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Court of Appeals: New Standard in Disqualification for Former Client Conflicts

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Division I of the Washington Court of Appeals recently issued a significant decision applying a new standard for former client conflicts in the disqualification context. *Plein v. USAA Casualty Insurance Company*, ___ Wn. App.2d ___, 445 P.3d 574, 2019 WL 3407107 (July 29, 2019), involved an insurance "bad faith" claim by the plaintiff homeowners against their property insurance carrier, defendant USAA, over coverage for a fire and subsequent repairs at their home. After filing their case, the homeowners associated a second law firm that had extensive coverage experience. Until shortly before the lawsuit, the second law firm had been long-time coverage counsel in Washington for USAA. For roughly a decade before, the law firm through multiple lawyers had represented USAA in at least 165 cases—including one involving similar facts to the homeowners' case. During the final two years of the representation alone, the law firm had billed USAA for over 8,000 hours of work. USAA, therefore, objected to the law firm's participation in the new case. The law firm sought a ruling from the trial court that no conflict existed and USAA filed a cross-motion for disqualification. The trial court permitted the law firm to continue, but, on discretionary review, the Court of Appeals reversed.

There was no dispute that USAA was a former client of the law firm by the time the *Plein* case was filed. There was also no dispute that the law firm had not advised USAA on any aspect of the *Plein* case before they went their separate ways. The specific lawyers handling the matter for the Pleins had not been involved in the firm's prior representation of USAA. At the same time, the law firm conceded that its relationship in Washington coverage matters for USAA had been both broad and deep.

The question before the Court of Appeals, therefore, was whether *Plein* was, in the vernacular of the former client conflict rule, RPC 1.9(a),"substantially related" to the work the firm had done for USAA. The Court of Appeals noted that it had historically analyzed that question under a line of Washington Court of Appeals decisions that preceded significant revisions to the RPCs that were adopted by the Washington Supreme Court in 2006. The earlier line compared the present and former matters and attempted to determine whether they were similar enough factually that confidential information from the earlier matter would be material to the later case.

The Court of Appeals reasoned, however, that with the adoption of official comments to the RPCs by the Supreme Court in 2006, it should look to those rather than the Court of Appeals' own earlier line of decisional law in assessing

the issue of substantial relationship. In that regard, Comment 3 to RPC 1.9 reads:

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

The Court of Appeals concluded that the particular relationship between the law firm and USAA in this instance was analogous to the example of the business person in Comment 3 because the law firm had "learned significant confidential information about USAA's strategies for bad faith litigation." 445 P.3d at 580. The Court of Appeals also found that the kind of information the law firm had used went beyond the general information Comment 3 also speaks to and was specific enough to meet the definition of "substantially related." Accordingly, it reversed the trial court and disqualified the law firm.

Plein is a major development in light of the new standard the Court of Appeals adopted for assessing former client conflicts in the disqualification context. At the same time, the depth and length of the law firm's work for USAA combined with their relatively recent parting of the ways suggest that the actual result in *Plein* may be an outlier. It remains to be seen how Comment 3's comparatively indistinct dividing line between general and specific knowledge of a client's so-called "playbook" is developed in other cases lacking *Plein*'s extreme facts. It also remains to be seen how *Plein* influences former client conflict analysis beyond disqualification.

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