No. 44969-2-II

COURT OF APPEALS, DIVISION II
FOR 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,
and KLICKITAT COUNTY,

Petitioners.

CONSOLIDATED BRIEF OF RESPONDENTS

Philip A. Talmadge, WSBA #6973
Sidney Tribe, WSBA #33160
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188
(206) 574-6661

Thomas S. Boothe, WSBA #21759
7635 S.W. Westmoor Way
Portland, OR 97225-2138
(503) 292-5800

Attorneys for Respondents
Robin Eubanks, Erin Gray, Anna Diamond, and Kathy Hayes

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A. INTRODUCTION

Washington courts do not take lightly the issue of disqualifying the chosen counsel of a party, particularly when the party seeking to evict an opponent waited eighteen months to act. David Brown claims that the attorney for four women who have accused him of sexual harassment should be disqualified under RPC 1.9 or RPC 1.18. Robin Eubanks, Erin Gray, Anna Diamond, and Kathy Hayes ("the harassed women") have relied upon and trusted their chosen attorney, Thomas Boothe, to represent them in this highly sensitive matter. Each of these women suffered substantial psychological and economic harm as a result of Brown's actions, and the embarrassing nature of the evidence they have to provide is manifest.

Parties who seek disqualification of their opponents' attorney must allege more than that they mentioned publicly known information about a matter during a conversation with that attorney about another, unrelated, issue. They must also act with reasonable promptness to move for disqualification, or they waive their claim of privilege.

Brown is an experienced lawyer who was well aware of this issue from the moment Boothe appeared on behalf of the harassed women in July 2011 and did nothing while substantial litigation ensued. In fact, Boothe himself raised the potential issue from the very start,

demonstrating his honesty and conscientious concern about the potential ethical issue. Boothe even sought and received ethics advice, in an abundance of caution. Brown nevertheless tries to paint Boothe and his clients as nefarious and unethical, and himself as the powerless victim, while glossing over his own conduct. Both the facts Brown alleges as the basis for disqualification and his proffered excuse for the eighteen-month delay are unconvincing.

Even if this Court is willing to accept Brown's questionable explanation for his long delay in acting, the trial court correctly concluded that, based on the facts taken in the light most favorable to Brown, disqualification was not warranted here. The trial court's summary order should be affirmed.

B. COUNTERSTATEMENT OF ISSUES

The harassed women acknowledge Brown's statement of issues, but believe they are more appropriately formulated as follows:

1. Did Brown and the County waive their opportunity to disqualify the harassed women's counsel by waiting over eighteen months to act while substantial activity and trial preparation in the case ensued?

2. Is an order denying disqualification proper when there is no evidence to support the claim that Brown sought or received legal advice from Boothe on the sexual harassment claims at issue here?

3. Is the application of the federal Hatch Act to Brown's plans to run for future public office "substantially related" to claims that he sexually harassed women under his supervision?

4. May this Court grant Brown and the County disqualification of the harassed women's counsel when the central facts are disputed and no hearing was held, or is the only possible remedy remand for resolution of credibility issues?

C. COUNTERSTATEMENT OF THE CASE

In their briefing, neither Brown nor the County apprises this Court of the facts of the dispute on the merits here. Instead, they attempt to minimize Brown's own conduct and suggest that the harassed women's action is a political ploy. Brown br. at 5; County br. at 7.

The underlying dispute is as follows: the women worked at the Klickitat County Prosecuting Attorney's Office; Brown was their attorney-supervisor. *Eubanks v. Brown*, 170 Wn. App. 768, 770, 285 P.3d 901, 902 (2012). Brown sexually harassed them at work, and Klickitat County ("the County") dismissed or constructively discharged them in response to their complaints despite knowing that other female employees had also accused Brown of sexual harassment. *Id.* In particular, 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; and he stared at Gray's

breasts during conversations. *Id.*; CP 322-363. As a result of Brown's harassment, the harassed women suffered emotional and economic damages. *Id.* Three of the harassed women were later fired by the County for complaining about Brown's actions, one was constructively discharged when the stress made her too ill to continue working. *Id.*

The County and Brown also do not mention the long procedural history of this case; the harassed women have waited years and still not had their day in court on the merits. This is the second interlocutory review of a motion Brown filed in this action. After the harassed women filed their claims against Brown, a long battle over venue ensued. *Id.* This Court affirmed the trial court's venue ruling, but the dispute currently continues at the Washington Supreme Court, where review has been granted. *Eubanks v. Brown,* 176 Wn.2d 1026 (Apr. 04, 2013).[1] Now, with the present appeal, Brown and the County have commenced a second round of interlocutory review.

In their briefing, Brown and the County repeatedly insist that the harassed women "admitted" certain facts, or suggest that facts here are undisputed or were resolved by the trial court. As a threshold matter, it is important to note that the two most critical disputed facts in this case –

[1] Oral argument has occurred in that case and the parties are awaiting a decision.

whether Boothe gave any legal advice Brown or whether the two ever discussed Brown's alleged sexual harassment – were *disputed by the harassed women and Boothe, and never resolved by the trial court.* CP 91-92, 446-47. Moreover, the only independent witness to this matter, a former Klickitat County employee, testified to Boothe's surprise when she told him months after Boothe's last contact with Brown and before Boothe was contacted about substituting as trial counsel in this case that Brown had had issues with female subordinates. CP 287. Instead, the trial court accepted for purposes of the motion the facts as Brown presented them, and ruled summarily that disqualification was not warranted. CP 435; RP 4, 15.

In fact, at the motion hearing, Brown's counsel admitted that the central facts of the motion *were* disputed and argued that the trial court needed to hold a hearing to resolve credibility issues:

> Your Honor, ...at the heart of the dispute in this case is a disagreement between Mr. Boothe and my client as to what was said during their phone conversations. I believe that's a credibility determination that the court should hear in an evidentiary hearing as opposed to motion papers.

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:

> Even if I were to – Let's say that I take everything that was in your client's motion as the truth, and nothing that Mr. Boothe says is the truth. Why should I disqualify?
>
> ...I'm going to rely primarily on Mr. Brown's affidavit and the memorandum for the factual basis for this motion.

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.

Whether Boothe offered Brown legal advice on the Hatch Act is disputed. In May and June 2010, Brown communicated with Boothe by telephone and email. The details of those communications are disputed.[2] Brown states that the conversations covered multiple topics, including the status of other matters unrelated to Brown's political ambitions. CP 81-93. Boothe admitted that the conversations included the Hatch Act, but clarified that he never advised Brown on the Hatch Act because he knew nothing about it. CP 91. Boothe also disputes that Brown ever mentioned sexual harassment allegations in any of their conversations, or otherwise referred directly or indirectly to Eubanks, Gray, or any other accuser. CP 91-93. Of the multiple emails that Brown sent to Boothe, not one

[2] 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. At least of some of their communications were on completely unrelated topics, such as domestic violence, gender differences in processing domestic violence claims, and DSHS. CP 106. Brown's affidavit and the history of the written communications between the two attorneys is analyzed in detail in the declaration of legal ethics expert Leland Ripley. CP 241-271.

mentioned sexual harassment complaints about him, let alone any of the four women's names or circumstances. CP 102-13.

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. He did not contact Boothe, seek Boothe's advice, or solicit his representation in relation to those proceedings; Brown was disciplined by the County for his conduct. *Id.* He called Boothe on June 21, *after* he had been disciplined. The subject matter 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. No mention was made of the sexual harassment matter. *Id.* That email was the final contact with Brown until Boothe called him for Oberfell, eleven months later in May 2011. CP 71.

In December 2010, the harassed women filed a complaint against Brown and Klickitat County alleging sexual harassment. CP 5. Again, Brown did not contact Boothe or seek his representation in defense of that complaint. The harassed women's initial trial attorney was Karen Linholdt. CP 238. By June of 2011, Linholdt was feeling overwhelmed

with handling a multi-plaintiff/multi-defendant case, and sought help. *Id.*[3] Her colleague Mary Ruth Mann referred her to Boothe, because Mann had worked with Boothe on complex employment discrimination cases before, and knew his work to be "highly competent." *Id.*

In a surplus of caution, Boothe 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.* 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. 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 did not move to disqualify Boothe. In November 2011, Boothe sent a letter to Brown's counsel memorializing an informal discovery conference between the parties. CP 154. 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

[3] Lindholt's declaration stated that she contacted Boothe in June 2012, but this is clearly a typographical error. Boothe's correspondence and the case records reflect that he appeared in July 2011. CP 136.

pending the appeals, *or separate into separate actions against the county and Mr. Brown.*" *Id.* (emphasis added).

From July 2011 to January 2013, Boothe conducted extensive trial preparation in the case. CP 96-100. Boothe invested more than 450 hours of preparation time, including written discovery, document review, depositions, motions practice, and extensive litigation over the venue issue, which is currently pending at the Supreme Court. *Id.*

Although Boothe appeared in July 2011, and although Brown knew by November 2011 that he was not going to be dismissed from the lawsuit regardless of the result in the venue challenge, CP 154, Brown did not move to disqualify Boothe until January 2013. CP 27, 44. The County joined in Brown's motion to disqualify Boothe, but only on Brown's behalf. CP 46-49. The County did not and does not assert any attorney-client relationship with Boothe. *Id.*[4]

The issue of whether Brown ever mentioned anything about the present matter in his conversations with Boothe is hotly disputed, and was not resolved by the trial court. In his affidavit, Brown alleged one exchange with Boothe about the sexual harassment claims. CP 4. Boothe

[4] The County asserted that any conflict of interest Brown asserted against Boothe could be "imputed" to the County. CP 49. The meaning of this phrase is unclear, but there to the extent that phrase suggests that the County holds any attorney-client privilege as to Boothe is insupportable. To the extent that Brown claims to have been seeking legal advice from Boothe, it was not in his capacity as an employee or related to his official duties, nor does the County allege that Boothe ever represented it.

categorically denied that Brown ever said anything to Boothe about any person or issue related to sexual harassment allegations. CP 91-92. Boothe's declaration stated that Brown never said anything remotely touching on the topic, either directly or indirectly. *Id.*

At a hearing on the motion to disqualify, 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 with respect to the sexual harassment claims. RP 16. The trial court stated:

> [A]n attorney-client relationship is not like a parent-child relationship or something just out there in the ozone. It relates to matters. ...If it is not a matter or substantially related matter, then there has to be a new attorney-client relationship formed.

RP 15. The trial court further stated that at most, Brown was, at most, a prospective client under RPC 1.18, and that 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" that: 1) Brown and Boothe had an attorney-client relationship only with respect to the Hatch Act and election matters; 2) the

election matter was not substantially related to the sexual harassment matter; 3) Brown was thus at most a prospective client under RPC 1.18 with relation to the sexual harassment claims, and; 4) Brown had not made a showing under RPC 1.18 of any significant harmful information that he had allegedly disclosed. CP 446-48.

Brown moved for discretionary review. CP 437. Klickitat County filed a separate notice and motion for discretionary review of the same order. CP 443. On August 30, 2013, this Court granted review.

D. SUMMARY OF ARGUMENT

The trial court ruled summarily on the disqualification motion, thus its findings of fact and conclusions of law are superfluous in this appeal. The harassed women need not challenge those findings, as review is *de novo,* nor may Brown and the County rely on them. Any argument raised below in support of affirming the trial court's decision is properly raised here.

Brown's excessive delay in bringing his motion alone is sufficient grounds for denying it. Despite his current insistence (without evidence) that the harassed women's attorney possessed damaging confidences since his appearance in July 2011, Brown waited eighteen months, during substantive complex litigation, including trial preparation and appellate proceedings on venue, to bring his motion. His explanation for the delay

strains credulity at best, and reveals his true tactical intentions – to delay resolution of the harassed women's claims on the merits and to drive up their expenses. The County's joinder does not cure Brown's lack of diligence. It admits its disqualification motion is completely derivative of Brown's. The County's belated involvement is further evidence of the defense tactic of delay.

Taking the evidence in the light most favorable to Brown, summary disposition of the disqualification motion was appropriate. RPC 1.9(a) does not categorically bar attorneys from suing their former clients as Brown and the County implicitly contend. Rather, applying the present language of RPC 1.9(a), Brown offers no evidence that he sought or received legal advice from Boothe with respect to the sexual harassment matter. Also, the Hatch Act issues that Brown claims to have pursued with Boothe are factually distinct from the harassed women's claims that Brown was sexually inappropriate at the workplace. Finally, under RPC 1.18, Brown has offered no evidence that Boothe possesses any significantly harmful information. His sole claim is that he mentioned sexual harassment allegations to Boothe. The fact that Brown was accused of sexual harassment is public knowledge.

Should this Court choose to remand for an evidentiary hearing, it should clarify to the trial court that the findings of fact and conclusions of

law included in the summary order on appeal are not binding. Both Brown and the County claim on appeal that these "unchallenged" findings are somehow binding and guide this Court's decision. In the interests of judicial economy, it should be made clear to the trial court that they are not binding, nor are they the law of the case, and any arguments by Brown and the County to the contrary are meritless.

This Court should affirm the trial court's summary judgment order. In the alternative, this Court should remand this matter for an evidentiary hearing to resolve disputed issues of material fact.

E. ARGUMENT

(1) Standard of Review

(a) The Trial Court's Summary Disposition Without Holding an Evidentiary Hearing to Resolve Disputed Issues of Fact Is Reviewed

An order entered by the trial court that relies solely on affidavits is similar to an order granting summary judgment, and is reviewed as if it were a summary judgment order. *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 696, 994 P.2d 911, 914 (2000). In *Brinkerhoff,* one party appealed a trial court's order enforcing a settlement agreement. Although the facts were disputed, the trial court entered an order relying solely on affidavits. *Id.* at 696. On appeal of the enforcement order, the parties disputed the standard of review. Despite the fact that orders enforcing settlements are

usually reviewed for abuse of discretion, this Court concluded that because the trial court acted summarily, relying solely on affidavits, the standard of review was not abuse of discretion, but *de novo*. *Id.*

The trial court summarily disposed of the disqualification motion. The court declined to hold an evidentiary hearing, weigh evidence, or make credibility determinations regarding the parties' conflicting evidence. CP 434-35; RP 4. Instead, the court relied purely on affidavits and took all the evidence in the light most favorable to Brown. *Id.* Thus, the standard of review here is *de novo*.

Despite having relied solely on affidavits and ruled summarily, the trial court entered findings of fact and conclusions of law. CP 446-48. Trial courts need not enter findings of fact and conclusions of law when acting summarily, and if it does so those findings are superfluous. CR 56; *Westberry v. Interstate Distrib. Co.,* 164 Wn. App. 196, 209, 263 P.3d 1251 (2011), *review denied,* 174 Wn.2d 1013 (2012).

Acknowledging the summary nature of the trial court's order disposition below is important to properly assess the County and Brown's arguments on appeal. Although they seek reversal of the trial court's summary judgment order, Brown and the County incorrectly rely upon some of the findings and conclusions to support their arguments, and

claim that they are somehow binding in this appeal. Brown br. at 1; County br. at 11, 16-18.

When a Washington court reviews orders finding that an attorney-client relationship existed, but the factual record was not developed, the proper course is not to enter findings but to remand to the trial court. *Dietz v. Doe,* 131 Wn.2d 835, 845, 935 P.2d 611, 616 (1997). Thus, this Court may not – as Brown and the County suggest – make credibility determinations or reach findings about disputed issues of fact. *Boeing Co. v. Heidy*, 147 Wn.2d 78, 87, 51 P.3d 793, 798 (2002) *disapproved of on other grounds by Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 201 P.3d 1011 (2009). Appellate courts do not weigh evidence or assess credibility. *Id.* It is the sole province of the trier of fact to pass on the weight and credibility of evidence. *Davis v. Dep't of Labor & Indus.,* 94 Wn.2d 119, 124, 615 P.2d 1279 (1980) (questions of credibility are for trier of fact and are not overturned on appeal); *State v. Walton,* 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992) (trier of fact's function is to weigh persuasiveness of evidence).

Acknowledging the current state of the factual record is also important because it means this Court cannot grant Brown and the County the relief they request: an order disqualifying Boothe. The facts that Brown and the County cite in support of their arguments for

disqualification are disputed. Even if this Court after review believes the trial court may have erred, the only proper remedy is remand for a hearing, credibility determinations, and entry of appropriate findings of fact and conclusions of law.

(b) Although the Parties Do No Dispute that the Standard of Review Is *De Novo*, This Court Should Clarify the Misstatement from *Sanders* Upon Which Brown and the County Rely, that All Disqualification Orders Are Reviewed *De Novo*

Brown and the County both state that the standard of review of an order denying attorney disqualification is *de novo*. Brown br. at 7; County br. at 7. The authority upon which Brown and the County rely regarding disqualification motions, *Sanders v. Woods,* 121 Wn. App. 593, 597, 89 P.3d 312, 314 (2004), does, in fact, make this statement. Thus, the parties do not disagree about the standard of review. However, it is important for future cases that this Court corrects the line of cases stating that disqualification orders are always reviewed *de novo*. This is an incorrect statement and could cause confusion.

The statement in *Sanders* suggesting that all disqualification orders are reviewed *de novo* is flawed. *Sanders* cites to *Eriks v. Denver,* 118 Wn.2d 451, 457–58, 824 P.2d 1207 (1992), in claiming that the *de novo* standard of review applies to all disqualification orders. However, our Supreme Court in *Eriks* was reviewing a summary judgment order

concluding that an attorney's conduct – the facts of which were not disputed – violated the RPCs. *Eriks*, 118 Wn.2d at 457. The only disputed "facts" in *Eriks* were statements in two affidavits from experts opining that the attorney's conduct did not give rise to a conflict of interest. *Id.* The Supreme Court concluded that although the attorney's *actions* were a question of fact, the experts' statements that those actions did not create a conflict of interest were questions of law, not fact. Thus, the Court held that the application of the undisputed facts of an attorney's conduct to the RPCs *on summary judgment* is reviewed *de novo*. *Id.* at 458.

Thus, *Eriks* said nothing about the standard of review of an order granting or denying disqualification. *Id.*[5] Simply applying the *Eriks de novo* standard of review – in which the Court was interpreting an RPC in the context of a summary judgment motion based on undisputed facts – to all disqualification orders is improper. It ignores that the trial court might have resolved disputed issues of fact after an evidentiary hearing. For example, disqualification is improper unless the trial court first establishes

[5] The *Sanders* court's reliance on *Eriks* appears to operate on the flawed assumption that if a trial court concludes that a lawyer violated RPC 1.9(a), disqualification is automatic. It is not. *First Small Bus. Inv. Co. of California v. Intercapital Corp. of Oregon*, 108 Wn.2d 324, 337, 738 P.2d 263, 270 (1987) (possible RPC 1.9(a) violation but no disqualification ordered because of substantial delay in bringing the motion).

that an attorney-client relationship exists, which is entirely a question of fact. *Dietz*, 131 Wn.2d at 843-46.

Although the holding would not be material to the standard of review here – since both parties agree it is *de novo* this Court should clarify in its opinion that, contrary to the *Sanders* statement, disqualification orders are not always reviewed *de novo*. Instead, this Court must look to the nature of the proceeding below, *e.g.* whether it was decided on summary judgment or after an evidentiary hearing. *Dietz*, 131 Wn.2d at 843-47; *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71, 74 (1992) *holding modified by Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994). Appellate review of a trial court's findings of fact and conclusions of law after an evidentiary hearing is limited to determining whether the trial court's findings are supported by substantial evidence in the record and, if so, whether the conclusions of law are supported by those findings of fact. *Willener v. Sweeting*, 107 Wn.2d 388, 393, 730 P.2d 45 (1986). Although the process of applying established facts to a court rule or RPC is a legal exercise reviewed *de novo*, the trial court's exercise of authority in *establishing* those facts is not reviewed *de novo*. *Id.* The trial court's findings of fact must simply be supported by substantial evidence. *Id.*

There is no question that the summary judgment standard of review is to be applied in this case, and thus the applicable standard is *de novo*. However, for clarity and for the benefit of future courts and litigants, this Court should clarify that there is no blanket *de novo* standard of review for disqualification orders. The standard of review is based upon the nature of the disqualification proceeding, and whether it was decided on summary judgment or after an evidentiary hearing.

(2) Brown Waived His Right to Move for Disqualification by Excessive Delay; Disqualification as to the County Is Moot Because the County's Position Is Entirely Derivative of Brown's

In their response to Brown and the County's motion to disqualify their attorney, the harassed women argued that Brown waived the option to move for disqualification by failing to bring his motion reasonably promptly. CP 208. The trial court not did reach or rule on this issue, but it is a sufficiently developed alternative basis for affirming the court's decision. *State v. Villarreal*, 97 Wn. App. 636, 643, 984 P.2d 1064, 1068 (1999), *review denied,* 140 Wn.2d 1008, 999 P.2d 1261 (2000); *State v. Sondergaard,* 86 Wn. App. 656, 657–58, 938 P.2d 351 (1997), *review denied,* 133 Wn.2d 1030, 950 P.2d 477 (1998).

In Washington, motions for disqualification are viewed in light of the potential consequences of depriving parties of their chosen counsel.

First Small Bus., 108 Wn.2d at 335. "Disqualification 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." *Matter of Firestorm 1991,* 129 Wn.2d 130, 140, 916 P.2d 411 (1996). Other state and federal courts agree that disqualification motions should be carefully scrutinized, because they are subject to abuse as a litigation tactic. *Associated Wholesale Grocers, Inc. v. Americold Corp.*, 266 Kan. 1047, 1057, 975 P.2d 231, 238 (1999); *In re Allboro Waterproofing Corp.*, 224 B.R. 286, 290 (Bankr. E.D.N.Y. 1998); *Allegaert v. Perot,* 565 F.2d 246, 251 (2d Cir. 1977).

As the Washington Supreme Court has stated, *delay in filing alone* is sufficient basis to deny a motion to disqualify counsel:

> A motion to disqualify should be made with reasonable promptness after a party discovers the facts which lead to the motion. This court will not allow a litigant to delay filing a motion to disqualify in order to use the motion later as a tool to deprive his opponent of counsel of his choice after substantial preparation of a case has been completed.

First Small Bus., 108 Wn.2d at 337 (quoting *Central Milk Producers Coop. v. Sentry Food Stores, Inc.*, 573 F.2d 988, 992 (8th Cir. 1978). *See also, Firestorm 1991,* 129 Wn.2d at 145 ("Delay in filing the motion to disqualify is suggestive of its use for purely tactical purposes and could be the sole grounds for denying a motion to disqualify.").

Even when the delay in bringing a disqualification motion was nine months, our Supreme Court concluded that the delay was excessive, and denied disqualification. *Id.* at 144. In *First Small Bus.*, the moving party waited several years. 108 Wn.2d at 337. Again, our Supreme Court denied disqualification, despite some evidence that there may have been an RPC violation.

Here, Brown was first made aware of Boothe's plans to appear in the case on July 11, 2011. Brown did not move for disqualification until January 2013, *more than eighteen months later.*

In the intervening year and half between Boothe's appearance and the filing of Brown's motion to disqualify, Boothe handled the harassed women's case as lead counsel, investing hundreds of hours of time and preparation in discovery, motions practice, and the first interlocutory appeal, the sole purpose of which was to ensure that the action against Brown remained in the same venue as the action against the County. That appeal is still pending. During the abundant discovery phase, Brown claims that Boothe could have been using alleged, albeit still unidentified, confidences against him, but did not take any action.

Brown's claimed justification for this extraordinary delay is that an order changing venue in this case would somehow result in Brown's dismissal. CP 412. Brown claims that he relied on Boothe's July 13,

2011 letter, in which he claims Boothe promised to dismiss Brown as a witness after the venue issue was resolved on appeal. *Id.* Thus, Brown claims it was reasonable to wait for the Court of Appeals to rule on the venue issue. *Id.* at 413. Brown claims that he selflessly refrained from bringing his motion for eighteen months as a "professional courtesy." *Id.*

Brown's explanation is illogical and pretextual. Boothe wrote nothing of the sort in his July 13 letter. He stated that if, after reviewing the venue motion, he believed the motion was meritorious, it *might* influence his decision regarding whether or not to dismiss Brown as a defendant. CP 137. However, Boothe clearly did *not* conclude the motion was meritorious, as the subsequent trial and appellate level litigation regarding that issue revealed. Even assuming Brown and his counsel misapprehended Boothe's July 13 letter, they could not misread Boothe's November 2011 letter, in which he *expressly stated* that even if the venue issue were resolved in Brown's favor, litigation against Brown would continue in the new venue. CP 154.

Moreover, the trial level litigation continued apace 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. The parties entered a

stipulated order on July 20, 2012 providing that "David Brown shall participate in all aspects of discovery, including production of documents, interrogatories, site visits, issuance of subpoenas for third party production, requests for admissions, and depositions. SCP ___.[6] Brown filed his answer and affirmative defenses in Clark County August 31, 2012. SCP ___. Brown filed a motion to compel delivery of Robin Eubanks' mental health records from Center for Counseling and Psychotherapy on November 2, 2012. SCP ___.

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 accuses Boothe of a betrayal, manipulation, and committing a serious ethical violation. Brown br. at 9-14. Brown claims that he disclosed sensitive and damaging confidences to Boothe that could harm him in this litigation, and that he fears Boothe will use those confidences against him. *Id.* Brown belittles and mocks Boothe's sincere

[6] Boothe has prepared a supplemental designation of clerk's papers, however, it will not be ready before the due date for this brief. Boothe will file a praecipe with the three citations herein referred to as "SCP."

efforts to seek independent advice in advance to determine if he truly had a conflict of interest. *Id.*

Brown is a sophisticated lawyer who has been represented at all times in this matter 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. CP 100.

Brown's attempt to disqualify Boothe at this late hour is a purely tactical decision that will harm the harassed women, if successful. 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 goal of the defense tactic here is not difficult to imagine delay 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 County's joinder in Brown's disqualification motion cannot cure Brown's inaction. First, although it is unclear from the record when

the County was informed of the Brown's claim of a conflict, it is clear that the County and Brown were communicating about the issue *before* Brown filed his motion. The County – with Brown's permission – obtained evidence in support of its joinder motion in early December 2012. CP 52-53. Brown's motion was not filed until January 2013. CP 44. Second, the County's "me too" motion is entirely derivative of Brown's. The County cannot and does not claim that it had any attorney-client relationship with Boothe. County br. at 15. Attorney-client privilege belongs exclusively to clients, and can be waived by clients; in this case the alleged client is Brown. *State ex rel. Sowers v. Olwell,* 64 Wn.2d 828, 833, 394 P.2d 681 (1964). If Boothe is not disqualified as to Brown, there is no independent basis to disqualify him as to the County, and the County raised no such argument below.

Disqualification of counsel is a drastic remedy that punishes both opposing counsel and the parties they represent. It should be imposed only when it is absolutely justified, and when the moving party has acted promptly. *Firestorm*, 129 Wn.2d at 140. Here, given the highly personal, embarrassing, and serious nature of the issues, the harassed women have suffered severe emotional distress. CP 317-321. 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. Brown and the County have not demonstrated, in light of the long delay, that no waiver has occurred and thus why disqualification would be warranted here. Summary judgment was proper.

(3) Disqualification is Not Warranted Under RAP 1.9 Because the Harassed Women's Counsel Did Not Represent Brown In the Present Matter or a Substantially Similar Matter

Brown's argument is unclear, but seems to suggest that Boothe should be disqualified because Brown reasonably believed he had an attorney-client relationship with Boothe regarding the harassed women's sexual harassment claims. Brown br. at 10, 19. Brown argues that Boothe is therefore disqualified under RPC 1.9(a) from representing the harassed women regardless of whether Brown disclosed any confidences to Boothe. Brown br. at 17.[7] Implicitly, Brown contends that RPC 1.9(a) categorically bars an attorney from ever suing a former client if that client only vaguely asserts that confidences were shared in the prior representation. That is plainly not the case under RPC 1.9(a).

RPC 1.9(a) states in relevant part:

[7] The County does not argue that Brown formed an attorney-client relationship with Boothe regarding the sexual harassment matter. Instead, the County argues only that Boothe represented Brown regarding the Hatch Act and election law, and that representation is "substantially related" to the sexual harassment matter. County br. at 16-25.

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

In order for this Court to conclude that Boothe "represented" Brown in the "same" matter – i.e. the present sexual harassment case -- it must conclude that Brown sought and received *legal advice* from Boothe regarding the sexual harassment allegations. *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." *Id.* Although the client's subjective belief is important, it "does not control the issue unless it is reasonably formed based on the attending circumstances, including the attorney's words or actions." *Id.*

(a) Brown Presented No Evidence that He and Boothe Formed an Attorney-Client Relationship With Respect to the Sexual Harassment Matter

Even if a lawyer and client have a preexisting attorney-client relationship with respect to one matter, that does not mean that the attorney *per se* represents the client with respect to every matter the client mentions to the lawyer. *Teja v. Saran*, 68 Wn. App. 793, 795-97, 846 P.2d 1375, *review denied,* 122 Wn.2d 1008, 859 P.2d 604 (1993). Rather than a *per se* rule, this Court applies the same *Bohn* "reasonable belief"

analysis, based on all of the attendant facts and circumstances. *Id.* Brown argues for a *per se* disqualification rule, which was rejected by the Supreme Court when it adopted the present version of RPC 1.9(a).

In *Teja,* an existing criminal client sought advice from his attorney about possibly bringing a claim against his business partner. *Teja,* 68 Wn. App. at 794. The client specifically averred that he showed the attorney bills, receipts, and other documentation, and discussed the proposed litigation in detail. *Id.* at 794-95. The critical fact in *Teja* is that the attorney responded to the client by *giving him legal advice:* that the claim was too small to warrant attorney involvement, and that he should file a claim in small claims court. *Id.* at 794. The client followed that advice, and when the business partner responded, the attorney appeared for the partner and filed a cross-claim in superior court. *Id.*

Brown articulates his subjective belief that Boothe represented him in the sexual harassment matter. Brown br. at 17, 19.[8] However, in *Teja* this Court focused on the *attorney's* words and actions as the critical facts upon which the client formed a *reasonable* belief of representation:

> *Pandher's advice to Teja*, viewed in light of their existing professional relationship, demonstrates behavior consistent with an attorney/client association. *Pandher's*

[8] This assertion is undermined by Brown's failure to even call Boothe regarding the County disciplinary process, let alone seek his appearance in that proceeding. CP 371. It is further undermined by Brown's failure to call Boothe when he was actually sued.

> *actions* were sufficient to support Teja's reasonable belief that such a relationship existed. Teja acted consistently with Pandher's suggestion and filed suit in small claims court against Saran.

Teja, 68 Wn. App. at 796 (emphasis added). This Court concluded that the critical facts supporting the client's reasonable belief of an attorney-client relationship were that he sought *and received* legal advice regarding the matter in question. *Id.* at 796.

The *Teja* rule is a sound application of the modern conflict of interest rule that our Supreme Court established when it adopted RPC 1.9. Brown incorrectly suggests that RPC 1.9(a) is a *per se* prohibition on even the appearance of a conflict of interest. Brown br. at 23-24. He claims that under RPC 1.9(a), an attorney should be disqualified even when the matters are totally dissimilar but when *confidences were disclosed* that are similar. *Id.*. Brown's position, if accepted, not only would ignore the plain language of RPC 1.9(a), but also ignores modern authority on the subject, such as *Teja, Bohn,* and *Dietz.*

Brown's argument goes astray because it focuses on mostly irrelevant authority interpreting rules other than the modern RPC 1.9.[9] For example, Brown exhorts this Court to heed a federal district court decision

[9] In so doing, Brown misleads this Court about the proper interpretation of RPC 1.9(a), a rule that expressly rejects Brown's argument.

from 1953, and quotes it at length. Brown br. at 22-23. However, that decision applied the conflict of interest rule as it then existed, which read:

> The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

T. C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 268 (S.D.N.Y. 1953), *quoting* Canon 6 of the Canons of Professional Ethics, American Bar Association (1908).[10]

Under the modern rule, he falls even shorter of the mark. Under the modern rule, the possession of confidential information no longer results in automatic disqualification if the matters are dissimilar. Instead, if potentially harmful confidences are at issue, then the proper remedy is not disqualification under RAP 1.9(a), but the prohibition on disclosure of such confidences under RAP 1.9(c).[11] That subsection of the rule prohibits disclosure of confidences regardless of the similarity of matters,

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[10] Under even this now-defunct ethical rule, Brown fails to state a sufficient basis for disqualification.

[11] Brown briefly argues RPC 1.9(c), Brown br. at 19-20, but neglects to address the fact even assuming that RPC 1.9(c) applies, it does not mandate *per se* disqualification. Instead, a former client alleging that RPC 1.9(c) applies must demonstrate that significantly harmful information was disclosed. RPC 1.9(c).

and would resolve Brown's alleged issues without depriving the harassed women of Boothe's counsel in this difficult matter.

Here, all the attending circumstances demonstrate that Brown could not have reasonably believed Boothe ever "represented" him in the sexual harassment matter. The *only* evidence Brown provides to support his purported belief that an attorney-client relationship existed was his statement that he "mentioned" the sexual harassment allegations to Boothe, and his claim that Boothe responded that such things could be expected in an election. CP 4. Even Brown's own affidavit affirms that he sought *no legal advice* from Boothe regarding how to respond to the sexual harassment allegations, and Boothe offered none. *Id.* In fact, Brown's claim is that Boothe's response was to comment on the allegations in light of Brown's plans to run for office, the very matter on which Brown claims to have approached Boothe for legal advice. *Id.* Brown does not allege that he sought Boothe's counsel about sexual harassment laws or about what he should do in response to the harassed women's claims. When Brown was involved in administrative proceedings, shortly after he claims to have spoken with Boothe, he did not ask Boothe to represent him or give him advice. He did not retain Boothe or compensate him for his alleged services. Brown's only following email communication was two press clippings about Brown's

Hatch Act concern. That email was the final contact with Brown until Boothe called him for Oberfell, eleven months later in May 2011. When Brown received the complaint in December 2011, again he did not contact Boothe to secure his advice or representation.

The trial court correctly applied RPC 1.9(a) in refusing to disqualify Boothe. Under the plain language of the rule, as well as the authority in *Bohn* and *Teja*, summary judgment was appropriate. Brown cannot claim that he formed a reasonable belief based on the attending circumstances that Boothe represented him with respect to the sexual harassment claims.

(b) Even If This Court Believes Summary Judgment Was Inappropriate, the Correct Remedy Is Remand for an Evidentiary Hearing, Not Disqualification

The existence of an attorney-client relationship is a question of fact that cannot be resolved on summary judgment unless the facts are undisputed. *Dietz,* 131 Wn.2d at 843. The burden of proving the existence of the relationship rests squarely with the person asserting the privilege. *Id.* at 844. In *Dietz,* our Supreme Court declined to rule on appeal that an attorney-client relationship existed when the facts were disputed and the trial court had not resolved that factual issue. *Id.* at 845-46.

Taking the facts in the light most favorable to Brown, the trial court's order was correct. However, should this Court conclude that the trial court should not have entered summary judgment, the proper course is not, as Brown and the County suggest, for this Court to make such findings of fact and disqualify Boothe. The proper remedy is remand for an evidentiary hearing to resolve disputed issues of material fact. *Dietz,* 131 Wn.2d at 845.

(c) A Sexual Harassment Action Is Not a "Substantially Related" Matter to Seeking Advice About Election Laws

In the alternative to claiming that Brown ever represented Boothe in this matter, Brown and the County argue that Boothe should have been *per se* disqualified under RPC 1.9(a) because Brown and Boothe allegedly had an attorney-client relationship with respect to the Hatch Act/election law matter. Brown br. at 24; County br. at 18.[12] Brown concedes that the Hatch Act and election law issues are not substantially related to the sexual harassment matter. Brown br. at 19. The County argues that the matters are interconnected because it alleges Brown's candidacy was the

[12] Again, Boothe disputes that he and Brown had an attorney-client relationship even with respect to the Hatch Act issue. Whether they had an attorney-client relationship is a disputed issue of material fact that should not have been resolved on summary judgment without an evidentiary hearing. At most, if this Court believes reversal of the trial court's order is warranted, this case must be remanded for resolution of these factual issues.

impetus for the harassed women's decision to come forward with their knowledge of Brown's behavior. County br. at 24.[13]

Even assuming *arguendo* that the record here establishes an attorney-client relationship between Boothe and Brown regarding the Hatch Act matter, Boothe's current representation is only prohibited if that matter is substantially similar to the present sexual harassment matter. RPC 1.9(a). Matters are substantially related when the factual matter in the former representation is so similar to a material factual matter in the current representation that a lawyer would consider the past representation useful in advancing the interests of the current client. *State v. Hunsaker,* 74 Wn. App. 38, 44, 873 P.2d 540 (1994). Neither Brown nor the County address the *Hunsaker* court's extensive discussion of substantially similar matters. The substantial relationship inquiry "does not require that the issues in the two representations be identical. The relationship is measured by the allegations in the complaint and by the nature of the evidence that would be helpful in establishing those allegations." *Trone v. Smith,* 621 F.2d 994, 1000 (9th Cir. 1980).

[13] This claim is also disputed. CP 277- 85. Moreover, it makes no sense. Brown lost his bid for election in 2010. The harassed women did not file their complaint until December 2011. If their motivations were merely political, then filing their complaint, with the attendant embarrassment, stress, and expense, is illogical. Brown's candidacy was ended *long before* the complaint's filing.

The comments to RPC 1.9 clarify that representation of a party adverse to a former client is not prohibited when the matters are "factually distinct:"

> On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client.

RPC 1.9 cmt. 2. Thus, contrary to what Brown and the County allege, the central inquiry under this rule is into the facts underpinning each matter. *Id.* In conducting this factual inquiry, courts 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 the former factual matter is sufficiently similar to the current one that the lawyer could use the confidential information to the client's detriment. *Sanders*, 121 Wn. App. at 598. The decision turns on whether the lawyer was so involved in the former representation that he can be said to have "switched sides." *Id.*

Even assuming Boothe represented Brown on the Hatch Act matter, the representation related to Brown's concerns about running for Klickitat County Prosecutor and the applicability of the Hatch Act to him. CP 3-4. The Hatch Act prohibits state or local officers from using their authority to influence elections, or otherwise engage in improper

fundraising or running for office while collecting a federally funded salary. 5 U.S.C.A. § 1502(a). The factual context of that alleged representation would encompass political and fundraising activities. Brown's allegations about those communications are described in his declaration. CP 2-5. Brown discussed the concerns he had about running for office as a current deputy prosecutor, whether it would be permitted under the Act, and whether he might be covered by the Act. *Id.* He discussed his concerns about the prosecuting attorney having fired another deputy prosecutor for political aspirations. *Id.* He discussed financial and media issues. *Id.*

In this matter, four women have alleged that Brown sexually harassed them. The factual context of this matter is as follows: the four women allege that Brown both physically and verbally harassed them in a sexual manner. For example, that Brown regularly sat in their shared office with his pants unzipped and his legs spread open on his desk; that he positioned himself in the doorway to the office so that they would need to rub against his body when they left the office; that he gave unwanted gifts to Eubanks; and that he stared at Gray's breasts during conversations.

There is no factual overlap between the Hatch Act representation and the sexual harassment issues later raised by the harassed women, other than the fact that they both involve Brown. Boothe's alleged

representation of Brown in advising him on federal election law for public employees, and his subsequent representation of the harassed women on their sexual harassment claims is not "switching sides" in the same matter. *Sanders*, 121 Wn. App. at 598. Even according to Brown's own evidence, he did not ask Boothe to defend him against any allegations of improper sexual conduct, or any allegations at all. He allegedly sought advice about laws applicable to persons running for office while holding a public post.

Brown claims that the "proper comparison is not whether the two *matters* are 'substantially related,' but whether Boothe obtained *confidences*...that are 'substantially related.'" *Id.* (emphasis added). This is a thinly disguised effort to revive the *per se* disqualification rule that is rejected by the language of RPC 1.9 and its comments. Brown makes no argument and offers no authority for this proposition as grounds for disqualification under RPC 1.9(a).[14] Brown simply insists that substantially related confidences were shared and demands that this Court accept that bald assertion and disqualify Boothe.

The trial court correctly entered summary judgment denying Brown and the County's claims that Boothe should be disqualified. The

[14] This Court need not review arguments that are not supported by authority and failure to provide argument and authority constitutes waiver of the issue. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

harassed women's attorney did not represent Brown in the same or a substantially related matter.

(4) Under RPC 1.18 Which Governs Potential Client Communications, the Harassed Women's Attorney Can Be Disqualified Only If Brown Carries His Burden of Proof that He Disclosed "Significantly Harmful" Information

Brown argues that, even under RPC 1.18, the mere fact that Brown claims to have mentioned the sexual harassment allegations to Boothe should be enough to warrant disqualification for reasons of public policy.[15] Brown br. at 25-34. Brown again insists that, as with RPC 1.9(a), all he needs to do to disqualify Boothe is make the general allegation that he disclosed "confidences." He argues that he need not demonstrate how the alleged confidences could be harmful to him. *Id.*

RPC 1.18 governs potential conflicts involving former prospective clients. Prospective clients are entitled to some, but not all, of the protection afforded a former client. RPC 1.18. Any person who discusses with a lawyer the possibility of forming a client/lawyer relationship with respect to a matter is a prospective client. RPC 1.18(a). A lawyer "shall not represent a client with interests materially adverse to those of a

[15] The trial court stated that the facts suggested Brown was, at most, a potential client regarding the sexual harassment matter. CP 442. Again, the critical facts on this issue are disputed, as Boothe denies ever having had any communications with Brown about anything touching on the sexual harassment allegations. CP 90-93.

prospective client in the same or a substantially related matter[16] if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter." RPC 1.18(c). Accordingly, if no attorney/client relationship was formed during the consultation—and it can be demonstrated that the attorney received no "significantly harmful" information during that consultation—then representation of the adverse client is permissible. *Id.*

Brown states that no published Washington cases analyze RPC 1.18, and that no Washington cases discuss whether a prospective client must disclose the substance of those confidences in order to seek disqualification. Brown br. at 26-27. Brown relies on foreign federal and state authority, most of which make general observations about attorney-client privilege with prospective clients. *Id.* at 28-30. Brown concludes that for policy reasons, parties moving to disqualify under RPC 1.18 should not have to demonstrate that significantly harmful information was disclosed. *Id.* He claims that the only way to demonstrate this is to reveal confidences, which he says should be prohibited. *Id.*[17]

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[16] Because this "same or substantially similar matter" test is incorporated into RPC 1.18, Eubanks and Gray's prior arguments regarding dissimilarity of the Hatch Act and sexual harassment matters applies in this context as well. The harassed women hereby incorporate those arguments into this RPC 1.18 discussion by reference.

[17] Brown's position regarding the inviolate nature of confidences is somewhat disingenuous because he has disclosed numerous communications he made to Boothe which, assuming he is correct that they had an attorney-client relationship, would also be

Although this Court has not interpreted RPC 1.18's "significantly harmful" language directly, Division I of this Court has made clear that the conflict rules governing prospective client contacts are distinct from those rules governing conflicts with actual former clients. *Rafel Law Grp. PLLC v. Defoor*, 176 Wn. App. 210, 308 P.3d 767, 773-74 (2013). In *Rafel,* the court refused to apply RPC 1.8, which governs business transactions between attorneys and current clients, to a prospective attorney-client transaction. *Id.* The court noted that the rules are deliberately structured "according to an attorney's duties to prospective, current, and former clients. ...Thus, the structure of the rules is consistent with the conclusion that RPC 1.8(a) does not apply to transactions entered into with prospective clients." *Id.*

The New Jersey Supreme Court has recently defined "significantly harmful" information as used in its RPC 1.18, which is similar to Washington's. It held:

> [I]n order for information to be deemed "significantly harmful" within the context of RPC 1.18, disclosure of that information cannot be simply detrimental in general to the former prospective client, but the harm suffered must be prejudicial in fact to the former prospective client within the confines of the specific matter in which disqualification is sought, a determination that is exquisitely fact-sensitive and -specific.

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privileged. So Brown apparently does not have a problem disclosing in detail some "confidences," but refuses to even *describe* the other alleged "confidences" that he says necessitate Boothe's disqualification.

O Builders & Assoc. Inc. v. Yuna Corp., 206 N.J. 109, 19 A.3d 966, 976 (2011). Even before ABA Model Rule 1.18 was enacted there, the District of Columbia Court of Appeals held:

> Certainly, even if an attorney-client relationship did not exist, a party has a right to expect that a lawyer whom he sought to employ will protect confidences and secrets imparted. But if an attorney-client relationship did not exist, the party will have to show that confidences and secrets were actually imparted. The party will not gain the benefit of an irrefutable presumption to disqualify counsel.

Derrickson v. Derrickson, 541 A.2d 149, 153–54 (D.C. App. 1988). *See also, State ex rel. Thompson v. Dueker*, 346 S.W.3d 390, 396-97 (Mo. Ct. App. 2011).

Despite the fact that RPC 1.18 states disqualification is not warranted unless the information disclosed is "significantly harmful," Brown nonetheless invites this Court to ignore the distinct language of RPC 1.18 and simply merge it with RPC 1.9. Brown br. at 26-30. Brown insists the same right to disqualify opposing counsel that is afforded to former clients should also be afforded to former prospective clients. *Id.* Brown seeks a ruling by this Court that any lawyer who has been contacted by a prospective client is automatically disqualified from the same or a substantially related matter regardless of whether there is any evidence that significantly harmful information was actually disclosed,

another effort to secure a per se rule when the language of the applicable rule is to the contrary. *Id.*

Courts are tasked with interpreting statutes and rules, but they may not rewrite them. *In re Estate of Black*, 153 Wn.2d 152, 162, 102 P.3d 796 (2004) ("explicit and unequivocal" statutes may not be rewritten); *State v. Blilie*, 132 Wn.2d 484, 492, 939 P.2d 691 (1997); *State v. Greenwood*, 120 Wn.2d 585, 592, 845 P.2d 971 (1993) (court rules are interpreted using principles of statutory construction). Our Supreme Court, as author of the RPCs, is presumed to know the rules of statutory construction. *Blilie*, 132 Wn.2d at 492. Courts should assume the rule means exactly what it says, and apply that rule as written. *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007).

When two different sections of the same law contain differing language, the author is presumed to have intended different meanings. *Id.* Brown's assertion that, for policy reasons, this Court should modify RPC 1.18 to have the same effect as RPC 1.9 contravenes the plain language of the provisions in question and violates the basic rules of statutory construction and judicial restraint.

Most of the foreign cases upon which Brown primarily relies either do not interpret the modern RPC 1.18, or do not support his position. For example, in *Rose Ocko Found., Inc. v. Liebovitz*, 155 A.D.2d 426, 427,

547 N.Y.S.2d 89 (1989), the Court was applying a broad standard that required lawyers to avoid "even the appearance of a conflict of interest." In *Factory Mut. Ins. Co. v. APComPower, Inc.*, 662 F. Supp. 2d 896, 901 (W.D. Mich. 2009), the Court noted that RPC 1.18 (which had not yet been adopted in Michigan) was distinct from RPC 1.9 in that it required specific evidence that significantly harmful information had been disclosed. The Court obtained those specific disclosures that the moving party had alleged to be "significantly harmful," but ultimately ruled that the moving party had waived the right to object to counsel's participation. *Factory Mut.*, 662 F. Supp. 2d at 901. In *Zalewski v. Shelroc Homes, LLC*, 856 F. Supp. 2d 426, 433 (N.D.N.Y. 2012), the moving party described in detail the nature of the conversations with the opposing attorney in support of disqualification.

Brown is incorrect in his policy assertion that this Court must rewrite RPC 1.18 to avoid forced public disclosure of confidences. Other courts applying the same rule have noted that the party seeking to demonstrate that significantly harmful information was disclosed can submit their evidence under a protective order, seal, or in camera. *See, e.g., O Builders*, 206 N.J. at 129; *State ex rel. Thompson v. Dueker*, 346 S.W.3d 390, 396 (Mo. Ct. App. 2011). Brown never sought to submit evidence under seal or to obtain an appropriate protective order.

Brown claims that he told Boothe that he mentioned sexual harassment allegations to Boothe in one of their conversations. CP 4.[18] The fact that persons were making sexual harassment allegations was public knowledge, not confidential harmful information. Brown refused to make any additional offer of proof to support his claim that Boothe received significantly harmful information from Brown that would justify his disqualification. RP 7, 10. When the trial court pointed out that such evidence was required under RPC 1.18, Brown insisted that such evidence was not required and declined to submit it. RP 7.

Brown has not made the required showing under RPC 1.18 that Boothe possesses any significantly harmful information. Disqualification was not warranted, and the trial court's summary judgment order should be affirmed.

(5) Despite Ruling Summarily, the Trial Court Improperly Made Findings of Fact and Conclusions of Law that, If Repeated on Remand, Would Prejudice the Harassed Women

Should this Court choose to remand this matter to the trial court for any credibility determinations and/or additional findings of fact, the harassed women seek to prevent repetition of an error that, if repeated, would prejudice them. The trial court entered findings of fact and

[18] Again this fact is disputed, and cannot be resolved by this Court on appeal. CP 91-93.

conclusions of law in a summary order, without first holding an evidentiary hearing. The court acknowledged it was ruling based solely on affidavits, but then adopted Brown's version of events as "findings of fact." CP 440; RP 4.

The County maintains that the harassed women may not challenge the findings or conclusions in the trial court's order because they did not file a notice of cross-appeal. County br. at 16-18. In support, the County cites *State v. Sims*, 171 Wn.2d 436, 442-43, 256 P.3d 285, 289 (2011). County br. at 17. They claim that, by challenging any of the trial court's findings or conclusions, The harassed women would be seeking "partial reversal" of the order. *Id.*

The County misapprehends RAP 2.4(a). The rule states that "The appellate court will, at the instance of the respondent, review those acts in the proceeding below which if repeated on remand would constitute error prejudicial to respondent." RAP 2.4(a).

The section of RAP 2.4(a) regarding cross-review upon which the County relies only applies when a respondent seeks "affirmative relief." "Affirmative relief" usually means "a change in the final result at trial." 2A Karl B. Tegland, Washington Practice: Rules Practice RAP 2.4 author's cmt. 3 at 174 (6th ed. 2004).

RAP 2.4(a) does not limit the scope of argument a respondent may make, although it qualifies any relief sought by the respondent beyond affirmation of the lower court. *See In re Arbitration of Doyle,* 93 Wn. App. 120, 127, 966 P.2d 1279 (1998) (holding that, when a respondent "requests a partial reversal of the trial court's decision, he seeks affirmative relief"); *cf. State v. McInally,* 125 Wn. App. 854, 863, 106 P.3d 794 (2005) ("The State is entitled to argue any grounds to affirm the court's decision that are supported by the record, and is not required to cross-appeal."). Notice of cross-review is only required if the respondent 'seeks affirmative relief as distinguished from the urging of additional grounds for affirmance.' *Robinson v. Khan,* 89 Wn. App. 418, 420, 948 P.2d 1347 (1998) (quoting *Phillips Bldg. Co. v. An,* 81 Wn. App. 696, 700 n.3, 915 P.2d 1146 (1996)).

The harassed women seek no affirmative relief here; they approve of the trial court's remedy of denying disqualification. However, the trial court's order would prejudice the harassed women if repeated on remand. Thus, they have a right to ask this Court to correct the form of the trial court's decision to avoid any implication that its superfluous "findings" are indeed findings where the facts were in dispute. RAP 2.4(a).

The harassed women ask this Court to correct the trial court order, an action that (1) constitutes alternate grounds for affirmance, because

they support the order denying disqualification, or (2) would be prejudicial on remand. No notice of cross-appeal is necessary in these circumstances.

The trial court should not have entered findings and conclusions while simultaneously acknowledging that it was ruling summarily. The court purported to resolve, based solely upon conflicting affidavits and as a matter of law, disputed issues of material fact. If this Court remands to the trial court, it should be with instructions to hold an evidentiary hearing, and offer clarification that the previous findings and conclusions are not binding.

F. CONCLUSION

Brown and the County have presented no basis for reversing the trial court's order. The trial court correctly ruled on summary judgment that disqualification was unwarranted on these facts. Even if there were any evidence of significantly harmful and attorney-client privileged information at risk, Brown's excessive delay in bringing his motion constitutes a waiver of his claimed privilege. This Court should affirm or, in the alternative, remand for an evidentiary hearing. Costs on appeal should be awarded to the harassed women.

DATED this 23rd day of December, 2013.

Respectfully submitted,

Philip A. Talmadge, WSBA #6973
Sidney Tribe, WSBA #33160
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188
(206) 574-6661

Thomas S. Boothe, WSBA #21759
7635 SW Westmoor Way
Portland, OR 97225-2138
(503) 292-5800
Attorneys for Respondents
Robin Eubanks, Erin Gray, Anna Diamond,
and Kathy Hayes

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 Consolidated Brief of Respondents in Court of Appeals Cause No. 44969-2-II 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.
Brooke Johnson
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 efiled with:
Court of Appeals, Division II
Clerk's Office

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: December 23, 2013, at Tukwila, Washington.

C. Jones
Talmadge/Fitzpatrick

TALMADGE FITZPATRICK LAW

December 23, 2013 - 11:37 AM

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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: Irelis E Colon - Email: **irelis@tal-fitzlaw.com**