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No. 97563-9

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Appellants,

vs.

USAA CASUALTY INSURANCE COMPANY,
an insurance company,

Respondents,

and

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

Defendants.

PLEINS' SUPPLEMENTAL BRIEF

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661
Attorneys for Appellants

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A. INTRODUCTION

Richard and Debra Plein ask this Court to reverse Division I's decision on the application of RPC 1.9, an application that deprives them of their counsel of choice, the law firm of Keller Rohrback L.L.P. ("Keller").

USAA Casualty Insurance Company's ("USAA") effort to deprive the Pleins of their chosen counsel was a litigation tactic, something our Rules of Professional Conduct ("RPC") deplore. Preamble [20] ("...the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons."). The trial court rejected USAA's ploy to disqualify Keller from representing the Pleins in the trial court, having read the plain language of RPC 1.9, and Comments [2] and [3] to the rule, and having considered expert testimony. The trial court made factual findings in declining to disqualify Keller.

Division I, however, misinterpreted RPC 1.9 and this Court's Comments to it in ruling that Keller was conflicted in its representation of the Pleins, despite the trial court's factually-supported findings to the contrary. That court's overbroad reading of RPC 1.9, not limited temporally, will foreclose firms from *ever* representing new clients allegedly adverse to former clients. This is contrary to this Court's rationale in adopting Comments [2] and [3] to RPC 1.9.

This Court should uphold the trial court's decision. Numerous courts in both state and federal jurisdictions have held that former corporate clients cannot bar attorneys from representing adverse clients in factually unrelated matters, let alone do so forever. RPC 1.9 applies only to representation in the same case or matters factually related, *not* merely matters of the same general type. Keller's representation of the Pleins was not factually related to any matter in which it formerly represented USAA, representation that ended in November 2017, more than 2 years ago.

Moreover, Division I did not consider a less draconian sanction than Keller's complete disqualification. If the Court believes that Keller is disqualified, which it is not, this Court should remand the case to the trial court for analysis of the appropriate remedy in light of this Court's *Firestorm* decision.

B. STATEMENT OF THE CASE

Division I's opinion sets forth the facts and procedure in this case largely in an accurate fashion, with several significant exceptions.

First, the Court gives short shrift to USAA's outrageous conduct that was the predicate for the Pleins' present action. As noted in the Pleins' complaint, CP 1-7, 138-45, USAA's favored contractor, Stirling Group LLC, failed to repair the fire damages to the Pleins' home covered under the Pleins' USAA policy. CP 3. The Pleins were forced to retain a public

adjuster to secure the USAA policy's coverages they paid for, CP 4, 224-26. USAA then failed to investigate or offer payment for the additional repairs to the Pleins' home for more than a year. As of November 2017, more than two years after the fire occurred, USAA still had not paid for the Pleins' home repairs. CP 4. To make matters worse, USAA shorted the Pleins on the living expenses under their policy's alternate living expenses ("ALE") coverage to which they were entitled while their house was under repair. CP 161-223, 241-42.

The Pleins were forced to hire attorney Joel Hanson to sue USAA when USAA did not resolve the coverage issues with the public adjuster. Hanson maintained an independent law practice unaffiliated with Keller; he never represented USAA. CP 15. Hanson then approached then-Keller Rohrback ("Keller") partner, William Smart, about representing the Pleins. Although Irene Hecht, a partner at Keller, had previously represented USAA for a number of years in coverage and insurance bad faith claims brought by USAA policyholders, generally, CP 14,¹ the attorney-client

¹ Although no screening is required due to the lack of a conflict, Hecht had no involvement in the present matter. CP 14, 29-30. Keller's USAA representation was performed solely by Hecht and by attorneys and staff reporting to her. *Id.* Indeed, during Keller's USAA representation, its attorney-client communications were not shared outside Hecht and her team, both formally and informally. On a formal basis, the firm maintained internal controls to prevent access by lawyers and staff outside of Hecht's team to any material relating to any USAA matters. CP 27. Thus, even if another member of the firm attempted to access a USAA file, the access would be denied automatically. On an informal basis, lawyers at the firm customarily did not discuss confidential client information outside the lawyers and staff working on a particular matter.

relationship between USAA and Keller ended in the fall of 2017. *Id.* It is undisputed that from November 2017 forward USAA was a former client of the firm. RPC 1.9.

Keller performed a conflict check that revealed Keller's past USAA representation, but that check confirmed that Keller's past work for USAA never involved the Pleins, their insurance claim, or their lawsuit. CP 15. At no time did Keller or any of its lawyers or staff perform any USAA work regarding the Pleins, nor was the matter ever called to the firm's attention. CP 14. Neither Hecht nor any Keller attorneys or staff who formerly worked on USAA matters had any contact with Hanson or the Pleins, nor with the Plein file. CP 15, 29. Smart and his colleague, Ian Birk, never represented USAA. They had no knowledge of any attorney-client communications with USAA, and no knowledge of, and no access to, any USAA files or documents provided to Keller at any time, for the reasons noted *supra*. CP 15, 27.

On January 25, 2018, Birk appeared for the Pleins and sent a letter to USAA's counsel advising that Keller would shortly appear on the Pleins' behalf, and asking about USAA's lack of reimbursement of the Pleins' ALE expenses, explaining that the Pleins would seek relief in court if USAA did not resume paying their utilities. CP 15-16. Approximately an hour after Keller's notice of association was filed, USAA's counsel asserted that

Keller's representation of the Pleins created a conflict of interest, and demanded that Keller withdraw immediately, threatening to move to disqualify both Keller *and Hanson* if Keller did not withdraw. CP 16.²

On January 31, 2018, Keller consulted with outside ethics counsel, Seattle University Professor David Boerner, CP 17, a fact *nowhere* referenced in Division I's opinion. Keller believed, and Professor Boerner confirmed, that it could not simply withdraw from representing the Pleins based on USAA's assertion of a conflict, as this would not be in the Pleins' best interest. CP 17, 32-33. Professor Boerner ultimately concluded that Keller's representation of the Pleins was not a prohibited conflict, because the *Plein* matter was not substantially related to any matter on which Keller formerly represented USAA.

Later that day, Hanson sought clarification from USAA's counsel about whether USAA was seeking *his* disqualification. CP 17. USAA responded, explaining that it needed Keller/Hanson's immediate withdrawal because the Pleins had filed a motion relating to USAA's nonpayment of their ongoing utility expenses. CP 17-18. USAA's counsel implied that it would be "flexible" about the timing of addressing the

² The threat against Hanson evidenced the tactical nature of USAA's effort. Hanson never had any conflict of interest in this matter, and USAA had no basis to disqualify him. Division I's Commissioner agreed in her ruling granting discretionary review. USAA abandoned any claim that Hanson should be disqualified below.

conflict issue, if the Pleins would give USAA more time to respond on the utility issue. CP 18.³ This proposal was plainly not in the Pleins' interest because the Pleins were out of heating oil and, living paycheck-to-paycheck, faced difficulty paying for fuel.⁴ USAA attempted to leverage Keller/Hanson's putative conflict to further delay addressing the Pleins' covered ALE. CP 18.

In the face of USAA's assertions, Keller filed a motion seeking court consideration of RPC 1.9's application. Professor Boerner offered an extensive declaration on RPC 1.9 reaffirming his opinion that the Pleins' case was factually unrelated to any matter on which Keller formerly represented USAA. CP 31-37.⁵ The trial court ruled that Hanson and Keller could continue representing the Pleins. CP 130.⁶ The trial court's February 14, 2018 order made the specific finding that this case "is factually distinct

³ Division I did not mention this key fact, evidencing USAA's tactical intent in seeking Keller's disqualification, anywhere in its opinion.

⁴ Even though the Pleins' residence was damaged, they still were forced to pay ongoing expenses related to it, such as the mortgage and the house's upkeep. CP 18. The rent and the utilities at their temporary rental were the type of additional living expenses covered under USAA's ALE coverage.

⁵ Meanwhile, although no sharing of USAA material ever occurred within the Keller firm, the firm again instructed all firm personnel to screen any past USAA information from firm personnel who did not work on USAA matters, including specifically those working on the *Plein* matter. CP 27.

⁶ Given the Boerner declaration, substantial evidence supported the trial court's decision, a point nowhere noted in Division I's opinion, particularly given its off-hand mention of the trial court decision. Op. at 4. ("The trial court allowed the Keller attorneys and Mr. Hanson to remain as counsel for the Pleins.")

from and not substantially related to the firm's prior representation of USAA and as a result, the firm's representation of the Pleins is not a conflict under RPC 1.9." CP 129-30.⁷

C. ARGUMENT

(1) In Applying RPC 1.9, This Court Disfavors Attorney Disqualification and Places the Burden of Proving the Factual Basis for Disqualification on the Party Seeking It

Because this Court has not interpreted RPC 1.9 since its adoption in 2006 of the Comments to that rule, this case is one of first impression. But Washington's public policy on attorney disqualification is clear. Washington law *disfavors* efforts to disqualify opposing counsel, particularly when employed as a tactical weapon.⁸ Because a motion for disqualification is such a "potent weapon" and "can be misused as a technique of harassment," courts must exercise extreme caution in considering it to be sure it is not being used to harass the attorney sought to

⁷ The trial court also granted the Pleins' emergency motion asking for USAA to comply with its policy terms and make interim payments for the Pleins' utility costs while they were living in their rental home. USAA sought discretionary review of that decision at Division I, but that court's commissioner denied USAA's motion. That effort, however, documents the extent to which USAA would go in depriving the Pleins of necessary living expenses for their temporary rental, including heating expenses during the winter.

⁸ See, e.g., *In re Firestorm 1991*, 129 Wn.2d 130, 140, 916 P.2d 411 (1996) ("Disqualification of counsel is a drastic remedy that exacts a hard penalty from the parties as well as punishing counsel;"); *Foss Maritime Co. v. Brandewiede*, 190 Wn. App. 186, 189, 359 P.3d 905 (2015), *review denied*, 185 Wn.2d 1012 (2016) (disqualification is a drastic remedy to be employed only in "compelling circumstances.").

be disqualified, or the party she/he represents.⁹ This is particularly so where a client is deprived of their chosen counsel.¹⁰ A client has a right to their counsel of choice, a right this Court has traditionally respected.¹¹

(a) The Party Seeking Attorney Disqualification Bears the Burden of Proof

The public policy context set forth above is why a party seeking to disqualify counsel historically has had the burden of proof as to disqualification. *Sanders v. Woods*, 121 Wn. App. 593, 597-98, 89 P.3d 312 (2004) (“In order to successfully disqualify a lawyer from representing an adversary, a former client must show that the matters currently at issue are substantially related to the subject matter of the former representation.”). Division I seemingly ignored this aspect of *Sanders*, asserting the question

⁹ See, e.g., *Kitchen v. Aristech Chem.*, 769 F. Supp. 254, 256–57 (S.D. Ohio 1991); *FMC Tech. Inc. v. Edwards*, 420 F. Supp. 2d 1153, 1157 (W.D. Wash. 2006) (because disqualification is drastic measure, court “must consider the danger of a motion to disqualify opposing counsel on a litigation tactic.”). See also, *Developments in the Law: Conflict of Interest in the Legal Profession*, 94 Harv. L. Rev. 1244, 1285 (1981) (“Lawyers have discovered that disqualifying counsel is a successful trial strategy, capable of creating delay, harassment, additional expense, and perhaps even resulting in the withdrawal of a dangerously competent counsel.”).

¹⁰ See, e.g., *Plant Genetic Sys., N.V. v. Ciba Seeds*, 933 F. Supp. 514, 517 (M.D.N.C. 1996) (“The guiding principle in considering a motion to disqualify counsel is safeguarding the integrity of the court proceedings; the purpose of granting such motions is to eliminate the threat that the litigation will be tainted.”); *Tessier v. Plastic Surgery Specialists, Inc.*, 731 F. Supp. 724, 729 (E.D. Va. 1990) (“There must be a balance between the client's free choice of counsel and the maintenance of the highest ethical and professional standards in the legal community.”).

¹¹ *State v. Hampton*, 184 Wn.2d 656, 662, 361 P.3d 734 (2015), cert. denied, 136 S. Ct. 1718 (2016); *In re Dependency of G.G. Jr.*, 185 Wn. App. 813, 826, 344 P.3d 234, review denied, 184 Wn.2d 1009 (2015).

of the burden in disqualification is unresolved in Washington, and then declining to resolve the question. Op. at 5 n.2.

This Court should affirm that the burden in attorney disqualification efforts rests with the party seeking an attorney's disqualification.

(b) In Light of This Court's 2006 Adoption of Comments to the Rule, RPC 1.9 Does Not Require an Attorney's Disqualification Unless the Attorney's Representation Involves the Same Matter or One Factually Related to the Representation of the Former Client

This Court's adoption of the RPCs is a function of its plenary power to regulate the practice of law in Washington. *Hizey v. Carpenter*, 119 Wn.2d 251, 261, 830 P.2d 646 (1992); *In re Disciplinary Proceedings Against Marshall*, 160 Wn.2d 317, 329, 157 P.3d 859 (2007) ("This Court bears the ultimate responsibility for lawyer discipline in Washington."). The current RPCs, including official Comments, are based on the ABA Model Rules of Professional Conduct,¹² and were adopted by this Court in 2006. *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 76 n.13, 331 P.3d 1147 (2014). The 2006 Comments to RPC 1.9, emanating from this Court, must guide the understanding of RPC 1.9, notwithstanding

¹² The Washington State Bar Association appointed a special committee, the Ethics 2003 Commission, to evaluate the American Bar Association's 2003 Model Rules of Professional Conduct. In 2006, this Court largely adopted the Ethics 2003 Commission's recommendation to accept the ABA's Model Rules. Johanna M. Ogdon, *Washington's New Rules of Professional Conduct: A Balancing Act*, 30 Seattle U. L. Rev. 245, 245-46 (2006).

whatever Court of Appeals case law prior to 2006 might have provided, as Division I correctly concluded. Op. at 8-9. But Division I failed to properly apply this Court's Comments, and simply ignored the trial court's factual findings, based on Professor Boerner's expert testimony, that supported the trial court's denial of USAA's disqualification motion.

USAA argued below for an RPC-based "duty of loyalty" on the part of counsel to former clients, app. br. at 13-15; reply br. at 20-22, and in discussing RPC 1.10, Division I also adopted a general, highly non-specific "duty of loyalty," despite the ABA/Washington rule history and this Court's Comments [2] and [3] to RPC 1.9.¹³ RPC 1.9, based on the ABA Model Rules, involves a different analysis, rejecting the old canons. Under the Model Rules, adopted by this Court, the mere possession of confidential information no longer results in an attorney's automatic disqualification based on any "appearances" or "duty of loyalty," if the matters are distinct. Instead, the lawyer must refrain from disclosure of such confidences under

¹³ Any analysis regarding "appearances" and "loyalty" involve out-of-date terminology. The ABA's former Code of Professional Responsibility had "Canons," "Ethical Considerations," and "Disciplinary Rules." It mentioned the appearance of professional impropriety. ABA 2004 ed. *Compendium of Professional Responsibility and Standards* at 271-73. The modern version of RPC 1.9 did not employ the "appearance" terminology because of concerns regarding its vagueness articulated by the ABA's Kutak Commission that studied the Code of Professional Responsibility. The ABA's Model Rules of Professional Conduct, of which Rule 1.9 is a part, supplanted the older Code with its "canons" and "appearances." Monroe Freedman, *The Kutak Model Rules v. The American Lawyer's Code of Conduct*, 26 Vill. L. Rev. 1165 (1981); Kathleen Maher, *Keeping Up Appearances*, 16 Prof. Law. 1 (2005).

RPC 1.9(c), the subsection of the rule prohibiting disclosure of confidences regardless of the similarity of matters. There is no automatic disqualification of an attorney based solely on that attorney's retention of some confidences from the former client, as evidenced by the fact that RPC 1.9(c) would be unnecessary if that were true.

RPC 1.9, as further explained in this Court's 2006 Comments, govern a lawyer's duties to former clients in Washington, specifically prohibiting a lawyer from representing another person adverse to a former client only "in the same or a substantially related matter." RPC 1.9(a). Op. at 9. Put another way, the lawyer may represent another person adverse to a former client in matters that are not "the same" or "substantially related," as RPC 1.9(a) states.

Pre-2006 case law from the Court of Appeals indicated that the question of "substantially related" was *factual*. *Sanders*, 121 Wn. App. at 597-600; *State v. Hunsaker*, 74 Wn. App. 38, 873 P.2d 540 (1994). *Sanders* illustrates what "factually related" means. There, a hotel owner sued a former employee for violating a noncompete agreement. A lawyer who sought to represent the employee, had previously represented the hotel owner *and had advised the hotel owner on the very noncompete agreement at issue*. *Sanders*, 121 Wn. App. at 596. As Division III explained, that lawyer (and his business partner) had previously sent other former

employees “cease and desist” letters based on the same noncompete agreement, and had specifically “reviewed the independent contractor agreements” and advised that they “appeared adequate.” *Id.* at 598. The lawyer was disqualified from representing the employee in a dispute about the same agreement that the lawyer had drafted for the employer. *Id.* Thus, it is not enough that the *subject matter* is “similar,” there must be *facts in common*, such as the facts surrounding the drafting of the noncompete agreement at issue in *Sanders*. Put bluntly, “substantially related” is not “substantially similar,” as Division I seemed to believe.

The *Sanders* court followed *Hunsaker*, a case that makes this point. There, the State charged Hunsaker with molestation of a child, M.S. At trial (and with speedy trial an issue), Hunsaker sought disqualification of his defense counsel, because that attorney had previously represented M.S. in a separate criminal matter against M.S. The court reversed the trial court’s disqualification of Hunsaker’s counsel because the separate prosecution of M.S. and the new prosecution of Hunsaker “appear[ed] to be totally unrelated.” *Id.* at 46. In other words, the representations were *factually* distinct.

No Washington case has interpreted RPC 1.9 since the 2006 rule change as to what the terms “same” or “substantially related” there mean. But whether matters are the “same” is a *factual* determination, as is whether

matters are “substantially related.” However, Division I here effectively treated the determination as *legal* in nature. That this “substantially related” analysis is a factual one is also supported by federal authorities. *See Cox v. Alliant Ins. Services, Inc.*, 2017 WL 4640452 (E.D. Wash. 2017) (rejecting disqualification). This Court should confirm that RPC 1.9’s “substantially related” analysis is a factual one.

(2) RPC 1.9 Did Not Disqualify Keller from Representing the Pleins

(a) Keller’s Representation of the Pleins Did Not Involve the Same Case or Matter

RPC 1.9’s limitation on a client’s right to the counsel of their choice is clear, and it is far narrower than Division I ruled. Where an attorney is involved in the *same* case or matter, and switches sides, RPC 1.9 bars such an action, cmt. [2], RPC 1.9. In a pre-2006 case, *Teja v. Saran*, 68 Wn. App. 793, 800, 846 P.2d 1375, *review denied*, 122 Wn.2d 1008 (1993), an attorney who consulted with one client about a matter was disqualified from representing the opposing party in that *same matter*. *Id.*

In this case, USAA does not contend that Keller represented it in the Pleins’ case, nor did any Keller attorney receive any confidences from USAA relating to facts surrounding the *Plein* matter. Rather, USAA has alleged only that Keller attorneys worked on USAA matters of the same general type as the *Plein* matter.

(b) Keller's Representation of the Pleins Did Not Involve a Case or Matter Factually Related to Any Former USAA Representation

Keller's representation of the Pleins was also not factually related to any other case or matter in which it had formerly represented USAA. Division I did not fully credit this Court's direction in the 2006 Comments to RPC 1.9 regarding the interpretation of "substantially related" representation. The plain language in Comment [2] makes it clear that a lawyer who represented a client in a particular matter may represent an adverse client in a factually distinct problem of that same *type*. In other words, "substantially related" is not "substantially similar" representation: "[A] lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client." RPC 1.9 cmt. [2].¹⁴

¹⁴ Indeed, the October 5, 2011 report of the ABA's Commission on Evaluation of the Rules of Professional Conduct specifically discussed the changes in RPC 1.9 from an earlier November 2000 Report to its May 2001 Report. https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_chan_june/. The May 2001 Report *rejected* language in RPC 1.9 that stated matters were "substantially related" if they involved the "same *subject matter*," in favor of "same *transaction or legal dispute*." The Report stated that this change was intended "to further refine and cabin the concept of substantial relationship, particularly as it affects the potential disqualification of former lawyers for an organization including the government." This Court's Comments [2] and [3] clearly reflect this understanding of RPC 1.9. The RPCs do not support broad, subject-matter disqualification of counsel.

This analysis is confirmed in *Best v. BNSF Railway Co.*, 2008 WL 149137 (E.D. Wash. 2008), a case not cited by Division I in its opinion or USAA in its answer. There, the court rejected a motion by the railroad to disqualify a lawyer in a FELA case merely because a similar type of case was involved. BNSF contended that the lawyer obtained specialized knowledge of BNSF's activities from his former representation. The lawyer had served for 10 years as BNSF's outside counsel. The court rejected the railroad's assertion that because the lawyer had represented it in numerous FELA cases and 90% of his former firm's revenues were derived from BNSF representation, the lawyer's access to sensitive BNSF information and personnel necessarily disqualified him. The court noted that the lawyer had no particular insights or information from his former BNSF work as to a hearing loss matter like the one before the court.¹⁵

Applying the plain language of Comment [2], Keller only worked on matters or claims of a similar *type* for USAA. Division I ignored the trial court's specific finding that there was no factual connection between Keller's representation of the Pleins and any of its former USAA representations. Division I observed that Keller attorneys were familiar

¹⁵ See also, *Wu v. O'Gara Coach Co., LLC*, 251 Cal. Rptr. 3d 573 (Cal. App. 2019) (court reverses disqualification based on attorney/executive's knowledge of former client's "playbook" where knowledge was general in nature and was not materially related to specific aspects of present litigation).

with the company's "inner workings" and worked on other insurance bad faith cases involving similar kinds of claims, in particular the *Cueva* claim. Op. at 10-12. However, other than being claims of a similar type, the court identified no connection between them. *Id.*

USAA cited *one case*, *Cueva*, as the example of how Keller's former USAA representation allegedly violated RPC 1.9. But Division I's analysis of *Cueva*'s alleged "factual similarity" to the Pleins' representation is faulty. *Cueva* was *unrelated*, factually, to the Pleins' representation. *Cueva* arose now *ten years ago*, a fact nowhere mentioned in the opinion. *Cueva* involved unrelated insureds. A different USAA affiliate than Sterling failed to remediate smoke damage, and then USAA failed to provide living benefits, delayed handling the plaintiffs' claim, and put its own interests above those of the Cuevas. There was no factual *connection* between the two matters, only factual "similarity." While Keller worked on prior bad faith cases, matters of the same *type* as *Plein*, those matters are not connected to *Plein*. Comment [2] allows the representation.¹⁶

Division I's opinion virtually disqualifies a lawyer from *ever* representing a client against a former client. If a lawyer has represented a

¹⁶ See *Arden v. Forsberg & Umlauf, P.S.*, 189 Wn.2d 315, 402 P.3d 245 (2017) (counsel retained by insurer not *per se* disqualified from representing insureds despite previous relationship between counsel and insurer; counsel did not advise insureds of that relationship).

client in a similar type of matter unconnected to the present representation, in the past, seemingly at any time, Division I’s analysis bars that representation despite comments [2] and [3] to RPC 1.9. Division I missed the distinction this Court drew in the Comments between “substantially related,” a factual inquiry, and “substantially similar.”

Division I also failed to credit this Court’s Comment [3], under which Keller’s knowledge of USAA’s policies and procedures with respect to other bad faith cases (often described as knowledge of the client’s “playbook”) does not preclude it representing the Pleins. Op. at 9-11. Specifically, Hecht’s knowledge about USAA’s policies and practices did not warrant disqualification. Comment [3] states: “In the case of an organizational client, general knowledge of the client’s policies and practices ordinarily will not preclude a subsequent representation.” Courts in other jurisdictions have properly applied RPC 1.9 to reject disqualifications in circumstances like those present here. Those courts have generally interpreted the rule narrowly, upholding the client’s right to their counsel of choice, and refused to disqualify in the absence of a specific factual connection between the matters at issue.¹⁷

¹⁷ For example, in *Watkins v. Trans Union, LLC*, 869 F.3d 514, 523 (7th Cir. 2017), an attorney represented corporate client Trans Union for years, defending it against allegations Trans Union had violated the Fair Credit Reporting Act, 15 U.S.C. § 1681d(b) (FCRA). The lawyer worked with Trans Union’s in-house counsel on over 250 cases and billed over 4,000 hours. After he left Trans Union, the attorney founded his own law firm

This Court's Comments [2] and [3] to RPC 1.9 also comport with the *Restatement of the Law Governing Lawyers*, which explains by illustration that a lawyer who has handled recurrent matters of a given *type* for a former client can handle new, distinct matters adverse to the former client, even if they are of the same general type as the past cases. *Restatement (Third) of the Law Governing Lawyers* § 132 (2000), Illustration 4 (“Although both representations involve marketability of title,

and represented consumers bringing FCRA claims against credit reporting agencies. In the case of one such plaintiff, Trans Union sought the attorney's disqualification, citing pre-Comment [2] and [3] case law interpreting RPC 1.9, and that because he had defended Trans Union in FCRA cases, the attorney was disqualified from representing Watkins in his FCRA case against Trans Union. *Id.* The Seventh Circuit affirmed the denial of disqualification in *Watkins* explaining that in the case of corporate clients, similarity between types of matters is not enough under Comments [2] and [3]. *Id.* at 521-23. It noted that “facts upon which Watkins' case will turn—recurrent false collection listings on his credit report, despite multiple requests to remove them—are unique to his claim against Trans Union and are not interwoven with any individual case in which [the lawyer] represented Trans Union in the past.” *Id.* at 521.

Similarly, in *Health Care & Ret. Corp. of Am., Inc. v. Bradley*, 961 So. 2d 1071, 1072 (Fla. Dist. Ct. App. 2007), a lawyer represented a nursing home for a period of three years in at least 60 cases, many of them involving claims of negligence in connection with pressure ulcers and falls. After the lawyer's representation of the nursing home terminated, he sought to represent a plaintiff against the same nursing home involving alleged negligence in connection with pressure ulcers and a fall. Applying the Comments [2] and [3] to RPC 1.9, the court concluded that this did not present a conflict. Because “each negligence case turns on its own facts,” the subsequent representation did not involve the attorney attacking the work that he performed for the former client, and the former and current matters were not substantially related. *Id.* at 1074.

See also, Miskel v. SCF Lewis & Clark Fleeting LLC, 2016 WL 3548438 at *5 (S.D. Ill. June 30, 2016) (lawyer who represented company as defendant in four maritime cases not disqualified from later representing plaintiff in maritime case against same company); *Olajide v. Palisades Collection, LLC*, 2016 WL 1448859 at *3 (S.D.N.Y. Apr. 12, 2016) (lawyer who represented debt collection firm in hundreds of matters not disqualified from later representing plaintiff whose debt was not a matter that he worked on for former client).

it is unlikely that Lawyer's knowledge of marketability of Tract X would be relevant to the litigation involving the marketability of title to Tract Y. Accordingly, the matters are not substantially related.”).

Critically, in the context of representing large entities like insurers or corporations, Division I's harsh, restrictive ruling puts former counsel of such institutional clients under those entities' financial control for an indefinite duration, depriving clients of their right to counsel of their choice, and threatening lawyer independence. Such a “life sentence” is contrary to this Court's Comments [2] and [3] to RPC 1.9.

Reconstructing the facts of Keller's prior USAA representations, the matters were not substantially related to *Plein* and no USAA confidences are at issue here in Keller's representation of the Pleins. Keller worked only on unrelated matters where USAA was accused of committing bad faith against other insureds, who made other insurance claims, based on other losses. Keller did not draft any USAA policy language at issue, so it had no knowledge of USAA's confidences on the intended meaning or applicability of the ALE provision in the applicable policy. Nothing USAA might have disclosed to Keller in confidence with respect to its conduct toward other insureds in other bad faith cases had anything to do with its conduct *toward the Pleins*. As with other kinds of tort cases, each insurance bad faith case turned on its own facts. Whether a different USAA affiliate

committed bad faith or caused harm to other homeowners is not substantially related to whether USAA committed bad faith in its handling of the Pleins' insurance claim.¹⁸ The Pleins' case was factually *unique*, and no Keller attorney had factual information about how USAA and its affiliate treated the Pleins.

Comment [3] also explains that a lawyer does not have a conflict under RPC 1.9 based on knowledge of information (such as the language of an insurance policy) that has been disclosed publicly or to other adverse parties. The Comment states: "Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying." Any knowledge regarding USAA's claims policies and practices *ordinarily turned over in discovery* does not disqualify the firm. Insurers are required to "adopt" and "implement" standards for handling claims under WAC 284-30-330(3), and these standards are routine subjects of discovery. *See In re: Mack Industries, Ltd.*, 606 B.R. 313, 324-25 (N.D. Ill. 2019) (information publicly available or disclosed in discovery does not constitute disqualifying information); *Hunsaker*, 74 Wn. App. at 49 (On whether counsel could use the prior representation of M.S. to discredit M.S. as a witness, the court specifically rejected disqualification based on

¹⁸ This analysis presumes that USAA does not have a systematic strategy for committing bad faith that it distributed to its affiliates with instructions to commit bad faith in every case. USAA has not alleged it had that kind of business model.

information that “would be available to defense counsel in discovery.”)¹⁹

Division I summarily rejected this analysis, though. Op. at 12-13.

Finally, Division I relied upon RPC 1.10 on the imputation of conflicts for its analysis of RPC 1.9, op. at 6-7, but that reliance is misplaced. Division I ignored the portion of RPC 1.10 that permits the screening of counsel in a firm. RPC 1.10(d)-(e).²⁰ Division I’s broad brush analysis of RPC 1.9 will give rise to the very types of tactical disqualification motions this Court rejected in adopting RPC 1.10(d), (e) and RPC 1.11.

In sum, the trial court correctly found that Keller had no conflict under RPC 1.9 in representing the Pleins. This Court’s 2006 Comments [2] and [3] to RPC 1.9 clarify that a new, factually distinct matter is not

¹⁹ In bad faith litigation, it is presumed that virtually all, if not all, of an insurer’s claim file must be produced in discovery notwithstanding an insurer’s attorney-client privilege. *Cedell v. Farmers Ins. Co. of Wash.*, 176 Wn.2d 686, 700, 295 P.3d 239 (2013). This Court recognized that an insured is presumptively entitled to the insurer’s claim file, notwithstanding claims of attorney-client or work product privilege. *Id.* at 696.

²⁰ Screening has traditionally been seen as a means of mitigating and avoiding attorney conflicts. For example, RPC 1.10(e) allows it to address an attorney coming to a new firm. *See PNC Bank, N.A. v. EP Curragh, LLC*, 2019 WL 3417058 (Ill. App. 2019). RPC 1.11 allows screening for former government attorneys coming back to private practice. Ironically, this means, for example, that Keller lawyers who leave the firm may sue USAA if they had no relationship with USAA, but lawyers like Birk who stay at Keller may not do so even though Birk never represented USAA. *See* Comments [4], [5]. This Court indicated its concern about such a problem in Comment [4] to RPC 1.9: “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.”

substantially related within the meaning of the rule to past, different matters, even if they are of the same general type. This Court should confirm that RPC 1.9's Comments [2] and [3] apply here and foreclose Keller's disqualification because representation of a former client in a similar type of matter does not meet RPC 1.9's "substantially related" matter test.

(c) Because the Matters Here Are Not Substantially Related, Any Remedy for USAA Is RPC 1.9(c) Which Prohibits the Disclosure of Confidences

Division I's opinion fails to address RPC 1.9(c), which is calculated to afford former clients protection from attorneys actually misusing the confidences from former representations. Logically, if the mere retention of a former client's confidences by counsel warranted *per se* disqualification, then there would be no need for RPC 1.9(c). But that rule allows a lawyer to participate in a matter adverse to a former client, provided that the lawyer does not "use" or "reveal" information relating to the former representation. RPC 1.9(c) allows representation in an unrelated matter, as long as the lawyer uses only "generally known" information and not confidences. RPC 1.9 cmt. [8].

USAA contended below that it need not make any showing that Keller could use confidences to its detriment in order to obtain Keller's disqualification, arguing that Keller was disqualified *as a matter of law* simply because it represented USAA in the past and presumably obtained

confidences. App. Br. at 25-28. USAA claimed, without proof, that it “only stands to reason that Keller has confidential information that is detrimental to USAA CIC.” *Id.* at 25. It contended that courts must presume that in the totally unrelated *Plein* matter, Keller will be able use whatever information it obtained in the *Cueva* matter, merely because of alleged similarities in the two, unrelated cases. *Id.*²¹

USAA had to make an evidentiary showing under RPC 1.9(c) that confidences would be used by Keller to its detriment, if the matters at issue were not substantially related, as was true here. *Teja*, 68 Wn. App. at 793. (“The plain language of RPC 1.9 indicates actual proof of disclosure of confidential information is not necessary *if the matters are substantially related.*” *Id.* (emphasis added).) It never did so. Keller’s disqualification was not merited accordingly, and this Court should so hold.

(3) If This Court Concludes that Keller’s Representation of the Pleins Implicated RPC 1.9(a), It Should Remand the Case to the Trial Court for an Analysis of Remedies Under *Firestorm*

Although Keller believes that Division I was wrong in concluding that RPC 1.9(a) was implicated in its representation of the Pleins, if the Court were to agree with Division I, that does not end the necessary

²¹ USAA even argued that Keller is in a “Catch-22” because it could not even review its files to ascertain whether it had confidential information that could be used to USAA’s detriment without violating the RPCs. App. Br. at 25-28.

analysis. This Court should remand the case to the trial court to conduct the necessary remedy analysis envisioned by this Court's decision in *Firestorm*. There, this Court held that in a case involving disqualification of counsel for access to privileged information, in fashioning a remedy a trial court must consider (1) prejudice; (2) counsel's fault; (3) counsel's knowledge of the privilege claim; and (4) possible lesser sanctions. *Firestorm*, 129 Wn.2d at 139-45. In *Foss*, Division I applied this remedy analysis in a case where counsel obtained privileged information. The court reversed a trial court order disqualifying the offending lawyer and his entire firm, as a sanction, noting that the trial court failed to adequately address the *Firestorm* factors. The court rejected a *per se* rule, that is, requiring disqualification automatically if confidential materials were accessed by counsel. *Foss*, 190 Wn. App. at 197. *See also, In re Examination of Privilege Claims*, 2016 WL 11164791, *accepted*, 2016 WL 8669870 (W.D. Wash. 2016) (rejecting disqualification).

The *Firestorm* analysis applies with no less vigor in an RPC 1.9 situation, and should be applied here if the Court were to find Keller's actions to implicate that rule.

D. CONCLUSION

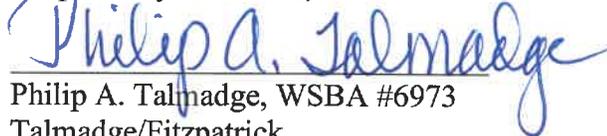
USAA brought a tactical disqualification motion to deprive the Pleins of their counsel of choice. Division I's published opinion failed to

apply this Court's Comments [2] and [3] to RPC 1.9, stands at odds with courts interpreting those comments, and virtually bars counsel from *ever* representing a client against a former client, despite those Comments. The trial court correctly applied RPC 1.9 and declined to disqualify Keller from representing the Pleins, properly honoring the Pleins' choice of counsel.

This Court should reverse Division I's opinion and restore the trial court's decision. Alternatively, as required by this Court's decision in *Firestorm*, if it were to conclude that RPC 1.9(a) is implicated by Keller's representation of the Pleins, it should remand the case to the trial court to conduct the necessary sanction analysis. Costs on appeal should be awarded to the Pleins.

DATED this 30 day of January, 2020.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorney for Appellants

APPENDIX

RPC 1.9:

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

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

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

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

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

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

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

RPC 1.9, Comment [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.

RPC 1.9, Comment [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.

RPC 1.9, Comment [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.

RPC 1.9, Comment [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(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

RPC 1.9, Comment [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.

RPC 1.9, Comment [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).

RPC 1.9, Comment [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.

FILED

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KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

The Honorable Veronica A. Galván
Trial Date: November 12, 2018

SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

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

Plaintiffs,

v.

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

Defendants.

No. 17-2-29542-6 SEA

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

THIS MATTER came on before this Court on Plaintiffs' Motion for Ruling Regarding
Asserted Conflict of Interest. The Court has considered said motion, defendant's response and
plaintiffs' reply, as well as the papers submitted therewith. Now, therefore,

THE COURT FINDS AS FOLLOWS:

Keller Rohrback's Motion for Ruling Regarding Asserted Conflict of Interest is

GRANTED as follows:

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 a conflict under RPC 1.9.

ORDER ON PLAINTIFFS' MOTION FOR RULING
REGARDING ASSERTED CONFLICT OF INTEREST- 1

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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

Respondents,

v.

USAA CASUALTY INSURANCE
COMPANY, an insurance company,

Appellant,

and

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

Defendant.

No. 78190-1-I

DIVISION ONE

PUBLISHED OPINION

FILED: July 29, 2019

CHUN, J. — We address whether, given the facts of this case, a law firm may represent a person adverse to a former client. In doing so, we analyze whether this case constitutes a matter “substantially related” to the firm’s representation of the former client under RPC 1.9(a). Comment 3 to RPC 1.9 guides our analysis.

On behalf of Richard and Debra Plein, attorney Joel Hanson filed a complaint for insurance bad faith and various other claims against USAA

Casualty Insurance Company. The claims stemmed from the actions of USAA and its recommended contractor for repairs following a house fire.

A few months later, attorneys William Smart and Ian Birk from the law firm Keller Rohrback LLP, joined the Pleins' legal team. USAA objected to Keller's participation in the litigation because the company and law firm had recently ended their extensive attorney-client relationship.

Keller requested the trial court rule on the asserted conflict of interest. The trial court found no conflict under RPC 1.9. USAA moved for discretionary review, which this court granted. We conclude Keller's representation of the Pleins violates RPC 1.9(a). Accordingly, we reverse.

I. BACKGROUND

The Pleins purchased homeowners' insurance from USAA. Later, in August 2015, a fire damaged their home and personal property. USAA determined that the insurance policy covered the damage and recommended The Sterling Group, LLC as a contractor to perform repairs. The Pleins followed the recommendation.

The Pleins moved back into their home after Sterling finished the repairs. They claim to have noticed a substantial lingering odor of smoke upon their return. According to the Pleins, Sterling had concealed, rather than properly repaired, the fire damage. The Pleins hired a public adjuster and USAA hired an industrial hygienist. The industrial hygienist discovered numerous deficiencies in the repair work. The Pleins alleged that USAA agreed to move them to a rental

house to complete the repairs, but it did not investigate the cost of the needed repairs or offer payment for those repairs.

The Pleins claim that as of November 14, 2017, USAA had not made a coverage decision as to the additional repairs. That day, Mr. Hanson filed a complaint against USAA and Sterling¹ on behalf of the Pleins. In January 2018, Mr. Hanson approached William Smart, an attorney with Keller, about representing the Pleins in their lawsuit. That same month, Mr. Smart and another Keller attorney, Ian Birk, agreed to associate as counsel on the case.

A conflicts check at Keller revealed the firm's past relationship with USAA. Keller attorney Irene Hecht and at least seven additional attorneys at the firm represented USAA and its affiliates for over a decade. Between August 2006 and November 2017, Keller represented USAA and its affiliates in at least 165 cases, approximately 12 of which involved insurance bad faith litigation by homeowners. Keller served as USAA's primary law firm in Washington for bad faith litigation. In the last two years of its representation, Keller billed over 8,000 hours of work for USAA.

One of the cases in which Keller represented a USAA subsidiary in an insurance bad faith lawsuit involved issues very similar to the Pleins' case. Specifically, Cueva v. Garrison Prop. & Cas. Ins. Co., Pierce County Superior Court No. 10-2-06680-8, concerned an allegation of insurance bad faith relating to the handling of repairs after a house fire. The similarities between Cueva and the Pleins' case included smoke damage inadequately repaired by a

¹ Sterling is not party to this appeal.

recommended contractor, health concerns arising from the smoke damage, appropriate methods to clean the house and personal property, and "factual and legal disputes concerning the methodology for objectively testing for smoke damage."

The relationship between USAA and Keller ended in November 2017, the same month the Pleins filed suit. Keller's past work for USAA had not involved the Pleins. Additionally, the firm indicated that Mr. Smart and Mr. Birk had never been involved in Keller's relationship with USAA and did not have any knowledge of attorney-client communications with the company.

After learning of Keller's involvement in the Plein lawsuit, USAA contacted the firm to claim a conflict of interest and demand immediate withdrawal. Keller moved for a ruling on the asserted conflict of interest. In response, USAA requested disqualification of Mr. Smart, Mr. Birk, and Mr. Hanson. The trial court concluded "the *Plein* matter is factually distinct from and not substantially related to [Keller]'s prior representation of USAA, and as a result, the firm's representation of the Pleins is not a conflict under RPC 1.9." The trial court allowed the Keller attorneys and Mr. Hanson to remain as counsel for the Pleins.

USAA requested discretionary review of the trial court's ruling. A commissioner of this court granted discretionary review as to the representation by the Keller lawyers, but denied review as to Mr. Hanson, who remains as counsel for the Pleins. The Pleins moved to modify the commissioner's ruling. A panel of this court denied the motion.

II. DISCUSSION

USAA contends Keller's participation in the case violates RPC 1.9(a). It argues that this case constitutes a matter substantially related to the firm's prior representation of the company. The Pleins argue the conflict of interest prohibition does not apply, and ask us to view their case as factually distinct from prior USAA cases handled by Keller. For the reasons discussed herein, we agree with USAA.

A. Standard of Review

We review de novo "a court's decision to grant or deny a motion to disqualify counsel." Sanders v. Woods, 121 Wn. App. 593, 597, 89 P.3d 312 (2004).² Likewise, we review de novo a determination of whether an attorney has violated the RPC. Teja v. Saran, 68 Wn. App. 793, 796, 846 P.2d 1375 (1993); see State v. Hunsaker, 74 Wn. App. 38, 42, 873 P.2d 540 (1994).

B. RPC 1.9(a) & RPC 1.10(a)

RPC 1.9(a) provides:

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.

(Emphasis added.)

² Washington courts have not established which party bears the burden of proof in connection with a motion to disqualify under RPC 1.9. Some federal courts applying Washington law have assigned the burden to the firm whose disqualification is sought. See, e.g., FMC Techs., Inc. v. Edwards, 420 F. Supp. 2d 1153, 1158 (W.D. Wash. 2006); Avocent Redmond Corp. v. Rose Elec., 491 F. Supp. 2d 1000, 1007 (W.D. Wash. 2007). Another concluded that the party seeking disqualification bears the burden of establishing the conflict of interest. Velazquez-Velez v. Molina-Rodriguez, 235 F. Supp. 3d 358, 361-62 (D.P.R. 2017). In this case, we would reach the same conclusion regardless of which party bears the burden.

Additionally, RPC 1.10(a) provides:

[W]hile 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.

Generally, this means, “[i]f an individual in a law firm is precluded by RPC 1.9 from representing a particular client, then all the members of the law firm are likewise prohibited from representing the client under RPC 1.10.” Hunsaker, 74 Wn. App. at 41-42. Hence, in this case, if RPC 1.9(a) precludes Ms. Hecht (or any other Keller lawyer) from representing the Pleins, RPC 1.10(a) prohibits such representation by any lawyer at the firm.

C. Underlying Principles

Comment 2 to RPC 1.10 explains:

The rule of imputed disqualification . . . 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.

RPC 1.9 incorporates both this duty of loyalty and the duty of confidentiality to former clients. See State v. White, 80 Wn. App. 406, 415, 907 P.2d 310 (1995).³

These duties correlate to bedrock principles of the legal profession.⁴ They

³ This case discusses former RPC 1.9, which, for the purposes of this proposition, does not vary materially from the current rule.

⁴ “[L]awyers are regarded as people who know how to keep secrets, as much as they are regarded as litigators . . . or drafters of contracts.” In re Disciplinary Proceedings Against Schafer, 149 Wn.2d 148, 160, 66 P.3d 1036 (2003) (citing 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 9.2 (3d ed. 2002)). “This perception is founded on more than 300 years of the practice of confidentiality.” Schafer, 149 Wn.2d at 160. “The attorney-client privilege is thought to derive from the original concept of an attorney’s implicit oath of loyalty to

remain critical toward former clients because “the attorney may hold confidences of the former client that could be used, sometimes subtly, against the former client.” In re Marriage of Wixom, 182 Wn. App. 881, 908-09, 332 P.3d 1063 (2014).⁵ Furthermore, effective representation necessitates protection of the confidential relationship between an attorney and client. See In re Disciplinary Proceedings Against Schafer, 149 Wn.2d 148, 160, 66 P.3d 1036 (2003).⁶

The parties do not dispute the imputation effect of RPC 1.10(a). We thus focus our inquiry on the application of RPC 1.9(a).

D. “Substantially Related Matter”

RPC 1.9(a) prohibits USAA’s former lawyers at Keller—and therefore the Keller firm under RPC 1.10(a)—from representing the Pleins on any matter “substantially related” to their former representation of the company.⁷

[their] client and is the oldest of the common law privileges.” Schafer, 149 Wn.2d at 160 n.4 (citing 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290 (John T. McNaughton ed., 4th rev. ed. 1961)).

⁵ The United States Supreme Court observed almost 170 years ago:

There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, one more honorably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it.

Stockton v. Ford, 52 U.S. 232, 247, 13 L. Ed. 676 (1850).

⁶ As the United States Supreme Court noted over 130 years ago:

The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.

Hunt v. Blackburn, 128 U.S. 464, 470, 9 S. Ct. 125, 127, 32 L. Ed. 488 (1888); cf. Schafer, 149 Wn.2d at 160-162 (discussing how the attorney-client privilege benefits society at large).

⁷ For a discussion regarding the history and development of the substantial relationship test in the United States, see 1 GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, THE LAW OF LAWYERING §§ 14.07-14.10 (4th ed. 2015).

The Court of Appeals originally established the following process for determining whether matters are substantially related:

[W]e 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 the confidential information to the client's detriment.

Sanders, 121 Wn. App. at 598; see also Hunsaker, 74 Wn. App. at 41-42; Teja, 68 Wn. App. at 796. It did so under the former version of RPC 1.9(a).⁸

Thereafter, in keeping with its inherent power to regulate the practice of law in Washington, see Chism v. Tri-State Constr. Inc., 193 Wn. App. 818, 838, 374 P.3d 193 (2016), our Supreme Court adopted the current version of RPC 1.9 along with associated comments in 2006. RPC 1.9 & cmts. 1-9 at 157 Wn.2d 1202-06 (2006). The RPCs' "Scope" provisions explain the role of the comments: Such comments "do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules." RPC Scope [14]. "The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. . . . The Comments are intended as guides to interpretation, but the text of each Rule is authoritative." RPC Scope [21].

⁸ At the time, RPC 1.9 provided as follows:

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) 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 consents in writing after consultation and a full disclosure of the material facts; or

(b) Use confidences or secrets relating to the representation to the disadvantage of the former client, except as rule 1.6 would permit.

Comment 3 provides guidance on the meaning of “substantially related matter.” However, it does not mention the prior standard for assessing substantially related matters as found in Sanders, Teja, or Hunsaker. Since adoption of the comments, no published Washington case has interpreted the comments to RPC 1.9 in order to address the definition of “substantially related matter.”

For the following reasons, Comment 3, rather than the prior case law, guides our analysis of whether Keller’s prior representation of USAA is substantially related to this case. First, the Court of Appeals decided those prior cases before 2006, in the absence of any similar comment. And second, the comments bear the imprimatur of the Washington Supreme Court, which adopted them and which exercises plenary authority over attorney discipline. Chism v. Tri-State Constr. Inc., 193 Wn. App. at 841.

Turning then to Comment 3, it provides, in pertinent part, a somewhat more stringent standard compared to the case law above:

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.*

(Emphasis added.) Below, we apply this definition as well as other provisions of the comment and conclude that this case and the prior representation of USAA qualify as substantially related.⁹

⁹ Even though Comment 3 clearly addresses the meaning of “substantially related,” the Pleins point to Comment 2 to argue that their case is “factually distinct” from Keller’s prior representation of USAA. The Pleins highlight Comment 2’s statement that “a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing

To illustrate, Comment 3 provides the example of a lawyer who learns “extensive private financial information” about a businessperson during representation and thus cannot subsequently represent the spouse in divorce proceedings. While the business and divorce proceedings are factually distinct, and do not involve the same transaction or legal dispute, there is a substantial risk that the attorney’s knowledge of private financial information would materially advance the spouse’s position in the divorce.¹⁰

USAA faces similar concerns as the businessperson described in Comment 3. While the specific facts of the Pleins’ case may qualify as distinct, Keller learned significant confidential information about USAA’s strategies for bad faith litigation. USAA provided a declaration about the scope of Keller’s

another client in a *factually distinct* problem of that type even though the subsequent representation involves a position adverse to the prior client.” RPC 1.9 cmt. 2 (emphasis added). But Comment 2 expressly focuses on the scope of the term “matter.” Deciding whether matters qualify as factually distinct does not necessarily complete the RPC 1.9(a) analysis. We must still determine whether those matters are substantially related. To be sure, Comment 3 indicates that matters may be substantially related even if they do not involve “the same transaction or legal dispute.”

¹⁰ USAA’s expert witness opines that this businessperson hypothetical constitutes an “example of the playbook problem.” And he implies that Keller possesses knowledge of USAA’s “playbook.” No published Washington case has yet to expressly address the “playbook” concept. One treatise describes it as follows:

Some courts and commentators . . . hold that the lawyer and [their] new client would have an improper advantage if the lawyer was permitted to make use of general tactical information and psychological insights, such as the former client’s negotiating style, risk aversion, willingness to be deposed, and ability to handle the stress—including the financial stress—of litigation. . . . This method of defining substantial relationship between legal matters is commonly referred to, utilizing a sports metaphor, as the “playbook” rationale. . . . [A]lthough disqualification based on pure playbook concerns is unwarranted, courts have not infrequently taken a close look where playbook information blends into more specific factual information that could be put to adverse use. Thus, even where matters are factually distinct, disqualification is sometimes ordered where a lawyer represented a client in a series of matters that involve the same modus operandi and underlying factual base as the new matter.

1 HAZARD, JR., HODES & JARVIS, *supra*, § 14.10. We note the playbook rationale for informational purposes. To a certain extent, it overlaps with the concerns set forth in Comment 3, and it is a concept that non-Washington courts have discussed extensively.

representation during their professional relationship, which spanned over a decade. Keller does not dispute this description of the extent of its representation of USAA.

According to USAA, it trusted Keller attorneys “with direct access to confidential and proprietary business information of USAA CIC and its affiliated companies” including, confidential claims handling materials, thought processes of adjusters and in-house attorneys, business and litigation philosophies, and strategies such as “approaches to settlement discussions, motion practice, case analysis, defenses, witness meetings, witness preparation, trial preparation, and discovery both on a case-by-case and institutional, company-wide level.” Keller served as one of the few law firms involved in insurance bad faith litigation on behalf of USAA in Washington, and had “intimate business and litigation knowledge.” Keller provided USAA and its affiliates with advice including “insurance coverage matters, litigation strategies, factual positions, litigation mitigation recommendations for training and communication materials, and legal arguments.”

Keller also participated in seminars as part of enterprise-wide strategic discussions where attorneys became privy to “proprietary information including litigation approach and strategies that has only been shared with a limited group of all of the law firms nationally representing USAA CIC and its affiliate companies in alleged bad faith litigation across the United States.” And Keller attorneys had electronic login credentials to certain internal proprietary and confidential documents concerning insurance bad faith litigation, “including

document repositories holding attorney-client information and electronic claim databases."

Moreover, Keller gathered information on specific issues in order to defend USAA in Cueva. Keller provided advice on local expert witnesses in industrial hygiene and toxicology. Thus, USAA has shown a significant risk that Keller has knowledge of both specific and general confidential information that could materially advance the Pleins' case.

Additionally, the temporal proximity of the prior representation affects the analysis of risk to the former client. "Information acquired in a prior representation may have been rendered obsolete by the passage of time." RPC 1.9 cmt. 3. Here, Keller agreed to represent the Pleins within three months of the end of its relationship with USAA. This short time frame provides scant opportunity for obsolescence, particularly given the extent—in substance and duration—of the prior representation.

The Pleins contend that Keller had only general knowledge and information that would be disclosed during discovery. Comment 3 addresses the role of specific versus general information as well as information disclosed to third parties: "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," and, "Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying."

RPC 1.9 cmt. 3. The Pleins' argument, however, disregards the significant amount of confidential information on legal strategies and defenses developed between USAA and Keller. Moreover, the specific knowledge gained during defense of Cueva appears relevant to the issues in the Pleins' case. Therefore, Keller's knowledge of USAA's legal strategies goes beyond the permitted "general knowledge of the client's policies and practices." RPC 1.9 cmt. 3.

Keller points to the fact that USAA has not suggested any pattern or practice of intentionally acting in bad faith that would have been learned during representation. However, the Comments state, "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." RPC 1.9 cmt. 3. As further noted by Comment 3, "[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." The bad faith litigation defense conducted by Keller on behalf of USAA, particularly in Cueva, creates significant concern that Keller possesses specific confidential information that could unfairly aid the Pleins.

III. CONCLUSION

In light of the foregoing, we determine that Keller's representation of the Pleins generates a substantial risk that USAA's confidential information would materially advance the Pleins' position in this case. We conclude there is a

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conflict of interest under RPC 1.9(a). Mr. Smart, Mr. Birk, and their firm are disqualified from representing the Pleins in this matter.

Reversed.



WE CONCUR:





DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Pleins' Supplemental Brief* in Supreme Court Cause No. 97563-9 to the following:

Robert S. McLay, WSBA #32662
Joshua N. Kastan, WSBA #50899
John B. Stauffer, WSBA #49920
Jaime Y. Ritton, WSBA #54873
DKM Law Group, LLP
1700 Seventh Avenue, Suite 2100
Seattle, WA 98101

Michael A. Jaeger, WSBA #23166
William W. Simmons, WSBA #35604
Lewis Brisbois Bisgaard & Smith LLP
1111 Third Avenue, Suite 2700
Seattle, WA 98101

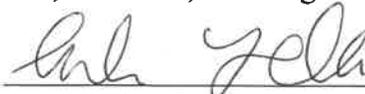
Joel Hanson, WSBA #40814
Joel B. Hanson Attorney at Law, PLLC
13540 Lake City Way NE, Suite 120
Seattle, WA 98125

William C. Smart, WSBA # 8192
Ian S. Birk, WSBA #31431
Keller Rohrback LLP
1201 Third Avenue, Suite 3200
Seattle, WA 98101

Original E-Filed with:
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Clerk's Office

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

DATED: January 3, 2020, at Seattle, Washington.



Sarah Yelle, Legal Assistant
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

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- tami.foster@lewisbrisbois.com
- william.simmons@lewisbrisbois.com
- wsmart@plaintifflit.com

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Sender Name: Sarah Yelle - Email: sarah@tal-fitzlaw.com

Filing on Behalf of: Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

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