

STATE OF NORTH CAROLINA
DURHAM COUNTY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
23 INS 738

BLUE CROSS AND BLUE SHIELD)
OF NORTH CAROLINA,)

Petitioner,)

v.)

NORTH CAROLINA STATE)
HEALTH PLAN FOR)
TEACHERS AND STATE)
EMPLOYEES,)

Respondent,)

and)

AETNA LIFE INSURANCE)
COMPANY,)

Respondent-Intervenor.)

RESPONSE IN OPPOSITION TO
AMENDED MOTION TO
DISQUALIFY COUNSEL

TABLE OF CONTENTS

	Page
INTRODUCTION	1
BACKGROUND	3
A. The Plan’s separate status and powers	3
B. The Plan’s request for proposals	4
C. This contested case	5
1. The nature of Blue Cross NC’s claims	5
2. Procedural history	5
D. Robinson Bradshaw’s lack of an attorney-client relationship with the Plan	7
1. Robinson Bradshaw’s past work as public-finance and bond counsel to the Department	7
2. Robinson Bradshaw’s past representation of the Treasurer in investment matters	8
E. Correspondence before the motion	8
ARGUMENT	10
I. The Plan’s motion applies the wrong standard	10
II. Robinson Bradshaw’s representation of Blue Cross NC is ethically proper	13
A. Robinson Bradshaw has no Rule 1.9 conflict with the Plan, because the Plan is not a former client of the firm	14
B. Robinson Bradshaw does not have a Rule 1.9 conflict as a result of the firm’s past representations of the Treasurer and the Department	15
1. Robinson Bradshaw’s past representations of the Treasurer and the Department were limited in scope	15

TABLE OF CONTENTS

(continued)

	Page
2. This case is not the same as or substantially related to Robinson Bradshaw's past representations of the Treasurer and the Department	17
a. This case does not involve the same transactions or legal issues that were involved in the firm's past bond and investment matters	18
b. No information that would have been involved in Robinson Bradshaw's former transactional representations is material to this case	20
3. This case is not materially adverse to the Treasurer or the Department	21
a. This case is adverse to the Plan alone.....	21
b. The Plan's arguments that it is equivalent to the Treasurer and the Department lack merit	23
i. The General Assembly has given the Plan a distinct status and distinct powers	23
ii. The Plan's history of a Type II transfer confirms the Plan's distinct status.....	24
iii. The Plan's public statements emphasize the Plan's independence	25
c. This case does not challenge any actions by the Treasurer or the Department.....	26

TABLE OF CONTENTS
(continued)

	Page
III. The equities weigh against disqualification.....	27
A. Granting the Plan’s motion would deprive Blue Cross NC of its chosen counsel	28
B. Disqualifying counsel would prejudice the conduct of this proceeding	29
C. The Plan unreasonably delayed filing its motion.....	30
CONCLUSION.....	31
CERTIFICATE OF SERVICE.....	32

Petitioner Blue Cross and Blue Shield of North Carolina (Blue Cross NC) respectfully requests that the Tribunal deny the amended motion of the North Carolina State Health Plan for Teachers and State Employees (the Plan) to disqualify Blue Cross NC's counsel.

This response attaches the affidavits of Alice Pinckney Adams, Jason S. Kerr, Katherine Gordon Maynard, and Matthew W. Sawchak.

INTRODUCTION

This contested case affects the health care of 582,000 North Carolina teachers, state employees, and family members. Because of this case's public importance, the case is proceeding quickly, on a schedule ordered by this Tribunal. But now, in the middle of discovery, the Plan has moved to disqualify the lawyers who have represented Blue Cross NC since the beginning of this case. The Plan has not justified that drastic request.

The Plan's motion relies on Rule 1.9(a) of the North Carolina Rules of Professional Conduct, which governs lawyers' duties to former clients. The Plan, however, is not a former (or present) client of Robinson Bradshaw. Instead, the Plan bases its motion on Robinson Bradshaw's past representations of the State Treasurer and the North Carolina Department of State Treasurer in unrelated matters.

The motion falters at the start by applying the wrong legal standard. It relies on an "appearance of impropriety" standard that the North Carolina Supreme

Court has overruled. Current North Carolina law requires the Plan to show an actual Rule 1.9 conflict of interest with a former client.

For two main reasons, the Plan has not shown such a conflict.

- First, conflicts with former clients exist only when matters are the same or substantially related. This contested case is wholly unrelated to Robinson Bradshaw's past representations of the Treasurer and the Department.
- Second, this case is not materially adverse to the Treasurer or the Department. The only government respondent here is the Plan. Under North Carolina law, the Plan is distinct from the Treasurer and the Department. The Plan tries to blur this distinction, but its efforts fail.

Moreover, even if there were a conflict here, the equities would not support the drastic remedy of disqualification. Disqualifying counsel would cause severe prejudice to Blue Cross NC and threaten the progress of this important case. The Plan's delay in filing its motion heightens the disruption and prejudice posed by the motion.

Blue Cross NC asks that the Tribunal reject the Plan's effort to derail this important case.

BACKGROUND

A. The Plan's separate status and powers

The Plan's independent status and powers are key facts here.

The General Assembly has created the Plan as an entity with "all the powers and privileges of a corporation." N.C. Gen. Stat. § 135-48.2(a); *see also id.* § 135-48.1(14) (defining the Plan as the entity created in section 135-48.2).

The Plan's powers include the ability to contract for services to the Plan and its members. *Id.* § 135-48.32. Large contracts require approval by the Plan's independent Board of Trustees. *Id.* § 135-48.22(4). The Plan can also sue and be sued in its own name. *See id.* §§ 135-48.2, 55-3-02(a)(1).

The Plan is connected with the Department, but to only a limited degree. The General Assembly connected the Plan with the Department through a Type II agency transfer. Act of May 11, 2011, ch. 85, § 2.2, 2011 N.C. Sess. Laws 119, 132; *accord* Amended Motion to Disqualify ¶ 14 [Mot.] (admitting this point). Type II transfers connect an agency with a principal department for supervision of certain management functions. N.C. Gen. Stat. § 143A-6(b). Unlike a Type I transfer, which merges an agency into a department, a Type II transfer leaves an agency intact. *Id.* § 143A-6(a)-(b). It directs the transferred agency to "exercise all its prescribed statutory powers independently of the head of the principal department." *Id.* § 143A-6(b).

B. The Plan’s request for proposals

When the Plan conducted a request for proposals to choose a third-party administrator for 2025 to 2027, the Plan exercised its independent statutory powers. *See* Pet. ex. 1 (the RFP).

The Plan itself has stressed this point. It has stated that it designed the RFP “[u]nder the Plan’s authority outlined in state law.” N.C. State Health Plan for Teachers and State Emps., Press Release at 1 (Jan. 20, 2023).¹ In this Tribunal, moreover, the Plan has argued that the RFP reflects “the State Health Plan’s modernization of its contracting processes.” Plan’s Prehearing Statement at 3.

The Plan has also stressed the role of its independent Board of Trustees in this RFP process. The Plan structured the RFP “to support and clarify the Board’s decision-making role.” Sam Watts, Letter to Matthew Sawchak at 3 (Jan. 20, 2023) [hereinafter Watts Letter].² It “took steps to enable careful, thoughtful evaluation, deliberation, and full participation by the Board.” *Id.*

After receiving recommendations from the Plan’s Evaluation Committee, the Board of Trustees voted to award the third-party-administrator contract to Aetna Life Insurance Company, rejecting proposals from Blue Cross NC and a third bidder. Plan’s Prehearing Statement at 2, 4. As the Plan has emphasized, “[i]t was

¹ <https://www.nctreasurer.com/news/press-releases/2023/01/20/state-health-plan-rejects-protests-losing-bidders>.

² <https://www.shpnc.org/documents/shp-documents/executed-response-blue-cross-protest-letter-01202023/download?attachment>.

the Board” that voted to award the contract to Aetna. Watts Letter at 3 (emphasis in original).

On January 12, Blue Cross NC filed a detailed request for a protest meeting with the Plan. The Plan rejected that request on January 20. *See id.* at 1.

C. This contested case

1. The nature of Blue Cross NC’s claims

Blue Cross NC filed this contested case on February 16, alleging errors in the Plan’s framing and scoring of the RFP. Pet. ¶¶ 6-10, 43; Blue Cross NC’s Prehearing Statement at 5-11. The Plan is the only government respondent in this case. The petition seeks relief against the Plan alone. Pet. at 25.

As the Plan has acknowledged, the contested issues in this case stem from the Plan’s actions. *See* Plan’s Prehearing Statement at 2-5. In its prehearing statement, the Plan did not identify any action of the Treasurer or the Department as a contested issue here. *See id.* at 4-5. Neither the Treasurer nor the Department is a party to this case. *See* Pet. at 2.

2. Procedural history

Since February 16, this case has been proceeding on a fast pace. The deadline for the parties to complete their document productions has already passed. Scheduling Order ¶ 3. Counsel are having weekly conferences in an effort to avoid or narrow discovery disputes. The deadline for all fact discovery is just three months from now. *Id.* ¶ 3(b).

Despite the expedited pace of this litigation, the Plan said nothing in this Tribunal about a motion to disqualify counsel until April 24:

- It did not mention such a motion during the parties' March 9 conference, in which the parties agreed that this Tribunal is the proper forum for this case.
- The Plan did not forecast a disqualification motion in its prehearing statement on March 20.
- It did not mention such a motion during the parties' March 23 call to negotiate a proposed schedule for the case.
- It did not mention it the next day, in the parties' jointly proposed scheduling order.
- It still did not mention such a motion during the parties' April 4 conference on discovery issues.
- It did not forecast a disqualification motion during the parties' April 10 scheduling conference with the Tribunal.
- Finally, the Plan did not forecast such a motion in the parties' April 17 conference on a proposed confidentiality-related protective order.

Sawchak Aff. ¶¶ 5-11.

D. Robinson Bradshaw’s lack of an attorney-client relationship with the Plan

Another key fact for this motion is the limited scope of Robinson Bradshaw’s earlier representations.

Robinson Bradshaw does not represent, and has not represented, the Plan. Maynard Aff. ¶ 6. Likewise, the firm has not had access to the Plan’s confidential information. Adams Aff. ¶ 16; Kerr Aff. ¶ 13. The Plan does not argue otherwise.

In past matters that were unrelated to the Plan, Robinson Bradshaw has represented the Treasurer and the Department. As shown below, however, none of those matters involved the Plan or its confidential information.

1. Robinson Bradshaw’s past work as public-finance and bond counsel to the Department

In the past, Robinson Bradshaw was a member of a three-firm pool of prequalified public-finance and bond counsel for state bond issues. Adams Aff. ¶ 5. Under the pool agreement, the Department could engage Robinson Bradshaw for specific bond issuances. *Id.* ¶ 11.

The firm’s written agreement to participate in that pool was with the Department, not the Plan. *Id.* ¶ 8. The pool agreement did not name or describe the Plan as a client. Nor did it instruct the firm to treat the Plan as a client for conflicts purposes. *Id.* ¶ 14.

Robinson Bradshaw’s work on these bond matters had nothing to do with the Plan. *Id.* ¶ 15. Likewise, the firm’s bond-related work did not involve any information related to the Plan. *Id.* ¶ 16.

Robinson Bradshaw's bond work for the Department has concluded. *Id.* ¶¶ 11-13; *accord* Affidavit of Samuel W. Watts ¶¶ 31-32 (attached to the Plan's amended motion) (referring to the firm's bond work in the past tense).

2. Robinson Bradshaw's past representation of the Treasurer in investment matters

In the past, the Treasurer engaged Robinson Bradshaw to help with certain investment-transaction matters. Kerr Aff. ¶¶ 5, 7. In each matter, the Treasurer engaged Robinson Bradshaw to help document a specific investment transaction. Watts Aff. ¶¶ 33, 35. The engagement agreements for these matters did not name the Plan as a client or ask the firm to treat the Plan as a client for conflicts purposes. Kerr Aff. ¶ 12.

Robinson Bradshaw's work on investment matters did not involve any information related to the Plan. *Id.* ¶ 13. During the investment matters, the Treasurer's counsel did not ask Robinson Bradshaw to perform any services on behalf of the Plan. *Id.* ¶¶ 14-15.

Earlier this year, Robinson Bradshaw was engaged on a final investment-transaction matter for the Treasurer. Watts Aff. ¶¶ 34-35. That engagement has ended. *Id.* ¶¶ 33, 35; Kerr Aff. ¶¶ 15-16.

E. Correspondence before the motion

After Robinson Bradshaw filed its request for a protest meeting with the Plan, the Department's general counsel, Ben Garner, wrote to Robinson Bradshaw and asked the firm to explain its conflicts analysis for its representation of Blue

Cross NC. Maynard Aff. ¶ 7 & ex. A. That inquiry led to two phone calls and two exchanges of letters between Mr. Garner and Kate Maynard, Robinson Bradshaw's general counsel. *See id.* ¶¶ 8-14 & exs. B-D.³ In those calls and letters, Ms. Maynard pointed out that this case is adverse only to the Plan, a non-client of the firm. *Id.* ex. B.

At no point in those calls and letters did Mr. Garner or anyone else forecast a motion to disqualify Robinson Bradshaw from this case. Maynard Aff. ¶¶ 13, 16. No one from the Plan said anything about a motion to disqualify the firm until April 24, when outside counsel called Mr. Sawchak to tell him that the Plan would file a disqualification motion the next day. Sawchak Aff. ¶ 12.

The Plan filed its original motion to disqualify on April 25. On May 18, the Plan filed an amended motion. In the amended motion, the Plan deleted its claims of a Rule 1.7 conflict with a current client of Robinson Bradshaw. The amended motion alleges only a former-client conflict under Rule 1.9(a). Mot. ¶ 60.

³ Mr. Garner's first letter noted that Robinson Bradshaw lawyer Matt Sawchak formerly represented the Plan when he was the Solicitor General of North Carolina. Ms. Maynard responded that Mr. Sawchak's past work as a government lawyer is unrelated to this case, so Rule 1.11, which defines the duties of former government lawyers, allows Mr. Sawchak to represent Blue Cross NC here. *See* Maynard Aff. ¶ 9 & ex. B at 1-3.

The Plan's motion disclaims any conflict arguments based on Mr. Sawchak's former government role. Mot. at 1 n.1.

ARGUMENT

The Plan's amended motion to disqualify fails for three main reasons.

First, the motion applies the wrong legal standard. *See infra* pp. 10-13.

Second, under the correct standard, the motion does not show any conflict of interest with a former client of Robinson Bradshaw. *See infra* pp. 13-27.

Third, the motion ignores the equities that weigh heavily against disqualification here. *See infra* pp. 27-31.

I. The Plan's motion applies the wrong standard.

The Plan's motion to disqualify fails at the threshold. It relies on a standard that the North Carolina Supreme Court overruled years ago.

The motion argues that the Tribunal should disqualify Robinson Bradshaw if this case involves even an appearance of impropriety. Mot. ¶ 10. It asserts that disqualification can occur even if the Plan does not show a violation of the North Carolina Rules of Professional Conduct. *Id.* ¶ 11.

The North Carolina Supreme Court unanimously rejected those arguments in 2017. In *Worley v. Moore*, the Supreme Court held that “the ‘appearance of impropriety’ test is no longer an appropriate legal standard for determining whether to disqualify counsel.” 370 N.C. 358, 368, 807 S.E.2d 133, 141 (2017). Rather, the *Worley* Court held, a party who moves for disqualification must show an actual violation of the North Carolina Rules of Professional Conduct. *Compare id.* at 364-65, 807 S.E.2d at 138-39, *with* Mot. ¶ 11.

The Plan's motion to disqualify strays from *Worley* in other ways as well. The Plan argues that on a motion like this one, "the client's perception of events is of paramount importance." Mot. ¶ 10 (quoting *Chemcraft Holdings Corp. v. Shayban*, No. 06 CVS 5227, 2006 WL 2839255, at *4 (N.C. Super. Ct. Oct. 5, 2006)). That subjective focus, however, is exactly why the *Worley* Court overruled the "appearance of impropriety" standard. See *Worley*, 370 N.C. at 367-68, 807 S.E.2d at 140-41. The Court held that the appearance standard gave undue weight to a client's subjective perceptions, rather than the objective facts of a representation. *Id.*

Under current law, as Chief Justice Newby explained in *Worley*, a movant who seeks to disqualify opposing counsel must meet a high burden of proof. *Id.* at 364, 807 S.E.2d at 138. That high burden counteracts the incentive for a litigant to seek disqualification for strategic reasons. *Est. of Harriott ex rel. Harriott v. Cent. Carolina Surgical Eye Assocs., P.A.*, No. 14 CVS 9982, 2015 WL 2024679, at *3 (N.C. Super. Ct. Apr. 28, 2015); *McCallum v. CSX Transp., Inc.*, 149 F.R.D. 104, 113 (M.D.N.C. 1993). As the North Carolina Rules of Professional Conduct warn, their purpose "can be subverted when they are invoked by opposing parties as procedural weapons." N.C. Rules of Pro. Conduct 0.2 cmt. 7.

The *Worley* standard for a disqualification motion has two elements, both of which the Plan must satisfy.

First, the Plan must show an actual violation of Rule 1.9(a), the conflict-of-interest rule the Plan cites here. See *Worley*, 370 N.C. at 364-65, 807 S.E.2d at 138-

39; *see also* Mot. ¶¶ 39-60 (relying on Rule 1.9(a) alone). The Plan must show a conflict of interest based on objective facts, not subjective opinions, speculation, or conjecture. *See Worley*, 370 N.C. at 368, 807 S.E.2d at 141; *see also P&L Dev., LLC v. Bionpharma, Inc.*, No. 1:17CV1154, 2019 WL 357351, at *7-8 (M.D.N.C. Jan. 29, 2019) (applying *Worley* and denying disqualification motion because the movant’s theories of Rule 1.9 conflicts were speculative).

Second, even if the Plan could show a conflict of interest here, it would also have to show that the balance of equities favors the drastic remedy of disqualification. *See, e.g., Worley*, 370 N.C. at 364, 807 S.E.2d at 138; *Harriott*, 2015 WL 2024679, at *3; *see also* Rule 0.2 cmt. 7 (“violation of a Rule does not necessarily warrant . . . disqualification of a lawyer in pending litigation”). This balancing test requires an analysis of several factors, including:

- the nonmoving party’s right to use the counsel of its choice,
- the hardship that disqualification would cause for the nonmoving party, the judicial system, and the public, and
- the risk that the movant is seeking disqualification for strategic reasons.

See, e.g., Worley, 370 N.C. at 364, 807 S.E.2d at 138; *Shaffer v. Farm Fresh, Inc.*, 966 F.2d 142, 146 (4th Cir. 1992); *Hepburn v. Workplace Benefits, LLC*, No. 5:13-CV-441, 2014 WL 1513157, at *2 (E.D.N.C. Apr. 16, 2014) (applying North Carolina ethics law); *Capacchione v. Charlotte-Mecklenburg Bd. of Educ.*, 9 F. Supp. 2d 572,

579 (W.D.N.C. 1998) (same); *McCallum*, 149 F.R.D. at 113 (citing North Carolina ethics rules).

The Plan's motion does not apply this balancing test at all. Thus, the motion not only applies the wrong legal standard; it fails to address the legal standard that does apply.

II. Robinson Bradshaw's representation of Blue Cross NC is ethically proper.

Robinson Bradshaw's representation of Blue Cross NC in this case complies with the North Carolina Rules of Professional Conduct. The Plan claims a violation of Rule 1.9(a), the rule on conflicts with former clients, but that claim does not succeed.

A party who moves to disqualify a law firm based on a former-client conflict "must meet a particularly high burden of proof." *Worley*, 370 N.C. at 364, 807 S.E.2d at 138. Such a party must establish three elements:

- (1) an attorney-client relationship existed between the former client and the opposing counsel in a matter such that confidential information would normally have been shared;
- (2) the present action involves a matter that is the same as or substantially related to the subject of the former client's representation, making the confidential information previously shared material to the present action; and
- (3) the interests of the opposing counsel's current client are materially adverse to those of the former client.

Id. at 364-65, 807 S.E.2d at 138-39 (line breaks added).

Here, the Plan does not argue that it is a former client of Robinson Bradshaw or that the firm has a Rule 1.9 conflict with the Plan. *See infra* p. 14.

Instead, the Plan asserts a Rule 1.9 conflict based on Robinson Bradshaw's past representations of the Treasurer and the Department. Mot. ¶¶ 51-53, 59. That assertion fails, because the firm's past representations of the Treasurer and the Department did not involve this case or any matter substantially related to this case. *See infra* pp. 15-20.

In addition, this case is not materially adverse to the Treasurer or the Department. It is adverse only to the Plan, an entity that is legally distinct from the Treasurer and the Department. *See infra* pp. 21-27.

A. Robinson Bradshaw has no Rule 1.9 conflict with the Plan, because the Plan is not a former client of the firm.

The Plan does not argue that Robinson Bradshaw has a conflict of interest with the Plan. No conflict is possible, because the Plan is not a past or present client of Robinson Bradshaw.

A Rule 1.9 conflict requires a prior attorney-client relationship. *Worley*, 370 N.C. at 364-65, 807 S.E.2d at 138. Robinson Bradshaw, however, has not represented the Plan on any matter. *Maynard Aff.* ¶¶ 5-6. The Plan does not argue otherwise. *See Mot.* ¶¶ 51-60.

As a result, Robinson Bradshaw has no Rule 1.9 conflict with the Plan.

B. Robinson Bradshaw does not have a Rule 1.9 conflict as a result of the firm's past representations of the Treasurer and the Department.

Likewise, Robinson Bradshaw does not have a Rule 1.9 conflict with the Treasurer or Department. The Plan's contrary arguments lack merit.

Robinson Bradshaw had past engagements with the Treasurer and the Department, but those engagements involved only limited transactional matters. The Plan has not shown that those narrow engagements involved the same matter as this case or were substantially related to this case. The Plan also has not shown that this case is materially adverse to the Treasurer or the Department, as opposed to the Plan.

For these reasons, the motion fails to show at least the second and third elements of a Rule 1.9(a) conflict. *See Worley*, 370 N.C. at 364-65, 807 S.E.2d at 138-39; *see also supra* p. 13 (quoting these elements).

1. Robinson Bradshaw's past representations of the Treasurer and the Department were limited in scope.

The first element under Rule 1.9(a) asks whether Robinson Bradshaw had an attorney-client relationship with the Treasurer and the Department and, if so, what the scope of that relationship was. Robinson Bradshaw has represented the Treasurer and the Department in the past, but those engagements had a narrow scope.

Worley holds that the scope of a past representation does not depend on a client's subjective views. Instead, that scope is set by the terms of engagement agreements and similar objective facts. 370 N.C. at 365-66, 807 S.E.2d at 139-40.

Here, the objective facts show that the Treasurer and the Department engaged Robinson Bradshaw only on discrete transactional matters that have nothing to do with this case.

The Treasurer, through the Department, engaged Robinson Bradshaw to help with specific investment transactions for the North Carolina Retirement Systems. Kerr Aff. ¶¶ 10-11; Watts Aff. ¶¶ 33-35. As Mr. Watts describes, the Treasurer and the Department asked the firm to “assist with reviewing and revising the transaction documents for” certain investments. Watts Aff. ¶ 33. The engagement letters for these matters made no mention of the Plan. Kerr Aff. ¶ 12. The matters did not involve any information from the Plan. *Id.* ¶ 13.

Robinson Bradshaw's engagement on bond matters was just as narrow. The firm was one of three firms that could serve the Department as bond counsel and public-finance counsel on specific bond issuances. Adams Aff. ¶¶ 5, 8-11; Watts Aff. ¶¶ 31-32. The firm's last engagement was for a bond issuance that closed a year ago. Adams Aff. ¶¶ 11-13. Here again, the engagement agreements for the firm's bond work made no mention of the Plan. *Id.* ¶ 14. Likewise, the matters did not involve any information of the Plan. *Id.* ¶ 16.

In sum, the past representations that underlie the Plan’s motion to disqualify are narrow transactional engagements with the Treasurer and the Department—engagements that had nothing to do with the Plan or this case.

2. This case is not the same as or substantially related to Robinson Bradshaw’s past representations of the Treasurer and the Department.

As the above discussion suggests, this case is not the same matter as, or substantially related to, Robinson Bradshaw’s earlier engagements for the Treasurer and the Department.

The “same or a substantially related matter” element calls for the Tribunal to compare Robinson Bradshaw’s past and current engagements in objective terms. *See Worley*, 370 N.C. at 364, 807 S.E.2d at 138. Under Rule 1.9(a), matters are the same or substantially related if they meet one of two tests:

- “they involve the same transaction or legal dispute,” or
- “there otherwise is a substantial risk that information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter.”

Rule 1.9, cmt. 3; *see Worley*, 370 N.C. at 365, 367, 807 S.E.2d at 139, 140 (relying on comment 3 to Rule 1.9); *Harriott*, 2015 WL 2024679, at *4 (same).

As shown below, this case fails both of these tests.

a. This case does not involve the same transactions or legal issues that were involved in the firm’s past bond and investment matters.

First, this case does not involve the same transactions or issues that were involved in Robinson Bradshaw’s former bond and investment matters.

“In the context of a motion to disqualify, substantially related has been interpreted to mean identical or essentially the same.” *Harriott*, 2015 WL 2024679, at *4 (quoting *Hepburn*, 2014 WL 1513157, at *3 (internal quotation marks omitted)). That standard requires a “virtual congruence of issues” that is “patently clear.” *Id.* (quoting *Plant Genetic Sys., N.V. v. Ciba Seeds*, 933 F. Supp. 514, 518 (M.D.N.C. 1996)).

Robinson Bradshaw’s past engagements and this bid protest have nothing even close to that level of sameness.

In the past engagements, the Treasurer or the Department engaged Robinson Bradshaw through written engagement letters. Those engagement letters limited the engagements to specific transactions. Adams Aff. ¶ 11; Kerr Aff. ¶ 10. The engagements had no connection with this dispute over an RFP issued by the Plan:

- The engagement letters for these matters did not name the Plan as a client. In fact, they did not mention the Plan at all. Adams Aff. ¶ 14; Kerr Aff. ¶¶ 10, 12.
- The Treasurer and the Department did not ask the firm to give any legal advice to Plan personnel. Adams Aff. ¶ 17; Kerr Aff. ¶ 14.

- The Treasurer and the Department did not give any Plan-related information to the firm, much less any information about the Plan’s procurement efforts. Adams Aff. ¶ 16; Kerr Aff. ¶ 13.

Here, then, Robinson Bradshaw’s earlier work was far from identical to this case, as Rule 1.9 requires. *See Harriott*, 2015 WL 2024679, at 4.

Because this case has no connection with Robinson Bradshaw’s earlier transactional work, it bears no resemblance to the only Rule 1.9 case the Plan discusses: *Kingsdown, Inc. v. Hinshaw*, No. 14 CVS 1701, 2015 WL 1880599 (N.C. Super. Ct. Apr. 22, 2015). *See* Mot. ¶¶ 48-50. In *Kingsdown*, a law firm advised a client on business transactions, then sued the client in a case that required the firm to attack those same transactions. *Compare* 2015 WL 1406311, at *2-3, 8 (N.C. Super. Ct. Mar. 25, 2015), *with* 2015 WL 1880599, at *4-5.

This case, unlike *Kingsdown*, does not involve Robinson Bradshaw attacking any transaction on which it advised the Treasurer or the Department. Blue Cross NC is not questioning any bond issuance by the Treasurer or any investment by the Department. *See, e.g.*, Pet. at 1. Instead, Blue Cross NC is questioning a 2022 RFP by the Plan. The Plan does not even allege that Robinson Bradshaw, in its work for the Treasurer and the Department, had any contact with this RFP. *See* Mot. ¶¶ 51-53.

Thus, this case does not involve the concern that underlies Rule 1.9(a): “a changing of sides” in the same matter that a past representation involved. *Worley*, 370 N.C. at 365, 807 S.E.2d at 139 (quoting Rule 1.9 cmt. 2).

b. No information that would have been involved in Robinson Bradshaw's former transactional representations is material to this case.

This case also fails the alternative standard for same or substantially related matters: a substantial risk that Robinson Bradshaw's earlier work for the Treasurer and the Department gave the firm information that would materially advance Blue Cross NC's position in this case. *See* Rule 1.9, cmt. 3; *Worley*, 370 N.C. at 367, 807 S.E.2d at 140.

The Plan does not argue that this case meets that standard. For example, the Plan does not argue that any information on the Treasurer's pension investments or the Department's bond issuances would advance Blue Cross NC's claims here in any way, let alone materially. *See* Mot. ¶¶ 40-48, 51-55. Nor does the Plan claim that in this case, Robinson Bradshaw is using or disclosing any nonpublic information of the Plan. *See id.* ¶¶ 39-60 (not relying on Rule 1.9(c), the rule that bars use or disclosure of past clients' nonpublic information).

The omission of these points was no accident. It was compelled by the facts: Robinson Bradshaw's past representations did not involve any information about the Plan at all. *See* Kerr Aff. ¶ 13; Adams Aff. ¶ 16.

Thus, this case fails both of the tests for the "same or a substantially related matter" element under Rule 1.9(a).

3. This case is not materially adverse to the Treasurer or the Department.

This case also fails the third element of a Rule 1.9(a) conflict. Robinson Bradshaw's representation of Blue Cross NC is not materially adverse to the Treasurer or the Department. *See Worley*, 370 N.C. at 365, 807 S.E.2d at 138-39.

Material adversity, like all other Rule 1.9 elements, is judged objectively. *See id.*

As shown below, this case is objectively adverse only to the Plan. It challenges actions that the Plan took in its own name. The Plan tries to blur the distinctions between itself and the Treasurer and the Department, but that effort fails. The Plan's subjective assertion that this case is adverse to the Treasurer and the Department cannot create the material adversity that this case lacks.

a. This case is adverse to the Plan alone.

The Plan, not the Treasurer or the Department, is the only government respondent in this contested case. That is because the case involves acts and decisions of the Plan.

The Plan issued the RFP that underlies this bid protest. Pet. ex. 1 at 1, 9 (the RFP). The Plan's staff conducted the RFP. Watts Aff. ¶¶ 38-40. The Plan's independent Board of Trustees decided the RFP's outcome. *See, e.g., id.* ¶ 41.

The Plan's own prehearing statement admits that this case challenges the Plan's actions alone. It defines the substantive issue in this case as "[w]hether *the State Health Plan*, in the Contract Award Decision or the Protest Denial, acted

erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule.” Plan’s Prehearing Statement at 3 (emphasis added).⁴ The prehearing statement identifies no actions of the Department or Treasurer that are at issue before this Tribunal.

Even the motion to disqualify shows that this case is adverse to the Plan alone:

- When the motion lists the relevant allegations in this case, it lists actions taken by the Plan. Mot. ¶¶ 41-42.
- The motion admits that “*SHP [State Health Plan] personnel* drafted the RFP, reviewed, considered, and evaluated the responses of the insurers that made submissions, and scored the RFP based on those responses.” *Id.* ¶ 43 (emphasis added).
- The motion also admits that the Plan’s Board of Trustees decided the outcome of the RFP unanimously—that is, without a tiebreaking vote from the Treasurer. *Id.*

⁴ The Plan’s prehearing statement (at 3) implies that the Department, rather than the Plan, makes contracts for third-party administrative services. That implied argument is mistaken. Section 135-48.32 provides that “Plan benefits shall be provided under contracts between *the Plan* and the claims processors selected by the Plan.” N.C. Gen. Stat. § 135-48.32(a) (emphasis added). Likewise, section 135-48.33(a) provides that the Plan’s Board of Trustees must approve Plan contracts, like the contract at issue, that are worth more than \$3 million. *Id.* § 135-48.33(a).

b. The Plan’s arguments that it is equivalent to the Treasurer and the Department lack merit.

In an effort to create material adversity with the Treasurer and the Department, the Plan tries to equate itself with those government actors. *See id.* ¶¶ 17-29, 40-47. That argument strays from North Carolina law, which shows that the Plan is a distinct entity with distinct powers. The argument also overlooks the Plan’s organizational history. Finally, it contradicts the Plan’s own public statements.

i. The General Assembly has given the Plan a distinct status and distinct powers.

North Carolina statutes give the Plan a status and powers that are distinct from those of the Treasurer and the Department. For example:

- The General Assembly has defined the Plan as a separate entity. N.C. Gen. Stat. § 135-48.1(14).
- It has given the Plan “all the powers and privileges of a corporation.” *Id.* § 135-48.2. Those powers include the power to sue and be sued in the Plan’s own name. *Id.* § 55-3-02(a)(1).
- To provide benefits to Plan members, the Plan contracts directly with outside parties. *Id.* § 135-48.32.
- The Plan has an independent Board of Trustees with its own powers and duties. *Id.* §§ 135-48.20, -48.22.

To try to blur the distinction between the Plan and the Treasurer, the Plan cites the Treasurer’s authority over the Plan’s staff. *See, e.g.,* Mot. ¶¶ 16-19.

However, the Plan's independent Board of Trustees makes the Plan's key decisions. N.C. Gen. Stat. §§ 135-48.22, -48.33(a). Those decisions include contract awards like the one at issue here. *Watts Aff.* ¶ 41.

ii. The Plan's history of a Type II transfer confirms the Plan's distinct status.

The General Assembly underscored the Plan's distinct status when it connected the Plan with the Department through a Type II agency transfer.

To clarify the organization of our state government, the General Assembly has defined two types of agency transfers.

Type I transfers move all or part of an agency to another principal department. N.C. Gen. Stat. § 143A-6(a). In those transfers, the head of the principal department assumes all of the substantive powers, duties, and functions of the transferred agency. *Id.*

In contrast, Type II transfers keep a transferred agency intact. *Id.* § 143A-6(b). The principal department that receives the agency becomes responsible only for supervision of certain management functions, like personnel policies and facilities. *Id.*; *see* Mot. ¶ 26 (describing the Plan's management functions). That managerial connection does not destroy a transferred agency's independence. To the contrary, a Type II agency continues to "exercise all its prescribed statutory powers independently of the head of the principal department." N.C. Gen. Stat. § 143A-6(b).

As the Plan acknowledges, it was connected with the Department through a Type II transfer. Mot. ¶ 14; *accord* Act of May 11, 2011, *supra*, § 2.2, 2011 N.C. Sess. Laws at 132. Because a Type II agency exercises its powers independently from the head of a principal department, the Plan is legally distinct from the Treasurer and the Department. *See* N.C. Gen. Stat. § 143A-6(b).

iii. The Plan’s public statements emphasize the Plan’s independence.

The Plan’s independence from the Treasurer and the Department is confirmed by the Plan’s own statements about this case.

- For example, the Plan has stated that it designed the RFP at issue “[u]nder the Plan’s authority outlined in state law.” Jan. 20, 2023 Press Release, *supra*, at 1.
- When it rejected Blue Cross NC’s request for a protest meeting, the Plan stressed that it structured the RFP “to support and clarify the . . . decision-making role” of the Plan’s Board. Watts Letter at 3.
- The Plan has told the public that “Plan staff objectively reviewed each [RFP] response.” Jan. 20, 2023 Press Release, *supra*, at 2.
- Finally, the Plan has stressed that “[i]t was *the Board* that . . . voted, unanimously, to award” the contract to Aetna. Watts Letter at 3 (emphasis in original).

In sum, North Carolina law defines the Plan as a separate entity with its own Board of Trustees and its own distinct powers. The Plan’s own statements confirm the Plan’s independence from the Treasurer and the Department.

c. This case does not challenge any actions by the Treasurer or the Department.

To try to overcome the above facts, the Plan relies on “*the Treasurer’s and Department’s position* that BCBS’s allegations allege error and abuse by the Department and criticize the Treasurer’s performance and delegations of his fiduciary duties.” Watts Aff. ¶ 42 (emphasis added). For at least three reasons, that position cannot make this case materially adverse to the Treasurer or the Department.

First, under *Worley*, the Treasurer’s and the Department’s subjective opinions on the nature of this bid protest carry no weight. *See Worley*, 370 N.C. at 367, 807 S.E.2d at 140. In *Worley*, the Supreme Court reversed a trial court for “determin[ing] disqualification in reliance on [a] former client’s subjective judgment, which Rule 1.9(a) prohibits.” *Id.*

Second, an objective analysis of this case defeats the claim that the case criticizes the Treasurer’s and the Department’s fiduciary performance. *See id.* at 368, 807 S.E.2d at 141 (requiring an objective analysis). The Plan is the only government respondent here. An RFP issued by the Plan—specifically, the criteria in and scoring of the RFP—is at the center of this case. *See* Pet. ¶¶ 43-114. The Plan admits that “SHP [State Health Plan] personnel” designed those criteria and

conducted that scoring. Mot. ¶¶ 42, 43, 46. The fact that the Treasurer and the Department oversaw those employees, *see id.*, cannot turn this contested case into a lawsuit for breach of fiduciary duty. The petition never even uses the word “fiduciary.”

Third, the Plan errs by implying that Robinson Bradshaw’s earlier work for the Treasurer and the Department was entangled with their fiduciary duties. *See id.* ¶ 59. The firm helped the Treasurer and the Department only on specific bond issuances and specific investment transactions. Adams Aff. ¶ 11; Kerr Aff. ¶¶ 7, 10. The Plan does not even claim that the Treasurer or the Department asked Robinson Bradshaw to advise them on their fiduciary duties. *See* Mot. ¶¶ 52-53; Watts Aff. ¶¶ 31-35.

For these reasons, Robinson Bradshaw’s representation in this case is not materially adverse to the Treasurer or the Department.

III. The equities weigh against disqualification.

As shown above, the Plan has not shown a Rule 1.9 conflict here. The lack of a conflict, by itself, defeats the Plan’s motion. *See Worley*, 370 N.C. at 364-65, 807 S.E.2d at 138-39.

But even if that were not the case, the Plan’s motion would still fail, because the equities weigh against the drastic remedy of disqualification. *See, e.g., Harriott*, 2015 WL 2024679, at *3; *Shaffer*, 966 F.2d at 146; *Capacchione*, 9 F. Supp. 2d at 579; *see also* Rule 0.2 cmt. 7 (“violation of a Rule does not necessarily warrant . . . disqualification of a lawyer in pending litigation”).

The Plan does not argue that the equities justify disqualifying Blue Cross NC's counsel from this case. That silence confirms that a disqualification here would be inequitable.

As discussed below, granting the Plan's motion would deprive Blue Cross NC of its fundamental right to choose its counsel. It would also cause serious prejudice to Blue Cross NC, the Tribunal, and the public in a time-sensitive case that affects the health care of 582,000 North Carolinians. Finally, the Plan's delay in making its motion weighs against disqualification.

A. Granting the Plan's motion would deprive Blue Cross NC of its chosen counsel.

The balance of equities begins with a presumption in favor of a party's right to use the counsel of its choice. *Worley* itself emphasizes that right. 370 N.C. at 364, 807 S.E.2d at 138. The right to choose counsel "is a fundamental tenet of American jurisprudence, and therefore a court may not lightly deprive a party of its chosen counsel." *Capacchione*, 9 F. Supp. 2d at 579 (applying North Carolina ethics law).

Robinson Bradshaw has served as Blue Cross NC's counsel since this dispute first arose. Ousting the firm now would prejudice Blue Cross NC severely, because this complex case is already well into discovery. Given the size and complexity of this case, it would be hard for new counsel to get fully up to speed in time. A sudden transition of counsel would also impose substantial costs on Blue Cross NC.

The Plan has offered no reason to cause this harm to Blue Cross NC—especially when, as shown below, the rest of the equities also weigh against disqualification.

B. Disqualifying counsel would prejudice the conduct of this proceeding.

Further weighing against disqualification is the serious prejudice that disqualification would inflict on this case and the public. *See Shaffer*, 966 F.2d at 146; *Capacchione*, 9 F. Supp. 2d at 582-83.

In addition to harming Blue Cross NC, disqualification would threaten the progress of this case. It would disrupt the parties' ongoing discussions about discovery by replacing counsel on one side of those discussions. That sudden transition could, despite counsel's best efforts, impede the progress of discovery or other proceedings. It could also spark disputes over earlier agreements among counsel—disputes that could require resolution by the Tribunal.

Any hindrance to the progress of this case would harm the public interest. Hundreds of thousands of state employees' health care decisions depend on the timely resolution of this case. The Plan's contract with Aetna is scheduled to take effect in 2025. Even on an expedited schedule, proceedings in this Tribunal are not scheduled to be complete until 2024. Scheduling Order ¶¶ 1, 8-9. Any delay or disruption from a change in counsel would threaten a scheduling collision that could complicate the resolution of the issues here.

These concerns—ones that the Plan’s motion does not address—weigh heavily against disqualifying Blue Cross NC’s counsel.

C. The Plan unreasonably delayed filing its motion.

Another reason to deny the disqualification motion is the Plan’s delay in filing the motion. The above problems stem in part from that delay.

When courts consider motions to disqualify counsel, they take care not to allow parties to use those motions to hamstring an opponent or derail a case.

See, e.g., Harriott, 2015 WL 2024679, at *3; *McCallum*, 149 F.R.D. at 113.

Those concerns apply here. After Blue Cross NC filed this contested case on February 16, the Plan waited *sixty-eight days* to file its initial disqualification motion. During those nine and a half weeks, the Plan took part in multiple conferences, multiple filings, and a scheduling hearing in this Tribunal—all without ever mentioning any plan to move to disqualify Robinson Bradshaw. *Sawchak Aff.* ¶¶ 5-11. Most notably, when the Tribunal was setting the schedule for this case, the Plan failed to give the Tribunal any notice of its intent to file a motion to disqualify opposing counsel. *Id.* ¶ 10.

Instead, the Plan did not reveal its plans for a disqualification motion until April 24. By then, counsel had conducted multiple scheduling conferences and discovery conferences, and the deadline for document production was only a month away. *See id.* ¶¶ 5-11; Scheduling Order ¶ 3.

In sum, the Plan did not file its motion to disqualify counsel until this case had reached a critical stage. That delay, which threatens disruption to the case now, weighs against the Plan's motion.

CONCLUSION

Blue Cross NC respectfully requests that the Tribunal deny the Plan's amended motion to disqualify Blue Cross NC's counsel.

This 30th day of May, 2023.

ROBINSON, BRADSHAW & HINSON, P.A.

/s/ Matthew W. Sawchak
Matthew W. Sawchak
N.C. State Bar No. 17059
msawchak@robinsonbradshaw.com

Stephen D. Feldman
N.C. State Bar No. 34940
sfeldman@robinsonbradshaw.com

434 Fayetteville Street, Suite 1600
Raleigh, North Carolina 27601
Telephone: (919) 239-2600
Facsimile: (919) 328-8790

Nathan C. Chase, Jr.
N.C. State Bar No. 39314
nchase@robinsonbradshaw.com

101 N. Tryon Street, Suite 1900
Charlotte, North Carolina 28246
Telephone: (704) 377-2536
Facsimile: (704) 378-4000

Counsel for Blue Cross and Blue Shield of
North Carolina

CERTIFICATE OF SERVICE

I certify that today, I caused this motion to be filed through this Tribunal's electronic-filing system. Under Rule 03.0501(4), the system will electronically serve the motion on the following counsel:

Aaron Vodicka, Esq.
North Carolina State Health Plan for Teachers and State Employees
aaron.vodicka@nctreasurer.com

Robert H. Edmunds, Jr., Esq.
Fox Rothschild LLP
bedmunds@foxrothschild.com

Marcus C. Hewitt, Esq.
Fox Rothschild LLP
mhewitt@foxrothschild.com

Elizabeth Sims Hedrick, Esq.
Fox Rothschild LLP
ehedrick@foxrothschild.com

Attorneys for Respondent

Lee M. Whitman, Esq.
Wyrick Robbins Yates & Ponton LLP
lwhitman@wyrick.com

Benjamin N. Thompson, Esq.
Wyrick Robbins Yates & Ponton LLP
bthompson@wyrick.com

Sophia V. Blair, Esq.
Wyrick Robbins Yates & Ponton LLP
sblair@wyrick.com

Attorneys for Respondent-Intervenor

This 30th day of May, 2023.

/s/ Matthew W. Sawchak
Matthew W. Sawchak