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DIVISION III
STATE OF WASHINGTON
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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

In re the Matter of
JAMES D. CUDMORE
And
GREGG L. BELT
No. 33193-8

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....II

I. INTRODUCTION.....1

II. STATEMENT OF THE CASE.....1

III. STATEMENT OF THE ISSUES.....4

IV. ARGUMENT.....5

 A. Standard Of Review.....6

 B. Bolliger’s Representation Of Cudmore And Belt
 Constituted A Concurrent Conflict Of Interest
 Under RPC 1.7 And Bolliger Did Not Receive
 Informed Consent To Waive The Conflict,
 Confirmed In Writing.....7

 C. Bolliger’s Withdrawal As Counsel For Cudmore
 And Continued Representation Of Belt Violated
 RPC 1.9 Because Bolliger Did Not Receive
 Informed Consent From Cudmore, Confirmed In
 Writing, To The Continued Representation.....13

 D. The Trial Court Did Not Abuse Its Discretion By
 Ordering Disqualification Of Bolliger Because
 Lamberson’s Motion For Disqualification Was
 Not Ripe Until Bolliger Filed The Notice Of
 Appeal On Behalf of Belt Alone And Therefore
 There Was No Unreasonable Delay In Bringing
 The Motion.....17

 E. The Doctrine Of Substituted Judgment Has No
 Application To This Matter.....22

 F. The Court Should Award Lamberson His Costs
 And Attorney Fees On Appeal.....23

V. CONCLUSION24

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Central Milk Producers Coop. v. Sentry Food Stores, Inc.</i> , 573 F.2d 988, 992 (8th Cir.1978)	18
<i>Eriks v. Denver</i> , 118 Wn.2d 451, 461, 824 P.2d 1207, 1212 (1992)	9
<i>First Small Bus. Inv. Co. of California v. Intercapital Corp. of Oregon</i> , 108 Wn.2d 324, 337, 738 P.2d 263, 270 (1987)	17; 18
<i>FMC Technologies, Inc. v. Edwards</i> , 420 F. Supp. 2d 1153, 1156 (W.D. Wash. 2006)	18; 19
<i>Global Enterprises, LLC v. Montgomery Purdue Blankenship & Austin PLLC</i> , 52 F. Supp. 3d 1162, 1173 (W.D. Wash. 2014)	15
<i>Hsu Ying Li v. Tang</i> , 87 Wn.2d 796, 799, 557 P.2d 342, 345 (1976)	24
<i>In re Disciplinary Proceeding Against Egger</i> , 152 Wn.2d 393, 412, 98 P.3d 477, 486 (2004)	8; 9
<i>In re Disciplinary Proceeding Against Stansfield</i> , 164 Wn.2d 108, 120, 187 P.3d 254, 260 (2008)	14
<i>In re Marriage of Wixom & Wixom</i> , 182 Wn. App. 881, 898, 332 P.3d 1063, 1072 (2014)	9; 14; 15; 16
<i>Int'l Longshoremen's Ass'n, Local Union 1332 v. Int'l Longshoremen's Ass'n</i> , 909 F. Supp. 287, 293 (E.D. Pa. 1995)	16
<i>Matter of Firestorm 1991</i> , 129 Wn.2d 130, 145, 916 P.2d 411, 419 (1996)	18
<i>People v. Hernandez</i> , 896 N.E.2d 297, 305 (Ill. 2008)	11; 12
<i>Raven v. Dep't of Soc. & Health Servs.</i> , 177 Wn.2d 804, 818, 306 P.3d 920, 927 (2013)	22; 23
<i>Sanders v. Woods</i> , 121 Wn. App. 593, 599, 89 P.3d 312, 315 (2004)	15
<i>State ex rel. Horn v. Ray</i> , 325 S.W.3d 500, 503 (Mo. Ct. App. 2010)	9; 10; 11; 12; 13
<i>State ex rel. S.G.</i> , 814 A.2d 612, 614 (N.J. 2003)	12
<i>State v. Orozco</i> , 144 Wn. App. 17, 19, 186 P.3d 1078, 1079 (2008)	6
<i>State v. Regan</i> , 143 Wn. App. 419, 428, 177 P.3d 783, 787 (2008)	22

<i>State v. Schmitt</i> , 124 Wn.App. 662, 666, 102 P.3d 856 (2004)	6
<i>State v. Vicuna</i> , 119 Wn. App. 26, 30, 79 P.3d 1, 3 (2003)	6; 22
<i>Teja v. Saran</i> , 68 Wn. App. 793, 796, 846 P.2d 1375, 1377 (1993)	6; 15
Statutes	Page(s)
RCW 74.34.120	21
RCW 74.34.130	21; 23; 24
Court Rules	Page(s)
ABA Model Rules Of Prof'l Conduct 45 (2007)	14
CPR DR 5-105	9
RAP 10.3	24
RAP 18.1	23
RAP 18.9	24
RPC 1.6	14
RPC 1.7	1; 4; 5; 7; 8; 9; 11; 12; 13; 17
RPC 1.9	1; 4; 5; 13; 14; 15; 16; 17; 18; 19
RPC 1.16	9; 16

I. INTRODUCTION

The Court should conclude that the trial court did not abuse its discretion in disqualifying attorney John Bolliger (Bolliger) from acting as appellate counsel for Gregg Belt (Belt). A vulnerable adult protection petition was filed by James Cudmore's (Cudmore) long-time step-son, Timothy Lamberson (Lamberson). The petition sought to restrain Belt's contact with Cudmore. Bolliger entered a notice of appearance on behalf of both Cudmore and Belt. He did so without obtaining a conflict waiver confirmed in writing. After the trial court entered a protection order restraining Belt, and Cudmore was found to be incapacitated, Bolliger withdrew from representing Cudmore and appealed on behalf of Belt alone. Prior to any substantive action in the appeal, Lamberson moved to disqualify Bolliger from acting as appellant's counsel for Belt. The matter was remanded to the trial court which entered an order of disqualification concluding Bolliger's continued representation of Belt would violate RPC 1.7 and RPC 1.9.

II. STATEMENT OF THE CASE

On July 11, 2013, Lamberson filed a petition for a vulnerable adult protection order (VAPO) seeking to restrain Gregg Belt from having contact with Lamberson's long-time stepfather, Cudmore. *CP 291*. Cudmore was

an eighty-four year old man suffering from “significant and worsening Alzheimer’s Type Dementia.” *CP 296*. According to Cudmore’s physician, Dr. Vaughn, Cudmore’s mental condition was continuing to deteriorate and he was unable to take care of “himself, his medicines, and his finances.” *Id.*¹ On July 8, 2013, Cudmore’s assisted living facility called the police because they believed Belt was “trying to take advantage of an elderly male at the [location] with severe dementia.” *CP 298*.

On July 18, 2013, Bolliger filed a notice of appearance on behalf of “respondent, Gregg L. Belt – and the above-reference alleged vulnerable adult, James Donald Cudmore.” *CP 299-300*. Bolliger did not inform Belt or Cudmore about the dangers of joint representation and did not receive a written conflict of interest waiver either from Belt or Cudmore. *CP 252*.

On July 19, 2013, Bolliger represented Belt in the hearing on the VAPO petition. *CP 302*. At the conclusion of the hearing, the trial court entered a VAPO against Belt restraining his contact with Cudmore on basis that Belt had unduly influenced Cudmore. *CP 302-04; RP, 7/19/2013 at pg.*

11. On July 26, 2013, Bolliger filed a motion for reconsideration on behalf

¹ Throughout the appellant’s brief, Bolliger asserts that Dr. Vaughn opined that Cudmore was mentally competent. *See e.g. Appellant’s Brief pgs. 7, 9, 37, 39*. This assertion is, to put it mildly, completely unsupported by the record. The recitation of an excerpt of Dr. Vaughn’s declaration contained in Bolliger’s memorandum stating he believed Cudmore had bare testamentary capacity does not equate to mental competence. *Compare CP 139-40 with CP 296*. This, along with the assertion that Dr. Vaughn “was successfully treating [Cudmore] for Alzheimer’s” *see e.g. Appellant’s Brief pg. 7*, continues to be one of the more perplexing statements made by Bolliger.

of Cudmore. *CP 368-77*. The trial court reserved on the issue of reconsideration pending submission of the guardian ad litem report in the guardianship proceeding. *See CP 382-83*.

On January 27, 2014, Bolliger filed a notice of intent to withdraw from representing Cudmore in the VAPO proceeding while continuing to represent Belt. *CP 305-06*. The same day, Bolliger, now stating that he represented only Belt, filed and sent a letter to the trial court seeking a special setting for an evidentiary hearing on Cudmore's capacity. *CP 313*. On February 4, 2014, the trial court responded noting that a guardianship over Cudmore's person and estate had been entered and thus a hearing on capacity would not be needed unless Cudmore's attorney felt a hearing was necessary. *CP 11*. On February 20, 2014, the trial court issued an order denying the motion for reconsideration. *CP 333-34*. On March 13, 2014, Bolliger filed a notice of appeal on behalf of Gregg Belt only. *CP 408-09*.

On April 3, 2014, the court of appeals acknowledged receipt of the notice of appeal, assigned a case number, and issued its scheduling order. *CP 336*. Two weeks later, on April 17, 2014, Lamberson filed a motion to disqualify Bolliger from representing Belt on appeal. *See CP 142*. On June 30, 2014, following a telephonic hearing before Commissioner McCown, the matter was remanded to the trial court. *CP 25-26*.

On December 5, 2014, after a series of scheduling delays, the trial court heard argument on the motion to disqualify Bolliger as counsel for Belt. *CP 348*. On January 21, 2015, the trial court entered findings of fact and conclusions of law determining that Bolliger’s continued representation of Belt—after previously representing both the protected vulnerable adult and the restrained party—violated RPC 1.7 and RPC 1.9. *CP 251-54*. On February 19, 2015, the trial court denied Belt’s motion for reconsideration. *CP 276-77*.

III. STATEMENT OF THE ISSUES

1. Whether Bolliger’s Representation Of The Vulnerable Adult And The Restrained Party In A Vulnerable Adult Protection Action Constitutes A Concurrent Conflict Of Interest Under RPC 1.7.
2. Whether Bolliger’s Failure To Obtain Informed Consent From His Clients Waiving The Conflict, Confirmed In Writing, Violated RPC 1.7.
3. Whether Bolliger’s Withdrawal From Representation Of Cudmore And Continued Representation Of Belt On Appeal Violated RPC 1.9 When He Failed To Receive A Written Waiver Of The Conflict From Cudmore As A Former Client.

4. Whether The Court Abused Its Discretion In Disqualifying Bolliger From Acting As Appellate Counsel Based On His Violations Of RPC 1.7 And RPC 1.9.
5. Whether The Court Should Award Lamberson His Costs And Attorney Fees On Appeal.

IV. ARGUMENT

The Court should conclude that the trial court did not abuse its discretion in disqualifying Bolliger from acting as appellate counsel for Belt. RPC 1.7 prohibits an attorney from engaging in or continuing representation where a concurrent conflict of interest exists. RPC 1.9 prohibits an attorney from representing “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.” In this matter, Bolliger appeared on behalf of Cudmore as the vulnerable adult and Belt as the restrained party. After the trial court entered the protection order and Cudmore was adjudicated to be incapacitated, Bolliger withdrew from representing Cudmore and appealed on behalf of Belt. At no time did Bolliger obtain a written conflict waiver from either client. As Bolliger engaged in representation involving a concurrent conflict of interest and

refused to voluntarily withdraw, the trial court correctly entered an order of disqualification.

A. Standard Of Review.

“The determination of whether an attorney has violated the Rules of Professional Conduct is a question of law and reviewed de novo.” *Teja v. Saran*, 68 Wn. App. 793, 796, 846 P.2d 1375, 1377 (1993). Whether a conflict of interest exists is a question of law. *State v. Vicuna*, 119 Wn. App. 26, 30, 79 P.3d 1, 3 (2003). An order of the court disqualifying an attorney from representation is reviewed for abuse of discretion. *State v. Orozco*, 144 Wn. App. 17, 19, 186 P.3d 1078, 1079 (2008) (citing *State v. Schmitt*, 124 Wn.App. 662, 666, 102 P.3d 856 (2004)). “A trial court abuses its discretion when it makes a decision based on untenable grounds or for untenable reasons.” *Id.*

In this matter, Bolliger represented Cudmore as the vulnerable adult and Belt as the respondent (and later as the restrained party) in the same action without informed consent waiving the concurrent conflict of interest from either client. Bolliger subsequently withdrew from representing Cudmore and appealed the entry of the protection order solely on Belt’s behalf. The Court must determine whether this representation violated the rules of professional conduct. Once this conclusion is made, the Court

should conclude that trial court's disqualification of Bolliger was well within its discretion.

B. Bolliger's Representation Of Cudmore And Belt Constituted A Concurrent Conflict Of Interest Under RPC 1.7 And Bolliger Did Not Receive Informed Consent To Waive The Conflict, Confirmed In Writing.

The Court should conclude that Bolliger's representation of Cudmore as the vulnerable adult and Belt as the restrained party constituted a concurrent conflict of interest under RPC 1.7. Because Bolliger did not receive informed consent to waive the conflict, confirmed in writing from either Cudmore or Belt, the trial court did not abuse its discretion in disqualifying Bolliger as appellate counsel. RPC 1.7 states as follows:

a. Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

1. the representation of one client will be directly adverse to another client; or
2. there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

b. Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

1. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
2. the representation is not prohibited by law;
3. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
4. each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures).

RPC 1.7. A concurrent conflict of interest occurs where the clients would be directly adverse or where there is a significant risk that the representation will materially limit the attorney's responsibilities to another client. RPC 1.7(a)(1-2). "A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client..." RPC 1.7, cmt. 3. "If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client..." RPC 1.7, cmt. 4.

Under RPC 1.7(b), an attorney can represent clients when a concurrent conflict of interest exists when "each affected client gives informed consent, confirmed in writing." RPC 1.7(b)(4). A purported alignment of interest between the clients does not preclude "a finding that a conflict existed [...]" RPC 1.7(b) applies even absent a direct conflict. *In re*

Disciplinary Proceeding Against Egger, 152 Wn.2d 393, 412, 98 P.3d 477, 486 (2004) (representing client who loans money to credit-risk borrower who will in turn use the loan to pay off another client created a significant risk of a material limitation of the lawyer's responsibilities to the clients).

An attorney may represent multiple clients with potentially conflicting interests where (1) it is obvious the attorney can adequately represent each client; and (2) each client consents to the multiple representation after full disclosure of the potential conflict.

Eriks v. Denver, 118 Wn.2d 451, 461, 824 P.2d 1207, 1212 (1992) (regarding CPR DR 5-105, the substantial equivalent of RPC 1.7).

RPC 1.7. "Rules of professional conduct should be construed broadly to protect the public from attorney misconduct." *In re Marriage of Wixom & Wixom*, 182 Wn. App. 881, 898, 332 P.3d 1063, 1072 (2014) *review denied*, 353 P.3d 632 (2015) (*citing Eriks*, 118 Wn.2d at 459). "An attorney should resolve all doubts against undertaking a dual representation." *Id.* An attorney is required to terminate representation of a client if continued representation would result in violation of the rules of professional conduct. RPC 1.16. Where an attorney refuses to withdraw, it becomes the duty of the court to disqualify the attorney from continuing representation. *Wixom*, 182 Wn. App. at 904.

In *State ex rel. Horn v. Ray*, the defendant was accused of assaulting his wife. 325 S.W.3d 500, 503 (Mo. Ct. App. 2010). After appearing on

behalf of the defendant, attorney Carl Kinsky informed the court that he was also appearing on behalf of the victim as well. *Id.* The defendant consulted with an independent attorney and both victim and defendant executed conflict of interest waivers. *Id.* On review, the court of appeals examined whether this dual representation violated the rules of professional conduct. Like Washington, Missouri has substantially adopted the Model Rules of Professional Conduct. *Id.* at 506. First, the court concluded that a concurrent conflict of interest existed even though the victim was not a party to the action. *Id.* “The attorney's duty of loyalty to multiple clients [...] can severely limit the attorney's ability to advise and advocate for any one client.” *Id.*

Having concluded that a concurrent conflict of interest existed, the court then examined “whether the clients could validly consent to the conflict.” *Id.* at 507. “Some conflicts, however, are nonconsentable, meaning that counsel cannot properly ask clients to consent to the conflict, nor can the lawyer provide representation based on client consent.” *Id.* Recognizing that a lawyer’s duties to each client include, “undivided loyalty, zealous advocacy, and independent judgment” the court did not believe the attorney could exercise his duties to one client without compromising his duties to the other client. *Id.* Counsel claimed that because the victim did not want to testify and opposed the prosecution, the

interests of the parties were aligned. *Id.* The court flatly rejected this argument:

Counsel's duty of loyalty to the defendant, however, prevents counsel from fairly presenting to the victim all possible courses of action because some of those options—most notably testifying against the defendant—would be detrimental to the defendant. Counsel's duty of loyalty to the defendant thus plainly forecloses alternatives that otherwise might be recommended to the victim.

[...]

Likewise, counsel's duty of loyalty to the victim prevents counsel from fairly presenting to the defendant all possible courses of action because some of those options—such as testifying that the victim lied about events leading to the instant charges or claiming self defense—would be detrimental to the victim.

[...]

Given the obvious difficulties with undivided loyalty to, and zealous advocacy for, both the defendant and the victim, counsel's asserted belief that he can provide competent and diligent representation to both clients simultaneously in the same criminal proceeding against the defendant is patently unreasonable.

Id. at 508 (emphasis added). Therefore, the court concluded that the attorney could not reasonably believe he could provide competent and diligent representation of both clients, creating an unwaivable conflict of interest under RPC 1.7(b). *Id.* Noting that the RPC speaks of clients and not parties, the court further concluded that the representation was barred by RPC 1.7(b)(3) because the case involved the assertion of a claim by one client against another. *Id.* at 509-10; *see also People v. Hernandez*, 896 N.E.2d 297, 305 (Ill. 2008) (*per se* conflict exists where counsel represents

defendant and victim of defendant's alleged conduct); *State ex rel. S.G.*, 814 A.2d 612, 614 (N.J. 2003).

In this case, the Court should conclude that Bolliger's representation of Cudmore as the vulnerable adult and Belt as the retrained party constituted a concurrent conflict of interest. On one hand, it remained in Belt's interest that protection order be denied regardless of his conduct. Bolliger was duty-bound to oppose the protection order on Belt's behalf. This duty to Belt materially limited Bolliger's ability to advocate any position on behalf of Cudmore except opposition to the order, and left Bolliger unable to inquire into any possibility of undue influence or manipulation. As a result, Bolliger's representation of both Cudmore and Belt created significant risk that the representation would materially limit Bolliger's responsibilities. Therefore, a concurrent conflict of interest exists under RPC 1.7.

Had Bolliger received informed consent from each client waiving the conflict, this Court would be faced with the difficult task of determining whether this representation created an unwaivable conflict of interest. As in *Horn*, the representation could be considered to result in a *per se* conflict of interest. *Horn*, 325 S.W.3d at 509-10; RPC 1.7(b)(3). The representation may have also limited Bolliger's duties to Belt and Cudmore to such an extent that it was not reasonable for him to believe he could competently and

diligent representation to each affected client. *Horn*, 325 S.W.3d at 508; RPC 1.7(b)(1). Fortunately, this Court can leave this question for another day. There is no dispute: Bolliger did not receive informed consent, confirmed in writing, from either client waiving the conflict. *CP 252*. At no point did Bolliger inform Belt or Cudmore of the concurrent conflict of interest or the dangers of joint representation. *Id.* As he did not inform his clients of the conflict, his clients did not waive the conflict and Bolliger did not receive a confirmation in writing that the conflict had been waived. *Id.* Based on this failure, Bolliger's representation of Cudmore and Belt violated RPC 1.7. Therefore, the trial court did not abuse its discretion in disqualifying Bolliger from acting as appellate counsel for Belt.

C. Bolliger's Withdrawal As Counsel For Cudmore And Continued Representation Of Belt Violated RPC 1.9 Because Bolliger Did Not Receive Informed Consent From Cudmore, Confirmed In Writing, To The Continued Representation.

The Court should conclude that Bolliger violated RPC 1.9 when he withdrew from representing Cudmore and appealed on behalf of Belt. RPC 1.9 states as follows:

- a. 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.

b. A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

1. whose interests are materially adverse to that person; and
2. about whom that lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

c. A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

1. use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
2. reveal information relating to the representation except as these Rules would permit or require with respect to a client.

RPC 1.9. “[M]atters are ‘substantially related’ ... if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter.” *In re Disciplinary Proceeding Against Stansfield*, 164 Wn.2d 108, 120, 187 P.3d 254, 260 (2008) (quoting ABA Model Rules Of Prof'l Conduct 45 (2007)). “A reason behind disqualifying an attorney from representing a client against a former client is that the attorney may

hold confidences of the former client that could be used, sometimes subtly, against the former client.” *Wixom*, 182 Wn. App. at 909. RPC 1.9 protects against even the appearance of the possibility that confidential information was disclosed in the representation of the former client. *Sanders v. Woods*, 121 Wn. App. 593, 599, 89 P.3d 312, 315 (2004). “The prohibition against attorneys ‘side switching’ is based both on the RPC prohibiting the disclosure of confidences and also on the duty of loyalty the attorney owes his or her clients.” *Id* (citing *Teja*, 68 Wn. App. at 798–99).

RPC 1.9 prohibits an attorney from representing a client if that client's interests are materially adverse to the interests of a former client, absent informed consent. RPC 1.9 also prohibits an attorney from later revealing information relating to representation of a client, or using information relating to a former client to the disadvantage of that client.

Global Enterprises, LLC v. Montgomery Purdue Blankenship & Austin PLLC, 52 F. Supp. 3d 1162, 1173 (W.D. Wash. 2014).

In this matter, Bolliger filed a notice of appearance on behalf of Belt and Cudmore. *CP 299-300*. After the hearing, the trial court entered an order of protection restraining Belt’s contact with Cudmore. *CP 302-04*. Bolliger filed a motion for reconsideration on behalf of Cudmore. *CP 368-77*. During the pendency of the court’s reservation of ruling on the motion for reconsideration, Cudmore was adjudicated as incapacitated and Bolliger withdrew from representation. *RP, 12/4/2014 pg. 4; CP 305-06*.

At whatever point Bolliger realized that he could no longer represent Cudmore due to conflict, he was obligated to withdraw from representation of both clients. RCP 1.16; *Wixom*, 182 Wn. App. at 904. An attorney cannot cure a conflict between clients by withdrawing from one client and continue to represent the other. *See e.g. Int'l Longshoremen's Ass'n, Local Union 1332 v. Int'l Longshoremen's Ass'n*, 909 F. Supp. 287, 293 (E.D. Pa. 1995) (“[A]n attorney may not drop one client like a ‘hot potato’ in order to avoid a conflict with another”). Bolliger retained the confidential information he learned from Cudmore when continued in his representation of Belt. Additionally, as discussed *supra*, Bolliger at no point during or after his representation of Cudmore received informed consent from Cudmore to continue as counsel for Belt. Therefore, the Court should conclude that Bolliger’s continued representation of Belt after withdrawing from Cudmore without a written waiver from Cudmore violated RPC 1.9. As a result, the trial court did not abuse its discretion in disqualifying Bolliger from continuing as counsel for Belt on appeal.

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D. The Trial Court Did Not Abuse Its Discretion By Ordering Disqualification Of Bolliger Because Lamberson's Motion For Disqualification Was Not Ripe Until Bolliger Filed The Notice Of Appeal On Behalf Of Belt Alone And Therefore There Was No Unreasonable Delay In Bringing The Motion.

The Court should affirm that the trial court did not abuse its discretion in disqualifying Bolliger from representing Belt on appeal. The motion for disqualification was timely brought in this matter as the motion was not ripe until Bolliger withdrew from representing Cudmore and appealed on behalf of Belt. Here, Bolliger argues that Lamberson unreasonably delayed bringing the motion to disqualify Bolliger from acting as appellate counsel because the conflict was apparent when he filed the joint notice of appearance on July 18, 2013. *Appellant's Brief pg. 20; see also CP 299-300*. It should be noted that "with this appeal, Mr. Bolliger seeks only to have the court's implicit RPC 1.7 and RPC 1.9 rulings overturned so that he will not be subjected to unmerited discipline by ODC." *Appellant's Brief pg. 19*. Bolliger's primary argument of delay is inconsistent with this position because, while delay would be a reason for declining disqualification, it would not justify his violation of the rules of professional conduct in a post-hoc manner.

"A motion to disqualify should be made with reasonable promptness after a party discovers the facts which lead to the motion." *First Small Bus*.

Inv. Co. of California v. Intercapital Corp. of Oregon, 108 Wn.2d 324, 337, 738 P.2d 263, 270 (1987) (quoting *Central Milk Producers Coop. v. Sentry Food Stores, Inc.*, 573 F.2d 988, 992 (8th Cir.1978)) (emphasis added). Delay in bringing a motion for disqualification without explanation may show a failure of the moving party to mitigate injury caused by the rules violation. *Matter of Firestorm 1991*, 129 Wn.2d 130, 145, 916 P.2d 411, 419 (1996). A motion for disqualification need not be raised until ripe. *FMC Technologies, Inc. v. Edwards*, 420 F. Supp. 2d 1153, 1156 (W.D. Wash. 2006).

In *FMC Technologies*, plaintiff originally brought suit against James Edwards and Darren Wattles for misappropriation of trade secrets. *Id.* at 1154. Plaintiff dismissed the action after defendants swore under oath that they did not have diagrams of the proprietary equipment. *Id.* Wattles later admitted that Edwards did have such drawings and plaintiff reinstated the lawsuit against Edwards. *Id.* at 1154-55. Edwards brought two successive motions to dismiss which were ultimately denied by the court but not until six months after the complaint was filed. *Id.* at 1162. Several weeks after the order denying the motion to dismiss was filed, plaintiffs moved to disqualify defense counsel on the basis that the representation violated RPC 1.9. *Id.* In opposing the motion, defendants argued that plaintiffs excessively delayed bringing the motion. *Id.* The court rejected the

argument, noting that if the motions to dismiss had been granted, then the conflict would be mooted. *Id.* Therefore, “the disqualification issue would not have been ripe for consideration.” *Id.* The court concluded as follows:

Any prejudice Defendants face is due to their attorneys' decision to ignore a conflict of interest, not this Court's decision to grant Plaintiffs' motion. Nor does the Court find any evidence that this motion was brought as a litigation tactic. The timing of the motion is soundly justified and the ethical issues raised require disqualification.

Id. at 1162-63.

In this matter, Bolliger is correct that the conflict existed from the start. However, while his joint representation raised a yellow flag, Lamberson had no way of knowing Bolliger had failed to receive informed written consent from Belt and Cudmore and thus the motion for disqualification was not yet ripe. Further, Lamberson likely did not have any standing to protect Cudmore’s interests at that point as Lamberson was not yet Cudmore’s guardian. *See FMC Technologies*, 420 F. Supp. 2d at 1156 (Majority view is that only former client has standing to bring disqualification motion for violation of RPC 1.9. Minority view is “nonclient litigants may, under proper circumstances, bring motions to disqualify counsel based on conflicts of interest”).

It wasn’t until January 27, 2014 when Bolliger filed a notice of withdrawal from representing Cudmore and on March 13, 2014 when he

filed a notice of appeal on behalf of Belt, that the yellow flag turned into a red flag. Bolliger could not have received consent from Cudmore personally to continue representation of Belt because a vulnerable adult protection order restrained Bolliger's contact with Cudmore. *CP 18*. Additionally, Lamberson had been appointed as guardian for Cudmore and Bolliger did not receive permission from Lamberson. *See CP 4*. It was at this point the motion for disqualification became ripe. The trial court agreed, stating:

The issue of whether or not this has been waived I don't think under this circumstances that delay in filing this motion until such time as there was a withdrawal from representation of Mr. Cudmore by Mr. Bolliger was unreasonable.

RP, 12/5/2014, pg. 19.

Two weeks after this Court assigned the appeal a case number and issued a scheduling order, Lamberson filed the motion to disqualify Bolliger from continuing to act as appellate counsel. *See CP 142; see also CP 336*. On June 30, 2014, this Court then remanded the issue to the trial court for consideration. *CP 25-26*. After several scheduling delays, the trial court heard the motion for disqualification on December 5, 2014. *RP, 12/5/2014, pg. 1.*²

² It is worth noting that Bolliger attempted to extend the delay in hearing on the motion for disqualification. *See CP 340-46*.

Bolliger's attempt to make it appear that Lamberson delayed more than a year in bringing the motion for disqualification is not supported by the record. *Appellant's Brief* pg. 20. This assertion does not fairly represent the procedural timing of the motion and ignores the motion for disqualification made to the court of appeals altogether. *See CP 142*. Bolliger appeared on behalf of Cudmore and Belt on July 18, 2013. *CP 299-300*. The next day, the trial court entered the order of protection against Belt. *CP 302-04*. Between July 19, 2013 and March 13, 2014, the order of protection remained in place and the only substantive ruling in the interim was Judge Mendoza's reservation on ruling on the motion for reconsideration. *See CP 382-83*. Once the motion for reconsideration was denied, the conflict of interest would have been mooted if Bolliger had not appealed on behalf of Belt. Unlike traditional civil litigation, a vulnerable adult protection petition is a summary proceeding. *See RCW 74.34.120(1); RCW 74.34.130*. With a final order in place on July 19, 2013, there was no discovery or substantive litigation occurring until Bolliger filed the notice of appeal on behalf of Belt on March 13, 2014. As a result, there was no prejudice in bringing the motion for disqualification on appeal. Therefore the Court should affirm that the trial court did not abuse its discretion in ordering disqualification of Bolliger.

E. The Doctrine Of Substituted Judgment Has No Application To This Matter.

The Court should conclude that the doctrine of substituted judgment has no application to this matter as it has no effect on whether a conflict of interest existed. The doctrine of substituted judgment requires the guardian of an incapacitated person to take the course of action the ward would choose if competent. *Raven v. Dep't of Soc. & Health Servs.*, 177 Wn.2d 804, 818, 306 P.3d 920, 927 (2013). However, whether a conflict of interest exists is not dependent on the subjective desires of the client. “Whether the circumstances demonstrate a conflict under ethical rules is a question of law.” *State v. Regan*, 143 Wn. App. 419, 428, 177 P.3d 783, 787 (2008) (citing *Vicuna*, 119 Wn. App. at 30–31). In essence, Bolliger wants to construct a scenario where Lamberson brought the motion to disqualify under his power as guardian of Cudmore, where Bolliger adequately informed Cudmore and Belt of the dangers of joint representation and each waived the conflict confirmed in writing, and Cudmore expressed his opposition to the petition free of both incapacity and undue influence.

Unfortunately from Bolliger’s standpoint, none of these things happened. He never informed Cudmore of the risks of joint representation. He never received a waiver of the conflict, confirmed in writing, from either client. He never received permission from Cudmore as a former client to

continue representing Belt. Substituted judgment applies to what the “particular individual would do if [they] were competent and understood all the circumstances.” *Raven*, 177 Wn.2d at 818 (emphasis added). There is no dispute that Bolliger failed to inform Cudmore of all the circumstances necessary for a knowing, intelligent or voluntary waiver of his right to conflict-free counsel. Therefore, the Court should conclude that the doctrine of substituted judgment is not applicable to the case at hand.

F. The Court Should Award Lamberson His Costs And Attorney Fees On Appeal.

Pursuant to RAP 18.1, Lamberson is requesting reasonable attorney fees and expenses related to the appeal. Under RAP 18.1, the court may award attorney fees as allowed by applicable law. *See* RAP 18.1. RCW 74.34.130 reads:

The court may order relief as it deems necessary for the protection of the vulnerable adult, including, but not limited to the following: [...] (7) Requiring the respondent to pay a filing fee and court costs, including service fees, and to reimburse the petitioner for costs incurred in bringing the action, including a reasonable attorney's fee.

Under this statute, the Court may award attorney fees to the petitioner against the respondent so that the protected person and the petitioner do not have to bear the expenses related to the respondent's misfeasance. In this case, Bolliger has continued this appeal on his own behalf despite the fact that his former client Belt has long since settled, agreeing to have no further

contact with Cudmore. *CP 361*. The Court has the inherent equitable power to award attorney fees given the facts and circumstances of the case. *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 799, 557 P.2d 342, 345 (1976). The Court can also award fees as a sanction based on an appellant's failure to comply with the Rules of Appellate Procedure. RAP 18.9.

In this matter, Bolliger violated his duties to both of his former clients Belt and Cudmore under the Rules of Professional Conduct. In pursuing this appeal, Bolliger has stepped into the shoes of Belt, a respondent who was potentially liable for Lamberson's attorney fees on appeal under RCW 74.34.130(7). Bolliger has done this solely for his own benefit without regard to his duties to his clients and his duty to this Court under the Rules of Professional Conduct. In doing so, Bolliger has impugned the competency of the trial court. *Appellant's Brief*, pg. 12 n. 5. He has violated the Rules of Appellate Procedure. *See Appellant's Brief app. 1-8*; RAP 10.3(8). On the whole, Bolliger's conduct has been vexatious and prejudicial to the administration of justice in a manner that this Court should exercise its equitable power and impose the costs and attorney fees incurred by Lamberson in this matter against Bolliger.

V. CONCLUSION

The Court should conclude that Bolliger violated RPC 1.7 and RPC 1.9 in the course of this litigation and that the trial court did not abuse its

discretion in disqualify him from continuing as counsel. It was not reasonable for Bolliger to believe that he could adequately and competently represent both Cudmore and Belt in this matter. Bolliger also failed to inform his clients of the dangers of joint representation or receive a written waiver of the conflict confirmed in writing. Finally, Bolliger did not receive consent from Cudmore to withdraw as counsel and appeal on behalf of Belt. Therefore, the Court should affirm the trial court's decision.

DATED this 29th day of September, 2015



SHEA C. MEEHAN, WSBA #34087

BRET UHRICH, WSBA #45595

Attorneys for Respondent Timothy Lamberson

I certify under penalty of perjury under the laws of the State of Washington that on this day, I served a true and correct copy of this document by mailing the same by first class mail, postage prepaid, to the offices of:

John C. Bolliger
5205 W. Clearwater Avenue
Kennewick, WA 99336

DATED this 29 day of September, 2015 at Richland, WA.



NATALIE A. DELAROSA