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A. IDENTITY OF PETITIONER

Petitioner is David Brown (hereinafter "Brown").

B. COURT OF APPEALS DECISION

Brown is seeking review of the decision in *Robin Eubanks, et. al. v. David Brown, et. al.*, Court of Appeals, Division II, NO. 44969-2-II. The Court of Appeals' decision was issued on June 3, 2014.

C. ISSUES PRESENTED FOR REVIEW

1. Does a client's timely notification of his or her former attorney that the client believes the former attorney has a conflict of interest preclude a finding of waiver simply because the former client did not immediately pursue a motion to disqualify?

2. Should a delay in pursuing a motion to disqualify for legitimate reasons, as opposed to tactical gain, result in a waiver of a conflict of interest, especially when the client has put his or her former attorney on notice of the conflict?

3. Does a finding that a client can waive a conflict of interest by "delaying" the filing of a motion to disqualify for reasons other than tactical gain diminish the public's trust in the practice of law?

D. STATEMENT OF THE CASE

Brown is a former deputy prosecutor in the Klickitat County Prosecuting Attorney's Office. CP 1. In late 2009, Brown made the

decision to run for the position of the Klickitat County Prosecuting Attorney. CP 1. During Brown's preparation for announcing his candidacy for the 2010 election, he became concerned that the Hatch Act, 5 U.S.C. §§ 1501-1508, precluded him from running for office while still employed as a deputy prosecutor. CP 1-2. Brown was also concerned about what legal protections he had as a county employee in an "at will" and FLSA-exempt position. CP 2. To address these concerns, Brown sought legal counsel, and was eventually directed to Tom Boothe ("Boothe"). CP 3.

In May 2010, Brown contacted Boothe for legal advice regarding the foregoing, and over the next two months had numerous phone calls with Boothe (totaling 75 minutes) and exchanged numerous e-mails with him. CP 47. These phone calls and e-mails primarily concerned Brown's decision to run for prosecuting attorney, but also touched on general employment issues. CP 3-4.

A few days after announcing his candidacy in May 2010, two employees (Robin Eubanks and Erin Gray, hereinafter collectively "Eubanks") submitted a formal grievance alleging that Brown had harassed them. CP 4. After the accusations were made, Brown spoke with Boothe and informed Boothe about the allegations. CP 4.

On December 17, 2010, Eubanks brought suit against Brown, asserting claims of sexual harassment. CP 5. Boothe subsequently

substituted as counsel for Eubanks, and on July 13, 2011 sent correspondence to counsel for Brown identifying Boothe's earlier contacts with Brown. CP 20, 25-26. At the time of Boothe's appearance in the case, Brown had a petition for discretionary review pending before the Court of Appeals regarding whether or not venue was proper in Clark County as it relates to Brown (hereinafter "the venue issue"). CP 21.

In Boothe's July 13, 2011 letter, he noted that it was not his "preference" to sue the alleged harasser, and that if Brown's discretionary review was "well taken," it would make Boothe's decision "to dismiss Mr. Brown even easier." CP 25. Shortly after receipt of the letter, counsel for Brown contacted Boothe. CP 21. During that conversation, Boothe advised counsel that if Brown prevailed on the venue issue, Boothe would seek his clients' authority to dismiss Brown. CP 21. Counsel for Brown then advised Boothe that Brown believed that Boothe had a conflict of interest that precluded Boothe's representation of Eubanks. CP 21. Counsel for Brown asked Boothe to withdraw and avoid motion practice. CP 21. Boothe declined. CP 21. In addition, Boothe became very angry and began personally attacking Brown. CP 96, 470. Boothe stated that Brown was a "liar" (and other derogatory terms) and that if Brown pursued a motion to disqualify Boothe, he would make it "a war." CP 96; 470. Boothe promised to attack Brown's credibility, cautioning counsel for

Brown that Brown "doesn't want to open a hornet's nest." CP 470. Given Boothe's representation that he would seek his clients' approval to dismiss Brown if Brown prevailed on the venue issue, and hoping to avoid the promised "war" if he prevailed on the venue issue, counsel for Brown advised Boothe that Brown would wait until final resolution of the venue issue before seeking disqualification. CP 471.

Having put Boothe on clear notice that it was Brown's position that Boothe had a conflict of interest, and that Brown would bring a disqualification motion (if necessary) after resolution of the venue issue, Brown did not raise the conflict issue again until November 2012. CP 22.

On September 18, 2012, the Court of Appeals ruled that venue was proper in Clark County. CP 21. Brown petitioned this Court for review. CP 21. While that petition was pending, the parties began scheduling depositions,¹ with Boothe requesting Brown's deposition. CP 21-22. Although the venue issue had not been resolved, with the commencement of depositions, Brown believed he could no longer put off the promised "war" and the opening of the "hornet's nest." CP 472. Counsel for Brown therefore again contacted Boothe and asked him to withdraw. CP 472. Boothe again declined. CP 472. Brown's counsel therefore notified Boothe that Brown intended to move forward with the motion to disqualify that

¹ No depositions had been taken prior to November 2012. CP 21, 472.

Brown's counsel had told Boothe 16 months earlier would be filed. CP 22. On January 7, 2013, Brown brought a motion to disqualify Boothe. CP 44.

In an order dated May 7, 2013, the trial court correctly concluded that Brown had an attorney-client relationship with Boothe "on the Hatch Act and other election issues." CP 435-36. The trial court also correctly found that as part of that attorney-client relationship, Brown discussed the harassment allegations made against Brown by Eubanks. CP 435. However, although Brown and Boothe had an attorney-client relationship, the trial court concluded that as it relates to the harassment claims, Brown was only a prospective client of Boothe. CP 436. Since Brown refused to disclose the substance of the confidences he shared with Boothe regarding the harassment claims, the trial court denied Brown's motion. CP 435-36.

Brown motioned the Court of Appeals for discretionary review. The court commissioner found that the trial court "appears to have committed probable error in denying the motions to disqualify Boothe, which substantially limits Brown and Klickitat County's ability to defend against the sexual harassment action, particularly in that Boothe seeks to take the deposition of Brown." *Appendix A, pgs. 11-12*. Further, the commissioner held that "[b]ecause Boothe formerly represented Brown in a matter that appears to be substantially related to the current action,

Boothe would be precluded from continuing his representation of Eubanks and Gray absent consent from Brown. RPC 1.9." *Appendix A, pg. 12.*

In its June 3, 2014 opinion, the Court of Appeals declined to address the issue of whether Boothe has a conflict of interest. *Appendix B, pg. 1.* Instead, the court disregarded well-established case law regarding the Rules of Professional Conduct (RPC), as well as the RPC themselves, and concluded that by waiting 18 months to file the motion to disqualify, Brown "waived" his right to claim that Boothe has an impermissible conflict of interest. The Court of Appeals based its decision on *In re Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 411 (1996), a case in which this Court held that a party could waive its right to disqualify opposing counsel for a *discovery violation* by delaying the filing of a disqualification motion. *Appendix B, pgs. 5-8.* The Court of Appeals also reasoned that although Boothe had been told right from the outset of his involvement in this case that Brown believed Boothe had a conflict of interest, and that Brown would pursue a motion to disqualify (if necessary) after resolution of the venue issue, Eubanks would be prejudiced if Boothe was disqualified, as Boothe had engaged in extensive litigation. Of course, the alleged extensive litigation Boothe engaged in came after Brown advised Boothe that it was Brown's position that Boothe had a conflict of interest and that Brown would move to disqualify Boothe upon final resolution of

the venue issue. Finally, the Court of Appeals specifically found that Brown's "delay" in the filing of the disqualification motion was not based on any "tactical reasons." This petition timely followed.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should accept review for three reasons. First, the Court of Appeals' decision that Brown waived his right to seek disqualification of his prior attorney is contrary to long-standing authority regarding a waiver of a conflict of interest. Pursuant to well-established law, a client is the only individual that is permitted to waive a conflict of interest and that waiver must be based upon "informed consent" and "confirmed in writing." It is undisputed Brown did not provide such consent. To the contrary, from the outset of Boothe's involvement in this case, Brown maintained the consistent position that Boothe had a conflict of interest and that Brown would move to disqualify Boothe upon resolution of the venue issue. In the absence of a finding that the delay in pursuing disqualification was for tactical reasons, a finding of waiver is contrary to Washington law. Review is appropriate pursuant to RAP 13.4(b)(1)-(2).

Second, the holding implicitly condones an attorney's conscious disregard for the RPC, subverts the intent and purpose of the RPC and risks shaking the public's confidence in the practice of law. As a matter of public policy, the onus should not be placed upon the client, whether

former, current or prospective, to ensure that an attorney abides by the RPC. The practical effect of the Court of Appeals' decision is to provide an incentive for attorneys to disregard the self-governing nature of the RPC and risk that a client will not timely pursue a disqualification motion. Here, when Boothe was advised of his former client's position that Boothe had a conflict, Boothe's response was to attack Brown and threaten a "war." The Court of Appeals has rewarded Boothe, to the detriment of Brown, for Brown's non-tactical reason for not immediately seeking disqualification, and for Boothe's decision to thereafter pursue "extensive litigation" in the face of a claimed conflict. Such a holding threatens to eviscerate the very core of the RPC and effectively operates as a disservice to the public – the very public the RPC were drafted to protect. Review is appropriate pursuant to RAP 13.4(b)(4).

Third, the message sent by the decision to both the public and to the legal profession is that compliance with the RPC is solely dependent upon the timely filing of a motion to disqualify. While the RPC will generally be rigorously enforced to protect the integrity of the profession, those same RPC can be ignored, and an attorney allowed to continue a representation that violates those RPC, simply because the former client did not pursue disqualification timely enough. That is bad public policy.

The Court of Appeals concluded that it is acceptable for an attorney to violate the RCP because of a procedural "delay" in moving to disqualify – even though the client protested the conflict of interest from the outset, and even though the client had valid, non-tactical reasons for delaying pursuit of disqualification. This Court should accept review, hold that a conflict of interest cannot be waived by a justified delay in bringing a motion to disqualify, and enter a finding disqualifying Boothe.

1. The Court Of Appeals' Decision Conflicts With Washington Law.

The Court of Appeals' decision in this case directly conflicts with established case law regarding waiver of a conflict of interest pursuant to the RPC. Relying upon *In re Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 411 (1996), the Court of Appeals held that Brown waived the right to seek Boothe's disqualification because of excessive delay in filing a motion to disqualify. While this Court in *Firestorm* did hold that an excessive delay can result in a party waiving the right to disqualify opposing counsel, that case addressed disqualification in the context of discovery sanctions, not when a conflict of interest exists. This Court framed the issue in *Firestorm* as whether the plaintiff's counsel conducted an improper ex parte interview with an expert pursuant to CR 26, and, if so, was the sanction of disqualification proper. *Firestorm*, 129 Wn.2d at 132.

Importantly, the Court distinguished *Firestorm* from cases involving unethical conduct by noting that "[n]o express ethical prohibition prohibits ex parte contact with an expert witness of an opposing party." *Id.* at 137, n. 2. Of course, in this case, and in contrast to *Firestorm*, the RPC expressly prohibit representation that involves a conflict of interest. The Court of Appeals' reliance upon *Firestorm* was thus misplaced.

Further, such a holding and reliance on *Firestorm* ignores this Court's caution and guidance that is directly on point with this case:

One situation requiring the drastic remedy of disqualification arises when counsel has access to privileged information of an opposing party. The issue of access to privileged information frequently arises in conflict of interest cases. Requiring disqualification after counsel has had access to privileged information preserves the public's confidence in the legal profession.

Firestorm, 129 Wn.2d at 140 (emphasis added) (internal citations omitted). The Court of Appeals ignored this Court's express guidance regarding the particular context in which disqualification would be an appropriate remedy – when a conflict of interest is present. The very issue before the Court of Appeals was whether Boothe had a conflict of interest. Presented with a case in which its commissioner concluded that Boothe had previously represented Brown in a matter substantially related to the

current action, and was therefore precluded by RPC 1.9 from continuing representation of Eubanks absent consent from Brown, the Court of Appeals misapplied *Firestorm*, and ignored the express language of RPC 1.9, which precludes a waiver of a conflict absent informed consent confirmed in writing.

The trial court explicitly found that an attorney-client relationship existed between Boothe and Brown and that Eubanks claims were discussed as part of that representation. CP 435. RPC 1.9(a) addresses duties owed by an attorney to a former client and states:

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 interest are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

RPC 1.0(e). "'Confirmed in writing,' when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent." RPC 1.0(b). "[A] lawyer

who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid." RPC 1.0, cmt. 6. The issue of waiver of a conflict of interest was already addressed by this Court in *In re Disciplinary Proceeding Against Carpenter*, 160 Wn.2d 16, 155 P.3d 937 (2007).

Here, Carpenter never obtained informed written consent from SPI. Curiously, he attempts to place the burden on SPI by arguing that it could have demanded his withdrawal, and its failure to do so waived the conflict of interest. However, [*In re Disciplinary Proceeding Against Haley*, 156 Wn.2d 324, 126 P.3d 1262 (2006)] clearly states that waiver either exists or does not and in this case, there was no informed written consent. The burden is on the attorney. The Association correctly asserts that it is not incumbent upon the client to police the lawyer's ethics and conduct, particularly where, as here, the client never received the required disclosures.

Carpenter, 160 Wn.2d at 26 (internal quotations omitted).

Here, Boothe did not discuss his anticipated representation of Eubanks with Brown and its associated material risks and reasonably available alternatives to Brown. Instead, when Brown told Boothe that he had a conflict of interest, Boothe called Brown a "liar" and threatened a "war" if Brown pursued the issue. In doing so, he ignored his obligations to his former client and his obligations under the RPC. Further, he

assumed the risk of later disqualification once Brown brought the motion to disqualify that Brown had promised at the outset of the case.

The Court of Appeals' decision also conflicts with *First Small Bus. Inv. Co. of California v. Intercapital Corp. of Oregon*, 108 Wn.2d 324, 337, 738 P.2d 263 (1987), a case actually relied upon by the Court of Appeals. In *First Small Bus.*, this Court did find that failure to act promptly with a motion to disqualify may result in waiver. 108 Wn.2d at 337. However, citing to *Central Milk Producers Coop. v. Sentry Food Stores, Inc.*, 573 F.2d 988 (8th Cir.1978), the Court noted that waiver can be found when the delay is used "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, citing *Central Milk*, 573 F.2d at 992. In this case, the Court of Appeals specifically concluded that there was "no indication that Brown delayed filing the motion for tactical reasons." That fact distinguishes this case from those cases where waiver is found because a client delayed pursuit of a disqualification motion to gain a tactical advantage. Here, not only did Brown notify Boothe immediately of his belief that Boothe had a conflict, but also: (1) Brown told Boothe he would move to disqualify him (if necessary) after resolution of the venue issue; and (2) Brown had a sound, legitimate basis for withholding the filing of a motion to disqualify (potential dismissal if

Brown prevailed on the venue issue). The Court of Appeals' reliance upon *First Small Bus*. and its conclusion that Brown did not delay the motion for tactical reasons simply cannot be reconciled.

In addition, for the same reasons as stated above, the Court of Appeals' finding of prejudice to Eubanks is in conflict with *First Small Bus*. Specifically, in citing to *Central Milk*, the Court noted that it would not allow a tactical delay of pursuing the motion to disqualify to deprive an opponent of his or her counsel of choice "after substantial preparation of the case has been completed." 108 Wn.2d at 337, *citing Central Milk*, 573 F.2d at 992. In this case, Brown cannot be said to have caused any prejudice to Eubanks, as Brown's "delay" was not for "tactical reasons." Further, unlike *First Small Bus*. and *Central Milk*, Brown notified Boothe of the claimed conflict right from the outset. Brown simply did not "allow" Boothe to engage in "extensive litigation." Rather, Boothe chose to engage in extensive litigation after being made aware that Brown would seek disqualification if resolution of the venue issue did not result in the dismissal of Brown. As such, the finding that Brown's delay was not the result of "tactical reasons" and the finding that the delay caused Eubanks prejudice simply cannot be reconciled.

This Court should accept review of this case because the Court of Appeals' decision clearly disregards authority regarding conflicts of

interest and disqualification. RAP 13.4(b)(1)-(2). The Court should make clear that "delays" in pursuit of disqualification motions that are not the result of "tactical reasons" do not result in a waiver of a conflict.

2. The Court of Appeals Decision Involves An Issue Of Substantial Public Interest.

The Court of Appeals' decision finding waiver of an identified conflict of interest based solely on delay strikes at the very heart of intent and purpose of the RPC. The decision has far-reaching implications and sends the wrong message to the public about the legal profession and the importance of the RPC. "[E]thics rules protect both the public *and* the integrity of the profession." *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 251 (1992) (emphasis in original). "A fundamental principal in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. This contributes to the trust that is the hallmark of the client-lawyer relationship." RPC 1.6, cmt. 2 (internal citation omitted). This duty of confidence continues after the representation ceases as "a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client expect in conformity with [RPC 1.8]. RPC 1.8, cmt. 1. Here, the Court of Appeals' decision can do nothing but question the public's trust in the legal profession. It

effectively instructs attorneys that they can disregard their obligations under the RPC for self-interest even in the face of a former client's protestations of a conflict. It encourages attorneys to undertake impermissible representations, as the other side may not move quickly enough to disqualify the attorney. It tells the public that courts will ignore 18 months of past unethical representation, and will condone unethical representation going forward, simply because a motion to disqualify was not brought, for non-tactical reasons, within some unidentified timeframe after notifying the attorney that he or she has a conflict of interest.

The trial court found that Brown and Boothe formed an attorney/client relationship "on the Hatch Act and other election law issues." CP 435. During a telephone conversation in the course of that representation, Brown and Boothe discussed the fact that employees were making sexual harassment allegations against Brown. CP 435. Boothe responded that such allegations could be expected in the course of an election. CP 435. Accordingly, Brown discussed the very allegations with Boothe that are the basis of this matter. Nonetheless, the Court of Appeal condoned Boothe's ability to use the confidences gained from his former client to prosecute a case going forward against Boothe's former client. Review is proper pursuant to RAP 13.4(b)(4) because there is a substantial public interest in maintaining public confidence in the legal profession.

This public confidence is called into question by a decision that explicitly found that the delay in pursuit of the disqualification motion was not for "tactical reasons," yet nonetheless refused to disqualify the attorney.

Additionally, the Court of Appeals' decision improperly places the burden on the former client to ensure that the attorney observes the RPC. Such a holding ignores the self-governing nature of the legal profession and an attorney's duties under the RPC. "The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement." RPC, Preamble, cmt. 10.

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in the furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities comprises the independence of the profession and the public interest which it serves.

RPC, Preamble, cmt. 12. Placing the burden on the former client to enforce an attorney's compliance with the RPC is contrary to the very

nature and intent of the RPC, and is likewise contrary to this Court's guidance. *Carpenter*, 160 Wn.2d at 26. This is especially true in this case, where Brown's purported "waiver" was not based on his failure to timely raise the conflict issue (as he did), but his failure to "timely" file a motion to disqualify – for non-tactical reasons - after raising the conflict issue.

The Court of Appeals also reasoned that disqualification was not appropriate because Brown "allowed" Boothe to "participate in extensive litigation activities before filing the motion to disqualify," which the Court of Appeals found would result in prejudice to Eubanks if Boothe was disqualified. This holding ignores the undisputed fact that Brown not only told Boothe at the outset of Boothe's representation that Brown believed there was a conflict of interest, but also that Brown intended to move to disqualify Boothe (if necessary) after the venue issue ran its course. Brown did not "allow" Boothe to engage in "extensive litigation" by laying in wait with respect to the conflict issue. Instead, it was Boothe, who after threatening a "war" against Brown if Brown pursued the conflict issue, chose to undertake the "extensive litigation" with full knowledge that Brown intended to pursue his disqualification upon resolution of the venue issue. Perhaps Boothe believed that his threats had intimidated Brown enough to cause him to forgo a motion to disqualify. Perhaps he simply did not believe Brown's counsel when Brown's counsel told him

that he would seek disqualification upon resolution of the venue issue. Regardless, Boothe knew Brown's position regarding the conflict of interest and that Brown intended to wait until resolution of the venue issue prior to pursuing a disqualification motion. If Boothe was not in agreement with this approach, he had the ability to himself bring a motion asking the court to find that he did not have a conflict. He chose not to do so, but instead chose to risk that he would be disqualified after undertaking "extensive litigation" in the case. This Court should accept review to clarify where the burden lies when a former client claims a conflict of interest against his or her former attorney.

In opposition to this Petition, Eubanks will argue that review is not proper because Boothe did not have a conflict in the first place. Such an argument misses the point, as it ignores the bigger picture and the message that the Court of Appeals' decision sends. The primary problem with the Court of Appeals decision is its refusal to resolve the conflict issue² in light of its finding that the delay in pursuing the motion to disqualify was not for "tactical reasons." The trial court found the existence of an attorney-client relationship but refused to disqualify Boothe because Brown would not disclose the confidences shared. The Court of Appeals

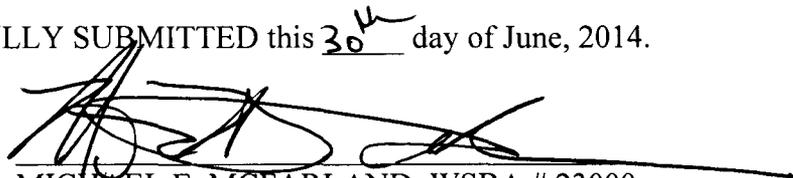
² Although one could argue that implicit in its ruling is a finding that there was a conflict of interest, as a former client cannot "waive" a conflict that did not exist in the first place.

commissioner found that the trial court had committed probable error because Boothe was violating RPC 1.9. With these findings on record, the Court of Appeals' refusal to resolve the very issue of whether Boothe has a conflict of interest based upon a justified "delay" deminimizes the RPC and sends a terrible message to the public. This is true whether or not Boothe does in fact have a conflict of interest. Review by the Court is necessary to rectify the far-reaching implications of the Court of Appeals' decision and to keep intact the public's confidence in the practice of law.

F. CONCLUSION

The Court of Appeals' decision that a conflict of interest can be waived by a justified delay in pursuing a motion to disqualify, after the former client has advised the former attorney of the former client's belief that a conflict exists, is contrary to well-established law. Further, the decision has the very real effect of telling the public that the RPC do not mean what they say, and that a conflict can be waived even when the delay in asserting it is justified. Based upon the foregoing, Mr. Brown respectfully request that the Court accept review of this matter.

RESPECTFULLY SUBMITTED this 30th day of June, 2014.


MICHAEL E. MCFARLAND, WSBA # 23000
Attorneys for Petitioner David Brown

CERTIFICATE OF SERVICE

FILED
JUN 23 2014
CLERK OF SUPERIOR COURT
COUNTY OF WASHINGTON
SEATTLE

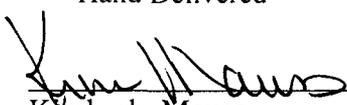
I certify under penalty of perjury under the laws of the State of Washington that on the 30th day of June, 2014, a true and correct copy of the foregoing *Petition for Discretionary Review to the Supreme Court*, was served upon the following parties and their counsel of record in the manner indicated below:

Thomas S. Boothe	Via Regular Mail	[]
Attorney at Law	Via Certified Mail	[]
1635 S.W. Westmoor Way	Via Overnight Mail	<input checked="" type="checkbox"/>
Portland, OR 97225	Via Facsimile	[]
	Hand Delivered	[]

Francis S. Floyd	Via Regular Mail	[]
Floyd, Pflueger & Ringer, P.S.	Via Certified Mail	[]
200 w. Thomas, Suite 500	Via Overnight Mail	<input checked="" type="checkbox"/>
Seattle, WA 98119-4296	Via Facsimile	[]
	Hand Delivered	[]

Philip A. Talmadge	Via Regular Mail	[]
Talmadge-Fitzpatrick	Via Certified Mail	[]
18010 Southcenter Parkway	Via Overnight Mail	<input checked="" type="checkbox"/>
Tukwila, WA 98188	Via Facsimile	[]
	Hand Delivered	[]

Dated: 6/30/14



Kimberly Mauss

APPENDIX

- A. Ruling Granting Review, No. 44969-2-II
- B. Published Opinion, No. 44969-2-II.

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ROBIN EUBANKS and ERIN GRAY,

Respondents,

v.

DAVID BROWN, individually and on behalf of his marital community, KLICKITAT COUNTY, KLICKITAT COUNTY PROSECUTING ATTORNEY'S OFFICE,

Petitioners.

No. 44969-2-II

BY  DEPUTY

STATE OF WASHINGTON

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FILED
COURT OF APPEALS
DIVISION II

RULING GRANTING REVIEW

David Brown, former deputy prosecutor for the Klickitat County Prosecuting Attorney's Office, and Klickitat County seek discretionary review of the trial court's order denying their motions to disqualify Thomas Boothe from representing Robin Eubanks and Erin Gray in the current sexual harassment action. Concluding that Brown and Klickitat County have shown that the trial court committed probable error which substantially limits their freedom to act, this court grants discretionary review.

FACTS

In late 2009, Brown decided to run for Klickitat County Prosecuting Attorney. After becoming concerned that the Hatch Act, 5 U.S.C. §§ 1501-1508, precluded him from running for office while still employed as a deputy prosecutor,

Brown sought legal advice and was referred to Boothe, an attorney in Portland, Oregon who also practices in Washington. In May and June 2010, Brown and Boothe communicated by telephone and e-mail to discuss Brown's concerns about running for office while employed as a deputy prosecutor, the applicability of the Hatch Act, and other election law issues. Their communications also included discussions about Brown's employment with the Klickitat County Prosecuting Attorney's Office and whether he would be fired after announcing his candidacy for Prosecuting Attorney.

On May 28, 2010, Eubanks and Gray, then employees of the Klickitat County Prosecuting Attorney's Office, submitted a formal grievance to the Klickitat County's Personnel Manager Randi Post, alleging that Brown had violated the Klickitat County Personnel Policy because of his conduct towards them at the office. Post interviewed Brown about the allegations on June 8, 2010. On June 12, 2010, four days later, Brown spoke with Boothe by telephone and mentioned to Boothe that employees were making sexual harassment allegations against him. In response, according to Brown, Boothe commented that those types of allegations could be expected in an election.

Believing that he would violate the Hatch Act if he remained as deputy prosecutor while running for office, Brown resigned in July 2010. In August 2010, Brown lost in the primary election for Klickitat County Prosecuting Attorney.

On December 17, 2010, Eubanks and Gray filed a suit in Benton County against Brown and Klickitat County, alleging sexual harassment and several related claims. At that time, Karen Lindholdt represented Eubanks and Gray. A

subsequent appeal ensued regarding proper venue for the case, which is currently pending before the Washington Supreme Court. *See Eubanks v. Brown*, 170 Wn. App. 768, 285 P.3d 901 (2012), *review granted*, 176 Wn.2d 1026 (2013).

In June 2011, while the appeal regarding venue was pending, Lindholdt sought substitute counsel on the case, believing that Eubanks and Gray would be better represented by an attorney with experience suing a governmental entity in a multi-plaintiff case. At the suggestion of a fellow attorney, Lindholdt called Boothe on June 22, 2011, to ask if he would take the case. After calling the Washington State Bar Association ethics hotline and consulting with Leland Ripley, an attorney who specializes in legal ethics, Boothe accepted Lindholdt's request based on his conclusion there was no disqualifying conflict. In mid-July 2011, Eubanks and Gray hired Boothe as counsel on their sexual harassment case. On July 28, 2011, Boothe entered his first appearance by filing a notice of substitution of counsel with the court.

On January 7, 2013, Brown filed a motion to disqualify Boothe from representing Eubanks and Gray on the basis that Brown was a former client of Boothe and shared confidences with him in 2010 regarding the claims brought by Eubanks and Gray.¹ In his supporting affidavit, Brown stated that he believed he had an attorney-client relationship with Boothe in 2010, which had prompted him to share confidences with Boothe about the allegations made by Eubanks and

¹ On February 8, 2013, Klickitat County joined in Brown's motion to disqualify Boothe.

Gray. Brown stated that, after the accusations were made by Eubanks and Gray, he spoke with Boothe and shared with him the fact that the sexual harassment allegations had been made. In response, Boothe had told Brown that he was not surprised and, if Brown won the election, the same accusers were just as likely to tell Brown that they had been encouraged by the other side to make the accusations in order to keep their jobs.

On February 22, 2013, the trial court heard argument regarding the joint motions to disqualify Boothe. At the outset, the trial court stated that it did not consider the sexual harassment action to be a “substantially related matter” to the Hatch Act issue. Brown’s Mot. for Disc. Rev., App. B at 45 (Report of Proceedings (RP) Feb. 22, 2013 at 16). Brown argued that the confidences he shared with Boothe about the sexual harassment claims were in the context of their attorney-client relationship and that he did not have to share those confidences with the trial court because it would destroy the purpose of attorney-client privilege. Klickitat County also argued that, if a conversation did occur regarding the sexual harassment lawsuit, it was enough to trigger disqualification.

The trial court agreed with Brown that, if an attorney-client relationship existed on the sexual harassment matter, Brown did not have to disclose what he shared with Boothe. It stated, however, that if Brown was only a prospective client on the sexual harassment matter, he had the burden of showing how the information he shared with Boothe could be substantially harmful to him in the current matter. Relying on Brown’s affidavit, the trial court found that Brown failed to establish that he formed an attorney-client relationship with Boothe on

the sexual harassment matter and, therefore, the rules of RPC 1.18, Duties to Prospective Client, applied. Because Brown's affidavit did not show how the information received by Boothe could cause substantial harm to Brown now, as the affidavit only stated the fact that he informed Boothe about the allegations, the trial court found that he failed to establish the grounds for disqualification.

On May 7, 2013, the trial court entered a written order on the joint motions to disqualify Boothe from representing Eubanks and Gray, making the following findings of fact:

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

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

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

Brown's Mot. for Disc. Rev., App. A at 2. In its conclusions of law, the trial court stated that Brown had formed an attorney-client relationship with Boothe on the Hatch Act and other election law issues, but did not form an attorney-client relationship with Boothe as to the sexual harassment allegations. It concluded that under RPC 1.9(a), Duties to Former Clients, the sexual harassment matter was not "a substantially related matter" to the Hatch Act and election law issues. Brown's Mot. for Disc. Rev., App. A at 3. In addition, the trial court concluded

that, assuming Brown had attempted to form an attorney-client relationship with Boothe in regard to the sexual harassment matter and was therefore a prospective client under RPC 1.18(a), Brown had failed to present any evidence that Boothe received information that could be significantly harmful to him in that matter. As such, the trial court denied the motions to disqualify Boothe from representing Eubanks and Gray in the sexual harassment matter. Brown and Klickitat County seek discretionary review.²

ANALYSIS

This court may grant discretionary review only when:

- (1) The superior court has committed an obvious error which would render further proceedings useless;
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
- (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
- (4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b). Brown and Klickitat County seek discretionary review under RAP 2.3(b)(1) and (b)(2). Additionally, Klickitat County seeks discretionary review under RAP 2.3(b)(3).

² Klickitat County argues that it has standing to seek discretionary review because it joined Brown's disqualification motion in the proceeding below and the trial court grouped Brown's motion with Klickitat County's joinder and referred to the motion in the plural, as "Defendants' Motions." Klickitat Co. Mot. for Disc. Rev. at 9 (italics omitted). This court agrees that Klickitat County is an aggrieved party under RAP 3.1 and thus has standing to seek discretionary review.

Brown and Klickitat County argue that the trial court erred in denying their motions to disqualify Boothe from representing Eubanks and Gray in the sexual harassment action. They argue that such error renders further proceedings useless and substantially alters the status quo or limits the freedom of a party to act because Boothe's continued representation of Eubanks and Gray causes irreparable harm to Brown, especially because Boothe seeks to take Brown's deposition.

The determination of whether an attorney's continued representation violates the Rules of Professional Conduct is a question of law and is reviewed de novo. *State v. Hunsaker*, 74 Wn. App. 38, 42, 873 P.2d 540 (1994); *Teja v. Saran*, 68 Wn. App. 793, 796, 846 P.2d 1375, *review denied*, 122 Wn.2d 1008 (1993). Disqualification of counsel is a drastic remedy that should be imposed only when absolutely necessary. *Matter of Firestorm 1991*, 129 Wn.2d 130, 140, 916 P.2d 411 (1996). One situation requiring such a remedy is when counsel has access to privileged information of an opposing party, which often arises in the context of conflict of interest cases. *Firestorm*, 129 Wn.2d at 140; *Teja*, 68 Wn. App. at 798-99; *First Small Business Inv. Co. v. Intercapital Corp.*, 108 Wn.2d 324, 337, 738 P.2d 263 (1987); *Kurbitz v. Kurbitz*, 77 Wn.2d 943, 947, 468 P.2d 673 (1970). Where a client asserts there is a conflict of interest or abuse of professional confidence, "the right of an attorney freely to practice his profession must, in the public interest, give way in cases of doubt." *Kurbitz*, 77 Wn.2d at 946; *Chugach Elec. Ass'n v. United States Dist. Court of Dist. of Alaska at Anchorage*, 370 F.2d 441, 444 (9th Cir. 1966).

Preliminarily, Eubanks and Gray concede for purposes of this motion that "Boothe represented Brown regarding Brown's concerns about running for election and the applicability of the Hatch Act." Resp. to Brown's Mot. for Disc. Rev. at 9. They also concede for purposes of this motion that Brown mentioned to Boothe on June 12, 2010 that Eubanks and Gray made sexual harassment allegations against him and that Boothe responded that such allegations could be expected in an election as a political tactic.

First, Brown argues that, in the context of an established and existing attorney-client relationship with Boothe, he shared confidences with Boothe about sexual harassment allegations made against him, which were by the same individuals that Boothe now represents in the lawsuit against Brown. Brown asserts that those confidences substantially relate to the current action under RPC 1.9(a) and therefore preclude Boothe from representing Eubanks and Gray in the sexual harassment action. In response, Eubanks and Gray argue that there was no factual overlap between the Hatch Act representation and the sexual harassment issues in the current action. As such, they contend that Boothe's representation of Eubanks and Gray in the current action is not "switching sides" in the same matter.

Under the Rules of Professional Conduct:

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.

RPC 1.9(a). For purposes of RPC 1.9, the scope of a "matter" depends on the facts of a particular situation or transaction. RPC 1.9 Comment 2. Matters are "substantially related" if they "involve the same transaction or legal dispute or if there is otherwise a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the [new] client's position in the subsequent matter." RPC 1.9 Comment 3. In determining whether two representations are substantially related, this court has engaged in a three part test where it must:

- (1) reconstruct the scope of the facts of the former representation;
- (2) assume the lawyer obtained confidential information from the client about all these facts; and
- (3) determine whether any former factual matter is sufficiently similar to the current one that the lawyer could use the confidential information to the client's detriment.

Sanders v. Woods, 121 Wn. App. 593, 598, 89 P.3d 312 (2004). When conducting this analysis, "[t]he decision turns on whether the lawyer was so involved in the former representation that he can be said to have switched sides." *Sanders v. Woods*, 121 Wn. App. at 598.

The trial court's findings in this case establish that Brown formed an attorney-client relationship with Boothe in 2010 when Brown was considering running for Klickitat County Prosecuting Attorney. Although Brown's initial legal concerns related to the Hatch Act, the court found that Brown spoke with Boothe more generally regarding election law issues about running for Prosecuting Attorney. In June 2010, during that period of representation, Brown disclosed information to Boothe about sexual harassment allegations made against him by

employees of the Klickitat County Prosecuting Attorney's Office, who are now represented by Boothe in a sexual harassment action against Brown.

In finding that the sexual harassment action was not "a substantially related matter" to the Hatch Act and election law issues, the trial court appears to have failed to consider whether there was a substantial risk that confidential factual information was obtained by Boothe during his representation of Brown that could materially advance Eubanks' and Gray's position in the current matter. *See Sanders*, 121 Wn. App. at 599 ("[T]he underlying concern is the possibility, or the appearance of the possibility, that the attorney may have received confidential information during the prior representation that would be relevant to the subsequent matter in which disqualification is sought." (quoting *Trone v. Smith*, 621 F.2d 994, 999 (9th Cir. 1980))). Although Brown's disclosures about the sexual harassment allegations did not directly related to the narrow Hatch Act issue, it appears that Brown thought disclosing the information was necessary to Boothe's overall representation of Brown, presumably because it pertained to Brown's employment with the Klickitat County Prosecuting Attorney's Office and how it could affect his candidacy for Prosecuting Attorney. Further, Boothe's response to Brown that such allegations could be expected in an election indicates that the sexual harassment allegations and the election issues are interconnected. *See Sanders*, 121 Wn. App. at 599 ("'Substantially related' requires only that the representations 'are relevantly interconnected.'" (quoting *Hunsaker*, 74 Wn. App. at 44 (quoting *Koch v. Koch Ind.*, 798 F. Supp. 1525, 1536 (D.Kan. 1992)) (citations omitted in *Hunsaker*)). On that basis, there is a

factual overlap between the prior representation and the current sexual harassment matter, such that the two matters are sufficiently similar to trigger a conflict of interest. In that circumstance, Brown needs not prove what actual confidences were divulged to Boothe. *Teja*, 68 Wn. App. at 800; RPC 1.9 Comment 3 (“A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter.”).

Eubanks and Gray contend that Brown's mere disclosure of the sexual harassment allegations to Boothe was insufficient to create an attorney-client relationship as to those allegations because Brown did not seek, and Boothe did not give, legal advice regarding those allegations. *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992), *modified on other grounds in Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994). Rather, they contend Brown's disclosure of the allegations was only commiseration. But Brown needs not show that an attorney-client relationship between him and Boothe was formed as to Brown's response to the sexual harassment allegations. He needs only show that the sexual harassment allegations are substantially related to Boothe's representation of Brown on the election issues.

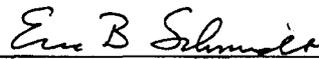
Because Boothe formerly represented Brown in a matter that appears to be substantially related to the current action, Boothe would be precluded from continuing his representation of Eubanks and Gray absent consent from Brown. RPC 1.9. The trial court appears to have committed probable error in denying the motions to disqualify Boothe, which substantially limits Brown and Klickitat

County's ability to defend against the sexual harassment action, particularly in that Boothe seeks to take the deposition of Brown. Accordingly, discretionary review is warranted under RAP 2.3(b)(2).

Because this court concludes that the trial court committed probable error in its analysis of Boothe's duties to Brown, as a former client under RPC 1.9, it does not address the arguments made by the parties regarding any duties owed by Boothe to Brown as a prospective client under RPC 1.18. The parties may raise those arguments in their briefs. Accordingly, it is hereby

ORDERED that Brown's and Klickitat County's motions for discretionary review are granted. The Clerk will issue a perfection schedule.

DATED this 30th day of August, 2013.



Eric B. Schmidt
Court Commissioner

cc: Michael Early McFarland, Jr.
Francis S. Floyd
John A. Safarli
Tom Boothe
Philip A. Talmadge
Sidney Tribe
Hon. Robert A. Lewis

APPENDIX B

FILED
COURT OF APPEALS
DIVISION II

2014 JUN -3 AM 8:34
STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BY 
DEPUTY

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

No. 44969-2-II

Respondents,

v.

KLICKITAT COUNTY and DAVID
BROWN,

PUBLISHED OPINION

Appellants.

MAXA, J. – David Brown and Klickitat County appeal the trial court’s denial of their motion to disqualify Thomas Boothe, counsel for Robin Eubanks, Erin Gray, Anna Diamond, and Kathy Hayes (collectively “the plaintiffs”) in their sexual harassment suit against Brown. The trial court ruled that even though Boothe was Brown’s former attorney he was not disqualified under Rule of Professional Conduct (RPC) 1.9 or RPC 1.18. We do not reach the merits of Brown’s disqualification motion because we hold that Brown waived any right to require Boothe’s disqualification because of the delay in filing his motion to disqualify. Accordingly, we affirm.

FACTS

Brown’s Communications With Boothe

Brown, who at the time was a deputy prosecuting attorney for Klickitat County, decided to run for Klickitat County Prosecuting Attorney in the 2010 election. As Brown was preparing

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to announce his candidacy, he became concerned with legal issues surrounding his decision to run for office. One of his concerns related to the Hatch Act, 5 U.S.C. §§ 1501-08, which restricts the political activities of individuals running for political office when they are employed in government positions that receive federal grant funds. Brown also was concerned about his rights as an at-will employee because another candidate for the prosecuting attorney position had been fired after she announced her candidacy.

In May 2010, Brown contacted Boothe, an attorney with employment law expertise, for advice. During the month of May, Brown and Boothe had several telephone conversations and exchanged numerous emails. The communications focused on the legal implications of Brown's decision to run for prosecuting attorney and other matters regarding Brown's employment.

In May 2010, Brown announced his candidacy to the public. A few days later, prosecuting attorney's office employees Eubanks and Gray filed a grievance accusing Brown of inappropriate conduct. On June 12, Brown called Boothe and talked with him for approximately 15 minutes. According to Brown, he informed Boothe that the allegations had been made. Boothe denies that he and Brown ever discussed the grievance.

On June 23, Brown emailed Boothe, forwarding links to two articles quoting Brown on the Hatch Act issues he was raising. Brown did not mention the grievances in the email. That email was the last contact between Brown and Boothe until 11 months later. Boothe never sent Brown a retainer letter, and did not bill him for their communications.

Boothe's Representation of the Plaintiffs

In December 2010, Eubanks and Gray filed a sexual harassment lawsuit against Brown. At that time, they were represented by two other attorneys. In June 2011, Boothe was contacted about serving as counsel for Eubanks and Gray. He investigated whether he had a conflict of interest based on his communications with Brown in 2010 and concluded that there was no disqualifying conflict that precluded him from representing Eubanks and Gray.

On July 13, Boothe sent a letter to Brown's counsel about becoming involved in the case and describing his earlier contacts with Brown. Brown's counsel told Boothe that Brown believed there was a conflict of interest because Brown and Boothe had had an attorney-client relationship the previous year. Boothe disagreed. In a letter to Brown's attorney, Boothe stated:

Because the Hatch Act is outside of my practice area . . . I explained that I was the wrong person to call for assistance. Nonetheless, Mr. Brown and I discussed it a few times after he said he would just welcome thoughts from an outside attorney. I never represented him or gave any advice of any kind. We were, instead, two colleagues conversing.

Clerk's Papers (CP) at 25-26. Boothe also stated that he had conferred with both the Washington State Bar Ethics Hotline and private counsel regarding his ethical obligations. Boothe formally substituted as counsel on July 28, 2011. Diamond and Hayes later were added as plaintiffs.

The litigation proceeded with Boothe representing the plaintiffs. Over the next 16 months, the parties engaged in document production and discovery and were involved in an appeal regarding whether venue was proper in Clark County. Boothe recorded more than 450 hours of time and his paralegals recorded over 675 hours on the litigation. During this period Brown did not mention his claim that Boothe had a conflict of interest or suggest that Boothe

should be disqualified. Only after the parties started taking depositions in November 2012 did Brown raise the issue again, taking the position that Boothe had a disqualifying conflict.

Motion to Disqualify Boothe

In January 2013, Brown moved to disqualify Boothe. Brown claimed that he had an attorney-client relationship with Boothe in 2010 and that he shared confidences with Boothe about the claims being brought against him in the sexual harassment suit. Brown argued under RPC 1.9(a) that Boothe must be disqualified because he was representing clients in the same or substantially related matter in which his clients' interests were materially adverse to Brown. Brown further argued that even if an attorney-client relationship did not exist, Boothe owed duties to him as a prospective client under RPC 1.18. The County joined in Brown's motion to disqualify Boothe.

The plaintiffs opposed the motion, asserting that there was no attorney-client relationship because, among other reasons, Boothe gave no legal advice and there was no retainer or engagement letter. The plaintiffs further argued that there was no relationship between Brown's inquiry regarding the Hatch Act and employment law issues and the plaintiffs' sexual harassment claim, and that there was no evidence that confidential information was communicated.

The trial court denied Brown's motion to disqualify Boothe, concluding that even assuming the truth of Brown's version of events, disqualification was not required under RPC 1.9(a) or RPC 1.18. We granted Brown's and the County's motion for discretionary review.

ANALYSIS

The plaintiffs argue that Brown waived his right to require Boothe's disqualification because of excessive delay in bringing the motion. Although the plaintiffs argued waiver below,

the trial court did not address this argument and instead ruled on the merits. However, “we can affirm a trial court on any alternative basis supported by the record and pleadings, even if the trial court did not consider that alternative.” *Champagne v. Thurston County*, 134 Wn. App. 515, 520, 141 P.3d 72 (2006), *aff’d*, 163 Wn.2d 69, 178 P.3d 936 (2008). We hold as a matter of law that Brown waived his right to move for Boothe’s disqualification. Accordingly, we need not reach the merits of Brown’s disqualification motion.¹

Our Supreme Court has stated that the “failure to act promptly in filing a motion for disqualification may warrant denial of [the] motion.” *First Small Bus. Inv. Co. v. Intercapital Corp.*, 108 Wn.2d 324, 337, 738 P.2d 263 (1987).

“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 Business, 108 Wn.2d at 337 (quoting *Cent. Milk Producers Coop. v. Sentry Food Stores, Inc.*, 573 F.2d 988, 992 (8th Cir. 1978)). “Delay in filing [a] motion to disqualify is suggestive of its use for purely tactical purposes and could be the sole grounds for denying a motion to disqualify.” *In re Firestorm 1991*, 129 Wn.2d 130, 145, 916 P.2d 411 (1996).

The combination of three factors compels our conclusion that Brown waived any right to require Boothe’s disqualification. First, Brown’s delay in filing the motion to disqualify was excessive. Boothe notified Brown that he was substituting as counsel for the plaintiffs in July

¹ The County joined Brown’s motion to disqualify Boothe and filed its own motion for discretionary review. However, there is no claim that the County was Boothe’s client or has an independent basis for seeking Boothe’s disqualification. As a result, Brown’s waiver of his right to require Boothe’s disqualification also precludes a non-client like the County from pursuing Boothe’s disqualification.

2011. Although Brown immediately claimed that Boothe had a conflict of interest, he did not move for disqualification until January 2013, 18 months after he received notice of Boothe's representation of the plaintiffs. In fact, after initially raising the issue, Brown did not even mention the possibility of disqualification for the next 16 months. In *Firestorm*, our Supreme Court indicated that a nine month delay in filing a motion to disqualify was significant in evaluating whether disqualification was warranted as a sanction for inappropriate ex parte contact with a witness. 129 Wn.2d at 144-45. Brown waited twice that long before bringing his motion to disqualify.

Second, Boothe had engaged in extensive litigation activities on behalf of his clients before Brown filed the motion to disqualify. Although the appellate record does not contain much detail regarding these activities, the parties exchanged written discovery, argued discovery motions in November 2011, and after that engaged in "eleven months of discovery struggles and document production." CP at 97-98. Brown also moved to compel production of the plaintiffs' counseling and psychotherapy records in November 2012. In November 2012, the parties scheduled depositions of the four plaintiffs, Brown, and another witness, and after two days of these depositions Brown raised the disqualification issue.² During this time, Boothe recorded more than 450 hours of time and his paralegals recorded over 675 hours on the litigation. Boothe also advanced over \$10,000 in litigation costs. Our Supreme Court in *Firestorm* found

² While discovery was ongoing Brown also appealed the trial court's ruling that venue was proper in Clark County. We accepted discretionary review and affirmed, and the Supreme Court subsequently granted Brown's petition for review. *Eubanks v. Brown*, 170 Wn. App. 768, 285 P.3d 901 (2012), review granted, 176 Wn.2d 1026, 301 P.3d 1047 (2013). The appeal still is pending in the Supreme Court. It appears that separate appellate counsel is representing the plaintiffs in this appeal.

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significant that counsel had expended over 640 hours and incurred litigation expenses during the period that the opposing party delayed in filing a motion to disqualify. 129 Wn.2d at 144-45.

Third, the plaintiffs would suffer prejudice if Boothe was disqualified. Although there is no evidence that substituting new counsel for Boothe will affect the outcome of the case, the record shows that disqualifying him may have a significant psychological impact on the plaintiffs. Boothe emphasized the plaintiffs' emotional fragility. In his declaration Booth stated that the three plaintiffs who had been deposed before Brown filed the motion to disqualify suffered stress reactions during the depositions – one cried throughout the deposition and needed 12 breaks to compose herself; the second burrowed her shoulder into Boothe's for security and needed two breaks; and the third was short of breath, panicked and shaking, and needed four breaks. Boothe claimed that the development of trust in him over 18 months was especially important for the plaintiffs, and that having to bring in new counsel would be "devastating" for them. CP at 101. Brown did not attempt to rebut this testimony.

We see no indication that Brown delayed filing the motion to disqualify for tactical reasons. In fact, Boothe made it a point to emphasize the professionalism of Brown's counsel throughout the case. Brown's explanation was that he delayed filing the motion to disqualify because Boothe had suggested in a July 2011 letter that the plaintiffs might dismiss Brown from the lawsuit if Brown prevailed on the venue matter. Therefore, Brown did not want to bring the motion while the appeal of the venue matter was pending. In addition, Brown stated that Boothe threatened that if Brown raised the conflict issue he would "make it a war." CP at 484. In order to avoid a contentious dispute and with the hope that Brown would be dismissed and the issue avoided, Brown delayed filing the motion to disqualify.

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Delaying the filing of what is expected to be a contentious motion to disqualify based on a hope that the issue will resolve itself may be understandable in certain situations, and *initially* may have been the prudent course of action here. However, when the attorney subject to disqualification is actively involved in ongoing litigation, a party cannot continue on this course of action indefinitely. At a certain point before that attorney engages in extensive litigation work a party must decide whether to move forward with the motion to disqualify or to waive the right to disqualify. Under the circumstances here Brown should have moved for disqualification far earlier.

We hold that Brown waived the right to have Boothe disqualified by waiting 18 months and by allowing Boothe to participate in extensive litigation activities before filing the motion to disqualify, particularly when disqualification after that delay would prejudice the plaintiffs. Further, because the County is a non-client, Brown's waiver also precludes the County from pursuing Boothe's disqualification.

We affirm.



MAXA, J.

We concur:



FORGEN, A.C.J.



LEE, J.