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Posted: May 28, 2020

Plein Redux: Supreme Court Reverses Court of Appeals on Disqualification for Former Client Conflict

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Last Fall, the Court of Appeals in *Plein v. USAA Casualty Insurance Company*, 9 Wn. App.2d 407, 445 P.3d 574 (2019), articulated a new—and quite broad—standard on disqualification for former client conflicts. As discussed in my October 3, 2019, NWSidebar post, the Court of Appeals in *Plein* abandoned its long-standing case law- based standard for assessing former client conflicts in favor of looking primarily to the comments to the former client conflict rule—RPC 1.9. That part of *Plein* wasn't particularly controversial because the Court of Appeals' case law-based approach was developed before the Supreme Court adopted official comments to RPC 1.9 in 2006. In applying those comments, however, the Court of Appeals read the standard quite broadly in disqualifying the law firm involved. On May 21, the Supreme Court reversed the Court of Appeals in a unanimous opinion concluding that the law firm should not have been disqualified. 2020 WL 2568541 (Wn. May 21, 2020).

The facts in *Plein* were straightforward. It 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 its own decisional line 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 its own earlier line of decisional law in assessing the issue of substantial relationship. The Court of Appeals analyzed *Plein* primarily under Comment 3 to RPC 1.9. The Court of Appeals read that comment broadly to include situations where a law firm had acquired significant information about the former client's operations even if the new matter was factually distinct—and disqualified the law firm on that basis.

The Supreme Court agreed that the comments now control. It parted company with the Court of Appeals, however, in reading the comments. The Supreme Court noted that under Comment 3 general knowledge of a former client's operations does *not* meet the substantial relationship test. The Supreme Court instead focused on Comment 2, which considers the factual similarity

between earlier and present representations in assessing their "substantial relationship." Interpreting Comment 2, the Supreme Court concluded:

> "[C]omment 2 anticipates the exact situation presented by this case: a lawyer representing a current client against a former organizational client on a 'factually distinct problem' of the same type as the prior representation. And it allows such representation of the current client, despite the objection by the former client. Under this comment 2, [the law firm's] representation of the Pleins is clearly permissible." *Id*. at *6.

Ironically, although the Supreme Court based its decision on Comment 2, its analysis under that comment wasn't all that different than the fact-driven test the Court of Appeals' prior case law-based standard used.

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