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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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

v.

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

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APPELLATE BRIEF

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

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## **A. INTRODUCTION**

“[A] later case that *depends on discrediting a former client on matters that were the subject of the former representation. . . .*” is “a clear violation of the [Rules of Professional Conduct], . . . [and] disqualification [is] not only justified, but also essential.” (FMC Technologies, Inc. v. Edwards, 420 F. Supp. 2d 1153, 1162 (W.D. Wash. 2006) (emphasis in original).)

Keller Rohrback Law Offices, LLP (“Keller”) represented USAA Casualty Insurance Company (“USAA CIC”) and its affiliated companies up until November 2017. The firm’s representation of USAA CIC and its affiliated companies last for over ten (10) years, including:

- **At least 165 cases**; (Clerk’s Papers (“CP”) 99 ¶ 5; CP 101 ¶ 9.a.)
- **At least 12 cases** that alleged insurance bad faith litigation arising from homeowners claims like the *Plein* case; (CP 101 ¶ 9.b.)
- **At least seven attorneys and four paralegals and staff performing administrative functions**; (CP 101 ¶¶ 9.c.-d.) and
- Billing an excess of **8,000 hours** between 2015 to November 2017. (CP 101 ¶ 9.e.)

In light of the facts before the trial court and Washington law, the trial court erred because the implications of the court's ruling on the Pleins' Motion for Ruling on Plaintiffs' Counsel's Conflict of Interest has the potential to affect USAA CIC's defense in the underlying case. If the trial court had properly analyzed requirements of Rules of Professional Conduct ("RPC") 1.9, then it would have been clear that Keller violated its duty of loyalty to USAA CIC when it accepted the Plein representation.

By permitting Keller to continue representing the Pleins despite its extensive relationship with USAA CIC and its affiliated companies have placed USAA CIC at a disadvantage. Keller has access to confidential documents that could affect USAA CIC's defense in the *Plein* matter. It is undisputed that Keller and USAA CIC and its affiliated companies had an extensive relationship that required an exchange of confidential and sensitive information, and that information in Keller's possession is materially adverse to USAA CIC in the *Plein* matter.

The order permitting the Keller continued representation of the Pleins ignored the nature of Keller's previous representation of the defendant in this case. It ignored the practical realities that Keller is now directly adverse to its former client in a factually and legally indistinguishable case to many of the cases in which it previously represented the defendant, ignored the confidential information obtained

due to that representation, and ignored the effect that the confidential information in its possession could have in the instant case. For these reasons, the *Plein* case has been tainted by the representation of the Pleins by Keller. As such, this Court should reverse the trial court's ruling, and disqualify Keller from further representation of the Pleins.

**B. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERRORS**

**Assignments of Error**

1. The trial court erred when it allowed Keller to represent the Pleins, condoning Keller's breach of its duty of loyalty to USAA CIC despite its intricate relationship with USAA CIC and its affiliated companies that ended only three months prior. The changing of sides from defending USAA CIC to challenging USAA CIC in a bad faith case demonstrates the impropriety of Keller's acceptance of the Plein representation.
2. Keller's prior representation of USAA CIC and its affiliated companies show a pattern of conduct that is based on an extensive relationship built over a ten (10) year period and numerous bad faith litigation cases. The confidential information that was obtained due to this relationship is still in Keller's possession, encompasses a wide scope that is not limited to public or organizational

information. A simple comparison of the *Cueva* case and the *Plein* matter demonstrates the similarities of the type of information that would have been acquired by Keller during its representation of an USAA CIC affiliated company. Thus, the trial court erred by granting the Pleins' motion and failing to apply the Sanders test and the comments to RPC 1.9.

3. The trial court erred when it granted the Pleins' motion because while Keller attempts to minimize the impact of its representation of the Pleins, their arguments concerning the implications and impact of their representation cannot amount to any kind of adequate assurance.
4. The trial court never addressed the issue of Irene Hecht's (of Keller) disqualification from representing the Pleins due to her extensive relationship with USAA CIC and its affiliated companies. It further failed to address RPC 1.10, which prohibits any other attorney at Keller from representing the Pleins due to Hecht's disqualification, thereby prohibiting any attorney at Keller from representing the Pleins against USAA CIC.
5. Any prejudice suffered by the Pleins is based on Keller's refusal to withdraw its representation. The Pleins are still represented by Joel

Hanson, and thus still have an attorney that could adequately represent them in the underlying bad faith litigation.

**Issues Pertaining to the Assignments of Error**

1. Was RPC 1.9 violated when Keller accepted the Plein representation and when Keller discovered that USAA CIC was a previous client and represented USAA CIC and its affiliated companies for over ten (10) years and in over 165 cases? (Assignment of Error No. 1)
2. Did Keller's extensive ten (10) year relationship with USAA CIC and its affiliated companies breach its duty of loyalty to its former client when Keller accepted the Plein representation just three (3) months after terminating the relationship with USAA CIC and its affiliated companies? (Assignment of Error No. 2)
3. Is the confidential information obtained by Keller from USAA CIC and its affiliated companies - during its extensive ten (10) year attorney-client relationship in defending its former client in bad faith cases – be used to USAA CIC's detriment in the *Plein* matter, a bad faith case? (Assignment of Error No. 3)
4. Did Keller breach its duty of loyalty to USAA CIC and its affiliated companies when Keller admits it has confidential information belonging to USAA CIC within its possession and that individuals at Keller have access to that information, yet agreed to represent the

Pleins, an adverse party to USAA CIC? (Assignment of Error No. 4)

5. Does Keller's former representation of USAA CIC and its affiliated companies meet the requirements of the "substantially related" analysis of Sanders and thus create a conflict of interest when Keller represented an affiliate company of USAA CIC in a similar homeowners bad faith case that concerned a failure of a contractor to properly remediate smoke damage at the insured's property, which are the exact same claims being brought against USAA CIC in the *Plein* matter? (Assignment of Error No. 5)
6. When partner Irene Hecht's former representation of USAA CIC and its affiliated companies disqualifies her from representing the Pleins under RPC 1.9, then are all attorneys at Keller disqualified from representing the Pleins under RPC 1.10? (Assignment of Error No. 6)

### **C. STATEMENT OF THE CASE**

#### **1. Keller's representation of USAA CIC and its affiliated companies.**

For almost ten (10) years, Keller represented USAA CIC and its affiliated companies on numerous "alleged bad faith or extra-contractual damages" in Washington. (CP 29 ¶¶ 1-2.) Irene M. Hecht ("Hecht") and at least seven attorneys and four paralegals worked on these matters, in

addition to the firm's staff who performed the administrative functions. (Id. ¶ 1; CP 101 ¶¶ 9.c.-d.) Approximately 165 cases were assigned to Hecht and her team, of which at least twelve (12) involved bad faith litigation arising from homeowners claims. (CP 99 ¶ 5; CP 101, ¶ 9.a.-b.)

Just in the last two (2) years of the representation, Keller billed USAA CIC and its affiliated companies over 8,000 hours. (CP 101 ¶ 9.e.) Because of this extensive relationship, Keller obtained confidential documents, which include but are not limited to, information and documents that are protected by attorney-client privilege and the attorney-work product doctrine. (*See* CP 29 ¶ 4; CP 99 ¶ 5; CP 100 – CP 101 ¶ 8.)

Keller worked on *Cueva v. Garrison Property & Casualty Ins. Co.*, Case No. 10-2-06680-8 (“Cueva Case”), a nearly identical smoke damage case filed in Pierce County Superior Court. (CP 102 – CP 103 ¶ 11; CP 117-125.) The allegations concerned issues with USAA's Property Direct Repair Program (“PDRP”), an optional service where USAA CIC and its affiliated companies identifies licensed and insured local contractors for the member to contract with to conduct repairs to their covered property. (CP 102 – CP 103 ¶ 11; CP 119 ¶ 2.7; CP 121 ¶ 2.13; CP 122 lines 14-16.) The attorneys at Keller and other staff met with more than one designated corporate representative concerning the operations of this PDRP, conducted several long meetings with witnesses, and provided advice regarding the

type and selection of local expert witnesses in the fields of industrial hygiene and toxicology. (CP 102 – CP 103 ¶ 11.)

By comparison, the issues raised in the *Plein* case are similar as well. The Pleins sued USAA CIC after smoke from a fire allegedly damaged their home. (CP 3 ¶¶ 3.5, 3.6, 3.16.) A PDRP contractor was assigned to remediate the home, but the work performed allegedly did not remediate the damage. (CP 3 ¶¶ 3.10-3.12, 3.14, 3.17.) The underlying issues in the *Plein* matter concern whether the PDRP properly remediated the property. (CP 3 ¶ 3.17; CP 4 ¶¶ 3.18-3.22; CP 5 ¶¶ 7.2-7.3, 8.1-8.2; CP 6 ¶¶ 8.3-8.4, 9.1, 10.1-10.2.) These are the exact same issues raised by *Cueva*.

## **2. Keller's representation of the Pleins**

Keller was approached by Joel Hanson to represent the Pleins in the lawsuit against USAA CIC just three (3) months after Keller's relationship with USAA CIC ended. (CP 26-CP 27 ¶ 3.) When Keller performed a conflict check prior to accepting representation of the Pleins, it revealed to Keller a clear conflict due to its previous representation of USAA CIC and its affiliated companies. (CP 27 ¶ 4.) Ignoring the conflict, Keller decided to represent the Pleins. (CP 15 lines 1-23; CP 27 ¶¶ 4, 6; CP 29 ¶¶ 1-2, 4.) The attorneys representing the Pleins reasoned that because they never worked on any USAA CIC's or its affiliated companies' cases and never had access to any communication or files associated with Keller's

representation of USAA CIC or its affiliated companies, there was no conflict to resolve. (CP 27 ¶ 5; CP 29 ¶ 4.) But Keller was also aware that Hecht is still part of the law firm, the files of USAA CIC and its affiliated companies are still at the firm, and that there are persons who still have access to those files at the firm. (CP 29 ¶¶ 1, 4.)

**3. Substitution of Counsel and the trial court's ruling on the Conflict of Interest.**

The association of counsel was filed on January 30, 2018, and USAA CIC's counsel immediately objected to the representation due to the *clear* conflict of interest and demanded that Keller withdraw its representation of the matter. (CP 8 - CP 9; CP 16 lines 10-24; CP 59 - CP 60.) In response, the Pleins filed a Motion for Ruling on Plaintiffs' Counsel's Conflict of Interest, arguing that there was no conflict under RPC 1.9 because the *Plein* matter is factually distinct from any case Keller represented on behalf of USAA CIC and its affiliated companies and that the organizational policies and practices of its former client are not confidential. (CP 11 - CP 62.)

USAA CIC argued that RPC 1.9 and 1.10 conflicted Keller's representation of the Pleins due to its extensive relationship with USAA CIC and its affiliated companies just a few months prior to filing the Notice of Association. (CP 69 - CP 73.) Of particular note was Keller's ten (10)

year relationship with USAA CIC and its affiliated companies, the 165 cases the firm represented on behalf of its former client, and Keller's representation of a similar prior case. (CP 71.)

Without any oral argument, the trial court granted the Pleins' Motion for Ruling on Plaintiffs' Counsel's Conflict of Interest without elaborating its basis for its ruling on February 14, 2018. (CP 129 - CP 130.)

**4. The Commissioner granted USAA CIC's Motion for Discretionary Review under RAP 2.3(b)(1) and (b)(2) due to the egregious facts of the Keller representation of the Pleins.**

USAA CIC brought a Motion for Discretionary Review before the Commissioner on June 8, 2018. (See APPBRF\_APX001-APPBRF\_APX005.) On July 3, 2018, the Commissioner issued her decision to grant USAA CIC's Motion for Discretionary Review for the following reasons:

- “[I]t 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.” (APPBRF\_APX004.)
- The Commissioner also found that the plaintiffs' claims “in *Cueva* are remarkably similar to the Pleins' claims against [USAA CIC],”

meeting the necessary threshold necessary to demonstrate a clear conflict of interest. (APPBRF\_APX005.)

Based on these facts, the Commissioner determined that “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, . . .” (APPBRF\_APX004.) This risk of Keller advancing the Pleins’ position against USAA CIC demonstrated the trial court’s error when it granted the Pleins’ Motion for Ruling Regarding Asserted Conflict of Interest under *both* RAP 2.3(b)(1) and (b)(2). (APPBRF\_APX003-APPBRF\_APX005.)

On July 26, 2018, the Pleins brought a Motion to Modify the Commissioner’s ruling, arguing that the Commissioner failed to consider Comments [2] and [3] of RPC 1.9 and used *dicta* from 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) to grant USAA CIC’s Motion for Discretionary Review. However, USAA CIC responded by stating that the Pleins’ arguments ignore not only the Commissioner’s careful ruling on this matter but also controlling Washington law as stated in RPC 1.9, Sanders and Hunsaker. As of the filing date of this appellate brief, the Court of Appeals has not yet ruled on the Pleins’ Motion to Modify.

## **D. ARGUMENT**

### **1. Standard of Review**

“Review of a court’s decision to grant or deny a motion to disqualify counsel is a legal question that is reviewed de novo.” (Sanders, 121 Wn. App. 593, 597, 89 P.3d 312 (2004) (citing Eriks v. Denver, 118 Wn.2d 451, 457-58, 824 P.2d 1207 (1992)).)

### **2. RPC 1.9 was violated by Keller when it accepted the Plein representation despite its knowledge of Keller’s previous representation of and relationship with USAA CIC and its affiliated companies.**

“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 interest of the former client unless the former client gives informed consent, confirmed in writing.” (RPC 1.9 (a).)

To explain the standard of RPC 1.9, Comment [2] defines the scope of RPC 1.9, and Comment [3] defines the phrase “substantially related.” In addition, Washington case law, particularly Sanders and Hunsaker, explain the standard of RPC 1.9. (Sanders, 121 Wn. App. at 593, 89 P.3d 312; Hunsaker, 74 Wn. App. at 38, 873 P.2d 540.) While these cases were decided prior to the adoption of the comments, it does not make their holdings or analysis any less relevant. The cases analyze RPC 1.9, and explained the interpretation of RPC 1.9. (Sanders, 121 Wn. App. at 597-

600, 89 P.3d 312; Hunsaker, 74 Wn. App. at 41-48, 873 P.2d 540.) Moreover, Hunsaker uses the same or similar language as they are currently phrased in Comment [2] and Comment [3] to RPC 1.9. (Hunsaker, 74 Wn. App. at 44, 46, 873 P.2d 540 (citations omitted).)

As such, the comments as stated in RPC 1.9 support USAA CIC's position that Keller's representation of the Pleins creates a conflict of interest based on the law firm's extensive relationship with USAA CIC and its affiliated companies. (CP 101 ¶ 9.) By accepting the Plein representation, Keller has breached its duty of loyalty. Its previous representation of several similar bad faith litigation cases on behalf of USAA CIC and its affiliated companies disqualifies Keller. (CP 29; CP 101 ¶ 9.) Furthermore, the threat of the disclosure of confidential information that is materially adverse to USAA CIC demonstrates the appearance of impropriety that precludes Keller from representing the Pleins against its former client, USAA CIC.

3. **Pursuant to Comment 2 of RPC 1.9, Keller's extensive representation of USAA CIC and its affiliated companies over a ten (10) year period disqualifies it from representing the Pleins.**
  - a. **Keller has breached its duty of loyalty to USAA CIC by accepting the representation of the Pleins when the attorneys knew of Keller's previous representation of USAA CIC and its affiliated companies.**

“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).) In other words, the analysis under RPC 1.9 is whether Keller’s extensive relationship with USAA CIC can be regarded as changing sides by agreeing to represent the Pleins. The **only answer** to this question is “yes.”

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 598, 89 P.3d 312; Teja v. Saran, 68 Wn. App. 793, 798-99, 846 P.2d 1375 (1993), review denied, 122 Wn.2d 1008 (1993).)

Hecht does not deny that she has confidential information from her representation of USAA CIC and its affiliated companies. (CP 29). It is undisputed this information was obtained due to the extensive relationship between Keller and USAA CIC and its affiliated companies by representing them in over 165 cases during a ten (10) year period. (CP 29; CP 101 ¶ 9.) Several of those cases were bad faith homeowners cases, and her team billed over 8,000 hours in the last two years. (CP 101 ¶¶ 9.b.-e.) Nonetheless, Keller tries to minimize these facts by arguing that only Hecht’s team has access to those files, that no one “discusses” USAA CIC’s cases, and that the only information that is pertinent is public or organizational information. (CP 19 - CP 25; CP 27 ¶¶ 5-6; CP 29.)

However, this is not the standard under the RPCs. Keller ignores the intricacies of the relationship and the necessary communications that were shared during the ten (10) year period. (CP 69 - CP 74; CP 99 - CP 103 ¶¶ 5-12.) It is not the **actual** disclosure of the information but rather the mere appearance of impropriety – the RPCs **assume** that this confidential information has already been disclosed. (State v. White, 80 Wn. App. 406, 415 (1995) (noting RPC 1.9’s “presumption of prejudice makes it unnecessary for the former client to prove that the attorney divulged actual confidences”), review denied, 129 Wn.2d 1012 (1996).)

**b. The possibility or the appearance of impropriety is demonstrative of Keller’s violation of RPC 1.9 based upon the scope as elaborated in Comment 2.**

“[T]he underlying concern is the *possibility, or the appearance of the possibility*, that the attorney may have received confidential information during the prior representation would be relevant to the subsequent matter in which disqualification is sought.” (Sanders, 121 Wn. App. at 599, 89 P.3d 312 (emphasis added) (quoting Trone v. Smith, 621 F.2d 994, 999 (9th Cir. 1980))). In other words, “[i]t is the possibility of the breach of confidence, not the fact of the breach, that triggers disqualification.” (Trone, 621 F.2d at 999.)

It is the mere appearance of impropriety that has tainted the *Plein* lawsuit with each passing day that Keller is allowed to continue to represent

the Pleins. The “actual proof of disclosure of confidential information is not necessary if the matters are substantially related[,]” (Teja, 68 Wn. App. at 799, 846 P.2d 1375.) and courts “*presume*[/] that confidential information was disclosed.” (FMC Technologies, Inc., 420 F. Supp. 2d at 1161 (emphasis in original) (citations omitted).)

The confidential information in this case goes beyond the normal disclosure of information that is exchanged in discovery. And this information is not limited to general policies and procedures (i.e. “playbook”) of USAA CIC. (CP 21 – CP 25.) In fact, the confidential information in Keller’s possession has not been rendered “obsolete” due to the amount of time that has passed because Keller accepted the Plein representation three (3) months after it had terminated its relationship with USAA CIC and its affiliated companies. (CP 8 - CP 9; CP 27 ¶¶ 4-5; CP 29; CP 99 ¶ 5.)

Furthermore, 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.)

While Keller claims it does not have access to confidential documents and do not speak to one another about their cases, what seems to have been forgotten is *the relationship and the information exchanged*

*during that relationship* is enough to disqualify them in the *Plein* matter. (CP 27 ¶¶ 4-6; CP 29; CP 99 – CP 103 ¶¶ 5-12.) Keller does not deny having confidential information of USAA CIC. (CP 27 ¶¶ 4, 6; CP 29.) As former counsel of USAA CIC, Keller is obligated to keep client confidences, including information and documents that are protected by attorney-client privilege and attorney work product doctrine in its possession. (RPC 1.9.)

But when Keller agreed to represent the Pleins, Keller breached the duty of loyalty to USAA CIC. Keller knew it had previously represented USAA CIC and it knew that it had confidential information. (CP 27 ¶¶ 4, 6; CP 29.) There is no question that Keller has switched sides by representing the Pleins in a homeowners bad faith case, similar to the types of cases it previously represented on behalf of USAA CIC. The trial court completely failed to address issue of not only the presumption that the confidential information in Keller's possession from its ten (10) year relationship with USAA CIC and its affiliated companies had already been disclosed, but also the impact that this would have of allowing Keller's continued representation of the Pleins' bad faith lawsuit that is completely adverse to USAA CIC. (CP 99 – CP 103 ¶¶ 5-12.) The information obtained during this relationship could be used to the detriment of USAA CIC in the underlying case, affecting its defense against the Pleins.

c. **All of Keller's employees have access to USAA CIC's confidential information that is adverse to USAA CIC in the Plein matter.**

The employees at Keller, who are in attorney and non-attorney roles, now have access to information concerning both USAA CIC and its affiliated companies **and** information that is directly adverse to USAA CIC due to Keller's representation of the Pleins. (CP 27 ¶¶ 4, 6; CP 29.) Attorneys are responsible for the actions of non-attorneys, including their violation of the ethical rules. (Daines v. Alcatel, S.A., 194 F.R.D. 678, 681-82 (E.D. Wash. 2000).)

Non-attorney staff "are regularly exposed to confidential client information as part of their everyday work. . . . [w]hether . . . [it is] the filing of a confidential client letter in a case file or attendance at a strategical meeting, non-attorneys . . . acquire sensitive information about their clients." (Id. at 682.) The trial court did not address the exposure of USAA CIC's and its affiliated companies' confidential information to non-attorney staff at Keller. This is a breach of the duty of loyalty and client confidences, and is a violation of RPC 1.9. The trial court's failure to recognize this blatant conflict will affect USAA CIC in the case against the Pleins if Keller is allowed to continue its representation that is in a position materially adverse to its former client.

**4. Comment 3 to RPC 1.9 and Washington case law requires an in depth analysis of the relationship of Keller’s former representation of USAA CIC and its affiliated companies.**

“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.) In other words, a court is to consider the information previously obtained by lawyer’s prior representation of the former client and whether that “privileged information” could work against the former client’s interest in the present matter. (See Hunsaker, 74 Wn. App. at 45, 873 P.2d 540 (referencing the analysis of State v. Stenger, 111 Wn.2d 516, 521-22, 760 P.2d 357 (1988)).) Therefore, “substantially related” analysis is not limited to the “same” defendant, plaintiff, or transaction – the analysis is more complicated.

It is about whether “the representations ‘are relevantly interconnected or reveal the client’s pattern of conduct.’” (Sanders, 121 Wn. App. at 599, 89 P.3d 312 (quoting Hunsaker, 74 Wn. App. at 44, 873 P.2d 540).)

“[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).)

The pertinent information in this case is **all of the confidential information in Keller’s possession**. It is not limited to organizational or public information. (CP 21 - CP 25.) After ten (10) years of representing USAA CIC and its affiliated companies, the confidential information obtained by Keller is limitless. (CP 29; CP 101 ¶ 9.) This is especially true when one does a comparison between the *Cueva case* and the *Plein* matter. The intricate relationship between Keller and USAA CIC was never addressed by the trial court. Had the relationship been properly analyzed, especially in the context of the *Cueva* case, it would have been clear that the intricate relationship between Keller and USAA CIC prevented Keller from representing the Pleins.

a. **Under the *Sanders* test, the *Plein* case is “substantially related” to the matters previously represented by Keller on behalf of USAA CIC and its affiliated companies.**

There are three requirements to the “substantially related” analysis to determine whether a conflict exists between the representation of the former client with the present representation:

(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).) It is undisputed that Keller has represented USAA CIC and its affiliated companies in at least twelve (12) bad faith homeowners cases. (CP 101 ¶ 9.b.) And one of those cases is the *Cueva* case. (CP 102 - CP 103 ¶ 11; CP 117 - CP 125.) An in depth review of the *Cueva* case and the *Plein* case clearly demonstrates not only the scope of Keller's former representation of USAA CIC and its affiliated companies, but also that the factual matters gained via that representation could be used to USAA CIC detriment in the *Plein* matter.

*i. When the Cueva Case is compared to the Plein matter, the similarities of the issues in both cases are apparent.*

“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., 420 F. Supp. 2d at 1159 (quoting Trone, 621 F.2d at 1000).)

Keller was involved in the *Cueva* case where the fact pattern and the allegations are almost *factually identical* to the *Plein* case rather than

“factually distinct.” (CP 20 - CP 22.) The inquiry is not whether the facts *are* identical, but rather same or substantially related. A simple comparison of the *Cueva* Complaint to the *Plein* Complaint demonstrates how “the scope of the facts of the former representation” (i.e. *Cueva*) are substantially the same to those in *Plein*. (Sanders, 121 Wn. App. at 598, 89 P.3d 312 (citing Hunsaker, 74 Wn. App. at 44, 873 P.2d 540); see CP 1 - CP 7; CP 117 - CP 125.) Because “the underlying *dispute* is about the same conduct”, there is a factual connection between the two cases. (FMC Technologies, Inc., 420 F. Supp. 2d at 1160 (emphasis in original).)

The *Cueva* case concerned a PDRP contractor that allegedly failed to remediate smoke damage at Cueva’s residence after a fire damaged their home and personal property. (CP 118 ¶¶ 2.3-2.4.) It was also alleged that USAA CIC’s affiliated company (“Garrison”) failed to provide additional living benefits to the Cuevas and accept liability or make payments for the fire and the resulting damage. (CP 118 - CP 119 ¶¶ 2.4-2.5.) Because of Garrison’s delay in handling the Cuevas’ claim and its alleged failure to pay for benefits under their policy, the Cuevas alleged that Garrison put its interests above their own. (CP 121 ¶ 2.11; CP 122 ¶ 3.1.) In sum, Garrison allegedly breached the contract by failing to pay benefits under the Policy, failing to investigate the Cuevas’ claims, and failing to supervise the PDRP contractor. (CP 122 ¶¶ 3.1-3.3) For these reasons, it was alleged that

Garrison breached the contract, acted in bad faith, and violated the Consumer Protection Act, in addition to violating the breach of fiduciary duties to the Cuevas, violated the Unfair Claims Practices Regulations, and defrauded the Cuevas. (CP 122 - CP 123 ¶¶ 3.1-3.5.)

The *Plein* case is about the alleged failure of the co-defendant (who was allegedly contracted under the PDRP), to remediate and repair the Pleins' home after a fire and the resulting smoke damaged parts of their home. (CP 3 – CP 4 ¶¶ 3.6-3.18.) USAA CIC allegedly failed to investigate the claim, to pay for the additional repairs, to pay for additional living expenses, and delayed in handling the Pleins' claim. (CP 4 - CP 5 ¶¶ 3.24-3.25, 3.29, 3.31, 4.1, 5.1, 6.1.) The Pleins' lawsuit is predicated on USAA CIC's alleged actions of putting USAA CIC's interests above the Pleins' interest. (CP 5 ¶ 5.1.) For these reasons, USAA CIC has allegedly breached the Pleins' insurance policy, acted in bad faith, and violated the Consumer Protection Act. (CP 4 - CP 5 ¶¶ 3.24-3.25, 3.28-3.31, 4.1, 5.1, 6.1.)

A simple comparison of the two cases clearly demonstrates the similarities of the allegations against USAA CIC and Garrison. The provisions of the policies that are allegedly at issue are similar, if not exactly the same. The provisions under the respective insurance policies concern the PDRP program, coverage of a fire and smoke damage claim, and the additional living expenses benefits. (CP 3 ¶¶ 3.6-3.18; CP 118 – CP 119 ¶¶

2.3-2.5.) By breaching the contract, both plaintiffs have alleged bad faith and the extra-contractual damages flowing from the breach. (CP 4 - CP 5 ¶¶ 3.24-3.25, 3.28-3.31, 4.1, 5.1, 6.1; CP 122 - CP 123 ¶¶ 3.1-3.5.) In other words, the *Plein* case is about insurance “bad faith litigation and extra-contractual damages” arising from a homeowners’ claim, which is exactly what Keller previously *defended* for USAA CIC’s affiliated company in the *Cueva* case.

*ii. Keller does not deny having confidential information concerning their former representation of USAA CIC and its affiliated companies.*

[T]he protection of confidences and secrets under Rule 1.9(b) is not limited to attorney-client privileged information. While “confidence” is defined by the Washington RPCs as “information protected by the attorney—client privilege,” “secret” is broader, referring to “other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(FMC Technologies, Inc., 420 F. Supp. 2d at 1161 (quoting RPCs *Terminology*)).) In addition, the ABA Model Rule 1.6 states “that confidentiality ‘applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.’” (FMC Technologies, Inc., 420 F. Supp. 2d at 1161 (quoting MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 3).)

Keller does not deny that it has obtained confidential information from its previous representation of USAA CIC and its affiliated companies. (CP 29 ¶ 4.) All of this information is readily accessible to anyone who works at Keller. This would include, but is certainly not limited to, the partners, attorneys, paralegals, and staff persons.

*iii. Based on the documents and information from its former representation of USAA CIC and its affiliates, if disclosed, the information could be used to the detriment of USAA CIC in the Plein case.*

Keller's representation of the *Cueva* case undeniably resulted in confidential information shared between Garrison and Keller. (CP 102 -CP 103 ¶ 11.) Because the *Cueva* allegations are substantially similar to that of the *Plein* matter, it only stands to reason that Keller has confidential information that is detrimental to USAA CIC. Moreover, this is only **one** bad faith insurance case that Keller has defended. Keller has represented USAA CIC and its affiliated companies in over 165 cases, and the information in its possession that is materially adverse to USAA CIC is limitless. (CP 101 ¶¶ 9.a.)

Similarities can be broader than "specific" facts – it can be business practices of a former client or information obtained via the attorney-client relationship that could affect the outcome of the current case. The test is "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 (emphasis added) (citing Hunsaker, 74 Wn. App. at 44, 873 P.2d 540).)

During the ten (10) year relationship, Keller handled over 165 cases, billing over 8,000 hours in just the last two years alone. (CP 101 ¶¶ 9.a., e.) There can be no question that Keller obtained confidential information concerning USAA CIC and its affiliated companies and the companies' claims handling practices. That is precisely at issue in the *Plein* matter – how USAA CIC handled the Pleins' claim. RPC 1.9 protects the former client's documents and information in the attorney's possession arising from the attorney-client relationship from being used against them. And an analysis of *Cueva* shows that the information in Keller's possession is materially adverse to USAA CIC and its defense against the Pleins.

Based on the Sanders test, Keller breached its duty of loyalty to USAA CIC and its affiliated companies when it accepted the Plein representation. The confidential information in its possession can be used to USAA CIC's detriment in the *Plein* matter. There can be no other conclusion. Therefore, the trial court erred when it granted the Pleins' Motion for Ruling Regarding Asserted Conflict of Interest.

**b. Keller's Catch-22 problem prevents it from being able to give adequate assurances that its prior representation cannot be used to the detriment of USAA CIC.**

The Pleins try to minimize Keller's conflict because Keller has never represented USAA CIC against the Pleins. (CP 27 ¶¶ 4-5; CP 29.) Even if that is true, Keller will never be able to give adequate assurances that the confidential information in its possession cannot be used against USAA CIC.

In order for Keller to give adequate assurances that there is no conflict is to review the confidential information in its possession. To meet this burden, Keller would have to review its records of every case that it had represented on behalf of USAA CIC and its affiliated companies during the ten (10) year relationship. (CP 101 ¶¶ 9.a.)

However, an attorney is bound by RPC 1.6 and 1.9 to hold in confidence information related to the representation of a former client. (In re Disciplinary Proceeding Against Botimer, 166 Wn.2d 759, 769, 214 P.3d 133 (2009).) A determination that confidential information is not protected by attorney-client privilege is not same determination as RPC 1.9, which requires protection of all confidential information from disclosure. (Id. (quoting ABA ANNOTATED MODEL RULES OF PROF'L CONDUCT R. 1.6, at 87-88 (5th Ed. 2003)).) In other words, all of the information in Keller's

possession concerning its prior representation of USAA CIC and its affiliated companies must be protected.

This is a Catch-22 scenario. Keller claims that they do not have any documents that would be harmful to USAA CIC, but the only way to confirm this statement is to violate the RPC 1.6 and 1.9, and look through the files in Hecht's possession to confirm. Although Hecht claims that she has never reviewed the *Pleins* matter nor has had access to the contents of that claim file, she has documents that are adverse to USAA CIC. (CP 29 ¶¶ 3-4.) The mere possibility that those documents can be used against USAA CIC is enough to disqualify *the entire firm* from representing the Pleins.

**5. Because RPC 1.9 disqualifies Hecht from representing the Pleins, RPC 1.10 disqualifies any attorney at Keller from representing the Pleins.**

There is no question that RPC 1.9 disqualifies Hecht and her team from representing the Pleins. RPC 1.10 prohibits *all attorneys* at Keller from representing the Pleins if Hecht is disqualified under RPC 1.9. (*See Sanders*, 121 Wn. App. at 598, 89 P.3d 312; *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.)

The trial court did not address the essential question of whether *Hecht* can represent the Pleins. If it had done so, then it would have been

clear that Keller's representation of the Pleins violates RPCs: Hecht cannot represent the Pleins, and thus neither can any other attorney at Keller. (RPC 1.10.) It is undisputed that Hecht is in possession of documents and client confidences that would conflict her out of representing the Pleins. (CP 29.) It is also undisputed that she has information that would violate her client's former confidences and breach her duty of loyalty to USAA CIC and its affiliated companies if she represented the Pleins. (*Id.*)

As elaborated in RPC 1.10, no other person in her law firm can represent any adverse party to USAA CIC because of Hecht's disqualification. Screening, as stated in RPC 1.10(e), is only for **incoming** attorneys – **not pre-existing** attorneys. There is no screening procedure adequate enough to isolate Hecht, the associate attorneys, and staff who have worked on and have access to the confidential information from Keller's extensive relationship with USAA CIC and its affiliated companies. The RPCs "simply do not allow law firms to establish their own screens to avoid conflict of interest under RPC 1.9(a) when the former client has not provided written consent . . . ." (CP 78 ¶ 9, lines 18-20 (emphasis added).) In fact, that is precisely why the RPCs **assume that the confidential information has already been disclosed.**

There is no question that RPC 1.9 disqualifies Hecht and her team. As such, RPC 1.10 disqualifies everyone else at Keller. Thus, the trial court

erred when it granted the Pleins' Motion for Ruling on Plaintiffs' Counsel's Conflict of Interest.

**6. The prejudice the Pleins have and will suffer, while minimal because Joel Hanson is still an attorney of record in the underlying case, bears no weight to this discussion. Keller can withdraw its representation of the Pleins.**

“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.) In this case, Keller was aware of the conflict and of its prior representation of USAA CIC. (CP 27 ¶¶ 4-6; CP 29.) Nonetheless, Keller ignored the conflict and proceeded to represent the Pleins. (CP 8-CP 9; CP 27 ¶¶ 4-6.) Any prejudice the Pleins will suffer is due to their attorneys’ lack of diligence and their breach of its duty of loyalty to USAA CIC. Thus, their argument concerning delay and prejudice has absolutely no weight in this discussion. The simple solution would be for Keller to withdraw its representation of the Pleins as was suggested by USAA CIC’s counsel. (CP 16 lines 10-24.) But rather than withdrawing from its representation of the Pleins, Keller continues to insert themselves into the underlying case. The Pleins’ argument that they should have their choice of representation is without merit – Joel Hanson is still the counsel of record. Thus, any prejudice that will be suffered by the Pleins was and is at the hands of Keller and not USAA CIC.

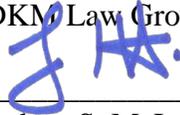
## **E. CONCLUSION**

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. RPC 1.9 prohibits an attorney from representing an adverse party to a former client. It is undisputed that Keller previously represented USAA CIC and its affiliated companies and that it has confidential information that is materially adverse to USAA CIC in the *Plein* matter. However, Keller discovered this conflict and blatantly ignored the RPCs, and agreed to represent the Pleins in a bad faith case against USAA CIC.

Despite this apparent conflict, the trial court granted the Pleins' Motion allowing Keller to continue representing them, and ignored the extensive relationship that had developed between Keller and USAA CIC. Moreover, this representation was accepted just three (3) months after USAA CIC became a former client. These egregious facts cannot continue because it would affect the defense of USAA CIC against the Pleins. Therefore, the trial court erred when it granted the Pleins' Motion for Ruling on Plaintiffs' Counsel's Conflict of Interest, and the trial court's decision should be reversed and Keller disqualified from representing the Pleins any further.

DATED THIS 14th day of September, 2018.

Respectfully submitted,  
DKM Law Group

A handwritten signature in blue ink, appearing to be 'R. S. McLay', is written over the text 'DKM Law Group'.

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No. 78190-1-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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

v.

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

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**APPENDIX** to Appellate Brief

RE: Order on the Plaintiffs' Motion for Ruling Regarding Asserted  
Conflict of Interest

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**TO: THE CLERK OF THE ABOVE-ENTITLED COURT, TO EACH PARTY, AND TO THE ATTORNEY OF RECORD FOR EACH PARTY HEREIN:**

Petitioner USAA Casualty Insurance Company hereby submits the following exhibits to the Appendix to its Appellate Brief Regarding the Order on the Pleins’ Motion for Ruling Regarding Asserted Conflict of Interest.

<u>Date</u>	<u>Document</u>	<u>Pages</u>
07/03/2018	Commissioner’s Order Granting USAA CIC’s Motion for Discretionary Review	APPBRF_APX001 through APPBRF_APX005
Last Amended 9/1/2016	Washington Rule of Professional Conduct (“RPC”) 1.6	APPBRF_APX006 through APPBRF_APX009
Last Amended 9/1/2006	RPC 1.7	APPBRF_APX010 through APPBRF_APX014
Last Amended 9/1/2006	RPC 1.9	APPBRF_APX015 through APPBRF_APX016
Last Amended 4/14/2015	RPC 1.10	APPBRF_APX017 through APPBRF_APX019

DATED THIS 14th day of September, 2018.

Respectfully submitted,  
DKM Law Group

A handwritten signature in blue ink, consisting of stylized initials, positioned above a horizontal line.

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*The Court of Appeals*  
of the  
*State of Washington*

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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:

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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

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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

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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,

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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

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Rules of Professional Conduct

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RPC 1.6  
CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer to the extent the lawyer reasonably believes necessary:

(1) shall reveal information relating to the representation of a client to prevent reasonably certain death or substantial bodily harm;

(2) may reveal information relating to the representation of a client to prevent the client from committing a crime;

(3) may reveal information relating to the representation of a client to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) may reveal information relating to the representation of a client to secure legal advice about the lawyer's compliance with these Rules;

(5) may reveal information relating to the representation of a client to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) may reveal information relating to the representation of a client to comply with a court order; or

(7) may reveal information relating to the representation to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client;

(8) may reveal information relating to the representation of a client to inform a tribunal about any client's breach of fiduciary responsibility when the client is serving as a court appointed fiduciary such as a guardian, personal representative, or receiver.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

[Originally effective September 1, 1985; amended effective September 1, 1990; September 1, 2006; September 1, 2016.]

Comment

See also Washington Comment [19].

[1] [Washington revision] This Rule governs the disclosure by a lawyer of information relating to the representation of a client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] [Washington revision] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0A(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[Comment [2] amended effective April 14, 2015.]

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct. See also Scope.

[Comment [3] amended effective September 1, 2011.]

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener

will be able to ascertain the identity of the client or the situation involved.

#### Authorized Disclosure

[5] [Washington revision] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose information relating to a client of the firm to other lawyers or LLLTs within the firm, unless the client has instructed that particular information be confined to specified lawyers or LLLTs.

[Comment [5] amended effective April 14, 2015.]

#### Disclosure Adverse to Client

[6] [Washington revision] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b) (1) recognizes the overriding value of life and physical integrity and requires disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply must reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] [Reserved.]

[8] [Reserved.]

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b) (4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b) (5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b) (5) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] [Reserved.]

#### Detection of Conflicts of Interest

[13] [Washington revision] Paragraph (b) (7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See RPC 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced, that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse, or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these rules. See also RPC 1.1, comment [6], [7], and [10] as to decisions to associate other lawyers or LLLTs.

[Comment 13 adopted effective September 1, 2016.]

[14] Any information disclosed pursuant to paragraph (b) (7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b) (7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b) (7). Paragraph (b) (7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[Comment 14 adopted effective September 1, 2016.]

[15] [Washington revision] A lawyer may be ordered to reveal information relating to the representation of a client by a court. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the information sought is protected against disclosure by the attorney-client

privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b) (6) permits the lawyer to comply with the court's order.

See also Washington Comment [24].

[16] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[17] [Washington revision] Paragraphs (b) (2) through (b) (7) permit but do not require the disclosure of information relating to a client's representation to accomplish the purposes specified in those paragraphs. In exercising the discretion conferred by those paragraphs, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 3.3, 4.1(b), and 8.1. See also Rule 1.13(c), which permits disclosure in some circumstances whether or not Rule 1.6 permits the disclosure.

See also Washington Comment [23].

#### Acting Competently to Preserve Confidentiality

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See RPC 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to forgo security measures that would otherwise be required by this rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see RPC 5.3, Comments [3]-[4].

[Comment 16 renumbered to 18 and amended effective September 1, 2016.]

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these rules.

[Comment 17 renumbered to 19 and amended effective September 1, 2016.]

#### Former Client

[20] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c) (2). See Rule 1.9(c) (1) for the prohibition against using such information to the disadvantage of the former client.

#### Additional Washington Comments (21-28)

[21] The phrase "information relating to the representation" should be interpreted broadly. The "information" protected by this Rule includes, but is not necessarily limited to, confidences and secrets. "Confidence" refers to information protected by the attorney client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

#### Disclosure Adverse to Client

[22] Washington's Rule 1.6(b) (2), which authorizes disclosure to prevent a client from committing a crime, is significantly broader than the corresponding exception in the Model Rule. While the Model Rule permits a lawyer to reveal information relating to the representation to prevent the client from "committing a crime . . . that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used the lawyer's services," Washington's Rule permits the lawyer to reveal such information to prevent the commission of any crime.

[23] [Reserved.]

[24] [Reserved.]

[25] The exceptions to the general rule prohibiting unauthorized disclosure of information relating to the

representation "should not be carelessly invoked." In re Boelter, 139 Wn.2d 81, 91, 985 P.2d 328 (1999). A lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of avoidable disclosure.

[26] Washington has not adopted that portion of Model Rule 1.6(b)(6) permitting a lawyer to reveal information related to the representation to comply with "other law." Washington's omission of this phrase arises from a concern that it would authorize the lawyer to decide whether a disclosure is required by "other law," even though the right to confidentiality and the right to waive confidentiality belong to the client. The decision to waive confidentiality should only be made by a fully informed client after consultation with the client's lawyer or by a court of competent jurisdiction. Limiting the exception to compliance with a court order protects the client's interest in maintaining confidentiality while insuring that any determination about the legal necessity of revealing confidential information will be made by a court. It is the need for a judicial resolution of such issues that necessitates the omission of "other law" from this Rule.

#### Withdrawal

[27] After withdrawal the lawyer is required to refrain from disclosing the client's confidences, except as otherwise permitted by Rules 1.6 or 1.9. A lawyer is not prohibited from giving notice of the fact of withdrawal by this Rule, Rule 1.8(b), or Rule 1.9(c). If the lawyer's services will be used by the client in furthering a course of criminal or fraudulent conduct, the lawyer must withdraw. See Rule 1.16(a)(1). Upon withdrawal from the representation in such circumstances, the lawyer may also disaffirm or withdraw any opinion, document, affirmation, or the like. If the client is an organization, the lawyer may be in doubt about whether contemplated conduct will actually be carried out by the organization. When a lawyer requires guidance about compliance with this Rule in connection with an organizational client, the lawyer may proceed under the provisions of Rule 1.13(b).

#### Other

[28] This Rule does not relieve a lawyer of his or her obligations under Rule 5.4(b) of the Rules for Enforcement of Lawyer Conduct.

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Rules of Professional Conduct

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RPC 1.7  
CONFLICT OF INTEREST: CURRENT CLIENTS

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

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

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

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

[Originally effective September 1, 1985; amended effective September 1, 1995; September 1, 2006.]

Comment

General Principles

[1] [Washington revision] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0A(e) and (b).

[Comment [1] amended effective April 14, 2015.]

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

See also Washington Comment [36].

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-

lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

#### Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

See also Washington Comment [37].

#### Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

#### Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] [Washington revision] When lawyers representing different clients in the same matter or in substantially related matters are related as parent, child, sibling, or spouse, or if the lawyers have some other close familial relationship or if the lawyers are in a personal intimate relationship with one another, there may be a significant risk that client confidences will be revealed and that the lawyer's family or other familial or intimate relationship will interfere with both loyalty and independent professional judgment. See Rule 1.8(1). As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer so related to another lawyer ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from such relationships is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rules 1.8(k) and 1.10.

[12] [Reserved.]

#### Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

#### Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation.

See Rule 1.1 (Competence) and Rule 1.3 (Diligence).

[16] [Washington revision] Paragraph (b) (2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states other than Washington limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest. See Washington Comment [38].

[17] [Washington revision] Paragraph (b) (3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0A(m)), such representation may be precluded by paragraph (b) (1).

[Comment [17] amended effective April 14, 2015.]

See also Washington Comment [38].

#### Informed Consent

[18] [Washington revision] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0A(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[Comment [18] amended effective April 15, 2014.]

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

See also Washington Comment [39].

#### Consent Confirmed in Writing

[20] [Washington revision] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0A(b). See also Rule 1.0A(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0A(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

[Comment [20] amended effective April 15, 2014.]

#### Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

#### Consent to Future Conflict

[22] [Reserved.]

#### Conflicts in Litigation

[23] Paragraph (b) (3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a) (2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on

behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a) (1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

#### Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a) (1) and (a) (2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

See also Washington Comment [40].

#### Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

See also Washington Comment [41].

#### Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

#### Additional Washington Comments (36 - 41)

#### General Principles

[36] Notwithstanding Comment [3], lawyers providing short-term limited legal services to a client under the auspices of a program sponsored by a nonprofit organization or court are not normally required to systematically screen for conflicts of interest before undertaking a representation. See Comment [1] to Rule 6.5. See Rule 1.2(c) for requirements applicable to the provision of limited legal services.

#### Identifying Conflicts of Interest: Material Limitation

[37] Use of the term "significant risk" in paragraph (a)(2) is not intended to be a substantive change or diminishment in the standard required under former Washington RPC 1.7(b), i.e., that "the representation of the client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests."

#### Prohibited Representations

[38] In Washington, a governmental client is not prohibited from properly consenting to a representational conflict of interest.

#### Informed Consent

[39] Paragraph (b)(4) of the Rule differs slightly from the Model Rule in that it expressly requires authorization from the other client before any required disclosure of information relating to that client can be made. Authorization to make a disclosure of information relating to the representation requires the client's informed consent. See Rule 1.6(a).

#### Nonlitigation Conflicts

[40] Under Washington case law, in estate administration matters the client is the personal representative of the estate.

#### Special Considerations in Common Representation

[41] Various legal provisions, including constitutional, statutory and common law, may define the duties of government lawyers in representing public officers, employees, and agencies and should be considered in evaluating the nature and propriety of common representation.

[Comments adopted effective September 1, 2006.]

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Rules of Professional Conduct

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RPC 1.9  
DUTIES TO FORMER CLIENTS

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

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

(1) whose interests are materially adverse to that person; and

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

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

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

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

[Originally effective September 1, 1985; amended effective September 1, 2006.]

## Comment

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. 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. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. 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.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

## Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some

degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] [Washington revision] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(e) and (b) for the restrictions on a firm when a lawyer initiates an association with the firm or has terminated an association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought. ed

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] [Washington revision] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0A(e). With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

[Comment [9] amended effective April 14, 2015.

[Comments adopted effective September 1, 2006.]

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Rules of Professional Conduct

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RPC 1.10  
IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) Except as provided in paragraph (e), 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 Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

(e) When the prohibition on representation under paragraph (a) is based on Rule 1.9(a) or (b), and arises out of the disqualified lawyer's association with a prior firm, no other lawyer in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified unless:

(1) the personally disqualified lawyer is screened by effective means from participation in the matter and is apportioned no part of the fee therefrom;

(2) the former client of the personally disqualified lawyer receives notice of the conflict and the screening mechanism used to prohibit dissemination of information relating to the former representation;

(3) the firm is able to demonstrate by convincing evidence that no material information relating to the former representation was transmitted by the personally disqualified lawyer before implementation of the screening mechanism and notice to the former client.

Any presumption that information protected by Rules 1.6 and 1.9(c) has been or will be transmitted may be rebutted if the personally disqualified lawyer serves on his or her former law firm and former client an affidavit attesting that the personally disqualified lawyer will not participate in the matter and will not discuss the matter or the representation with any other lawyer or employee of his or her current law firm, and attesting that during the period of the lawyer's personal disqualification those lawyers or employees who do participate in the matter will be apprised that the personally disqualified lawyer is screened from participating in or discussing the matter. Such affidavit shall describe the procedures being used effectively to screen the personally disqualified lawyer. Upon request of the former client, such affidavit shall be updated periodically to show actual compliance with the screening procedures. The law firm, the personally disqualified lawyer, or the former client may seek judicial review in a court of general jurisdiction of the screening mechanism used, or may seek court supervision to ensure that implementation of the screening procedures has occurred and that effective actual compliance has been achieved.

(f) When LLLTs and lawyers are associated in a firm, an LLLT's conflict of interest under LLLT RPC 1.7 or LLLT RPC 1.9 is imputed to lawyers in the firm in the same way as conflicts are imputed to lawyers under this rule. Each of the other provisions of this Rule also applies in the same way when LLLT conflicts are imputed to lawyers in the firm.

[Originally effective September 1, 1985 amended effective September 1, 1992; September 1, 2006; September 1, 2011; April 14, 2015.]

Comment

Definition of "Firm"

[1] [Washington revision] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers, LLLTs, or any combination thereof in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers or LLLTs employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0A(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0A, Comments [2] - [4].

[Comment amended effective April 14, 2015.]

Principles of Imputed Disqualification

[2] [Washington revision] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b) and (e).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] [Reserved. See Washington Comment [11].]

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] [Washington revision] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a definition of informed consent, see Rule 1.0A(e).

[Comment amended effective April 14, 2015.]

[7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[8] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

#### Additional Washington Comments (9 - 14)

#### Principles of Imputed Disqualification

[9] The screening provisions in Washington RPC 1.10 differ from those in the Model Rule. Washington's adoption of a nonconsensual screening provision in 1993 preceded the ABA's 2009 adoption of a similar approach in the Model Rules. Washington's rule was amended and the screening provision recodified as paragraph (e) in 2006, and paragraphs (a) and (e) were further amended in 2011 to conform more closely to the Model Rules version. None of the amendments to this Rule, however, represents a change in Washington law. The Rule preserves Washington practice established in 1993 with respect to screening by allowing a lawyer personally disqualified from representing a client based on the lawyer's prior association with a firm to be screened from a representation to be undertaken by other members of the lawyer's new firm under the circumstances set forth in paragraph (e). See Washington Comment [10].

[10] Washington's RPC 1.10 was amended in 1993 to permit representation with screening under certain circumstances. Rule 1.10(e) retains the screening mechanism adopted as Washington RPC 1.10(b) in 1993, thus allowing a firm to represent a client with whom a lawyer in the firm has a conflict based on his or her association with a prior firm if the lawyer is effectively screened from participation in the representation, is apportioned no part of the fee earned from the representation and the client of the former firm receives notice of the conflict and the screening mechanism. However, prior to undertaking the representation, non-disqualified firm members must evaluate the firm's ability to provide competent representation even if the disqualified member can be screened in accordance with this Rule. While Rule 1.10 does not specify the screening mechanism to be used, the law firm must be able to demonstrate that it is adequate to prevent the personally disqualified lawyer from receiving or transmitting any confidential information or from participating in the representation in any way. The screening mechanism must be in place over the life of the representation at issue and is subject to judicial review at the request of any of the affected clients, law firms, or lawyers. However, a lawyer or law firm may rebut the presumption that information relating to the representation has been transmitted by serving an affidavit describing the screening mechanism and affirming that the requirements of the Rule have been met.

[11] Under Rule 5.3, this Rule also applies to nonlawyer assistants and lawyers who previously worked as nonlawyers at a law firm. See *Daines v. Alcatel*, 194 F.R.D. 678 (E.D. Wash. 2000); *Richards v. Jain*, 168 F. Supp. 2d 1195 (W.D. Wash. 2001). For the definition of nonlawyer for the purposes of Rule 5.3, see Washington Comment [5] to Rule 5.3.

[Comment amended effective April 14, 2015; Comment [11] amended effective September 1, 2016.]

[12] In serving an affidavit permitted by paragraph (e), a lawyer may serve the affidavit on the former law firm alone (without simultaneously serving the former client directly) if the former law firm continues to represent the former client and the lawyer contemporaneously requests in writing that the former law firm provide a copy of the affidavit to the former client. If the former client is no longer represented by the former law firm or if the lawyer has reason to believe the former law firm will not promptly provide the former client with a copy of the affidavit, then the affidavit must be served directly on the former client also. Serving the affidavit on a represented former client does not violate Rule 4.2 because the communication with the former client is not about the "subject of the representation" and the notice is "authorized by law," i.e., the Rules of Professional Conduct.

[13] Rule 1.8(1) conflicts are not imputed to other members of a firm under paragraph (a) of this Rule unless the relationship creates a conflict of interest for the individual lawyer under Rule 1.7 and also presents a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

[14] For the parallel provision imputing lawyer conflicts to an LLLT when an LLLT has associated with a lawyer, see LLLT RPC 1.10(f).

[Comment adopted effective September 1, 2006; amended effective September 1, 2011; April 14, 2015.]

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