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COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

RICHARD PLEIN, a married person, and
DEBRA PLEIN (formerly Debra De Witt),
a married person, and the marital community
composed thereof,

Respondents,

vs.

USAA CASUALTY INSURANCE COMPANY,
an insurance company,

Petitioners,

and

THE STERLING GROUP, INC. (doing business as
Sterling Group, DKI), a corporation,

Respondents.

BRIEF OF RESPONDENTS

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A. INTRODUCTION

USAA Casualty Insurance Company (“USAA”) seeks to deprive Richard and Debra Plein of their chosen counsel, the law firm of Keller Rohrback L.L.P. (“Keller”), as a tactic in this litigation, something our Rules of Professional Conduct (“RPC”) deplore. Preamble [20] (“...the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.”). USAA unsuccessfully sought to disqualify Keller from representing the Pleins in the trial court. The trial court, having read the plain language of RPC 1.9 and Comments 2 and 3 thereto, made factual findings and declined to disqualify Keller.

Now, USAA seeks this Court’s review. However, instead of confronting the trial court’s findings and the *complete, plain* language of the RPC and its comments, USAA cobbles together out-of-context phrases from one comment with out-of-context statements from cases that predate the modern, more narrow iteration of RPC 1.9.

This Court should uphold the trial court’s decision. Numerous courts in both state and federal jurisdictions have held that former corporate clients cannot forever bar attorneys from representing adverse clients in factually unrelated matters. A matter being of the same type, or alleging a similar tort claim, does not make that matter *factually related* under the rule.

B. STATEMENT OF THE CASE¹

The Pleins purchased from USAA an insurance policy that provided coverage for fire damage to their home. CP 3. In August 2015, a fire occurred that damaged their home and personal property. *Id.* Agreeing that the policy covered the occurrence, USAA recommended The Sterling Group, LLC, to perform repairs on the house. *Id.* The Pleins hired Sterling based on USAA's recommendation. *Id.*

After Sterling told them repairs had been completed, the Pleins moved back into their home. However, they noticed a substantial smoke odor remained. *Id.* They discovered that rather than repair the damage, Sterling had simply concealed unrepaired damage. *Id.* They hired a public adjuster to assist them. *Id.* at 4. USAA hired an industrial hygienist, who discovered numerous deficiencies in work. The public adjuster identified still more problems. *Id.* USAA failed to investigate or offer payment for the additional repairs for more than a year. As of November 2017, more than two years after the fire occurred, USAA still had not provided coverage for the repairs. *Id.*

In November 2017, the Pleins filed a complaint against USAA. During the last week of January 2018, the Pleins' counsel, Joel Hanson,

¹ The facts regarding the underlying case are taken from the Pleins' complaint. For the purposes of this appeal, these facts are not at issue, and USAA's brief appears to accept them as true *arguendo*.

approached Keller partner, William Smart, about representing the Pleins. Hanson maintains an independent law practice unaffiliated with Keller; he has never represented USAA. CP 15.

Irene Hecht, a partner at Keller, did represent USAA for a number of years in coverage and insurance bad faith claims brought by USAA policyholders. CP 14.² The attorney-client relationship between USAA and Keller ended in the fall of 2017. *Id.* It is undisputed that from November 2017 forward USAA became a former client of the firm within the meaning of RPC 1.9.

Keller performed a standard conflict check that revealed the past representation of USAA, but nothing relating to the Pleins, confirming that Keller's past work for USAA never involved anything relating to the Pleins, their insurance claim, or their lawsuit. CP 15.³

² Although no screening is required due to the lack of a conflict, Hecht has no involvement in the present matter. *Id.* Keller's USAA representation was performed solely by Hecht and by attorneys and staff reporting to her. *Id.* Indeed, during Keller's USAA representation, its attorney-client communications were not shared outside Hecht and her team. This was so on both a formal and informal basis. On a formal basis, the firm maintained internal controls to prevent access by lawyers and staff outside of Hecht's team to any material relating to any USAA matters. Thus, even if another member of the firm attempted to access a USAA file, the access would be denied automatically. *Id.* On an informal basis, lawyers at the firm customarily did not discuss confidential client information outside the lawyers and staff working on a particular matter. *Id.*

³ At no time did Keller or any of its lawyers or staff perform any USAA work regarding the Pleins' insurance claim or the Plein matter, nor was the matter ever called to the firm's attention. CP 14. Neither Hecht nor any Keller attorneys or staff who formerly worked on USAA matters had any contact with Hanson or the Pleins, nor with the Plein file. CP 15.

Over the week of January 22, 2018, Hanson spoke on the phone with Smart; Hanson and the Pleins met with Smart and Keller partner, Ian Birk. Smart and Birk never represented USAA. They had no knowledge of any attorney-client communications with USAA, and no knowledge of, and no access to, any USAA files or documents provided to Keller at any time. *Id.*

After the meeting, the Pleins retained Smart and Birk to work with Hanson. *Id.* Knowing of the firm's former representation of USAA, but having no reason to believe the *Plein* matter had any connection to any work the firm had done for USAA such that the matter was not substantially related to any prior matter, Smart and Birk agreed to the representation. *Id.*

On January 25, 2018, Birk sent a letter to USAA's counsel advising that the firm would shortly appear on behalf of the Pleins and asking about USAA's lack of reimbursement of the Pleins' utility expenses, explaining that the Pleins would seek relief from the Court if USAA did not resume paying their utilities. CP 15-16.

On January 30, 2018, Smart and Birk filed a notice of association as the Pleins' counsel and filed a motion regarding ongoing payment of utilities. CP 16.

Approximately an hour later, USAA responded through counsel, asserting that Keller's representation of the Pleins created a conflict of

interest, and demanding that Keller withdraw immediately and threatening to move to disqualify both Keller and Hanson if Keller did not withdraw:

Irene,

Good evening. We represent USAA Casualty Insurance Company ("USAA CIC") in the *Plein v. USAA CIC et ano.* matter venued in King County Superior Court.

About an hour ago, we were surprised to receive the attached Notice of Association of Counsel of your firm – specifically, your colleagues William Smart and Ian Birk (cc'd here) – associating as co-Plaintiffs' counsel in this case.

Given that until just 3 months ago you and the Keller Rohrback firm represented USAA CIC as well as its affiliated entities in a large number of active matters, your firm's recent retention on behalf of Plaintiffs in the *Plein* matter represents a direct conflict against a former firm client, in violation of RPC 1.9 and 1.10.

Per RPC 1.10(a), "while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7 or 1.9" Per RPC 1.9(a), "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or 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."

USAA CIC has not waived this, or any, conflict as between your firm and USAA CIC, or any of its affiliates.

We write to demand your firm's **immediate** withdrawal as counsel of record in this matter. Should we not receive a Notice of Withdrawal of the Keller Rohrback firm and your colleagues within the next 24 hours, we will file a Motion to Disqualify your firm from this case. We will also move to disqualify co-Plaintiffs' counsel Joel Hanson on the grounds that his representation is likewise tainted by this direct conflict.

We look forward to hearing from you and your colleagues.

Regards,
Josh Kastan

CP 16.

The next day, Keller consulted with outside ethics counsel, Seattle University Professor David Boerner. CP 17. Keller believed, and Professor Boerner confirmed, that it could not simply withdraw from representing the Pleins based on USAA's assertion of a conflict, as this would not be in the Pleins' best interest. *Id.*

Later that day, Hanson sought clarification from USAA's counsel about whether USAA was seeking his disqualification:

Mr. Kastan:

I respectfully disagree with your position. I am not aware of any reason why I should be disqualified from this matter. Nor do I agree that I am somehow "tainted". I do not know any confidential or secret information about USAA. I have never represented USAA in any capacity.

I am troubled by your email because it indicates that you will seek my disqualification if Mr. Smart and Mr. Birk do not immediately withdraw, but if they do withdraw you will not object to my continued representation of the Pleins. I perceive this to be a threat to seek my disqualification without any basis. Please let me know if I am mistaken.

I am also frustrated that your email demanded a reply within 24 hours. I wish USAA would demonstrate the same 24-hour urgency for the Pleins, who are presently living without heat.

Regards,

Joel Hanson

Id.

USAA responded, claiming that the reason it needed immediate withdrawal by Keller was that the Pleins had filed a motion relating to USAA's nonpayment of their ongoing utility expenses. *Id.* USAA's counsel implied that it would be flexible about the timing of addressing the conflict issue, if the Pleins would give USAA more time to respond on the utility issue:

Joel,

Thank you for your e-mail. The Keller Rohrback firm's association as your co-counsel in this case remains seriously troubling to us and our client given the direct conflict. We have still heard nothing from them, and have not received any notice of their withdrawal.

Given that you and your co-counsel have opted to note Plaintiff's Motion for the absolute minimum notice period under LCR 7, you left us with no choice but to urge you and your co-counsel to respond to our request within a shortened timeframe. We intend to get our motion to disqualify on-calendar shortly. However, if Plaintiff agrees to continue the noted date for the motion, we can also work with you regarding timing to confer further regarding our position as to disqualification.

It is our view that the longer the Keller Rohrback firm remains in the case, the greater the taint to your continued representation of Plaintiffs as co-counsel. Given their significant and lengthy relationship with USAA as their counsel, and the extensive records and knowledge that Keller Rohrback has relative to attorney-client communications with USAA, the prejudice to USAA in both Keller Rohrback and your continued conflicted representation is overwhelming – and growing with each passing day.

Regards,
Josh Kastan

CP 18. This proposal was not in the Pleins' interest. At the time of this exchange, the Pleins were out of heating oil and, living paycheck-to-paycheck, faced difficulty paying for fuel. Even though the Pleins' residence was damaged, they still were forced to pay ongoing expenses related to it, such as the mortgage and the house's upkeep. The rent and the utilities at their temporary rental were additional living expenses covered under the ALE portion of their USAA policy. USAA appeared to leverage the asserted conflict to further delay addressing the Pleins' covered ALE.

Id.

Professor Boerner completed his analysis, concluding that Keller's representation of the Pleins was not a prohibited conflict, because the *Plein*

matter was not substantially related to any matter on which Keller formerly represented USAA in a declaration. CP 31-37.⁴

Hanson and Keller filed a motion in the trial court, before the Honorable Veronica Alicea-Galván, seeking a ruling on whether they must be disqualified in the Pleins' representation. CP 13-25. USAA filed a response asserting that both Hanson and Keller should be disqualified under RPC 1.9(a). CP 63-75. It submitted a declaration from Professor Hugh Spitzer to counter the Boerner declaration. CP 76-82.

The trial court entered an order on February 14, 2018, making the specific finding that this case “is factually distinct from and not substantially related to the firm’s prior representation of USAA and as a result, the firm’s representation of the Pleins is not a conflict under RPC 1.9.” CP 129-30. Substantial evidence supported the trial court’s decision. It ruled that Hanson⁵ and Keller could continue representing the Pleins. CP 130.

⁴ Meanwhile, although no sharing of USAA material ever occurred within the firm, the firm again instructed all firm personnel to screen any past USAA information from firm personnel who did not work on USAA matters, including specifically those working on the *Plein* matter. CP 27.

⁵ Hanson never had any conflict of interest in this matter, and USAA had no basis to disqualify him. This Court agreed in the ruling granting discretionary review. Appendix B. USAA has finally now abandoned any claim that Hanson should be disqualified as it does not raise such an argument in its brief.

The trial court also granted the Pleins' emergency motion asking for USAA to comply with its policy terms and make interim payments for the Pleins' utility costs while they are living in their rental home. Appendix A.

USAA filed two notices for discretionary review by this Court. CP 131-37. The first, in which it challenged the trial court's ruling granting the Pleins' emergency motion requiring USAA to make interim payments, was denied. Appendix A.⁶

USAA's second request for review challenged the trial court's denial of disqualification. CP 131-37. In response, the Pleins noted that the trial court's ruling was correct under RPC 1.9 and Comments 2 and 3. However, this Court ruled that discretionary review was appropriate because Hecht handled bad faith matters for USAA, and the Pleins' complaint included similar types of claims. Appendix B. Keller moved to modify that decision, and this Court has not yet ruled on the motion.

C. SUMMARY OF ARGUMENT

The trial court's finding that the present case is factually distinct from any prior Keller representation of USAA is supported by substantial evidence; the trial court correctly ruled that Keller should not be disqualified. The plain language of RPC 1.9, particularly Comments 2 and

⁶ USAA has not sought further review of that decision. The argument, however, documents the extent to which USAA would go in depriving the Pleins of necessary living expenses for their temporary rental, including heating expenses during the winter.

3, foreclose USAA’s disqualification argument. The text of the rule prohibits representation adverse to a former client only in the “same” or a “substantially related” matter. As described below, this requires a genuine factual connection between the matters. The comments expressly clarify that the prohibition does not extend to serial matters merely of the same “type” if they are factually distinct. USAA has not alleged that any Keller attorney worked on the *Plein* matter, or that the *Plein* matter is factually *related* to any former matter on which Keller attorneys worked. Nor has USAA alleged even hypothetical confidences that could be used to its detriment here. All USAA alleges is that the *Plein* matter is similar in *type* to other matters, and that Keller attorneys learned about USAA’s policies and procedures. USAA’s remaining arguments are red herrings and tautologies.

The trial court’s denial of disqualification was appropriate.

D. ARGUMENT

(1) Standard of Review and Principles Governing Motions to Disqualify an Opponent’s Counsel

A trial court’s decision to deny disqualification is reviewed for abuse of discretion. *Pub. Util. Dist. No. 1 of Klickitat Cty. v. Int’l Ins. Co.*, 124 Wn.2d 789, 811–12, 881 P.2d 1020 (1994). A trial court abuses its discretion when it makes a decision based on untenable grounds or for

untenable reasons. *State v. Orozco*, 144 Wn. App. 17, 19–20, 186 P.3d 1078, *review denied*, 165 Wn.2d 1005 (2008). Whether an attorney’s conduct violates a relevant rule of professional conduct is a question of law reviewed *de novo*. *Eriks v. Denver*, 118 Wn.2d 451, 457-58, 824 P.2d 1207 (1992).

Our Supreme Court adopts the RPCs as a function of its power to regulate the practice of law in Washington. *Hizey v. Carpenter*, 119 Wn.2d 251, 261, 830 P.2d 646 (1992). The current version of the RPCs, including the official comments thereto, was adopted in 2006. *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 76 n.13, 331 P.3d 1147 (2014). The 2006 rules were adapted from the American Bar Association Model Rules, promulgated in 2003. Johanna M. Ogdon, *Washington’s New Rules of Professional Conduct: A Balancing Act*, 30 Seattle U. L. Rev. 245 (2006).

Critical to the argument here is the fact that the Comments to RPC 1.9 adopted in 2006 emanate from our Supreme Court, the ultimate authority for lawyer discipline in Washington. *In re Disciplinary Proceedings Against Marshall*, 160 Wn.2d 317, 329, 157 P.3d 859 (2007). Those Comments must guide the understanding of the RPC, notwithstanding whatever Court of Appeals case law prior to 2006 might have provided. Preamble [14] (“Comments do not add obligations to the Rules but provide guidance for practicing *in compliance with the Rules*.”)

(emphasis added); Preamble [15] (“The Comments are sometimes used to alert lawyers to their responsibilities under such other law.”); Preamble [21] (“The Comment accompanying each Rule explains and illustrates the *meaning and purpose of the Rule*... The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.”) (emphasis added). *See generally, State Farm Mut. Auto. Ins. Co. v. Sanders*, 975 F. Supp. 2d 509, 511 (E.D. Pa. 2013).

Because the modern iteration of RPC 1.9 with its clarifying comments was only adopted in Washington in 2006, there is a dearth of case law applying the updated rules. A survey of cases involving modern disqualification decisions reveals important guiding principles. Consideration of a motion to disqualify involves a balancing of competing interests. Among the many competing interests are maintaining the integrity of the legal community and the legal process, protecting litigants from prejudice caused by violations of the rules, and respecting a person's ability to choose her own counsel. *See, e.g., id.; Plant Genetic Sys., N.V. v. Ciba Seeds*, 933 F. Supp. 514, 517 (M.D.N.C. 1996) (“The guiding principle in considering a motion to disqualify counsel 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.”); *Tessier v. Plastic Surgery Specialists, Inc.*, 731 F. Supp. 724, 729 (E.D. Va. 1990) (“There

must be a balance between the client's free choice of counsel and the maintenance of the highest ethical and professional standards in the legal community.”).⁷

The best articulation of a standard encompassing these considerations was advanced by the Eighth Circuit in dealing with disqualification for a similar type of violation as that alleged here—*ex parte* contact with a represented party. In *Meat Price Investigators Ass’n v. Spencer Foods, Inc.*, 572 F.2d 163 (8th Cir. 1978), the court stated that “three competing interests must be balanced: (1) the client’s interest in being represented by counsel of its choice; (2) the opposing party’s interest in a trial free from prejudice due to disclosures of confidential information; and (3) the public’s interest in the scrupulous administration of justice.” *Id.* at 165. Other courts also use a similar test that considers a motion to disqualify by first looking at the rules governing attorney conduct, and then considers those “ ‘in light of the public interest and the litigants’ rights.’ ”

⁷ Keller will not proceed with its representation of the Pleins if that representation would violate RPC 1.9. Keller believes its representation is permissible under the rule, obtained the opinion of an outside ethics expert, and promptly sought a ruling from the trial court. Significantly, however, disqualification is considered so drastic a remedy that even a violation does not automatically justify it. *See, e.g., Chapman Eng’rs, Inc. v. Natural Gas Sales Co., Inc.*, 766 F. Supp. 949, 954 (D. Kan. 1991) (“An ethical violation does not automatically trigger disqualification.... The remedy for unethical conduct lies with the appropriate disciplinary machinery unless there exists the threat of tainting the trial.”); *Papanicolaou v. Chase Manhattan Bank*, 720 F. Supp. 1080, 1083 (S.D.N.Y. 1989) (“It follows that a violation of professional ethics rules does not alone trigger disqualification ...; rather, a trial judge should primarily assess the possibility of prejudice at trial that might result from the attorney's unethical act.”).

Cole v. Ruidoso Municipal Schools, 43 F.3d 1373, 1383 (10th Cir. 1994) (quoting *In re Dresser Indus., Inc.*, 972 F.2d 540, 543 (5th Cir. 1992)); see also, *F.D.I.C. v. United States Fire Ins. Co.*, 50 F.3d 1304, 1311–12 (5th Cir. 1995).

Other general principles underlie this idea of a balancing test. First, violations come in varying degrees of severity, but disqualification is always a drastic measure, which courts should hesitate to impose except when absolutely necessary. See, e.g., *Owen v. Wangerin*, 985 F.2d 312, 317 (7th Cir. 1993); *Metrahealth Ins. Co. v. Anclote Psychiatric Hosp.*, 961 F. Supp. 1580, 1582 (M.D. Fla. 1997) (“The disqualification of one’s chosen counsel is an extraordinary measure that should be resorted to sparingly.”). Because of the impact a motion to disqualify has on the party losing her counsel, the moving party is held to a high standard of establishing the basis of the motion, and the need for disqualification. See, e.g., *Plant Genetic Sys.*, 933 F. Supp. at 517 (“Disqualification is a serious matter which cannot be based on imagined scenarios of conflict, and the moving party has a high standard of proof to meet in order to prove that counsel should be disqualified.”); *English Feedlot, Inc. v. Norden Laboratories, Inc.*, 833 F. Supp. 1498, 1506 (D. Colo. 1993) (“The moving party has the burden of showing sufficient grounds for disqualification.... Specific facts must be alleged and ‘counsel cannot be disqualified on the basis of speculation or

conjecture....’ ”); *Tessier*, 731 F. Supp. at 729 (E.D. Va. 1990) (“The Court is also aware that the disqualification of a party's chosen counsel is a serious matter which cannot be based on imagined scenarios of conflict.”). Other means of addressing a violation short of disqualification are available to the court—like exclusion of ill-gotten evidence—and should be used when appropriate. *See, e.g., University Patents, Inc. v. Kligman*, 737 F. Supp. 325, 329 (E.D. Pa. 1990) (“the court is satisfied that the circumstances warrant precluding the defendants from introducing any information obtained through Mr. Morrison’s *ex parte* contacts with persons whose statements could bind the University.”).

Finally, because a motion for disqualification is such a “potent weapon” and “can be misused as a technique of harassment,” the court must exercise extreme caution in considering it to be sure it is not being used to harass the attorney sought to be disqualified, or the party he represents. *See, e.g., Kitchen v. Aristech Chem.*, 769 F. Supp. 254, 256–57 (S.D. Ohio 1991); *see also, Developments in the Law: Conflict of Interest in the Legal Profession*, 94 Harv. L. Rev. 1244, 1285 (1981) (“Lawyers have discovered that disqualifying counsel is a successful trial strategy, capable of creating delay, harassment, additional expense, and perhaps even resulting in the withdrawal of a dangerously competent counsel.”).

(2) The Plain Language of RPC 1.9 and Its Comments Permit Keller’s Representation of the Pleins and End this Court’s Inquiry

USAA argues that the trial court erred in applying Comment 2 to RPC 1.9. Br. of App. at 13-24. USAA’s brief goes to great lengths to isolate and decontextualize phrases from the RPC 1.9 comments and case law. Simply reading RPC 1.9 in full, including the full text of Comments 2 and 3, reveals that the trial court properly denied USAA’s motion to disqualify Keller here.

(a) Comment 2 Allows Representation in a Subsequent Matter of the Same “Type” If It Is Factually Distinct; USAA Alleges Only that Keller Represented It in Factually Distinct Bad Faith Cases

RPC 1.9 generally governs a lawyer’s duties to former clients, specifically prohibiting a lawyer from representing another person adverse to a former client only “in the same or a substantially related matter.” RPC 1.9(a). Thus, put another way, the lawyer may represent another person adverse to a former client in matters that are not “the same” or “substantially related.” RPC 1.9(a) 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 interests are materially adverse to the interests of the former client.”

The party seeking to disqualify counsel has the burden of proof. *Sanders v. Woods*, 121 Wn. App. 593, 597-98, 89 P.3d 312 (2004). “In order to successfully disqualify a lawyer from representing an adversary, a former client must show that the matters currently at issue are substantially related to the subject matter of the former representation.” *Id.*

USAA argues, by taking language from Comment 2 out of context, that RPC 1.9 prohibits Keller’s representation of the Pleins. Br. of App. at 12-15. USAA relies on the phrase “changing sides” from Comment 2 but nothing else. *Id.* USAA contends that (1) Keller has represented USAA in previous bad faith cases, (2) the Pleins have a bad faith case, and therefore Keller has “chang[ed] sides.” *Id.* at 14. USAA cites, but does not analyze, this Court’s decisions in *Sanders v. Woods*, 121 Wn. App. 593, 89 P.3d 312 (2004) and *Teja v. Saran*, 68 Wn. App. 793, 846 P.2d 1375, *review denied*, 122 Wn.2d 1008 (1993).

However, other plain language in Comment 2 defeats USAA’s entire legal theory on appeal. It states that a lawyer who represented a client in a particular matter may represent an adverse client in a “factually distinct problem of that type”:

When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. *On the other hand, a lawyer who recurrently handled a type of problem for a former client is not*

precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client.

RPC 1.9 cmt. 2 (emphasis added). USAA also ignores that the rule requires not just that Keller is now adverse, which is patently true, but that Keller changed sides “*in the matter in question.*” RPC 1.9 cmt. 2 (emphasis added).

Both of these admonitions from Comment 2 clarify that the trial court properly denied USAA’s motion. USAA admits Keller did not work on the *Plein* matter, which is the “matter in question.” So Keller has not “changed sides in the matter in question.” USAA has alleged only that Keller attorneys worked on factually distinct matters of the same type as the *Plein* matter. USAA *did not* allege, much less prove, that the former matters have specific facts in common with the *Plein* matter. If all USAA does is allege that the former matters were of a similar type, its argument fails.

Neither USAA nor its expert below discussed the official comment to RPC 1.9 that speaks directly to the issue: “*a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the*

prior client.” RPC 1.9 cmt. 2 (emphasis added). USAA’s position is impassioned; but it asks the Court to disregard this law.

USAA’s analysis ignores plain language of RPC 1.9 and its comments and relies instead on out-of-context statements from earlier case law that predates the modern comments. Br. of App. at 12-13. For example, *Sanders*, which USAA cites in support, actually supports the Pleins’ argument here upon review of its facts. In *Sanders*, a hotel owner sued a former employee for violating a noncompete agreement. A lawyer who sought to represent the employee, had previously represented the hotel owner *and had advised the hotel owner on the very noncompete agreement at issue.* *Sanders*, 121 Wn. App. at 596. As Division III explained, that lawyer (and his business partner) had previously sent other former employees “cease and desist” letters based on the same noncompete agreement, and had specifically “reviewed the independent contractor agreements” and advised that they “appeared adequate.” 121 Wn. App. at 598. This Court said that the lawyer was disqualified from representing the employee in a dispute about the same agreement that the lawyer had drafted for the employer. *Id.*

Thus, *Sanders* illustrates what “factually related” means, and it does not support USAA’s argument. It is not enough that the subject matter is

similar. There must be facts in common, such as the facts surrounding the drafting of the noncompete agreement at issue in *Sanders*.

It is true that the third element of the *Sanders* test is worded in a way that seems to support USAA's contention that matters of a similar type are "substantially related." That third element says that after comparing the facts of each case, the trial court should determine "whether any formal factual matter is sufficiently 'similar' to a current one...". *Id.* The word "similar" makes it sound as if similarities in type between cases (i.e., that they are both bad faith cases or both involve delay in coverage) means the matters are substantially similar.

However, *Sanders* predates the Supreme Court's clarification of the Rule's language in Comment 3, which eliminated any argument based on *Sanders* that mere similarity of subject matter or issues is sufficient to warrant disqualification.⁸ The matters must have actual facts in common, as opposed to the type of claim advanced or the type of tortious behavior alleged. RPC 1.9 cmt. 2.

Also, the *Sanders* court followed *State v. Hunsaker*, 74 Wn. App. 38, 43, 873 P.2d 540, 542 (1994), a case which clarified that disqualification

⁸ As explained *supra*, the *Sanders* court actually did correctly analyze whether the two matters shared related facts, as opposed to "similar" facts. However, USAA alights on the imprecise use of the word "similar" in the *Sanders* iteration of the test to try and circumvent the plain language of Comment 2.

is inappropriate if the cases are “unrelated” factually, but of the same “type.”⁹ In *Hunsaker*, the State charged Hunsaker with molestation of a child, M.S. At trial (and with speedy trial an issue), Hunsaker sought disqualification of his defense counsel, because defense counsel had previously represented M.S. in a separate criminal matter against M.S. This Court reversed the trial court’s disqualification of Hunsaker’s counsel, because the separate prosecution of M.S. and the new prosecution of Hunsaker “appear[ed] to be totally unrelated.” *Id.* at 46. On the issue of whether counsel could use the prior representation of M.S. to discredit M.S. as a witness, the court specifically rejected disqualification based on information that “would be available to defense counsel in discovery.” *Id.* at 49.

Teja v. Saran, 68 Wn. App. 793, 800, 846 P.2d 1375, 1379, *review denied*, 122 Wn.2d 1008 (1993) which also predates Comment 2, is inapplicable here. In *Teja*, an attorney who consulted with one client about a matter was disqualified from representing the opposing party in that same matter. *Teja*, 68 Wn. App. at 800. USAA does not assert that any Keller attorney worked for USAA on the *Plein* matter, or received any confidences relating to facts surrounding the *Plein* matter.

⁹ *Sanders* also predates the 2006 adoption of Comment 2 to RPC 1.9 by our Supreme Court, which cleared up any confusion, noting that similar subject matter or issues does not merit disqualification, only related facts.

Applying the plain language of Comment 2, USAA’s argument on appeal fails. USAA points only to the fact that Keller worked on matters of a similar type or involving similar claims. Br. of App. at 22-23.¹⁰ USAA talks about similarity of “issues”, not identity of actual facts. *Id.* In doing so, it *ignores* the trial court’s specific finding that there was no factual similarity in Keller’s representation of the Pleins and its former USAA representations. USAA also states that Keller attorneys were familiar with the company’s “inner workings” and worked on other insurance bad faith cases involving similar kinds of claims, in particular the *Cueva* claim. *Id.* However, other than being claims about similar subject matter, USAA identifies no related facts between them. *Id.*

USAA’s failure to address this language in RPC 1.9 is deliberate. Comment 2 directly contradicts the assertion that the rule prohibits Keller’s representation of a client in every bad faith matter against USAA.

¹⁰ In a case arising in Washington federal courts applying our RPCs, *Best v. BNSF Railway Co.*, 2008 WL 149137 (E.D. Wash. 2008), the court rejected a motion by the railroad to disqualify a lawyer in a FELA case merely because a similar type of case was involved. BNSF contended that the lawyer obtained specialized knowledge of BNSF’s activities from his former representation. The lawyer had served for 10 years as BNSF’s outside counsel. The court rejected the railroad’s assertion that because the lawyer had represented it in numerous FELA cases and 90% of his former firm’s revenues were derived from BNSF representation, the lawyer’s access to sensitive BNSF information and personnel necessarily disqualified him. The court noted that the lawyer had no particular insights or information from his former BNSF work as to a hearing loss matter like the one before the court.

Keller worked on prior bad faith cases, which are nothing more than matters of the same type. USAA does not allege those matters involve the same “transaction” as the *Plein* matter. It concedes that Keller never worked on the *Plein* matter. Comment 2 allows the representation. Keller may represent the Pleins in their “factually distinct” matter without violating RPC 1.9.

(b) Comment 3 to RPC 1.9 Permits Representation Adverse to a Former Institutional Client Even If the Attorney Gained Knowledge of the Former Client’s Policies and Practices

USAA argues that Keller’s knowledge of USAA’s policies and procedures with respect to other bad faith cases nevertheless precludes it representing the Pleins. Br. of App. at 19-24. It argues that in a prior matter, involving unrelated insureds named Cueva, a different USAA affiliate than the co-defendant here failed to remediate smoke damage, and then USAA failed to provide living benefits, delayed handling the plaintiffs’ claim, and put its own interests above the Cuevas’. *Id.* USAA also claims that the policy provisions and damages at issue are similar. *Id.* However, it alleges no actual factual connection between the two matters, only factual “similarity.” *Id.* Instead, it argues the Hecht’s knowledge about USAA’s policies and practices warrants disqualification. *Id.*

Comment 3 to RPC 1.9 expressly refutes USAA's argument. "In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation." Comment 3 also explains that a lawyer does not have a conflict under RPC 1.9 based on knowledge of information (such as the language of an insurance policy) that has been disclosed publicly or to other adverse parties. The comment states: "Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying."

Any knowledge regarding USAA's claims policies and practices *ordinarily turned over in discovery* does not disqualify the firm. Insurers are required to "adopt" and "implement" standards for handling claims under WAC 284-30-330(3), and these standards are routine subjects of discovery. Indeed, in bad faith litigation, it is presumed that virtually all, if not all, of an insurer's claim file must be produced in discovery notwithstanding an insurer's attorney-client privilege. *Cedell v. Farmers Ins. Co. of Wash.*, 176 Wn.2d 686, 700, 295 P.3d 239 (2013). The Court recognized that an insured is presumptively entitled to the insurer's claim file, notwithstanding claims of attorney-client or work product privilege. *Id.* at 696.

(c) As Numerous Courts Have Held Comments 2 and 3 Read Together Support the Trial Court's Decision that a Corporation Cannot Disqualify Its Former Attorney Merely for Representing an Adverse Client in a Similar Area of Law

There is little Washington authority applying Comments 2 and 3 in the context of former corporate clients. However, this Court can rely on authority from other jurisdictions for guidance. *Hunsaker*, 74 Wn. App. at 42.

The Seventh Circuit Court of Appeals, considering precisely the same argument USAA raises here, denied disqualification citing Comments 2 and 3. *Watkins v. Trans Union, LLC*, 869 F.3d 514, 523 (7th Cir. 2017). In *Watkins*, an attorney represented corporate client Trans Union for years, defending it against allegations Trans Union had violated the Fair Credit Reporting Act, 15 U.S.C. § 1681d(b) (FCRA). *Watkins*, 869 F.3d at 517. The lawyer worked with Trans Union's in-house counsel on over 250 cases and billed over 4,000 hours. *Id.* After he left Trans Union, the attorney founded his own law firm and represented consumers bringing FCRA claims against credit reporting agencies. *Id.* In the case of one such plaintiff, Richard Watkins, Trans Union sought the attorney's disqualification. It cited pre-Comment 2 and 3 case law interpreting RPC 1.9. *Id.* at 518. It argued that because he had defended Trans Union in

FCRA cases, the attorney was disqualified from representing Watkins in his FCRA case against Trans Union. *Id.*

The Seventh Circuit affirmed the denial of disqualification in *Watkins* explaining that in the case of corporate clients, similarity between types of matters is not enough under Comments 2 and 3. *Id.* at 521-23. It noted that “facts upon which Watkins’ case will turn—recurrent false collection listings on his credit report, despite multiple requests to remove them—are unique to his claim against Trans Union and are not interwoven with any individual case in which [the lawyer] represented Trans Union in the past.” *Id.* at 521.

In another case almost identical to the one at bar, a Florida appellate court also declined to disqualify. In *Health Care & Ret. Corp. of Am., Inc. v. Bradley*, 961 So. 2d 1071, 1072 (Fla. Dist. Ct. App. 2007), a lawyer represented a nursing home for a period of three years in at least 60 cases, many of them involving claims of negligence in connection with pressure ulcers and falls. After the lawyer’s representation of the nursing home terminated, he sought to represent a plaintiff against the same nursing home involving alleged negligence in connection with pressure ulcers and a fall. Applying the Comments 2 and 3 to RPC 1.9, the court concluded that this did not present a conflict. Because “each negligence case turns on its own facts,” the subsequent representation did not involve the attorney attacking

the work that he performed for the former client, and the former and current matters were not substantially related. *Id.* at 1074.

Other recent decisions applying Comments 2 and 3 in the context of lawyers who formerly represented corporations reach the same conclusion that the trial court did here. *Miskel v. SCF Lewis & Clark Fleeting LLC*, 3:14-CV-338-SMY-DGW, 2016 WL 3548438 at *5 (S.D. Ill. June 30, 2016) (lawyer who represented company as defendant in four maritime cases not disqualified from later representing plaintiff in maritime case against same company); *Olajide v. Palisades Collection, LLC*, 15-CV-7673 (JMF), 2016 WL 1448859 at *3 (S.D.N.Y. Apr. 12, 2016) (lawyer who represented debt collection firm in hundreds of matters not disqualified from later representing plaintiff whose debt was not a matter that he worked on for former client).¹¹ These decisions, moreover, follow the *Restatement of the Law Governing Lawyers*, which explains by illustration that a lawyer who has handled recurrent matters of a given type for a former client can handle new, distinct matters adverse to the former client, even if they are of the same type as the past cases. *Restatement (Third) of the Law Governing Lawyers* § 132 (2000), Illustration 4 (“Although both representations involve marketability of title, it is unlikely that Lawyer’s knowledge of

¹¹ Cited as persuasive unpublished authority under GR 14.1(b) and FRAP 32.1.

marketability of Tract X would be relevant to the litigation involving the marketability of title to Tract Y. Accordingly, the matters are not substantially related.”).

In a reconstruction of the facts of Keller’s prior representations, the matters are not substantially related and there are no USAA confidences at issue here. USAA does not assert that Keller worked on the *Plein* matter, only unrelated matters where USAA was accused of committing bad faith against other insureds. Br. of App. at 22. Keller did not draft any policy language at issue, so it has no knowledge of USAA’s confidential intended meaning or applicability. Nothing USAA might have disclosed in confidence with respect to its conduct toward other insureds in other bad faith cases has anything to do with its conduct toward the Pleins here.¹²

As with other kinds of tort cases, each insurance bad faith case turns on its own facts. Whether a different USAA affiliate committed bad faith or caused harm to other homeowners is not substantially related to whether USAA committed bad faith in its handling of the Pleins’ insurance claim.¹³

¹² USAA has not suggested that it has a pattern or practice of intentionally acting in bad faith towards its insureds that Keller would have learned.

¹³ This analysis presumes that USAA does not have a systematic strategy for committing bad faith that it distributes to its affiliates with instructions to commit bad faith in every case. USAA has not alleged it has that kind of business model.

The Pleins' case is unique, and no Keller attorney had factual information about how USAA and its affiliate treated the Pleins.

The trial court correctly found no conflict under RPC 1.9. The comments to the current rule clarify that a new, factually distinct matter is not substantially related within the meaning of the rule to past, different matters, even if they are of the same type. Cases applying the modern comments to analogous facts all find no violation and decline to disqualify. And this conclusion is consistent with the Restatement. USAA offers no authority reaching a contrary result, offers no authority applying Comments 2 and 3 at all, and in now three rounds of briefing has yet to even acknowledge the existence of the language of Comments 2 and 3 speaking directly to the facts before the Court. Hoping that the Court will disregard the plain language of the rule explaining that Keller's representation is not a prohibited RPC 1.9 conflict, USAA offers up generalities, taken out of context, as if wishing away the rule that defeats its argument. This is not enough to prove a conflict of interest by opposing counsel and justify the extraordinary remedy of disqualification.

- (3) The Presumption that Keller Acquired Confidences Is Insufficient to Merit Disqualification; Because the Matters Are Not Substantially Related, the Remedy Is RPC 1.9(c) Which Prohibits the Disclosure of Confidences

USAA insists that it need not make any showing to this Court that Keller could use confidences to its detriment in order to obtain Keller's disqualification. It argues that Keller is disqualified as a matter of law simply because it represented USAA in the past and presumably obtained confidences. Br. of App. at 25-28. USAA claims, without proof, that it "only stands to reason that Keller has confidential information that is detrimental to USAA CIC." *Id.* at 25. It contends that this Court must presume that in the totally unrelated *Plein* matter, Keller will be able use whatever information it obtained in the "substantially similar" *Cueva* matter. *Id.* USAA argues that Keller is in a "Catch-22" because it may not review its files to ascertain whether it has confidential information that can be used to USAA's detriment without violating the RPCs. *Id.*

USAA is incorrect in its belief that it need not make any evidentiary showing that confidences will be used to its detriment. USAA does have a burden to make this showing, because the matters here are not substantially related. *Teja*, 68 Wn. App. at 793. "The plain language of RPC 1.9 indicates actual proof of disclosure of confidential information is not necessary *if the matters are substantially related.*" *Id.* (emphasis added).

Logically, if the mere retention of confidences warranted *per se* disqualification, then there would be no need for RPC 1.9(c). That section of the rule allows a lawyer to participate in a matter adverse to a former

client, provided that the lawyer does not “use” or “reveal” information relating to the former representation. RPC 1.9(c) allows representation in an unrelated matter, as long as the lawyer uses only “generally known” information and not confidences. RPC 1.9 cmt. 8.

(4) There Is No Nebulous “Duty of Loyalty” or “Appearance of Impropriety” in the Modern RPC 1.9 that Requires Disqualification Even When the Rule Is Not Violated

USAA argues that RPC 1.9 prohibits Keller’s representation of the Pleins because it appears improper and violates Keller’s “duty of loyalty.” Br. of App. at 15-17. USAA again cites *Sanders* in support, as well as *Trone v. Smith*, 621 F.2d 994 (9th Cir. 1980), *superseded by rule as stated in U.S. for Use & Benefit of Lord Elec. Co., Inc. v. Titan Pac. Const. Corp.*, 637 F. Supp. 1556, 1564 n.6 (W.D. Wash. 1986).

USAA’s argument regarding “appearances” and “loyalty” is out of date. These expansive disqualification rules were extricated from the modern version RPC 1.9. The modern rule clarified and narrowed the contours of the older federal common-law rule for attorney disqualification. The Model Rules of Professional Conduct, of which Rule 1.9 is a part, replaced the Model Code of Professional Conduct, which was based on canons first promulgated in 1908. Monroe Freedman, *The Kutak Model Rules v. The American Lawyer’s Code of Conduct*, 26 Vill. L. Rev. 1165 (1981); Kathleen Maher, *Keeping Up Appearances*, 16 Prof. Law. 1 (2005).

Some of the Model Rules, including Rule 1.9, explicitly rejected the old canons. *Id.* (2002 revisions to Rule 1.9 deleted the lingering reference to “appearance of impropriety” originally housed in Canon 9 because it was “no longer helpful to the analysis of questions arising under this Rule”). The Kutak Commission’s proposed Model Rules of Professional Conduct were issued in 1983 and then adopted by the states in the years that followed. Washington adopted the present version of RPC 1.9 in 2006.

Under the modern rule, the mere *possession* of confidential information no longer results in automatic disqualification based on any appearances or duty of loyalty if the matters are dissimilar. Instead, the lawyer must refrain from disclosure of such confidences under RPC 1.9(c).¹⁴ That subsection of the rule prohibits disclosure of confidences regardless of the similarity of matters, and negates USAA’s claim of an automatic disqualification based solely on the retention of confidences.

USAA’s reliance on *Trone*, a case decided in 1980, is therefore misplaced. *Trone* applied the same canons of ethics that were updated when the RPCs were adopted. *Trone*, 621 F.2d at 999. In fact, *Trone* cites to former Canon 9 the “appearance of professional impropriety,” as the basis for its ruling. *Id.*

¹⁴ Keller has scrupulously refrained from using or disclosing any USAA client confidences. The firm’s internal controls and practices described above guard against any risk of use or disclosure.

Likewise, *Sanders* and *Teja* do not hold that there is an independent “duty of loyalty” or “appearance of impropriety” standard that can be breached even if there is no RPC 1.9 violation. They simply explain that propriety and loyalty are the *reasons* why “side switching” is prohibited, and why RPC 1.9 was adopted. *Teja*, 68 Wn. App. at 799; *Sanders*, 121 Wn. App. at 599.

USAA cannot sustain the argument that disqualification is appropriate based on any “duty of loyalty” or “appearance of impropriety” even though Keller has not violated RPC 1.9.

(5) The Rules About Non-Attorney Staff and Imputed Disqualification Are Irrelevant Because Keller Has No Conflict

USAA also advances arguments that the trial court should have “address[ed] the exposure of USAA[‘s]... confidential information to non-attorney staff at Keller,” Br. of App. at 18, and that one attorney’s disqualification is imputed to the whole firm.

USAA’s arguments regarding imputation, although correct, are irrelevant. Keller has no conflict. Although Keller has scrupulously avoided any access to confidential information by staff and attorneys who did not work with Hecht, this is prudence, and not required when no conflict exists.

E. CONCLUSION

The trial court correctly applied RPC 1.9 and declined to disqualify Keller from representing the Pleins. This Court should affirm. Costs on appeal should be awarded to respondents.

DATED this 16th day of November, 2018.

Respectfully submitted,



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APPENDIX A

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

RICHARD PLEIN, a married person, and
DEBRA PLEIN (formerly Debra De Witt), a
married person, and the marital community
composed thereof,

Plaintiffs,

v.

USAA CASUALTY INSURANCE
COMPANY, an insurance company, and THE
STERLING GROUP, INC. (doing business as
Sterling Group, DKI) a corporation,

Defendants.

No. 17-2-29542-6 SEA

ORDER ON PLAINTIFFS' EMERGENCY
MOTION TO REQUIRE INTERIM
COMPLIANCE WITH INSURANCE
POLICY

THIS MATTER came on before this Court on Plaintiff's Motion to Require Interim
Compliance with Insurance Policy. The Court has considered said motion, defendant's response
and plaintiff's reply as well as the papers submitted therewith. Now, therefore,

IT IS HEREBY ORDERED that:

1. Plaintiffs' Emergency Motion to Require Interim Compliance with Insurance
Policy is GRANTED.

APPENDIX B

The Court of Appeals
of the
State of Washington

RICHARD D. JOHNSON,
Court Administrator/Clerk

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CASE #: 78190-1-I
Richard Plein, et ano, Resps v. USAA Casualty Ins Co., Pet

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on July 2, 2018, regarding Petitioner's Motion for Discretionary Review Re: Order on Plaintiffs' Motion for Ruling Re Asserted Conflict of Interest:

This is the second of two motions for discretionary review brought by defendant/petitioner USAA Casualty Insurance Co. in this lawsuit brought against it by plaintiffs/respondents Richard and Debra Plein. On June 11, 2018, I denied discretionary review of a February 14, 2018 trial court order granting the Pleins' emergency motion to require USAA on an interim basis to reimburse the Pleins for all utility charges incurred at their rental home. In this motion USAA seeks discretionary review of a February 14, 2018 trial court order granting the Pleins' motion regarding a conflict of interest asserted by USAA and ruling that the Pleins' attorneys are not disqualified. For the reasons stated below, review is granted.

In August 2016 a fire damaged the Pleins' home. Their insurer, USAA, directed them to a preferred contractor, the Sterling Group, to make repairs. The Pleins moved to a rental house during the repairs. In January 2017, they returned to their home, but reported an overwhelming smell of smoke. The Pleins hired a public adjuster to assist them with their claims. USAA hired an industrial hygienist who reported, among other things, remaining smoke damage. In June 2017, the Pleins moved back out of their home and to a rental. The Pleins remain out of their damaged home.

The Pleins retained attorney Joel Hanson, and in November 2017 sued USAA. They allege that USAA failed to investigate or offer payment for the cost of additional necessary repairs, delayed in making a coverage decision, failed to pay for the additional repairs, and failed to pay the full amounts due under the insurance contract. The Pleins' claims against USAA include breach of contract, bad faith, and violation of the Consumer Protection Act. (The Pleins also allege claims against The Sterling Group – they are not at issue in this motion).

In January 2018, Hanson contacted attorneys William Smart and Ian Birk of Keller Rohrback L.L.P. about representing the Pleins. After a meeting, the Pleins retained Smart and Birk to work with Hanson in their claims against USAA, and Smart and Birk filed a notice of association.

USAA objected, alleging a conflict of interest based on Keller's extensive relationship with USAA. Keller had done no previous work for the Pleins. However, Keller had a ten year history of representing USAA in coverage and insurance bad faith cases. Keller attorney and partner Irene Hecht represented USAA in these matters. The relationship ended only three months earlier, in November 2017. During this ten year period of representation, Keller represented USAA in at least 165 cases, of which at least twelve cases involved Keller defending claims of bad faith against USAA. In the two most recent years, 2015 to 2017, at least seven Keller attorneys and four paralegals represented USAA, billing in excess of 8,000 hours. Keller asserts that during its representation of USAA, the firm maintained confidentiality on a formal and informal basis. See Answer at 1-2.

In response to USAA's objection, Keller filed a motion seeking a ruling on the alleged conflict of interest, and the parties filed briefing. The parties also filed opposing expert opinions addressing the conflict issue. The Pleins' expert opined that the current matter is not

substantially related to Keller's prior representation, resulting in no disqualifying conflict. Appendix to Motion for DR at 42-48. USAA's expert took the opposite view, opining that the current matter is substantially related to Keller's prior representation, including one particular case, *Cueva v. Garrison Property & Casualty Insurance Co.*, Pierce County No. 10-2-06680-8. Appendix at 100, 136-44. USAA's expert opined that Keller is disqualified under RPC 1.9.

The trial court granted Keller's motion:

1. The Court finds that the *Plein* matter is factually distinct from and not substantially related to the firm's prior representation of USAA, and as a result, the firm's representation of the Pleins is not in conflict under RPC 1.9.
2. Keller Rohrback L.L.P. is not required to withdraw nor be disqualified as counsel for the Pleins.
3. Joel Hanson is not required to withdraw nor be disqualified as counsel for the Pleins.

Trial is set to begin in November 2018.

USAA seeks discretionary review under RAP 2.3(b)(1), obvious error that renders further proceedings useless, and (b)(2), probable error that substantially alters the status quo or substantially limits its freedom to act. The Pleins argue that USAA must meet the (b)(1) standard and cannot do so.

There is some authority that (b)(2) is appropriately applied here. See *American States Insur. Co. v. Nammathao*, 153 Wn. App. 461, 465, 220 P.3d 1283 (2009) (noting review of disqualification decision was granted under RAP 2.3(b)(2)); *Foss Maritime Co. v. Brandewiede*, 190 Wn. App. 186, 192, 359 P.3d 905 (2015) (commissioner granted review under RAP 2.3(b)(2), panel reversed trial court decision). Applying (b)(2), if Keller has a disqualifying conflict but is allowed to represent the Pleins, USAA's freedom to act in defending itself is substantially limited. Applying (b)(1), if USAA is correct that Keller has a disqualifying conflict, going forward in the current posture would be a waste of time and result in reversal, rendering further proceedings useless. These standards are not identical and ordinarily deciding on the applicable criteria is key. But here, under either subsection, there is authority that disqualification presents the situation where a party challenging a disqualification ruling after a final judgment must demonstrate prejudice. *Teja v. Saran*, 68 Wn. App. 793, 800, 846 P.2d 1375 (1993), citing *First Small Business Inv. Co. v. Intercapital Corp.*, 108 Wn.2d 324, 331-32, 783 P.2d 263 (1987); see *RWR Management, Inc. v. Citizens Realty Co.*, 133 Wn. App. 265, 280, 135 P.3d 955 (2006) (court's interlocutory decision was not presented for discretionary review; consequently, we question the viability of the issue now). In this limited way and as a practical matter, disqualification challenges are somewhat like venue challenges. See *Lincoln v. Transamerica Inv. Corp.*, 89 Wn.2d 571, 577-78, 573 P.2d 1316 (1978) (where plaintiff objects to venue decision, remedy is to seek discretionary review and not to wait until the trial is concluded and then ask an appellate court to set aside

an unfavorable judgment on the basis that the venue was laid in the wrong county); accord, Youker v. Douglas County, 162 Wn. App. 448, 460, 258 P.3d 60 (2011). In short, to accept interlocutory review, there must be a demonstration of error, but the second part of the test is less critical.

The parties generally agree regarding the applicable standards. Appellate review of a decision to grant or deny a motion to disqualify is a legal question reviewed de novo. Sanders v. Woods, 121 Wn. App. 593, 597, 89 P.3d 312 (2004); Foss Maritime, 190 Wn. App. at 192 (we generally review a disqualification order for an abuse of discretion, but to the extent the case involves questions of law regarding application of court rules to particular facts and whether an attorney's conduct violates the RPCs, appellate review is de novo) . In order to disqualify a lawyer from representing an adversary, a former client must show that the matters currently at issue are *substantially related* to the subject matter of the former representation. RPC 1.9. Sanders, 121 Wn. App. at 597-98. To determine whether the two representations are substantially related, the court 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 a current one that the lawyer could use confidential information to the client's detriment. Sanders, 121 Wn. App. at 598; State v. Hunsaker, 74 Wn. App. 38, 47, 873 P.2d 540 (1994). If one law firm member is precluded by RPC 1.9 from representing a particular client, then all members are similarly precluded under RPC 1.10. Id.

“ Substantially related” requires only that the representations are “relevantly interconnected or reveal the client’s pattern of conduct.” . . . “The underlying concern is 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.”

(citations omitted). Sanders, 121 Wn. App. at 599. The question is whether the current representation is factually distinct or factually similar to the prior representation, see Motion for DR at 12, Answer to DR at 11. And the key is whether there is a substantial risk that confidential factual information as would normally have been obtained in prior representation would advance the new client’s position against the former client, or put differently, would the attorney in the prior representation normally be expected to have gained such confidential information.

The Pleins argue that Keller’s prior representation is not substantially similar to the current representation. But it is undisputed that Keller represented USAA in coverage and bad faith disputes for ten years, that a significant number of the cases involved allegations that USAA acted in bad faith, that Keller defended USAA from bad faith allegations, that Keller is necessarily familiar with USAA practices and procedures in claims handling, and that Keller stopped representing USAA only three months before the current litigation started and five months before Keller associated with Hanson in this action. Moreover, as noted above,

USAA provided evidence that the *Cueva* case in which Keller defended USAA involved substantially similar claims. In *Cueva* the plaintiffs suffered a fire in their home and filed claims with USAA. Plaintiffs' allegations include that USAA and the contractor it provided (Maxcare of Washington) failed to properly repair the damage and used potentially toxic chemicals in making the repairs. Plaintiffs' claims against USAA in *Cueva* are remarkably similar to the Pleins' claims against it. See Appendix at 136-44. The Pleins' assert that *Cueva* is distinguishable because it involved ill health effects from toxic chemicals instead of smoke damage. While true, it is unclear how this distinction makes a difference in the conflict analysis. See Answer to DR at 18, n. 18. See also Birk Declaration (apparently not considered by the trial court).

I conclude that USAA has demonstrated that discretionary review is warranted to the extent the trial court found no conflict of interest in Keller's representation of the Pleins. Review is not warranted as to Hanson's representation of the Pleins. The Pleins' request for sanctions against USAA is denied.

Therefore, it is

ORDERED that discretionary review is granted, and the clerk will set a perfection schedule.

Please be advised a ruling by a Commissioner "is not subject to review by the Supreme Court." RAP 13.3(e)

Should counsel choose to object, RAP 17.7 provides for review of a ruling of the Commissioner. Please note that a "motion to modify the ruling must be served... and filed in the appellate court not later than 30 days after the ruling is filed."

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

LAM

cc. Hon. Veronica Alicea Galvan

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Brief of Respondents (with Corrected Case Caption)*** in Court of Appeals, Division I Cause No. 78190-1 to the following:

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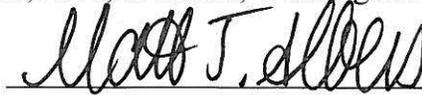
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: November 19, 2018, at Seattle, Washington.



Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe

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Comments:

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