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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,

Respondent,

and

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

Defendants.

SUPPLEMENTAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
Table of Authorities.....	ii
INTRODUCTION.....	1
A. STATEMENT OF THE CASE.....	1-3
B. ARGUMENT.....	4
1. <u>The Court of Appeals, Division I’s Analysis Under the RPC was Accurate and the Decision Should be Affirmed.....</u>	4-6
2. <u>The Presumption that Keller Learned Confidences by Representing USAA CIC Supports Disqualification.....</u>	6-7
3. <u>Washington Rules of Professional Conduct Govern and Case Precedent Properly Places the Burden Upon Keller and Supports Disqualification.....</u>	7-9
4. <u>Division I Appropriately Interpreted RPC 1.9 and RPC 1.10 Under This Court’s Application of the 2006 Amendments and Adopted Comments on Substantially Related Matters.....</u>	10-12
CONCLUSION.....	12

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Chism v. Tri-State Constr. Inc., 193 Wash. App. 818,
374 P.3d 193 (2016).....11

Plein v. USAA Casualty Insurance Company,
445 P.3d 574 (2019).....*passim*

Sanders v. Woods, 121 Wn. App. 593, 89 P.3d 312 (2004)*passim*

State v. Hunsaker, 74 Wn. App. 38, 873 P.2d 540 (1994).....*passim*

State v. Stenger, 111 Wn.2d 516, 760 P.2d 357 (1988)10

State v. White, 80 Wn. App. 406 (1995)
rev. denied, 129 Wn. 2d 1012 (1996).....6

Teja v. Saran, 68 Wn. App. 793, 846 P.2d 1375 (1993).....4,6,8

Federal Cases

Amgen, Inc. v. Elanex Pharmaceuticals, Inc.,
160 F.R.D. 134 (W.D. Wash. 1994).....7

EMC Technologies, Inc. v. Edwards,
420 F. Supp. 2d 1153 (W.D.Wash.2006).....*passim*

Koch v. Koch Industries,
798 F. Supp. 1525 (D. Kan. 1992).....11

Trone v. Smith, 621 F.2d 994 (9th Cir. 1980).....6

United States v. Stewart, 185 F.3d 112, 121 (3d Cir. 1999).....5

Statutes

RCW 2.06.040.....1

Codes, Rules and Regulations

RAP 12.3(d)1

RAP 13.4(b)(4)2,4

RPC 1.9.....*passim*

RPC 1.10.....*passim*

Other Authorities

MODEL RULES OF PROF'L CONDUCT R. 1.9.....4,8

INTRODUCTION

Upon accepting review of the Pleins' Petition, this Court should affirm the Washington State Court of Appeals, Division I's sound ruling to find a direct, uncurable conflict of interest exists to warrant disqualification of the Keller Rohrback LLP ("Keller") firm in this matter. Division I's panel majority published its decision under Washington Rules of Appellate Procedure ("RAP") Rule 12.3(d) pursuant to chapter 2.06.040 Revised Code of Washington ("RCW") because its ruling relates to a significant area of law. (Wash. R. App. P. 12.3.) The issues at bar are noteworthy for ascertaining potential conflicts, establishing the correct burden for attorneys to identify an apparent, presumptive conflict of interest, and in taking action to protect client interests and uphold attorney ethical standards.¹

A. STATEMENT OF THE CASE

USAA Casualty Insurance Company (hereinafter "USAA CIC" or "Respondent") herein supplements its original Answer to Petitioners Richard and Deborah Pleins' ("Pleins") Petition for Review ("Petition").

The Washington State Court of Appeals, Division I rendered its decision by a published opinion in this case on July 29, 2019, ruling that Keller, in taking on its representation of the Pleins against USAA CIC, violates the RPC. (Respondent's Answer to Petition for Review, Appendix (hereinafter referred to as "APX") at pages APX159 through APX166.)

USAA CIC's position aligns with its original response to Keller's motion at the trial court level and is supported by Division I's decision to

¹ In the event this Court now addresses any new issues not raised in the Petition for Review that Respondent wishes the Court to consider, Respondent's Answer to the Petition conditionally raised issues to be considered in the event the Court granted 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).)

overturn the trial court and disqualify the Keller law firm from representing the Pleins (insureds) against USAA CIC (insurer).

Petitioners sought review under “Considerations Governing Acceptance of Review” outlined in RAP 13.4(b)(4). The Court of Appeals, however, ruled correctly under Washington law and in applying the Rules of Professional Conduct (“RPC”) to bar Keller’s representation against its former client. Nothing alluded to in the Petition for Review (see “Petition” at page 8) warrants a need for further review of Division I’s decision under RAP 13.4 for the principles governing disqualification of counsel.

At issue before the Court of Appeals and here is whether a law firm, with an extensive 10-year client relationship at the highest levels within a 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 firm’s former client after its representation ended only months previously? Division I ruled correctly; the answer is consistently “**no.**”

Keller initially moved for a ruling from the trial court – *not* USAA CIC as the Pleins incorrectly represented to this Court in the Petition – asserting there was no conflict of interest pursuant to RPC 1.9. USAA CIC responded to the Motion for Ruling Regarding Asserted Conflict of Interest brought before the trial court. (Plein, 445 P.3d at 577 (2019).) USAA CIC appealed the trial court’s errant decision, 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 Court of Appeals properly found that a conflict 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)).) Keller was composed in part of attorneys who formerly represented the insurer and a conflict of interest arose based upon Washington law, this Court’s prior rulings, and State Courts’ application of the RPC. Simply put, without a waiver or exception for Keller to engage as counsel on behalf of the Pleins against its former client USAA CIC, there is no curable remedy to the conflict Keller created.

USAA CIC initially objected to Keller’s association as the Pleins’ counsel, which was identified in the Court of Appeals decision and represents why this case will further align the duties and expectations for firms and institutional clients when potential representation conflicts arise. Keller’s representation in this matter against USAA CIC – its former long-standing client – created a direct conflict from the onset, after associating as an adverse party’s counsel a mere two months after its representation of USAA CIC ended. Division I navigated the course through a fact-intensive inquiry in its published decision: Keller’s adverse involvement to represent the Pleins in a case against its former client must be barred under applicable Washington law, the RPC, and also in fairness and equity.

Here, the Court has abundant support to rule that Division I correctly overturned the trial court’s ruling, where Keller’s duty of loyalty and confidentiality to USAA CIC – former institutional client for which Keller defended various first party actions – is at issue and has been breached. Keller’s representation of the Pleins jeopardized USAA CIC through a threatened, material conflict. The mere appearance of impropriety here is enough to trigger an inquiry into ethical conduct and disqualification.

B. ARGUMENT

1. The Court of Appeals, Division I's Analysis Under the RPC was Accurate and the Decision Should be Affirmed.

Division I's ruling illustrates why the RPCs expressly prohibit Keller's representation of the Pleins in this case. Petitioner's first argument sought 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 ethical rules.

In this Court's prior rulings on the issue of conflict, 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 its 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).) Importantly, the issue is whether "the instant suit constitute[s] 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).) Here, the answer is "yes." Further, while it is true that, "Parties are allowed to switch sides; lawyers **are not** . . . '[c]onflicts of

interest arise whenever an attorney's loyalties are divided . . .'" (Id. at 1160 (emphasis added) (quoting United States v. Stewart, 185 F.3d 112, 121 (3d Cir. 1999), cert. denied, 528 U.S. 1063 (1999)).)

Application of the RPC needs no further exploration, as Division I opined 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]).)

This case presents 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. Here, Keller has undertaken a client on the same type of claim *against* USAA CIC in a substantially related case – posing a material conflict of interest and threatening its former client in violation of the RPC.

Division I delved into Keller's association on behalf of the Pleins against the firm's former client, USAA CIC. The Court of Appeals' decision establishes why a firm in Keller's situation cannot represent a client to affirmatively prosecute extracontractual claims against a longstanding institutional client, as was the case here where: 1) that attorney-client relationship ended only months before the new, conflicting representation; and 2) the representation was against a client for whom the firm defended the *exact same types* of actions in Washington State and during which it *learned, developed, and shared trade and legal defense secrets*.

Thus, Keller's loyalties were divided because when it agreed to represent the Pleins and it breached the duty of loyalty to USAA CIC.

Keller associated as counsel on this extracontractual property damage case *against* its former client (only two months after the prior decade-long representation for USAA CIC ended), where the RPC strictly prohibits the representation, which on its face also appears unethical without informed, written consent from the prior client. The trial court improperly condoned Keller’s behavior to essentially “switch sides” and represent the Pleins in a case and position that was materially adverse to USAA CIC.

2. The Presumption that Keller Learned Confidences by Representing USAA CIC Supports Disqualification.

Washington courts presume 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); *FMC 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 (1003) [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”].)

Within the RPC’s plain language and case precedent at issue, which includes this Court’s interpretation and Washington State courts’ application over the past decades, a fervent policy rationale exists for the procedure already in place to protect the public interest. Under the Court’s historical and still-current interpretation of the RPC, when concern for potential conflict in a litigated matter is voiced by a former client, there is no

requirement for actual disclosure of confidences or burden upon the client. Rather, the mere prospect of confidences becoming disclosed by a lawyer in an adversarial role against its former client, or any threat of conflicting interest without an informed, written consent waiver as to the conflict, properly places the burden upon the firm that is subject to disqualification.

Here, not only is the instant matter substantially related to those in which Keller previously represented USAA CIC and its affiliated entities, but Keller's original motion and the trial court applied the wrong standards to assess a conflict of interest. USAA CIC need not prove that actual confidences were divulged (although they were); Keller must establish that such matters were not somehow substantially related and it simply cannot.

To require otherwise, or to develop a different disqualification procedure, would create an unwarranted process that not only contradicts the RPC, but also abrogates the duties of attorney loyalty and ethical considerations onto the very clients whom Washington State attorneys are sworn to protect. At Keller's behest, Petitioners wrongly seek to shift the burden in establishing a conflict exists onto its former client, USAA CIC.

3. Washington Rules of Professional Conduct Govern and Case Precedent Properly Places the Burden Upon Keller and Supports Disqualification.

In *FMC Techs., Inc. v. Edwards*, 420 F. Supp. 2d 1153 (W.D. Wash. 2006), the Western District analyzed former-client conflicts 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.’” (*FMC 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. Imputation was emphasized on the record below by USAA CIC and within Division I's decision to disqualify Keller. 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 – and any duty to demonstrate an exception or curable remedy to *any potential conflict* rests – and should remain to be impressed – upon the lawyer or firm against whom disqualification is sought. USAA CIC has done nothing wrong and is not upheld to the attorney ethical standards of Keller in undertaking client engagements and practicing law.

Keller largely unopposed the facts of its prior client representation.

² Again, in *EMC Techs., Inc.*, 420 F. Supp. 2d 1153 (W.D. Wash. 2006) the Western District of Washington Court 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)).)

USAA CIC voiced its opposition to Keller from the onset, signaling how a true conflict existed. The crux of the Petition wrongly attempts to now shift 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.

To shift the burden onto the very client who voices that a potential conflict has arisen inappropriately subjects the former client to unnecessary cost, undue burden, and potentially requires the disclosure of confidences. Keller, as lawyers undertaking the representation here with a potential conflict attached, is primarily responsible to acknowledge, avoid, disclose, and *at the very least make known* any apparent conflicts upon inception. A law firm, like Keller here, should bear any and all burden of demonstrating why a truly conflicting client-representation would be allowed to proceed.

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 the conflict inquiry here and ultimately lead the Court of Appeals to a just disqualification. Among other restrictions, under RPC 1.9 an attorney (or, by extension under RPC 1.10 (*supra*), an *entire firm*) cannot represent a client whose interests are materially adverse to that of a former client *absent informed consent*.

The present case qualifies as a substantially related matter, where representing the Pleins poses a substantial risk that Keller had obtained confidential, factual information regarding the insurer that would materially advance the Pleins' (insured) claim against Keller's former client (insurer).³

³ (*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 from prior firm's (Keller) representation in present litigation for another party (Pleins) against the same firm's former client (USAA CIC)).)

4. Division I Appropriately Interpreted RPC 1.9 and RPC 1.10 Under This Court's Application of the 2006 Amendments and Adopted Comments on Substantially Related Matters.

The Petition at page 11 highlights why Division I's opinion correctly concludes that the terms of RPC 1.9 govern a lawyer's duties to former clients in Washington. Specifically, to prohibit 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 and legal analysis to apply the RPC and Washington precedent in the subject case. There is no support for the Pleins' contention that Division I made a deficient determination to disqualify Keller, nor that it was based upon analysis that was only *legal* in nature.

Before the Court of Appeals' thorough inquiry in ruling to disqualify Keller, precedent on this issue included a line of cases interpreting RPC language prior to this Court's adoption of the 2006 Amendments and Comments. Analysis of the words "substantially related" used within RPC 1.9 is based on the contextual analysis of the facts in a particular case, 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)).)

The "substantially related" test has never related only to whether it is the same defendant or plaintiff in a case – the analysis is more complex and requires peeling back layers of the prior representation and also scrutinizing the entire extent of the current, conflicting representation. The complete analysis properly relates to 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* 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 considered the complex prior relationship between Keller and USAA CIC and its affiliated companies, in addition to the vast amount of information acquired in the 10-year representation. In doing so, it addressed the lower court’s deficient analysis of the immediate conflict and potential harm caused by Keller’s representation of the Pleins.

Here, the Court of Appeals was further 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 this Court’s 2006 adoption of the current version of RPC 1.9 and the associated comments (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 illustrates why its holding, based on 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 above definition and provisions from the comments in this Court’s adoption of the 2006 RPC to conclude that Keller’s current representation of the Pleins in this case and Keller’s prior representation of USAA CIC qualify as being substantially related. (*Id.*) Based on the span of the Keller and USAA CIC relationship, the extent of cases worked upon, and confidences shared to defend first party extracontractual claims, there is but one conclusion: Keller’s representation of the Pleins – now against its former client, USAA CIC – poses a material, *substantial risk that confidential factual information as would normally have been – and was in-fact – obtained in the prior representation would materially advance the client’s (Pleins’) position in the subsequent matter.*

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 its 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 uphold Keller’s disqualification and affirm Division I’s sound decision.

Respectfully submitted,

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A handwritten signature in blue ink, appearing to be 'J. H.', is positioned above a horizontal line.

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

DATED THIS 3rd day of January 2020.

Respectfully submitted,

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