

FILED
SUPREME COURT
STATE OF WASHINGTON
9/19/2019 2:18 PM
BY SUSAN L. CARLSON
CLERK

No. 97563-9

IN THE 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,

Petitioners,

v.

USAA CASUALTY INSURANCE COMPANY,
an insurance company,

Respondents,

and

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

Defendants.

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

The Washington State Court of Appeals, Division I decision is a sound, published opinion on the conflict of interest in this matter and need not be granted review by this Court. Under to Washington Rules of Appellate Procedure (“RAP”) Rule 12.3(d), the panel majority determined the form of its decision in this matter to be published in the Washington Appellate Reports pursuant to chapter 2.06.040 Revised Code of Washington (“RCW”). (Wash. R. App. P. 12.3.) Division I published its decision because this is a significant ruling and the issue at bar is noteworthy for attorney ethical standards and the burden when ascertaining conflicts.

Procedurally, Petitioners do not justify why review should be granted under “Considerations Governing Acceptance of Review” outlined in RAP 13.4(b)(4). The Court of Appeals ruled correctly under Washington law and the Rules of Professional Conduct (“RPC”) to bar Keller Rohrback LLP’s (“Keller”) representation against its former client. Nothing alluded to at Page 8 in the Petition for Review warrants further review by this Court under RAP 13.4 for the principles governing disqualification of counsel.

Substantively, at issue before the Court of Appeals was whether a law firm, with an extensive 10-year relationship with a client at the highest levels within the company’s Chief Legal Office, billing in excess of 8,000 hours in the preceding two years alone, may take on a case that is directly adverse to that former client after its last representation ended only months previously? Division I got it right, as the answer must consistently be “**no.**” “[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.” (*EMC Technologies, Inc. v. Edwards*, 420 F. Supp. 2d 1153, 1162 (W.D. Wash. 2006) (emphasis in original).)

Up until November 2017, Keller represented USAA Casualty Insurance Company (“USAA CIC”) and its affiliated companies:

- For over 10 years in **at least 165 cases**;
- Defending **at least 12 cases** involving alleged insurance bad faith litigation arising from homeowners claims like the Pleins’ case; and
- Only the most recent two years reflected a depth of firm involvement including **at least seven attorneys and four paralegals** working on these matters, billing in excess of **8,000 hours** since 2015.

In light of the facts above, the Court of Appeals properly decided the issues and ruled in favor of USAA CIC to disqualify Keller as counsel.

A. IDENTITY OF RESPONDENT

USAA Casualty Insurance Company (hereinafter “USAA CIC” or “Respondent”) asks this Court to deny review of the Court of Appeals, Division I decision, thereby terminating review designated in Part B.

B. COURT OF APPEALS DECISION

The Washington State Court of Appeals, Division I, rendered its decision within a published opinion in this case on July 29, 2019. A copy of the decision is in the Appendix at pages APX159 through APX166.

C. ISSUES PRESENTED FOR REVIEW

1. Whether under Washington law, this Court’s prior rulings, and State Courts’ application of the RPC, it is an established principal that disqualification of an attorney or firm who takes on to represent a client in a new action against its prior, longstanding institutional client, gives rise to a burden upon the attorney or firm to rebut disqualification?

2. Does this Court’s prior rulings and adoption of 2006

Comments to RPC 1.9, as considered in Division I’s application of the RPC in this case, properly apply the “substantially related” standard to determine whether facts at issue for Keller’s current disqualification compare to its prior representation and pose a substantial risk of disclosing confidences to create a conflict, where Keller stands to benefit from prosecuting a case against – and to the detriment of – its former client?

3. Was the only display of a tactical move at the trial court level Keller’s Motion for Ruling Regarding Asserted Conflict of Interest?

4. Where an attorney of a firm who formerly represented a client insurer’s interest for over a decade in first party coverage and bad faith issues, is it proper to disqualify the entire law firm from representing a current client to institute a bad faith lawsuit directly adverse to the firm’s former client who is a defendant in the same lawsuit; to wit, the insurer client that the firm represented in a defense capacity for over 10 years?¹

D. STATEMENT OF THE CASE

USAA CIC herein answers to oppose Petitioners Richard and Deborah Pleins’ (“Pleins”) Petition for Review (“Petition”). USAA CIC’s position aligns with its original response to Keller’s motion at the trial court level and Division I’s published opinion, which overturned the trial court.

On July 29, 2019, Division I issued its decision on the merits of the discretionary review, holding that Keller should be disqualified as counsel and reasoned that the firm, in taking on representation of the Pleins, was in violation of the RPC. The Court of Appeals properly found that a conflict

¹ In the event this Court addresses any new issues not raised in the Petition for Review that Respondent wants the Court to consider, they are raised herein conditionally to be considered only in the event the court grants review. (Lewis River Golf, Inc. v. O.M. Scott & Sons, 120 Wn.2d 712, 725, 845 P.2d 987 (1993) (conditionally raised issues considered on review).)

of interest is evident in this case under the terms of RPC 1.9, which governs a lawyer's duties to former clients in Washington, specifically prohibiting a lawyer from representing another person adverse to a former client "in the same or substantially related matter." (Plein v. USAA Casualty Insurance Company, 445 P.3d 574 (2019) (citing RPC 1.9(a).))

The Pleins' Petition makes several significant and material inaccuracies with respect to the recitation of the record, including to mischaracterize the posture on appeal: USAA CIC did not file a motion to disqualify the Keller firm. (*See* Pleins' Petition at Page 5.) Rather, USAA CIC responded to a Motion for Ruling Regarding Asserted Conflict of Interest before the trial court. (Plein, 445 P.3d at 577 (2019).))

Keller initially sought a ruling from the trial court – and *not* USAA CIC as the Pleins incorrectly represent to this Court in the Petition – to determine there was no conflict of interest pursuant to RPC 1.9, which was granted review and rightfully reversed by Division I, Justice Chun concluding that Keller's representation in Plein violates RPC 1.9(a) (Plein, 445 P.3d at 581) (Hazelrigg-Hernandez, J., and Mann, A.C.J., concurring).))

The overwhelming basis for objection to Keller's association as the Pleins' counsel is forceful in deciding this case. Keller's representation in this matter against USAA CIC – its former long-standing client – creates a conflict from the onset, after associating as an adverse party's counsel a mere two months after its representation for USAA CIC ended. By published decision, Division I set the facts straight through fact-intensive inquiry – Keller's adverse involvement to represent the Pleins in a case against its former client must be barred under applicable Washington law and the RPC, and arguably also in fairness and in equity.

This Court too should find that Division I's published opinion corrected the trial judge's errant ruling, where the duty of loyalty and confidentiality to USAA CIC – former institutional client for whom Keller defended many first party actions – is at issue and jeopardizes USAA CIC by the threatened, material conflict. The mere appearance of impropriety is enough to trigger an inquiry into ethical conduct and disqualification.

1. Keller's Representation of USAA CIC and its Affiliated Companies.

Since at least 2007 to November 21, 2017, Keller was counsel of record on numerous Washington cases that involved “alleged bad faith or extra-contractual damages” for USAA CIC and its affiliated companies. (APX075, ¶¶ 1-2.) Keller partner Irene M. Hecht (“Hecht”) was responsible for all matters pertaining to USAA CIC and its affiliated companies. (Id. ¶ 1.) At least seven attorneys and four paralegals worked on these cases, in addition to the firm's staff who handled confidential documents and communications concerning those lawsuits. (APX118, ¶¶ 9, c.-d.)

The relationship between Keller, USAA CIC and its affiliated companies was far deeper and more complex than Keller's original moving papers and the Pleins' Petition suggest. Indeed, as part of that representation, the Keller firm was trusted within the sacred confines of the attorney-client relationship and *direct* access to confidential and proprietary business information of USAA CIC and its affiliated companies.

Keller worked on a nearly identical smoke damage case in Pierce County Superior Court, *Cueva v. Garrison Property & Casualty Ins. Co.*, Case No. 10-2-06680-8 (“*Cueva Case*”). (APX119-APX120, ¶ 11.) The allegations in that lawsuit concerned an attack on USAA CIC's Property Direct Repair Program (“PDRP”), an optional service where USAA CIC

and its affiliated companies identifies licensed and insured local contractors and the member may choose to contract for covered repairs to their property. (Id.) 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. (Id.)

2. Keller's Representation of the Pleins.

Keller performed a necessary conflict check *before* accepting to represent the Pleins, which revealed Keller's representation for USAA CIC and its affiliated companies. (APX073, ¶ 4.) Nevertheless, Keller decided to represent the Pleins asserting that Keller attorneys representing the Pleins had never worked on any USAA CIC cases and never had access to any communication or files associated with Keller's representation of USAA CIC or its affiliated companies. (APX073, ¶ 5; APX075, ¶ 4.) But Keller does not deny that: 1) Hecht is still part of the law firm, 2) the files of USAA CIC and its affiliated companies are still at the firm, and 3) there are persons who still have access to those files at the firm. (APX075 ¶¶ 1, 4.)

3. Substitution of Counsel and 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 *glaring* conflict of interest, calling on Keller withdraw its representation in the matter. (APX024-APX025; APX032, lines 10-24; APX070-APX071.) Keller then filed its Motion for Ruling Regarding Asserted Conflict of Interest. (See APX029-APX080.) USAA CIC filed an Opposition and Keller filed a Reply. (See APX081-APX147.)

Keller represented USAA CIC and its affiliated companies in cases that were no different from a subject-matter and substantive perspective than the instant case's extracontractual allegations. The fact that Keller only terminated its involvement in, and representation of, USAA CIC and its affiliated entities' litigation defense in November 2017 – the same month the Plein case was filed and merely two months before Keller associated as counsel on behalf of the Pleins on January 30, 2018 – further compounds the egregiousness of Keller representing the Pleins in this case.

The instant conflict of interest is not secluded to an attorney or specific practice area within the Keller firm – it is imputed to the *entire* firm under RPC 1.10. No degree of screening or preventative measure can cure the present conflict under the specific set of facts for this case.

This Court is impressed to deny review and adhere to the Division I Court of Appeals' decision to disqualify Keller as the Pleins' counsel.

E. ARGUMENT

1. Standard of Review.

Petitioners specifically seek review under RAP 13.4(b)(4) (*see* Petition, page 6) and also make reference to RAP 13.4(b)(2). (*Id.* at 8.) “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 v. Woods*, 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)).)

Review should only be granted under limited circumstances outlined by “Considerations Governing Acceptance of Review” where under the relevant subsections this Court accepts a petition for review only: “(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals;” or “(4) If the petition involves an issue of substantial

public interest that should be determined by the Supreme Court.” (RAP 13.4(b).) Petitioner’s reasoning under RAP 13.4(b)(2) or (b)(4) both fail because the published opinion by the Court of Appeals is a sound decision.

2. The Pleins’ Petition for Review Should be Denied.

Division I’s ruling establishes why the RPCs expressly prohibit Keller’s representation of the Pleins. The Petition’s opening argument seeks review under RAP 13.4(b)(4) for an issue of substantial public interest, asserting that the inquiry involves a published decision, an issue of first impression, and this Court’s interpretation of lawyer ethics rules.

To the extent Keller is using this scenario as a test case to determine whether a firm can affirmatively prosecute extracontractual claims against a longstanding institutional client – for whom it defended the *exact same types* of actions in Washington State and during which it *learned, developed, and shared trade and legal defense secrets* – this Court need not grant review to rectify such behavior, as Division I has fulfilled the task.

This case is really about business, client confidences and conflicts. Specifically, a decade-long relationship where Keller benefited as a near-exclusive first-party and bad faith litigation defense counsel for USAA CIC and its affiliates in Washington State. Keller’s representation of its former client spanned years on these exact types of extracontractual suits, all while gaining USAA CIC’s confidences and litigation strategies as a client – and enriching the Keller firm for its labor as counsel. Now, Keller seeks to prosecute the same type of claims *against* USAA CIC in a substantially related case – posing a material conflict and threatening its former client.

Keller largely unopposed the facts of the prior client representation. The crux of this Petition attempts to now shift the burden of Keller’s ethical duties under the RPC to elicit an offering of “proof” and place an unfounded

evidentiary burden onto its former client to demonstrate why Keller's representation in Plein is adverse to USAA CIC. USAA CIC established that a conflict exists, which it voiced to Keller at the onset. Application of the RPC needs no further exploration by this Court, as Division I bluntly states with respect to the RPC, "The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule," yet "[t]he Comments are intended as guides to interpretation, but the text of each Rule is authoritative." (Plein, 445 P.3d at 579 (citing to RPC Scope[21]).)

The inquiry under RPC 1.9 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." (EMC Technologies, Inc., 420 F. Supp. 2d at 1159 (W.D. Wash. 2006) (emphasis in original) (quoting MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 2 (2004)); Sanders, 121 Wn. App. at 598, 89 P.3d 312 (noting "[t]he decision turns on whether the lawyer was so involved in the former representation that he can be said to have switched sides") (citing State v. Hunsaker, 74 Wn. App. 38, 46, 873 P.2d 540 (1994)).)

RPC 1.9 concerns the prohibition of disclosure of confidences and breaching the duty of loyalty that an attorney owes his clients. (See, e.g., EMC Technologies, Inc., 420 F. Supp. 2d at 1161; 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).) Does "the instant suit constitute[] side-switching in factually intertwined lawsuits that implicates disclosure of confidences *or* breach of the duty of loyalty[?]" (EMC Technologies, Inc., 420 F. Supp. 2d at 1159 (emphasis added).) In this case, the answer is "yes." "Parties are allowed to switch sides; lawyers are not . . . [c]onflicts of interest arise whenever an attorney's loyalties are divided

...” (Id. at 1160 (quoting United States v. Stewart, 185 F.3d 112, 121 (3d Cir. 1999), cert. denied, 528 U.S. 1063 (1999)).)

Keller’s loyalties are divided because when Keller agreed to represent the Pleins it breached the duty of loyalty to USAA CIC. Keller associated in as attorneys on this extracontractual property damage case *against* its former client (to wit, only two months after the prior decade-long representation for USAA CIC ended), such activity is expressly prohibited by the RPC and on its face appears unethical without informed written consent. The trial court improperly condoned Keller’s behavior, essentially “switching sides” to represent a party materially adverse to USAA CIC.

This is a stark breach of the duties of loyalty and client confidences. The case is about money, fees, and Keller using a decade-long, intertwined client relationship with USAA CIC in defending extracontractual claims, only for Keller to now advance a lawsuit against its prior client with the prospect of its own financial gain from the opposite spectrum.

With overwhelming case precedent and plain language of the RPC at issue, which include this Court’s interpretation and Washington State Courts’ application over the past few decades, a fervent policy rationale exists for the procedure currently in place to protect the public interest. Under the present interpretation of the RPC, when concern for potential conflict in a litigated matter is set forth by a former client, there is no requirement for any actual disclosure of confidences or burden upon that client. Rather, the mere prospect of confidences becoming disclosed by a lawyer in an adversarial role against its former client, or a threat of conflicting interest without an informed, written consent waiver, properly places the burden upon the firm subject to disqualification.

To require otherwise, or to develop a different disqualification

procedure, would create an unwarranted and untenable process to not only discredit the RPC, but also abrogate the duties of attorney loyalty and ethics onto the very clients whom Washington State attorneys are sworn to protect. At Keller's behest, Petitioners unreasonably request that this Court shift the burden in establishing a conflict exists onto its former client, USAA CIC.

3. USAA CIC Responded to the Pleins' Motion and Never Tactically "Moved" for Disqualification.

The Petition at page 5 wrongly states that USAA CIC filed a motion to disqualify. At issue is Keller's association of counsel for the Pleins, which was objected to at the onset by Keller's former client, USAA CIC. Keller then filed its own affirmative motion with the trial court for a ruling on the asserted conflict. To the extent the Petition misconstrues the record below, there was no gamesmanship or attempt to assert a tactical advantage by USAA CIC. The opposite is true, and deflection of the crucial issue here where an actual conflict exists – and Keller being put on notice of same – should enlighten the Court in its decision to decline review.

4. Washington Rules of Professional Conduct Govern and Properly Support Disqualification.

In EMC Techs., Inc. v. Edwards, 420 F. Supp. 2d 1153 (W.D. Wash. 2006), the Western District of Washington analyzed former-client conflicts of interest under the RPC, noting implications where, “[i]n determining whether a violation of Rule 1.9 requires disqualification, the burden of proof rests ‘upon the firm whose disqualification is sought.’” (EMC Techs., Inc. v. Edwards, 420 F. Supp. 2d 1153, 1157–58 (W.D. Wash. 2006) (quoting Amgen, Inc. v. Elanex Pharmaceuticals, Inc., 160 F.R.D. 134, 139-40 (W.D. Wash. 1994) (citing MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt.

8)).)2

Washington legal ethics rules regarding Duties to Former Clients (RPC 1.9) and Imputation of Conflicts of Interest (RPC 1.10) necessitate the conclusion that Keller is conflicted from representing the Pleins in the present litigation. RPC 1.10(a) provides the basis for USAA CIC's position that the conflict is *per se* imputed to the entire firm, which was not visibly addressed in the Petition. Comment [2] to RPC 1.10 emphasizes the imputation rule, which "gives effect to the principle of loyalty to the client" and is derived 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 1.10, Cmt. 2 (emphasis added).)

This baseline rule absolutely prohibits Keller's involvement in the instant case. Absent informed written consent, the duty to establish a conflict does not exist – or to constructively demonstrate an exception or curable remedy to *any* potential conflict – is and should remain to be impressed upon the lawyer or firm against whom disqualification is sought.

Given the direct reference to RPC 1.9 within RPC 1.10(a), the ethical bounds of RPC 1.9 are also relevant here to firmly root the bona fides of a conflict inquiry and, ultimately, a just disqualification. Among other restrictions, under RPC 1.9 an attorney (or, by extension under RPC

2 The Court in *EMC Techs., Inc.*, 420 F. Supp. 2d 1153 (W.D. Wash. 2006) notes that the ABA Model Rules of Professional Conduct and Comments, while not binding in Washington, "are 'instructive' when interpreting Washington RPCs that are analogous to the ABA Model Rules." (*EMC Techs., Inc.* at 1158 (W.D. Wash. 2006) (*citing* *Teja v. Saran*, 68 Wash.App. 793, 846 P.2d 1375, 1378 n. 4 (1993); *also citing* *State v. Hunsaker*, 74 Wash.App. 38, 873 P.2d 540, 544–45 (1994)).)

1.10 (*supra*), an *entire firm*) cannot represent a client whose interests are materially adverse to that of a former client *absent informed consent*:

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.

(RPC 1.9(a); Decl. Spitzer, APX098-099 at ¶ 11.)

As University of Washington School of Law Professor Hugh Spitzer has opined on record in the lower court for this matter:

[T]he key to analyzing whether a lawyer (or any lawyers in a firm) may represent a client adverse to a former client, is whether the relevant matter is the ‘same or substantially related’ to one or more matters that the firm had handled for the former client.

(Decl. Spitzer, APX099 at ¶ 12.) Therefore, in this regard:

[T]he factual context is key: did the lawyer and law firm just obtain general knowledge of a former client’s practices, or a deep understanding and factual awareness of the former client’s philosophy, approach, and strategies as well as specific facts about the client and its operations.

(Decl. Spitzer, APX100 at ¶ 15.) This case unquestionably presents the latter scenario, for Keller’s prior representation allowed it to obtain a deep understanding and factual awareness of the former client’s philosophy, approach, and strategies, in addition to specific facts for the institutional client’s thought processes and litigation operations.

Here, this qualifies as a substantially related matter in Keller now representing the Pleins, posing a substantial risk that Keller had obtained confidential, factual information regarding the insurer that would materially advance the insured Pleins’ claim against Keller’s former client insurer.³

³ (*See Plein v. USAA Casualty Insurance Company*, 445 P.3d at 581 (*see also* hn. 5, defining “substantially related matter” and viewing RPC 1.9 Comment 3 as instrumental for identifying a substantial risk for conflict because potential disclosure of confidences

5. The Appellate Court Appropriately Interpreted RPC 1.9 and RPC 1.10 Under This Court’s Historic Application of the 2006 Amendments and Adopted Comments.

The Pleins’ Petition at page 11 states how Division I’s published opinion correctly concluded that the terms of RPC 1.9 govern a lawyer’s duties to former clients in Washington; specifically, prohibiting a lawyer from representing another person adverse to a former client “in the same or substantially related matter.” RPC 1.9(a). This precisely defines the nature and completeness of Division I’s factual analysis in the subject case, where there is no support for the Pleins’ contention that Division I somehow made the determination to disqualify deficiently or only *legal* in nature.

Historically, before Division I’s recent guidance and detailed inquiry in its ruling, the precedent on this issue included a line of cases interpreting language within the RPCs prior to this Court’s adoption of the 2006 Amendments and Comments. Analysis of the words “substantially related” within RPC 1.9 is based on the contextual analysis of the facts, where a court is to consider the information previously obtained by 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” has never been about whether it is the same defendant or same plaintiff – 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); *see also*

from prior firm’s (Keller) representation in present litigation for another party (Pleins) against the same firm’s former client (USAA CIC)).)

EMC Technologies, Inc., 420 F. Supp. 2d at 1159; Koch v. Koch Industries, 798 F. Supp. 1525, 1536 (D. Kan. 1992).)

“[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, 798 F. Supp. at 1536).)

Division I’s analysis fully considers the complex relationship between Keller and USAA CIC and its affiliated companies, in addition to the large amount of information acquired in the 10-year relationship. In doing so, it addressed the lower court’s deficient analysis of the potential harm caused by Keller’s continued representation of the Pleins.

The Court of Appeals was guided by this Court’s inherent power to regulate the practice of law in Washington under Chism v. Tri-State Constr. Inc., 193 Wash. App. 818, 374 P.3d 193 (2016), and through the high court’s adoption of the current version of RPC 1.9 and the associated comments in 2006 (Plein, 445 P.3d at 579 (citing RPC 1.9 & cmts. 1-9 at 157 Wn.2d 1202-06 (2006))). Comment 3 to RPC 1.9 provided further guidance to Division I on what is considered a “substantially related matter” because, since the adoption of the comments in 2006, until now no published Washington case has served as authority for “[interpretation of] the comments to RPC 1.9 in order to address the definition of ‘substantially related matter.’” (Plein, 445 P.3d at 579 (2019).) Division I correctly outlines its holding based on why the more “stringent standard” within Comment 3, rather than definitions applied in pre-2006 case law, is on point: 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.*

(Plein, 445 P.3d at 579 (citing to RPC 1.9, Comment 3 (emphasis added in original)).)

Division I applied the definition as well as other provisions from the comments within this Court's adoption of the 2006 RPC to conclude that Keller's current representation in the Plein matter and Keller's prior representation of USAA CIC qualify as being substantially related. (*Id.*)

6. Keller's Disqualification Stems from Representation of the Pleins on a Matter Substantially Related to the Prior Scope of Representation for its Former Client USAA CIC.

Washington courts have presumed a substantial relationship exists "if there is a reasonable probability that confidences were disclosed which could be used against the client in later, adverse representation." (Trone v. Smith, 621 F.2d 994, 998-999 (9th Cir. 1980); EMC Technologies, Inc. v. Edwards, 420 F. Supp. 2d 1153, 1161 (W.D. Wash. 2006); State v. White, 80 Wn. App. 406, 415 (1995), *rev. denied*, 129 Wn. 2d 1012 (1996) (noting RPC 1.9's "presumption of prejudice makes it unnecessary for the former client to prove that the attorney divulged actual confidences"); Teja v. Saran, 68 Wn. App. 793, 799-800 (1993) (finding "[t]he plain language of RPC 1.9 indicates actual proof of disclosure of confidential information is not necessary if the matters are substantially related," and holding that "former clients need not prove that actual confidences were divulged").)

Here, not only is the instant matter substantially related to those in which Keller previously represented USAA CIC and its affiliated entities, but Keller similarly asks this Court to apply the wrong standards in assessing the conflict of interest, as it did at the trial court and on appeal to

Division I. It is not Respondent's burden; it is the Pleins' burden – and ultimately that of Keller – to demonstrate how they could continue with the representation when a potential conflict arises. USAA CIC need not prove actual confidences were divulged (even though they were); Keller must prove that such matters were not substantially related. The firm cannot.

Contrary to the Pleins' position, it is *not* the aggrieved former client's burden to affirmatively protect their interests – as USAA CIC is forced to do in the present action – but instead, “the burden is on the law firm whose disqualification is sought to demonstrate that the representations under scrutiny are not substantially related and that the prohibition under RPC 1.9(a) does not apply.” (Decl. Spitzer, APX100 at ¶ 16; *see Amgen, Inc. v. Elanex Pharms., Inc.*, 160 F.R.D. 134 (W.D. Wash. 1994) (citing “Comment 8 to Rule 1.9 of the similarly worded ABA Model Rules of Professional Conduct”); *EMC Technologies, Inc. v. Edwards*, 420 F. Supp. 2d at 1158 (W.D. Wash. 2006).) Keller has not met that burden here – especially given that Keller's motion and supporting papers before the trial court were overcome by myriad substantive factual and legal similarities between the instant case and its prior representation for USAA CIC.

The present case is factually akin to Sanders, where a lawyer whom previously represented a hotel owner was disqualified in a lawsuit regarding a noncompete agreement because the lawyer took on a former employee of the hotel for a case against the hotel involving a dispute over the same agreement the lawyer had drafted for the hotel owner. (Sanders, 121 Wn. App. 593.) Meanwhile, Hunsaker deals with Constitutional protections afforded to a criminal defendant and issues at stake regarding effective assistance of counsel, speedy trial, and the appointment of an attorney for a criminal defendant, which is not on point with this Court's inquiry for

review. (Hunsaker, 74 Wn. App. 38, 873 P.2d 540 (1994).)

The Court of Appeals analyzed how Keller's decade-long representation for USAA CIC provided "intimate business and litigation knowledge" on behalf of USAA CIC, which demonstrates numerous examples of how "Keller learned significant confidential information about USAA's strategies for bad faith litigation" and also noting Keller's non-dispute as to the description of the extent of its representation for USAA CIC (citing to Keller being trusted "with direct access to confidential and proprietary business information of USAA CIC and its affiliated companies" which included: confidential claims handling materials, thought processes of adjusters and in-house counsel, business and litigation processes, philosophies and strategies "both on a case-by-case and institutional, company-wide level.") (Plein, 445 P.3d at 580.)

This is precisely why Keller's representation for the Pleins against USAA CIC is substantially related to Keller's past representation on behalf of USAA CIC, in both in the *Cueva Case* and in many other regards.

7. There is No Contention Asserting that the Pleins' Case Involved the Same Exact Matter as any Prior Keller Representation for USAA CIC.

USAA CIC never asserted that the Plein case was actually the "same matter" as a previously litigated or specific case wherein Keller represented USAA CIC. Instead, it is the interwoven relationship between the insurer-client and firm as its prior counsel that spanned a decade – with all of the intimate information Keller obtained through developing defense strategy in representing the institutional client – which here creates conflict. This substance, coupled with the proximity in time by which that prior lawyer-client relationship terminated and the association of counsel by Keller for the Pleins, were all factors for disqualification and adjudication in USAA

CIC's favor at the Court of Appeals. No further review is required.

The Petition at page 16 indicates that USAA CIC cited to only one case (the *Cueva Case*) as an example of how the former representation by Keller caused the current RPC 1.9 violation. This underscores the issue at bar, where Keller was retained by USAA CIC on 165 matters relating to bad faith and coverage litigation in Washington State.

Keller did not represent USAA CIC on the Plein case specifically and Division I's decision outlines facts in favor of disqualification, which are instructive here. Division I's opinion reviewed the specific facts of the prior *Cueva Case*, in which USAA CIC defended an almost identical fire-damage loss case. Keller's prior representation in the *Cueva Case*, which is so similarly situated to Plein, is enough for the disqualification to be appropriate. The Court of Appeals elaborated how Keller can in no way avoid a conflict arising by now representing the Pleins to *prosecute their specific* fire-damage loss bad faith case against former client, USAA CIC.

As demonstrated by USAA CIC in opposing Keller's trial court motion and reasoning in the Division I Court's decision, Keller cannot reasonably dispute that its prior, more than decade-long representation of USAA CIC and its affiliated entities for defending first-party claims indeed involved much of the same factors of representation and is *substantially related* to the extracontractual subject matter of the Pleins' case.

8. RPC 1.9(c) Cannot Cure the Blatant RPC Violations in this Case and Any Attempts to "Screen" Are Insufficient and Futile.

No attempt by Keller to "screen" this matter – technologically or otherwise – avoids the mandatory imputation under RPC 1.9 and RPC 1.10 of the conflict presented here. Indeed, although "[s]creens are often used on an informal basis to satisfy concerns of clients and former clients who

voluntarily waive conflicts of interest” and therefore provide an informed written consent under RPC 1.7(b)(4) or 1.9(b)(2), respectively, the RPC “simply do not allow law firms to establish their own screens to avoid conflict of interests under RPC 1.9(a) when the former client has not provided written consent.” (Decl. Spitzer, APX098 at ¶ 9.)

Unlike situations in which an “ethical screen” may be appropriate – this situation is one in which the *same firm* attempted to *sue the very client* they represented a few months prior. Under the RPC, any attempts by Keller to screen would be futile and, regardless, would not obviate their need to comply with the fundamental requirements of RPC 1.9 and 1.10.

RPC 1.9(c) cannot absolve Keller of the deficiencies in its theory to now represent the Pleins in bad faith actions against its former client. First, no authority or policy rationale exists to support the position that such an undertaking can occur without direct violation of the RPC. Second, there is no basis for reading into the laws as currently drafted nor any policy to “protect the public interest” that would validate shifting the burden onto a former client against whom the conflicting representation poses a threat.

CONCLUSION

Given Keller’s longstanding and in-depth relationship with USAA CIC and its affiliated entities, RPC 1.9 and 1.10 bar *any attorney* at the firm from representing a client adverse to its former client USAA CIC. Keller cultivated the relationship with USAA CIC for over a decade only to later turn against that same client in the instant case, supporting the conclusion that the firm is necessarily conflicted from involvement in the Plein matter.

Accordingly, USAA CIC respectfully requests that this Court deny the instant Petition, uphold Keller’s disqualification, and affirm the Washington State Court of Appeals, Division I’s sound decision.

DATED THIS 19th day of September, 2019.

Respectfully submitted,

DKM Law Group, LLP

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

Robert S. McLay (WSBA No. 32662)
Joshua N. Kastan (WSBA No. 50899)
John B. Stauffer (WSBA No. 49920)
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APPENDIX

No. 97563-9

IN THE 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,

Petitioners,

v.

USAA CASUALTY INSURANCE COMPANY,
an insurance company,

Respondents,

and

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

Defendants.

APPENDIX TO ANSWER TO PETITION FOR REVIEW

Robert S. McLay (WSBA No. 32662)
Joshua N. Kastan (WSBA No. 50899)
John B. Stauffer (WSBA No. 49920)
Attorneys for Respondents
USAA Casualty Insurance Company

DKM Law Group, LLP
1700 Seventh Ave. Suite 2100
Seattle, WA 98101
(206) 407-2518

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

Respondent USAA Casualty Insurance Company hereby submits the following exhibits as appendices to its Answer to Petition for Review – presented by Petitioners Plein pursuant to Rules of Appellate Procedure Rule 13.4(b).

Date	Document	Pages
11/20/2017	The Plein Complaint – Case No. 17-2-29542-6 SEA	APX001 - APX023
01/30/2018	Notice of Association of Keller Rohrback LLP	APX024 - APX026
02/02/2018	Notice of Court Date for the Pleins’ Motion for Ruling Regarding Asserted Conflict of Interest	APX027 - APX028
02/02/2018	The Pleins’ Motion for Ruling Regarding Asserted Conflict of Interest	APX029 - APX041
02/02/2018	Declaration of David Boerner in Support of the Pleins’ Motion for Ruling Regarding Asserted Conflict of Interest	APX042 - APX071
02/02/2018	Declaration of Ian Birk in Support of the Pleins’ Motion for Ruling Regarding Asserted Conflict of Interest	APX072 - APX076
02/02/2018	[Proposed] Order for the Pleins’ Motion for Ruling Regarding Asserted Conflict of Interest	APX077 - APX078
02/02/2018	Certificate of Service of the Pleins’ Motion for Ruling Regarding Asserted Conflict of Interest	APX079 - APX080
02/08/2018	USAA Casualty Insurance Company’s Opposition to the Pleins’ Motion for Ruling on Keller Rohrback’s Conflict of Interest	APX081 - APX093
02/08/2018	Errata to USAA Casualty Insurance Company’s Opposition to the Pleins’ Motion for Ruling on Keller Rohrback’s Conflict of Interest	APX094 - APX095
02/08/2018	Declaration of Hugh D. Spitzer in Support of USAA Casualty Insurance Company’s Opposition to the Pleins’ Motion for Ruling on Keller Rohrback’s Conflict of Interest	APX096 - APX114

02/08/2018	Declaration of John Gillard in Support of USAA Casualty Insurance Company's Opposition to the Pleins' Motion for Ruling on Keller Rohrback's Conflict of Interest	APX115 - APX120
02/08/2018	[Proposed] Order Finding Existence of Conflict of Interest and Disqualifying Keller Rohrback L.L.P. and Joel Hanson	APX121 - APX122
02/08/2018	Declaration of Service of USAA Casualty Insurance Company's Opposition to the Pleins' Motion for Ruling on Keller Rohrback's Conflict of Interest and its Supporting Documents	APX123 - APX124
02/09/2018	The Pleins' Reply RE Motion for Ruling Regarding Asserted Conflict of Interest	APX125 - APX131
02/09/2018	Declaration of Ian S. Birk in Support of the Pleins' Reply RE Motion for Ruling Regarding Asserted Conflict of Interest	APX132 - APX144
02/09/2018	Declaration of Joel Hanson in Support of the Pleins' Reply RE Motion for Ruling Regarding Asserted Conflict of Interest	APX145 - APX147
02/14/2018	Trial Court's Order Granting the Pleins' Motion for Ruling Regarding Asserted Conflict of Interest	APX148 - APX149
03/16/2018	USAA Casualty Insurance Company's Notice of Discretionary Review – RE: Order on the Pleins' Motion for Ruling Regarding Asserted Conflict of Interest	APX150 - APX153
03/16/2018	Declaration of Service of USAA Casualty Insurance Company's Notice of Discretionary Review – RE: Order on the Pleins' Motion for Ruling Regarding Asserted Conflict of Interest	APX154 - APX156
03/16/2018	Certificate of E-Service of USAA Casualty Insurance Company's Notice of Discretionary Review – RE: Order on the Pleins' Motion for Ruling Regarding Asserted Conflict of Interest and Declaration of Mailing	APX157
03/16/2018	Filing Affidavit of Service with the Court of Appeals Division I - USAA Casualty Insurance Company's Notice of Discretionary Review – RE: Order on the Pleins' Motion for Ruling Regarding Asserted Conflict of Interest	APX158
07/29/2019	The Washington State Court of Appeals, Division I decision of <u>Plein v. USAA Casualty Insurance Company</u> , 445 P.3d 574 (July 2019)	APX159 – APX166

DATED THIS 19th day of September, 2019.

Respectfully submitted,

DKM Law Group, LLP

A handwritten signature in blue ink, consisting of stylized initials that appear to be 'JH'.

Robert S. McLay (WSBA No. 32662)
Joshua N. Kastan (WSBA No. 50899)
John B. Stauffer (WSBA No. 49920)
Attorneys for Respondents,
USAA Casualty Insurance Company
1700 7th Avenue, Suite 2100
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Tel: (206) 407-2518



Notice of Service of Process

null / ALL
Transmittal Number: 17446360
Date Processed: 11/28/2017

Primary Contact: Ruby Esquivel
United Services Automobile Association
9800 Fredericksburg Rd.
Attn: Ruby Esquivel
San Antonio, TX 78288-0002

Electronic copy provided to: Carmen Solis
Debra Brake
Sandra Adams
Jenna Meurer
Danielle Lopez

Entity: USAA Casualty Insurance Company
Entity ID Number 3692525

Entity Served: USAA Casualty Insurance Company

Title of Action: Richard Plein vs. USAA Casualty Insurance Company

Document(s) Type: Summons/Complaint

Nature of Action: Contract

Court/Agency: King County Superior Court, Washington

Case/Reference No: 17-2-29542-6 SEA

Jurisdiction Served: Washington

Date Served on CSC: 11/27/2017

Answer or Appearance Due: 40 Days

Originally Served On: CSC

How Served: Certified Mail

Sender Information: Joel B. Hanson
Not Shown

Information contained on this transmittal form is for record keeping, notification and forwarding the attached document(s). It does not constitute a legal opinion. The recipient is responsible for interpreting the documents and taking appropriate action.

To avoid potential delay, please do not send your response to CSC

251 Little Falls Drive, Wilmington, Delaware 19808-1674 (888) 690-2882 | sop@cscglobal.com

STATE OF WASHINGTON

MIKE KREIDLER
STATE INSURANCE COMMISSIONER

www.insurance.wa.gov



OFFICE OF
INSURANCE COMMISSIONER

Certificate number **16756** is being issued to certify that the Insurance Commissioner of the State of Washington (OIC) has **ACCEPTED** service of process in the matter below.

Date Service of Process Accepted: 11/20/2017
 Certificate Issued: 11/20/2017
 Issued By: Nika Fate-Dixon
 Certificate Type: First Attempt
 Certified Mailing Number: 70160750000021599611
 Service Requested Upon: USAA CASUALTY INSURANCE COMPANY
 CORPORATION SERVICE COMPANY
 300 DESCHUTES WAY SW SUITE 304
 TUMWATER, WA 98501 US
 Authorized in Washington: Yes
 Attorney Details: JOEL B HANSON
 JOEL B HANDSON ATTORNEY AT LAW PLLC
 6100 219TH SW
 SUITE 480
 MOUNTLAKE TERRACE, WA 98043 US
 (425) 582-5636
 Case Number: 17-2-29542-6 SEA
 Plaintiff: RICHARD PLEIN, a married person and DEBORAH PLEIN (formerly Deborah De Witt), a married person, and the marital community composed thereof
 Defendant: USAA CASUALTY INSURANCE COMPANY, an insurance company, and THE STERLING GROUP, INC (doing business as Sterling Group, DKI,) a corporation
 Documents: CASE INFORMATION COVER SHEET AND AREA DESIGNATION
 ORDER SETTING CIVIL CASE SCHEDULE
 COMPLAINT
 SUMMONS
 PLAINTIFFS' FIRST REQUESTS FOR ADMISSION TO DEFENDANT
 Copies Sent To: JOEL B HANSON
 USAA CASUALTY INSURANCE COMPANY

SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

Plein

NO. 17-2-29542-6 SEA

VS

CASE INFORMATION COVER SHEET
AND AREA DESIGNATION

USAA and Sterling Group

CAUSE OF ACTION

(COM) - BREACH OF CONTRACT (COM 2)

AREA DESIGNATION

SEATTLE - Defined as all King County north of Interstate 90 and including all of Interstate 90 right of way, all of the cities of Seattle, Mercer Island, Issaquah, and North Bend, and all of Vashon and Maury Islands.

Insurance Commissioner
ACCEPTED SOP

NOV 20 2017

Zpm

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

Plein vs. USAA and Sterling Group	Plaintiff(s), Respondent(s)	NO. 17-2-29542-6 SEA ORDER SETTING CIVIL CASE SCHEDULE ASSIGNED JUDGE: Galvan, Veronica Alicea, Dept. 21 FILED DATE: 11/14/2017 TRIAL DATE: 11/12/2018 SCOMIS CODE: *ORSCS
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A civil case has been filed in the King County Superior Court and will be managed by the Case Schedule on Page 3 as ordered by the King County Superior Court Presiding Judge.

I. NOTICES

NOTICE TO PLAINTIFF: The Plaintiff may serve a copy of this **Order Setting Case Schedule (Schedule)** on the Defendant(s) along with the **Summons and Complaint/Petition**. Otherwise, the Plaintiff shall serve the **Schedule** on the Defendant(s) within 10 days after the later of: (1) the filing of the **Summons and Complaint/Petition** or (2) service of the Defendant's first response to the **Complaint/Petition**, whether that response is a **Notice of Appearance**, a response, or a Civil Rule 12 (CR 12) motion. The **Schedule** may be served by regular mail, with proof of mailing to be filed promptly in the form required by Civil Rule 5 (CR 5).

"I understand that I am required to give a copy of these documents to all parties in this case."

PRINT NAME	SIGN NAME
------------	-----------

Insurance Commissioner
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NOV 20 2017

TIME 2pm

I. NOTICES (continued)

NOTICE TO ALL PARTIES:

All attorneys and parties should make themselves familiar with the King County Local Rules [KCLCR] -- especially those referred to in this *Schedule*. In order to comply with the *Schedule*, it will be necessary for attorneys and parties to pursue their cases vigorously from the day the case is filed. For example, discovery must be undertaken promptly in order to comply with the deadlines for joining additional parties, claims, and defenses, for disclosing possible witnesses [See KCLCR 26], and for meeting the discovery cutoff date [See KCLCR 37(g)].

CROSSCLAIMS, COUNTERCLAIMS AND THIRD PARTY COMPLAINTS:

A filing fee of \$240 must be paid when any answer that includes additional claims is filed in an existing case.

KCLCR 4.2(a)(2)

A Confirmation of Joinder, Claims and Defenses or a Statement of Arbitrability must be filed by the deadline in the schedule. The court will review the confirmation of joinder document to determine if a hearing is required. If a Show Cause order is issued, all parties cited in the order must appear before their Chief Civil Judge.

PENDING DUE DATES CANCELED BY FILING PAPERS THAT RESOLVE THE CASE:

When a final decree, judgment, or order of dismissal of all parties and claims is filed with the Superior Court Clerk's Office, and a courtesy copy delivered to the assigned judge, all pending due dates in this *Schedule* are automatically canceled, including the scheduled Trial Date. It is the responsibility of the parties to 1) file such dispositive documents within 45 days of the resolution of the case, and 2) strike any pending motions by notifying the bailiff to the assigned judge.

Parties may also authorize the Superior Court to strike all pending due dates and the Trial Date by filing a *Notice of Settlement* pursuant to KCLCR 41, and forwarding a courtesy copy to the assigned judge. If a final decree, judgment or order of dismissal of all parties and claims is not filed by 45 days after a *Notice of Settlement*, the case may be dismissed with notice.

If you miss your scheduled Trial Date, the Superior Court Clerk is authorized by KCLCR 41(b)(2)(A) to present an *Order of Dismissal*, without notice, for failure to appear at the scheduled Trial Date.

NOTICES OF APPEARANCE OR WITHDRAWAL AND ADDRESS CHANGES:

All parties to this action must keep the court informed of their addresses. When a Notice of Appearance/Withdrawal or Notice of Change of Address is filed with the Superior Court Clerk's Office, parties must provide the assigned judge with a courtesy copy.

ARBITRATION FILING AND TRIAL DE NOVO POST ARBITRATION FEE:

A Statement of Arbitrability must be filed by the deadline on the schedule **if the case is subject to mandatory arbitration** and service of the original complaint and all answers to claims, counterclaims and cross-claims have been filed. If mandatory arbitration is required after the deadline, parties must obtain an order from the assigned judge transferring the case to arbitration. **Any party filing a Statement must pay a \$220 arbitration fee.** If a party seeks a trial de novo when an arbitration award is appealed, a fee of \$250 and the request for trial de novo must be filed with the Clerk's Office Cashiers.

NOTICE OF NON-COMPLIANCE FEES:

All parties will be assessed a fee authorized by King County Code 4A.630.020 whenever the Superior Court Clerk must send notice of non-compliance of schedule requirements and/or Local Civil Rule 41.

King County Local Rules are available for viewing at www.kingcounty.gov/courts/clerk.

Insurance Commission
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NOV 20 2017

TIME: 2pm

II. CASE SCHEDULE

√	CASE EVENTS	DATE
	Case Filed and Schedule Issued.	11/14/2017
√	Last Day for Filing Statement of Arbitrability without a Showing of Good Cause for Late Filing [See KCLMAR2.1(a) and Notices on page 2]. \$220 Arbitration fee must be paid	4/24/2018
√	DEADLINE to file Confirmation of Joinder if not subject to Arbitration [See KCLCR 4.2(a) and Notices on page 2]	4/24/2018
	DEADLINE for Hearing Motions to Change Case Assignment Area [KCLCR 82(e)]	5/8/2018
	DEADLINE for Disclosure of Possible Primary Witnesses [See KCLCR 26(k)]	6/11/2018
	DEADLINE for Disclosure of Possible Additional Witnesses [KCLCR 26(k)]	7/23/2018
	DEADLINE for Jury Demand [See KCLCR 38(b)(2)]	8/6/2018
	DEADLINE for Change in Trial Date [See KCLCR 40(e)(2)]	8/6/2018
	DEADLINE for Discovery Cutoff [See KCLCR 37(g)]	9/24/2018
	DEADLINE for Engaging in Alternative Dispute Resolution [See KCLCR 16(b)]	10/15/2018
	DEADLINE for Exchange Witness & Exhibit Lists & Documentary Exhibits [See KCLCR 4(j)]	10/22/2018
√	DEADLINE to file Joint Confirmation of Trial Readiness [See KCLCR 16(a)(1)]	10/22/2018
	DEADLINE for Hearing Dispositive Pretrial Motions [See KCLCR 56;CR56]	10/29/2018
√	Joint Statement of Evidence [See KCLCR 4(k)]	11/5/2018
	DEADLINE for filing Trial Briefs, Proposed Findings of Fact and Conclusions of Law and Jury Instructions (Do not file proposed Findings of Fact and Conclusion of Law with the Clerk)	11/5/2018
	Trial Date [See KCLCR 40]	11/12/2018

The √ indicates a document that must be filed with the Superior Court Clerk's Office by the date shown.

III. ORDER

Pursuant to King County Local Rule 4 [KCLCR 4], IT IS ORDERED that the parties shall comply with the schedule listed above. Penalties, including but not limited to sanctions set forth in Local Rule 4(g) and Rule 37 of the Superior Court Civil Rules, may be imposed for non-compliance. It is FURTHER ORDERED that the party filing this action **must** serve this *Order Setting Civil Case Schedule* and attachment on all other parties.



DATED: 11/14/2017

PRESIDING JUDGE

Insurance Commissioner
ACCEPTED SOP

NOV 20 2017

TIME: 2pm

IV. ORDER ON CIVIL PROCEEDINGS FOR ASSIGNMENT TO JUDGE

READ THIS ORDER BEFORE CONTACTING YOUR ASSIGNED JUDGE.

This case is assigned to the Superior Court Judge whose name appears in the caption of this case schedule. The assigned Superior Court Judge will preside over and manage this case for all pretrial matters.

COMPLEX LITIGATION: If you anticipate an unusually complex or lengthy trial, please notify the assigned court as soon as possible.

APPLICABLE RULES: Except as specifically modified below, all the provisions of King County Local Civil Rules 4 through 26 shall apply to the processing of civil cases before Superior Court Judges. The local civil rules can be found at www.kingcounty.gov/courts/clerk/rules/Civil.

CASE SCHEDULE AND REQUIREMENTS: Deadlines are set by the case schedule, issued pursuant to Local Civil Rule 4.

THE PARTIES ARE RESPONSIBLE FOR KNOWING AND COMPLYING WITH ALL DEADLINES IMPOSED BY THE COURT'S LOCAL CIVIL RULES.

A. Joint Confirmation regarding Trial Readiness Report

No later than twenty one (21) days before the trial date, parties shall complete and file (with a copy to the assigned judge) a joint confirmation report setting forth whether a jury demand has been filed, the expected duration of the trial, whether a settlement conference has been held, and special problems and needs (e.g., interpreters, equipment).

The Joint Confirmation Regarding Trial Readiness form is available at www.kingcounty.gov/courts/scforms. If parties wish to request a CR 16 conference, they must contact the assigned court. Plaintiff's/petitioner's counsel is responsible for contacting the other parties regarding the report.

B. Settlement/Mediation/ADR

a. Forty five (45) days before the trial date, counsel for plaintiff/petitioner shall submit a written settlement demand. Ten (10) days after receiving plaintiff's/petitioner's written demand, counsel for defendant/respondent shall respond (with a counter offer, if appropriate).

b. Twenty eight (28) days before the trial date, a Settlement/Mediation/ADR conference shall have been held. FAILURE TO COMPLY WITH THIS SETTLEMENT CONFERENCE REQUIREMENT MAY RESULT IN SANCTIONS.

C. Trial

Trial is scheduled for 9:00 a.m. on the date on the case schedule or as soon thereafter as convened by the court. The Friday before trial, the parties should access the court's civil standby calendar on the King County Superior Court website www.kingcounty.gov/courts/superiorcourt to confirm the trial judge assignment.

MOTIONS PROCEDURES

A. Noting of Motions

Dispositive Motions: All summary judgment or other dispositive motions will be heard with oral argument before the assigned judge. The moving party must arrange with the hearing judge a date and time for the hearing, consistent with the court rules. Local Civil Rule 7 and Local Civil Rule 56 govern procedures for summary judgment or other motions that dispose of the case in whole or in part. The local civil rules can be found at www.kingcounty.gov/courts/clerk/rules/Civil.

Non-dispositive Motions: These motions, which include discovery motions, will be ruled on by the assigned judge without oral argument, unless otherwise ordered. All such motions must be noted for a date by which the ruling is requested; this date must likewise conform to the applicable notice requirements. Rather than noting a time of day, the

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NOV 20 2017

TIME: 2pm

Note for Motion should state "Without Oral Argument." Local Civil Rule 7 governs these motions, which include discovery motions. The local civil rules can be found at www.kingcounty.gov/courts/clerk/rules/Civil.

Motions in Family Law Cases not involving children: Discovery motions to compel, motions in limine, motions relating to trial dates and motions to vacate judgments/dismissals shall be brought before the assigned judge. All other motions should be noted and heard on the Family Law Motions calendar. Local Civil Rule 7 and King County Family Law Local Rules govern these procedures. The local rules can be found at www.kingcounty.gov/courts/clerk/rules.

Emergency Motions: Under the court's local civil rules, emergency motions will usually be allowed only upon entry of an Order Shortening Time. However, some emergency motions may be brought in the Ex Parte and Probate Department as expressly authorized by local rule. In addition, discovery disputes may be addressed by telephone call and without written motion, if the judge approves in advance.

B. Original Documents/Working Copies/ Filing of Documents: All original documents must be filed with the Clerk's Office. Please see information on the Clerk's Office website at www.kingcounty.gov/courts/clerk regarding the requirement outlined in LGR 30 that attorneys must e-file documents in King County Superior Court. The exceptions to the e-filing requirement are also available on the Clerk's Office website. The local rules can be found at www.kingcounty.gov/courts/clerk/rules.

The working copies of all documents in support or opposition must be marked on the upper right corner of the first page with the date of consideration or hearing and the name of the assigned judge. The assigned judge's working copies must be delivered to his/her courtroom or the Judges' mailroom. Working copies of motions to be heard on the Family Law Motions Calendar should be filed with the Family Law Motions Coordinator. Working copies can be submitted through the Clerk's office E-Filing application at www.kingcounty.gov/courts/clerk/documents/eWC.

Service of documents: Pursuant to Local General Rule 30(b)(4)(B), e-filed documents shall be electronically served through the e-Service feature within the Clerk's eFiling application. Pre-registration to accept e-service is required. E-Service generates a record of service document that can be e-filed. Please see the Clerk's office website at www.kingcounty.gov/courts/clerk/documents/efiling regarding E-Service.

Original Proposed Order: Each of the parties must include an original proposed order granting requested relief with the working copy materials submitted on any motion. **Do not file the original of the proposed order with the Clerk of the Court.** Should any party desire a copy of the order as signed and filed by the judge, a pre-addressed, stamped envelope shall accompany the proposed order. The court may distribute orders electronically. Review the judge's website for information: www.kingcounty.gov/courts/SuperiorCourt/judges.

Presentation of Orders for Signature: All orders must be presented to the assigned judge or to the Ex Parte and Probate Department, in accordance with Local Civil Rules 40 and 40.1. Such orders, if presented to the Ex Parte and Probate Department, shall be submitted through the E-Filing/Ex Parte via the Clerk application by the attorney(s) of record. E-filing is not required for self-represented parties (non-attorneys). If the assigned judge is absent, contact the assigned court for further instructions. If another judge enters an order on the case, counsel is responsible for providing the assigned judge with a copy.

Proposed orders finalizing settlement and/or dismissal by agreement of all parties shall be presented to the Ex Parte and Probate Department. Such orders shall be submitted through the E-Filing/Ex Parte via the Clerk application by the attorney(s) of record. E-filing is not required for self-represented parties (non-attorneys). Formal proof in Family Law cases must be scheduled before the assigned judge by contacting the bailiff, or formal proof may be entered in the Ex Parte Department. **If final order and/or formal proof are entered in the Ex Parte and Probate Department, counsel is responsible for providing the assigned judge with a copy.**

C. Form

Pursuant to Local Civil Rule 7(b)(5)(B), the initial motion and opposing memorandum shall not exceed 4,200 words and reply memoranda shall not exceed 1,750 words without authorization of the court. The word count includes all portions of the document, including headings and footnotes, except 1) the caption; 2) table of contents and/or authorities, if any; and 3) the signature block. Over-length memoranda/briefs and motions supported by such memoranda/briefs may be stricken.

Insurance Commissioner
ACCEPTED SOP

NOV 20 2017

TIME: 2pm

IT IS SO ORDERED. FAILURE TO COMPLY WITH THE PROVISIONS OF THIS ORDER MAY RESULT IN DISMISSAL OR OTHER SANCTIONS. PLAINTIFF/PETITIONER SHALL FORWARD A COPY OF THIS ORDER AS SOON AS PRACTICABLE TO ANY PARTY WHO HAS NOT RECEIVED THIS ORDER.



PRESIDING JUDGE

Insurance Commissioner
ACCEPTED SOP

NOV 20 2017

TIME: 2PM

NOV 20 2017

TIME: 2pm

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

RICHARD PLEIN, a married person, and
DEBORAH PLEIN (formerly Deborah 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.

COMPLAINT

The Plaintiffs, Richard Plein and Deborah Plein (collectively, "the Pleins"), by and
through their attorney of record, Joel B. Hanson, allege as follows:

I. PARTIES

1.1 Deborah Plein is the owner of a house located at 807 N Adams, St., Tacoma,
Washington.

1.2 The Pleins are married and the 807 N Adams, St. house is their residence.

- 1 3.4 The subject insurance policy provided insurance coverage for damage to the
2 Pleins' property caused by fire.
- 3 3.5 In August of 2015, a fire occurred at the house.
- 4 3.6 The fire damaged the house and the Pleins' personal property items.
- 5 3.7 The fire damage was covered under the insurance policy.
- 6 3.8 USAA agreed it was covered.
- 7 3.9 USAA recommended Sterling Group to the Pleins to perform the repairs on the
8 house.
- 9 3.10 The Pleins hired Sterling Group to do the repairs based on USAA's
10 recommendation.
- 11 3.11 Sterling Group agreed to repair all the damage to the Pleins' residence caused by
12 the fire.
- 13 3.12 The Pleins relied on USAA and Sterling Group to move the repair process
14 forward.
- 15 3.13 USAA worked with Sterling Group to determine what repairs were necessary.
- 16 3.14 Sterling Group told the Pleins that fire damaged areas of the house had been
17 repaired.
- 18 3.15 USAA and Sterling Group moved the Pleins back into the house and told them
19 repairs had been completed.
- 20 3.16 The Pleins smelled a substantial smoke odor which should not have existed after
21 repairs had been completed.
- 22 3.17 The Pleins discovered that Sterling Group had done "repairs" which actually
23 concealed unrepaired fire damage.
- 24
- 25

- 1 3.18 The Pleins discovered problems with the repair work performed by Sterling
2 Group.
- 3 3.19 The Pleins retained a public adjuster to assist them with the insurance claim.
- 4 3.20 USAA hired an industrial hygienist to inspect the property.
- 5 3.21 The industrial hygienist discovered numerous deficiencies in the work performed
6 by Sterling Group.
- 7 3.22 The Pleins' public adjuster also communicated to USAA that additional repairs
8 were needed.
- 9 3.23 USAA finally agreed to move the Pleins back into a rental house after they had
10 been living in the unrepaired house with a strong smoke odor for approximately
11 half a year.
- 12 3.24 USAA failed to investigate the cost of the additional necessary repairs.
- 13 3.25 USAA declined to offer payment for those additional necessary repairs.
- 14 3.26 In early July of 2017, the Pleins' public adjuster asked USAA whether it would
15 agree to cover the cost of repairing the house based on the industrial hygienist's
16 report.
- 17 3.27 On July 28, 2017, USAA said it needed more time to make a coverage decision.
- 18 3.28 USAA has refused to make a coverage decision.
- 19 3.29 USAA has failed to pay for the additional necessary repairs.
- 20 3.30 As of the date this lawsuit is being filed (November 14, 2017), USAA still has not
21 answered the question of whether it will cover the cost of the additional necessary
22 repairs.
- 23 3.31 USAA has failed to promptly pay the full amounts due under the insurance
24 contract.
- 25

1 **IV. BREACH OF CONTRACT BY USAA**

2 4.1 USAA's conduct breached the insurance contract.

3 **V. BAD FAITH BY USAA**

4 5.1 USAA treated Plaintiffs unfairly. USAA placed its interests above Plaintiffs'
5 interests. USAA's conduct, including, but not limited to, its violations of the Washington
6 Administrative Code, constituted insurance bad faith.

7 **VI. VIOLATION OF THE CONSUMER PROTECTION ACT BY USAA**

8 6.1 USAA's conduct, including, but not limited to, its bad faith and its violations of
9 the Washington Administrative Code, constituted violations of the Washington Consumer
10 Protection Act, RCW 19.86 *et seq.*

11 **VII. BREACH OF CONTRACT BY STERLING GROUP**

12 7.1 Sterling Group was contractually obligated to repair all the damage caused by the
13 fire.

14 7.2 Sterling Group was contractually obligated to remediate all smoke residue and
15 smoke odor.

16 7.3 Sterling Group breached its duties to Plaintiffs.

17 **VIII. NEGLIGENCE BY STERLING GROUP**

18 8.1 Sterling Group had a duty to use reasonable care when performing repairs on the
19 house.

20 8.2 Sterling Group had a duty to use reasonable care when overseeing the work of its
21 subcontractors.

1 8.3 Sterling Group had a duty to use reasonable care when ensuring that the repair
2 work was properly completed.

3 8.4 Sterling Group failed to use reasonable care.

4 **IX. VIOLATION OF CONSUMER PROTECTION ACT BY STERLING GROUP**

5 9.1 Sterling Group's conduct violated the Consumer Protection Act.

6 **X. FRAUD AND FRAUDULENT MISREPRESENTATION BY STERLING GROUP**

7 10.1 Sterling Group fraudulently concealed and misrepresented its failure to properly
8 perform repairs.

9 10.2 Sterling Group's conduct constituted fraud and fraudulent misrepresentation.

10 **XI. DAMAGES**

11 11.1 As a direct and proximate result of the foregoing, Plaintiffs have suffered, and
12 continue to suffer, special and general damages in an amount to be proven at trial.

13 WHEREFORE, Plaintiffs prays for the following relief:

14 A. Judgment against Defendant USAA for violations of the Washington Consumer
15 Protection Act, RCW 19.86 *et. seq.*;

16 B. Judgment against Defendant USAA for bad faith and breach of contract;

17 C. Judgment against Defendant USAA in an amount to fairly compensate Plaintiffs
18 for all consequential, special, and general damages caused by USAA's wrongful acts and
19 omissions;

20 D. Judgment against Defendant USAA for attorneys' fees and costs as allowed by
21 law;

22 E. An award of exemplary damages against Defendant USAA pursuant to RCW
23 19.86, *et. seq.*;

1 F. Judgment against Defendant Sterling Group for violations of the Washington
2 Consumer Protection Act, RCW 19.86 *et. seq.*;

3 G. Judgment against Defendant Sterling Group for breach of contract, negligence,
4 and fraud;

5 H. Judgment against Defendant Sterling Group in an amount to fairly compensate
6 Plaintiffs for all consequential, special, and general damages caused by Sterling Group's
7 wrongful acts and omissions;

8 I. Judgment against Defendant Sterling Group for attorneys' fees and costs as
9 allowed by law;

10 J. An award of exemplary damages against Defendant Sterling Group pursuant to
11 RCW 19.86, *et. seq.*;

12 K. For such other relief as the Court deems just and equitable.

13
14 DATED this 14th day of November, 2017.

15
16 JOEL B. HANSON, ATTORNEY AT LAW, PLLC

17
18 /s Joel Hanson

19 Joel B. Hanson, WSBA #40814
20 Attorney for Plaintiff

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Insurance Commissioner
ACCEPTED SOP

NOV 20 2017

TIME: Zpm

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

RICHARD PLEIN, a married person, and
DEBORAH PLEIN (formerly Deborah 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

SUMMONS

TO THE DEFENDANT: USAA CASUALTY INSURANCE COMPANY:

A lawsuit has been started against you in the above-entitled court by the plaintiffs.
Plaintiffs' claim is stated in the written Complaint, a copy of which is served upon you with
this Summons.

In order to defend against this lawsuit, you must respond to the Complaint by stating
your defense in writing, and serving a copy upon the person signing this Summons within 40

1 days after the service of this Summons, excluding the day of service, or a default judgment
2 may be entered against you without notice. A default judgment is one where the plaintiff is
3 entitled to what is asked for because you have not responded. If you serve a notice of
4 appearance on the undersigned person, you are entitled to notice before a default judgment may
5 be entered.

6 You may demand that the plaintiffs file this lawsuit with the court. If you do so, the
7 demand must be in writing and must be served upon the person signing this Summons. Within
8 14 days after you serve your demand, plaintiff must file this lawsuit with the court, or the
9 service on you of this Summons and Complaint will be void.

10 If you wish to seek the advice of a lawyer in this matter, you should do so promptly so
11 that your written response, if any, may be served on time.

12 This Summons is issued pursuant to Rule 4 of the Civil Rules for Superior Court of the
13 State of Washington.

14 DATED this 14th day of November, 2017.

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19 JOEL B. HANSON, ATTORNEY AT LAW, PLLC

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21 /s Joel Hanson

22 Joel B. Hanson, WSBA #40814
23 Attorney for Plaintiffs
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Insurance Commissioner
ACCEPTED SOP

NOV 20 2017

TIME: 2pm

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

RICHARD PLEIN, a married person, and
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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

**PLAINTIFFS' FIRST REQUESTS FOR
ADMISSION TO DEFENDANT**

TO: USAA CASUALTY INSURANCE COMPANY;

Pursuant to CR 26 and 36, you are hereby served with the original of the following
Requests for Admission. You are requested to answer the requests in writing and under oath
within the space provided or using additional space, if necessary, and thereafter to serve a copy
of the same upon counsel for plaintiffs within forty (40) days after service hereof.

If the response to any of these requests is anything other than an unqualified admission
of the facts stated in the request, the response shall admit each fact that is true and qualify or

1 deny the remainder of the facts stated in the request. **If you cannot admit or deny a fact, you**
2 **must set forth in detail the reasons why you cannot truthfully admit or deny the matter.**
3 **A lack of information or knowledge may not be used as a response to a request unless you**
4 **have made a reasonable inquiry and the information known to you is insufficient to**
5 **enable you to admit or deny the request.** If objection is made to any of these requests, the
6 reason therefor must be specifically stated in the response. If you fail to admit the truth of any
7 matter set forth in these requests, and if the serving party later proves the truth of that matter,
8 you may be liable for reasonable expenses incurred in making that proof, including attorney's
9 fees and legal costs, and other sanctions available under CR 36 and 37.

11 These Requests for Admission are continuing, and in the event you discover further
12 information or documentation that alters, modifies, deletes, or augments the answers given now
13 or anytime hereafter, you are to provide such information by supplemental answer to the full
14 extent provided by the Civil Rules.

16 DATED this 14th day of November, 2017.

19 JOEL B. HANSON, ATTORNEY AT LAW, PLLC

21 /s/ Joel Hanson
22 Joel Hanson, WSBA #40814
23 Attorney for Plaintiffs
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By: _____

STATE OF WASHINGTON)
) ss.
COUNTY OF _____)

_____, being first duly sworn, upon oath deposes
and states as follows:

I am an authorized agent of defendant, USAA Casualty Insurance Company, the
defendant herein; I have read the foregoing Plaintiffs' First Requests for Admission to
Defendant and Responses thereto, know the contents thereof, and believe the same to be true.

DATED this _____ day of _____, 2017.

By: _____

SUBSCRIBED AND SWORN to before me this _____ day of _____
_____, 2017.

NOTARY PUBLIC in and for the state of
Washington, residing at _____
My commission expires: _____



OFFICE OF THE INSURANCE
COMMISSIONER

P.O. BOX 40258
OLYMPIA, WA 98504-0258

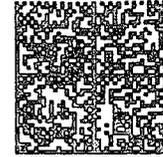
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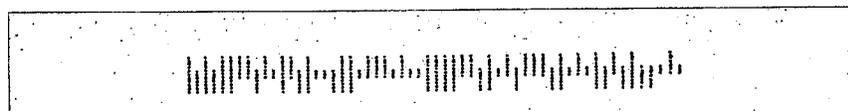
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FIRST CLASS



UNITED STATES POSTAL SERVICE
APR 023
PITNEY BOWES
02 1R \$05.170
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MAILED FROM ZIP CODE 98501

USAA CASUALTY INSURANCE COMPANY
CORPORATION SERVICE COMPANY
300 DESCHUTES WAY SW SUITE 304
TUMWATER WA 98501



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

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

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

Plaintiffs,

v.

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

Defendants.

No. 17-2-29542-6 SEA

NOTICE OF ASSOCIATION OF
COUNSEL

TO: CLERK

AND TO: ALL PARTIES AND THEIR COUNSEL

PLEASE TAKE NOTICE of the association of William C. Smart, Ian S. Birk, and

Keller Rohrback L.L.P., as co-counsel with Joel B. Hanson, representing plaintiffs, Richard and
Debra Plein. All further notices, pleadings, and other legal papers, exclusive of original process,
should continue to be served upon Joel B. Hanson and should also be served on Keller Rohrback
L.L.P. at the following address:

NOTICE OF ASSOCIATION OF COUNSEL 1

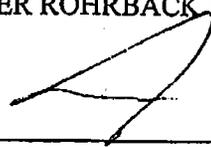
KELLER ROHRBACK L.L.P.

1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
TELEPHONE: (206) 823-1900
FACSIMILE: (206) 823-3384

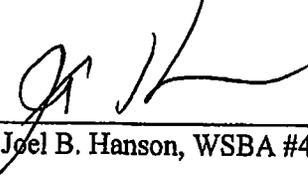
1 William C. Smart
2 Ian S. Birk
3 Keller Rohrback L.L.P.
4 1201 Third Avenue, Suite 3200
5 Seattle, Washington 98101

6 DATED this 30 day of January 2018.

7 KELLER ROHRBACK L.L.P.

8 By 
9 William C. Smart, WSBA #8192
10 Ian S. Birk, WSBA #31431

11 JOEL B. HANSON, ATTORNEY AT LAW, PLLC

12 By 
13 Joel B. Hanson, WSBA #40814
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15 Attorney for Plaintiffs
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Certificate of Service

I, Chris Jarman declare under penalty of perjury under the laws of the State of Washington that at all times hereinafter mentioned, I am a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On January 30, 2018, I caused a copy of the above document to be served on the individuals identified below via King County Superior Court E-Service and E-mail:

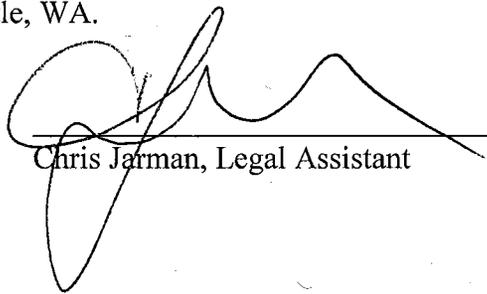
Robert S. McLay
Joshua N. Kastan
DKM Law Group, LLP
201 Spear Street, Ste 100
San Francisco, CA 94105

Attorneys for Defendant USAA Casualty Insurance Company

Michael A. Jaeger
Keith M. Hayasaka
1111 Third Avenue
Seattle, WA 98101

Attorneys for The Sterling Group, Inc.

DATED January 30, 2018, at Seattle, WA.


Chris Jarman, Legal Assistant

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

RICHARD PLEIN and DEBRA PLEIN

vs.

USAA CASUALTY INSURANCE COMPANY., ET AL.

CASE NO. 17-2-29542-6 SEA
NOTICE OF COURT DATE (Judges)
(NOTICE FOR HEARING)
SEATTLE COURTHOUSE ONLY
 (Clerk's Action Required) (NTHG)

TO: THE CLERK OF THE COURT and to all other parties per list on Page 2:
PLEASE TAKE NOTICE that an issue of law in this case will be heard on the date below and the Clerk is directed to note this issue on the calendar checked below.

Calendar Date: February 12, 2018 **Day of Week:** Monday

Nature of Motion: Motion for Ruling Regarding Asserted Conflict of Interest

<p>CASES ASSIGNED TO INDIVIDUAL JUDGES – SEATTLE</p> <p>If oral argument on the motion is allowed (LCR 7(b)(2)), contact staff of assigned judge to schedule date and time before filing this notice. Working Papers: The <u>judge's name</u>, date and time of hearing <u>must</u> be noted in the upper right corner of the Judge's copy. Deliver Judge's copies to Judges' Mailroom at C203</p> <p><input checked="" type="checkbox"/> Without oral argument (Mon - Fri) <input type="checkbox"/> With oral argument Hearing Date/Time: _____</p> <p>Judge's Name: <u>The Honorable Veronica A. Galván</u> Trial Date: <u>November 12, 2018</u></p>
<p>CHIEF CRIMINAL DEPARTMENT – SEATTLE (E1201)</p> <p><input type="checkbox"/> Bond Forfeiture 3:15 pm, 2nd Thursday of each month <input type="checkbox"/> Extraordinary Writs from criminal or infraction (Show Cause Hearing) LCR 98.40(d) 3:00 p.m. Mon-Thurs. <input type="checkbox"/> Certificates of Rehabilitation- Weapon Possession (Convictions from Limited Jurisdiction Courts) 3:30 First Tues of each month</p>
<p>CHIEF CIVIL DEPARTMENT – SEATTLE (Please report to W325 courtroom 2 for assignment) <i>Deliver working copies to Judges' Mailroom, Room C203. In upper right corner of papers write "Chief Civil Department" or judge's name and date of hearing</i></p> <p><input type="checkbox"/> Extraordinary Writs (Show Cause Hearing) (LCR 98.40) 1:30 p.m. Thurs/Fri -report to Room W719 <input type="checkbox"/> Supplemental Proceedings/ Judicial Subpoenas (1:30 pm Thurs/Fri)(LCR 69) <input type="checkbox"/> Motions to Consolidate with multiple judges assigned (LCR 40(a)(4) (without oral argument) M-F <input type="checkbox"/> Structured Settlements (1:30 pm Thurs/Fri)(LCR 40(2)(S))</p>
<p>Non-Assigned Cases:</p> <p><input type="checkbox"/> Non-Dispositive Motions M-F (without oral argument). <input type="checkbox"/> Dispositive Motions and Revisions (1:30 pm Thurs/Fri). <input type="checkbox"/> Certificates of Rehabilitation (Employment) 1:30 pm Thurs/Fri (LR 40(a)(2)(B))</p>

You may list an address that is not your residential address where you agree to accept legal documents.

Sign: [Signature] Print/Type Name: Ian S. Birk
 WSBA # 31431 (if attorney) Attorney for: Plaintiffs
 Address: 1201 Third Avenue, Suite 3200 City, State, Zip Seattle, WA 98101
 Telephone: (206) 623-1900 Email Address: ibirk@kellerrohrback.com Date: 2.7.18

DO NOT USE THIS FORM FOR FAMILY LAW OR EX PARTE MOTIONS.

LIST NAMES AND SERVICE ADDRESSES FOR ALL NECESSARY PARTIES REQUIRING NOTICE

Robert S. McLay, WSBA #32662
 Joshua Kastan, WSBA #50899
 DKM Law Group, LLP
 201 Spear Street, Suite 1100
 San Francisco, CA 94105
 (415) 818-4869
rsm@dkmlawgroup.com
JNK@dkmlawgroup.com
Attorneys for Defendant USAA

Michael Jaeger, WSBA #23166
 William Simmons, WSBA #35604
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 1111 Third Avenue, Suite 2700
 Seattle, WA 98101
 (206) 436-2020
Michael.Jaeger@LewisBrisbois.com
william.simmons@lewisbrisbois.com
Attorneys for Defendant The Sterling Group

Joel Hanson, WSBA #40814
 Joel Hanson Attorney at Law PLLC
 19909 Ballinger Way NE
 Shoreline, WA 98155
 (206) 658-2217
joel@joelhansonlaw.com
Attorneys for Plaintiffs

Name _____
 Service Address: _____
 City, State, Zip _____
 WSBA# _____ Atty. For: _____
 Telephone #: _____
 Email Address: _____

IMPORTANT NOTICE REGARDING CASES

Party requesting hearing must file motion & affidavits separately along with this notice. List the names, addresses and telephone numbers of all parties requiring notice (including GAL) on this page. Serve a copy of this notice, with motion documents, on all parties.

The original must be filed at the Clerk's Office not less than **six** court days prior to requested hearing date, except for Summary Judgment Motions (to be filed with Clerk 28 days in advance).

THIS IS ONLY A PARTIAL SUMMARY OF THE LOCAL RULES AND ALL PARTIES ARE ADVISED TO CONSULT WITH AN ATTORNEY.

The SEATTLE COURTHOUSE is in Seattle, Washington at 516 Third Avenue. The Clerk's Office is on the sixth floor, room E609. The Judges' Mailroom is Room C203.

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

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SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

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

Plaintiffs,

v.

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

Defendants.

No. 17-2-29542-6 SEA

MOTION FOR RULING REGARDING
ASSERTED CONFLICT OF INTEREST

I. RELIEF REQUESTED

Keller Rohrback L.L.P. (Keller), recently associated as counsel for plaintiffs Richard and Debra Plein, seeks a ruling from the Court on whether its representation of the Pleins is barred by its former representation of defendant USAA Casualty Insurance Company (USAA). After Keller appeared, USAA asserted a conflict of interest. Keller asks that the Court rule that its representation of the Pleins is permissible under RPC 1.9.

II. STATEMENT OF FACTS

A. Past representation of USAA.

Attorney Irene M. Hecht, a partner at Keller, represented USAA (and certain affiliated insurers) for a number of years. Ms. Hecht defended the company in coverage and insurance bad faith claims brought by USAA policyholders. Ms. Hecht has no involvement in the present matter. Keller assumes for purposes of this motion that USAA policyholders in these matters asserted the same types of claims that the Pleins assert in this action, namely that USAA's handling of a given homeowners' or other type of insurance claims amounted to insurance bad faith. Keller's representation of USAA was performed solely by Ms. Hecht and by attorneys and staff reporting to her.

During Keller's representation of USAA, its attorney-client communications were not at any time shared outside Ms. Hecht and her team. This was so on both a formal and informal basis. On a formal basis, the firm maintained internal controls to prevent access by lawyers and staff outside of Ms. Hecht's team to any material relating to any USAA matters. Thus, even if another member of the firm attempted to access a USAA file, the access would be denied automatically. On an informal basis, lawyers at the firm customarily do not discuss confidential client information outside the lawyers and staff working on a particular matter.

At no time did Keller or any lawyer or staff at Keller perform any work on behalf of USAA regarding the Pleins' insurance claim or the *Plein* matter, nor was the matter ever called to the firm's attention.

The attorney-client relationship between USAA and Keller ended in the fall of 2017. It is undisputed that from November 2017 forward USAA became a former client of the firm.

1 **B. Representation of the Pleins.**

2 Approximately the last week of January 2018, the Pleins' counsel, Joel Hanson,
3 approached Keller partner William C. Smart about representing the Pleins. Mr. Hanson
4 maintains an independent law practice unaffiliated with Keller. Mr. Hanson has never
5 represented USAA.
6

7 The firm performed a standard conflict check. It revealed the past representation of
8 USAA. It revealed nothing relating to the Pleins, confirming that Keller's past work for USAA
9 never involved anything relating to the Pleins, their insurance claim, or their lawsuit.

10 Over the week of January 22, 2018, Mr. Hanson spoke on the phone with Mr. Smart a
11 couple of times, and Mr. Hanson and the Pleins met with Mr. Smart and Keller partner Ian S.
12 Birk. Mr. Smart and Mr. Birk never had any role in the representation of USAA. They have no
13 knowledge of any attorney-client communications with USAA. They have no knowledge of—
14 and no access to—any USAA files or documents provided to Keller at any time.
15

16 The result of the meeting was that the Pleins wished to retain Mr. Smart and Mr. Birk in
17 addition to Mr. Hanson. Knowing of the firm's former representation of USAA but having no
18 reason to believe the Plein matter had any connection to any work the firm had done for USAA,
19 and the matter was therefore not substantially related to any prior matter, Mr. Smart and Mr.
20 Birk agreed to associate as counsel for the Pleins.
21

22 Neither Ms. Hecht nor any attorneys or staff who formerly worked on USAA matters
23 had any contact with Mr. Hanson or the Pleins, nor with the *Plein* file.

24 **C. Asserted former client conflict.**

25 On January 25, 2018, Mr. Birk addressed a letter to USAA's counsel advising that the
26 firm would shortly appear on behalf of the Pleins and asking about USAA's lack of

1 reimbursement of the Pleins' utility expenses, explaining that the Pleins would seek relief from
 2 the Court if USAA did not resume paying their utilities. The Pleins were living in a temporary
 3 rental while their home insured by USAA remained uninhabitable due to a covered loss. USAA
 4 did not respond.¹ On January 30, 2018, Mr. Smart and Mr. Birk filed a notice of association as
 5 the Pleins' counsel and filed a motion regarding ongoing payment of utilities.
 6

7 Approximately an hour later, USAA responded, asserting that Keller's representation of
 8 the Pleins created a conflict of interest. USAA demanded that Keller withdraw immediately and
 9 threatened to move to disqualify both Keller and Mr. Hanson if Keller did not withdraw:

10 Irene,

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

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

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

19 Per RPC 1.10(a), "while lawyers are associated in a firm, none of them shall knowingly represent a client when
 20 any one of them practicing alone would be prohibited from doing so by Rule 1.7 or 1.9" Per RPC 1.9(a), "[a]
 21 lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the
 22 same or substantially related matter in which that person's interests are materially adverse to the interests of the
 23 former client unless the former client gives informed consent, confirmed in writing."

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

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

We look forward to hearing from you and your colleagues.

Regards,
 Josh Kastan

¹ This was the fifth time a representative of the Pleins asked for a response from USAA on the utilities. Their
 public adjuster had sent emails about the utilities on January 3, 10, and 12, and Mr. Hanson had sent a letter on
 January 20. USAA ignored all of these inquiries, even as the Pleins ran out of heating oil in January.

1 Declaration of David Boerner, Ex. B.

2 The next day, Keller consulted with outside ethics counsel, Seattle University Professor
3 David Boerner. Boerner Decl. Keller did not believe, and Professor Boerner confirmed, that it
4 could simply withdraw from representing the Pleins based on the assertion of a conflict by
5 USAA's counsel, as this would not be in the Pleins' interest. *Id.*

6
7 Later that day, Mr. Hanson sought clarification from USAA's counsel, since USAA
8 seemed to be conceding that Mr. Hanson did not have a conflict, given that it would agree to his
9 continuing representation of the Pleins if Keller withdrew, but was threatening to seek his
10 disqualification nonetheless:

11 Mr. Kastan:

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

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

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

18 Regards,

19 Joel Hanson

20 Boerner Decl., Ex. B.

21 USAA responded, claiming that the reason it needed immediate withdrawal by Keller
22 was that the Pleins had filed a motion relating to USAA's nonpayment of their ongoing utilities.
23 USAA's counsel implied that they would be flexible about the timing of addressing the conflict
24 issue, if the Pleins would give USAA more time to respond on the utility issue:
25
26

1 Joel,

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

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

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

15 Regards,
16 Josh Kastan

17 Boerner Decl., Ex. B.

18 This proposal was not in the Pleins' interest. At the time of this exchange, the Pleins
19 were out of heating oil and, living paycheck to paycheck, faced difficulty paying for it. Even
20 though the Pleins' residence was damaged, they still were forced to pay ongoing expenses
21 related to it, such as mortgage and upkeep. The rent and the utilities at their temporary rental
22 were additional expenses. USAA appeared to rely on the asserted conflict in order to further
23 delay addressing the Pleins' covered additional living expenses.

24 Professor Boerner completed his analysis and concluded that Keller's representation of
25 the Pleins was not a prohibited conflict, because the *Plein* matter is not substantially related to
26 any matter on which Keller formerly represented USAA. *See* Boerner Decl. Meanwhile,
although no sharing of USAA material ever occurred within the firm, the firm again instructed
all firm personnel to screen any past USAA information from firm personnel who did not work
on USAA matters, including specifically those working on the *Plein* matter. This motion
followed.

1 **B. The official comments to RPC 1.9 show that there is no conflict.**

2 In its emails, USAA omitted the official comments to RPC 1.9, which demonstrate that a
3 lawyer may represent parties adverse to a former client in new cases that are factually distinct
4 from past cases. Comment 2 to RPC 1.9 states:

5
6 When a lawyer has been directly involved in a specific transaction, subsequent
7 representation of other clients with materially adverse interests in that transaction
8 clearly is prohibited. On the other hand, **a lawyer who recurrently handled a
9 type of problem for a former client is not precluded from later representing
10 another client in a factually distinct problem of that type even though the
11 subsequent representation involves a position adverse to the prior client.**

12 RPC 1.9, cmt. 2 (emphasis added). This comment precisely describes the situation before the
13 Court. Keller only ever represented USAA as its counsel in discrete cases each with its own
14 facts.

15 The *Plein* case is factually distinct from any case preceding it. Whether USAA's
16 handling of the *Plein* matter amounted to insurance bad faith turns on the particular facts of the
17 Pleins' situation. USAA has provided no evidence, and it is highly improbable, that there has
18 been another case in which:

- 19 • The insured was led to a particular contractor believing it to be one
20 recommended by USAA;
- 21 • That contractor purported to repair fire damage;
- 22 • The contractor covered up fire damage without repairing it but led the
23 policyholder to believe the damage had been fixed;
- 24 • The insured moved back into the house believing it to be fixed;
- 25 • After several weeks the insured detected an overwhelming smoke smell;
- 26 • A new inspection showed that the house was never properly repaired;

- 1 • The insured moved back out of the house into a temporary rental;
- 2 • The insurer delayed analysis of the damage; and
- 3 • The insurer stopped paying for the insured's utilities.

4 The legal standards for what constitutes insurance bad faith in Washington are well
5 developed and the subject of pattern instructions. WPI Chapter 320. Whether an insurer has
6 engaged in bad faith in a particular matter depends on the facts in that case.

7 Because the *Plein* case is “factually distinct” under RPC 1.9 Comment 2, the firm’s past
8 recurrent representation of USAA in other matters of the same type does not preclude its
9 representation of the Pleins.

10 Given this clear statement foreclosing an RPC 1.9 conflict, USAA is likely to try arguing
11 that Keller’s imputed knowledge of USAA’s policies and procedures nevertheless precludes its
12 representing a new client in a “factually distinct” matter.³ However, Comment 3 to RPC 1.9
13 addresses this. First, Comment 3 explains that a lawyer does not have a conflict under RPC 1.9
14 based on knowledge of information that has been disclosed publicly or to other adverse parties.
15 The comment states: “Information that has been disclosed to the public or to other parties
16 adverse to the former client ordinarily will not be disqualifying.” This means that any
17 knowledge regarding USAA’s claims policies and practices *ordinarily turned over in discovery*
18 does not disqualify the firm. Insurers are required to “adopt” and “implement” standards for
19 handling claims under WAC 284-30-330(3), and these standards are routine subjects of
20 discovery.

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³ Mr. Smart and Mr. Birk have no actual knowledge of any USAA documents, communications, or other matters.

1 Second, Comment 3 explains that general knowledge of an institutional client's "policies
2 and practices" also does not create a conflict under RPC 1.9: "In the case of an organizational
3 client, general knowledge of the client's policies and practices ordinarily will not preclude a
4 subsequent representation." This rule is consistent with the rule stated in Comment 2, above.
5 Where a lawyer merely represents a client in recurrent matters of a particular type, any general
6 knowledge of the client's "policies and practices" does not lead to a conclusion that a future,
7 "factually distinct" matter is substantially related.
8

9 **C. Case law shows that an RPC 1.9 conflict exists only when a subsequent
10 representation would be aided by some specific confidence gained by the lawyer in
11 the prior representation.**

12 The Court of Appeals explained the test in *Sanders v. Woods*, 121 Wn. App. 593, 598,
13 89 P.3d 312 (2004). In *Sanders*, a hotel owner sued a former employee for violating a
14 noncompete. A lawyer, Floyd Ivey, who sought to represent the employee, had previously
15 represented the hotel owner *and had advised the hotel owner on the very noncompete at issue*.
16 As the court explained, Mr. Ivey (and his business partner) had previously sent other former
17 employees "cease and desist" letters based on the same noncompete agreement, and had
18 specifically "reviewed the independent contractor agreements" and advised that they "appeared
19 adequate." 121 Wn. App. at 598.
20

21 The court applied the following test:

22 To determine whether the two representations are substantially related, we must:
23 (1) reconstruct the scope of the facts of the former representation; (2) assume the
24 lawyer obtained confidential information from the client about all these facts; and
25 (3) determine whether any former factual matter is sufficiently similar to a
26 current one that the lawyer could use the confidential information to the client's
detriment.

Id. at 598 (citing *State v. Hunsaker*, 74 Wn. App. 38, 43, 873 P.2d 540, 542 (1994)). Under this
test, the "facts" of the "former representation" involved the same noncompete agreement whose

1 validity the lawyer sought to challenge in the subsequent representation. Thus, the factual nature
2 of the former representation suggested specific information that would be relevant to the latter
3 representation.⁴

4 In contrast, the Court of Appeals reversed a disqualification when there was no factual
5 link between the matters. In *Hunsaker*, the state charged Hunsaker with molestation of M.S. At
6 trial (and with speedy trial an issue), Hunsaker sought disqualification of his defense counsel,
7 because defense counsel had previously represented M.S. in a separate criminal matter against
8 M.S. The appellate court reversed the trial court's disqualification of Hunsaker's counsel,
9 because the separate prosecution of M.S. and the new prosecution of Hunsaker "appear[ed] to
10 be totally unrelated." 74 Wn. App. at 46. On the issue of whether counsel could use the prior
11 representation of M.S. to discredit M.S. as a witness, the court specifically rejected
12 disqualification based on information that "would be available to defense counsel in discovery."
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14
15 *Id.* at 49.

16 In this case, the resolution of the Pleins' claims turns on the particular facts of their case
17 and standards and practices of USAA that "would be available ... in discovery." Because there
18 is no basis to conclude that representation of the Pleins would put at issue any work that Keller
19 previously did for USAA, the *Plein* matter is not "substantially related."
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25 ⁴ Washington follows the "factual context" analysis to determine whether matters are "substantially related" under
26 RPC 1.9. *Hunsaker*, 74 Wn. App. at 45-46. Under this test, the court looks at the factual setting of the former and
latter matters and *assumes* that confidences were shared in the former matter. The purpose of framing the test this
way is so that the client never has to divulge confidences when asserting an RPC 1.9 conflict. This is a salutary
purpose. It does not change the fact that mere generalized knowledge of "policies and practices" obtained in
recurrent representations does not disqualify a counsel from handling a "factually distinct" matter.

1 **D. Case law interpreting RPC 1.9 Comment 2 shows that representation of the Pleins**
2 **is permissible.**

3 Washington has not had a case specifically addressing RPC 1.9 Comment 2's provision
4 that "a lawyer who recurrently handled a type of problem for a former client is not precluded
5 from later representing another client in a factually distinct problem of that type." However,
6 courts interpreting this provision in analogous situations have allowed the subsequent
7 representation.

8 In *Health Care & Ret. Corp. of Am., Inc. v. Bradley*, 961 So. 2d 1071, 1072 (Fla. Dist.
9 Ct. App. 2007), lawyer Fisher represented a nursing home for a period of three years in at least
10 60 cases, many of them involving claims of negligence in connection with pressure ulcers and
11 falls. After Fisher's representation of the nursing home terminated, Fisher sought to represent a
12 plaintiff against the same nursing home involving alleged negligence in connection with
13 pressure ulcers and a fall. Applying the above comment to RPC 1.9, the court concluded that
14 this did not present a conflict. Because "each negligence case turns on its own facts," the
15 subsequent representation did not involve "Fisher attacking [the] work that [Fisher] performed
16 for the former client," and the former and current matters were not substantially related. *Id.* at
17 1074 (quotation omitted).

18 In a similar case, where a lawyer went from defending an obstetric group from medical
19 negligence claims to prosecuting a factually distinct medical negligence claim against the group,
20 the court found no conflict under the above rule where the former clients "failed to meet their
21 burden of establishing anything particularly unique or confidential about techniques of medical
22 malpractice defense representation that Edwards risks using adversely to [the former clients]."
23 *Vincent v. Essent Healthcare of Connecticut*, 465 F. Supp. 2d 142, 146-47 (D. Conn. 2006).
24
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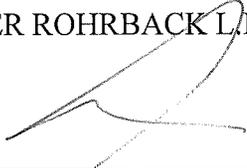
1 As the comments to RPC 1.9 explain, “generalized background knowledge,” or so-called
2 “‘playbook’ information,” is not disqualifying, unless it is “directly in issue or of unusual value
3 in the subsequent matter.” *Ex parte Regions Bank*, 914 So. 2d 843, 850 (Ala. 2005) (quotation
4 omitted, & quoting Restatement (Third) of the Law Governing Lawyers § 132, comment d(iii)
5 (2000)). As the above cases show, disqualification is generally only required where the prior
6 matter bears in some specific way on the subsequent matter, such as when a lawyer challenges a
7 noncompetite or other instrument or matter on which the lawyer formerly assisted the client.
8

9 VI. CONCLUSION

10 Because the *Plein* matter is a factually distinct matter turning on its own independent
11 merits, it is not “substantially related” to any prior USAA matter within the meaning of
12 RPC 1.9. Accordingly, Keller’s representation of the Pleins is proper.
13

14 DATED this 2nd day of February, 2018. I certify that this Memorandum contains
15 3,873 words, in compliance with the Local Civil Rules.
16

17 KELLER ROHRBACK L.L.P.

18
19 By 

20 William C. Smart, WSBA #8192
21 Ian S. Birk, WSBA #31431
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The Honorable Veronica A. Galván
Trial Date: November 12, 2018

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SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

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

Plaintiffs,

v.

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

Defendants.

No. 17-2-29542-6 SEA

DECLARATION OF DAVID BOERNER

David Boerner declares:

1. I am over the age of 18 and competent to make the statements in this Declaration based on my own personal knowledge and based on my analysis of the facts and circumstances surrounding Keller Rohrbach L.L.P.'s association in *Plein v. USAA*.

2. Since 1983, I have been a faculty member with the Seattle University School of Law, and its predecessor the University of Puget Sound School of Law teaching, among other courses, Professional Responsibility. A copy of my curriculum vitae is attached as Exhibit A.

1 3. From 1981 through 1988, from 1993 to 1996, from 1999 to 2004, and from 2006
2 to 2008, I served as a member of the Rules of Professional Conduct Committee of the
3 Washington State Bar Association and from 1982 through 1988, I was Chair of that committee.
4 The Rules of Professional Conduct Committee provides advice to Washington lawyers on their
5 professional responsibilities. I have made presentations and conducted seminars on the
6 professional responsibilities of lawyers at numerous continuing legal education seminars
7 presented by the Washington State Bar Association and by other legal organizations and law
8 firms. I have also provided advice to many lawyers and law firms concerning the professional
9 responsibilities of lawyers and have testified as an expert witness on issues of the professional
10 obligations of lawyers in the Superior Courts of Clark, Grays Harbor, King, Pierce, Skagit, and
11 Snohomish counties, and in the United States District Courts for the Western and Eastern
12 Districts of Washington. From 1988 to 2003, I served as a member of the Character and Fitness
13 Committee of the Washington State Bar Association and as chair of that committee during the
14 2000–2001 year. I served as a member of the Special Committee for the Evaluation of the Rules
15 of Professional Conduct (Ethics 2003) from 2003 to 2006.

18 4. On January 30, 2018, William C. Smart and Ian S. Birk of Keller Rohrback
19 (Keller) contacted me concerning the assertion of a conflict of interest by USAA. The email in
20 which USAA asserted this conflict (and subsequent correspondence on the same email string) is
21 attached as Exhibit B.

23 5. As an initial matter, Mr. Smart and Mr. Birk were concerned that they could not
24 withdraw merely on the assertion of a conflict by USAA’s counsel, because doing so would not
25 be in keeping with their responsibilities to the Pleins. After discussing the facts in our initial
26

1 telephone call, including the prior representation of USAA by Keller partner Irene M. Hecht, I
2 agreed that immediate withdrawal as demanded by USAA was neither required nor justified.

3 6. Keller retained me as independent ethics counsel to analyze the conflict asserted
4 by USAA and to give my opinion on whether the firm's representation of the Pleins is
5 consistent with the ethical responsibilities for lawyers under the RPCs, and in particular RPC
6 1.9. As explained below, my conclusion is that Keller's representation of the Pleins is not a
7 conflict under RPC 1.9 and the comments to that rule.
8

9 7. In addition to discussing the asserted conflict with Mr. Smart and Mr. Birk, I also
10 reviewed a declaration by Ms. Hecht. The facts material to my opinions include the following:

11 A. A prior to November 2017, Ms. Hecht, a partner at Keller Rohrback L.L.P.,
12 represented USAA on a broad spectrum of matters. I understand that other firm
13 lawyers and staff supervised by Ms. Hecht participated in this representation.
14 This representation consisted of representing USAA in discrete assigned cases,
15 including coverage and bad faith cases.
16

17 B. Mr. Smart and Mr. Birk are partners at Keller Rohrback L.L.P. Neither has
18 represented USAA. Neither participated in the firm's former representation of
19 USAA. Neither has received any information relating any matter in which the
20 firm represented USAA. Neither has access to any information received by the
21 firm relating to any USAA matter.
22

23 C. USAA ceased to be a client of Keller Rohrback L.L.P. prior to November 2017.

24 D. During the week of January 22, 2108, Mr. Smart and Mr. Birk were asked to
25 associate in a bad faith case against USAA brought by the Pleins and their then
26

1 attorney Joel Hanson. Mr. Hanson has an independent law practice unaffiliated
2 with Keller. I have been told that Mr. Hanson has never represented USAA.

3 E. On January 29, 2018, Keller filed a notice of association in the case and filed a
4 motion relating to additional living expense coverage.

5
6 F. Approximately an hour after this motion was electronically delivered to USAA's
7 counsel, USAA objected to Keller's representation of the Pleins and asserted that
8 a conflict exists prohibiting the same. USAA indicated that if Keller did not
9 immediately withdraw, it would seek disqualification of not only Keller, but also
10 Mr. Hanson. USAA's email provided no factual basis for the conclusion that the
11 *Plein* matter was the same or substantially related to any other matter, nor for the
12 suggestion that there could be any basis for disqualifying Mr. Hanson.

13
14 G. The parties exchanged further emails in the following days. Keller elected to
15 submit the question whether there is a conflict under RPC 1.9 to the Court.

16 8. In my opinion, no conflict exists for the following reasons.

17 9. The relevant rules of professional conduct governing the situation are RPC 1.9
18 and 1.10. The rule of RPC 1.10 is that a conflict by one lawyer in the firm is imputed to another.
19 Accordingly, the sole determinative question is whether the *Plein* matter is "substantially
20 related" to another matter in which the firm represented USAA.

21
22 10. RPC 1.9(a) prohibits a lawyer who has formerly represented a client in a matter
23 from representing another person in the "the same or a substantially related matter in which that
24 person's interests are materially adverse to the interests of the former client ..."

25 11. The comments to RPC 1.9 demonstrate that matters are substantially related for
26 the purposes of the rule if they involve the same transaction or legal dispute or if there otherwise

1 is a substantial risk that confidential factual information as would normally have been obtained
2 in the prior representation would materially advance the client's position in the subsequent
3 matter.

4 12. The comments further demonstrate that matters are not substantially related when
5 they are "factually distinct," and merely involve the same generalized information and concepts
6 as past cases. Comment 2 to RPC 1.9 states in relevant part:
7

8 When a lawyer has been directly involved in a specific transaction, subsequent
9 representation of other clients with materially adverse interests in that transaction
10 clearly is prohibited. On the other hand, a lawyer who recurrently handled a type
11 of problem for a former client is not precluded from later representing another
12 client in a factually distinct problem of that type even though the subsequent
13 representation involves a position adverse to the prior client.

14 13. Based on my independent conversations with Mr. Smart, Mr. Birk, and
15 Ms. Hecht, this comment speaks directly to the issue here. There is no evidence that Keller ever
16 represented USAA in connection with the *Plein* matter and I understand that it did not. This is
17 not a situation in which a lawyer in a subsequent matter is adverse to any work the lawyer did
18 for the former client in the same transaction. Rather, Ms. Hecht recurrently handled individual
19 cases on behalf of USAA and the *Plein* matter is simply a new and factually unique iteration of
20 such a case.

21 14. Insurance bad faith cases are unique on their facts. They turn on an insurer's
22 actions in handling a specific insurance claim. While they commonly involve discussion of the
23 insurer's general claims handling standards and policies, in the vast run of cases the disposition
24 of the case turns on the interaction of those standards and policies with the individual events of
25 the insurance claim at issue.

26 15. Comment 3 to RPC 1.9 is also relevant. It provides in relevant part:

1 Information that has been disclosed to the public or to other parties adverse to the
2 former client ordinarily will not be disqualifying.

3 * * *

4 In the case of an organizational client, general knowledge of the client's policies
5 and practices ordinarily will not preclude a subsequent representation; . . .

6 16. These comments underscore that general information of the type typically
7 exchanged in discovery in recurrent matters is generally not disqualifying under RPC 1.9. This
8 is because a general understanding of information that comes up in recurrent cases does not
9 suggest that a lawyer will have a particular advantage in the new matter by virtue of the past
10 representation.

11 17. In addition to the *Plein* matter having unique facts, it is highly unlikely that any
12 confidences or other information acquired by Ms. Hecht could be used by Mr. Smart or Mr. Birk
13 against USAA. In the first place, there is no reason to believe that Ms. Hecht's work on other,
14 unrelated cases involving different policyholders, different insurance losses, and different
15 insurance claims would have any bearing on the *Plein* matter. In the second place, there is no
16 evidence that any information acquired Ms. Hecht was in fact shared outside her group, and
17 Mr. Smart and Mr. Birk indicate that they have no actual knowledge of such information nor
18 internal access to it.
19

20 18. Case law specifically addressing this issue identifies that lawyers (or firms) may
21 represent subsequent clients against former clients in matters of the same type as long as the
22 current representation is not a matter that was "substantially related" to a previous matter.
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19. I declare under penalty of perjury that the foregoing is true and correct.

Dated this 2nd day of February, 2018, at Bellevue, Washington.



David Boerner

Exhibit A

DAVID BOERNER
Seattle University School of Law
901 12th Avenue, P. O. Box 222000, Seattle, WA 98122-1090
Phone: 206.398.4016/Fax: 206.398.4077
Email: dboerner@seattleu.edu/boernerlaw@gmail.com

EDUCATION LLB, University of Illinois, 1963
B.S., University of Illinois, 1962

BAR MEMBERSHIPS State of Washington, 1963
U.S. District Court, Western District of Washington, 1963
U.S. Court of Appeals, Ninth Circuit, 1967; United States Supreme Court, 1973

PROFESSIONAL ASSOCIATIONS American Bar Association
Washington State Bar Association
King County Bar Association

EMPLOYMENT HISTORY **2009 – PRESENT** Professor of Law, Emeritus, Seattle University School of Law

1987 - 2009 Associate Professor of Law, Seattle University School of Law (formerly University of Puget Sound School of Law)

1981 - 1987 Associate Dean and Associate Professor of Law, University of Puget Sound School of Law

1971 – 1981 Chief Criminal Deputy, King County (Seattle), Prosecuting Attorney

1967 – 1970 Assistant Attorney General, State of Washington

1965 – 1967 Assistant United States Attorney, Western District of Washington

1963 - 1965 Associate, Johnson, Jonson and Inslee/Seattle

AWARDS Excellence in Diversity Award, Washington State Bar Association 2008
Lifetime Achievement Award, Seattle University School of Law 2008
Award of Merit, Washington State Bar Association 2004
Outstanding Lawyer, King County Bar Association 2001
McGoldrick Fellow, Seattle University 2001

- AWARDS** Outstanding Achievement By A Scholar, Washington Council on Crime and Delinquency 1991
- PUBLICATIONS** *Sentencing In Washington: A Legal Analysis of the Sentencing Reform Act of 1981* (Butterworths, 1985)
- Confronting Violence: In The Act and In The Word*, 15 Univ. of Puget Sound Law Review 525 (1992)
- The Role of the Legislature in Guidelines Sentencing in "The Other Washington,"* 28 Wake Forest L. Rev. 381 (1993).
- Bringing Law to Sentencing*, 6 Federal Sentencing Reporter 174 (1993).
- Sentencing Policy In Washington*, 6 Overcrowded Times No. 3, p.1 (1995); reprinted in *Sentencing In Overcrowded Times: A Comparative Perspective* (M. Tonry, ed. Oxford University Press, 1997).
- Sentencing Guidelines and Prosecutorial Discretion*, 78 Judicature 196 (1995).
- The Use of Offender Characteristics In Guideline Sentencing*, 9 Federal Sentencing Reporter 136 (1996)
- Appellate Review and The Allocation of Sentencing Discretion: A Report From The "Other" Washington*, prepared for the Annual Conference of the National Association of Sentencing Commissions, Minneapolis, Minnesota (1998).
- Sentencing Reform in the Other Washington, 28 Crime and Justice: An Annual Review of Research* 71 (2001) (with Roxanne Lieb)
- PROFESSIONAL ACTIVITIES** Member, Trust Account Responsibilities and Retainers Task Force, Washington State Bar Association, 2006- 2007
- Member, Governor's Task Force on Sex Offenders, State of Washington, 2007
- Member, King County Sheriff's Blue Ribbon Panel, 2006 – 2008
- Police Intelligence Auditor, City of Seattle, 2004 – Present
- Advisor, Model Penal Code: Sentencing 2004 – Present.
- Member, King County Independent Task Force on Elections, 2005.
- Rules of Professional Conduct Committee, Washington State Bar Association; Member, 1981-88, 1993-1996, 2000 – 2004, Chair, 1982-1988.
- Character and Fitness Committee, Washington State Bar Association, Member 1998-2004, Chair 2000-2001.

**PROFESSIONAL
ACTIVITIES
(CON'TD)**

Sentencing Guidelines Commission, State of Washington; Chair, 1999-Present;
Member, 1998-Present.

Member, Evaluation of The Rules of Professional Conduct Committee, (Ethics 2003)
Washington State Bar Association, 2002 – 2006.

Chair, Time For Trial Task Force, Washington Supreme Court, 2002.

Member, Joint Select Committee on the Drug Sentencing Grid, Washington State
Legislature, 2002.

Committee To Define The Practice of Law, Washington State Bar Association,
Member, 2000 –2001.

Future of the Legal Profession Study Group, Washington State Bar Association,
Member, 2001.

Chair, King County Inquest Procedures Review Committee, 2000-2001.

Member, Governor's Action Group on Domestic Violence, 1999.

Member, Lawyer's Assistance Program Committee, Washington State Bar
Association, 1998-2001.

Washington Pattern Jury Instructions Committee, Washington State Supreme Court;
Member, 1985-2009.

Board for Trial Court Education, Washington State Supreme Court; Member, 1984-
2009, Vice-Chair and Chair, Curriculum Committee, 1985-1992, Chair 2002-2004.

Washington Supreme Court, Novak Commission on Attorney's Fees, 1987-1989.

Governor's Task Force on Community Protection, Member, Chair, Alternatives
Subcommittee, 1989.

Federal Public Defender Merit Screening Committee, Western District of Washington,
Chair, 1989-90.

Executive Board, Criminal Law Section, Washington State Bar Association; Member,
1977-1987.

Board of Prosecutor Training Standards and Education, Washington Criminal Justice
Training Commission; Member, 1984-86.

**PROFESSIONAL
ACTIVITIES
(CON'TD)**

Board of Directors, Washington Council on Crime and Delinquency; Member, 1984-1990.

Judicial Merit Selection Committee, City of Seattle; 1983, 1985.

Independent Counsel, Select Committee on Campaign Practices, House of Representatives, December, 1984 - January, 1985.

Governor's Emergency Commission on Prison Overcrowding; Member.

Pierce County Assigned Counsel Advisory Board; Member 1983-1992.

King County Public Defender Advisory Board; 1983-1985.

King County Executive Advisory Committee; Member, 1984-85.

King County Charter Review Commission; Chair; 1987-1988.

Boundry Review Board for King County; Member, 1986-1993.

Moderator, King County Regional Governance Summit, 1990.

Northwest Regional Institute, National Institute of Trial Advocacy; Instructor, 1981, 1982, 1983, 1984, 1985, 1987.

Seattle-King County Bar Association; Member, Board of Trustees, 1979-1982.

**PROFESSIONAL
PRESENTATIONS**Legal and
Judicial Ethics:

2011 Speaker, Common Prosecution and Defense Ethical Issues, Washington State Bar Association Criminal Law Section CLE, January 7, 2011.

2010 Speaker, Ethical Issues in Prosecution, Newly Elected Prosecutors Course, Washington Association of Prosecuting Attorneys, December 9, 2010.

Speaker, Ethical Issues In The Practice of Law, Foster Pepper CLE, December 6, 2010.

Speaker, Ethics, Seattle University School of Law CLE, November 5, 2010.

Speaker, Ethical Issues, Washington State Bar Association Program, November 5, 2010.

Speaker, Ethics In Immigration Practice, Kitsap County Bar Association CLE, September 14, 2010.

Legal and
Judicial Ethics
(con'td):
2009

Speaker, Ethics for Land Use Lawyers, Washington State Bar Association Land Use Section, December 3, 2009.

Speaker, Common Prosecution and Defense Ethical Issues, Washington State Bar Association Criminal Law Section, November 20, 2009.

Speaker, Ethics and The Torture Memos, Former United States Attorney's Association, Seattle, WA, October 3, 2009.

How Legal Supervisors Are Affected By Changes to The RPC's, Seattle University School of Law CLE, March 25, 2009.

2008

Speaker, Ethical Dilemmas for the Practicing Lawyer, Washington State Bar Association CLE, November 17, 2008.

Speaker, Ethical Implications of Hourly and Alternative Billing Practices, Seattle University School of Law CLE, November 14, 2008.

Speaker, Common Prosecution and Defense Ethics Issues, Washington State Bar Association Criminal Law Section CLE, Spokane, November 1, 2008.

Speaker, Common Prosecution and Defense Ethics Issues, Washington State Bar Association Criminal Law Section CLE, Seattle, October 25, 2008.

Speaker, High Profile Cases, Washington State Bar Association CLE, October 24, 2008.

Panelist, General Counsel: Are You The Arrow or The Bull's-Eye?, Federal Bar Association CLE, October 3, 2008.

Speaker, Ethics, the RPC's and Advertising, Washington State Bar Association, April 4, 2008.

2007

Speaker, Ethics Workout, King County Bar Association, December 5, 2007.

Speaker, Amanda Kumar's Case, Seattle University School of Law CLE, November 17, 2007.

Speaker, Ethical Dilemmas for The Practicing Lawyer, WSBA CLE, November 5, 2007.

Speaker, Ethics and Land Use Lawyers, WSBA CLE, October 19, 2007.

Speaker, High Profile Cases, WSBA CLE, October 16, 2007.

Speaker, Ethics In Criminal Law, Criminal Law Section, WSBA, Spokane, WA, September 28, 2007.

Speaker, Ethics In Criminal Law, Criminal Law Section, WSBA, Seattle, WA, September 22, 2007.

Legal and
Judicial Ethics
(con'td):
2006

Speaker, The New Rules of Professional Conduct and Access to Justice, Seattle University School of Law CLE, June 29, 2007.

Speaker, New Ethics Rule, ADR Section, King County Bar Association, December 14, 2006.

Speaker, Fourth Annual Conference on The Law of Lawyering, WSBA, December 13, 2006.

Speaker, Ethics in Defending DUI's, Washington Foundation for Criminal Justice, December 8, 2006.

Speaker, When Death and Divorce Collide, WSBA, November 29, 2006.

Speaker, Professional Ethics for International Lawyers, Washington State Bar Association, November 30, 2006.

Speaker, Ethics In Criminal Law, Criminal Law Section, WSBA, Spokane, WA, November 11, 2006; Seattle, WA, November 18, 2006.

Speaker, Ethical Dilemmas for The Practicing Lawyer, WSBA, November 13, 2006.

Speaker, Ethics for Corporate Counsel, Washington State Bar Association CLE, November 1, 2006,

Speaker, 50 Ways to Lose Your Client, WSBA, October 12, 2006.

Speaker, The New Rules of Professional Conduct, WSBA, September 18, 2006.

Washington's Proposed Rules of Professional Conduct, Tacoma Inn of Court, Tacoma, WA, March 20, 2006.

Ethical Issues for Corporate Counsel, Law Seminars International, Seattle, WA, March 14, 2006.

2005

Non-Conflict Ethics, Washington State Bar Association Annual Conference on The Laws of Lawyering, December 15, 2005.

Ethics In Family Law and Estate Planning, Washington State Bar Association, December 1, 2005.

Ethics In Criminal Law, Criminal Law Section, Washington State Bar Association, Seattle, WA, November 19, 2005.

Ethical Dilemmas for the Practicing Lawyer, Washington State Bar Association CLE, November 14, 2005.

Ethics In Criminal Law, Criminal Law Section, Washington State Bar Association, Yakima, WA, November 12, 2005.

Legal and
Judicial Ethics
(con'td):

Speaker, Ethical Issues, Seattle University School of Law CLE, Amanda Kumar's Case, October 28, 2005.

Speaker, Ethical Issues Before Administrative Tribunals, Washington State Bar Association CLE, Friday, October 28, 2005.

Ethics Before Hearing Boards, October 26, 2005.

Ethics In Sexual Assault Cases, Washington Association of Prosecuting Attorneys CLE, Leavenworth, WA, September 15, 2005.

Speaker, Ethical Issues In Special Assault Prosecutions, Washington Association of Prosecuting Attorneys Training Program, September 15, 2005.

Panelist, Ethics, National Institute of Trial Advocacy, June 21, 2005.

Speaker, Ethics In Criminal Law, Criminal Law Section, Washington State Bar Association CLE, May 20, 2005.

Speaker, Ethics, Washington State Trial Lawyers Association CLE, April 21, 2005.

Speaker, Ethics for Prosecutors, King County Prosecuting Attorney's Office CLE, April 18, 2005.

Speaker Revisions To The Rules of Professional Conduct, J. Reuben Clark Law Society CLE, March 18, 2005.

Speaker, Revisions To The Rules of Professional Conduct, Seattle University School of Law CLE, March 11, 2005.

2004

Speaker, Revisions To The Rules of Professional Conduct, Washington State Bar Association CLE, Seattle, December 17, 2004.

Speaker, Revisions To The Rules of Professional Conduct, Microsoft Corporation CLE, Redmond, WA, December 9, 2004.

Speaker, Revisions To The Rules of Professional Conduct, Washington Association of Criminal Defense Lawyers, Seattle, WA, December 3, 2004.

Speaker, Ethics In Criminal Law, Washington State Bar Association, CLE, Seattle, November 12, 2004; Spokane, November 13, 2004.

Speaker, Ethical Dilemmas, Seattle University School of Law, CLE, October 15, 2004.

Speaker, Dealing with Ethical Issues Involving Land Use/Environmental Law Matters, Washington State Bar Association CLE, October 7, 2004.

Speaker, Ethics, Tacoma-Pierce County Bar Association Annual Meeting, September 26, 2004.

Speaker, Ethics On The Criminal Side, Washington Association of Prosecuting Attorneys, June 25, 2004.

Legal and
Judicial Ethics
(con'td):

- Speaker, Ethics On The Civil Side, Washington Association of Prosecuting Attorneys, June 24, 2004.
- Speaker, Ethical Dilemmas, Seattle University School of Law CLE, April 16, 2004
- Speaker, Unauthorized Practice and the Technology Bill of Rights, Access to Justice/University of Washington School of Law Conference, January 6, 2004.
- 2003 Speaker, Ethics, King County Bar Association CLE, December 19, 2003.
- Speaker, Ethics In Litigation, Washington Trial Lawyers Association CLE, December 17, 2003.
- Moderator, Criticism of Judges, Washington Bench/Bar/Press Committee Annual Meeting, November 21, 2003.
- Speaker, Ethical Dilemmas, Washington State Bar Association CLE, November 20, 2003.
- Speaker, Prosecutorial Ethics, Washington Association of Prosecuting Attorneys Annual Meeting, June 20, 2003.
- Speaker, Ethics In Mental Health Proceedings, King County Bar Association CLE, March 26, 2003.
- Panelist, Ethical Consideration In Public Sector Law, American Bar Association CLE, February 7, 2003.
- Speaker, Ethical Dilemmas, Seattle University School of Law CLE, February 1, 2003.
- 2002 Speaker, Confidentiality, Washington State Bar Association CLE, December 19, 2002.
- Panelist, Response To Criticism, Bench-Bar-Press Committee of Washington Annual Meeting, November 15, 2002.
- 2001 Speaker, Legal Ethics In Criminal Law, Washington State Bar Association CLE, December 15, 2001.
- Speaker, Legal Ethics, King County Bar Association CLE, December 13, 2001.
- Speaker, Ethical Dilemmas in the Practice of Law, Washington State Bar Association, October 17, 2001.
- Speaker, Legal Ethics, Washington Defense Trial Lawyers, Yakima, Washington, April 26, 2001.
- Speaker, "The Ethics of Deception", Labor and Employment Law Section, King County Bar Association, January 18, 2001.
- 2000 Panelist, Legal Ethics, Federal Bar Association, December 6, 2000.
- Speaker, Ethical Dilemmas in the Price of Law, Washington State Bar Association, October 27, 2000.

Legal and
Judicial Ethics
(con'td):

- 1999 Moderator, Conflicts of Interest In Litigation, King County Bar Association, December 16, 1999.
- Speaker, Judicial Independence, Bench/Bar/Government Conference, King County Bar Association, November 11, 1999.
- Speaker, Ethical Dilemmas In Health Care Practice, Washington Association of Health Care Lawyers, November 5, 1999.
- Speaker, Ethics For Patent, Trademark & Copyright Lawyers, March 17, 1999.
- 1998 Speaker, "Current Dilemmas In Litigation Ethics," University of Washington CLE, December 12, 1998.
- Speaker, "Ethical Dilemmas In DUI Defense," Cowan, Hayne & Fox CLE, December 1, 1998.
- Speaker, "Ethics In Criminal Law," Washington State Bar Association Criminal Law Section CLE, November 21, 1998.
- Ethical Dilemmas For The Practicing Lawyer, Washington State Bar Association, November 18, 1998.
- Moderator, "Ethical Dilemmas For The Practicing Lawyer," Washington State Bar Association CLE, October 16, 1998.
- Speaker, "Ethics Jeopardy," Washington Criminal Justice Institute, September 24, 1998.
- Moderator, "Is The Civil Justice Broken," District Conference of the United States District Court for the Western District of Washington, September 18, 1998.
- Speaker, "Ethical Considerations For Prosecutors," Annual Meeting, Washington Association of Prosecuting Attorneys, June 24, 1998.
- Moderator, "Ethical Dilemmas: Problems Puzzles, Pitfalls," Seattle University School of Law CLE, May 29, 1998.
- Speaker, Ethical Issues In Representing The Growing or Maturing Closely Hold Business, Washington State Bar Association, February 6, 1988.
- Speaker, "Ethics In Criminal Law," Washington State Bar Association Criminal Law Section CLE, May 16, 1998.
- 1997 Speaker, "Ethical Dilemmas In Litigation," Fourth Annual Litigation Update CLE, King County Bar Association and University of Washington Law School, December 20, 1997.

Legal and
Judicial Ethics
(con'td):

Moderator, Professionalism and Ethics In Federal Criminal Practice, Federal Bar Association of Western Washington CLE, December 10, 1997.

Speaker, "Ethical Issues in Promoting Diversity and Eliminating Bias in the Legal Profession, Washington State Bar Association CLE, Seattle, repeated via video, December 3, 1997.

Moderator, Conflicts of Interest In Litigation, King County Bar Association CLE, December 3, 1997.

Speaker, Ethics, Kitsap County Bar CLE, October 10, 1997.

Moderator, Ethical Dilemmas For The Practicing Lawyer, Washington State Bar Association CLE, October 3, 1997.

Speaker, Ethics For Prosecutors and Defense Counsel, Washington State Bar Association Criminal Law Section CLE, August 16, 1997.

Speaker, Ethical Dilemmas, King County Bar Association CLE, August 14, 1997.

Speaker, Ethics For Prosecutors, King County Prosecuting Attorney's Office, May 16, 1997.

Speaker, Ethical Dilemmas In Land Use Practice, Washington State Bar Association CLE, May 10, 1997.

Speaker, Ethics In Judicial Campaigns, Washington State Bar Association CLE, May 9, 1997.

1996

Speaker, "The Client Billing Dilemma", King County Bar Association CLE, December 12, 1996.

Panelist "Ethical Dilemmas For The Practicing Lawyer, Washington State Bar Assn. CLE, Tacoma, October 24, 1996.

Speaker, "Ethical Issues in Promoting Diversity and Eliminating Bias in the Legal Profession, Washington State Bar Assn. CLE, Seattle, September 12, 1996.

Speaker, "Ethical Issues In Fees," Seattle University School of Law CLE, Seattle, Washington, June 14, 1996; Tacoma, November 22, 1996.

Speaker, "Ethics and The Office", Continuing Legal Education Symposium, Sebury and Smith, Spokane, March 28, 1996.

Speaker, "Avoiding Legal Malpractice and Bar Discipline," Washington Trial Lawyers Association CLE, February 29, 1996.

Legal and
Judicial Ethics
(con'td):

- 1995 Speaker, "The Ethics of Deception," King County Bar Association CLE, November 9, 1995.
- 1994 Speaker, "Conflicts In A Business Setting," Advising The Small Business Continuing Legal Education Seminar, Washington State Bar Association, August 12, 1994.
- Speaker, "Ethics" Environmental Land Use Law Seminar, Washington State Bar Association, May 14, 1994.
- 1993 Speaker, "Ethical Screens, Cones of Silence and the Problem of the Mobile Lawyer," Federal Bar Association, December 8, 1993.
- Speaker, "Ethics for Paralegals," Office of Attorney General, December 1, 1993.
- Moderator, "Judicial Selection in the Clinton Era," Federalist Society, April 14, 1993.
- Speaker, "Ethics in Judicial Campaigns," Conference on Pursuit of a Judicial Career for Attorneys of Color, February 27, 1993.
- 1992 Speaker, Ethics In Government, Growth Management Continuing Legal Education Seminar, Washington State Bar Association, October 30, 1992.
- Speaker, Ethics For Paralegals, Washington State Trial Lawyers Association, July 31, 1992.
- Speaker, Ethics In The Practice of Law, Schwabe, Williamson, Ferguson & Burdell, Firm Retreat, June 10, 1992.
- 1991 Speaker, "Ethics and The Court Employee", Court Support Personnel Orientation, Administrator For The Courts, December 5, 1991.
- Speaker, "Legal Ethics," Continuing Legal Education Seminar, Seabury & Smith, November 26, 1991.
- Speaker, "Your Ethics Are Not My Ethics," Annual Bench/Bar/Press Conference, Washington State Bar Association, November 21, 1991.
- Speaker, "Ethics In Prosecution," Annual Conference, Office of United States Attorney, Western District of Washington, September 25, 1991.
- Panelist, "Ethics In Judicial Campaigns," Annual Convention, American Judges Association, August 28, 1991.
- Speaker, "Judicial Ethics For Administrative Law Judges, Annual Conference, Washington Administrative Law Judges Association, August 2, 1991.

Legal and
Judicial Ethics
(con'td):

- Panelist, "Ethics and Sanctions In Discovery," Ethics In The Practice of Law CLE, Washington Women Lawyers, June 12, 1991.
- Speaker, "Ethics and The Court Employee", Court Support Personnel Orientation, Administrator For The Courts, April 5, 1991.
- 1990
- Speaker, Ethics of Trial Advocacy, Northwest Regional, National Institute of Trial Advocacy, June 20, 1990.
- Moderator, "Futures and the Washington Courts, Washington Administrator For The Courts, December 14, 1990.
- Speaker, "Ethics and The Court Employee", Court Support Personnel Orientation, Administrator For The Courts, March 23, 1990.
- 1989
- Speaker, "Ethics", Washington Superior Court Administrators Association, October 27, 1989, April 12, 1991.
- Speaker, "Ethics for Judicial Educators", National Association of State Judicial Educators, October 9, 1989.
- Speaker, "Prosecutorial Ethics," Washington Association of Prosecuting Attorneys, June 23, 1989.
- Speaker, "Ethics and The County Clerk," Washington Association of County Clerks, April 5, 1989.
- Speaker, "Ethics In Criminal Defense," Washington Association of Criminal Defense Lawyers, March 31, 1989.
- Speaker, "Ethics and The Court Employee", Court Support Personnel Orientation, Administrator For The Courts, March 10, 1989.
- 1988
- Speaker, "Conflicts of Interest", Seminar on Representation of Corporations and Employees Under Criminal Investigation, American Bar Association, Complex Crimes Committee and Washington Association of Criminal Defense Lawyers, November 14, 1988.
- Speaker, Judicial Faculty Development Seminar, Administrator for the Courts, November 11-12, 1988.
- Speaker, "Ethical Concerns In Settlement Negotiations Involving Fee Shifting Statutes", Attorney Fees CLE, Washington State Bar Association, November 3, 10 and 17, 1988.
- Speaker, "Ethics For Municipal Attorneys", Fall Conference, Washington Assn. of Municipal Attorneys, October 27, 1988.

Legal and
Judicial Ethics
(cont'd):

Speaker, "Prosecutorial Ethics", Annual Meeting, Oregon District Attorney Association, August 4, 1988.

Speaker, "Racial Discrimination In The Criminal Justice System, Seminar sponsored by Community Relations Service, United States Dept. of Justice, May 7, 1988.

Invited Commentator, Regional Hearing on Proposed Changes In Rules Regulating Lawyer Advertising, American Bar Assn., March 25, 1988.

Speaker, "Ethics and The Court Employee", Court Support Personnel Orientation, Administrator For The Courts, March 11, 1988.

Speaker, "Ethics In Land Use Practice", Environmental and Land Use Section, Washington State Bar Assn., February 26, 1988.

1987 Coordinator and Discussion Leader, "Discretionary Power of the Judge," Superior Court Judges Regional Seminar, April 4, 1987.

Speaker, "Elections and the Canons of Judicial Ethics, National Association of Women Judges, October 9, 1987.

1986 Speaker, "Ethics and The Court Employee", Court Support Personnel Orientation, Administrator For The Courts, March 26, 1986.

Speaker, "Ethics for Government Attorneys," Attorney General's Conference, August 21, 1986.

Speaker, "Washington's Rules of Professional Conduct," Garvey, Schubert, Adams and Barer, Seattle, August 16, 1986.

Speaker, "Washington's Rules of Professional Conduct," Perkins, Coie, Seattle, April 7, 9, 1986.

Speaker, "Washington's Rules of Professional Conduct," Perkins, Coie, Seattle, March 24, 26, 1986.

1985 Speaker, "Rules of Professional Conduct and the Public Attorney," Continuing Legal Education Seminar, Office of Attorney General, Olympia, December 3, 1985.

Moderator, "Image of the Law," panel discussion, National Association of Bar Executives, Seattle, September 30, 1985.

Speaker, "The Elected Judge and the Judicial Role," Washington Appellate Judges Conference, Seattle, July 2, 1985.

Legal and
Judicial Ethics
(cont'd):

Speaker, "Prosecutors and the Rules of Professional Conduct," Continuing Legal Education Seminar, King County Prosecuting Attorney, June 28, 1985.

Speaker, "Conflicts of Interest," Continuing Legal Education Seminar, Litigation Section, Washington State Bar Association, Yakima, Bellevue, Spokane, and Seattle, May 3, 1985.

Speaker, "Conflicts of Interest," Continuing Legal Education Seminar, Litigation Section, Washington State Bar Association, Yakima, Bellevue, Spokane, and Seattle, April 12, 13, 19, 26, 1985.

Speaker, "The Regulation of Speech in Judicial Election Campaigns," Spring Conference, Washington Superior Court Judges Association, Pasco, April 7, 1985.

Speaker, "Knowing the Rules: The Code of Professional Responsibility and Lawyer's Speech -- What Lawyer's May Say," Continuing Legal Education Seminar, American Civil Liberties Union of Washington, Seattle, February 15, 1985.

1984 Speaker, "Bench-Bar-Press Seminar, Administrator for the Courts, Tacoma, June 16, 1984.

1983 "Ethics in Public Practice, Selected Situations for Discussions," Ethics Workshop, Attorney General's Conference, August 11, 1983.

1982 "Courts and the News Media: Access to Judicial Records: A Constitutional Perspective," presented at the University of Washington School of Law, October 23, 1982.

CRIMINAL LAW:

2007 Speaker, Sentencing and The Political Process, National Association of Sentencing Commissions, Oklahoma City, OK, August 7, 2007.

2006 Speaker, *Blakely v. Washington In The State Supreme Courts*, Annual Conference, Chief Judges of State Court of Appeals, Washington, D.C., November 16, 2006.

Speaker, *Blakely Fix*, Washington Appellate Judges Judicial Conference, April 11, 2006.

2004 Moderator, *Impact of Blakely v. Washington*, State-Federal Judicial Council, Tacoma, WA, November 5, 2004.

Speaker, *Implications of Blakeley*, Moderator, Moral Basis of Sentencing, National Association of Sentencing Commissions, Santa Fe, New Mexico, August 16, 2004.

2002 Speaker, *Speedy Trial*, Washington Judicial College, September 30, 2002.

**CRIMINAL
LAW (CONT'D):**

- 2000* Keynote Speaker, Seventh Annual Washington Criminal Justice Institute, Washington State Bar Association, September 23, 2000.
- 1999* Speaker, The Future of Corrections, Washington Correctional Association, September 15, 1999.
- 1998* Panelist, Locating The Boundaries of Legal Mental Illness: The Implications of Hendricks, Section on Law and Mental Disability, American Association of Law School's Annual Meeting, San Francisco, January 9, 1998.
- 1997* Speaker, Civil Commitment of Sexually Violent Predators After Hendricks, Washington Criminal Justice Institute, September 19, 1997.
- 1996* Speaker, "Prosecutorial Guidelines," Seattle City Attorney's Office, April 15, 1996.
- 1995* Speaker, "Sentencing Guidelines and Prosecutors," Oklahoma District Attorneys Seminar, Austin, Texas, October 16, 1995.
- 1994* Speaker, "The Future of Sentencing Guidelines," Washington Criminal Justice Institute, September 16, 1994.
- Speaker, "Sentencing Guidelines Over The Past Decade," National Conference of Sentencing Guidelines Commission, July 29, 1994.
- 1993* Speaker, "Misdemeanor Sentencing," Washington Association of Criminal Defense Lawyers, CLE, October 21, 1993.
- Speaker, "Drafting and Politics," National Conference of State Legislators, October 10, 1993.
- Speaker, "The Effect of Washington's Sentencing Guidelines on Racial Disparity In Sentencing," Law and Society Association Annual Meeting, May 28, 1993.
- Speaker, "Sentencing," King County Prosecuting Attorney's Office, March 20, 1993.
- 1992* Member, Transition Task Force on Criminal Justice, Governor-Elect Mike Lowry, 1992-93.
- Speaker, Sentencing, Washington State Bar Association Annual Convention, September 16, 1992.
- Speaker, Civil Commitment A Social Control, Law and Society Assn., Annual Convention, Philadelphia, PA, May 31, 1992.
- 1991* Speaker, "The Evolving Common Law of Sentencing" Washington Judicial Conference, August 26, 1991.

**CRIMINAL
LAW
(CONT'D):**

Speaker, "Common Law of Sentencing," Annual Conference, Washington Association of Prosecuting Attorneys, June 21, 1991.

Consultant, Alaska Sentencing Commission, May 2-4, 1991.

1990

Speaker, Sentencing Guidelines For Misdemeanors, Oregon Criminal Justice Council, Portland, Oregon, February 23, 1990.

Speaker, Sentencing, Judicial Orientation, Washington Superior Court Judges Association, February 8, 1990.

1989

Speaker, State and Federal Sentencing, Washington Association of Criminal Defense Attorneys, December 1, 1989.

Speaker, Sentencing The Sexual Offender, Washington Defender Association, Seattle, November 17, 1989, Spokane, November 18, 1989.

Moderator and Speaker, Indeterminate Sentence Review Board, Conference on Parole For Inmates Convicted of Murder In The First Degree, October, 1989.

Speaker, Financial Obligations and Sanctions, Conference on Offenders In The Community, Washington Council on Crime and Delinquency, August 3, 1989.

Speaker, Sentencing Developments, Washington Association of Prosecuting Attorneys, June 23, 1989.

Speaker, Sentencing Reform In Washington, Wisconsin Prison Capacity Task Force, February 6, 1989.

1988

Debate Moderator, Candidate for Attorney General, sponsored by Washington Council on Crime and Delinquency, September 14, 1988.

Invited Participant, Society For The Reform of the Criminal Law, Ottawa, Canada, August 1-3, 1988.

Panelist, "Alternative Sentences", Conference of Washington Sentencing Guidelines Commission, May 25, 1988.

Speaker, "Decisions and Reasons" Washington Indeterminate Sentence Review Board, April 15, 1988.

Speaker "Sentencing Reform Act", Lower Columbia Community College, Longview, Washington, February 16, 1988.

1987

Moderator, "From Confinement To Community," Workshop on Crime and Correctional Policy, Washington Council on Crime and Delinquency, October 20, 1987.

**CRIMINAL
LAW
(CONT'D):**

Speaker, "History of Sentencing Reform," Washington Sentencing Guidelines Commission, August 22, 1987.

Speaker, "The Sentencing Reform Act: On Appeal," Washington Judicial Conference, August 27, 1987.

1986

Speaker, "Developments in Sentencing," Tacoma/Pierce County Bar Association, December 5, 1986.

1985

Speaker, "Sentencing in Washington -- Today and Tomorrow," Annual Conference, Washington Council on Crime and Delinquency, November 15, 1985.

Moderator, "Commentary on State Constitutional Law Regarding Privacy and Searches," Honorable James M. Dolliver, Chief Justice, Washington Supreme Court and Honorable Carolyn R. Dimmick, United States District Court, Western District of Washington, Washington State Bar Convention, Seattle, September 13, 1985.

Speaker, "Exceptional Sentences and Appellate Review," Fall Judicial Conference, Tacoma, August 6, 1985.

1984

Speaker, "The Sentencing Reform Act," Superior Court Judges Regional Seminar, Everett, November 10, 1984.

Speaker, "The Sentencing Reform Act," Continuing Legal Education Seminar, Criminal Law Section, Seattle-King County Bar Association, Seattle, October 31, 1984.

Speaker, "The Constitutionality of the Sentencing Reform Act," Continuing Legal Education Seminar, University of Washington School of Law, Seattle, October 27, 1984.

Speaker, "The Process of Reform," Leadership Tomorrow Forum on Criminal Justice, Sponsored by Greater Seattle Chamber of Commerce and United Way of King County, Seattle, October 18, 1984.

Speaker, "Introduction, Calculations and Possible Problems Under the Sentencing Reform Act," Continuing Legal Education Seminar, Pierce County Bar Association, Tacoma, October 12, 1984.

Speaker, "Determinate Sentencing: Legal Impacts," Fall Judicial Conference, Spokane, August 27, 1984.

Speaker, "Sentencing Under the New Act," Spring Conference, Washington Superior Court Judges Association, Lake Chelan, April 18, 1984.

**CRIMINAL
LAW
(CONT'D):**

Debate Moderator, "Roadblocks and The Constitution," sponsored by Washington Commission for the Humanities and Metrocenter YMCA, Seattle, April 11, 1984.

Speaker, "An Orwellian Analysis of the Sentencing Reform Act," at 1984 "Was Orwell Right?" Continuing Legal Education Seminar, Criminal Law Section, Washington State Bar Association, Seattle, March 30, 1984.

Presenter, Regulation of Prosecutorial Discretion in Washington, National Conference on Sentencing, National Institute of Justice, Baltimore, Maryland, January 18-20, 1984.

1983

"The Early Morning Line: A Preliminary Analysis of What Process is Due Under the Sentencing Reform Act," Continuing Legal Education Seminar, University of Washington School of Law, October 8, 1983.

"An Overview of the Sentencing Reform Act of 1981," Washington State Bar Association Annual Convention, September 15, 1983.

Exhibit B

Ian Birk

From: Joshua N. Kastan <JNK@dkmlawgroup.com>
Sent: Wednesday, January 31, 2018 6:17 PM
To: Joel Hanson; Irene Hecht; Will Smart; Ian Birk
Cc: Robert S. McLay; Chris Jarman; Shannon McKeon; Nicole Dyakanoff; Doris L. Corpus
Subject: Re: Plein v. USAA CIC - Demand to Immediately Withdraw Due to Direct Conflict with Former Client

Joel,

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

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

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

Regards,
 Josh Kastan

JOSHUA N. KASTAN

DKM LAW GROUP

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San Francisco Office
 535 Pacific Avenue, Suite 101
 San Francisco, CA 94133
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From: "joel@joelhansonlaw.com" <joel@joelhansonlaw.com>
Date: Wednesday, January 31, 2018 at 5:52 PM
To: Joshua Kastan <JNK@dkmlawgroup.com>, Irene Hecht <ihecht@KellerRohrback.com>, Will Smart <wsmart@KellerRohrback.com>, Ian Birk <ibirk@KellerRohrback.com>

Cc: Robert McLay <RSM@dkmlawgroup.com>, Chris Jarman <cjarman@KellerRohrback.com>, Shannon McKeon <smckeon@KellerRohrback.com>, Nicole Dyakanoff <ndyakanoff@KellerRohrback.com>, "Doris L. Corpus" <DLC@dkmlawgroup.com>

Subject: RE: Plein v. USAA CIC - Demand to Immediately Withdraw Due to Direct Conflict with Former Client

Mr. Kastan:

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

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

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

Regards,

Joel Hanson

Please note that my address and phone number have changed:

Joel B. Hanson, Attorney at Law, PLLC
19909 Ballinger Way NE
Shoreline, WA 98155
Office: 206-658-2217
Cell: 206-412-8765
Fax: 425-368-7442
joel@joelhansonlaw.com

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----- Original Message -----

Subject: Plein v. USAA CIC - Demand to Immediately Withdraw Due to Direct Conflict with Former Client

From: "Joshua N. Kastan" <JNK@dkmlawgroup.com>

Date: Tue, January 30, 2018 5:20 pm

To: Irene Hecht <ihecht@KellerRohrback.com>, Will Smart <wsmart@KellerRohrback.com>, Ian Birk <ibirk@KellerRohrback.com>

Cc: "Robert S. McLay" <RSM@dkmlawgroup.com>, Chris Jarman <cjarman@KellerRohrback.com>, Joel Hanson <joel@joelhansonlaw.com>, "Shannon McKeon" <smckeon@KellerRohrback.com>, Nicole Dyakanoff <ndyakanoff@KellerRohrback.com>, "Doris L. Corpus" <DLC@dkmlawgroup.com>

Irene,

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

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

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

Per RPC 1.10(a), "while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7 or 1.9" Per RPC 1.9(a), "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing."

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

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

We look forward to hearing from you and your colleagues.

Regards,
Josh Kastan

Joshua N. Kastan, Esq.

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DKM LAW GROUP

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

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SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

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

Plaintiffs,

v.

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

Defendants.

No. 17-2-29542-6 SEA

DECLARATION OF IAN S. BIRK

Ian S. Birk declares:

1. I am over the age of 18 and competent to make the statements in this declaration from personal knowledge. If called to testify I would testify to these same matters in court.

2. I joined Keller Rohrback L.L.P. as an attorney in 2005. I became a partner at the firm in 2010. I am familiar with the firm's practices and procedures.

3. I first became aware of the *Plein* matter during the week of January 22, 2018, when William C. Smart, another partner in the firm, advised me that he had been consulted about the case that week. Mr. Smart advised that he had had one or two phone calls with the

1 Pleins' counsel, Joel Hanson. Later in the week, Mr. Smart, Mr. Hanson, and I met with the
2 Pleins. They desired to retain Mr. Smart and myself as co-counsel with Mr. Hanson.

3 4. We performed a standard conflict check. It disclosed the firm's prior
4 representation of USAA. It disclosed nothing concerning the Pleins, their insurance claim, or
5 their lawsuit. Based on this, it is my belief that Keller Rohrback never provided any
6 representation to USAA concerning the Pleins.
7

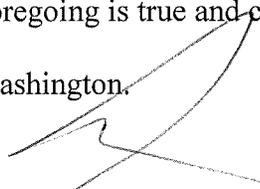
8 5. Mr. Smart and I never had any role in the representation of USAA. We have no
9 knowledge of any attorney-client communications with USAA. We have no knowledge of—and
10 no access to—any USAA files or documents provided to Keller at any time.

11 6. After USAA asserted a conflict, I asked our firm's managing partner to instruct
12 all firm personnel to screen any past USAA information from firm personnel who did not work
13 on USAA matters, including specifically those working on the *Plein* matter. I learned, in
14 addition, that the firm has for many years had in place internal procedures to ensure that
15 information received from USAA would not be shared outside of those attorneys and staff
16 specifically working on USAA matters. I am not privy to any such information and never have
17 been.
18

19 7. Attached as Exhibit A is a declaration by my partner, Irene M. Hecht, which I
20 asked our firm administrator to obtain so that our outside ethics counsel, Professor Boerner, and
21 the Court, could evaluate the asserted RPC 1.9 conflict.
22

23 8. I declare under penalty of perjury that the foregoing is true and correct.

24 Dated this 2nd day of February, 2018, at Seattle, Washington.
25
26



Ian S. Birk

Exhibit A

I, IRENE M. HECHT, declare as follows:

I am a partner in the law firm of Keller Rohrback L.L.P. I make this declaration based on my own personal knowledge. I am of legal age and otherwise competent to make this declaration. I have been in private practice at Keller Rohrback L.L.P. since 1980 and have been a partner since 1986. My private practice includes representation of insurance companies on coverage matters and defending insurers when they are sued for bad faith or extra-contractual damages. Until approximately three months ago, my clients included USAA. I believe I represented USAA for the first time in approximately 2007.

I represented USAA when they retained me as outside counsel on specific matters only. Those matters were specific lawsuits, involving coverage disputes or defending USAA when it was sued in a specific case for alleged bad faith or extra-contractual damages. I would represent USAA when I was asked to enter a Notice of Appearance on its behalf in a specific lawsuit. In October, 2017, my attorney-client relationship with USAA terminated. On November 21, 2017, I sent a letter to USAA's General Counsel confirming that USAA was no longer a client of the firm.

I have no knowledge of or information about the *Plein v. USAA CIC et. ano.* lawsuit. The first time I heard of the lawsuit was on January 30, 2018, when I received an email from Josh Kastan of the DKM Law Group, addressed to me and Will Smart and Ian Birk of my firm about the lawsuit. I have never discussed that lawsuit or my former representation of USAA with William Smart or Ian Birk.

During my representation of USAA, access to USAA documents and information was restricted to myself and the attorneys and staff that were supporting me in my representation of USAA. This is still true. Neither William Smart nor Ian Birk or any of their support staff have ever been able to and cannot access any USAA files or documentation.

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

SIGNED this 1st day of February, 2018 at Seattle, Washington.


Irene M. Hecht, WSBA #11063

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

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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

[PROPOSED] 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.

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.

IT IS SO ORDERED.

Dated this _____ day of February, 2018.

The Honorable Veronica Galván
SUPERIOR COURT JUDGE

Presented by:
KELLER ROHRBACK L.L.P.

By 
William C. Smart, WSBA #8192
Ian S. Birk, WSBA #31431

JOEL B. HANSON, ATTORNEY AT LAW, PLLC

By  for
Joel B. Hanson, WSBA #40814

Attorney for Plaintiffs

4836-4334-7291, v. 1

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

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SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

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

Plaintiffs,

v.

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

Defendants.

No. 17-2-29542-6 SEA

CERTIFICATE OF SERVICE

I, Shannon McKeon, declare under penalty of perjury under the laws of the State of Washington that I am employed by the law firm of Keller Rohrback, L.L.P., at all times hereinafter mentioned, I was and am a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On this 2nd day of February, 2018, I caused copies of the following documents to be served on the following individuals via e-mail and King County Superior Court E-Service:

1. Notice of Court Date;
2. Motion for Ruling Regarding Asserted Conflict of Interest;

HON. JUDGE VERONICA ALICEA-GALVÁN

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

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

Plaintiffs,

vs.

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

Defendants.

CASE NO. 17-2-29542-6 SEA

**DEFENDANT USAA CASUALTY
INSURANCE COMPANY'S
OPPOSITION TO PLAINTIFFS'
MOTION FOR RULING ON
PLAINTIFFS' COUNSEL'S CONFLICT
OF INTEREST**

Noted Date: February 12, 2018

Complaint Filed: November 14, 2017

Trial Date: November 12, 2018

Defendant USAA Casualty Insurance Company ("USAA CIC") hereby submits the following Opposition to Plaintiffs Richard and Deborah Plein (the "Pleins") Motion for a Ruling on the Pleins' Counsel's Conflict of Interest:

I.
INTRODUCTION

After representing a client for 12 years, billing in excess of 8,000 hours in the last 2 years on such representation, and after being involved with cases in litigation at the highest levels, may a law firm sue that same client in substantially similar matters a mere 3 months after the attorney-client relationship? As a matter of both Washington law and the public's confidence in the legal system, that question must be answered with a strong "no." To answer otherwise would cut against the many duties that a lawyer owes to current and former clients and would ignore the serious ethical obligations that govern the legal profession.

1 Yet, that is precisely what USAA CIC’s former Washington State litigation defense firm,
2 Keller Rohrback L.L.P. (“Keller Rohrback”) requests that this Court approve here. As Keller
3 Rohrback’s own Motion concedes – and similarly supported by the Declaration of John F. Gillard
4 (“Decl. Gillard”) filed concurrently herewith on behalf of USAA CIC – Keller Rohrback defended
5 USAA CIC and its affiliated companies “in coverage and insurance bad faith claims brought by
6 USAA [sic] policyholders.” (Motion, at 2:4-5.) Keller Rohrback’s representation was not a one-
7 time, limited engagement but instead was a deep and wide-ranging relationship of 12 years through
8 at least 165 separate cases – one of which was a nearly identical smoke damage case due to a
9 contractor’s work at a home that involved extensive meetings with corporate representatives and
10 other witnesses who they may likely be in a position to now cross-examine in this case – in which

11 Keller Rohrback:

- 12 • Was privy to the proprietary business customs and practices of USAA CIC and
13 its affiliated companies;
- 14 • Was involved in attorney-client communications with adjusters, business
15 representatives, and in-house attorneys, through regular in-person and telephonic
16 channels;
- 17 • Provided access to “playbook” of USAA CIC and its affiliated companies,
18 including litigation philosophies, outlook, techniques, and strategies;
- 19 • Gave USAA CIC and its affiliated companies advise with regard to their
20 representation, including as to insurance coverage, litigation strategy, factual
21 analysis, and recommended legal positions;
- 22 • Actively participated in court appearances, depositions, written filings, and
23 mediations on behalf of USAA CIC and its affiliated companies; and
- 24 • Obtained electronic login credentials to USAA CIC and its affiliated companies’
25 internal proprietary and confidential documents regarding alleged insurance bad
26 faith litigation, including attorney-client document repositories and electronic
27 claims databases.

28 (See, e.g., Decl. Gillard, at ¶¶ 7-9.)

1 Keller Rohrback represented USAA CIC and its affiliated companies in cases that were no
2 different from a subject-matter and substantive perspective than the instant alleged insurance bad
3 faith action. The fact that Keller Rohrback only terminated its involvement in, and representation
4 of, USAA CIC and its affiliated entities' litigations in November 2017 – just 3 months ago – further
5 compounds the egregiousness of their representation of the Pleins such a short time later.

6 The instant conflict of interest is imputed to the *entire* Keller Rohrback firm under the
7 Washington Rules of Professional Conduct (“RPC”). No degree of screening can cure the conflict,
8 and the entirety of the Keller Rohrback firm *must* be treated as “essentially one lawyer” under the
9 RPC. Similarly, given the ingrained client relationship fostered by Keller Rohrback during their
10 representation of USAA CIC and its affiliated entities, their representation of the Pleins as co-
11 counsel with attorney Hanson has similarly tainted his representation requiring his disqualification,
12 as well.

13 **II.** **STATEMENT OF FACTS**

14 One can deduce most of the facts supporting the conflict of interest faced by Keller
15 Rohrback from their moving papers alone. Indeed, as even Keller Rohrback’s own declarations
16 acknowledge, Keller Rohrback was counsel of record on Washington cases involving “alleged bad
17 faith or extra-contractual damages” since at least 2007 – over *a decade*. (*See* Declaration of Irene
18 Hecht [“Decl. Hecht”] attached as Exhibit “A” to Declaration of Ian Birk [“Decl. Birk”].)
19 Moreover, as Keller Rohrback’s own “independent ethics counsel” has testified multiple Keller
20 Rohrback lawyers and staff participated in the representation. (Declaration of David Boerner
21 [“Decl. Boerner”], at ¶ 7.A.) The relationship continued until Keller Rohrback formally terminated
22 the attorney-client relationship on November 21, 2017 – only about 3 months ago. (*Id.*)

23 Yet, despite these concessions, the relationship between Keller Rohrback, USAA CIC, and
24 USAA CIC’s affiliated companies was far deeper and more complex than Keller Rohrback’s papers
25 suggest. Indeed, as part of that representation, Keller Rohrback attorneys – and the Keller
26 Rohrback firm, generally – were trusted within the sacred confines of the attorney-client
27 relationship with *direct* access to confidential and proprietary business information of USAA CIC
28 and its affiliated companies. (Decl. Gillard, at ¶ 5.) This included, but was not limited to:

- 1 a. The business customs and practices, including confidential claims handling materials
2 and business relationships with outside companies and vendors;
- 3 b. The thought processes of adjusters, business representatives, and in-house attorneys;
4 and
- 5 c. Business and litigation philosophies and strategies, including approaches to
6 settlement discussions, motion practice, case analysis, defenses, witness meetings,
7 witness preparation, trial preparation, and discovery both on a case-by-case and
8 institutional, company-wide level.

9 (Decl. Gillard, at ¶ 5.)

10 USAA CIC agrees with Ms. Hecht's acknowledgement in her declaration that the *entirety* of
11 her role as outside defense counsel for USAA CIC and its affiliated entities involved "insurance bad
12 faith matters" involving allegations that included allegations breach of contract, common law torts,
13 and/or statutory claims (*e.g.*, Consumer Protection Act; Insurance Fair Conduct Act) relating to the
14 handling of property and casualty insurance claims in the State of Washington. (*Compare* Decl.
15 Hecht, *with* Decl. Gillard, at ¶ 6.) Given that alleged insurance bad faith litigation is such a
16 nuanced area of law – often involving discovery into the methods and practices of an insurer's
17 claims handling – it required Keller Rohrback's systematic understanding of the litigation strategy,
18 inner-workings, and business decisions of USAA CIC and its affiliated entities. (*See* Decl. Gillard,
19 at ¶ 7.) This deeply familiar knowledge of the client is not only helpful in representing USAA CIC
20 and its affiliated entities in suit, but it is the express goal of the client to educate their outside
21 counsel in this way. (Decl. Gillard, at ¶ 7.) As one of the few firms hired to defend litigation
22 against USAA CIC and its affiliated entities in the entire State of Washington, Keller Rohrback was
23 considered by USAA CIC and its affiliated entities' in-house counsel to have exactly that type of
24 intimate business and litigation knowledge of the companies – and indeed was their primary outside
25 law firm for alleged bad faith litigation since at least 2012 to late 2017. (Decl. Gillard, at ¶¶ 6-7.)

26 In this role, Keller Rohrback:

- 27 a. Had regular in-person and telephonic access to company employees, executives,
28 directors, and in-house attorneys relative to insurance claims and related alleged bad

1 faith litigation;

- 2 b. Provided USAA CIC and its affiliated companies with advice, including as to
3 insurance coverage matters, litigation strategies, factual positions, litigation
4 mitigation recommendations for training and communication materials, and legal
5 arguments; and
- 6 c. Was provided with electronic login credentials to internal proprietary and
7 confidential documents regarding alleged insurance bad faith litigation, including
8 document repositories holding attorney-client information and electronic claims
9 databases; and
- 10 d. Actively participated in court appearances, depositions, written court filings,
11 correspondence, and mediations on behalf of USAA CIC and its affiliated entities.

12 (Decl. Gillard, at ¶ 8.)

13 Apart from this qualitative information as to the complexity of the relationship between
14 Keller Rohrback, USAA CIC, and USAA CIC's affiliated entities, the quantitative data regarding
15 the relationship speaks for itself:

- 16 a. Since 2006, Keller Rohrback was counsel of record on behalf of USAA CIC and/or its
17 affiliated companies on at least 165 cases in litigation in the State of Washington;¹
- 18 b. Of those files, at least twelve cases involved alleged insurance bad faith litigation arising
19 from homeowners claims (like the Pleins' claim, here) in which Keller Rohrback was
20 hired to defend USAA CIC and/or its affiliated companies;²
- 21 c. Since 2015, based upon Keller Rohrback's representations on their fee invoices to
22 USAA CIC and/or its affiliated companies, seven attorneys with the Keller Rohrback
23 firm worked on files defending USAA CIC and/or its affiliated companies;³
- 24 d. Since 2015, based upon Keller Rohrback's representations on their fee invoices to
25 USAA CIC and/or its affiliated companies, four paralegals with the Keller Rohrback

26 ¹ Decl. Gillard, at ¶ 9.a.

27 ² Decl. Gillard, at ¶ 9.b.

28 ³ Decl. Gillard, at ¶ 9.c.

1 firm worked on files defending USAA CIC and/or its affiliated companies;⁴ and

2 e. Since 2015, Keller Rohrback billed in excess of **8,000 hours** on matters defending
3 USAA CIC and/or its affiliated companies.⁵

4 In fact, Keller Rohrback specifically represented Garrison Property and Casualty Insurance
5 Company, which is a subsidiary of USAA CIC **in a matter involving smoke damage to a house in**
6 **which the plaintiff alleged bad faith relating to the handling of the claim – nearly identical to the**
7 **Pleins’ allegations here**. The allegations included an attack on USAA’s PDRP program (Property
8 Direct Repair Program), an optional service by which USAA identifies licensed and insured local
9 contractors with which USAA members may choose to contract for covered repairs to their
10 property. Keller Rohrback attorneys and at least one paralegal met with more than one designated
11 corporate representative concerning the operation of the PDRP program, had hours-long meetings
12 with witnesses who may be the same witnesses in the Plein case, and provided advice concerning
13 the type and selection of local expert witnesses in the fields of industrial hygiene and toxicology,
14 which appear to be some of the same fields of expertise at issue in the Plein case. (Decl. Gillard, at
15 ¶ 9.f.)

16 Moreover, Keller Rohrback attorneys attended at least **three online webinars and in-person**
17 **symposia** in which confidential, attorney-client communications were exchanged regarding the
18 representation of USAA CIC and its affiliated companies. During these meetings, Keller Rohrback
19 was privy to highly proprietary information regarding the business practices of USAA CIC and its
20 affiliated companies, as well as discussion of litigation approach and strategies. (Decl. Gillard, at ¶
21 10.) This information has only been shared with a limited group of all of the law firms nationally
22 representing USAA CIC and its affiliate companies in alleged bad faith litigation across the United
23 States. (*Id.*)

24 In light of this, USAA CIC has significant concerns that confidential factual information
25 provided to, and obtained by, Keller Rohrback in its prior representation of USAA CIC and its
26 affiliated entities could advance the Pleins’ position in this case. (Decl. Gillard, at ¶ 11.) As part of

27 ⁴ Decl. Gillard, at ¶ 9.d.

28 ⁵ Decl. Gillard, at ¶ 9.e.

1 Keller Rohrback’s representation of USAA CIC and its affiliated companies, the firm was always
 2 expected to – and did, in fact – understand USAA CIC’s inner-workings and litigation strategies.
 3 (*Id.*) For example, Keller Rohrback had (and has) extensive knowledge of how adjusters on behalf
 4 of USAA CIC and its affiliated entities analyze and handle homeowners insurance claims and the
 5 interplay of this knowledge with the companies’ views in defending allegations of insurance bad
 6 faith in Washington. (*Id.*) The internal thought-processes in which Keller Rohrback is well-versed
 7 are directly and indisputably applicable to the Pleins’ case. (*Id.*)

8 **III.**
STATEMENT OF ISSUES

9 Keller Rohrback has aggressively presented this Court with a single issue: can it represent a
 10 client that is directly adverse to a defendant in this very case that the firm represented for over 10
 11 years? The answer must be a strong “no” – and with it, the simultaneous disqualification of their
 12 co-counsel whose representation has been tainted by Keller Rohrback’s improper involvement.

13 **IV.**
EVIDENCE RELIED UPON

14 In addition to the instant Opposition, USAA CIC’s position is based upon the Declaration of
 15 John F. Gillard and the Declaration of Hugh D. Spitzer filed concurrently herewith.

16 **V.**
LEGAL AUTHORITY

17 **A. RPC 1.9 and 1.10 Prohibit Keller Rohrback’s Representation Here**

18 The Washington legal ethics rules regarding Duties to Former Clients (RPC 1.9) and
 19 Imputation of Conflicts of Interest (RPC 1.10) necessitate the conclusion that Keller Rohrback is
 20 conflicted from representing the Pleins here.

21 Before addressing the effect of RPC 1.9 in this matter, RPC 1.10(a) provides the basis for
 22 USAA CIC’s position that regardless of the number of Keller Rohrback attorneys that represented
 23 USAA CIC and its affiliated companies, the conflict *is per se imputed to the entire firm*:

24 (a) Except as provided in paragraph (e), while lawyers are associated
 25 in a firm, none of them shall knowingly represent a client when any
 26 one of them practicing alone would be prohibited from doing so by
 27 Rules 1.7 or 1.9, unless the prohibition is based on a personal interest
 28 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.

1 (RPC 1.10(a); Declaration of Hugh Spitzer [“Decl. Spitzer”], at ¶ 6.)

2 The reason for this imputation of a conflict is simple. As Comment [2] to RPC 1.10
3 emphasizes the imputation rule “gives effect to the principle of loyalty to the client,” and is derived
4 from “the premise that a firm of lawyers is essentially one lawyer for purposes of the rules
5 governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the
6 obligation of loyalty owed by each lawyer with whom the lawyer is associated.” (RPC 1.10, Cmt.
7 2; Decl. Spitzer, at ¶ 6.) Unfortunately for Keller Rohrback, although RPC 1.10 provides certain
8 exceptions to this *blanket imputation of conflict to the entire firm* under limited circumstances, no
9 such exempting factors are applicable here. (Decl. Spitzer, at ¶¶ 6-8.)

10 As a result, Keller Rohrback *must* be treated as “essentially one lawyer” when applying the
11 duties-to-former-clients rule under RPC 1.9. (Decl. Spitzer, at ¶ 10.) This baseline rule absolutely
12 prohibits Keller Rohrback’s involvement in the instant case.

13 Given RPC 1.10(a)’s reference to RPC 1.9, the ethical bounds of RPC 1.9 are also relevant
14 here. Under that rule, among other restrictions, an attorney (or, by extension under RPC 1.10, a
15 *entire firm*) cannot represent a client whose interests are materially adverse to that of a former client
16 absent informed written consent:

17 A lawyer who has formerly represented a client in a matter shall not
18 thereafter represent another person in the same or a substantially
19 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.

20 (RPC 1.9(a); Decl. Spitzer, at ¶ 11.)

21 As University of Washington School of Law Professor Hugh Spitzer has opined, “the key to
22 analyzing whether a lawyer (or any lawyers in a firm) may represent a client adverse to a former
23 client, is whether the relevant matter is the ‘same or substantially related’ to one or more matters that
24 the firm had handled for the former client.” (Decl. Spitzer, at ¶ 12.) In this way, “the factual context
25 is key: did the lawyer and law firm just obtain general knowledge of a former client’s practices, or a
26 deep understanding and factual awareness of the former client’s philosophy, approach, and strategies
27 as well as specific facts about the client and its operations.” (Decl. Spitzer, at ¶ 15.) This case
28 unquestionably presents the latter scenario.

1 It cannot be reasonably disputed by Keller Rohrback that its representation of USAA CIC and
 2 its affiliated entities was substantially related to the subject matter of the instant case, for reasons
 3 including that:

- 4 • **Most significantly, Keller Rohrback was involved in a suit against**
 5 **a USAA CIC affiliate involving nearly the same allegations** of
 6 smoke damage to a house, the same allegations regarding another
 7 PDRP contractor (in this case, co-defendant Sterling), met
 8 extensively with potentially the same witnesses in this case, and
 9 provided extensive advice in the context of that nearly identical
 10 case;⁶
- 11 • The instant case involves allegations of insurance bad faith and
 12 extracontractual damages, just like those in which Keller Rohrback
 13 represented USAA CIC and its affiliated entities in the past;⁷
- 14 • Keller Rohrback has extensive knowledge of USAA CIC and its
 15 affiliated entities' internal workings, considerations of strategy,
 16 and business considerations as to litigation of extracontractual
 17 matters, directly applicable to the Pleins' case here;⁸ and
- 18 • Keller Rohrback attorneys participated in enterprise-wide, strategic
 19 attorney-client discussions, during which highly proprietary
 20 information regarding the business and litigation practices of
 21 USAA CIC and its affiliated companies were discussed.⁹

22 Significantly, Washington courts presume a substantial relationship exists "if there is a
 23 reasonable probability that confidences were disclosed which could be used against the client in later,
 24 adverse representation." (*Trone v. Smith*, 621 F.2d 994, 998-999 (9th Cir. 1980); *FMC Technologies*,

25 _____
 26 ⁶ Decl. Gillard, at ¶ 9.f.

27 ⁷ Decl. Hecht; Decl. Gillard, at ¶ 9.

28 ⁸ See Decl. Gillard, at ¶¶ 5-8.

⁹ Decl. Gillard, at ¶ 10.

1 *Inc. v. Edwards*, 420 F. Supp. 2d 1153, 1161 (W.D. Wash. 2006); *State v. White*, 80 Wn. App. 406,
2 415 (1995), *rev. denied*, 129 Wn. 2d 1012 (1996) [noting RPC 1.9’s “presumption of prejudice makes
3 it unnecessary for the former client to prove that the attorney divulged actual confidences”]; *Teja v.*
4 *Saran*, 68 Wn. App. 793, 799-800 (1003) [finding “[t]he plain language of RPC 1.9 indicates actual
5 proof of disclosure of confidential information is not necessary if the matters are substantially
6 related,” and holding that “former clients need not prove that actual confidences were divulged”.)
7 Not only is the instant matter substantially related to those in which Keller Rohrback previously
8 represented USAA CIC and its affiliated entities here, but Keller Rohrback’s Motion asks the Court
9 to simply apply the wrong standards in assessing their conflict of interest here. It is not USAA CIC’s
10 burden; it is Keller Rohrback’s burden. USAA CIC need not prove actual confidences were divulged
11 (even though they were); Keller Rohrback must prove that such matters were not somehow
12 substantially related. The firm cannot.

13 Further, and contrary to the Pleins’ position, it is *not* the aggrieved former client’s burden to
14 affirmatively protect their interests – as USAA CIC is doing here – but instead “the burden is on the
15 law firm whose disqualification is sought to demonstrate that the representations under scrutiny are
16 not substantially related and that the prohibition under RPC 1.9(a) does not apply.” (Decl. Spitzer,
17 at ¶ 16; *see Amgen, Inc. v. Elanex Pharms., Inc.*, 160 F.R.D. 134 (W.D. Wash. 1994) [citing
18 “Comment 8 to Rule 1.9 of the similarly worded ABA Model Rules of Professional Conduct”]; *FMC*
19 *Technologies, Inc. v. Edwards*, 420 F. Supp. 2d 1153, 1158 (W.D. Wash. 2006).) Keller Rohrback
20 has not met that burden here – especially given that their Motion and supporting papers are
21 overwhelmingly overcome by the myriad substantive factual and legal similarities between their prior
22 representation and the instant case.

23 Applied here, the framework and rules described above lead one to conclude that Keller
24 Rohrback is *not* eligible to represent the Pleins absent the informed written consent of USAA CIC.
25 Such consent has expressly been withheld. (Decl. Gillard, at ¶ 4.) Not only are there factual and
26 legal similarities between the Pleins’ case and the matters in which Keller Rohrback was involved,
27 but the number of Keller Rohrback attorneys and paralegals that have worked on these files, through
28 **at least 165 matters** in a decade of representation, and the fact that Keller Rohrback was attorney of

1 record for USAA CIC and its affiliated companies just *3 months ago* necessitate their disqualification
 2 from the instant matter. (*See Decl. Spitzer, at ¶ 17; Decl. Gillard, at ¶ 9.*) Indeed, Keller Rohrback
 3 has likely put themselves in a position of cross-examining the same witnesses that the firm previously
 4 prepared and presented. (*Decl. Spitzer, at ¶ 17.*)

5 **B. Any Attempts to “Screen” Are Insufficient and Futile**

6 No attempt by Keller Rohrback to “screen” this matter – technologically or otherwise –
 7 avoids the mandatory imputation under RPC 1.9 and RPC 1.10 of the conflict here. Indeed,
 8 although “[s]creens are often used on an informal basis to satisfy concerns of clients and former
 9 clients who voluntarily waive conflicts of interest and provide informed consent under RPC
 10 1.7(b)(4) or 1.9(b)(2), respectively,” the RPC “simply do not allow law firms to establish their own
 11 screens to avoid conflict of interests under RPC 1.9(a) when the former client has not provided
 12 written consent.” (*Decl. Spitzer, at ¶ 9.*)

13 Unlike the situations in which an “ethical screen” may be appropriate – in circumstances of
 14 a new attorney with a preexisting conflict joining a firm or where an older attorney with a conflict
 15 has left a firm – this situation is one in which the *same firm* is now attempting to *sue the very client*
 16 that they represented just *3 months ago*. (*See Decl. Spitzer, at ¶¶ 8-9.*) Under the RPC, any
 17 attempts by Keller Rohrback to screen would be futile and, regardless, would not obviate their need
 18 to comply with the fundamental requirements of RPC 1.9 and 1.10.

19 **C. The Boerner Declaration is Cursory and Deficient**

20 Disappointingly, Keller Rohrback’s declaration from an ethics professor, David Boerner, is
 21 devoid of any fact- or case-specific discussion of the nature and extent of Keller Rohrback’s
 22 representation of USAA CIC and its affiliated entities. While perhaps Keller Rohrback simply did
 23 not advise Mr. Boerner of the wide-ranging and in-depth relationship with USAA CIC and its
 24 affiliated entities – from actual representation in litigation for over 10 years, to participation at
 25 defense counsel webinars and symposia, to direct access to company personnel and files – Mr.
 26 Boerner’s declaration does little – if anything – to actually analyze whether the instant matter is
 27 “substantially related” to those in which Keller Rohrback was previously involved on the opposing
 28 side. Contrary to Mr. Boerner’s assertion, while particular aspects of insurance coverage litigation

1 may be “unique on their facts,”¹⁰ Mr. Boerner’s declaration completely ignores the interconnected
 2 nature of the institutional relationship that Keller Rohrback attorneys established with USAA CIC
 3 and its affiliated entities.

4 This relationship necessarily involved enterprise-wide knowledge of the companies’ inner-
 5 workings, applicable to each and every litigation regardless of the particular policy holder or facts
 6 at-issue. (Decl. Gillard, at ¶ 7.) Regardless, Mr. Boerner provides absolutely no foundation for his
 7 asserted knowledge of the intricacies and nuances of alleged insurance bad faith litigation,¹¹ about
 8 which he does not appear qualified. As such, this Court should give Mr. Boerner’s declaration
 9 little, if any, weight.

10 **D. The Pleins’ Representation By Co-Plaintiffs’ Counsel, Joel Hanson, is Tainted and He
 Should Likewise Be Disqualified**

11 From a practical standpoint, Keller Rohrback’s putative co-counsel in this matter, Joel
 12 Hanson, is tainted by association with the Keller Rohrback’s deep connections with USAA CIC and
 13 its affiliated companies. Indeed, attorney Hanson has not provided this Court with *any* evidence in
 14 support of Keller Rohrback’s moving papers that he has not gleaned information, knowledge, or
 15 understanding of USAA CIC’s business practices through his conversations with the Keller
 16 Rohrback attorneys with whom he has associated. In light of the nature and extent of Keller
 17 Rohrback’s relationship with USAA CIC and its affiliated companies, the risk of shared
 18 confidences – however innocent – is simply too great a risk to inviolate nature of the relationship
 19 between attorney and former client.

20 As such, given the absolute dearth of evidence Mr. Hanson has provided to support the
 21 propriety of his continued representation of the Pleins here, he should be disqualified on the same
 22 grounds as his co-counsel at Keller Rohrback. The risk of shared confidences, strategy, and
 23 knowledge of USAA CIC and its affiliated entities is simply too great.

24 ///

25 ///

26 ///

27 ¹⁰ Decl. Boerner, at ¶ 14.

28 ¹¹ Decl. Boerner, at ¶ 14.

VI.
CONCLUSION

1
2 Given Keller Rohrback's longstanding and in-depth relationship with USAA CIC and its
3 affiliated entities, RPC 1.9 and 1.10 bar *any attorney* at that firm from representing *any* client
4 adverse to its former clients, including USAA CIC here. The fact that Keller Rohrback cultivated
5 the relationship with USAA CIC and its affiliated entities for over a decade only to later turn
6 against that same client in the instant case supports the conclusion that the firm is necessarily
7 conflicted from involvement in the instant case – or any case involving USAA CIC and its affiliated
8 companies. The substantially similar nature of Keller Rohrback's prior representations – both from
9 a factual and legal perspective, not to mention the very same strategic considerations vis-à-vis the
10 litigation – should wholly prevent their representation here. Likewise, Keller Rohrback's co-
11 counsel, Joel Hanson, is tainted by association and should be equally disqualified from representing
12 the Pleins in this case.

13 Accordingly, in light of the foregoing, USAA CIC respectfully requests that this Court deny
14 the instant Motion and disqualify both the Keller Rorhback firm and Joel Hanson from
15 representation in this matter.

16
17 In compliance with the King County LCR 7(b)(5)(B)(vi), I certify that this Opposition
18 contains 4,059 words, including all headings and footnotes.

19
20 Dated: February 8, 2018

DKM LAW GROUP, LLP

21
22 By 

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USAA CASUALTY INSURANCE COMPANY

HON. JUDGE VERONICA ALICEA-GALVÁN

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

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

Plaintiffs,

vs.

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

Defendants.

CASE NO. 17-2-29542-6 SEA

**ERRATA TO DEFENDANT USAA
CASUALTY INSURANCE COMPANY'S
OPPOSITION TO PLAINTIFFS'
MOTION FOR RULING ON
PLAINTIFFS' COUNSEL'S CONFLICT
OF INTEREST**

Noted Date: February 12, 2018

Complaint Filed: November 14, 2017

Trial Date: November 12, 2018

Defendant USAA Casualty Insurance Company (“USAA CIC”) hereby submits the following Errata to the Opposition to Plaintiffs Richard and Deborah Plein (the “Pleins”) Motion for a Ruling on the Pleins’ Counsel’s Conflict of Interest:

Page 2, lines 8 through 11 in USAA CIC’s Opposition should be corrected to read as follows (correction indicated in capital letters):

Keller Rohrback’s representation was not a one-time, limited engagement but instead was a deep and wide-ranging relationship of 12 years through **at least 165** separate cases – one of which was **a nearly identical smoke damage case involving A PREFERRED REPAIR COMPANY’S WORK AT A HOME that involved extensive meetings with corporate representatives and other witnesses who they may likely be in a position to now cross-examine in this case** – in which Keller Rohrback: . . .

Page 4, lines 24 through 26 in USAA CIC’s Opposition should be corrected to read as

1 follows (correction indicated with underline):

2 “Primary outside law firm in Washington.”

3 Page 6, line 16 in USAA CIC’s Opposition should be corrected to read as follows
4 (correction indicated with underline):

5 “webinars or in-person symposia”

6 Counsel for USAA CIC regrets the above typographical errors in the Opposition.

7
8 Dated: February 8, 2018

DKM LAW GROUP, LLP

9
10 By



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

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

Plaintiffs,

vs.

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

Defendants.

CASE NO. 17-2-29542-6 SEA

**DECLARATION OF HUGH D. SPITZER
IN SUPPORT OF DEFENDANT USAA
CASUALTY INSURANCE COMPANY'S
OPPOSITION TO PLAINTIFFS'
MOTION FOR RULING ON
PLAINTIFFS' COUNSEL'S CONFLICT
OF INTEREST**

Noted Date: February 12, 2018
Complaint Filed: November 14, 2017
Trial Date: November 12, 2018

I, Hugh D. Spitzer, declare:

1. I am over the age of 18 and I am competent to make the statements in this Declaration based on my personal knowledge, experience, and based on my analysis of certain facts and circumstances involved in Plaintiffs' engagement of Keller Rohrback L.L.P. to represent Plaintiffs in this case. If called as a witness, I could and would testify to all of the matters stated herein.

2. I have been a faculty member at the University of Washington School of Law since 1986, and have been teaching on a full-time basis since 2012. I have taught Professional Responsibility since 2013. A copy of my curriculum vitae is attached as Exhibit A.

3. In addition to teaching professional responsibility, I regularly teach attorney ethics

1 topics in continuing education programs for lawyers. I also publish on professional responsibility
2 topics in professional and academic journals. My primary focus topics in writing and speaking on
3 professional responsibility are identification of the client, conflicts of interest, special ethics
4 problems with representing public and private entities, and lawyers serving in non-lawyer positions.
5 I am chairing the Washington State Bar Association's Mandatory Malpractice Insurance Task
6 Force.

7 4. I have been asked by Joshua N. Kastan of the DKM Law Group to evaluate the facts
8 described in a Declaration of John. F. Gillard, Assistant Vice President working in and for the Chief
9 Legal Office for USAA, dated February 8, 2018. In addition to my legal ethics background and
10 experience, and my review of treatises and Washington authorities regarding this topic, I have also
11 reviewed the following documents in connection with the above-captioned matter: the complaint
12 filed by Richard Plein and Deborah Plein against USAA CIC, dated November 14, 2017; the
13 Declaration of Ian S. Birch dated February 2, 2018; the Motion for Ruling on Asserted Conflict
14 dated February 2, 2018; and the Declaration of David Boerner dated February 2, 2018.

15 5. The Washington Rules of Professional Conduct most relevant to this matter are RPC
16 1.9 (Duties to Former Clients), and RPC 1.10 (Imputation of Conflicts of Interest: General Rule).

17 6. Before addressing the effect of RPC 1.9 in this matter, it is helpful to first consider
18 on the basic imputation rule in RPC 1.10(a), which states:

19 (a) Except as provided in paragraph (e), while lawyers are associated
20 in a firm, none of them shall knowingly represent a client when any
21 one of them practicing alone would be prohibited from doing so by
22 Rules 1.7 or 1.9, unless the prohibition is based on a personal interest
23 of the disqualified lawyer and does not present a significant risk of
24 materially limiting the representation of the client by the remaining
25 lawyers in the firm.

26 Comment [2] to Washington's RPC 1.10 emphasizes that the imputation rule "gives effect to the
27 principle of loyalty to the client," and is derived from "the premise that a firm of lawyers is
28 essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise

1 that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom
2 the lawyer is associated.” Consequently, loyalty is the key underlying issue, along with the
3 protection of confidential information. Comment [3] to RPC 1.10 provides an exception from the
4 imputation rule in certain narrow circumstances when “neither questions of client loyalty nor
5 protection of confidential information are presented.” That clearly is not the case here, because the
6 issues derive from among other things, matters relating to loyalty and confidentiality.

7 7. Washington RPC 1.10(b) permits an exception from imputation under certain
8 circumstances when a lawyer has left a law firm, but based on the materials I reviewed, that does
9 not appear to be applicable here.

10 8. Washington RPC 1.10(e) allows a new attorney to join a firm and to be “screened”
11 from work from which he or she would otherwise be disqualified because of work done at a
12 previous firm. But that screening mechanism does not appear to be applicable here.

13 9. Consequently, only RPC 1.10(a) appears to apply in this instance, and the screen to
14 which Mr. Birk refers in paragraph 6 of his declaration has no effect in terms of lessening the direct
15 application of RPC 1.10(b). Screens are often used on an informal basis to satisfy concerns of
16 clients and former clients who voluntarily waive conflicts of interest and provide informed consent
17 under RPC 1.7(b)(4) or 1.9(b)(2), respectively. However, apart from situations involving lawyers
18 changing firms, the Washington Rules of Professional Conduct simply do not allow law firms to
19 establish their own screens to avoid conflicts of interest under 1.9(a) when the former client has not
20 provided written consent (which is not provided here).

21 10. Based on the facts as presented in the materials I have reviewed, it appears that all
22 attorneys at Keller Rohrback L.L.P. will have to be treated as “essentially one lawyer” when
23 applying the duties-to-former-clients rule under RPC 1.9.

24 11. RPC 1.9(a) provides:

25 A lawyer who has formerly represented a client in a matter shall not
26 thereafter represent another person in the same or a substantially
27 related matter in which that person's interests are materially adverse to
28 the interests of the former client unless the former client gives informed

1 consent, confirmed in writing.

2 Based upon my review of the Declaration of John F. Gillard, it is apparent that there is no practical
3 likelihood of USAA providing a consent in this instance.

4 12. It is generally accepted that the key to analyzing whether a lawyer (or any lawyers in
5 a firm) may represent a client adverse to a former client, is whether the relevant matter is the “same
6 or substantially related” to one or more matters that the firm had handled for the former client.
7 Washington Comment [3] to RPC 1.9 states that matters are substantially related “if they involve
8 the same transaction or legal dispute or if there otherwise is a substantial risk that confidential
9 factual information as would normally have been obtained in the prior representation would
10 materially advance the client’s position in the subsequent matter.”

11 13. The key to understanding the application of RPC 1.9(a) here is the second phrase
12 quoted immediately above, *i.e.*, whether there is a substantial risk that confidential factual
13 information as would *normally have been obtained* in the prior representation would advance the
14 new client’s position against the former client. The issue is not whether any individual attorney in
15 the firm did or did not, as a factual matter, obtain confidential information; the key is whether one
16 of those attorneys would normally be expected to have done so. One of the examples of a
17 prohibited representation included in Comment [3] to RPC 1.9 is where a lawyer who has
18 represented a businessperson and learned extensive private financial information about that person,
19 may then represent that person’s spouse in a divorce. The divorce is obviously not the “same”
20 matter as the earlier transactional work the lawyer performed. But under RPC 1.9, the divorce is
21 treated as substantially related.

22 14. The businessperson example in Washington Comment [3] to RPC 1.9 is just one
23 example of the “playbook” problem, *i.e.*, when a law firm that represented a former client over a
24 number of years on a range of matters, in doing so gained an understanding of that former client’s
25 “playbook,” *i.e.*, an understanding of, among other things: the former client’s business customs,
26 their pattern of conduct, the employees’ thought-processes, their strategies, their overall litigation
27 philosophy, their approach to settlements, their strengths and weaknesses, and so on. When a law
28 firm has a thorough understanding of a former client’s playbook, every attorney in that law firm is

1 prohibited from representing clients adverse to the former client at least with respect to types of
2 matters of the kind that the firm formerly handled. This is particularly true when enough time has
3 not lapsed so that there has been a change in personnel or strategic approach at the former client.

4 15. In applying RPC 1.9(a) in situations such as this one, the factual context is key: did
5 the lawyer and law firm just obtain general knowledge of a former client's practices, or a deep
6 understanding and factual awareness of the former client's philosophy, approach, and strategies as
7 well specific facts about the client and its operations.

8 16. In many jurisdictions nationwide, including Washington, the burden is on the law
9 firm whose disqualification is sought to demonstrate that the representations under scrutiny are not
10 substantially related and that RPC 1.9(a) prohibition does not apply. When a disqualification is
11 sought under RPC 1.9(a), a court is expected to do the following: reconstruct the facts of the former
12 representation; assume that the lawyer/law firm whose disqualification is sought had obtained
13 confidential information from the former client about those facts; and then determine whether the
14 former factual matter or matters were sufficient similar to the new one such that the lawyer(s) could
15 use that confidential information to the former client's detriment. The rule on placement of burden
16 and the assumption about confidential information being obtained, are meant to protect clients'
17 reasonable expectation of loyalty, to enhance the lawyer-client relationship, and to promote the
18 public's confidence in the integrity of the legal system.

19 17. When one applies the framework and the rules described above to the factual context
20 described in the declarations provided thus far in this matter, it is apparent that Keller Rohrback
21 L.L.P. is not eligible to represent the Plaintiffs absent written consent from USAA. As described in
22 John F. Gillard's declaration, Keller Rohrback L.L.P. has represented USAA and affiliated
23 companies in at least 165 matters dating back to 2006, at least a dozen of which involved insurance
24 bad faith allegations in property damage claims. Those included one that appears to have involved
25 nearly identical smoke damage issues and contractor work and which might involve Keller
26 Rohrback L.L.P. lawyers cross-examining USAA corporate representatives who were witnesses for
27 USAA when that law firm was the company's counsel. Since 2015, seven individual attorneys and
28 four paralegals at that law firm worked on matters defending USAA or its affiliates, billing in

1 excess of 8,000 hours of time. Keller Rohrback L.L.P. recently was sole counsel for USAA in four
2 contract claims asserting bad faith upon the part of USAA as an insurer. The client-lawyer
3 relationship between Keller Rohrback L.L.P and USAA ended quite recently, in November, 2017.

4 18. Based on John F. Gillard's declaration, in the course of representing USAA, Keller
5 Rohrback L.L.P. attorneys apparently had direct electronic access to confidential and proprietary
6 business information about USAA, regularly met with USAA employees, executives and in-house
7 lawyers, and gained a deep understanding of that company's business practices, the thought
8 processes and practices of adjusters, in-house lawyers, and business people. Keller Rohrback
9 L.L.P. attorneys also seem to have been closely involved with USAA personnel in developing
10 business and litigation strategy, and those attorneys became privy to USAA's approach to claims
11 handling, potential defenses, witness preparation, discovery, trial preparation, and settlements. John
12 F. Gillard, an in-house counsel at USAA, has represented that Keller Rohrback L.L.P. provided
13 advice to USAA on these very matters.

14 19. John H. Gillard has stated that Keller Rohrback L.L.P. attorneys participated in at
15 least three on-line or in-person strategic information and planning sessions involving USAA and its
16 outside counsel around the country. Confidential information about USAA, its business practices,
17 and litigation approach appears to have been discussed at those meetings. This reinforces my view
18 that Keller Rohrback L.L.P. attorneys were privy to and quite familiar with USAA's litigation
19 strategy.

20 20. The length of Keller Rohrback L.L.P.'s representation of USAA, the fact that the
21 representation was so recent, and that law firm's deep understanding of USAA's business practices
22 and litigation strategy in cases such as this matter, all lead to the conclusion that Keller Rohrback
23 L.L.P.'s representation of Richard and Deborah Plein in this lawsuit would constitute a
24 representation in "a substantially related matter in which that person's interests are materially
25 adverse to the interests of the former client." Such a representation is prohibited under RPC 1.9(a).

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

Dated this 8th day of February, 2018 at Seattle, Washington.



HUGH D. SPITZER

EXHIBIT

A

HUGH D. SPITZER

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B.A. Yale University, 1970
 Cum Laude, with Special Honors
 in Political Science

J.D. University of Washington, 1974
 Washington Law Review

LL.M. University of California, Berkeley, 1982

1986–Present

University of Washington School of Law
 Professor of Law (Acting)

Courses regularly taught:

- Professional Responsibility
- State Constitutional Law
- Local Government Law
- Roman Law
- Transnational Law
- Regularly supervise students on independent research projects.

1983–1986

University of Puget Sound School of Law
 Adjunct Professor. Taught Roman Law.

1982–2016

Foster Pepper PLLC, Seattle, Washington
 Member

- Public finance and municipal law attorney. Bond counsel on general obligation and revenue borrowings for the State of Washington, City of Seattle and numerous cities, counties, special purpose districts, housing authorities and universities. Developed new methods of financing infrastructure and affordable housing by innovative structuring of complex transactions and by redrafting state and federal

legislation. Developed new approaches to working with for-profit and nonprofit corporations to help finance housing and public infrastructure improvements.

- Mediating, negotiating and drafting intergovernmental contracts and public-private contracts, usually concerning construction of major public facilities or provision of public services. Mediating intergovernmental conflicts. Work involves careful understanding of (and assistance in development of) clients' needs, communication with other parties to understand their needs, and working to structure mutually beneficial agreements.
- Underwriters' counsel and bank counsel on public finance transactions, principally for infrastructure, low and moderate-income housing and utilities transactions. Work focuses on securities law.
- Legislation drafting (usually pro bono) to assist public entities and nonprofits and to improve drafting of existing statutes. Also drafting and/or review of bills at the request of legislators and staff. Primary drafter of legislation providing significant changes in the fields of transportation, public finance, solid waste, water quality, redevelopment, and local improvement districts.
- Advising public and private clients on state constitutional law questions. Submitting *amicus* briefs to appellate courts on state constitutional and finance matters.
- As chair of municipal and public finance department 1995-1998, responsible for managing group of twenty lawyers and staff and interfacing with firm management. Served on Executive Committee of firm.

1980–1981

University of Washington Graduate School of Public Affairs (now Evans School)

Lecturer. Taught Administrative Law and PublicSector Labor Law.

1978–1981

Office of the Mayor, City of Seattle

Legal Counsel and Special Assistant to Mayor Charles Royer

Policy and staffing responsibilities in public safety and justice, human rights and the courts. Directed the redrafting of substantial parts of Seattle's Criminal Code and chaired a committee of prosecutors and defense attorneys in criminal code revision. Managed the reorganization of the Seattle Human Rights Department and the Office of Women's Rights. Closely involved in redrafting Seattle's Affirmative Action Plan and the drafting and implementation of Seattle's Women and Minority Business Enterprise Ordinance. Responsible for policy development and redrafting of Seattle's Administrative Code. Developed and implemented a new merit selection system for municipal court judges. Directed a project on municipal court overload and financing, and a project on public defender organization and finance.

1976–1977**Seattle City Council Staff**

Worked as legislative assistant to Councilmember John Miller, focusing principally on public facilities construction projects, transportation and recreation. Investigated issues of Council concern, drafted policy papers, and engaged in negotiations.

1973–1976**Hafer, Cassidy & Price**

Intern, then associate, in firm specializing in labor law. Represented unions in federal court, National Labor Relations Board, state courts, administrative tribunals and arbitrations. Represented plaintiffs in civil rights actions in federal and state courts. Intensive trial and hearings practice.

Summer, 1972**Washington State Law and Justice Planning Office**

Program Monitor. Evaluated a dozen governmental and nonprofit-sponsored projects funded by the federal Law Enforcement Assistance Administration. Performed program audits on, among others, programs for juvenile offenders, offender rehabilitation and domestic violence.

1970–1971**New York City Health and Hospitals Corporation**

Budget Analyst; Assistant to Vice-President for Program Planning, Finance and Budgeting. Assisted in development of annual budget for government corporation responsible for New York City's public hospitals. Responsible for timely production of budget document. Analyzed existing and prospective programs, among others, for drug treatment in the Bronx, housing nurses near Bellevue Hospital, and allocating scarce kidney dialysis resources.

Summer, 1970**U.S. Department of Health, Education & Welfare**

Program Analyst, Office of Planning and Evaluation. Performed program audits on federally-funded health and social services programs in Boston and New York.

Major Publications and Articles

THE WASHINGTON STATE CONSTITUTION (2013)(2nd ed. Oxford University Press)(with Robert F. Utter). *Book provides an article by article, section by section analysis of Washington's constitution, describing the historical background, drafting and interpretation issues, and key court cases applying each section.*

Amending Codes of Judicial Conduct to Impose Campaign Contribution and Expenditure Limits on Judicial Campaigns, ___ Virginia J. of Social Policy & the Law ___ (2018)(forthcoming) (with Phillip A. Talmadge). *Reviews social science research documenting the impact of massive judicial campaign contributions on appellate judges, and urges state supreme courts impose contribution limits and take other actions by court rule to reduce special-interest influence on the judiciary. Argues that those actions would be permissible under federal constitutional law.*

Model Rule 5.7 and Lawyers in Government Jobs—How Can They Ever Be “Non-Lawyers”? 30 Georgetown Journal of Legal Ethics 45 (2017). *Focuses on the ethical obligations of licensed lawyers working in “non-law” government staff and management positions. Recommends that attorneys in those types of jobs should evaluate their responsibilities in the context of Rule 5.7 (“Law-related Services”) of the ABA Model Rules of Professional Conduct.*

Trumping Home Rule and Sanctuary Jurisdictions: Constraints on Federal Action to Induce State and Local Collaboration with National Programs, 6 Mun. Lawyer 6 (Nov.-Dec. 2017).

Realigning the Governmental/Proprietary Distinction in Municipal Law. 40 Seattle U. L. Rev. 173 (2016). *Details the contradictory and confusing distinction between “governmental” and “proprietary” modes of local government activities in seven doctrinal areas. Recommends abolishing that distinction and replacing it with a simpler division of municipal authority into “governmental sovereign powers” and “governmental service activities.”*

“Home Rule” vs. “Dillon’s Rule” for Washington Cities, 38 Seattle U. L. Rev. 809 (2015). *Reviews the tension between the late-nineteenth century “Dillon’s Rule” limiting city powers, and the “home rule” approach that gained dominance in the early and mid-twentieth century. Explains the occasional “zombie-like” reappearance of Dillon’s Rule and recommends ways to keep to keep that doctrine buried.*

Revisiting the Client Conundrum: Whom Does Lawyer for a Government Represent, and Who Gives Direction to That Governmental Lawyer? (Univ. of Wash. Sch. of Law Research Paper No. 25-10)(2015). *Examines the special difficulties of identifying the “client” in the context of governmental entities.*

Washington State’s Mandate: The Constitutional Obligation to Fund Post-Secondary Education, 89 Wash. L. Rev. Online 15 (2014). (With Adam Sherman.) *Focuses on provisions of the Washington State Constitution that address post-secondary education, and argues that Washington State has a constitutional obligation to support and fund its institutions of higher learning.*

Pivoting to Progressivism: Justice Stephen J. Chadwick, the Washington Supreme Court and Change in Early Twentieth Century Judicial Reasoning and Rhetoric. 104 Pac. N.W.Q 107 (2014). *Focuses on the public life and writings of a Washington Supreme Court Justice who served between 1918 and 1919, and analyzes the forces that caused a rapid reversal of the Court’s doctrine as it shifted from Lochner-type rejection of government regulatory statutes to support of Progressive Era enactments by the state legislature.*

Ethics Issues in Representing Intergovernmental Entities, Proceedings of the Washington State Association of Municipal Attorneys, Spring Conference 5-1 (2014). *Analyzes key attorney ethics problems inherent in the formation, and later operation, of intergovernmental entities, and suggests ways to minimize violations of the Rules of Professional Conduct.*

Organizing Interlocal Entities: What Form is Best... and Does the Interlocal Cooperation Act Need a Rewrite? Proceedings of the Washington State Association of Municipal Attorneys, Spring Conference (2013). *Recommends a substantial overhaul of Washington's Interlocal Cooperation Act, and recommends enactment of a mechanism for creation of intergovernmental municipal corporations.*

A Local Government by Any Other Name, in Proceedings of the Washington State Association of Municipal Attorneys, Fall Conference (2009). *Suggests a taxonomy of general terms for classifying local government entities, critiques the use of multiple terms for similar concepts, and recommends legislative changes.*

Washington: The Past and Present Populist State, in THE CONSTITUTIONALISM OF AMERICAN STATES 771-84 (George E. Connor and Christopher W. Hammons, eds., 2008). *Describes the impact of the late-nineteenth century populist movement on the structure and content of Washington's constitution and the consequential impact on the state's political and legal life.*

New Life for the 'Criteria Tests' in State Constitutional Jurisprudence: 'Gunwall is Dead—Long Live Gunwall' 37 Rutgers Law Journal 1169 (2006). *Outlines the development of state constitutional jurisprudence in Washington State, and provides a general theory of state constitutional analysis.*

Taxes vs. Fees: A Curious Confusion, 38 Gonzaga Law Review 335 (2003). *Provides an analytical framework for categorizing various types of taxes and user charges, melding economic and legal concepts.*

"Municipal Police Power in Washington State 75 Washington Law Review 495 (2000). *Provides a comprehensive review of the history and scope of government regulatory powers since statehood.*

Which Constitution? Eleven Years of Gunwall in Washington State" 21 Seattle University Law Review 1187 (1998). *Reviews and analyzes all Washington Supreme Court cases citing State v. Gunwall for its six-step approach to applying the State Constitution when analogous provisions of the United States Constitution also apply.*

Bearing Arms in Washington State, Proceedings of the Washington State Association of Municipal Attorneys Spring Conference (1997). *Analyzes the Washington State Constitution's strong Right-to-Bear-Arms provision in the context of 800 years of history.*

A Washington State Income Tax – Again? 16 University of Puget Sound Law Review 401 (1993). *Presents a historical review of the Washington Constitution's tax uniformity clause, the State Supreme Court cases of the 1930s that rejected the income tax.*

An Analytical View of Recent 'Lending of Credit' Decisions in Washington State, 8 Univ. of Puget Sound Law Review 195 (1985). *Presents a close analysis of Article VIII, Sections 5 and 7 of the Washington Constitution, and suggests a framework for evaluating specific government actions and proposals under those provisions.*

Court Rulemaking in Washington State, 6 University of Puget Sound Law Review No. 1 (1982). *Critiques the Washington Supreme Court's weakening of the Judicial Council and the Court's assumption of control of aspects of rulemaking that might better be handled by a Judicial Council or the Legislature.*

Intra-Union Disciplinary Proceedings, The Labor Relations Law of Canada, Chapter 14 (1977). *Describes internal discipline in Canadian labor unions.*

A Survey of the Washington Industrial and Safety Act's First Months of Operation, 9 Gonzaga Law Review 639 (1974). *Presents an overview of the initial period of putting WISHA into effect.*

* * * * *

Book Reviews:

American Federalism: Punching Holes in the Myth, 84 Washington Law Review 717 (2009). Reviews John D. Nugent, *Safeguarding Federalism: How States Protect their Interests in National Policymaking*.

Review of Robert Schapiro, *Polyphonic Federalism: Toward the Protection of Fundamental Rights*, 40 Publius, The Journal of Federalism 563 (2009)

Review of Robert F. Williams, *State Constitutional Law: Cases and Materials* 3d ed., 21 Seattle University Law Review 997 (1998)(With Charles W. Johnson)

Recent CLE Presentations

“5 Mistakes that Get Lawyers in Trouble,” UW Second Friday Ethics CLE, Anchorage, Alaska, January 12, 2018.

“When Can a Lawyer *Not* be a Lawyer?” Government Lawyers Bar Association, Olympia, Washington, December 8, 2017.

“Trumping Home Rule and Sanctuary Jurisdictions,” International Municipal Lawyer Association, 2017 Annual Conference, Niagara Falls, Ontario, October 18, 2017.

“Enforcing Federal Priorities Through Commandeering and Financial Threats,” Washington State Bar Association Webinar, May 24, 2017.

“When Can a Lawyer *Not* be a Lawyer?” Washington State Society of Hospital Attorneys, Seattle, Washington, April 28, 2017.

“Realigning the Governmental/Proprietary Distinction in Municipal Law,” Washington State Association of Municipal Attorneys, Walla Walla, Washington, Thursday, October 6, 2016.

“Washington State Constitutional Law – An Overview,” Washington State Appellate Judges Program, Washington State Supreme Court, Olympia, Washington, January 27, 2016.

“Ethics: Risk – The Game of Reduction of Professional Exposure, Loss Prevention, and Bond Counsel Liability,” Panelist, 40th Annual Bond Attorneys Workshop, National Assoc. of Bond Lawyers, Chicago, Illinois, Sept. 9-11, 2015

Other Articles

“What if President Can’t Do the Job? Here’s the Constitutional Answer,” *The Seattle Times* August 11, 2017

“Bright Rights, Big City,” *Citywise*, May/June 2016

“Protip for Sagebrush Rebels: This Land was Never Yours,” *Crosscut*, March 1, 2016

“‘Sanctuary Cities’ to Find Sanctuary in the Rehnquist and Roberts Courts,” JURIST—Academic Commentary, Dec. 30, 2016, <http://www.jurist.org/forum/2016/12/Hugh-Spitzer-sanctuary-cities.php>

“Arlene’s Flowers Case Judge Got it Right,” *The News Tribune*, December 18, 2015 (with Peter Nicolas)

“Scandal Rocks Washington’s Supreme Court! Arthur S. Beardsley’s Account of the 1908 Root-Gordon Scandal.” 69 NW Lawyer 48 (Apr/May 2015)(edited & wrote introduction)

“Don’t Rob Higher Education to Fund Other Education Mandates,” The Seattle Times, November 28, 2014 (with Stan Barer)

“Is warehousing mental patients another state constitutional dilemma?” *The Seattle Times*, August 27, 2014

“Seven ways to break D.C. gridlock,” *Crosscut Public Media*, November 19, 2012

“Washington’s Right to Bear Arms,” *The Seattle Times*, June 3, 2012

“On Law and Life in Cuba: The Cuban Legal System and Culture Offer Contrasts and Surprises,” Washington State Bar News, January 2012

“Calling in the Cavalry” *Cityvision Magazine* March/April 2011

Book Review: (Review of Robert Schapiro, *Polyphonic Federalism: Toward the Protection of Fundamental Rights*) Publius, *The Journal of Federalism* 2009; doi:10.1093/publius/pjp039

Book Review: “American Federalism: Punching Holes in the Myth” (Review of John D. Nugent, *Safeguarding Federalism: How States Protect Their Interests in National Policymaking*) 84 Wash. L. Rev. 717 (2009)

“Borrowing Your City’s Future” *Cityvision Magazine*, July/August 2009

“An Academic Perspective: Why We Have 51 Constitutions” *UW Law*, Spring 2009, Volume 59

“Filibuster Lets Minority Rule in Senate, Should be Ended” *Tacoma News Tribune*, February 17, 2009

“Open doors to court rulemaking process” *Seattle Post-Intelligencer*, August 13, 2008

“Power to the people! It’s in the Constitution”, *Crosscut Seattle*, April 17, 2008

“Pharmacists have professional obligation to serve public”, *The Tacoma News Tribune*, Friday, March 14, 2008

“Split the Justice Department to Keep Politics, Prosecution Separate” *Seattle Times*, August 1, 2007

“Saving for A Rainy Day: Good, But Not Good Enough” *Seattle Times*, March 5, 2007

“Property Rights vs. the Law” *Seattle Times*, October 27, 2006

“Those Dirty (Fill in the Blanks) Turn into Americans” *Seattle Times*, May 24, 2006

“Devil’s in the Details of Tax Increment Financing” *Puget Sound Business Journal*, April 21-27, 2006

“State’s Constitution, High Court Shield Us from Improper Condemnation of Property” *News Tribune*, March 19, 2006

“State Should Boost Investment in Affordable Housing” *Seattle Times*, January 13, 2006

“Remove Partisan Stain from State Elections” *Seattle Times*, June 29, 2005

“Back to the Future: How 13 Superstates Can Restore the Founders’ Vision” *Seattle Times*, November 14, 2004

“Wave Goodbye to Attorney-Client Privilege?” *Washington State Bar News*, Vol. 58, No. 11, November 2004

“Watch Out for Accidental Taxes!” Washington Association of Sewer and Water Districts, Pipeline, Volume 9, Issue 8, August 2004.

“Same-Sex Marriage Decision Draws on Sound Jurisprudence” Tacoma News Tribune, August 15, 2004

“Washington State’s Upside-Down Tax System” Seattle Times, June 6, 2004

“Public Disclosure Act Services the Public” (with Sue Donaldson) Seattle Post-Intelligencer, June 1, 2004

“Keep Populism Positive” Seattle Post-Intelligencer November 19, 2003

“The Tax Devil You Know Isn’t Doing You Any Favors” Seattle Times, January 13, 2003.

“Out of Balance: State’s Tax System is Broken and Needs Fixing” Seattle Post-Intelligencer, December 8, 2002.

“There’s No Free Ride” The Seattle Times, October 6, 2002.

“Legal and Policy Analysis: Assessing the Potential for New School Funding Litigation and Initiatives,” for 2002 Washington School Law Academy (with Steven S. Miller).

“Watch For Some Big-Picture Changes Coming Monday to the Supreme Court” Seattle Post Intelligencer, January 7, 2001.

“Why Lawyers Have Often Worn Strange Clothes, Claimed to Work for Free – and Been Hated” Washington State Bar News, September 2000.

“Take the Initiative on Constitutionality” Seattle Post Intelligencer, July 16, 2000.

“Many Ways to Marry” Seattle Post Intelligencer, April 28, 2000.

“U.S. Supreme Court Decision Affirms States Exist (Surprise!)” Seattle Post-Intelligencer, July 15, 1999.

Preface to 1999 Reprint of Beverly Rosenow, Journal of the Washington State Constitutional Convention.

Book Review: “Theme and Variations” (Review of Robert F. Williams, State Constitutional Law: Cases and Materials, 2d Ed.) 21 Seattle University Law Review 997 (1998) (with Charles W. Johnson).

“Washington’s Constitution: How It Affects Us,” Four-part series in the Seattle Post-Intelligencer, November 16, 18, 19, 20, 1997.

Book Review: “The Best-Kept Secret: How to Find It and Where to Find It: Washington Legal Researcher’s Deskbook,” Washington Journal, December 19, 1996, p. 12.

“‘Riders’ Should Be Run Out of Washington D.C.,” Seattle Post-Intelligencer, December 21, 1995.

“O.J. Might As Well Be Tried By The Romans,” Seattle Post-Intelligencer, July 13, 1994, at A19.

“Financing an Integrated Coastal Zone Management Program,” presented to the IPCC Regional Preparatory Workshop (a United Nations international workshop on impacts of climate change), July 16, 1993.

“Caesar Would Have Arbitrated,” 47 Washington State Bar News No. 4, pp. 50-51 (1993).

Book Review: “The Fall of the House of WPPSS,” 18 Urban Lawyer 284 (1986).

“OK, Margaret. Now that you’ve got the Falklands back, what will you do with them?” Seattle Post-Intelligencer, August 1, 1982, at B5.

“Is Washington Ready for Merit Selection of Judges?” with William S. Bailey, 35 Washington State Bar News No. 6, p. 66 (1981).

“Impact of the New Court of Record Rules on Courts of Limited Jurisdiction in Washington State,”
Proceedings of the Washington State Association of Municipal Attorneys (1981).

“Law Libraries Losing to ‘Double Inflation,’” 34 Washington State Bar News No. 11 (1980).

“I-90 and the Politics of Mediation,” 83 Argus No. 18 (1976).

“Business and Students,” 13 California Management Review 83 (1970).

Community Affairs

Chair, Washington State Bar Association, Mandatory Malpractice Insurance Task Force (current)

Board Member, Washington State Budget and Policy Center, 2006 to 2016

Chair, Washington State Affordable Housing Advisory Board, 2000 – 2007

Chair, Washington State GMA and Housing Task Force, 2007

Vice-Chair, Washington State Tax Structure Study Committee, 2001-2002

Member, King County Financial Policies Advisory Task Force, 2007

Board Member, Wedgwood Swim Pool, 2004-2006; President, 2006

Board Member, Institute for a Democratic Future, 2000 to present

Member, Funding Alternatives Work Group, Court Funding Task Force, 2003-2004

Member, Council on Public Legal Education, 1997-2005

Member, Governor’s Economic Development Task Force, 2002

Member, Jurisprudence Committee of the Access to Justice Board, 1997-2005

Member, King County Bar Foundation President’s Council, 1996-2002

Member and Vice-Chair, Puget Sound Water Quality Authority, 1987-1996

Member and Chair, City of Seattle Low-Income Housing Levy Oversight Committee, 1987-1996

Board Member, King County Housing Partnership (a non-profit corporation), 1990-1997; on Executive Committee 1990-1994

Board, University of Washington Law School Alumni Association, 1985-1990

Member and Secretary, Washington State Law Revision Commission (Washington State Bar Association appointee), 1982-1987

Member, Greater Seattle Chamber of Commerce Solid Waste Task Force, 1988-1990

Member, Seattle City Council’s Harborfront Advisory Committee, 1987-1988

Member, Washington State Public Works Advisory Board and Chair of its Finance Subcommittee, 1984-1985

Visiting Committee, U. W. School of Law, 1980-1988

Member, METRO Citizens Transit Advisory Committee, 1975-1977

Regularly write and submit *amicus curiae* appellate briefs *pro bono* (e.g., submitted Washington State Supreme Court briefs on behalf of the American Association of University Professors opposing Initiative 601, for the Association of Washington Cities regarding street utility charges, for the Greater Seattle Chamber of Commerce supporting community redevelopment financing, and for a group of legislators supporting access to marriage for same-sex couples.

Awards and Recognition

Ernest H. Campbell Award for Excellence in the Practice of Municipal Law, Washington State Assoc. of Municipal Attorneys, 2016

American Association of University Professors, UW Chapter, 2015 Award for Courage in Pursuit of Excellence in Washington State Higher Education

Seattle Magazine, Top 155 Lawyers, Designation: Constitutional Law, 2006-2012

Best Lawyers in America – Public Finance Law, 2007-2016

Super Lawyer, Washington Law and Politics, 2000-2016; Top 100 Lawyers 2011

Good in Government Award, League of Women Voters of Washington, 2006

Outstanding Alums Achievement Award, Washington Law Review, 1996

Professional and Bar Memberships

Washington State Bar Association

American Bar Association

ABA Center for Professional Responsibility

American Political Science Association

American Society for Political and Legal Philosophy

National Association of Bond Lawyers

Washington State Association of Municipal Attorneys

Seattle-King County Bar Association

SKCBA Committee on Public Defense Services (approx. 1980)

SKCBA Committee on Court Modernization (approx. 1980)

ABA Forum on Affordable Housing and Community Development Law

HON. JUDGE VERONICA ALICEA-GALVÁN

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

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

Plaintiffs,

vs.

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

Defendants.

CASE NO. 17-2-29542-6 SEA

**DECLARATION OF JOHN F. GILLARD
IN SUPPORT OF DEFENDANT USAA
CASUALTY INSURANCE COMPANY'S
OPPOSITION TO PLAINTIFFS'
MOTION FOR RULING ON
PLAINTIFFS' COUNSEL'S CONFLICT
OF INTEREST**

Noted Date: February 12, 2018

Complaint Filed: November 14, 2017
Trial Date: November 12, 2018

I, John F. Gillard, declare:

1. I am over the age of 18 and I am competent to make the statements in this

Declaration based on my personal knowledge and experience. I am also familiar with Mr. and Mrs. Pleins' allegations in the instant case and have reviewed the operative Complaint. If called as a witness, I could and would testify to all of the matters stated herein.

2. I submit this Declaration in Support of USAA Casualty Insurance Company's ("USAA CIC") Opposition to Plaintiffs' Motion for a Ruling on Plaintiffs' Counsel's Conflict of Interest.

3. I am an Assistant Vice President working in and for the Chief Legal Office for USAA, which provides legal advice to USAA and its subsidiaries, including USAA CIC. My job

1 responsibilities include the oversight, selection of, and maintenance of the company's relationships
2 with outside law firms hired to represent USAA CIC and its affiliated companies in litigation. I
3 have worked as an attorney in the litigation group responsible for managing litigation filed against
4 USAA CIC and its affiliated companies for over 11 years. I am also an attorney, licensed to
5 practice in the State of Texas since 1994. As part of this role, I am familiar with the nature and
6 extent of Keller Rohrback L.L.P.'s ("Keller Rohrback") longtime relationship in representing
7 USAA CIC and its affiliated companies.

8 4. USAA CIC does not consent to Keller Rohrback's involvement in any adverse
9 capacity against USAA CIC or its affiliated companies. This includes, but is not limited to, Keller
10 Rohrback's representation of the Pleins in the instant matter. USAA CIC does not agree to any
11 involvement of the Keller Rohrback firm in this or any case against USAA CIC or its affiliated
12 insurance companies, regardless of any "ethical wall" that they may attempt to erect. The
13 relationship between Keller Rohrback, USAA CIC, and USAA CIC's affiliated companies was
14 longstanding, deep, and close.

15 5. As discussed further below, Keller Rohrback represented USAA CIC and its
16 affiliated companies in the State of Washington in over 165 matters between August 2006 and
17 November 2017. As part of that representation, Keller Rohrback attorneys – and the Keller
18 Rohrback firm, generally – were trusted within the confines of the attorney-client relationship with
19 direct access to confidential and proprietary business information of USAA CIC and its affiliated
20 companies, including:

- 21 a. The business customs and practices, including confidential claims handling materials
22 and business relationships with outside companies and vendors;
- 23 b. The thought processes of adjusters, business representatives, and in-house attorneys;
24 and
- 25 c. Business and litigation philosophies and strategies, including approaches to
26 settlement discussions, motion practice, case analysis, defenses, witness meetings,
27 witness preparation, trial preparation, and discovery both on a case-by-case and
28 institutional, company-wide level.

1 6. As recently as November 2017, Keller Rohrback was the sole defense counsel of
2 record in approximately four matters in the State of Washington on behalf of USAA CIC and/or its
3 affiliated companies. Like the Pleins' case against USAA CIC here, those matters all included
4 allegations of "insurance bad faith" and/or statutory claims (*e.g.*, Consumer Protection Act;
5 Insurance Fair Conduct Act) relating to the handling of property and casualty insurance claims in
6 the State of Washington ("Alleged Bad Faith Litigation"). Keller Rohrback was USAA CIC and its
7 affiliated companies' primary law firm for Alleged Bad Faith Litigation in Washington since at
8 least 2012 through June 2017. These cases included, but were not limited to litigation arising from
9 homeowner's insurance claims (such as the Pleins' case, here), automobile insurance claims, and
10 others.

11 7. In my experience, insurance bad faith litigation is an especially nuanced area of
12 practice, often involving discovery into the methods and practices of an insurer's claims handling.
13 The types of litigation my team handles on behalf of USAA CIC and its affiliated companies often
14 involve enterprise-wide business practices about which we educate our outside counsel so they are
15 deeply familiar with our practices so they can more effectively represent our companies. Until
16 USAA and Keller Rohrback ceased their working relationship in late 2017, I and my team
17 considered Irene Hecht and those attorneys and staff who worked with her at Keller Rohrback on
18 any USAA matters to have exactly that type of intimate business and litigation knowledge of our
19 companies. Keller Rohrback was one of just a few law firms hired to defend Alleged Bad Faith
20 Litigation filed against USAA CIC and its affiliated companies in all of Washington.

21 8. In this role, Keller Rohrback:

- 22 a. Had regular in-person and telephonic access to company employees, executives, and
23 in-house attorneys relative to insurance claims and related Alleged Bad Faith
24 Litigation;
- 25 b. Provided USAA CIC and its affiliated companies with advice, including as to
26 insurance coverage matters, litigation strategies, factual positions, litigation
27 mitigation recommendations for training and communication materials, and legal
28 arguments; and

- 1 c. Was provided with electronic login credentials to certain internal proprietary and
2 confidential documents regarding insurance bad faith litigation, including document
3 repositories holding attorney-client information and electronic claim databases; and
4 d. Actively participated in court appearances, depositions, written court filings,
5 correspondence, and mediations on behalf of USAA CIC and its affiliated entities.

6 9. In response to the Pleins' Motion regarding their attorneys' conflict of interest, I
7 have reviewed USAA CIC's records and collected data regarding Keller Rohrback's in-depth and
8 longtime involvement as counsel of record for USAA CIC and its affiliated companies in order to
9 demonstrate the extensive and deep relationship between that firm and my USAA litigation team in
10 particular, as well as Keller Rohrback and USAA CIC and its affiliated companies, more generally.

11 This includes, but is not limited to, the following examples:

- 12 a. Since 2006, Keller Rohrback was counsel of record on behalf of USAA CIC and/or
13 its affiliated companies on at least 165 cases in litigation in the State of Washington;
14 b. Of those files, at least 12 involved insurance bad faith litigation arising from
15 residential property damage claims in which Keller Rohrback was hired to defend
16 USAA CIC and/or its affiliated companies;
17 c. Since November 2015, based upon Keller Rohrback's representations on their fee
18 invoices to USAA CIC and/or its affiliated companies, twelve (12) *attorneys* with
19 the Keller Rohrback firm worked on files defending USAA CIC and/or its affiliated
20 companies;
21 d. Since November 2015, based upon Keller Rohrback's representations on their fee
22 invoices to USAA CIC and/or its affiliated companies, 4 *paralegals* with the Keller
23 Rohrback firm worked on files defending USAA CIC and/or its affiliated
24 companies; and
25 e. Since November 2015, Keller Rohrback billed in excess of 8000 hours on matters in
26 defending USAA CIC and/or its affiliated companies.

27 10. In addition, as part of the enterprise-wide strategic discussions that my group
28 organizes among our outside counsel, Keller Rohrback attended at least three of online webinars or

1 in-person symposia in which confidential, attorney-client communications were exchanged
2 regarding the representation of USAA CIC and its affiliated companies. During these meetings,
3 Keller Rohrback was privy to proprietary information including litigation approach and strategies
4 that has only been shared with a limited group of all of the law firms nationally representing USAA
5 CIC and its affiliate companies in alleged bad faith litigation across the United States.

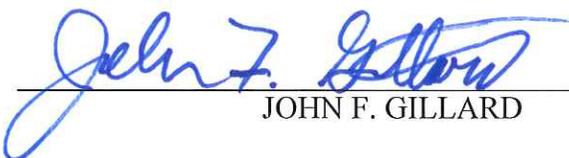
6 11. Keller Rohrback specifically represented Garrison Property and Casualty Insurance
7 Company, which is a subsidiary of USAA CIC, between March 2010 and September 2012, in a
8 very similar matter pending in Pierce County, Washington involving smoke damage to a house in
9 which the plaintiff alleged bad faith relating to the handling of the fire and smoke damage claim to
10 their house (*Cueva v. Garrison*). The legal and factual disputes in *Cueva v. Garrison* included an
11 attack on USAA's PDRP program (Property Direct Repair Program), an optional service by which
12 USAA identifies licensed and insured local contractors with which USAA members may choose to
13 contract for covered repairs to their property. Co-Defendant in this case, the Sterling Group, was
14 part of the PDRP program at the time the Pleins contracted with them to make repairs to their
15 house. *Cueva v. Garrison*, for which Keller Rohrback advised USAA CIC's subsidiary, included
16 allegations, factual scenarios, and legal issues parallel to those that appear to be at issue in this case:
17 that smoke damage was not adequately repaired or remediated, alleged health concerns arising out
18 of exposure to smoke damage, appropriate methods to clean a house and personal property items
19 that have been exposed to smoke, and factual and legal disputes concerning the methodology for
20 objectively testing for smoke damage and the alleged health effects from exposure to smoke-
21 damaged items of personal property following a fire event. Keller Rohrback attorneys and at least
22 one paralegal met with more than one designated corporate representative concerning the operation
23 of the PDRP program, had hours-long meeting with a corporate representative witnesses with
24 significant responsibility for the overall operation of the PDRP program and who is still deeply
25 involved in USAA's property damage claims operations such that he may be a corporate
26 representative in the Plein case, depending upon the areas of inquiry. Keller Rohrback also
27 provided advice concerning the type and selection of local expert witnesses in the fields of
28 industrial hygiene and toxicology, which appear to be some of the same fields of expertise at issue

1 in the Plein case. In particular, Susan Evans was a retained expert for Garrison working with Keller
2 Rohrback in the Cueva v. Garrison case, and Ms. Evans provided expert information concerning
3 appropriate repair and cleaning methods for the Plein's house during the handling of their claim that
4 is at issue in this lawsuit.

5 12. I have no doubt that there is a substantial risk – and indeed, likelihood – that
6 confidential factual information obtained by Keller Rohrback in its prior representation of USAA
7 CIC and its affiliated entities could advance the Pleins' position in this case. As part of Keller
8 Rohrback's representation of USAA CIC and its affiliated companies, the firm was always
9 expected to – and did, in fact – understand USAA CIC's inner-workings and litigation strategies.
10 For example, based upon my experience and knowledge of Keller Rohrback's prior representation
11 of USAA CIC and its affiliated entities, the firm had (and has) extensive knowledge of how USAA
12 CIC's adjusters analyze and handle homeowner's insurance claims and the interplay of this
13 knowledge with the companies' litigation strategy and analysis in defending Alleged Bad Faith
14 Litigation in Washington. The internal legal advice, attorney mental impressions, and attorney
15 thought-processes in which Keller Rohrback is well-versed remain directly applicable to the Pleins'
16 case.

17
18 I declare under penalty of perjury under the laws of the State of Washington that the
19 foregoing is true and correct.

20 Dated this 8th day of February, 2018 at San Antonio, Texas.

21
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23 _____
24 JOHN F. GILLARD

HON. JUDGE VERONICA ALICEA GALVAN

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

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

Plaintiffs,

vs.

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

Defendants.

CASE NO. 17-2-29542-6 SEA

**[PROPOSED] ORDER FINDING
EXISTENCE OF CONFLICT OF
INTEREST AND DISQUALIFYING
KELLER RORHBACK L.L.P. AND JOEL
HANSON**

Complaint Filed: November 14, 2017
Trial Date: November 12, 2018

THIS MATTER came on before this Court on Plaintiffs’ Motion for a Ruling Regarding Plaintiffs’ Counsel’s Conflict of Interest. The Court has considered Plainiffs’ Motion, Defendant’s opposition, and Plaintiffs’ Reply, as well as the papers submitted therewith. Now, therefore,

THE COURT FINDS AS FOLLOWS:

Keller Rohrback L.L.P. is conflicted from representing the Pleins in this matter pursuant to the restrictions of Washington Rules of Professional Conduct (“RPC”), including RPC 1.9 and 1.10.

By association, Joel Hanson’s representation is similarly tainted and he is likewise conflicted from representing the Pleins in this matter.

Keller Rohrback L.L.P. and Joel Hanson are required to immediately withdraw from their representation in this matter, and are hereby disqualified.

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IT IS SO ORDERED.

Dated this _____ day of February, 2018.

Hon. Veronica Galván, Judge
KING COUNTY SUPERIOR COURT

Presented by:
DKM LAW GROUP, LLP



By _____
ROBERT S. McLAY (WSBA No. 32662)
rsm@dkmlawgroup.com
JOSHUA N. KASTAN (WSBA No. 50899)
jnk@dkmlawgroup.com
801 Second Avenue, Suite 800
Seattle, WA 98104
Attorneys for Defendant
USAA CASUALTY INSURANCE COMPANY

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

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

Plaintiffs,

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

DECLARATION OF SERVICE

I the undersigned hereby declare that I am employed in San Francisco County,
California, am over the age of 18, and not a party to the within action. My business address is
535 Pacific Avenue, Suite 101, San Francisco, California 94133. On the 8th day of
February 2018, I caused to be filed and served:

- **USAA Casualty Insurance Company’s Opposition to Plaintiffs’ Conflict of Interest Motion;**
- **Declaration of John F. Gillard in Support of USAA Casualty Insurance Company’s Opposition;**
- **Declaration of Hugh D. Spitzer in Support of USAA Casualty Insurance Company’s Opposition;**
- **Proposed Order Finding Conflict of Interest and Requiring Disqualification and Withdrawal**

- 1 and served as follows:
- 2 via email via e-service
- 3 via us mail
- 4 via legal messenger
- 5 via email
- 6 via Overnight Mail U.S. Mail
- 7 via facsimile

8 On parties/counsel listed below at the following address:

<p>10 Joel B. Hanson, Esq. Attorney at Law, PLLC 11 6100 219th Street, SW, Suite 480 Mountlake Terrace, WA 98043 12 Tel: (425) 582-5636 13 E-mail: joel@joelhansonlaw.com</p>	<p>Attorney for Plaintiffs, RICHARD PLEIN and DEBORAH PLEIN</p>
<p>14 Michael A. Jaeger, Esq. 15 William W. Simmons, Esq. Lewis Brisbois Bisgaard & Smith LLP 16 1111 Third Avenue, Suite 2700 17 Seattle, WA 98101 18 Tel: (206) 436-2020 E-Fax: (206) 436-2030 19 E-mail: Jim.Derriglaw@me.com</p>	<p>Attorneys for The Sterling Group, Inc.</p>

20

21 I declare under penalty of perjury of the laws of the State of California that the foregoing is
 22 true and correct.

23 DATED this 8th day of February 2018 at San Francisco, California.

24

25 

26

27 _____
 Mona Mujaddidi

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

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

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

Plaintiffs,

v.

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

Defendants.

No. 17-2-29542-6 SEA

REPLY RE MOTION FOR RULING
REGARDING ASSERTED CONFLICT
OF INTEREST

1. **The vigor of a litigant's argument is sometimes inversely proportional to its legal merit. Despite forceful assertion, USAA aims away from, rather than toward, the governing legal standards.**

Courts require the former client to justify disqualification: "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." *Sanders v. Woods*, 121 Wn. App. 593, 597–98, 89 P.3d 312 (2004) (emphasis added). The Court must balance *two* considerations: the former client's interests; *and* the *current* client's right to be represented by counsel of their choice. One court has observed:

1 Judges must exercise caution not to paint with a broad brush under the misguided
2 belief that coming down on the side of disqualification raises the standard of
3 legal ethics and the public's respect. The opposite effects are just as likely—
encouragement of [vexatious] tactics and increased cynicism by the public.

4 *United States ex rel. Lord Elec. Co., Inc. v. Titan Pac. Constr. Corp.*, 637 F. Supp. 1556, 1564
5 (W.D. Wash. 1986) (quotation omitted).

6 USAA has provided nothing to establish that the Pleins' matter is "substantially related"
7 to any earlier case.

8 **2. The facts do not establish a conflict under RPC 1.9.**

9 Neither USAA nor its expert even *mentions* the RPC 1.9 comment on point: "**a lawyer**
10 **who recurrently handled a type of problem for a former client is not precluded from later**
11 **representing another client in a factually distinct problem of that type even though the**
12 **subsequent representation involves a position adverse to the prior client.**" RPC 1.9,
13 comment 2 (emphasis added). USAA's position is impassioned; but it asks the Court to
14 disregard the law.
15

16 USAA shows Keller represented it, for 12 years, on 165 matters, and devoted thousands
17 of hours of time. In *Health Care & Ret. Corp. of Am., Inc. v. Bradley*, 961 So. 2d 1071, 1072
18 (Fla. Dist. Ct. App. 2007), a lawyer represented a client, for three years, on 60 matters, and
19 devoted thousands of hours of time, and was **not** disabled from representing new, adverse
20 clients on new matters. It can be presumed that in handling 60 matters for the former client, the
21 lawyer in *Bradley* learned confidences and did all the things USAA says attorney Hecht did:
22 holding regular telephone calls, providing legal advice, accessing internal documents,
23 participating in court appearances. *See* Opp'n at 4–5. This is the routine business of "recurrently
24 [handling] a type of problem" for a client. Both the rule and *Bradley* hold that this does **not**
25
26

1 preclude the lawyer from handling factually distinct new matters, even of the same type.

2 *Bradley* is on all fours with the issue before the court.

3 USAA focuses on the “playbook” problem. USAA grossly overstates the circumstances
4 in which a Court will disqualify counsel based on “playbook” knowledge. Courts hold that
5 “generalized background knowledge,” or so-called “‘playbook’ information,” is not
6 disqualifying, unless it is “directly in issue or of unusual value in the subsequent matter.” *Ex*
7 *parte Regions Bank*, 914 So. 2d 843, 850 (Ala. 2005) (quotation omitted).
8

9 The Restatement illustrates the relationship that is necessary to disqualify a lawyer based
10 on “playbook” information. This refers to a lawyer who has been equivalent to in-house
11 counsel, managing the business at the highest level:

12 •3. Lawyer was general inside legal counsel to Company A for many years,
13 dealing with all aspects of corporate affairs and management. Lawyer was
14 dismissed from that position when Company A hired a new president. Company
15 B has asked Lawyer to represent it in an antitrust suit against Company A based
16 on facts arising after Lawyer left Company A's employ but involving broad
17 charges of anti-competitive practices of Company A that, if true, were occurring
18 at the time that Lawyer represented Company A. Lawyer may not represent
19 Company B in the antitrust action. Because of the breadth of confidential client
information of Company A to which Lawyer is likely to have had access during
the earlier representation and the breadth of issues open in the antitrust claim of
Company B, a substantial risk exists that use of that information would
materially advance Company B's position in the later representation.

20 Restatement (Third) of the Law Governing Lawyers § 132 (2000), Illustration 3.

21 The rule is the opposite when a lawyer handles discrete matters arising from different
22 facts, as the next illustration in the Restatement shows:

23 •4. Lawyer represented Client A, a home builder, at the closings of the sales of
24 several homes Client A had built in Tract X. Lawyers performing such work
25 normally might encounter issues relating to marketability of title. A is now
26 represented by other counsel. Client B has asked Lawyer to represent him in a
suit against A in connection with B's sale to A of Tract Y, a parcel of land owned
by Client B on which A plans to build homes. The present suit involves the
marketability of the title to Tract Y. Although both representations involve

1 marketability of title, it is unlikely that Lawyer's knowledge of marketability of
2 Tract X would be relevant to the litigation involving the marketability of title to
3 Tract Y. Accordingly, the matters are not substantially related. Lawyer may
4 represent Client B against A without informed consent of A.

4 *Ibid.*, Illustration 4.

5 Keller was not USAA's in-house counsel, nor general counsel, nor had any role in its
6 "corporate affairs and management." Keller handled discrete matters, arising in one state among
7 USAA's multistate business. This is like Illustration 4, not Illustration 3, and does not preclude
8 adverse representation.

9 USAA points to one case, which it describes as the "[m]ost significant" fact on which
10 it relies. Opp'n at 9. This is *Ricardo Cueva et al. v. Garrison Prop. & Cas. Ins. Co.*, Pierce
11 County No. 10-2-06680-8. According to USAA, the *Cueva* case was a smoke damage case, in
12 which a contractor in a preferred provider program carried out faulty repairs. This only
13 emphasizes the error of USAA's position. The *Cueva* insurance loss occurred on February 23,
14 2009, **nine** years ago. Birk Decl., Ex. A. The Cuevas are not the Pleins; the Pleins had different
15 conversations with their adjuster; the Pleins had different damage; the Pleins have different ALE
16 needs; the Pleins had a different contractor; the Pleins had different paperwork. Because these
17 individual differences make these matters "factually distinct," courts do **not** disqualify counsel
18 based on generalized "playbook" information.

21 **3. The cases cited by USAA are inapposite.**

22 USAA fails to cite a single case requiring disqualification of counsel on similar facts. It
23 fails to cite a single case that even addresses similar facts.

24 *Trone v. Smith*, 621 F.2d 994, 998 (9th Cir. 1980), held, under California law, that
25 matters are substantially related where there is a reasonable probability that confidences
26 disclosed in one could be used against the client later. But this generalization is qualified by the

1 official comments, which USAA ignores, and which show that disqualification is not required
2 based on information “disclosed to the public”; or given “to other parties adverse to the former
3 client” (such as in discovery); or information “rendered obsolete by the passage of time” (such
4 as 9-year-old cases); or “general knowledge of the client’s policies and practices.” RPC 1.9,
5 comment 3. And there is no evidence that Smart, Birk or Hanson have any knowledge of
6 “confidences disclosed” in an earlier case. The record establishes the opposite.
7

8 USAA cites no case in which a court evaluated a lawyer’s handling of successive,
9 factually distinct matters. In *FMC Techs., Inc. v. Edwards*, 420 F. Supp. 2d 1153, 1155 (W.D.
10 Wash. 2006), a law firm was adverse to a former client in the *same* transaction in which the firm
11 had formerly represented the client. In *State v. White*, 80 Wn. App. 406, 415, 907 P.2d 310
12 (1995), a lawyer was adverse to a former client in the *same case*. In *Teja v. Saran*, 68 Wn. App.
13 793, 795, 846 P.2d 1375 (1993), a lawyer was adverse to a former client on the very matter on
14 which the lawyer had advised that client.
15

16 None of these cases address the issue before the Court. USAA relies exclusively on
17 generalizations about RPC 1.9 drawn from inapposite cases. It ignores the comments, the
18 Restatement, and case law that has applied these standards to the facts presented here, where
19 Keller formerly handled discrete matters for USAA, and now seeks to handle a different one. It
20 is apparent that USAA feels very strongly about the issue. But the law does not find a disabling
21 conflict on these facts. The cases that analyze the “playbook” issue simply draw a different line
22 than USAA advocates.
23

24 **4. There is no factual or legal support for disqualifying attorney Hanson.**

25 USAA is egregiously incorrect in asserting that Mr. Hanson has any conflict. Under
26 RPC 1.10, Keller’s representation of USAA is not imputed to Mr. Hanson. USAA cites no law

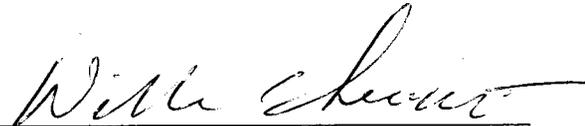
1 extending a conflict to associated counsel at different firms. There is no presumption that
 2 Mr. Hanson learned USAA's confidences, and he affirms that he has not. *See* Hanson Decl. But
 3 disqualifying Mr. Hanson based on another law firm's conflict would be unfair both to
 4 Mr. Hanson and to the Pleins. USAA's insistence that Mr. Hanson should be disqualified—
 5 based on no legal authority—reveals this asserted conflict for something else: a tactic intended
 6 to deprive the Pleins of counsel.
 7

8 5. Conclusion

9 The official comments to RPC 1.9, the Restatement, and every court to have considered
 10 the question—such as *Bradley* and *Regions Bank*—hold that a lawyer may represent new
 11 clients, adverse to the former client, in factually distinct, new matters. USAA and its expert
 12 ignore these authorities, fail to mention them, fail to distinguish them, and fail to point to any
 13 contrary authority. Accordingly, the Court should hold that Keller's representation of the Pleins
 14 is permissible under RPC 1.9.
 15

16 RESPECTFULLY SUBMITTED this 9th day of February, 2018. I certify that this
 17 Memorandum contains 1639 words, in compliance with the Local Civil Rules.
 18

19 KELLER ROHRBACK L.L.P.

20
 21 By 
 22 William C. Smart, WSBA #8192
 Ian S. Birk, WSBA #31431
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4826-7899-3244, v. 1

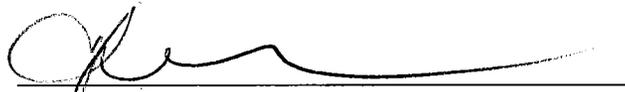
Certificate of Service

I, Chris Jarman, declare under penalty of perjury under the laws of the State of Washington that at all times hereinafter mentioned, I am a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On February 9, 2018, I caused a copy of the **REPLY RE MOTION FOR RULING ON ASSERTED CONFLICT** to be served on the individuals identified below via King County E-Service and E-mail:

Robert S. McLay, WSBA #32662 Joshua Kastan, WSBA #50899 DKM Law Group, LLP 201 Spear Street, Suite 1100 San Francisco, CA 94105 (415) 818-4869 rsm@dkmlawgroup.com JNK@dkmlawgroup.com Attorneys for Defendant USAA	Michael Jaeger, WSBA #23166 William Simmons, WSBA #35604 Lewis Brisbois Bisgaard & Smith LLP 1111 Third Avenue, Suite 2700 Seattle, WA 98101 (206) 436-2020 Michael.Jaeger@LewisBrisbois.com william.simmons@lewisbrisbois.com Attorneys for Defendant The Sterling Group
Joel Hanson, WSBA #40814 Joel Hanson Attorney at Law PLLC 19909 Ballinger Way NE Shoreline, WA 98155 (206) 658-2217 joel@joelhansonlaw.com Attorneys for Plaintiffs	

DATED February 9, 2018, at Seattle, WA.


 Chris Jarman, Legal Assistant

4826-7899-3244, v. 1

4826-7899-3244, v. 1

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

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SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

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

Plaintiffs,

v.

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

Defendants.

No. 17-2-29542-6 SEA

DECLARATION OF IAN S. BIRK

Ian S. Birk declares:

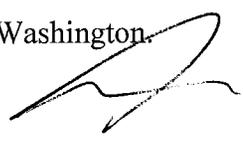
1. I am over the age of 18 and competent to make the statements in this declaration based on my own personal knowledge. I am one of the attorneys representing the plaintiffs in this action.

2. Attached as **Exhibit A** is a true and correct copy of the Amended Complaint, *Cueva v. Garrison Property and Causality Insurance Co.* Cause No 10-2-06680-8 (Pierce County Superior Ct., March 18, 2010.) retrieved from Pierce County Superior Court Linx.

I declare under penalty of perjury that the foregoing is true and correct.

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Dated this 9 day of February 2018, at Seattle, Washington.



Ian S. Birk

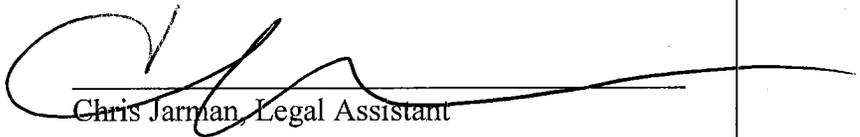
1 **Certificate of Service**

2 I, Chris Jarman declare under penalty of perjury under the laws of the State of
 3 Washington that at all times hereinafter mentioned, I am a resident of the State of Washington,
 4 over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be
 5 a witness herein.

6
 7 On February 9, 2018, I caused a copy of the **DECLARATION OF IAN S. BIRK** to be
 8 served on the individuals identified below via King County E-Service and E-mail:

<p>9 Robert S. McLay, WSBA #32662 10 Joshua Kastan, WSBA #50899 DKM Law Group, LLP 11 201 Spear Street, Suite 1100 12 San Francisco, CA 94105 (415) 818-4869 rsm@dkmlawgroup.com JNK@dkmlawgroup.com Attorneys for Defendant USAA</p>	<p>Michael Jaeger, WSBA #23166 William Simmons, WSBA #35604 Lewis Brisbois Bisgaard & Smith LLP 1111 Third Avenue, Suite 2700 Seattle, WA 98101 (206) 436-2020 Michael.Jaeger@LewisBrisbois.com william.simmons@lewisbrisbois.com Attorneys for Defendant The Sterling Group</p>
<p>16 Joel Hanson, WSBA #40814 Joel Hanson Attorney at Law PLLC 17 19909 Ballinger Way NE 18 Shoreline, WA 98155 (206) 658-2217 joel@joelhansonlaw.com Attorneys for Plaintiffs</p>	

21 DATED February 9, 2018, at Seattle, WA.

22
 23 
 Chris Jarman, Legal Assistant

24 4847-1559-2284, v. 1

Exhibit A

March 18 2010 12:49 PM

KEVIN STOCK
COUNTY CLERK
NO: 10-2-06680-8

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

<p>RICARDO CUEVA and LATISHA ANN CUEVA, individually, and as husband and wife, and as parents and natural guardians of MADELINE MARIA CUEVA, a minor,</p> <p style="text-align: center;">Plaintiffs,</p> <p>vs.</p> <p>GARRISON PROPERTY AND CASUALTY INSURANCE COMPANY, a foreign insurer, and MAXCARE OF WASHINGTON, INC, a Washington corporation,</p> <p style="text-align: center;">Defendants.</p>	<p>NO. 10-2-06680-8</p> <p>AMENDED COMPLAINT ON INSURANCE POLICY AND FOR DAMAGES</p>
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For their Complaint, plaintiffs state:

I. PARTIES

1.1 Plaintiffs are husband and wife, and are, and were at all material times, residents of Pierce County, Washington. They own a home at 1503 67th Street SE, Auburn, Pierce County,

AMENDED COMPLAINT ON INSURANCE POLICY AND FOR DAMAGES-1

WILLIAMS LAW OFFICE
252 BLUEBERRY HILL DRIVE
QUILCENE, WA 98376
PHONE 360.765.0729 FAX 360.765.0734
GW@AREYOUCOVERED.COM

1 Washington. They bring this action as individuals, as husband and wife, and as parents and
2 natural guardians of MADELINE MARIA CUEVA, a minor.

3 1.2 Defendant GARRISON PROPERTY AND CASUALTY INSURANCE
4 COMPANY (hereinafter "USAA") is an insurance company headquartered in San Antonio,
5 Texas. USAA is engaged in the business of insurance, and is and was marketing, underwriting and
6 adjusting personal lines insurance in Washington State and in Pierce County, at all material times.

7 1.3 Defendant MAXCARE OF WASHINGTON, INC., (hereinafter MAXCARE) is a
8 corporation, incorporated and active in the state of Washington, with its headquarters and
9 principal place of business in Washington.

10 1.4 MADELINE MARIA CUEVA is a minor child, and is the daughter of plaintiffs
11 CUEVA.

12 II. FACTS

13
14 2.1 Based upon and relying on the advice of USAA's agents, plaintiffs purchased a
15 Homeowners Policy from USAA, under policy number GAR 01062252990A. This insurance
16 policy purported to cover plaintiffs' home, their personal property, and their loss of use of the
17 insured property.

18 2.2 Plaintiffs had paid all premiums and the policy was fully in force on or about
19 February 23, 2009, when a fire occurred on the premises.

20 2.3 The fire substantially damaged plaintiffs' dwelling and its contents.

21 2.4 Plaintiffs promptly notified USAA of the fire, and of the damage to dwelling and
22 contents, and of plaintiffs' need for loss of use and additional living expense benefit, and complied
23 with all of USAA's reasonable requests for information and cooperation.

1 2.5 USAA has failed and refused to accept full liability under the policy for the fire or
2 for resulting damages, and its failure to provide the benefits promised by the policy was, and is,
3 unreasonable.

4 2.6 Although plaintiffs have requested full payment of their claim, USAA has
5 unreasonably refused to make full and adequate payment of the claim.

6 2.7 USAA agreed to but has failed to repair the house and its contents, under
7 either the USAA Property Direct Repair Program, the USAA repair option in the policy, or
8 otherwise, and has failed to provide adequate alternative housing for the CUEVA family.

9 2.8 USAA, in the course of adjustment and investigation, has, without limitation,
10 violated the following Unfair Claims Practice Regulations:

11 **WAC 284-30-330. Specific unfair claims settlement practices defined.**

12 (1) Misrepresenting pertinent facts or insurance policy provisions.

13 (2) Failing to acknowledge and act reasonably promptly upon communications
14 with respect to claims arising under insurance policies.

15 (3) Failing to adopt and implement reasonable standards for the prompt
16 investigation of claims arising under insurance policies.

17 (4) Refusing to pay claims without conducting a reasonable investigation.

18 (5) Failing to affirm or deny coverage of claims within a reasonable time after
19 proof of loss statements have been completed.

20 (6) Not attempting in good faith to effectuate prompt, fair and equitable
21 settlements of claims in which liability has become reasonably clear.

22 (7) Compelling insureds to institute or submit to litigation, arbitration, or appraisal
23 to recover amounts due under an insurance policy by offering substantially less
24 than the amounts ultimately recovered in such actions or proceedings.

25 (12) Failing to promptly settle claims, where liability has become reasonably clear,
26 under one portion of the insurance policy coverage in order to influence

1 settlements under other portions of the insurance policy coverage.

2 (13) Failing to promptly provide a reasonable explanation of the basis in the
3 insurance policy in relation to the facts or applicable law for denial of a claim or
4 for the offer of a compromise settlement.

5 **WAC 284-30-350. Misrepresentation of policy provisions.**

6 (1) No insurer shall fail to fully disclose to first party claimants all pertinent
7 benefits, coverages or other provisions of an insurance policy or insurance contract
8 under which a claim is presented.

9 (2) No agent shall conceal from first party claimants benefits, coverages or other
10 provisions of any insurance policy or insurance contract when such benefits,
11 coverages or other provisions are pertinent to a claim.

12 **WAC 284-30-360. Failure to acknowledge pertinent communications.**

13 (3) An appropriate reply shall be made within ten working days, or 15 working
14 days with respect to communications arising under group insurance contracts, on
15 all other pertinent communications from a claimant which reasonably suggest that
16 a response is expected.

17 (4) Every insurer, upon receiving notification of claim, shall promptly provide
18 necessary claim forms, instructions, and reasonable assistance so that first party
19 claimants can comply with the policy conditions and the insurer's reasonable
20 requirements. Compliance with this paragraph within the time limits specified in
21 subsection (1) of this section shall constitute compliance with that subsection.

22 **WAC 284-30-370 Standards for prompt investigation of a claim.**

23 Every insurer must complete its investigation of a claim within thirty days after
24 notification of claim, unless the investigation cannot reasonably be completed
25 within that time.

26 **WAC 284-30-380. Standards for prompt, fair and equitable settlements
27 applicable to all insurers.**

28 (1) Within fifteen working days after receipt by the insurer of properly executed
proofs of loss, the first party claimant shall be advised of the acceptance or denial
of the claim by the insurer. No insurer shall deny a claim on the grounds of a
specific policy provision, condition, or exclusion unless reference to such
provision, condition, or exclusion is included in the denial. The denial must be
given to the claimant in writing and the claim file of the insurer shall contain a copy
of the denial.

1 (3) If the insurer needs more time to determine whether a first party claim should
2 be accepted or denied, it shall so notify the first party claimant within fifteen
3 working days after receipt of the proofs of loss giving the reasons more time is
4 needed. If the investigation remains incomplete, the insurer shall, within forty-five
5 days from the date of the initial notification and no later than every thirty days
6 thereafter, send to such claimant a letter setting forth the reasons additional time is
7 needed for investigation.

8 (4) Insurers shall not fail to settle first party claims on the basis that responsibility
9 for payment should be assumed by others except as may otherwise be provided by
10 policy provisions.

11 2.9 On February 23, 2010, plaintiff notified USAA that it was in violation of the
12 Insurance Fair Conduct Act, and provided both USAA and the Office of the Insurance
13 Commissioner of the State of Washington with the 20 day notice required by the Act.

14 2.10 Although the 20 day period has elapsed, USAA has failed to resolve the claim, and
15 has made no meaningful response to the 20 day notice at all.

16 2.11 USAA has intentionally created delay in the claim process, and has used the
17 uncertainty, financial cost, and stress of claim delay to place its policyholders in a
18 disadvantageous position.

19 2.12 Plaintiffs have lost the use of their property, have lost economic opportunity and
20 income, and have lost the use of funds which should have been paid promptly as part of the claim
21 process.

22 2.13 USAA chose, supervised, and paid MAXCARE and others to repair the damaged
23 property pursuant to USAA's Property Direct Repair Program. Under this program, USAA had
24 full direction and control of repairs to plaintiffs' property.

25 2.14 MAXCARE, at all material times, was acting both for itself and for USAA. Both
26 USAA and Maxcare are liable to plaintiffs for all damages proximately caused by their conduct.
27 The liability of each is joint, several, and joint and several.
28

1 by law, breach of the fiduciary duty owed to insureds by USAA, violate the Unfair Claims
2 Practices Regulations codified at Washington Administrative Code 284-30, violate the
3 Washington Consumer Protection Act, RCW 19.86, and constitute attempts to defraud plaintiffs
4 of their valid claims.

5 3.5 Pursuant to the Insurance Fair Conduct Act, RCW 48.30, plaintiffs provided USAA
6 with the 20 day notice required by the Act. USAA failed to remedy the claim, and is liable in full
7 for the remedies and penalties afforded by the Insurance Fair Conduct Act, RCW 48.30, including
8 treble damages, reasonable and statutory costs and attorney fees, expert witness fees, and all other
9 damages allowed by the Act.

10 3.6 MAXCARE's actions, described above, were negligent, fraudulent, and unlawful.

11 12 **IV. DAMAGES**

13
14 4.1 By virtue of breach of the insurance contract between the parties, USAA is liable in
15 full for the amount of plaintiffs' unpaid claims, coverages and benefits.

16 4.2 USAA is further liable for damages which directly and proximately result from
17 breach of the contract of insurance and for all damages resulting from USAA's breach of the
18 implied duty of good faith and fair dealing owed to plaintiffs.

19 4.3 As a direct and proximate result of the wrongful conduct of USAA, plaintiffs have
20 lost the use of their property, have lost economic opportunity and income, and have lost the use
21 of funds which should have been paid promptly as part of the claim process. They have suffered
22 from stress, emotional distress and have incurred special and general damages in an amount to be
23 proven at trial.

24 4.4 USAA is liable for plaintiffs' reasonable attorneys fees, all expenses and costs of

1 litigation, prejudgment interest and for treble damages pursuant to the Washington Consumer
2 Protection Act.

3 4.5 USAA is liable for plaintiffs' reasonable attorneys fees, all expenses and costs of
4 litigation, pursuant to *Olympic Steamship*, the Washington Consumer Protection Act, and the
5 Insurance Fair Conduct Act.

6 4.6 USAA is liable for plaintiffs' reasonable attorneys fees, all expenses and costs of
7 litigation, prejudgment interest and for treble damages pursuant to the Insurance Fair Conduct
8 Act.

9 4.7 As a direct and proximate result of defendants' wrongful conduct, defendants are
10 liable for all damages and losses sustained by plaintiffs.

11 4.8 As a result of the accident, plaintiffs sustained severe and potentially permanent
12 injuries. These injuries continue and will continue into the future, and include pain, suffering, loss
13 of enjoyment of life, medical expenses, loss of earning capacity, and loss of income, losses of
14 consortium, and other losses to be set out more fully at trial. These losses continue and will
15 continue into the future.

16 4.9 All losses hereunder are in an amount to be proven at trial, and include both special
17 and general damages, in amounts to be proven at trial.

20 V. AGENCY AND VICARIOUS LIABILITY

21 5.1 USAA has performed acts and omissions as set out herein, by and through the acts
22 and omissions of its employees and agents, and by and through the acts and omissions of
23 MAXCARE. All acts and omissions of USAA's employees or agents in this matter are and were
24 the acts and omissions of USAA.

25
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27 AMENDED COMPLAINT ON INSURANCE
28 POLICY AND FOR DAMAGES-8

WILLIAMS LAW OFFICE
252 BLUEBERRY HILL DRIVE
QUILCENE, WA 98376

PHONE 360.765.0729 FAX 360.765.0734
GW@AREYOUCOVERED.COM

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

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SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

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

Plaintiffs,

v.

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

Defendants.

No. 17-2-29542-6 SEA

DECLARATION OF JOEL B. HANSON

Joel B. Hanson declares:

1. I am over the age of 18 and competent to make the statements in this declaration based on my own personal knowledge. I am one of the attorneys representing the plaintiffs in this action.

2. In its brief regarding the conflict of interest it asserts, USAA argues that I should be disqualified because, it says, I have not provided evidence that “[I have] not gleaned information, knowledge, or understanding of USAA CIC’s business practices through [my] conversations with the Keller Rohrback attorneys with whom [I have] associated.” Opp’n at 12.

1 3. This is a disingenuous argument, since the papers on file with the Court show
2 that even Mr. Smart and Mr. Birk have no knowledge of USAA's business practices.

3 4. I have never represented USAA. I have never been affiliated with the Keller
4 Rohrback law firm.

5 5. I have never gained any knowledge about USAA's practices other than as its
6 opposing counsel through ordinary civil discovery in contested matters other than this one. I
7 have not gleaned information, knowledge, or understanding of USAA CIC's business practices
8 through my conversations with the Keller Rohrback attorneys with whom I have associated.

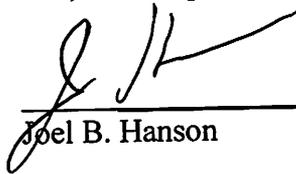
9 6. If both Keller Rohrback and I were disqualified, the Pleins would be left without
10 any legal representation in this matter. Leaving them even temporarily without counsel would
11 give USAA a significant and unfair advantage over them in this case. The Pleins still have not
12 been told by USAA whether it intends to pay for their heating oil. Similarly, the Pleins still have
13 not been told by USAA whether it will pay for the cost of fixing approximately \$200,000 in
14 unrepaired damage to their home that resulted from the fire and the subsequent repair problems
15 by Defendant Sterling Group. USAA has not even answered their July 2017 request for a
16 coverage decision. As time passes, the Pleins' situation becomes increasingly desperate.

17 7. If both Keller Rohrback and I were disqualified, there is a strong likelihood that
18 the Pleins would have a difficult time obtaining competent representation in this matter. The
19 Pleins cannot afford to pay an attorney except on a contingent basis. Homeowner insurance bad
20 faith cases like this are complex and time consuming, especially when compared to the dollar
21 amounts that are at stake. To my knowledge, there is only a small number of local attorneys who
22 regularly take homeowner cases such as the Pleins' on a contingent basis. Due to the time-
23 consuming nature of insurance bad faith cases, I am frequently forced decline potential clients
24
25
26

1 because I do not have enough time. When I try to refer potential clients to other attorneys who
2 are knowledgeable in this field, I often learn that those attorneys are also too busy to take
3 another case. One of the attorneys I know who handled these cases has recently moved his
4 practice to another state. Another attorney who handled these cases is in the process of winding
5 his practice down.
6

7 8. I declare under penalty of perjury that the foregoing is true and correct.
8

9 Dated this 9th day of February 2018, at Shoreline, Washington.
10

11 
Joel B. Hanson

12 4828-7062-2044, v. 1
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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.

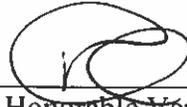
ORDER ON PLAINTIFFS' MOTION FOR RULING
REGARDING ASSERTED CONFLICT OF INTEREST- 1

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

- 1 2. Keller Rohrback L.L.P. is not required to withdraw nor be disqualified as counsel
- 2 for the Pleins.
- 3 3. Joel Hanson is not required to withdraw nor be disqualified as counsel for the
- 4 Pleins.

5 IT IS SO ORDERED.

6 Dated this 14 day of February, 2018.



7
8 The Honorable Verónica Galván
9 SUPERIOR COURT JUDGE

10 Presented by:
11 KELLER ROHRBACK L.L.P.

12
13 By _____
14 William C. Smart, WSBA #8192
15 Ian S. Birk, WSBA #31431

16 JOEL B. HANSON, ATTORNEY AT LAW, PLLC

17
18 By _____
19 Joel B. Hanson, WSBA #40814

20 *Attorney for Plaintiffs*

21
22 4836-4334-7291, v. 1

NOTICE OF DISCRETIONARY REVIEW

KING COUNTY

SUPERIOR COURT CLERK

E-FILED

CASE NUMBER: 17-2-29542-6 SEA

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

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

Plaintiffs,

vs.

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

Defendants.

CASE NO. 17-2-29542-6 SEA

**DEFENDANT USAA CASUALTY
INSURANCE COMPANY'S NOTICE OF
DISCRETIONARY REVIEW**

*[Re: Order on Plaintiffs' Motion for Ruling
Regarding Asserted Conflict of Interest]*

TO: ALL PARTIES OF RECORD

AND TO: THE CLERK OF THE COURT

PLEASE TAKE NOTICE that Defendant USAA Casualty Insurance Company ("USAA
CIC") hereby seeks discretionary review by the Court of Appeals for the State of Washington,
Division I, of the Order of the King County Superior Court granting Plaintiffs Richard and Deborah
Pleins' ("Pleins") Motion for Ruling Regarding Asserted Conflict of Interest entered on February
14, 2018.

A copy of the Order granting the Pleins' Motion for Ruling Regarding Asserted Conflict of
Interest, on which this discretionary review is sought, is attached hereto.

///

///

1 The parties and counsel of record in this action are as follows:

2 • **Counsel for Plaintiffs Richard Plein and Deborah Plein**

3 Joel Hanson
 4 JOEL HANSON ATTORNEY AT LAW, PLLC
 6100 219th Street SW, Suite 480
 5 Mountlake Terrace, WA 98043-2222

6 Joel Hanson
 JOEL HANSON ATTORNEY AT LAW, PLLC
 19909 Ballinger Way NE
 7 Shoreline, WA 98155

8 William C. Smart
 Ian S. Birk
 9 KELLER ROHRBACK LLP
 1201 Third Avenue, Suite 3200
 10 Seattle, WA 98101

11 • **Counsel for Defendant The Sterling Group, Inc.**

12 Michael A. Jaeger
 13 William W. Simmons
 LEWIS BRISBOIS BISGAARD & SMITH LLP
 14 1111 Third Ave., Suite 2700
 15 Seattle, Washington 98101

16 • **Counsel for Defendant USAA Casualty Insurance Company**

17 Robert S. McLay
 Joshua N. Kastan
 18 DKM LAW GROUP, LLP
 801 Second Avenue, Ste. 800
 19 Seattle, Washington 98104

20 Dated: March 16, 2018

DKM LAW GROUP, LLP

21
 22
 23 By 

ROBERT S. McLAY (WSBA No. 32662)
rsm@dkmlawgroup.com
 JOSHUA N. KASTAN (WSBA No. 50899)
jnk@dkmlawgroup.com
 801 Second Avenue, Suite 800
 Seattle, WA 98104
 Attorneys for Defendant
 USAA CASUALTY INSURANCE COMPANY

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

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.

IT IS SO ORDERED.

Dated this 14 day of February, 2018.

The Honorable Verónica Galván
SUPERIOR COURT JUDGE

Presented by:
KELLER ROHRBACK L.L.P.

By _____
William C. Smart, WSBA #8192
Ian S. Birk, WSBA #31431

JOEL B. HANSON, ATTORNEY AT LAW, PLLC

By _____
Joel B. Hanson, WSBA #40814

Attorney for Plaintiffs

4836-4334-7291, v. 1

18 MAR 16 PM 12:03

KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE NUMBER: 17-2-29542-6 SEA

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

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

Plaintiffs,

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

DECLARATION OF SERVICE

I the undersigned hereby declare that I am employed in San Francisco County,
California, am over the age of 18, and not a party to the within action. My business address is
535 Pacific Avenue, Suite 101, San Francisco, California 94133. On the 16th day of
March 2018, I caused to be mailed:

**DEFENDANT USAA CASUALTY INSURANCE COMPANY'S NOTICE OF
DISCRETIONARY REVIEW** [Re: Order on Plaintiffs' Motion for Ruling Regarding Asserted
Conflict of Interest]

and served as follows:

___ via email

x via e-service

x via us mail

1 ____ via legal messenger

2 ____ via email

3 ____ via Overnight Mail U.S. Mail

4 ____ via facsimile

5 On parties/counsel listed below at the following address:

6

7 Joel B. Hanson, Esq.
 8 JOEL HANSON Attorney at Law, PLLC
 9 6100 219th Street, SW, Suite 480
 10 Mountlake Terrace, WA 98043-2222
 11 Tel: (425) 582-5636
 12 E-mail: joel@joelhansonlaw.com

**Attorney for Plaintiffs, RICHARD
 PLEIN and DEBORAH PLEIN**

11 Joel B. Hanson, Esq.
 12 JOEL HANSON Attorney at Law, PLLC
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 14 Shoreline, WA 98155
 15 E-mail: joel@joelhansonlaw.com

**Attorney for Plaintiffs, RICHARD
 PLEIN and DEBORAH PLEIN**

16 William C. Smart, Esq.
 17 Ian S. Birk, Esq.
 18 KELLER ROHRBACK LLP
 19 1201 Third Avenue, Suite 3200
 20 Seattle, WA 98101

**Attorney for Plaintiffs, RICHARD
 PLEIN and DEBORAH PLEIN**

21 Michael A. Jaeger, Esq.
 22 William W. Simmons, Esq.
 23 Lewis Brisbois Bisgaard & Smith LLP
 24 1111 Third Avenue, Suite 2700
 25 Seattle, WA 98101
 26 Tel: (206) 436-2020
 27 E-Fax: (206) 436-2030
 28 E-mail:
 Michael.Jaeger@LewisBrisbois.com
 E-mail:
 william.simmons@lewisbrisbois.com

Attorneys for The Sterling Group, Inc.

26 I declare under penalty of perjury of the laws of the State of California that the foregoing is
 27 true and correct.
 28

1 DATED this 16th day of March 2018 at San Francisco, California.

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5 Doris L. Corpus
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SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR
THE COUNTY OF KING

PLEIN ET ANO

vs.

USAA CASUALTY INS CO ET ANO

Case No.: 17-2-29542-6 SEA

CERTIFICATE OF E-SERVICE

(AFSR)

I, Joshua Kastan, certify that I initiated electronic service of the following document(s) on the parties listed below who have consented to accept electronic service via the King County eFiling Application. Service was initiated on March 16, 2018 at 12:03:52 PM.

Document(s):

1. NOTICE DEFENDANT USAA RE CONFLICT OF INTEREST
2. DECLARATION OF MAILING
3. NOTICE DEFENDANT USAA RE PAYMENT OF UTILITIES
4. DECLARATION OF MAILING

Parties:

1. Chris Jarman, Other Involved Party
email: CJarman@kellerrohrback.com
2. Joel Hanson, Attorney for Petitioner/Plaintiff
email: joel@joelhansonlaw.com
3. James Derrig, Attorney for Respondent/Defendant
email: eservice.DerrigLaw@me.com
4. Joshua Kastan, Attorney for Respondent/Defendant
email: JNK@dkmlawgroup.com

Executed this 16th day of March, 2018.

s/ Joshua Kastan
203 Redwood Shores Parkway
Suite 480
Redwood City, CA 94065
2017393813
JNK@dkmlawgroup.com

DKM LAW GROUP, LLP**March 16, 2018 - 1:34 PM****Filing Affidavit of Service****Transmittal Information**

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: Case Initiation
Trial Court Case Title: Plein Et Ano Vs Usaa Casualty Ins Co Et Ano
Trial Court Case Number: 17-2-29542-6
Trial Court County: King County Superior Court
Signing Judge: Veronica A. Galv[◆]n
Judgment Date: 02/14/2018

The following documents have been uploaded:

- AFS_Affidavit_of_Service_20180316133228D1295633_7633.pdf
This File Contains:
Affidavit of Service
The Original File Name was Plein POS Conflict of Interest.pdf

A copy of the uploaded files will be sent to:

- JNK@dkmlawgroup.com
- RSM@dkmlawgroup.com
- ibirk@kellerrohrback.com
- joel@joelhansonlaw.com
- michael.jaeger@lewisbrisbois.com
- william.simmons@lewisbrisbois.com
- wsmart@kellerrohrback.com

Comments:

Sender Name: Joshua Kastan - Email: JNK@dkmlawgroup.com

Address:

801 2ND AVE STE 800

SEATTLE, WA, 98104-1573

Phone: 415-200-0204

Note: The Filing Id is 20180316133228D1295633

445 P.3d 574

Court of Appeals of Washington, Division 1.

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, Petitioner,
and

The Sterling Group, Inc. (doing business as
Sterling Group, DKI), a corporation, Defendant.

No. 78190-1-I

FILED: July 29, 2019

Synopsis

Background: Insureds filed suit against insurer, asserting claim for bad faith arising out of insurer's handling of claim for loss from fire. Insurer filed motion for ruling on asserted conflict of interest of insureds' attorneys who were members of law firm that had previously represented insurer. The Superior Court, King County, Veronica Alicea Galvan, J., allowed firm attorneys to remain as counsel for insureds. Insurer's petition for discretionary review was allowed.

[Holding:] The Court of Appeals, Chun, J., held that firm attorneys and firm were disqualified from representing clients in action against insurer that was long-term former client of firm.

Reversed.

West Headnotes (6)

[1] Appeal and Error
 **Disqualification**

An appellate court reviews de novo a trial court's decision to grant or deny a motion to disqualify counsel.

[Cases that cite this headnote](#)

[2] Appeal and Error
 **Counsel**

An appellate court reviews de novo a determination of whether an attorney has violated the Rules of Professional Conduct.

[Cases that cite this headnote](#)

[3] Attorney and Client
 **Partners and associates**

If an individual in a law firm is precluded by the Rules of Professional Conduct from representing a particular client, based on the attorney having represented 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, then all the members of the law firm are likewise prohibited from representing the client. [RPC 1.9\(a\)](#). 1.10(a).

[Cases that cite this headnote](#)

[4] Attorney and Client
 **The relation in general**

Effective representation of a client necessitates protection of the confidential relationship between the attorney and client.

[Cases that cite this headnote](#)

[5] Privileged Communications and Confidentiality
 **Purpose of privilege**

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.

[Cases that cite this headnote](#)

[6] Attorney and Client**Insurance**

Law firm's long-term representation of homeowners insurer involved "matters substantially related" to representation of insureds in their action against insurer for alleged bad faith arising out of insurer's handling of claim for repairs to insured's home following fire, and thus, firm attorneys and firm were disqualified from representing insureds in action against insurer; there was substantial risk that firm attorneys had obtained confidential, factual information regarding insurer that would materially advance insureds' claim, including information regarding insurer's strategies in defending against multiple prior claims of bad faith, insurer trusted firm attorneys with direct access to confidential and proprietary business information, including confidential claims handling materials, thought processes of adjusters and in-house attorneys, business and litigation philosophies, and strategies in settlement discussions, motion practice, case analysis, defenses, witness meetings, witness preparation, trial preparation, and discovery, and firm attorneys agreed to represent insureds within few months of firm's termination of its relationship with insurer. [RPC 1.9\(a\)](#), [1.10\(a\)](#).

Cases that cite this headnote

*575 Honorable Veronica Alicea Galvan, Judge

Attorneys and Law Firms

[Robert Stewart Mclay](#), [Joshua Nathan Kastan](#), DKM Law Group LLP, 801 2nd Ave. Ste. 800, Seattle, WA, 98104-1573, [Brian Roger Esq. Davis](#), Attorney at Law, 535 Pacific Ave. Ste. 101, San Francisco, CA, 94133-4635, [Jaime Yoshimi Ritton](#), Attorney at Law, 801 2nd Ave. Ste. 800, Seattle, WA, 98104-1573, Counsel for Petitioner(s)

[Joel Hanson](#), Attorney at Law PLLC, 13540 Lake City Way Ne. Ste. 120, Seattle, WA, 98125-3665, [William Candler Smart](#), [Ian S. Birk](#), Keller Rohrback LLP, 1201 3rd Ave. Ste. 3200, Seattle, WA, 98101-3052, [Philip Albert Talmadge](#), Talmadge/Fitzpatrick/Tribe, 2775 Harbor Ave. Sw., Third

Floor Ste. C., Seattle, WA, 98126-2138, [Isaac Ruiz](#), Plaintiff Litigation Group PLLC, 95 S. Jackson St. Ste. 100, Seattle, WA, 98104, Counsel for Respondent(s)

[Mick Anthony Jaeger](#), [William W. Simmons](#), Lewis Brisbois Bisgaard & Smith LLP, 1111 3rd Ave. Ste. 2700, Seattle, WA, 98101-3224, Counsel for Other Parties

PUBLISHED OPINION

[Chun, J.](#)

*576 ¶1 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.

¶2 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.

¶3 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.

¶4 Keller requested the trial court rule on the asserted conflict of interest. The trial court found no conflict under [RPC 1.9](#). USAA filed a petition 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

¶5 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.

¶6 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.

¶7 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.

¶8 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.

¶9 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 *577 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 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."

¶10 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.

¶11 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.

¶12 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

¶13 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

[1] [2] ¶14 We review de novo "a court's decision to grant or deny a motion to disqualify counsel." [Sanders v. Woods](#), 121 Wash. 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 Wash. App. 793, 796, 846 P.2d 1375 (1993); see [State v. Hunsaker](#), 74 Wash. App. 38, 42, 873 P.2d 540 (1994).

B. [RPC 1.9\(a\)](#) & [RPC 1.10\(a\)](#)

¶15 [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.)

[3] ¶16 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 *578 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 Wash. App. at 41-42, 873 P.2d 540. 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

[4] [5] ¶17 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 Wash. App. 406, 415, 907 P.2d 310 (1995).³ These duties correlate to bedrock principles of the legal profession.⁴ They 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 Wash. 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 Proceeding Against Schafer](#), 149 Wash.2d 148, 160, 66 P.3d 1036 (2003).⁶

¶18 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”

¶19 [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

*579 ¶20 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 Wash. App. at 598, 89 P.3d 312; *see also* [Hunsaker](#), 74 Wash. App. at 41-42, 873 P.2d 540; [Teja](#), 68 Wash. App. at 796, 846 P.2d 1375. It did so under the former version of RPC 1.9(a).⁸

¶21 Thereafter, in keeping with its inherent power to regulate the practice of law in Washington, *see* [Chism v. Tri-State Constr. Inc.](#), 193 Wash. 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].

¶22 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."

¶23 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 Wash. App. at 841, 374 P.3d 193.

¶24 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

*580 ¶25 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

[6] ¶26 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 representation during their professional relationship, which spanned over a decade. Keller does not dispute this description of the extent of its representation of USAA.

¶27 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."

¶28 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.”

¶29 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.

¶30 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 *581 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.

¶31 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.

¶32 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

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

¶34 Reversed.

WE CONCUR:

[Hazelrigg-Hernandez, J.](#)

[Mann, A.C.J.](#)

All Citations

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Footnotes

1 Sterling is not a party before us.

- 2 Washington courts have not established which party bears the burden of proof in connection with a motion to disqualify under [RPC 1.9](#). The United States District Court for the Western District of Washington has 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 federal court, applying the Model Rules of Professional Conduct, 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.
- 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 Proceeding Against Schafer*, 149 Wash.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 Wash.2d at 160, 66 P.3d 1036. “The attorney-client privilege is thought to derive from the original concept of an attorney’s implicit oath of loyalty to [their] client and is the oldest of the common law privileges.” *Schafer*, 149 Wash.2d at 160 n.4, 66 P.3d 1036 (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, 11 How. 232, 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 Wash.2d at 160-162, 66 P.3d 1036 (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).
- 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.
- 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 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.

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September 19, 2019 - 2:18 PM

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