

No. 97563-9

No. 78190-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

Richard Plein, Respondent,
and
Deborah Plein (formerly Deborah De Witt), Respondent,

v.

USAA Casualty Insurance Company, Petitioner,
and
The Sterling Group, Inc., Defendant.

APPELLANT REPLY BRIEF

RE: ORDER ON THE PLAINTIFFS' MOTION FOR RULING
REGARDING ASSERTED CONFLICT OF INTEREST

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A. INTRODUCTION

“The guiding principle in considering a motion to disqualify is safeguarding the integrity of the court proceedings; the purpose of granting such motions is to eliminate the threat that the litigation will be tainted.” (*Plant Genetic Sys., N.V. v. Ciba Seeds*, 933 F. Supp. 514, 517 (M.D.N.C. 1996) (citation omitted).)

The conflict of interest in this case is not an “imagined scenario” or based upon speculation or conjecture, but rather one that very much prejudices Petitioner-Defendant USAA Casualty Insurance Company’s (“USAA CIC”) defense in the *Plein* litigation due to Keller Rohrback L.L.P.’s (“Keller”) tainted representation. Attorneys are bound by the duty of loyalty to their former clients, and the legal profession requires an attorney to act ethically and professionally, without any actual or perceived impropriety.

First, the trial court’s failure to analyze Rule of Professional Conduct (“RPC”) 1.10 due to Irene Hecht’s (“Hecht”) continued presence at Keller despite her extensive relationship with USAA CIC and its affiliated companies warrant the disqualification of Keller.

Second, the Respondent-Plaintiffs Richard Plein and Deborah Plein (“the Pleins”) are now raising a new argument, stating that a balancing test should be applied to the RPC 1.9 analysis. Even if this Court can consider

the balancing test, which it cannot, the facts of this case solely weigh in favor of Keller's disqualification.

Third, *Sanders v. Woods*, 121 Wn. App. 593, 89 P.3d 312 (2004) and *State v. Hunsaker*, 74 Wn. App. 38, 873 P.2d 540 (1994) are still good Washington law and are instructive on the issues raised by USAA CIC. The other jurisdictional cases cited by the Pleins have distinguishable facts, and upon closer inspection support USAA CIC's arguments rather than the Pleins.

Fourth, the confidential information within Keller's possession is not limited to the general knowledge of USAA CIC's and its affiliated companies' policies and procedures, and the risk of the disclosure of this information disqualifies Keller under RPC 1.9.

Finally, any harm that the Pleins would suffer is based upon Keller's actions and not USAA CIC.

Accordingly, USAA CIC respectfully requests this Court to disqualify Keller from representing the Pleins based upon the arguments raised within its Appellate Brief and the arguments below. Disqualification is the only appropriate remedy based upon Keller's egregious actions in this case.

B. ARGUMENT

1. RPC 1.10 Prohibits Keller From Representing The Pleins Due To Hecht's Continued Association With Keller.

In their Brief, the Pleins fail to address the controlling issue in this case: RPC 1.9 disqualifies Hecht and her team from representing the Pleins because of her extensive ten (10) year relationship with USAA CIC and affiliated companies that included over 165 cases. (Clerk's Papers ("CP") 29 ¶¶ 1-2; CP 99-103 ¶¶ 5-12.) Because Hecht is still a member of Keller and has access to confidential information concerning USAA CIC and its affiliated companies, **all attorneys at Keller are prohibited from representing the Pleins.** (CP 29-30; RPC 1.10(a); USAA CIC's Appellate Brief ("USAA CIC's Brief), p. APPBRF_APX017; State v. Vicuna, 119 Wn. App. 26, 31, 79 P.3d 1 (2003) (citation omitted), review denied, 152 Wn. 2d 1008 (2004); Hunsaker, 74 Wn. App. at 41-42, 873 P.2d 540 (citation omitted).)

The trial court failed to address this crucial issue in its decision to allow Keller to continue its representation of the Pleins. (*See* CP 133-134.) Had the trial court properly analyzed RPC 1.10, then it would have been clear that Keller's representation of the Pleins violates the RPCs. (*See* CP 69:18-70:12; CP 77-78 ¶¶ 6-9.) If the trial court analyzed the issue as to whether Hecht could represent the Pleins, then there is no question that she would be violating her former client's confidences and breaching her duty

of loyalty to USAA CIC. (RPC 1.10(a); RPC 1.9; USAA CIC’s Brief, pp. APPBRF_APX015, APPBRF_APX017.) Thus, the trial court’s ruling was in error.

While the Pleins try to indirectly address this issue by arguing that the matters Hecht and her team worked on are being screened, they forget that Hecht is not an incoming attorney – she has been with Keller for over thirty (30) years. (CP 29-30; Brief of Respondents (“Plein Brief”), pp. 3 n.2-3, 8 n.4, 33.) As an attorney with an extensive affiliation with Keller, there is simply no “screen” adequate to enough to avoid any type of conflict of interest as demonstrated in this case. More importantly, RPC 1.10(a) does not permit it.

Therefore, the Pleins constant repetition that Hecht does not represent them and that other attorneys (or staff) on the *Plein* matter have never worked on any USAA CIC’s or its affiliated companies’ matters is simply not relevant under the RPC 1.10 analysis. (Plein Brief, pp. 3 n.3, 8 n.4, 33.) Under RPC 1.10, there can be no question that Keller is disqualified from representing the Pleins.

2. Keller’s Disqualification Is Warranted Based Upon The Facts Of This Case.

The Pleins argue that a balancing test should be applied based upon case law from other states and federal courts, and those cases predate

Washington's adoption of the "modern" RPCs. (Plein Brief, pp. 12-14.)

But there are several issues with the balancing test.

(a) *The Pleins' New Argument, A Balancing Test, Cites Case Law From Other Jurisdictions That PreDate Washington's Adoption Of The "Modern" RPC 1.9 And Do Not Address The Concepts Of RPC 1.9 Or RPC 1.10.*

First, this is the first time the Pleins are raising a balancing test argument, and was never argued below. Second, the case law cited by the Pleins supporting their position of a "balancing test" do not even address the issue at hand or even the same rule of professional conduct.

Brief contact with a represented opposing party is **not** the same as representing an adverse party to a former client. (*Meat Price Investigators Ass'n v. Spencer Foods, Inc.*, 572 F.2d 163, 165 (8th Cir. 1978).) Nor are the issues concerning the prohibition of an attorney acting as both an advocate and witness in the same trial, the question of whether there was an attorney-client relationship, or the question of what qualifies as the attorney's independent reasonable judgment when trying to disclose a conflict to a client have not been raised by the *Plein* facts. (*F.D.I.C. v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1311 (5th Cir. 1995) (discussing "[t]he proscription against an attorney serving as both an advocate and a witness in the same litigation"); *Cole v. Ruidoso Mun. Sch.*, 43 F.3d 1373, 1384 (10th Cir. 1994) (discussing whether "there was an attorney-client

relationship that would subject a lawyer to the ethical obligation of preserving confidential communications”); Owen v. Wangerin, 985 F.2d 312, 317 (7th Cir. 1993) (finding that the trial court did not abuse its discretion when it disqualified an attorney from representing a client due to a conflict of interest because the attorney “had not made an ‘independent reasonable judgment that the representation [would] not adversely affect the competing personal interests”), rehearing denied, (Mar. 5, 1993).)

Third, and ironically, the Pleins in the same breath argue that the Washington case law cited by USAA CIC predates the “modern” RPCs and thus is not relevant to the RPC 1.9 analysis. (Plein Brief, pp. 11-12, 19-21.) However, they fail to explain this blatant contradiction: predated case law from other jurisdictions concerning *other* rules of professional conduct are controlling in the *Plein* RPC 1.9 analysis, but predated case law from Washington concerning RPC 1.9 is not relevant. (Plein Brief, pp. 11-14, 19-21.) The simple answer to this contradiction is that the “modern” RPC argument is a smoke screen and a red herring, and should bear no weight in this Court’s analysis of the *Plein* RPC 1.9 issue. Washington case law on this subject is relevant and controlling, and is instructive that the Court should rule in USAA CIC’s favor by finding a clear conflict of interest in this case and that disqualification is the only appropriate remedy.

(b) The Elements Of The Purported Balancing Test Weighs In Favor Of Keller's Disqualification.

Finally, the Pleins, the proponent of the balancing test, fail to even apply the balancing test to the facts of this case, and simply argue that their interest in being represented by its counsel of choice is dispositive. (Plein Brief, pp. 12-14.) Even though the facts of *Meat Price Investigators Ass'n* are not comparable (nor relevant) to those in *Plein*, the analysis of the balancing test elements demonstrates that there is a clear conflict of interest and that disqualification of Keller is appropriate. (572 F.2d at 165 (citation omitted).)

First, the Pleins have not been deprived of their counsel of choice. (*Id.*) Joel Hanson is an attorney of record in this case. Even if Keller is disqualified, the Pleins are still being represented by “an attorney of their choice.” (Plein Brief, pp. 12-14.)

Second, the Pleins conveniently ignore the egregious facts of Keller's actions. It is undisputed that:

- USAA CIC is a former client of Keller since November 2017 and Keller agreed to represent the Pleins in January 2018. (CP 26-27 ¶¶ 3-4; CP 29; CP 99-100 ¶¶ 5-6; Plein Brief, pp. 2-4.)

- the attorneys who represented USAA CIC and its affiliated companies are still at Keller. (CP 29; Plein Brief, p. 3.)
- USAA CIC and its affiliated companies were represented by Keller for over ten (10) years in at least 165 cases. (CP 99 ¶ 5; CP 101 ¶ 9.a.)
- at least twelve (12) of those cases arises from bad faith litigation concerning homeowners claims, like those in *Plein*. (CP 101 ¶ 9.b.)
- Keller billed over 8,000 hours in the last two years of their representation, with at least seven (7) attorneys, (4) paralegals, and the staff working on USAA CIC's and its affiliated companies' matters. (CP 101 ¶¶ 9.c-e.)

Based on these facts, USAA CIC's "interest in a trial free from prejudice due to disclosures of confidential information" is at issue because of Keller's extensive relationship with USAA CIC and its affiliated companies. (Meat Price Investigators Ass'n, 572 F.2d at 165 (citation omitted).)

Third, it is in "the public's interest in the scrupulous administration of justice" to disqualify Keller from representing the Pleins because Keller's previous representation of USAA CIC and its affiliated companies is in direct conflict with its current representation. (*Id.*) *Cueva v. Garrison*

Property & Casualty Ins. Co., Case No. 10-2-06680-8 (“*Cueva*”) case filed in Piere County clearly demonstrates a similarity between the facts of *Cueva* with those of the *Plein* case, involving “substantially similar claims”. (See USAA CIC’s Brief, pp. 20-26.) There is no question that even if a balancing test was applied, Keller should be disqualified from representing the Pleins due to its former relationship with USAA CIC and its affiliated companies.

3. **Sanders And Hunsaker Are Instructive On Whether Keller’s Representation Of The Pleins Are In Conflict With Its Former Representation Of USAA CIC.**

None of the cases cited by USAA CIC have been overturned. The rules derived from *Sanders* and *Hunsaker* are still very much applicable to this case, as demonstrated by the Commissioner’s Order granting USAA CIC’s Motion for Discretionary Review. (*Id.* at APPBRF_APX004-005.)

But the Pleins would like the Court to disregard *Sanders* and *Hunsaker* because the *Sanders* test clearly demonstrates that Keller violated RPC 1.9. The three requirements to the “substantially related” analysis to determine whether a conflict exists between the representation of the former client with the present representation is as follows:

- (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 a current one that the lawyer could use the confidential information to the client’s detriment.

(Sanders, 121 Wn. App. at 598, 89 P.3d 312 (citing Hunsaker, 74 Wn. App. at 44, 873 P.2d 540).) Interestingly, while the Pleins rely on the analysis in *Best v. BNSF Ry. Co.*, the *Best* court discusses the *Sanders* test and the “switching sides” analysis after Washington’s adoption of the “modern” RPCs. (No. CV-06-172-RHW, 2008 WL 149137 *6-7 (E.D. Wash. 2008) (finding that the disqualification of an attorney was not warranted because he only had information of general policies and procedures and not confidential information that could impact his current representation of “hearing loss claims”); Plein Brief, p. 22 n.10.)

USAA CIC has demonstrated that all of the elements of the *Sanders* test have been satisfied by the egregious facts in this case. (USAA CIC’s Brief, pp. 19-26.) USAA CIC reconstructed Keller’s former representation by using *Cueva* as an example of Keller’s previous representation of USAA CIC and its affiliated companies. (*Id.*) It is undisputed that Keller has confidential information concerning the *Cueva* litigation. (*Id.* at 24-25; CP 29 ¶ 4.) Thus, confidential information from the *Cueva* case, which includes information protected by attorney-client privilege and attorney work product doctrine, are in Keller’s possession and could be used against USAA CIC’s in the *Plein* matter.

To narrowly read *Sanders* and *Hunsaker* as “[t]he matters must have actual facts in common, as opposed to the type of claim advanced or the type of tortious behavior alleged” would essentially eliminate any protections that a former client may have against its former attorney. (Plein Brief, p. 20.) The test clearly states that if a former factual matter is sufficiently similar to the current one, there is a conflict of interest. (*Sanders*, 121 Wn. App. at 598, 89 P.3d 312 (citing *Hunsaker*, 74 Wn. App. at 44, 873 P.2d 540).) There is no question that the *Cueva* case is factually similar to the factual issues in *Plein* and meets the elements of the *Sanders* test. (USAA CIC’s Brief, pp. 19-26.)

4. A Factual Comparison of *Cueva* and *Plein* Demonstrates How Comment 2 of RPC 1.9 Disqualifies Keller From Representing The Pleins.

The Pleins argue that USAA has taken the following statement from Comment 2 of RPC 1.9 out of context: “The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.” (RPC 1.9 cmt. 2; *Sanders*, 121 Wn. App. at 598, 89 P.3d 312 (citation omitted); Plein Brief, pp. 16-17.) Exactly how this sentence was taken “out of context” is unclear, nor do they explain how USAA CIC has failed to analyze *Sanders* even though USAA CIC analyzed the elements of the *Sanders* test. (Plein Brief, pp. 16-17; USAA CIC’s Brief, pp. 13-15; 19-

26.) The fatal flaw in the Pleins' argument concerning Comment 2 is that Keller is not representing the Pleins in a "factually distinct problem" from its previous representation of USAA CIC and its affiliated companies. Keller reads this phrase so narrowly that any representation that have different facts would allow a law firm to represent any client that is adverse to its former client, essentially nullifying any protections for a former client and degrading its duty of loyalty to its former client. (Plein Brief, pp. 16-23.)

The inquiry is not whether the facts *are* identical, but rather same or substantially related: "The substantial relationship inquiry 'does not require that the issues in the two representations be identical. The relationship is measured by the allegations in the complaint and by the nature of the evidence that would be helpful in establishing those allegations.'" (FMC Technologies, Inc. v. Edwards, 420 F. Supp. 2d 1153, 1159 (W.D. Wash. 2006) (quoting Trone v. Smith, 621 F.2d 994, 1000 (9th Cir. 1980)).)

A simple comparison of the **facts** as alleged in the respective complaints of *Cueva* and *Plein* clearly demonstrates the similarities or "facts in common". (CP 1-7; CP 117-125; USAA CIC's Brief, pp. 19-26; Plein Brief, pp. 18, 20.) USAA CIC is not arguing that the *Cueva* and *Plein* cases are only similar because they are bad faith or a delay in coverage

cases, but the similarities are in the issues and policy provisions that are implicated by the **facts** in those cases:

- the contractors used by the insureds were allegedly part of USAA CIC's and its affiliated companies' Property Direct Repair Program ("PDRP") program;
- the respective insurance claims and ongoing issues in the lawsuits concerned smoke damage; and
- the insureds alleged that USAA CIC and its affiliated company failed to properly remediate and investigate. (CP 3 ¶¶ 3.6-3.18; CP 102-103 ¶ 11; CP 118 – CP 119 ¶¶ 2.3-2.7; CP 121-122 ¶¶ 2.13, 3.3; CP 124-125 ¶¶ 5.1-5.3.)

When "[t]he underlying *dispute* is about the same conduct", then there is a factual connection (or "facts in common") between the two cases. (FMC Technologies, Inc., 420 F. Supp. 2d at 1160 (emphasis in original); Plein Brief, pp. 18, 20.) As such, the facts of *Cueva* and *Plein* meet the "same or substantially related" standard under RPC 1.9 just based upon the factual allegations in the respective complaints. The comparison of the **factual allegations** of *Cueva* and *Plein* reveal the nexus, or the substantially related facts as described in *Sanders* and *Hunsaker*. (CP 3-5 ¶¶ 3.6-3.18, 3.24-3.25, 3.28-3.31, 4.1, 5.1, 6.1; CP 102-103 ¶ 11; CP 118 – CP 119 ¶¶ 2.3-2.7; CP 121 ¶ 2.13; CP 122-123 ¶¶ 3.1-3.5; CP 124-125 ¶¶ 5.1-5.3;

Sanders, 121 Wn. App. at 598, 89 P.3d 312 (citing Hunsaker, 74 Wn. App. at 44, 873 P.2d 540).) To suggest otherwise is a clear attempt to ignore the fact that Keller has “changed sides” as explained in Comment 2 of RPC 1.9. Accordingly, USAA CIC is not asking the Court to disregard Comment 2 – it is asking the Court to enforce RPC 1.9 as illustrated by Comment 2 due to the facts presented by this case.

5. Keller Has Confidential Information That Is Not Limited To General Knowledge About Policies And Procedures, And USAA CIC Contends That The Risk Of Disclosure Of That Confidential Information Disqualifies Keller.

The Pleins narrowly reads USAA CIC’s argument about the confidential information in Keller’s possession by arguing that information normally turned over in discovery does not disqualify a firm from representing an adverse client. (Plein Brief, pp. 23-24) But the Pleins ignore *all* of the information in Keller’s possession, which is not limited to information normally turned over in discovery. A substantial relationship is presumed “[i]f there is a reasonable probability that confidences were disclosed which could be used against the client in later, adverse representation, . . .” (Trone, 621 F.2d at 998.)

“[A] commonality of legal claims or issues is not required. . . [T]he inquiry is whether ‘the attorneys were trying to

acquire information vitally related to the subject matter of the pending litigation.’ . . . What confidential information could have been imparted involves considering what information and facts ought to have been or would typically be disclosed in such a relationship.”

(Hunsaker, 74 Wn. App. at 44, 873 P.2d 540 (emphasis added) (quoting Koch v. Koch Industries, 798 F. Supp. 1525, 1536 (D. Kan. 1992).)

Because of the extensive ten (10) year attorney-client relationship, Keller has information that cannot be disputed as attorney-client privilege and attorney work product. (CP 29-30; CP 99-102 ¶¶ 5-10; CP 103 ¶ 12.) It is incomprehensible how many thousands of pages of emails, notes, work product, drafts, etc. that are in Keller’s possession. To contend that there could not be information that would be adverse to USAA CIC in this case is nonsensical, especially given the nature of Keller’s former representation of USAA CIC and its affiliated companies that just ended three (3) months prior to Keller accepting the *Plein* representation. (CP 29-30; CP 99 ¶ 5; *Plein* Brief, pp. 3-4.) *Cueva* is just one example of a case where Keller obtained the confidential information during its representation of USAA CIC and its affiliated companies. (CP 99-103 ¶¶ 5-12.)

“Matters are ‘substantially related’ . . . if they involve the same . . . 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.” (RPC 1.9 cmt. 3; USAA CIC’s Brief, p. APPBRF_APX015.) An interpretation of an insurance policy and the provisions contained therein are covered under attorney work product doctrine and attorney-client privilege. Thus, contrary to the Pleins’ argument, Keller’s interpretation and analysis of the PDRP program based on the facts and information in Keller’s possession due to its previous representation is directly relevant and applicable to the PDRP issue in *Plein*. (CP 3-5 ¶¶ 3.6-3.18, 3.24-3.25, 3.28-3.31, 4.1, 5.1, 6.1; CP 102-103 ¶ 11; CP 118 – CP 119 ¶¶ 2.3-2.7; CP 121 ¶ 2.13; CP 122-123 ¶¶ 3.1-3.5; CP 124-125 ¶¶ 5.1-5.3; Plein Brief, pp. 23-24, 28.) Therefore, the confidential information in Keller’s possession is not limited to the “general knowledge of policies and procedures of an organizational client” and can be used to the prejudice of USAA CIC and its affiliated companies. (Plein Brief, pp. 23-24.)

6. The Egregious Facts Of The Plein Representation Cannot Be Found In Any Case From Any Other Jurisdiction.

The Pleins cite to other case in other jurisdictions with allegedly “similar” facts to the instant case and argue they are instructive when applying Comments 2 and 3 of “modern” RPC 1.9 in the context of former corporate clients. (Plein Brief, pp. 25-29.) Nothing could be further from

the truth. All of the cases cited by the Pleins can be used to support USAA CIC's arguments.

For example, in *Watkins v. Trans Union, LLC*, the court found that RPC 1.9 was not violated per Comment 2 because the dispute did not involve the "same transaction or legal dispute." (869 F.3d 514, 520-21 (7th Cir. 2017), rehearing denied, (Sept. 27, 2017).) However, the attorney's representation of his former client ended **ten (10) years earlier**. (*Id.* at 516-17.) By contrast, the amount of time that has passed prior to Keller accepting the Plein representation was **three (3) months**. (CP 26-27 ¶¶ 3-4; CP 29-30; CP 99 ¶ 5; Plein Brief, pp. 3-4.) Furthermore, unlike *Watkins*, USAA CIC is contending that it is not only the knowledge gained from "experience" that would be used against it in the *Plein* case – it is **all of the confidential information Keller gained through its ten (10) year representation of USAA CIC and its affiliated companies** that is at issue in this case. (USAA CIC's Brief, pp. 19-28; 869 F.3d at 522.) The fact that there is confidential information within Keller's possession and Keller accepted the representation of an adverse client within three (3) months of ending its relationship with USAA CIC creates a substantial risk against USAA CIC. (CP 26-27 ¶¶ 3-4; CP 29-30; CP 99-102 ¶¶ 5-10; CP 103 ¶ 12; Plein Brief, pp. 3-4.) Finally, the Pleins also fail to mention that the *Watkins*

attorney was disqualified from two prior cases against his former client prior to the *Watkins* case. (869 F.3d at 517.)

The *Bradley* court used *Sears, Roebuck & Co. v. Stansbury*, 374 So. 2d 1051 (Fla. Dist. Ct. App. 1979) to analyze rule of professional conduct 1.9. (*Health Care & Ret. Corp. of Am. Inc. v. Bradley*, 961 So. 2d 1071, 1073 (Fla. Dist. Ct. App. 2007).) *Stansbury* found that disqualification of an attorney was warranted because the issues in his former case concerned defects of the same lawnmower as the *Stansbury* case and “the connection between two cases was ‘obvious’.” (374 So. 2d at 1053.) Similarly, the allegations in *Cueva* and *Plein* concerns USAA CIC’s and its affiliated companies’ PDRP program and the insurance provisions that were affected by the PDRP program. (CP 3-5 ¶¶ 3.6-3.18, 3.24-3.25, 3.28-3.31, 4.1, 5.1, 6.1; CP 102-103 ¶ 11; CP 118 – CP 119 ¶¶ 2.3-2.7; CP 121 ¶ 2.13; CP 122-123 ¶¶ 3.1-3.5; CP 124-125 ¶¶ 5.1-5.3.) Therefore, the *Bradley* court’s analysis of *Stansbury* supports USAA CIC’s position that the alleged “defectiveness” of the PDRP program meets the RPC 1.9 standard of “same or substantially similar”, and that the matter has “facts in common.” (*Bradley*, 961 So. 2d at 1073; *Stansbury*, 374 So. 2d at 1053; *Plein* Brief pp. 18, 20.)

The *Miskel* case concerned the disqualification of an **incoming attorney** that potentially had a conflict of interest based on her former

representation of a client from a previous firm. (*Miskel v. SCF Lewis & Clark Fleeting LLC*, No. 3:14-cv-338-SMY-DGW, 2016 WL 3548438 *1 (S.D. Ill. June 30, 2016).) More specifically, the essential question in *Miskel* is whether the transfer of ownership of a company to a new company results in the continuing duties to a former client as a result of the previous attorney-client relationship of the acquired company. (*Id.* at *5.) While the court went further noted that the attorney’s “entry of appearance . . . [was] troubling”, she did not have confidential information as a result of the prior representation. (*Id.*) As such, the court did not find the disqualification of the firm nor the attorney was necessary. (*Id.*) These facts are not the same facts as *Plein* because Hecht is not a new attorney, USAA CIC was not acquired by any other company, and there is no question that Keller has confidential information in its possession. (CP 29-30; USAA CIC’s Brief, pp. 24-25.)

Finally, *Olajide* concerns a case that resulted in a default judgment (which was outsourced to be enforced by a third party) prior to the *Olajide* attorney joining the law firm. (*Olajide v. Palisades Collection, LLC*, No. 15-CV-7673, 2016 WL 1448859 *1-2 (S.D.N.Y. Apr. 12, 2016).) After the attorney left the law firm, the attorney agreed to represent the judgment-debtor against the attorney’s former firm and former client. (*Id.* at *2.) Although the court did not find a conflict because the default judgment was

entered *prior* to the attorney joining the law firm, it *did not preclude a future conflict and disqualification*. (*Id.* at *4-5.) If the attorney decided to proceed with a class action against his former firm and former client, then the court may have to revisit the attorney's disqualification if his clients included judgment debtors where the judgments were entered while the attorney was working for the law firm. (*Id.* at *5.) Furthermore, the court also noted that the *Olajide* attorney had been previously disqualified from other cases due to a conflict of interest. (*Id.* at *4.) Again, this case is not instructive because Hecht has been at Keller for over 30 years and represented USAA CIC and its affiliated companies until November 2017. (CP 29; CP 99 ¶ 5; CP 101 ¶ 9.) If anything, *Olajide* supports USAA CIC's argument that there is a conflict of interest due to Hecht's representation of USAA CIC and its affiliated companies.

In sum, while the Pleins try to argue their position based on cases from other jurisdictions, their attempt falls flat. None of the cases cited have the egregious facts that are comparable to those in *Plein*, let alone that are similar to those in *Plein*. In fact, rather than discrediting USAA CIC's arguments concerning Keller's conflict of interest, these cases support USAA CIC's position that Keller's disqualification is warranted.

7. Attorneys Are Bound By The Duty Of Loyalty To Their Former Clients.

RPC 1.9 is concerned about the prohibition of disclosure of confidences and breaching the duty of loyalty that an attorney owes his clients. (*See, e.g., Sanders*, 121 Wn. App. at 599, 89 P.3d 312 (citing *Teja v. Saran*, 68 Wn. App. 793, 798-99, 846 P.2d 1375 (1993), review denied, 122 Wn.2d 1008 (1993)).) More specifically, RPC 1.9(c) concerns itself with the continuing duty of loyalty an attorney owes its former client. But according to the Pleins, Keller does not have a duty of loyalty to USAA CIC and its affiliated companies as a former client because the concept “is out of date” as applied to RPC 1.9. (Plein Brief, pp. 31-33.)

Perhaps the Pleins are strict constructionists and only apply the duty of loyalty to current clients. (*See* RPC 1.7 - Conflict of Interest: Current Clients; RPC 1.8 - Conflict of Interest: Current Clients: Specific Transactions.) But to strictly apply the duty of loyalty only to current clients is nonsensical, especially given the fact that RPC 1.9 and RPC 1.10 obligates a lawyer to conduct him/herself in a manner that is not detrimental to a former client. (*See also* RPC 1.10 cmt. 2, 3.)

Furthermore, an attorney is bound by RPC 1.6 and 1.9 to hold in confidence information related to the representation of a former client and is bound by the duty of loyalty to keep these confidences. (*In re Disciplinary Proceeding Against Botimer*, 166 Wn.2d 759, 769, 214 P.3d 133 (2009) (en

banc).) The duty of loyalty is not an outdated concept when applied to RPC

1.9. Attorneys are bound by the duty of loyalty to their former clients.

8. Attorneys Are Bound To Act Ethically And Professionally To Maintain Society's Respect And Confidence In The Legal Profession.

The Pleins further argue that the appearance of impropriety is an “outdated concept” because “it was no longer helpful to the analysis of questions under [RPC 1.9].” (Plein Brief, pp. 31-32.) However, the appearance of impropriety is still part of the “modern” RPCs. To argue otherwise is to suggest that attorneys can act unprofessionally and unethically without impunity. The “Fundamental Principles of Professional Conduct” of the “modern” RPCs explains why an attorney cannot act with the “appearance of impropriety”:

Lawyers, as guardians of the law, play a vital role in the preservation of society. To understand this role, lawyers must comprehend the components of our legal system, and the interplay between the different types of professionals within that system. To fulfill this role lawyers must understand their relationship with and function in our legal system. **A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.** . . .

But in the last analysis **it is the desire for the respect and confidence of the members of the legal profession and the society which the lawyer serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct.** *The possible loss of that respect and confidence is the ultimate sanction.* So long as its practitioners are guided by these principles, the law will

continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.

(RPC: Fundamental Principles of Professional Conduct (emphasis added).)

As a “noble profession”, attorneys are bound to act ethically and professionally as members of the legal profession, without any actual or perceived impropriety. (*Id.*)

However, Keller’s representation of Pleins created an appearance of impropriety because it was

- adverse to its former clients, USAA CIC and its affiliated companies; (CP 26-27 ¶ 3; CP 29; CP 99-100 ¶¶ 5-6; Plein Brief, p. 18.)
- accepted within three (3) months of ending its attorney-client relationship with USAA CIC and its affiliated companies; (CP 26-27 ¶¶ 3-4; CP 29; CP 99-100 ¶¶ 5-6; Plein Brief, pp. 3-4.)
- accepted while knowing Keller had confidential information from its prior representation of USAA CIC and its affiliated companies; (CP 26-27 ¶¶ 3-4; CP 29; CP 99-103 ¶¶ 5-12; Plein Brief, pp. 3-4.) and
- was accepted knowing that Hecht and her staff was still at Keller and who all have access to the confidential

information of USAA CIC and its affiliated companies. (CP 26-27 ¶¶ 3-4; CP 29; CP 99-103 ¶¶ 5-12.)

This case exemplifies why the ethical rules embody the concept of impropriety. Keller's actions violated the ethical rules and compromised "the respect and confidence of the members of the legal profession and the society." (RPC: Fundamental Principles of Professional Conduct.) As such, the RPCs encompass the concept of impropriety because it provides the gauge for attorneys to act with the "highest degree of ethical conduct". (*Id.*)

9. Disqualification Of Keller Is Appropriate Because Keller Intentionally Disregarded The Conflict And Any Harm Or Harassment That Will Result Is Based On Keller's Actions Alone.

Based upon the glaring facts presented by this case, disqualification is not too drastic of a measure to impose onto to Keller. Keller admits to identifying a conflict of interest, yet decided to represent the Pleins. (CP 26-27 ¶¶ 3-4; Plein Brief, pp. 3-4.) Keller came to this decision despite its knowledge that Hecht was in possession of confidential information concerning cases she represented USAA CIC and its affiliated companies for over ten (10) years. (CP 26-27 ¶¶ 3-4; CP 29-30; Plein Brief, pp. 3-4.) This is a clear violation of the RPCs. (*See* RPC 1.9; RPC 1.10.) If Keller is allowed to continue to represent the Pleins despite the egregious facts in

this case, then it would set a dangerous precedent and essentially nullify RPC 1.9 and RPC 1.10 protections guaranteed to former clients.

Any alleged harm or harassment the Pleins have or will suffer is no fault of USAA CIC, but is due to the actions taken by Keller. (CP 8-9; CP 27 ¶¶ 4-6; CP 29-30; Plein Brief, pp. 3-4, 15.) USAA CIC’s counsel requested on numerous occasions for Keller to disqualify itself from representation due to its clear conflict of interest. (CP 16; CP 18; CP 27 ¶ 6; CP 29; Plein Brief, pp. 5, 7.) Keller ignored these requests. (CP 16; CP 18; CP 27 ¶ 6; CP 29; Plein Brief, pp. 5, 7.) To suggest that USAA CIC using this as a harassment tactic is simply unfounded. (Plein Brief, p. 15.) The RPCs are clear that the actions taken by Keller violated the Rules, and thus should be disqualified. The “harassment” in this case is the result of Keller ignoring the conflict of interest and accepting to represent an adverse client to USAA CIC despite knowing of the conflict. “Any prejudice [the Pleins] face is due to their attorneys’ decision to ignore a conflict of interest, . . .” (FMC Technologies, Inc., 420 F. Supp. 2d at 1162.)

C. CONCLUSION

For all of the foregoing reasons stated above, the lower court erred in granting the Pleins’ motion allowing Keller to continue to represent them in a lawsuit against a former client, USAA CIC. Keller blatantly ignored the conflict and accepted the Plein representation despite discovering

Keller's previous representation of USAA CIC and its affiliated companies just three (3) months prior.

The trial court's failure stems from its lack of analysis of RPC 1.10 and RPC 1.9 when it granted the Pleins' Motion allowing Keller to continue its representation. This decision ignored the extensive relationship that developed between Keller and USAA CIC, prejudicing USAA CIC's defense in the *Plein* matter. Disqualification is the only appropriate remedy for the prejudice that USAA CIC has and will suffer in this case.

Therefore, the trial court erred when it granted the Pleins' Motion for Ruling on Plaintiffs' Counsel's Conflict of Interest. Accordingly, USAA CIC respectfully requests this Court to reverse the trial court's decision and disqualify Keller from representing the Pleins any further.

DATED THIS 19th day of December 2018.

Respectfully submitted,
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