges that the standard of review is "de novo" (*Brief, pg. 16*) she argues that: (1) the trial court's findings and conclusions are "superfluous;"[1] (2) this "Court cannot grant Brown and the County the relief they request: an order disqualifying Boothe;"[2] and (3) if

[1] Respondents' Brief, pg. 14.
[2] Respondents' Brief, pg. 15.

this Court believes that the trial court erred, this Court should remand the case for an evidentiary hearing.[3] Eubanks is incorrect on all three counts.

Eubanks cites to CR 56 to argue that the trial court's findings and conclusions are "superfluous." CR 56 involves summary judgment motions, not all motions that are resolved in a "summary" manner. There is no rule of law that a trial court's findings of fact and conclusions of law on non-dispositive motions are "superfluous" simply because the motion is decided without oral testimony. Further, any argument that Eubanks makes has been waived by her failure to appeal. The place to argue the findings and conclusions was at the trial court by appropriate timely objection. Eubanks could then contest those findings and conclusions by cross-appeal. Having done neither she waived those arguments.

RAP 10.3(g) requires specific assignments of error for each finding or conclusion contested.

> As a preliminary matter, Goodman attempts to raise three objections to the trial court's findings of fact. *See* Br. of Appellant at 8. However, he never assigned specific error to any of the trial court's findings. *See* Br. of Appellant at 1. A party must assign error to a finding of fact for it to be considered on review. *See Eggert v. Vincent,* 44 Wash.App. 851, 854, 723 P.2d 527 (1986). Indeed, Goodman stipulated to all evidence at trial. Consequently, the trial court's findings are verities on appeal. *State v. Hill,* 123 Wash.2d 641, 644, 870 P.2d 313 (1994).

---

[3] Respondents' Brief, pg. 16.

Moreover, RAP 10.3(g) provides in relevant part:

> A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error *which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.*

State v. Goodman, 150 Wn.2d 774, 781-782, 83 P.3d 410 (2004).

> These findings of fact are not set forth as required by CAROA 42(g)(1)(iii) and CAROA 43. Though those challenged are set forth in plaintiffs' reply brief we cannot review them. *Coons v. Coons*, 6 Wash.App. 123, 125,491 P.2d 133 (1971), requires such findings be treated as verities. However, we will examine the findings to determine if they support the conclusions of law as found by the trial judge.

St. Luke's Evangelical Lutheran Church of Country Homes. v. Hales, 13 Wn.App. 483, 485, 534 P.2d 1379 (1975). *See also Pixton v. Silva,* 13 Wn.App. 205, 207, 534 P.2d 135 (1975) (findings to which error has been assigned yet not set out verbatim must be accepted as verities.)

Klickitat County's citation to *Sims v. Sims,* 171 Wn.2d 436, 256 P.3d 285 (2011) is on point. Eubanks seeks not only to reverse the entry of the findings of fact and conclusions of law, but also the specific findings and conclusions themselves. Under *Sims* and the cases cited therein it is obvious that Eubanks seeks "affirmative relief."

> The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter

> of review **only if** (1) 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.

RAP 2.4(a). RAP 2.5 rejects raising an issue for the first time on appeal. Eubank's argument is simply a back door attempt to appeal what Eubanks now perceives as a procedural error by the Trial Court.

Also, Eubanks makes no argument that "the necessities of the case" require such affirmative relief. Eubanks' is satisfied with the trial court's action if the Order is affirmed but she seeks affirmative direction from this Court to the trial court if the Order is reversed and remanded for further proceedings. *Consolidated Brief,* p. 46. A respondent requests affirmative relief if it seeks anything other than an affirmation of the lower court's ruling. *Singletary v. Manor Healthcare Corp.,* 166 Wn.App. 774, 787, 271 P.3d 356 (2012) (". . . we are unaware of any published case reversing the trial court in favor of the respondent absent a cross appeal. RAP 2.4(a).") Eubanks' request that this Court "correct" *Sanders v. Woods,* 121 Wn.App. 593, 597, 89 P.3d 312 (2004) requires a notice of appeal. Failing that the trial court's findings and conclusions are verities on appeal and cannot be revised or ignored as Eubanks suggests.

Eubanks' arguments for remand for an evidentiary hearing are likewise misplaced. *See*, *Matter of Firestorm 1991*, 129 Wash. 2d 130,

135, 916 P.2d 411 (1996). In that case, the Supreme Court was reviewing a trial court's order disqualifying counsel for a violation of CR 26(b)(5) based solely on affidavits. *Matter of Firestorm*, 129 Wash. 2d at 134. Rather than remand the Supreme Court noted:

> When a trial court fails to make any factual findings to support its conclusion, and the only evidence considered consists of written documents, an appellate court may, if necessary, independently review the same evidence and make the required findings. *Bryant v. Joseph Tree, Inc.*, 119 Wash.2d 210, 222, 829 P.2d 1099 (1992).

Matter of Firestorm, 129 Wash. 2d at 135. Just as the Supreme Court did in that case, this Court can and should "independently review" the evidence in the record and make the required findings that Boothe has an impermissible conflict of interest that requires his disqualification.

Eubanks' reliance upon *Dietz v. Doe*, 131 Wash. 2d 835, 935 P.2d 611 (1997) regarding remand for an evidentiary hearing is also misplaced. In *Dietz v. Doe* the Court remanded to the trial court because of the absence of "an adequate factual basis to establish an attorney-client relationship . . .." *Dietz*, 131 Wash. 2d at 845. This record contains an abundant "adequate factual basis" to disqualify Boothe.

Finally, Eubanks failed to appeal any portion of the trial court's Order but requests that this Court take a step back and order an evidentiary hearing *on the issue of whether an attorney-client relationship existed in*

the first place. Consolidated Brief, § E.(3)(b), pp. 32-33. This argument by the Eubanks should likewise be ignored.

C. Brown Did Not Waive His Right To Seek Disqualification.

In making the waiver argument Eubanks contends that even if this Court finds that Boothe is engaging in the ongoing unprofessional conduct asserted by Brown, the Court can overlook it simply because Brown allegedly delayed seeking Boothe's disqualification. Eubanks' argument is that this Court should authorize a clear violation of the RPCs based solely upon an alleged delay, which must be rejected. Not only would such a result be contrary to public policy but the facts of this case establish that Brown did not, in fact, waive his right to seek Boothe's disqualification.

Eubanks relies upon two cases to support their waiver argument: *First Small Bus. Inv. Co. of California v. Intercapital Corp. of Oregon*, 108 Wash. 2d 324, 738 P.2d 263 (1987) and *Matter of Firestorm 1991*, *supra*. Neither case supports Eubanks waiver argument.

In *First Small Bus. Inv. Co. of California*, the Court cited to *Central Milk Producers Coop. v. Sentry Food Stores, Inc.,* 573 F.2d 988 (8th Cir.1978) for the proposition that a party may waive its right to seek disqualification when it is used as a strategic "tool" to "to deprive his opponent of counsel of his choice after substantial preparation of a case has been completed." *First Small Bus.*, 108 Wash. 2d at 337. In *First*

Small Bus., the motion to disqualify was not filed until after a trial on the merits and a subsequent appeal. *First Small Bus.*, 108 Wash. 2d at 328. The Court found that the passage of "several years" (actually *six years*) in bringing the motion to disqualify to constitute an "overwhelming delay. *Id.* at 337. And contrary to what Eubanks requests from this Court, the *First Small Bus.* Court did not authorize the conflict of interest to continue. Rather, in one of the two consolidated cases on appeal ("ICO v. ICW"), the Court merely reinstated the original judgment obtained after the trial. *Id.* at 337. In the other case ("FSBIC v. ICO") there was "insufficient evidence of an attorney-client relationship" which would negate any issue of ongoing conflict of interest. *Id.*

In *Matter of Firestorm 1991*, the motion to disqualify counsel was based upon an alleged ex parte contact with an expert, not an existing and ongoing representation of clients pursuing claims against the attorney's former client. *Firestorm* simply does support Boothe's ongoing conflict of interest based upon an alleged "waiver" by Brown.

In addition, the Court in *Firestorm* noted that a delay in filing a motion to disqualify is "suggestive of its use for purely tactical purposes" and therefore "could be" grounds for denying a motion to disqualify. *Firestorm*, 129 Wash. 2nd at 145. In this case there is nothing to suggest that the motion to disqualify is being used "purely for tactical purposes."

See *Richard B. v. State Dept. of Health and Social Services,* 71 P.3d 811, 821-822 (Alaska 2003), distinguishing both *Central Milk Producers* and *First Small Bus.* (cited by Eubanks when she suggests a "purely tactical decision." *Consolidated Brief, pg. 24*). There must be real evidence that a tactical advantage was the reason for the delay.

Second, in *Firestorm*, the record did "not indicate why [law firm] waited so long in bringing the motion to disqualify." *Id.* In the instant case, the record demonstrates clearly that Brown made Boothe aware of Brown's concerns about Boothe's conflict of interest at the very outset of Boothe's representation of Eubanks. CP 21. It was Boothe's refusal to withdraw that resulted in the purported "delay" in the motion to disqualify and the "hundreds of hours" Boothe claims to have "invested" in the case prior to the filing of the motion to disqualify.

When counsel for Brown advised Boothe in July 2011 that Brown believed Boothe had a conflict of interest, Boothe began verbally attacking Brown, calling him a "liar" and other derogatory terms. CP 151. Boothe also threatened that if Brown raised the conflict issue Boothe would "make it a war." CP 484. Given Boothe's prior representation about likely dismissing Brown if Brown prevailed on the venue issue (CP 25) and given Boothe's threat to "go to war" Brown held off filing the motion to compel for as long as was practical, with the hope that Brown would be

dismissed without the necessity of engaging in the threatened "war." The practicality of that ended in November 2012 when substantive discovery commenced, forcing Brown to invite the threatened "war" by protecting his rights under the RPC's. CP 483.[4]

Eubanks' contention of tactical reasons for the delay begs the question of what tactical advantage could be gained by "delaying" the motion. There is no support for Eubanks' suggestion that the purported "delay" was intended to delay the ultimate resolution of these claims and to "drive up [Eubanks'] expenses." *Consolidated Brief, pgs. 11-12*. There is no trial date and neither discovery nor motion practice have been stayed. The case has always been free to move forward toward final resolution and is simply unaffected by the motion to disqualify and this appeal.[5]

Eubanks' also contends that the purported "delay" is premised upon the unsupported and incorrect conclusion that Brown does not want these claims resolved. He does. For three years Brown has been wrongly

---

[4] While Eubanks now argues that "substantial litigation," including "trial preparation" occurred during the alleged "delay" in Brown's pursuit of the motion to disqualify, the reality is that between July 2011 when Brown first notified Boothe that he (Brown) objected to Boothe's representation of Eubanks, and November 2012, when Brown again raised the issue with Boothe, <u>no depositions had been taken</u>. CP 22, 483.

[5] Brown has advised Boothe that Brown will not submit to a deposition until the disqualification issue is resolved. However, no other discovery has been affected in any way by the motion to disqualify and this appeal.

accused of "sexually harassing" Eubanks and has been subjected to inflammatory and untrue allegations by Eubanks and her attorneys. More than anyone Brown wants the truth to come out and this matter resolved. Eubanks' suggestion is absurd. Equally absurd is Eubanks' assertion that Brown is trying to "drive up" expenses in a potential "fee shifting" case, failing to explain how the "delay" would further the purported goal of "driving up" expenses to force Eubanks to "settle their cases cheaply"[6] as opposed to filing the motion in July 2011. Filing of the motion in January 2013 has no more affect on the costs of this litigation than it would have had if the motion had been filed in July 2011.

Eubanks implies that she would be prejudiced if Boothe was disqualified now because he has "invested hundreds of hours of time and preparation in discovery, motions practice, and the first interlocutory appeal."[7] This ignores the reality that if Boothe is disqualified Eubanks will still have all the benefit of those "hundreds of hours" invested by Boothe, as substituting counsel will not have to repeat discovery already undertaken. Further, the fact that Boothe may be out the time and expenses is not a valid consideration since Boothe's created the conflict of interest. The RPC's are designed to protect clients such as Brown, not

---

[6] Respondents' Brief, pg. 24.
[7] Respondents' Brief, pg. 21.

Boothe's entitlement to fees. Boothe's commitment of "hundreds of hours" after being advised of Brown's position is the result of Boothe's refusal to recognize a clear conflict and not because of any "delay" by Brown.

D. Disqualification Is Warranted Under RAP 1.9.

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 subjective belief must be "reasonable" (*Id.*); it is the primary factor in determining whether or not Boothe had an attorney-client relationship with Brown regarding Eubanks' claims.

Notwithstanding their acknowledgment of the foregoing Eubanks cites to *Bohn v. Cody*, 119 Wash. 2d 357, 364, 832 P.2d 71, 75 (1992), contending that the Court "must conclude that Brown sought and received legal advice from Boothe regarding the sexual harassment allegations." *Consolidated Brief, pg. 27*. This argument ignores the very purpose of the confidentiality provisions of the RPCs. RPC 1.6 ("Confidentiality of Information") precludes an attorney from revealing "information relating to the representation of a client unless the client gives informed consent" or is otherwise necessary pursuant to very specifically identified exceptions. *See*, *In re Disciplinary Proceeding Against Schafer*, 149 Wash. 2d 148, 161, 66 P.3d 1036 (2003) (discussing the public policy of

guarding client confidences). Eubanks is simply incorrect in her position that Boothe must have given "advice or assistance" in order to preclude his representation of the plaintiffs herein. Rather, the key determinant is whether Brown shared "confidences" with Boothe and whether Brown's belief that Boothe was his attorney was "reasonable." *See, Teja v. Saran*, 68 Wash. App. at 798-99 ("This prohibition against side-switching is based not only upon the duty prohibiting the disclosure of confidences, but also upon a duty of loyalty"). It is not the providing of "advice" that governs disqualification but the protection against the misuse of confidences gained and the reasonableness of the client's subjective belief regarding the existence of an attorney-client relationship. Indeed, in the case cited by Eubanks (*Bohn v. Cody*), the Court concluded that an attorney-client relationship did not exist because the purported client's "'subjective belief was not reasonably based on the attending circumstances." *Bohn*, 119 Wash. 2d at 364.

In addition, Eubanks' assertion that Boothe did not give Brown advice is incorrect. When Brown told Boothe of the harassment claims Boothe gave Brown advice: "Mr. Boothe did not seem surprised and said something to effect that if I was to win the election, these same accusers were just as likely to come and tell me that they had been encouraged by the other side to make the accusations in order to keep their jobs." CP 4.

Brown had a number of options as to how to respond to the allegations, including Boothe's suggestion that he do nothing since the accusers would retract their statements if Brown won. Eubanks limits *Teja v. Saran* to examination of a client's subjective belief of an attorney-client relationship based only upon the "words and actions" of the attorney. *Consolidated Brief, pg. 28*. Boothe did in fact give Brown advice relating to the sexual harassment allegations. Even under Eubanks' narrow interpretation of *Teja v. Saran* Brown's belief in the attorney-client relationship was reasonable.

Also, the "words and actions" of the attorney are but one of the "attending circumstances" that determine the reasonableness of a client's subjective belief. *Bohn*, 119 Wash. 2d at 363, *holding modified by Trask v. Butler*, 123 Wash. 2d 835, 872 P.2d 1080 (1994) ("The client's subjective belief, however, does not control the issue unless it is reasonably formed based on the attending circumstances, including the attorney's words or actions"). The "attending circumstances" here include the numerous phone calls and e-mails between Brown and Boothe. CP 1-19, 69-75, 514-516.

Eubanks' argument that Brown's subjective belief was "unreasonable" is belied by Boothe's own actions. Specifically, while Boothe now denies the existence of an attorney-client relationship with

Brown, Boothe himself, in a "surplus of caution,"[8] contacted both the WSBA ethics counsel and an "ethics expert" for advice on whether Boothe had a conflict of interest. CP 95-96. One must question how Eubanks can argue that Brown's subjective belief that he had an attorney-client relationship with Boothe was "unreasonable" when the attorney in question, who now protests that there was no such relationship, himself sought legal advice as to whether a relationship and a conflict existed.

Eubanks's argument that Brown did not subjectively believe that he had an attorney-client relationship with Boothe because Brown "did not contact Boothe, seek Boothe's advice, or solicit his representation" when the harassment claims were made (*Consolidated Brief, pg. 7)* is contrary to the record. Brown did in fact call Boothe after the allegations were made. CP 4. The record also shows that Brown called Boothe shortly after Brown was interviewed about the allegations (CP 49, 430, 435) talking for over 15 minutes. *Id.*

Eubanks contention that Brown merely "mentioned" the sexual harassment allegations to Boothe, and his claim "that Boothe responded that such things could be expected in an election" (*Consolidated Brief, pg. 31*) is not accurate. Rather, the record shows that Brown not only shared

---

[8] Respondents' Brief, pg. 8.

with Boothe the fact that the allegations had been made,[9] but also that he shared "confidences" with Boothe concerning those allegations (CP 4, 511); the subject matter of the pending claims. The law does not require Brown to disclose what those confidence were in order to have Boothe disqualified from representing Eubanks. *Kurbitz v. Kurbitz,* 77 Wash.2d 943, 946, 468 P.2d 673 (1970).

Eubanks' suggestion that if Brown believed he had an attorney-client relationship with Boothe, he would have solicited Boothe's representation for the June 8, 2010 interview[10] incorrectly assumes that Brown believed he needed representation at that point. Brown has maintained from the outset that he did not harass anyone and that the claims were made solely for political reasons. In light of that, it was entirely reasonable for Brown not to bring his attorney to the interview, *especially* after his attorney suggested that if he won the election these accusers were just as likely to tell him that they had been encouraged by "the other side" to make the accusations. CP 4.[11]

---

[9] CP 3.

[10] Respondents' Brief, pg. 31.

[11] Eubanks' representation to this Court that Brown was "disciplined" for the alleged conduct is misleading. The truth is that after the Personnel Manager completed her investigation, in which she concluded that Brown was being "truthful" that he did not consciously or unconsciously harass anyone, she recommended, based upon Brown's "professionalism" that he undergo some training on "sensitivity and team building." CP 371.

While not conceding the existence of an attorney-client relationship between Boothe and Brown on election law and other employment issues, Eubanks focuses her argument on the proposition that Boothe did not represent Brown as it relates to the sexual harassment claims or a "substantially similar matter." *Consolidated Brief, pgs. 26-38.*[12] Eubanks' interpretation of the RPC's would allow an attorney to obtain confidences from a client about a "dissimilar" matter and later represent persons adverse to the former client in an action involving those confidences. *Id., pg. 30.* According to Eubanks, as long as Boothe does not disclose the confidences learned from Brown, Boothe is free to represent parties adverse to Brown as it relates to those confidences. *Brief, pg. 30.* For the following four reasons, Eubanks is incorrect.

First, RPC 1.9(a) precludes an attorney from representing parties adverse to a former client in a "substantially related matter." Eubanks contends that this requires Boothe's representation of Brown to be specifically related to the harassment claims, as opposed to representing him on "election law and other employment issues." Eubanks' interpretation of RPC 1.9(a) is too narrow, as the proper comparison is

[12] Eubanks does concede that taking the facts in the light most favorable to Brown, "the trial court's order was correct." *Brief, pg. 33.* Further, Eubanks did not seek review of the finding that Boothe and Brown had an attorney-client relationship on election law and other employment issues.

between the confidences shared by Brown with his then-attorney and the subject matter of the pending litigation. Those confidences shared are "substantially related" to the subject matter of this litigation.[13]

Second, RPC 1.9 does not simply preclude Boothe from "disclosing" the confidences he learned from Brown, but precludes him from *using* those confidences "to the disadvantage of" Brown. RPC 1.9(c)(1). Boothe's representation of Eubanks regarding confidences disclosed by Brown to Boothe is "to the disadvantage of" Brown. RPC 1.9(c)(1) precludes such representation.

Third, if disqualification is not the "proper remedy" for a violation of RPC 1.9(c), as advocated by Eubanks, what is the "proper remedy?" How can Brown be protected from Boothe using those confidences "to the disadvantage of" Brown if Boothe is not disqualified? Not surprisingly, Eubanks fails to offer any alternative "proper remedy" that would protect Brown from Boothe's use of the confidences shared "to the disadvantage of" Brown. See *State v. Hunsaker*, 74 Wn. App. 38, 47, 873 P.2d 540 (1994) (disqualification may be proper pursuant to RPC 1.9(b), which at that time precluded an attorney from using "confidences or secrets relating to the representation to the disadvantage of the former client.")

---

[13] This comparison is not necessary, as Brown had an attorney-client relationship with Boothe relating to the harassment claims.

Fourth, as acknowledged by Eubanks, the purpose of disqualifying an attorney pursuant to RPC 1.9 is to preclude the attorney from using "the past representation" to "advance[e] the interests of the current client." *Consolidated Brief, pg. 34,* citing *State v. Hunsaker*, *supra.*[14] As noted in *Hunsaker*, the "factual context" determines whether prior and present representations are "substantially related." The Court compares the "matters" or "factual contexts" of the two representations. *Hunsaker*, 74 Wn. App. at 43-44. Under the *Hunsaker* analysis, even assuming that Boothe's prior representation of Brown related only to "election law and other employment issues," disqualification is mandatory because the "factual contexts" of both representations are identical in that Brown previously disclosed factual confidences regarding the harassment claims. Thus, Boothe's "past representation" of Brown is "useful in advancing the interests of [his] current clients." RPC 1.9 precludes such representation.

> Because Teja consulted with [attorney] Pandher about the underlying circumstances of the current suit between Teja and Sarana and the matter is substantially related, Pandher was precluded from continuing his representation of Saran absent consent from Teja. At that point Pandher should have withdrawn. The trial court erred by not granting the motion to disqualify.

---

[14] Eubanks argues that Brown relies upon "irrelevant authority" in citing T.*C. Theatre Corp. v. Warner Bros. Pictures*. Brief, pg. 30. However, *Husaker*, relied upon by Eubanks cites to this case as the "seminal conflict of interest decision," whose rule was codified in RPC 1.9.

Teja v. Saran, 68 Wn.App. at 800 (applying RPC 1.9(a)). Furthermore:

> Teja correctly points out that attorney side-switching undermines the integrity of the legal system in the eyes of the public. Members of the community have a right to consult an attorney without later having that attorney appear on the other side of the same issue.

Teja v. Saran, 68 Wn.App. 810. Here, Brown has the right to rely upon that "integrity of the legal system" to have Boothe disqualified herein.

E. Disqualification Is Warranted Under RAP 1.18.

Brown had more than a "prospective" attorney-client relationship with Boothe regarding the Eubanks claims. Yet even if Brown was only a "prospective client" of Boothe regarding those claims, disqualification under RAP 1.18 is required since Brown shared confidences with Boothe on those claims during an existing, ongoing attorney-client relationship.

Eubanks' RAP 1.18 argument is based upon the unsupported contention that when Brown shared confidences with Boothe about the harassment claims, Brown did not already have an established attorney-client relationship with Boothe. Eubanks notes that under RPC 1.18(a) a person who discussed with a lawyer the possibility of forming a client/lawyer relationship with respect to a matter is a prospective client. *Brief, pg. 38.* What distinguishes this situation from the prospective attorney-client relationship is that at the time Brown shared the

confidences about the harassment allegations, he already had an attorney-client relationship with Boothe. The cases Eubanks cites, and her the arguments, all involve a prospective client seeking to form an attorney-client relationship.[15] The trial court found that Brown and Boothe had an attorney-client relationship when Brown shared the confidences about the harassment allegations (CP 435) which Eubanks failed to appeal.

Eubanks' RPC 1.18 interpretation requires extreme client cautio when sharing information with his or her existing attorney to protect against the attorney subsequently representing a party adverse to the client in a matter relating to those confidences. The error in Eubanks' RPC 1.18 interpretation can be seen by consideration of the following scenario:

> Attorney has been representing Client for 10 years, handling all of Client's business-related legal issues. After 10 years of an ongoing attorney-client relationship, Client meets with Attorney to discuss a dissolution of Client's marriage. During the discussion, Client shares confidences that Client does not want his spouse to know and that would be beneficial to the spouse in the dissolution proceeding.

According to Eubanks' RPC 1.18 interpretation, although Attorney has represented Client for 10 years in business "matters", because the confidences shared with Attorney concerned Client's marriage, Client

---

[15] *See, e.g., Respondents' Brief, pg. 41, citing Derrickson v. Derrickson*, 541 A.2d 149, 153-154 (D.C. App. 1988) ("But if an attorney-client relationship did not exist, the party will have to show that confidences and secrets were actually imparted").

would be a "prospective client" regarding the dissolution so Attorney could represent Client's spouse in the dissolution unless Client was willing to disclose to the court the confidences he shared with Attorney. Client would face the same untenable choice that Eubanks argues Brown must make here: Either allow Attorney to continue representing the party adverse to Client or disclose the confidences Client is seeking to protect. RPC 1.18 simply does not require the disclosure of confidences disclosed in the context of an existing attorney-client relationship.

Contrary to argument Brown is not contending that an attorney contacted by a prospective client is automatically disqualified from the same or substantially similar representation regardless of any evidence that significantly harmful information was actually disclosed. *Brief, pg. 41*. Rather, it is Brown's position that RPC 1.18 does not require him to disclose the specifics of the confidences shared with a prospective attorney. Brown has submitted testimony that he did in fact share confidences with Boothe "about the sexual harassment allegations." CP 511. Eubanks' RPC 1.18 argument requires Brown to disclose the very confidences he is trying to protect in order to establish that the confidences are "significantly harmful," in turn destroying the protections of the attorney-client privilege and of RPC 1.18. If a prospective client is forced to disclose the "significantly harmful" confidences shared with an attorney

the disqualification of that attorney would serve no purpose. Once the confidences are disclosed and become public they will significantly harm the prospective client, regardless of who is representing the adverse party.

III. CONCLUSION

Requiring disqualification after counsel has had access to privileged information preserves the public's confidence in the legal profession. *Intercapital Corp. v. Intercapital Corp.,* 41 Wash.App. 9, 16, 700 P.2d 1213, *review denied,* 104 Wash.2d 1015 (1985). To protect that confidence, Brown respectfully requests that the Court reverse the trial court and find that Boothe has a disqualifying conflict of interest.

DATED this 16th day of January, 2014.

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

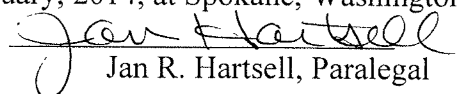
DECLARATION OF SERVICE

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 **Reply Brief of Petitioner David Brown** in Court of Appeals Cause No. 44969-2-II to the following parties:

Thomas S. Boothe	Via Regular Mail	[X]
Attorney at Law	Via Certified Mail	[ ]
7635 SW Westmoor Way	Via Overnight Mail	[ ]
Portland, OR 97225-2138	Via Facsimile	[ ]
tsb@boothehouse.com	Hand Delivered	[ ]
	E-mail	[X]
Philip A. Talmadge	Via Regular Mail	[X]
Emmelyn Hart	Via Certified Mail	[ ]
Talmadge/Fitzpatrick	Via Overnight Mail	[ ]
18010 Southcenter Parkway	Via Facsimile	[ ]
Tukwila, WA 98188	Hand Delivered	[ ]
phil@tal-fitzlaw.com	E-mail	[X]
Francis S. Floyd	Via Regular Mail	[X]
Floyd, Pflueger & Ringer, P.S.	Via Certified Mail	[ ]
200 w. Thomas, Suite 500	Via Overnight Mail	[ ]
Seattle, WA 98119-4296	Via Facsimile	[ ]
ffloyd@floyd-ringer.com	Hand Delivered	[ ]
	E-mail	[X]
Original efiled with:	Via Regular Mail	[ ]
	Via Certified Mail	[ ]
Washington State Court of Appeals	Via Overnight Mail	[ ]
Division II	Via Facsimile	[ ]
950 Broadway, Ste. 300	Hand Delivered	[ ]
Tacoma, WA 98402	E-mail	[X]
JIS-Link		

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 16th day of January, 2014, at Spokane, Washington.



Jan R. Hartsell, Paralegal

EVANS CRAVEN & LACKIE PS

January 16, 2014 - 4:26 PM

Transmittal Letter

Document Uploaded: 449692-Reply Brief.pdf

Case Name: Robin Eubanks and Erin Gray v. David Brown and Klickitat County, et al.

Court of Appeals Case Number: 44969-2

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers   Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): ________

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: ________

Comments:

No Comments were entered.

Sender Name: Adrien M Plummer - Email: **aplummer@ecl-law.com**

A copy of this document has been emailed to the following addresses:

jhartsell@ecl-law.com
tsb@boothehouse.com
phil@tal-fitzlaw.com
ffloyd@floyd-ringer.com
prisken@ecl-law.com
mmcfarland@ecl-law.com
Kmauss@ecl-law.com