Coverage Counsel as Witness: The Fine Line Between "Claims Handling" and "Legal Advice"

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"Changing Sides": Representations Against Former Clients, Disqualification, and ABA Model Rule 1.9(a)

By Neil B. Posner[1]

I. INTRODUCTION

Can a lawyer ever "switch sides"? Having previously represented one client, may a lawyer in the future represent a new client in a matter adverse to the old client? If so, how? If not, why not?

In particular, can a lawyer who previously represented an insurance company in a matter represent a policyholder in a later matter that is adverse to that insurance company?

As we shall see, these are difficult questions, which implicate the ABA Model Rule 1.9(a) and the Comments to that Rule. Reaching the wrong answer to these questions can lead to serious consequences, including professional discipline[2] and the possibility of disqualification.[3] These questions are of particular interest to coverage lawyers, as two recent cases demonstrate.

II. RECENT CASES

In 2020, two state supreme courts, issuing opinions two weeks apart, confronted disqualification motions brought by insurers against lawyers who formerly had represented those insurers, but were now representing insureds in cases adverse to them.

In the first of these two cases, the Colorado Supreme Court held that a lawyer who previously represented an insurer should be disqualified from later suing his former client on behalf of an

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The intent of this article is to bring the issues discussed in it to the attention of the readers. It does not constitute legal advice. The opinions expressed herein are solely those of the author and not necessarily those of the author's law firm or its clients. Please do not drive motor vehicles or operate dangerous machinery after reading this article.

[2] *See*, *e.g.*, N.C. Bar Ass'n v. Sossomon, 197 N.C. App. 261, 266-67, 676 S.E.2d 910 (2009) (lawyer who previously represented seller of land in drafting of restrictive covenant disciplined for, in part, violation of Rule 1.9 for materially adverse representation on the very same matter by attempting to negotiate a waiver of the restrictive covenant from the former client for a new client, without getting a waiver of the conflict of interest or even disclosing that he was representing the other party).

[3] *See* Persichette v. Owners Ins. Co., 2020 CO 33, 462 P.3d 581 (2020), discussed more fully *infra*.

insured.[4] Two weeks later, the Washington State Supreme Court held that disqualification was not required.[5] In both cases, the issue required the courts to interpret their respective state's Rule of Professional Conduct 1.9(a), and, in particular, the meaning of the phrase "substantially related."

III. ABA MODEL RULE 1.9(a)

A. The Rule and its Development

ABA Model Rule of Professional Conduct 1.9 is titled "Duties to Former Clients." For purposes of this discussion, it is Rule 1.9(a) that is most pertinent. It reads:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.[6]

In both cases, all parties conceded that the present and former matters were not "the same." Accordingly, the dispute turned on whether the matters were "substantially related" as to implicate Rule 1.9(a). As will be discussed more fully below, the question as to the interpretation of the meaning of the phrase "materially adverse" also must be examined.

According to the ABA's Standing Committee on Ethics and Professional Responsibility, the history of this Rule can be found in Canon 6 of the ABA's 1908 Canons of Ethics.[7] That Canon prohibited, in pertinent part, "the subsequent acceptance of retainers or employments from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."[8] According to ABA Formal Opinion 497:

> Under the ABA Model Code of Professional Responsibility, "there was no direct corollary to" Model Rule 1.9(a). Instead, "former client conflicts were sometimes treated under Canon 9 of the Code under the appearance of impropriety standard."[9]

The current Rule was adopted in August 1983, as revised as part of the Ethics 2000 revisions.[10]

B. "formerly represented"

1. Generally

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[4] *Id.*

[5] Plein v. USAA Cas. Ins. Co., 195 Wash. 2d 677, 463 P.3d 728 (2020).

[6] Not all jurisdictions have adopted this Rule word-for-word. Accordingly, please check your own jurisdiction's Rules for the controlling wording.

[7] *See* ABA Formal Opinion 497 (Feb. 10, 2021).

[8] *Id.*

[9] *Id.*, quoting Peter Geraghty, *Ethics Tip-August 2017*, A.B.A. (Aug. 1, 2017), https://www.americanbar.org/groups/professional_responsibility/services/ethicssearch/ethicstipaugust2017/.

[10] ABA Formal Op. 497 at 2-3.

Although in *Persichette* and *Plein*, the parties conceded that the attorney-client relationship between the sought-to-be-disqualified lawyers and the insurers had ended, the question of whether the moving party is (or is not) a "former client" is not always straightforward.

The first question under this analysis, then, is: was there ever a lawyer-client relationship?[11] According to the Restatement,

> A relationship of client and lawyer arises when:
>
> (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
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> (a) the lawyer manifests to the person consent to do so; or
>
> (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or
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> (2) a tribunal with power to do so appoints the lawyer to provide the services.[12]

2. Former Client is an Organization

Needless to say, if there was an engagement letter or other written evidence of an intention to form an attorney-client relationship, the question should end there. When the lawyer represented an organization, however, the question as to who, exactly, is the former client for Rule 1.9 purposes is not always so clear. These questions can arise in three situations: (1) corporate affiliates, (2) organizations and their individual constituents, and (3) mergers and asset sales. Of these, the first

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[11] *See*, *e.g.*, City of Waukegan v. Martinovich, No. 03 C 3984, 2005 WL 3465567 (N.D. Ill. Dec. 16, 2005) (disqualifying defendant's lawyer in environmental cleanup action because plaintiff employed her in remediation project; nature of her work belied argument she had been nonlegal "consultant"); Stratagene v. Invitrogen Corp. 225 F. Supp. 2d 608 (D. Md. 2002) (former associate's "discrete and limited" administrative work on plaintiff's patent application sufficed to create lawyer-client relationship disqualifying her from representing defendant that plaintiff was suing for infringement of related patent); *In re* Estate of Klehm, 842 N.E.2d 1177 (Ill. App. Ct. 2006) (law firm that represented sons solely in their roles as beneficiaries of father's estate *not* disqualified from representing executor of mother's estate in citation proceeding against sons); *In re* James, 679 S.E.2d 702 (W. Va. 2009) (lawyer who agreed to represent defendant in drunk-driving accident after meeting with both defendant's and victim's parents did *not* form attorney-client relationship with victim's parents).

[12] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000). For additional insight into how at least one court analyzed a situation where the corporation argued that it was a current client of opposing counsel, and finding such argument unavailing, *see* Rohm and Haas Co. v. Dow Chemical Co., Civil Action No. 4309-CC, 2009 WL 445609 (Del. Ch. Feb. 12, 2009) (Dow failed to convince court that it is a current client of opposing counsel; further finding that opposing counsel was not in possession of confidential information obtained during its representation of Dow that will materially enhance the position of Rohm and Haas in this litigation.). The *Rohm and Haas* court stated further that "[w]hen making this determination [whether to disqualify], the Court must weigh the interest of the former client in protecting confidences against the prejudice that will be caused to the current client if the firm were disqualified [citing Express Scripts, Inc. v. Crawford, Civil Action No. 2663-N, 2007 WL 417193 *1 (Del. Ch. Jan. 25, 2007)]. I am also mindful of the skepticism with which courts view motions for disqualification. Because of the risk that the ethical rules may be 'invoked by opposing parties as procedural weapons,' courts impose a significant burden on the party seeking disqualification. [Citing Appeal of Infotechnology, Inc., 582 A.2d 215, 216-17 (Del.1990)]."

and third have the greater potential to be at issue when the organization purporting to be a former client is an insurance company. For guidance on these issues, Model Rule 1.13 (Organization as Client) comes into play, which provides in pertinent part: "(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." The Annotated Model Rules of Professional Conduct offers the following examination of the issue:

> **Lawyer Represents Organization**
>
> Unless a lawyer has also formed a lawyer-client relationship with a constituent, Rule 1.13 clarifies that a lawyer employed or retained by an organization represents the organization itself, not the individual constituents who act for it. Thus, the Model Rules embrace the "entity theory" of organizational representation. Rule 1.13(a); *accord Restatement (Third) of the Law Governing Lawyers* § 96(1) cmt. b (2000) ("The so-called 'entity' theory of organizational representation . . . is now universally recognized in American law, for purposes of determining the identity of the direct beneficiary of legal representation of corporations and other forms of organizations."); *see also Murray v. Metro. Life Ins. Co.*, 583 F.3d 173 (2d Cir. 2009) (lawyer for mutual insurance company represents entity, not policyholders); ABA Formal Ethics Op. 08-453 (2008) (law firm's ethics counsel typically represents firm itself, not individual lawyers within firm); Alaska Ethics Op. 2012-3 (2012) (lawyer for corporation not lawyer for constituents without more); Colo. Ethics Op. 120 (2008) (organization's lawyer does not automatically represent its constituents); N.J. Ethics Op. 664 (1992) (lawyer who represents corporation in collections matters has lawyer-client relationship with corporation, not with corporation's credit manager). *See generally* 3 Ronald E. Millen & Jeffrey M. Smith, *Legal Malpractice* § 26:5 (2009) (discussing potential conflicts of entity lawyer in numerous contexts, including corporate formation, closely held corporations, and shareholder derivative actions); D. Ryan Nayar, *Almost Clients: A Closer Look at Attorney Responsibility in the Context of Entity Representation*, 41 Tex. J. Bus. L. 313 (Winter 2006); Ellen A. Pansky, *Between an Ethical Rock and Hard Place: Balancing Duties to the Organizational Client and Its Constituents*, 37 S. Tex. L. Rev. 1167 (Oct. 1996); George Rutherglen, *Lawyer for the Organization: An Essay on Legal Ethics*, 1 Va. L. & Bus. Rev. 141 (Fall 2006); Joan C. Rogers, "Corporate Lawyers Must Take Steps to Minimize Client Identity Problems," *ABA/BNA Lawyers' Manual on Professional Conduct*, 29 Law. Man. Prof. Conduct 624 (Current Reports, Sept. 25, 2013); William H. Simon, *Whom (or What) Does the Organization's Lawyer Represent? An Anatomy of Intraclient Conflict*, 91 Cal. L. Rev. 57 (Jan. 2003).[13]

But as we know, many insurance companies are members of larger corporate families. Does a lawyer that represents (or formerly represented) one affiliated member of a larger corporate organization represent the other affiliated members, or the larger corporate organization itself, for purposes of this analysis? Again, we turn to the Annotated Model Rules of Professional Conduct for further examination:

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[13] ELLEN J. BENNETT & HELEN W. GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 236 (9th ed. 2018) (hereinafter ANNOT. M.R.) (ellipsis in original).

Corporate Families

By representing one entity the lawyer does not thereby become the lawyer for affiliated entities. Rule 1.7, cmt. [34] ("A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary."); *see also* ABA Formal Ethics Op. 95-390 (1995) ("A lawyer who represents a corporate client is not by that fact alone necessarily barred from a representation that is adverse to a corporate affiliate of that client in an unrelated matter."). This general rule, however, will give way whenever there is (1) an agreement to the contrary, (2) substantial organizational overlap, or (3) shared confidential information. Rule 1.7, cmt. [34] (Lawyer may need client consent for; or be barred from, representation adverse to affiliate when "the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client"); *see also GSI Commerce Solutions, Inc. v. BabyCenter, LLC*, 618 F.3d 204 (2d Cir. 2010) (lawyers for parent company disqualified from representation adverse to subsidiary in light of financial interdependence and "substantial operational commonality" between parent and subsidiary, including wholly owned status of subsidiary, shared in-house legal department and other services, such as accounting and human resources, and management overlap); *Boynton Beach Firefighters' Pension Fund v. HCP, Inc.*, No. 3:16-cv-1106, 2017 WL 5759361, 2017 BL 425053 (N.D. Ohio Nov. 28, 2017) (no disqualification); *Atlantic Specialty Ins. Co. v. Premera Blue Cross*, No. C15-1927-TSZ, 2016 WL 1615430, 2016 BL 129407 (W.D. Wash. Apr. 22, 2016) (because of shared insurance claims handling, firm disqualified); *Lennar Mare, LLC v. Steadfast Ins. Co.*, 105 F. Supp. 2d 1100 (E.D. Cal. 2015) (entities too close, firm disqualified); *HLP Props., LLC v. Consol. Edison Co. of N.Y., Inc.*, No. 14 Civ. 01383 (LGS), 2014 WL 5285926, 2014 BL 289700 (S.D.N.Y. Oct. 16, 2014) (law firm represented parent while suing subsidiary; although parent and subsidiary were one for conflicts purposes, court denied disqualification because prejudice to client outweighed harm to parent); *Standard Ret. Servs., Inc. v. Ky. Bancshares, Inc.*, No. 5:14-026-DCR, 2014 WL 4783016, 2014 BL 276266 (E.D. Ky. Sept. 24, 2014) (lawyer representing one subsidiary of parent not disqualified from opposing another subsidiary of that same parent by virtue of that relationship alone); N.Y. City Ethics Op. 2007-3 (2007) (explaining relevant factors to discern "whether the affiliate is de facto a current client"); Pa. Ethics Op. 01-62 (2001) (representation of multiple franchisees of franchisor in connection with advice on leases poses no apparent Rule 1.7 conflict). *See generally* 3 Ronald E. Millen & Jeffrey M. Smith, *Legal Malpractice* § 26:5 (2009) (discussing cases and ethics opinions in parent-subsidiary context); Darian Ibrahim, *Solving the Everyday Problem of Client Identity in the Context of Closely Held Businesses*, 56 Ala. L. Rev. 181 (Fall 2004); Michael Sacksteder, *Formal Opinion 95-390 of the ABA's Ethics Committee: Corporate Clients, Conflicts of Interest, and Keeping the Lid on Pandora's Box*, 91 Nw. U.L. Rev. 741 (Winter 1997); John Steele, *Corporate Affiliate Conflicts: A Reasonable Expectations Test*, 29 W. St. U.L. Rev. 283

(Spring 2002); Charles W. Wolfram, *Corporate-Family Conflicts*, 2 J. Inst. For Study Legal Ethics 295 (1999).[14]

The above annotation should be of particular interest to larger corporate-family insurers that would seek to strengthen their future disqualification positions, and of equal interest to lawyers who may seek to "switch sides" at some future point. The comment that the general rule—that representation of an organization does not necessarily bar a lawyer from taking on a representation that is adverse to an affiliate of that organization—must "give way whenever there is (1) an agreement to the contrary, (2) substantial organizational overlap, or (3) shared confidential information."[15] In every disqualification matter, each of those three prongs should be subject to discovery and scrutiny. Insurers that arguably fall within this "corporate family" issue should be especially concerned that their engagement agreements with their outside counsel be explicit with respect to the first of these prongs.

Of interest are those cases that considered the extent to which information is shared among the affiliates, such as *GSI Commerce Solutions*, *Lennar Mare*, and *Premera Blue Cross*, and found those facts to justify disqualification. And of equal interest are those cases that did *not* disqualify, such as *Boynton Beach* and *Standard Retirement Services*.

3. Should Violation of Rule 1.9(a) Require Disqualification?

Finally, there is the *HLP Properties* case, in which the court "denied disqualification because prejudice to client outweighed harm to parent." This factor—this balancing test between the rights of the former client to prevent former counsel from switching sides versus the rights of a client to counsel of its own choosing—can be a deciding factor in a close disqualification case. As the Annotated Model Rules explains:

Disqualification

> Violation of an ethics rule is not itself a sufficient basis for disqualification. *See, e.g.*, *Dixon v. Golden-Masano-Bradley Law Firm*, Civ. No. 2:06-0392, 2006 WL 1737767, 2006 BL 71854 (E.D. Pa. June 23, 2006) ("disqualification depends upon the requirements and purpose of the rule and how it is applied in particular factual circumstances"); *Ridgeway Nursing & Rehabilitation Facility, LLC v. Lane*, 415 S.W.3d 635 (Ky. 2013) (refusing to issue mandamus disqualifying lawyer for obtaining evidence in violation of Rule 4.2 when other remedies, such as excluding improperly obtained evidence, were available; lawyer may still be subject to discipline); *Schuff v. A.T. Klemens & Son*, 16 P.3d 1002 (Mont. 2000) (although ethics rule violation not prima facie grounds for disqualification, it is additional evidence that may "tip the scales"; lawyer who is not disqualified because court finds no prejudice may still be subject to discipline); *Musa v. Gillette Commc'ns*, 641 N.E.2d 233 (Ohio Ct. App. 1994) (violation of ethics code should not result in disqualification unless "absolutely necessary"; trial

[14] ANNOT. M.R. 238-39.

[15] *Id.*

> court's order of disqualification "in order to prevent the possibility of an ethical violation" was abuse of discretion).[16]

Accordingly, the violation of Rule 1.9(a), standing alone, may not be sufficient to justify disqualification. The needs of the nonmoving client must be considered, as well as the motives of the party moving for disqualification: As one court has explained:

> The right of a party to choose his or her own attorney is important, but it must be balanced against the need to maintain "the highest ethical standards" that will preserve the public's trust in the bar and in the integrity of the court system. [*Killian v. Iowa Dist. Ct.*, 452 N.W.2d 246, 430 (Iowa 1990)]. In balancing these interests, a court must also be vigilant to thwart any misuse of a motion to disqualify for strategic reasons. *See id.*; *accord* 1 GEOFFREY C. HAZARD, JR. AND W. WILLIAM HODES, THE LAW OF LAWYERING § 10.2, at 10–10 (3d ed. 2004 Supp.) (stating "policymaking with respect to conflicts of interest regulation must take account of the opportunities for manipulation and tactical infighting").[17]

Assuming, then, that the lawyer and the former client entered into a lawyer-client relationship, and the motives on the part of the party moving for disqualification survive scrutiny, it becomes necessary to analyze whether the current matter and the former matter are "substantially related" and, if they are, are the parties "materially adverse."

C. "substantially related"

1. Test

The test for whether the current and the former matters are substantially related is the product of older case law. In the case of *T.C. Theatre Corp. v. Warner Bros. Pictures*,[18] the court held that "the former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him."[19] The modern Rule 1.9(a) has adopted this concept. Comment [3] to Rule 1.9, adopted in 2002, provides that matters are "substantially related" for purposes of the 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."[20] According to the Annotated Model Rules, "[h]undreds of reported decisions have considered application of the 'substantial relationship' test, almost always in a disqualification context, and the variety of results is wide."[21] The cases ordering disqualification include:

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[16] *Id.* at 10-11.

[17] Bottoms v. Stapleton, 706 N.W.2d 411, 415 (Iowa 2005).

[18] 113 F. Supp. 265 (S.D.N.Y. 1953).

[19] *Id.* at 268.

[20] ANNOT. M.R. at 182.

[21] *Id.* at 188-89.

- *Holmes v. Credit Protection Ass'n*, No. 1:17-cv-3995-WTL-MPB, 2018 WL 5777324, 2018 BL 406262 (S.D. Ind. Nov. 2, 2018 (disqualification ordered; representations involved overlapping issues and lawyer worked on prior matter for sixty hours, had access to file for several years and consulted with company on strategy)

- *Acad. Of Allergy & Asthma in Primary Care v. La. Health Serv. & Indem. Co.*, Civ. No. 18-399, 2018 WL 4739690, 2018 BL 361993 (E.D. La. Oct. 2, 2018) (earlier negotiations with state medical board *substantially related to this suit for insurance coverage*)

- *Costello v. Buckley*, 199 Cal. Rptr. 3d 891 (Ct. App. 2016) (lawyer defending a collection case had previously represented the plaintiff in easement matter; there was substantial relationship between matters because lawyer would have learned about plaintiff's relationship with defendant)

And cases *not* ordering disqualification include:

- *TWiT, LLC v. Twitter, Inc.* No. 18-cv-00341-JSC, 2018 WL 2470942, 2018 BL 194996 (N.D. Cal. June 1, 2018) (firm may represent defendant in suit for trademark infringement and breach of contract although it previously represented plaintiff in matter involving third party's threatened patent suit against it; no substantial relationship between matters)

- *Moore v. Olson*, 351 P.3d 1066 (Alaska 2015) (earlier negotiation of airport hangar lease not substantially related to enforcement of business break-up settlement agreement)

- *McCleary v. City of Des Moines Zoning Bd.*, 900 N.W.2d 617 (Iowa Ct. App. 2017) (earlier preparation of letter of intent for city not substantially related to this zoning challenge)

- In re *Catherine A.*, 65 N.Y.S.3d 339 (App. Div. 2017) (custody case in which lawyer is adverse to mother not substantially related to earlier criminal drug case in which lawyer represented mother)

- *Adams Creek Assocs. v. Davis*, 652 S.E.2d 677 (N.C. Ct. App. 2007) (suit for trespass to property not substantially related to earlier suit to establish ownership of same property)

Factors that led courts to order disqualification appear to go to the depth of the prior engagement as well as to whether there was substantial similarity between the current and the former matters. Where the similarities appeared to be less-than substantial, the courts appear to disfavor disqualification.

As will be discussed below with respect to the *Persichette* and *Plein* cases, the degree of similarity between the current and former matters, as well as the depth of the former lawyers' involvement with the respective insurers, led to different results. The next prong—the passage of time—also was a factor that led to different results. And, as more fully discussed below, whether the courts gave sufficient weight to the "materially adverse" prong of the Rule is a valid question.

2. Passage Of Time

Even when the current and former matters appear to be substantially similar, a lengthy passage of time between them has been a factor against disqualification. As Comment [3] provides,

"[i]nformation 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."[22] Nevertheless, in at least four cases, the passage of ten years or more did *not* preclude a finding of substantial relationship. *See*, *e.g.*, *Fallacaro v. Fallacaro*,[23] *Niemi v. Girl Scouts of Minnesota*,[24] *Gjoni v. Swan Club*,[25] and In re *Gadbois*.[26] Accordingly, even a substantial passage of time may not avoid disqualification.

D. "materially adverse"

In addition to the requirement regarding the "same or substantially related" prong, Rule 1.9(a) also bars a lawyer from representing a client in a matter adverse to a former client when the current client's interests "are materially adverse to the interests of the former client."[27] The question of whether interests are "materially adverse" has led to confusion, according to the ABA's Standing Committee on Ethics and Professional Responsibility, which issued its Formal Opinion 497 on February 10, 2021. The Committee summarized the issue as follows:

> Rule 1.9(a) and 1.18(c)[28] address conflicts involving representing a current client with interests that are "materially adverse" to the interests of a former client or prospective client on the same of a substantially related matter. [Footnote omitted.] But neither Rule specifies when the interests of a current client are "materially adverse" to those of a former client or prospective client. Some materially adverse situations are typically clear, such as, negotiating or litigation against a former or prospective client on the same or a substantially related matter, attacking the work done for a former client on behalf of a current client, or, in many but not all instances, cross-examining a former or prospective client. [Footnote omitted.] Where a former client is not a party to a current matter, such as proceedings where the lawyer is attacking her prior work for the former client, the adverseness must be assessed to determine if it is material. *General economic or financial adverseness alone does not constitute material adverseness*.[29]

The Committee then states that the purpose of its Opinion is to address "how to construe the language 'interests [that] are materially adverse to the interests of the former client' in Rule 1.9(a) . . . ."[30] Because, in the context of insurance-coverage disputes, the question of whether the current and former clients' interests are "materially adverse" typically will appear to be obvious. Yet, according to the Formal Opinion, the analysis is more susceptible to nuance than one might initially assume. Of

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[22] *Id.* at 182.

[23] No. FA 980719606S, 1999 WL 241743 (Conn. Super. Ct. Apr. 8, 1990).

[24] 768 N.W.2d 385 (Minn. Ct. App. 2009).

[25] 2 N.Y.S.3d 341 (App. Div. 2015).

[26] 786 A.2d 393 (Vt. 2001).

[27] ANNOT. M.R. at 181.

[28] Rule 1.18 concerns duties to prospective clients, which is beyond the scope of this article.

[29] ABA Formal Op. 497, at 1 (Feb. 10, 2021) (emphasis added).

[30] *Id.* at 2.

particular interest to practitioners in the insurance-coverage space is the following analysis, which is quoted here verbatim (with omissions noted):

> **II. Subsequent interpretation of the language "materially adverse to the interests of the former client" in Rule 1.9**
>
> Subsequent to the Ethics 2000 amendments, courts, regulatory authorities, and ethics scholars have interpreted the meaning of "material adverseness" in Rule 1.9. These authorities have generally concluded that "material adverseness" includes, but is not limited to, matters where the lawyer is directly adverse on the same or a substantially related matter. While material adverseness is present when a current client and former client are directly adverse, material adverseness also can be present where direct adverseness is not.
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> However, "material adverseness" does *not* reach situations in which the representation of a current client is simply harmful to a former client's economic or financial interests, without some specific tangible direct harm. In *Gillette Co. v. Provost*,[31] the court concluded that "[w]ith respect to the 'material adverse' prong of Rule 1.9, representation of one client is not 'adverse' to the interests of another client, for the purposes of lawyers' ethical obligations, merely because the two clients compete economically." As noted in New York State Bar Association Ethic Opinion 1103, "[j]ust as competing economic interests do not create [a Rule 1.7 conflict] so they do not create a 'material adverse' interest within the meaning of Rule 1.9(a)."[32] Thus, a lawyer does not have a Rule 1.9 conflict solely because the lawyer previously represented a competitor of a current client whose economic interests are adverse to the current client. Material adverseness, referred to by the *Gillette* court, "requires a conflict as to the legal right and duties of the clients, not merely conflicting or competing economic interests."[33]

Disputes between policyholders and insureds are virtually certain to satisfy the definition of "material adversity." It is highly unlikely that such a dispute would involve "conflicting or competing economic interests." But disputes between insurers might involve such a dispute. Likewise, a dispute between insureds with respect to the same insurance coverage, while appearing on its surface to involve "a conflict as to the legal right and duties of the clients," might also—upon further examination—involve such a dispute. Accordingly, the need to undertake this analysis cannot be ignored.

As the Opinion goes on to say:

> As the Court of Appeals for the Eighth Circuit explained in *Zerger & Mauer LLP v. City of Greenwood*:
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> > Generally, whether a former client and current client have materially adverse interests is not a difficult question, as the situation usually

[31] 2016 WL 2610677 (Mass. Feb. 11, 2019).

[32] N.Y. State Bar Ass'n Comm'n on Prof'l Ethics Op. 1103 (2016) (edits in Formal Opinion 497).

[33] ABA Formal Op. 497 at 2 (with citation to *Gillette* at 2016 WL 2610677 at *3).

> involves a new client suing a former client. However, the question is more complicated when a former client, "although not directly involved in the [current] litigation may be affected by it in some manner. When such is the case . . . a fact-specific analysis is required in order to evaluate 'the degree to which the current representation may actually be harmful to the former client.' This analysis focuses on 'whether the current representation may cause legal, financial, or other identifiable detriment to the former client.'"[34]
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> Such detriment has it [*sic*] limits, otherwise the concept of materiality would have no meaning. Further, in the absence of direct adverseness, generalized financial harm or a claimed detriment that is not accompanied by demonstrable harm to the former or prospective client's interests does not constitute "material adverseness."[35]

The Opinion provides several types of situations in which "material adverseness" may be found, two of which are (in this author's opinion) applicable to insurance-coverage disputes.

A. Suing or negotiating against a former client

> Suing a former client or defending a new client against a claim by a former client (*i.e.*, being on the opposite side of the "v" from former client) on the same or on a substantially related matter is a classic example of representing interests that are directly adverse and therefore "materially adverse" to the interests of a former client.[36]

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[34] Zerger & Mauer LLP v. City of Greenwood, 751 F.3d 928, 933 (8th Cir. 2014) (internal citations omitted and ellipses in original). The ABA Formal Opinion 497, at footnote 12, also cites "Plotts v. Chester Cycles LLC, 2016 WL 614023 *7-8 (D. Ariz. Feb. 16, 2016) (stating that "[w]hile the existence of possible personal liability [as to a former client] would establish material adversity [in a substantially related matter], the non-existence of personal liability does not necessarily dictate a different result."). In *Plotts*, an adverse financial impact on an entity in which the former client had an ownership interest and that had been the subject of the prior representation constituted material adverseness. *See also*, *In re* Carpenter, an individual met with a lawyer about representation in a matter adverse to the Christian Science Church of Boston. Through extensive research, the prospective client had discovered that the mineral rights to 300 acres of North Dakota land had been left by a decedent to the Church and hoped for a fee or other compensation from the Church for bringing the information to its attention. The individual briefed the attorney on his research and conclusions. The attorney, after declining to represent the individual, promptly took the information that he had been given and contacted the Church, offering to represent it with respect to the mineral rights. The lawyer's representation of the Church was found to be "materially adverse" to the prospective client's interests. Carpenter was found to have violated Rule 1.18 and was suspended for 90 days." ABA Formal Op. 497 at 4 n.12. On a personal note, I have seen just such a fact-pattern in my practice and, upon learning what opposing counsel had done, my client (who had been opposing counsel's prospective client) referred opposing counsel to the applicable disciplinary board.

[35] ABA Formal Op. 497 at 4.

[36] At this point, footnote 13 to the Formal Opinion cites, e.g., "Persichette v. Owners Ins. Co., 462 P.3d 581, 585-86 (Colo. 2020) (law firm representing plaintiff in lawsuit against former client was "materially adverse" to the interests of such former client); Anderson & Anderson LLP v. N. Am. Foreign Trading Corp., 3 N.Y.S.3d 284 (Sup. Ct. 2014) ("direct adversity in litigation meets the definition of 'materially adverse interests.' "); Jordan v. Phila. Housing Auth'y, 337 F. Supp. 2d 666, 672 (E.D. Pa. 2004) ("There is no situation more 'materially adverse' than where a lawyer's former client is in a suit against lawyer's current client . . ."");

In assessing whether a lawyer has represented parties on both sides of the "v," the analysis of who or what the lawyer at issue formerly represented may be important.[37] In addition, being across the table, so to speak, from a former client and negotiating against that former client in transactional matters typically constitutes "material adverseness."[38]

* * *

C. Examining a former client

Rule 1.9(c)(1) prohibits using information from a former client "to the disadvantage of the former client." If a lawyer must use information relating to the former representation to the disadvantage of a former client to competently examine the former client, the lawyer has a conflict, unless that information has become "generally known." [Footnote omitted.] However, even if a lawyer ethically can use the information or does not need to use information, the lawyer still may have a conflict of interest in examining a former client under Rule 1.9(a) if the former client's interests are "materially adverse" to the current client *and* the current matter is substantially related to the prior matter. Courts have sometimes found "material adverseness" when the lawyer proposes to examine a former client, where no information from the prior representation will be used.[39]

Disciplinary Counsel v. Broyles, 49 N.E.3d 1238 (Ohio 2015) (lawyer disciplined for representing bank at a default hearing in a foreclosure case and then seeking to vacate the default on behalf of the property owners)." As we shall see, below, the most likely reason that the Formal Opinion did not cite the *Plein* case was because the *Plein* court, by not finding a "substantial relationship," never reached the "materially adverse" issue.

[37] Here, footnote 14 to the Formal Opinion cites "Delso v. Trustees for the Retirement Plan for Hourly Employees of Merck, 2007 WL 766349 *10-11 (D.N.J. Mar. 6, 2007) (finding no past attorney-client relationship between current lawyer for plaintiff and the defendant)." ABA Formal Op. 497 at 5 n.14.

[38] Footnote 15 to the Formal Opinion cites "Sylvia Stevens, *Conflicts Part II: Former Client Conflicts*, OR. STATE BAR BULLETIN (Dec. 2009) ('Where the current and former clients are opposing parties in litigation or in a transaction, the adversity of their interests is obvious.'), https://www.osbar.org/publications/bulletin/09dec/barcounsel.html." ABA Formal Op. 497 at 5 n.15.

[39] ABA Formal Op. 497 at 7. Footnote 30 to the Formal Opinion states, "In Illaraza v. Hovensa LLC, 2012 WL 1154446 6-10 (D.V.I. Mar. 31, 2012), the plaintiffs' lawyer was disqualified from representing plaintiffs in action against their employer and others for wrongful discharge and defamation stemming from an incident in which plaintiffs and another employee-manager were prosecuted for grand larceny for stealing employer's property. The charges against the two plaintiffs were dismissed, but the third individual pled guilty to possession of stolen property. The plaintiffs' lawyer had represented the employee-manager in his criminal case. In the wrongful discharge and defamation action, the plaintiffs contended in their summary judgment submission that the employee-manager defamed them. The court found that this constituted 'material adverseness' that could not be alleviated by various promises by the plaintiffs' lawyer not to use confidential information against the former client, employee-manager. The court rejected the lawyer's offer not to cross examine her former client on any topics in which the lawyer had confidential information." While this is an interesting fact-pattern, there are two issues that compel me to comment. One is that the ABA Commission's reliance on this case to support an argument that "[c]ourts have sometimes found 'material adverseness' when the lawyer proposes to examine a former client, where no information from the prior representation will be used", while not misplaced, is not very helpful either. Rule 1.9(c) *does* prohibit a "lawyer who has formerly represented a client in a matter or

The Formal Opinion concludes, stating:

> "Material adverseness" under Rule 1.9(a) . . . exists where a lawyer is negotiating or litigating against a former . . . client or attacking the work done for the former client on behalf of a current client in the same or a substantially related matter. [Footnote omitted.] It also exists in many but not all instances, where a lawyer is cross-examining a former . . . client. "Material adverseness" may exist when the former client is not a party or a witness in the current mater if the former client can identify some specific material legal, financial, or other identifiable concrete detriment that would be caused by the current representation. However, neither generalized financial harm nor a claimed detriment that is not accompanied by demonstrable and material harm or risk of such harm to the former or prospective client's interests suffices.[40]

Here, then, is the clearest advice the Commission provides; namely:

- The current and former matters must be the same or "substantially related" before undertaking the "material adverseness" analysis.

- Assuming that the same or "substantially related" prong has been satisfied, then "material adverseness" is going to exist "where a lawyer is negotiating or litigating against a former . . . client or attacking the work done for the former client on behalf of a current client . . . ."

- Even if the lawyer is *not* negotiating or litigating against a former client, "material adverseness" may exist where a lawyer is cross-examining a former client.

- Further, even if the lawyer is *not* negotiating or litigating against a former client, "material adverseness" may exist if the former client is not a party or a witness in the current matter but can identify some specific material legal, financial, or other identifiable concrete detriment that the current representation would cause, the burden being on the former client to do so.

- But generalized financial harm, nor a claimed detriment not accompanied by demonstrable and material harm or risk of harm to the former client will not result in disqualification.

IV. APPLICATION OF THE RULE TO THE RECENT CASES

In both cases, the lawyer representing the insured formerly represented the insurer. One state supreme court disqualified the lawyer; the other did not. The result in both cases turned on the

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whose present or former firm has formerly represented a client in a matter" from "us[ing] information relating to the representation to the disadvantage of the former client . . . ." In the *Illaraza* case, the lawyer expressly promised *not* to use such information. Second, if this is the only such case that the Commission could find, out of a federal district court sitting in the United States Virgin Islands, then it is not unfair to say that it might be wiser on the part of the practitioner to give more weight to the exact wording of Rule 1.9(c) in his or her jurisdiction than to the holding of this case *unless* the facts of the practitioner's case is on all fours with the facts of *Illaraza*.

[40] ABA Formal Op. 497 at 8-9 (ellipses added).

respective courts' analyses of the jurisdiction's Rule 1.9(a), the comments to that Rule, and the specific facts in the records.

In the Colorado case, *Persichette v. Owners Insurance Company*,[41] insured's counsel previously had been the insurer's "longtime former counsel." Notwithstanding the trial court's finding of "numerous and substantial" similarities between the current and former representations, the trial court concluded that the law firm's disqualification was *not* warranted and that the insured was "entitled to counsel of his choice."[42] The supreme court held that the record warranted disqualification.

In the Washington State case, counsel for the insured previously had defended the insurer in bad-faith litigation for over ten years.[43] Yet, the court held that "USAA fails to show a 'substantial risk' that [insured's counsel] obtained 'confidential factual information' that would 'materially advance' the Pleins' case."[44]

Why the different result?

In both cases, the two law firms previously (but no longer) represented the respective insurers. This fact implicated Rule 1.9(a) of each jurisdiction's Rule of Professional Conduct. Both jurisdictions adopted the ABA Model Rule. Further, in both cases, all parties conceded that the present and former matters were not "the same"; the dispute was whether the matters were "substantially related" as to implicate Rule 1.9(a).

In reaching its decision to disqualify, the Colorado Supreme Court relied heavily on two themes; one textual, the other factual. The textual theme was Comment 3 to Rule 1.9(a), which provides that matters are "substantially related" if: (a) "they involve the same transaction or legal dispute" or (b) "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." Given the insurer's concession that the present and former representations did not involve "the same transaction or legal dispute," the Court's concern was with part (b) of Comment 3. That led to an examination of the facts that the trial court found, which were:

- The firm is "intimately familiar with [Owners'] claim handling policies and procedures, negotiation strategy, settlement pay ranges, and the factors that motivate [Owners] to settle or view a case as a risk."
- The firm "is intimately familiar with [Owners'] handling of cases involving uninsured motorists, unreasonable delay [claims], and bad faith [claims]"; this includes Owners' "hierarchy of settlement authority," as well as its "negotiation strategy" in dealing with such cases.
- The firm "advised [Owners] on how to handle claims and defended [Owners] against bad faith claims."

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[41] 2020 CO 33, 462 P.3d 581 (May 4, 2020).

[42] *Persichette*, 2020 CO 33 ¶ 10, 462 P.3d at 585.

[43] Plein v. USAA Cas. Ins. Co., 195 Wash. 2d 677, 680, 463 P.3d 728, 730 (May 21, 2020).

[44] *Id.*

- The firm knows Owners' personnel and is aware of "the personalities and tendencies of key figures involved as witnesses for [Owners]."
- The firm "made presentations to [Owners'] employees" on topics that are "relevant" to this lawsuit, such as memorializing communications with insured customers.
- The firm is "very familiar with Mr. Page's work as a claims adjuster."
- The firm "trained Mr. Page on claims-handling and bad faith avoidance practices"; it also trained him "as a witness in bad faith and unreasonable delay cases."
- "[B]oth representations involve the same legal material and theories: ... bad faith theories and claim-handling practices."
- "The present litigation involves a matter that is substantially similar to the prior representation."
- The "similarities between the current and prior representation[s] are numerous and substantial."
- "The most troubling aspect of [the firm's] representation of [the insured] is how close [the firm] has come to attacking [its] own work"; after advising Owners "on how to handle claims" and defending Owners "against bad faith claims," [the firm] is now "prosecuting a bad faith claim against [Owners] and potentially attacking the very policies and procedures the firm helped put in place."
- [Insured] "may derive certain advantages" from [the firm's] prior representation of owners.[45]

In spite of all that, the trial court ruled that the current and prior representations were not "substantially related." The supreme court disagreed, finding that the trial court "collapsed 'a substantially related matter' into 'the same' matter" and that, by doing so, "read 'a substantially related matter' out of the rule."[46] Indeed, the supreme court found that the trial court's own findings of fact indicated that the insured's lawyer knew way too much about the insurer's inner workings (having counseled on policies and procedures, having trained the staff, and most particularly having trained the actual adjuster on the claim at issue in the case. In the end, the supreme court ruled that disqualification was necessary in order to preserve the integrity and fairness of the proceedings.[47]

Two weeks later, the Washington State Supreme Court reached a different result under similar facts.[48] There, the insured's counsel previously represented the insurer in over 165 matters over a period of more than 10 years, including four bad-faith cases.[49] The insurer further alleged that counsel had access to the insurer's business customs and practices, confidential claims-handling materials,

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[45] *Persichette*, 2020 CO 33 ¶ 27, 462 P.3d at 588.

[46] *Id.* ¶ 30, 462 P.3d at 589.

[47] *Id.* ¶ 47, 462 P.3d at 592.

[48] Plein v. USAA Cas. Ins. Co., 195 Wash. 2d 677, 463 P.3d 728 (May 21, 2020).

[49] *Id.* at 680, 463 P.3d at 729.

thought processes of adjusters, and business and litigation philosophies and strategies. Counsel admitted that, over the time he represented the insurer, he had regular access to company employees, executives, and in-house lawyers, had provided the insurer with advice on coverage and litigation strategies, had electronic login credentials to certain internal proprietary and confidential documents, and actively participated in court appearances, depositions, and mediations on behalf of the insurer.[50]

In deciding that the present and former matters were not "substantially related," the Washington court analyzed both Comments 2 and 3 to Rule 1.9(a). According to the court, Comment 2 emphasizes that the "scope of a 'matter' ... depends on the facts of a particular situation or transaction" and 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."[51] According to the Washington court, "comment 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 objection by the former client. Under this comment 2, [the firm's] representation of the [insured] is clearly permissible."[52]

In contrast, the insurer focused on Comment 3, which states that "matters may be 'substantially related' '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.' "[53] As it was in the Colorado case, the insurer did not contend that the firm represented it in the same "transaction or legal dispute" as the matter before the court. Accordingly, the inquiry was "whether there is a 'substantial risk' that [the firm] acquired 'confidential factual information as would normally have been obtained in the prior representation' that 'would materially advance' the [insured's] position."[54]

A significant point raised and acknowledged by both courts is this: that the former client does not have to show that the former client's lawyer actually obtained confidential information. This is so for the logical reason that the former client should not be and is not required to reveal the confidential information learned by the lawyer in order to establish the "substantial risk." Rather, a conclusion about the possession of such knowledge may be based on the nature of the services the lawyer provided and the information that would "in ordinary practice" be learned in the course of providing such services.[55]

The Washington court reviewed the case law in other jurisdictions, finding more persuasive the decisions requiring that "substantially related" matters be "factually related" to implicate Rule

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[50] *Id.* at 680-81, 463 P.3d at 729-30.

[51] *Id.* at 689, 463 P.3d at 733 (emphases in original).

[52] *Id.*, 463 P.3d at 734.

[53] *Id.*

[54] *Id.* at 689-90, 463 P.3d at 734.

[55] *See* ABA Model Rule 1.9(a) and comment [3]. Both Colorado and Washington have adopted both the Model Rule and the comments verbatim.

1.9(a).[56] Finally, the court specifically relied on Comment 2, which provides 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," and also relied on Comment 3, which allows the representation to go forward despite "general knowledge of the [organizational] client's policies and practices."[57]

A. The "Playbook" Argument; The "Duty of Loyalty" Argument

The Washington court did not adopt the insurer's "playbook" and "duty of loyalty" arguments. Here's what the court had to say on them:

> Two other potential interpretations of RPC 1.9(a) would preclude [the law firm's] representation of the [insureds]: the "playbook" approach and the duty of loyalty. We reject both of these approaches as inconsistent with RPC 1.9 and its comments.
>
> 1. "Playbook" Approach
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> Some courts have taken a "playbook" approach to disqualification. In *Chugach Electric Ass'n v. United States Dist. Court for District of Alaska*, 370 F.2d 441, 442 (9th Cir. 1966), an attorney brought an antitrust action against a corporation where he had previously served as general counsel. Despite no showing that the lawyer " 'had access to secret or confidential information related to the issues' " in the case, the Ninth Circuit disqualified him. *Id.* at 443. It did so because the lawyer's general representation of the corporation could "provide him with greater insight and understanding of the significance of subsequent events in an antitrust context and offer a promising source of discovery." *Id.*
>
> That was 1966. Since that time, the model rules have changed. The RPC and ABA Model Rule comments now flatly reject this "playbook" approach to disqualification motions. RPC 1.9 cmt. 2 ("[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."), cmt. 3 (allowing representation despite "general knowledge of the [organizational] client's policies and practices").
>
> 2. "Duty of Loyalty" Approach
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> USAA also contends that [former counsel] breached the "duty of loyalty" it owed to USAA. [Citation to record omitted.] But there is no separate "duty of loyalty" under RPC 1.9 beyond the test outlined in RPC 1.9. If [prior counsel's] representation of the [insureds] violates RPC 1.9(a), it breaches the duty of loyalty. If there were a general duty of loyalty to never litigate against a former client, courts would not need to apply RPC 1.9(a) at all and would not need to assess whether matters are

[56] *See generally, Plein*, 195 Wash. 2d at 691-95, 463 P.3d at 734-36.

[57] *Id.* at 695-96, 463 P.3d at 737.

> substantially related; disqualification would be automatic any time a lawyer sought to represent a party adverse to a former client. This is clearly not what the RPCs say.[58]

The Colorado court did not address—nor did it need to address—either of these arguments, having determined that the party moving for disqualification—the insurer—had established that the current and former matters were "substantially related." That point, however, brings us to the question of how, if at all, we can harmonize these two cases?

B. Harmonizing *Persichette* and *Plein*

Perhaps the answer to the question lies in two areas. One is a general reluctance on the part of courts to disqualify a client, as well as a general concern as to the motive of the party moving for disqualification.[59] Both courts recognized and addressed that issue as a key principle.

The other area must address the quality of the case the insurer presented in the Colorado case versus the case presented by the insurer in the Washington case.

In the Colorado case, the facts presented by the insurer were extensive and detailed. The very fact that the former lawyer had direct experience of the adjuster on this very case simply could not be ignored, and that experience went beyond mere "playbook" knowledge. The lawyer knew the adjuster's work as a claims adjuster, had trained him on claims-handling and bad-faith-avoidance practices, and had trained him as a witness in bad-faith and unreasonable-delay cases." In addition, the lawyer wasn't merely generally familiar with the insurer's procedures; rather, he knew them "intimately." Such intimacy included claim-handling policies and procedures; negotiation strategy; and settlement pay ranges, among other things. He specifically knew the insurer's procedures with respect to handling the exact type of cases that were at issue in the case at bar. In fact, both the case at bar and the lawyer's previous work for the insurer involved the same legal theories. To put it in the simplest terms, in the *Persichette* case, the insurer understood the Rule and the comments, recognized how high the burden-of-proof bar is in disqualification cases, and put together a factual record that met the requirements set forth in the Rule and the comments.

In the *Plein* case, however, the facts presented by the insurer were not as detailed and specific as those presented by the insurer in *Persichette*, which led the Washington court to review the evolution of prior and current law on the question of "substantially related."

Previously, the Washington Court of Appeals had established a three-factor test for establishing whether the current and former matters are "substantially related."

> To determine whether the two representations are substantially related, we 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

[58] *Id.* at 695, 463 P.3d at 736-37.

[59] *See* § III.B.3., *supra.*

> (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.[60]

Yet, as the Washington supreme court pointed out, the appellate court in *this* case "disavowed that factual context test,"[61] reasoning that "comment 3 to RPC 1.9, adopted in 2006, 'does not mention the prior standard for assessing substantially related matters as found in *Sanders* . . .' so it declined to apply that test going forward."[62] The Washington supreme court accepted the rule articulated in *Wallace* and the "parties agree[d] that this rule and these comments now guide [the court's] analysis, but they emphasize *different comments*,"[63] which arguments are summarized here:

> The Pleins [i.e., the insureds] highlight comment 2, which states that the "scope of a 'matter' ... depends on the facts of a particular situation or transaction." RPC 1.9 cmt. 2. Pursuant to comment 2, " '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.' " (quoting RPC 1.9 cmt. 2). [Citation to the record omitted; emphases added by *Plein* court; footnote regarding change to comment 2 from pre-2002 version of the Model Rule omitted.]
>
> The Court of Appeals [in this case] emphasized that this comment concerned only what constitutes the scope of a single "matter" and does not help understand whether distinct matters are "substantially related." [Citation to appellate decision below omitted.] But comment 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 objection by the former client. Under this comment 2, [former lawyer's] representation of the Pleins [the insureds] is clearly permissible.
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> USAA, in contrast, focuses on comment 3, which states that matters may be "substantially related" "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." RPC 1.9 cmt. 3. USAA does not claim that [the former lawyer] represented it in the same "transaction or legal dispute" as the one at issue in this case. *Id.* The key inquiry, therefore, is whether there is a "substantial factual

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[60] *Plein*, 195 Wash. 2d at 688, 463 P.3d at 733 (emphases added by *Plein* court) (quoting Sanders v. Woods, 121 Wash. App. 593, 598, 89 P.3d 312 (2004)).

[61] *Plein*, 195 Wash. 2d at 688, 463 P.3d at 733.

[62] *Id.*, citing Wallace v. Evans, 131 Wash. 2d 572, 577, 934 P.2d 662 (1997) (changes to a court rule made it unnecessary to overrule a case decided before the changes).

[63] *Plein*, 195 Wash. 2d at 688, 463 P.3d at 733 (emphasis added).

> information as would normally have been obtained in the prior representation" that "would materially advance" the [insureds'] position. *Id.*[64]

Both arguments seem right. The insured argued that comment 2 essentially permits the lawyer who formerly represented the insurer to represent the insured in a factually distinct case "even though the subsequent representation involves a position adverse to the prior client." That is, after all, what comment 2 says.

But the insurer argued, essentially, that comment 3 requires something more; that the analysis doesn't stop just because comment 2 might appear to answer the question. What the insurer argued, basically, is that comment 3 requires an analysis that consists of the following parts: (1) a "substantial risk" that (2) the former lawyer acquired "confidential factual information as would normally have been obtained in the prior representation" that (3) "would materially advance" the insured's position.

That argument also seems right, and the Washington supreme court agreed that the analysis does not stop with comment 2 but must consider the guidance provided by comment 3:

> Under [Rule 1.9] and these comments, the former client need not show that the lawyer actually *obtained* confidential information—the "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." Rather, 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."
>
> Comment 3 provides several examples of information gained from a former representation that poses such a risk and hence creates a conflict. A lawyer who learned "extensive private financial information" about a client may not represent the client's spouse in a divorce. Nor may a lawyer help a client secure environmental permits, then represent another client seeking to rezone the same plat of property for environmental reasons. But comment 3 also lists several types of information gained from a former client's representation that will not create a conflict. These include "general knowledge of [an organizational] client's policies and practices," "[i]nformation that has been disclosed to the public or to other parties adverse to the former client," and information "rendered obsolete by the passage of time." However, even as to organizational clients, "knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation."[65]

Having articulated the tension between comments 2 and 3, the Washington court acknowledged that the question whether the "substantially related" test bars the insurer's former lawyer's current representation of the insureds is difficult, and that the answer "depends on just how related the former and current representation must be to meet comment 3's 'substantially related'

[64] *Id.* at 689-90, 463 P.3d at 734.

[65] *Id.* at 690, 463 P.3d at 734 (emphases in original; citations to Rule 1.9 and comments thereto omitted; edits in brackets in original).

test."[66] And to assist in answering that question, the court turned to other jurisdictions, finding that decisions holding that "substantially related" matters must be *factually* related are more persuasive.[67]

Among the cases and authorities relied upon were *Watkins v. Trans Union LLC*,[68] in which a lawyer defended Trans Union in approximately 250 Fair Credit Reporting Act cases over five years, billing over 4000 hours, then twelve years later sought to represent a FCRA plaintiff against Trans Union. The trial court denied Trans Union's motion to disqualify the lawyer, finding that the " 'prior representations [were] not factually related such that the same matter [was] in dispute,' nor was 'there a risk that confidential information from the prior matters would materially advance [the FCRA plaintiff's] claims.' " The Seventh Circuit affirmed, holding that even though both the former and current representations involved FCRA violations, they did not turn on the same facts of one particular situation or transaction.[69] The *Plein* court, quoting extensively from *Watkins*, explained:

> * * * The [*Watkins*] court categorized the knowledge that the lawyer gained while working for Trans Union into three groups: (1) general knowledge experience working with the FCRA, (2) knowledge of Trans Union "policies and practices" that would be discoverable to an opposing FCRA litigation, and (3) "general knowledge" of Trans Union policies and practices. To the extent the lawyer learned "truly confidential information," the passage of time made it obsolete based on 10 years of development in technology and the law. This decision is based on the factual relationship—or lack thereof—between the subject matter of the former representation and the subject matter of the former representation and the subject matter of the current representation. It holds that the matters are not substantially related where, as in the instant case, the facts forming the basis for each claim are completely different.[70]

The Washington court found additional authority in accord with the analysis articulated in *Watkins*, including *Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[71] in which the Fifth Circuit acknowledged that Merrill Lynch had shown that the law firm represented it in similar *types* of cases but "said nothing about the specific nature" of those cases, stating, instead, that those cases "generally . . . involved various kinds of securities, margin accounts, Merrill Lynch's relationship with its customers and employees, and the federal and state securities laws." Concluding that "[t]he list of similarities Merrill Lynch offered 'could be applied to virtually any law firm that had ever represented Merrill Lynch or any large brokerage firm,' " the court denied the motion to disqualify.[72]

Applying the reasoning of these cases, the *Plein* court acknowledged that "USAA does allege that [prior counsel] obtained specific information relevant to the facts of the instant case during its representation of USAA [in a prior similar matter]. That matter involved allegations similar to those

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[66] *Id.* at 690-91, 463 P.3d at 734.

[67] *Id.* at 691-94, 463 P.3d at 734-36.

[68] 869 F.3d 514 (7th Cir. 2017).

[69] *Plein*, 195 Wash. 2d at 691, 463 P.3d at 735, citing *Watkins*, 869 F.3d at 518, 521.

[70] *Plein*, 195 Wash. 2d at 692, 463 P.3d at 735, citing *Watkins*, 869 F.3d at 521-23.

[71] 646 F.2d 1020 (5th Cir. 1981).

[72] *Plein*, 195 Wash. 2d at 692-93, 463 P.3d at 735, citing *Duncan*, 646 F.2d at 1022, 1024, 1028-29.

made by the Pleins. But USAA's response to an unrelated set of facts, even facts based on similar allegations, does not suggest that [prior counsel] obtained confidential information that would materially advance the Pleins' case. Indeed, comment 2 specifically allows a lawyer to represent a current client in a 'factually distinct problem' of the same type that it 'recurrently handled' for the former client. RPC 1.9 cmt. 2."[73]

The *Plein* court did locate contrary authority, stating:

> In contrast, in *Government of India v. Cook Industries, Inc.*, the Second Circuit applied a stricter test but found that plaintiffs satisfied that test and hence affirmed an order of disqualification. 569 F.2d 737, 739-40 (2d Cir. 1978). In that case, a lawyer represented defendant Cook Industries on two closely related cases against allegations that it had come up short on soybean deliveries. *Id.* at 738. The lawyer worked on these Cook Industries cases for three years and billed over 100 hours. *Id.* at 739. He then represented a new client—a plaintiff who alleged that Cook Industries came up short on a grain delivery. *Id.* All three cases involved allegations of fraudulent documentation. *Id.* Because the attorney had "conduct[ed] confidential inquiries as to [the former client's] loading procedures," and the "very same information necessarily was the cornerstone" of the allegations in the new case, the Second Circuit affirmed the trial court's order of disqualification. *Id.* Despite requiring a showing that the relationship between the two cases was "patently clear," the court stated that "[i]t would be difficult to think of a closer nexus between issues." *Id.* at 739-40.
>
> But *Cook Industries* was decided long before the ABA added comments 2 and 3 to the rule. The addition of those two comments demonstrates an intent to limit disqualification under RPC 1.9(a). Both comments emphasize that the disqualifying confidential information must be "factual." RPC 1.9 cmt. 2 (allowing representation in "*factually* distinct" problem of type lawyer handled for former client (emphasis added)), cmt. 3 (matters substantially related where there is "a substantial risk that confidential *factual* information" would materially advance new client's position (emphasis added)).[74]

The *Plein* court concluded that:

> The current RPC 1.9 and its associated comments thus tell us to decide whether the former and current representation are factually related. If not, then they are not "substantially related" within the meaning of the rule. [Former counsel] did not represent USAA on the Plein matter or on anything factually related to the Plein matter. As a result, it did not represent USAA on any matter substantially related to the instant case, so it may now represent the Pleins.[75]

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[73] *Plein*, 195 Wash. 2d at 693-94, 463 P.3d at 736.

[74] *Id.* at 694, 463 P.3d at 736.

[75] *Id.* at 695, 463 P.3d at 736.

And that brings us to the question set forth above; namely, how, if at all, we can harmonize these two cases?

Having seen the factual evidence each insurer provided, is it possible to predict whether the *Plein* court would have ruled differently if USAA had come forward with evidence substantially similar to that which Owners Insurance came up with in *Persichette*? If we look again at the *Plein* court's conclusion ("[Former counsel] did not represent USAA on the Plein matter or on anything factually related to the Plein matter. As a result, it did not represent USAA on any matter substantially related to the instant case . . . ."), it appears that there are two questions the *Plein* court would have to answer if the facts of the *Persichette* case were before it: (1) did former counsel represent the insurer on the *Persichette* matter; or (2) did former counsel represent the insurer on any matter substantially related to the *Persichette* matter?

The answer to the first question is easy. Under the *Plein* court's analysis, the answer is "no."

But the *Plein* court's analysis doesn't stop there; it asks a second question, which, in my view, turns on itself. "Did former counsel represent the insurer on any matter substantially related to the prior matter"? In attempting to answer the "substantially related" question, how can a court answer the question of whether the former and current matters are "substantially related" by asking whether the former and current matters are "substantially related"? I strongly suggest that a court cannot.

That said, my view is that, had the *Plein* court had before it the record in the *Persichette* case, the *Plein* court would have had a much harder time finding that disqualification was not appropriate. While it was true that, in *Persichette*, the former lawyer did not represent Owners on the Persichette matter, but the former lawyer was involved in Owners' policies and practices with respect to precisely the same type of matters that arose in *Persichette*, and to a much more intimate degree. If I were wearing the robe in the *Persichette* case, and were bound to follow the reasoning set forth in *Plein*, I would not have been able to look away from the facts presented in *Persichette*; in particular, the fact that former counsel had trained the specific adjuster that worked on the instant matter, including specifically training him on claims-handling and bad faith avoidance practices as well as on being a witness in bad faith and unreasonable delay cases. In my view, that alone would have presented a sufficient nexus between the current and former matters to present a record of "substantially related" matters.

V. CONCLUSIONS AND RECOMMENDATIONS

The *Plein* case sets a higher bar for the party moving for disqualification than does the *Persichette* case. Because the *Plein* court did not find the requisite *factual* similarities, under its reading of comments 2 and 3 to Rule 1.9(a), the moving party did not meet its burden. Accordingly, the *Plein* court did not have to reach the question of whether the interests of the current client were "materially adverse to the interests of the former client," as required by Rule 1.9(a).

While it can be argued that the *Persichette* case set a lower bar, it cannot be said that the bar is so much lower that practitioners seeking to disqualify insurers' former counsel from representing insureds should be dashing off to Colorado. Put another way, it cannot be said that if the *Persichette* court had before it the facts in the *Plein* case the Colorado supreme court would have held the same way. It can be said, however, that the record in *Persichette* was more specific than was the record in *Plein*. Having found that the former and current matters in *Persichette* were "substantially related," it

became much easier for the Colorado supreme court to find that the current clients interests were "materially adverse to the interests of the former client," as required by Rule 1.9(a), and as further developed by ABA Formal Opinion 497.

What recommendations, then, can be offered to both insurers and insureds?

As for insurers, it must be noted that "generalized financial harm or a claimed detriment that is not accompanied by demonstrable harm" to the insurer will almost certainly fail the "material adverseness" test.[76] Further, general knowledge of the insurer's policies and practices also is unlikely to pass the "substantially related matter" test articulated in the cases and comments above. For insurers that are members of a "corporate family," it must be noted that a lawyer who represents one member of the corporate family does not necessarily represent any other constituent of affiliated member of the family. That general rule, however, may give way whenever there is (1) an agreement to the contrary, (2) substantial organizational overlap, or (3) shared confidential information.[77] At a minimum, then, insurers may wish to consider including such "agreement to the contrary" in their engagement letters. Insurers also should note that the passage of time can work to defeat even a strong factual case. In both *Persichette* and *Plein*, approximately ten years had passed between "then" and "now." It made no difference in *Plein*; it may have been a factor (but not the strongest one) in *Persichette*. Put another way, it would be unwise to assume that a lengthy passage of time will be determinative. And, finally, the more facts that can be presented, the stronger the case. Insurers, therefore, should be cognizant of (i) how much access into the insurer's "wheelhouse" outside counsel should be granted, and (ii) to the extent that such access is in the insurer's best interest, that good records will help support a disqualification motion should one become necessary.

As for insureds, while the outcome in *Persichette* might be troublesome, the analysis in *Plein* does suggest that motions for disqualification are not often granted. While insureds might find that encouraging, the question remains whether it ever is a good idea to hire coverage counsel that previously represented the insurer that is adverse to the insured in the instant matter. Before doing so, insureds should be asking the same kind of questions that these courts asked. While it is obvious that having coverage counsel that formerly represented one's adversary can have clear advantages, it cannot be understated how annoying (not to mention time-consuming and expensive) disqualification litigation can be. Cases in point? The fact that both *Persichette* and *Plein* went up to the supreme courts of their respective states! Accordingly, in evaluating whether to engage the services of counsel that formerly represented the insurance company that is adverse to insured in a particular matter, insureds should strongly consider seeking the advice of independent counsel with appropriate expertise in this area of legal ethics.

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[76] *See* ABA Formal Op. 497 at 4.

[77] *See* § III.B.2., *supra.*