**5.7: Former Client Conflicts of Interest**

*It's harder to be friends than lovers, and you shouldn't try to mix the two. ‘Cause if you do it and you’re still unhappy, then you know that the problem is you.*[[1]](#footnote-0)

Attorneys have fiduciary duties not only to their current clients, but also to their former clients. While some of an attorney’s fiduciary duties apply only to current clients, other duties survive the attorney-client relationship. For example, the duty of care typically applies only to current clients, although an attorney may also have a duty of care not to negligently harm the interests of former clients. The duty of loyalty applies primarily to current clients, but also applies to former clients in certain circumstances. And the duty of confidentiality applies with equal force to both current and former clients.

[**Rule 1.9: Duties to Former Clients**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_9_duties_of_former_clients/)

1. 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.
2. A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
   1. whose interests are materially adverse to that person; and
   2. about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.
3. A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
   1. use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
   2. reveal information relating to the representation except as these Rules would permit or require with respect to a client.

[**Rule 1.9 Duties To Former Clients, Comment [2]**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_9_duties_of_former_clients/comment_on_rule_1_9/)

The scope of a “matter” for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer’s involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, 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. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[**Rule 1.9 Duties To Former Clients, Comment [3]**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_9_duties_of_former_clients/comment_on_rule_1_9/)

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

[***Wilson P. Abraham Const. v. Armco Steel Corp.*, 559 F. 2d 250 (5th Cir. 1977)**](https://scholar.google.com/scholar_case?case=10957290777699849581)

**Summary:** Stephen D. Susman represented Whitlow Steel in a Texas federal antitrust conspiracy action. Armco, Ceco, and Laclede were Whitlow’s co-defendants in that action, and were also the defendants in a Louisiana federal antitrust conspiracy action. Ultimately, they pleaded to all of the charges. William E. Wright filed a civil action against Whitlow, Armco, Ceco, and Laclede in Texas, on behalf of Wilson P. Abraham Construction. And then Wright filed an action against Armco, Ceco, and Laclede in Louisiana, and hired Susman as co-counsel. Defendants in the Louisiana action filed a motion to disqualify Susman because he represented Whitlow in the antitrust conspiracy action. The district court denied the motion, and the circuit court vacated and remanded for the district court to determine whether Susman received confidential information.

This is an appeal from an order of the district court denying the defendants’ motion to disqualify counsel for plaintiff. Though the appeal is not from a final judgment in the traditional sense, we take jurisdiction of it as a collateral matter severable from the underlying suit, and too important to be denied review at this time.

This dispute centers around exactly what relationship cocounsel for the plaintiff, a Mr. Stephen D. Susman, had with the various defendants in this suit in a prior legal matter. The factual background which leads up to this current dispute is somewhat detailed and complicated. It begins in 1972 when Mr. Susman was associated with the firm of Fulbright and Jaworski in Houston, Texas. At that time, he undertook to represent Whitlow Steel Company, Inc., an independent rebar fabricator in Houston. This representation was in connection with a Federal Grand Jury investigation of the rebar steel industry in Texas. In August 1973, charges of antitrust violations were levied against Whitlow, Armco Steel Corp., The Ceco Corp., and Laclede Steel Company. Armco, Ceco, and Laclede are the defendants in the present action before this court. As counsel for Whitlow, Mr. Susman met on more than one occasion with the representatives of Armco, Ceco, and Laclede. At these meetings some efforts allegedly were made to develop a cooperative defense. Exactly what information was exchanged, and the importance of that information, is hotly disputed. Mr. Susman contends that the meetings were disorganized and nothing of substance was ever discussed. The defendants contend that documents were in fact discussed and disseminated, grand jury witness lists were prepared, and reports were given as to exactly what testimony was being presented before the grand jury by the various witnesses. The gist of the defendants’ argument is that Mr. Susman was privy to a substantial amount of confidential information. Mr. Susman flatly denies this.

At the same time of the grand jury investigation of the Texas steel industry, a separate grand jury investigation of the Louisiana steel industry was underway. In April 1974, four mills (including Armco, Ceco, and Laclede), an independent fabricator, and five individuals were indicted for “bid rigging.” All defendants except one pled nolo contendere to the Louisiana indictment. After Armco, Ceco, and Laclede were sentenced in Louisiana, they filed motions to dismiss the Texas indictment. They argued that because of the close relationship of the Texas case to the Louisiana case, the double jeopardy clause prevented further prosecution. The Texas district court refused to rule on the defendants’ motion at that time saying that the motion presented such a close factual question that it could not be ruled on until the court heard all the evidence at trial. This ruling prompted the defendants to enter pleas in order to avoid trial.

The final fact which needs to be brought out to fully understand the controversy before this Court is that some time after the Texas grand jury investigation, a civil suit was filed in Texas against Whitlow and the defendants in this suit. The counsel for the plaintiff in that suit was a Mr. William E. Wright. That civil suit is still pending, but at the time it was filed Mr. Susman was still counsel for Whitlow. Mr. Susman, however, denies that anything of substance was done in connection with the defense of that case where he represented Whitlow.

We are now in a position to set forth exactly what the present controversy involves. The plaintiff in the present suit, Wilson P. Abraham Construction Corporation, has filed a civil suit in Louisiana based primarily upon some facts which led to the Louisiana indictments. Counsel for the plaintiff in this suit is William E. Wright, the same person who had been counsel for another party in the Texas civil suit in which Mr. Susman represented Whitlow Steel Company. The defendants allege that the complaint in this case is virtually identical to the Texas complaint in which they were also party defendants. In any event, Mr. Wright has sought to engage Mr. Susman as co-counsel in this case. The defendants are challenging this alleging basically that Mr. Susman has a conflict of interest because of his previous relationship with them when he represented Whitlow Steel Company.

The law in this Circuit is fairly straightforward. This Court has recently reaffirmed with regards to attorney disqualification that a former client seeking to disqualify an attorney who appears on behalf of his adversary, need only to show that the matters embraced within the pending suit are substantially related to the matters or cause of action wherein the attorney previously represented him. This rule rests upon the presumption that confidences potentially damaging to the client have been disclosed to the attorney during the former period of representation. The Court may not even inquire as to whether such disclosures were in fact made or whether the attorney in fact is likely to use the damaging disclosures to the detriment of his former client. The inquiry is limited solely to whether the matters of the present suit are substantially related to matters of the prior representation, and this is because this Court recognizes that in order to aid the frank exchange between attorney and client, it is necessary to preclude even a possibility that information given in confidence by a former client will ever be used without that client's consent. The law in this Circuit is, of course, little more than a reinforcement of the Code of Professional Responsibility, Ethical Considerations, and Disciplinary Rules, promulgated by the American Bar Association and adopted by the Supreme Court of Louisiana effective July 1, 1970.

The case before us, however, presents somewhat of a twist to the usual attorney-client controversy. It is not a former client of Mr. Susman who seeks to disqualify him, but rather co-defendants of a former client. The defendants here contend that in a case alleging conspiracy, such as the case at bar, the defendants have a right to consult together about the case, and that all information derived by any of the counsel from such consultation is necessarily privileged. The defendants persuasively argue that in a joint defense of a conspiracy charge, the counsel of each defendant is, in effect, the counsel of all for the purposes of invoking the attorney-client privilege in order to shield mutually shared confidences. We agree, and hold that when information is exchanged between various co-defendants and their attorneys that this exchange is not made for the purpose of allowing unlimited publication and use, but rather, the exchange is made for the limited purpose of assisting in their common cause. In such a situation, an attorney who is the recipient of such information breaches his fiduciary duty if he later, in his representation of another client, is able to use this information to the detriment of one of the co-defendants. Just as an attorney would not be allowed to proceed against his former client in a cause of action substantially related to the matters in which he previously represented that client, an attorney should also not be allowed to proceed against a co-defendant of a former client wherein the subject matter of the present controversy is substantially related to the matters in which the attorney was previously involved, and wherein confidential exchanges of information took place between the various co-defendants in preparation of a joint defense.

Having stated the bare facts of this rather complicated dispute, and having set forth the law, we unfortunately are unable to presently resolve the controversy. Exactly what information was exchanged between Mr. Susman when he represented Whitlow Steel Company and worked with counsel for the various defendants is greatly contested. Here there is no presumption that confidential information was exchanged as there was no direct attorney-client relationship. Mr. Susman should not be disqualified unless the trial court should determine that Mr. Susman was actually privy to confidential information. The parties also have a completely different version as to the similarity of the Texas grand jury investigation and the Louisiana investigation, and whether or not these investigations are substantially related to the present case.

Under these circumstances it is impossible for us to resolve this matter without some specific factual findings by the trial judge as to the content of the information which was exchanged and whether or not the present controversy is substantially related to the prior one. Nowhere in our search of the record were we able to find any findings made by the trial judge before he denied the defendants’ motion to disqualify Mr. Susman. Consequently, we set aside the district court order denying the defendants’ motion for disqualification and remand for the entry of formal findings of fact and conclusions of law dealing with these issues.

[***Doe v. A Corporation*, 709 F. 2d 1043 (5th Cir. 1983)**](https://scholar.google.com/scholar_case?case=4975636001429606833)

**Summary:** Attorney John Doe was in-house counsel to A Corporation. Among other things, Doe advised A on its employee benefits. In 1980, Doe quit and filed an ERISA class action against A, alleging multiple claims, and seeking to represent a class of plaintiffs with similar claims. A filed a motion to dismiss Doe’s action, and Doe withdrew as class counsel. The district court granted summary judgment to A, because Doe had received confidential information about A. The circuit court held that Doe could not represent the class or serve as class representative, because it would violate his duty of confidentiality to A. But it held that Doe could pursue his own claim against A.

ALVIN B. RUBIN, Circuit Judge:

A lawyer employed as house counsel for a corporation rendered legal advice concerning employee benefits to the corporation and to the administrators of its benefit plan. After he resigned from employment with the corporation, he sued for benefits allegedly due him under the corporation's pension and life insurance plans. He also sought to represent a class of other employees allegedly entitled to those benefits. We affirm the district court’s judgment holding that he is barred by his ethical obligations as a lawyer from prosecuting such litigation as the class representative of other employees. However, we hold that he may prosecute an action in his own behalf and reverse that part of the judgment dismissing his personal claims.

I.

The plaintiff, who is identified as John Doe,[[2]](#footnote-1) was employed in the legal department of A Corporation from 1975 to 1980. In his professional capacity as a lawyer, he consulted with and advised both A Corporation and the administrators of its Benefit Plan concerning legal questions about employee benefits, including those arising in the course of the administration of the Benefit Plan and those involving A Corporation’s group life insurance policy and other benefits. He made daily decisions concerning the rights of individual employees and the acceptability of their beneficiary designations, gave the plan administrators legal advice, and worked with other lawyers in drafting plan provisions. These duties continued until Doe was transferred to A Corporation’s litigation section in April 1979. He resigned in March 1980.

Eleven months later Doe filed suit against A Corporation and X Insurance Company, asserting a claim arising under the Employee Retirement Income Security Act of 1974, as well as pendent claims arising under state law. Doe alleged that X Insurance Company had issued a group policy insuring the lives of A Corporation's employees. He alleged that premiums were paid on a contributory basis, partly by A Corporation and partly by its employees. As a result of its favorable experience, Doe claimed, X Insurance Company had paid dividends to A Corporation, which A Corporation retained without disclosing their receipt to its employees or to “the appropriate federal and state agencies.” Doe also contended that he was improperly denied conversion of his policy to a “comparable term life” policy upon termination of his employment and was offered only the right to convert to whole life insurance. Doe conceded that, as part of his legal duties for A Corporation, he had advised the corporation whether it had a duty to disclose its receipt of dividends to plan participants.

In a separate suit against A Corporation and its Benefit Plan, Doe contended that his pension benefits should have been vested when he resigned. This claim was based on a provision in the plan, required by ERISA, vesting plan benefits in an employee who has been employed for five years. Doe had completed four years and 1600 hours of employment and argued that this was legally sufficient for vesting under the plan and the applicable federal statute.

Doe signed the pleadings in each suit as co-counsel. In each he sought, in addition to prosecuting his own claim, to appear as representative of a class of employees having like claims. In each he sought broad relief for the members of the class, including equitable relief and damages, a “special award” for himself of one-third of any recovery, and an attorney's fee for himself and his co-counsel based on a percentage of the class recovery.

A Corporation filed a motion to dismiss, to enjoin Doe and his co-counsel from prosecuting the suit, and to seal the record on the ground that Doe was barred from initiating a lawsuit because its prosecution would result in his violating the attorney-client privilege and in his disclosing confidential information. Benefit Plan, represented by the same counsel as A Corporation, joined in the motion. Doe withdrew as co-counsel for the class but continued to assert his right to appear both as an individual plaintiff and as a representative of the plaintiff class.

The district court treated the motion as one for summary judgment. It granted the motion, holding that Doe was disqualified to sue either A Corporation or Benefit Plan because they were his former clients. Relying on an irrebuttable presumption that the substantial relationship between Doe’s duties for A Corporation and the issues in the suit would lead Doe to use his former clients’ confidential information to their detriment in prosecuting the action, the court dismissed both suits with prejudice to Doe but without prejudice to a suit by any present or future employee of A Corporation.

A client is usually entitled to counsel of his choice. But the lawyer may be forbidden by ethical strictures to accept tendered employment. Because Doe has now withdrawn as counsel, we must go beyond the question whether he would be barred from acting as a lawyer for others whose interests conflict with those of his former client and consider how those ethical standards constrain his conduct in representing others as class representative, albeit not lawyer, and in asserting his own claims.

II.

The attorney-client privilege is evidentiary. A client may invoke it to prevent his lawyer from revealing communications made in confidence to the lawyer while acting in the capacity of professional legal adviser for the purpose of obtaining legal advice. However, during the course of representing a client, a lawyer may receive information that is not shielded by the privilege but is considered confidential by the client. He may, for example, receive information from some source other than the client or information imparted for a purpose other than obtaining legal advice.

Some of the information Doe acquired about A Corporation’s affairs was protected by the attorney-client privilege. However, he apparently gained other information that was not privileged. For example, he apparently saw letters and other documents that originated with X Insurance Company and received and answered questions from other A Corporation employees about their rights.

The Code of Professional Responsibility seeks to safeguard both the attorney-client privilege and other confidential information by restricting a lawyer's ability to accept employment that would threaten disclosure of either. Canon 4 deals directly with the matter: “A Lawyer Should Preserve the Confidences and Secrets of a Client.” But other principles are also applicable, for Canon 9 states, “A Lawyer Should Avoid Even the Appearance of Professional Impropriety.” These provisions protect not only against disclosure of privileged communications but also against the revelation of confidential information that is not privileged.

Ethical Consideration 4-4 states: “The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge.” The ethical duty extends to shielding the confidentiality of all information acquired in the course of representing a client, preventing the use of any such knowledge to the client's disadvantage. “The use of the word ‘information’ in these Ethical Considerations as opposed to ‘confidence’ or ‘secret’ is particularly revealing of the drafters’ intent to protect all knowledge acquired from a client without regard to whether someone else may be privy to it.”

Adherence to Canon 4 requires that a lawyer be disqualified from representing a party to litigation if the adversary party can show that matters in the pending suit are substantially related to matters in which the attorney previously represented the adversary. A substantial relationship between issues in a lawsuit and a lawyer's earlier work for an adversary may also serve as the basis for disqualification under Canon 9.

If a lawyer seeks to act adversely to his former client in a matter that might involve disclosure of information acquired during the prior employment, the former client need not prove that the lawyer has used or is likely to use such information in order to disqualify the lawyer representing the party suing him. There is a conclusive and irrebuttable presumption that permitting the lawyer who has switched loyalties to represent the adversary of a former client in substantially related litigation will lead to disclosure and misuse of confidential information obtained during the previous representation.

The applicability of Canon 9 turns on whether the moving party has shown that there is a reasonable possibility of the occurrence of some specifically identifiable improper conduct and whether the likelihood of public suspicion outweighs the social interest in the lawyer’s continued participation in the case.

If Doe were still attempting to represent the class as its lawyer, he would have a patent conflict of interest.

It must be remembered that the attorney in such situations as this does not have the shelter enjoyed by a defendant whose adversary must meet a burden of proof. Where conflict of interest or abuse of professional confidence is asserted, the right of an attorney freely to practice his profession must, in the public interest, give way in cases of doubt.

The standard of ethical conduct not only disqualifies Doe from representing a class as lawyer but also bars him from disclosing information he received from A Corporation to some other lawyer. A lawyer is not merely a panderer who is to do for a client anything that the client would like to do himself had he but the lawyer’s knowledge. As a member of a profession that enjoys the exclusive license to engage in the practice of law, he is required to deny requests that would violate the ethical tenets of his profession even at the sacrifice of self-interest.

The responsibilities of a class representative are not identical to those of the lawyer for the class. The class representative need not be a member of the bar and is not subject to the profession’s ethical constraints. But a representative owes duties to the class that require him to exert the utmost diligence on behalf of all of its members. To allow Doe to act as class representative would create a tension between his obligation as representative to do all he can to vindicate the rights of the class members and his personal ethical duty to protect A Corporation’s secrets. A lawyer may not, simply by assuming a new identity, escape the strictures that would govern his conduct were he representing the class as counsel. Doe contends that he must be permitted to represent the class because he has yet another identity as a fiduciary for Benefit Plan and his fellow employees of A Corporation. Although the attorney-client privilege may be inapplicable when either the lawyer or the client stands in a fiduciary relationship to the party seeking disclosure, Doe simply was not such a fiduciary. He was a lawyer for and representative of A’s corporate interest.

If there are meritorious causes of action against A Corporation, someone other than Doe can and must file the suit as class representative just as someone other than he must act as class counsel. Obviously, Doe may not divulge information that would enable another to volunteer as class representative. If no other class member ever learns of the claim, it may go forever unvindicated. The lawyer’s duty to his client creates the possibility that his silence will permit valid claims to lie unasserted.

III.

The assertion of ethical barriers to Doe’s attempt to vindicate his personal claims creates a conflict with another fundamental policy: the availability of a legal forum for the adjudication of rights. The Supreme Court has recognized that, in some circumstances, access to courts is protected by the due process clause. While the principle does not give any broad “right” of access to federal court, the courtroom door should not lightly be barred to a person who has a tenable legal claim.

The conflict between protection of the client’s need for confidentiality and the lawyer’s opportunity to assert claims against that client cannot be resolved on the basis that one enjoys universal primacy over the other. The Code makes confidentiality the general principle but recognizes exceptions to the prohibition against divulging even a client's secrets. Thus, a lawyer may reveal confidential information and secrets when it is necessary for him to do so to prevent the client from committing a crime, to collect a fee, or to defend himself against an accusation of wrongful conduct. The rationale for the last of these exceptions is: “It would be a manifest injustice to allow the client to take advantage of the rule of exclusion as to professional confidence to the prejudice of his attorney, or that it should be carried to the extent of depriving the attorney of the means of obtaining or defending his own rights.”

In none of the cases relied upon by A Corporation has a lawyer been prohibited from asserting a personal cause of action. In *Richardson v. Hamilton International Corp.*, the plaintiff was an attorney who held stock in the defendant corporation. He had represented the corporation in his private practice before filing the lawsuit. He filed a shareholder’s derivative action as a class action. The court disqualified him from appearing as a lawyer in the action and prohibited him from maintaining the suit while recognizing that another shareholder could maintain the action. Because a derivative suit is brought on behalf of the corporation, not the suing individual, the lawyer was not seeking to assert a cause of action to vindicate his personal rights.

*Meyerhofer v. Empire Fire & Marine Insurance Co.* contains language arguably to the contrary. The court affirmed a district court decision “to the extent that the orders appealed from prohibit the attorney from acting as a party or as an attorney for a party.” Yet the court had earlier in its opinion stated: “The attorney never sought to ‘prosecute litigation,’ either as a party or as counsel for a plaintiff party.”

The distinction between what is forbidden to the lawyer appearing as an attorney-at-law and what is permitted an individual who is a lawyer but asserts only his personal rights was drawn in *Hull v. Celanese*. The court affirmed the disqualification of a law firm seeking to represent a potential intervenor in a sex discrimination suit. The intervenor was herself a lawyer and an employee of the defendant; she had worked on the defense of the sex discrimination suit in which she sought to intervene. The court made clear that: “This decision should not be read to imply that the lawyer cannot pursue her claim of employment discrimination based on sex.”

In an attempt to demonstrate that Doe has been guilty of unethical conduct that should be added to the balance against him, A Corporation has brought to our attention material of record indicating impropriety. Before filing suit, Doe threatened A Corporation with litigation on behalf of a purported class if it did not meet demands that included the payment to him of a “contingent attorney fee” of 10% of a fund he described as “millions of dollars.” From his actions thereafter, something other than a disinterested effort to vindicate the rights of a group of wronged employees might be inferred. When he filed suit, he did not seek only redress for his own claims and for those members of the classes he wished to represent: in the suit involving the group insurance, he demanded payment to himself, personally, of a “special award” of one-third of the “class” recovery, which he asserted to be in the “millions,” as well as treble damages, and he sought “at least $300,000” as personal recompense in the suit against the Benefit Plan. In addition, he signed the complaints as co-counsel, and sought to be awarded an attorneys’ fee in both actions, the fee in the group insurance suit to be based on a “percentage” of the “class” recovery. If, indeed, it develops after the facts are fully explored that Doe attempted either to blackmail or to mulct the corporation, we do not condone that conduct. If he has violated the Code of Professional Responsibility, disciplinary charges should be brought against him. The district court did not, however, dismiss Doe’s personal claim because of his misconduct. The district judge granted summary judgment on the basis that Doe’s prior representation of A Corporation was a per se bar. A lawyer, however, does not forfeit his rights simply because to prove them he must utilize confidential information. Nor does the client gain the right to cheat the lawyer by imparting confidences to him.

The sole interest A Corporation can assert, other than defeating Doe's claim, is preservation of confidentiality for the secrets Doe learned while in its employment. The corporation’s interest in confidentiality, however, can be at least partially protected by anonymity. There is no social interest in allowing the corporation to conceal wrongdoing, if in fact any has occurred. Nor is there any social interest in allowing it to deny Doe pension rights or insurance benefits if they are legally due him. But that would be the effect of our refusing to allow Doe to prosecute his individual lawsuit.

IV.

Doe, in turn, seeks to disqualify counsel for the defendants on the basis that they represent both A Corporation and the Benefit Plan, whose interests are allegedly conflicting. He relies on Disciplinary Rule 5-105(B), which provides: “A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).”

Counsel representing both A Corporation and Benefit Plan assert that they have made a full disclosure to their respective clients and that both have consented to the joint representation, waiving any possible claim of conflict of interest which may arise. A potential or even real conflict of interest may, of course, be waived, even in criminal cases. At the moment, A Corporation and Benefit Plan share an important common interest in seeking to prevent misuse of their confidences by their former lawyer and employee. While their interests may at some time diverge, it is for them, once fully informed, to determine whether their lawyer can be faithful to both of their interests.

Accordingly, we AFFIRM as much of the judgment as dismisses the class action claims in both suits without prejudice, places the case records under seal, and enjoins Doe and co-counsel from communicating with other persons to induce them to file suit and from disclosing any confidential information Doe gained during his employment by A Corporation. We REVERSE the judgment insofar as it dismisses Doe’s personal claim with prejudice and REMAND for further proceedings consistent with this opinion. Each party shall bear its own costs.





[***Brennan’s, Inc. v. Brennan’s Restaurants, Inc.*, 590 F. 2d 168 (5th Cir. 1979)**](https://scholar.google.com/scholar_case?case=4804534419597500813)

**Summary:** The Brennan family owned Brennan’s, Inc. in New Orleans and Brennan’s Restaurants, Inc., which operated other restaurants. Edward F. Wegmann was general counsel for all of the family businesses, and helped them register trademarks. After a dispute, the family divided the enterprise, but did not determine rights to the trademarks. Brennan’s Restaurants filed a trademark infringement action against Brennan’s, which hired Wegmann to represent it. Wegmann hired Arnold Sprung, a trademark specialist, as co-counsel. Brennan’s Restaurants filed a motion to disqualify Wegmann and Sprung, which the district court granted. The circuit court affirmed the disqualification of Wegmann, based on the appearance of impropriety, but vacated and remanded the disqualification of Sprung, to determine whether he actually learned any confidential information from Wegmann.

TJOFLAT, Circuit Judge:

This is an action for trademark infringement and unfair competition. This appeal, however, concerns the disqualification of attorneys. The district court barred the appellants’ attorneys from further representing them on grounds of conflict of interest. The correctness of this order is the only issue before us.

I

The underlying dispute in this case arises out of the business affairs of the Brennan family of New Orleans, Louisiana, who have been in the restaurant business for many years. All of the corporate parties are owned and closely held by various members of the Brennan family. Appellee Brennan’s, Inc., the plaintiff below, owns and operates Brennan’s restaurant at 417 Royal Street in New Orleans. The corporate appellants own and operate other restaurants in Louisiana, Texas, and Georgia. There has been no trial as yet, but a review of the facts leading to the present suit, as disclosed by the pleadings and affidavits, is necessary to a decision of this appeal. For convenience, the parties will be referred to in the capacities in which they appear in the court below.

Prior to 1974, all the members of the Brennan family were stockholders and directors of plaintiff, and some of them were stockholders and directors of the corporate defendants. All the corporations were independent legal entities in the sense that none held any of the stock of another, but they were all owned by members of the Brennan family and had interlocking boards of directors. In 1971, Edward F. Wegmann became general counsel for the family businesses, and his retainer was paid pro rata by all the corporations. He continued this joint representation until November 1973.

As part of his services, Mr. Wegmann, in close cooperation with trademark counsel in Washington, D.C., prosecuted applications for the federal registration of three service marks: “Brennan’s,” “Breakfast at Brennan’s,” and a distinctive rooster design. A registration for the rooster design was issued in February 1972, but the applications for the other two marks were initially denied on the ground that they were primarily a surname. On the advice of Washington trademark counsel, Mr. Wegmann collected data supporting a demonstration that the marks had acquired a secondary meaning, and the applications were amended to include this material. Registrations were subsequently issued in plaintiff's name in March 1973. These registered service marks are the subject of this lawsuit.

Later in 1973 a dispute developed within the Brennan family over the operation and management of the family businesses. This dispute was resolved in November 1974 by dividing the corporations’ stock between the two opposing family groups. Plaintiff became 100% owned by one group and the corporate defendants became 100% owned by the second group, composed of the individual defendants. Mr. Wegmann elected to continue to represent defendants and severed his connections with plaintiff and its shareholders.

At no time during the negotiations which culminated in the November 1974 settlement was there any discussion of who would have the right to use the registered service marks. Both sides claimed ownership of the marks and continued to use them after the settlement. Attempts to negotiate a license or concurrent registration were unsuccessful. Plaintiff filed this suit for trademark infringement and unfair competition on May 21, 1976. In their answer and counterclaim defendants alleged that the marks were registered in plaintiff’s name for convenience only, and, “in truth and actuality, the applications were filed and the registrations issued for the benefit and ownership of all of the Brennan family restaurants, including the corporate defendants.” Defendants also alleged that the marks and registrations are invalid.

Upon the filing of this suit, Mr. Wegmann, on behalf of the defendants, retained the services of Arnold Sprung, a New York patent and trademark attorney, to assist him in the defense of the case. On October 22, 1976, plaintiff moved for the disqualification of both attorneys: Mr. Wegmann on the ground that his present representation was at odds with the interests of plaintiff, his former client, and Mr. Sprung by imputation of Mr. Wegmann’s conflict. After a hearing, the district court granted the motion. It found that the subject matter of the present suit is substantially related to matters in which Mr. Wegmann formerly represented plaintiff, and to allow him now to represent an interest adverse to his former client creates the appearance of impropriety. It also found that “the close working relationship which has been shown to exist between Mr. Wegmann and Mr. Sprung creates a significant likelihood that Mr. Sprung would have had access to or been informed of confidential disclosures made to Mr. Wegmann by his former client.”

II

We first consider the disqualification of Mr. Wegmann.

Defendants argue that the district court failed to consider that in his prior representation of plaintiff, Mr. Wegmann also represented defendants. This fact of joint representation is crucial, they assert, since no confidences can arise as between joint clients. Hence, the argument goes, Mr. Wegmann violates no ethical duty in his present representation.

We have not addressed this precise question before. In *Wilson P. Abraham Construction Corp. v. Armco Steel Corp.*, we reaffirmed the standard that “a former client seeking to disqualify an attorney who appears on behalf of his adversary, need only to show that the matters embraced within the pending suit are substantially related to the matters or cause of action wherein the attorney previously represented him,” but we acknowledged that “this rule rests upon the presumption that confidences potentially damaging to the client have been disclosed to the attorney during the former period of representation.” Defendants contend that this presumption cannot apply in this case. This argument, in our view, interprets too narrowly an attorney’s duty to “preserve the confidences and secrets of a client.” The fundamental flaw in defendants’ position is a confusion of the attorney-client evidentiary privilege with the ethical duty to preserve a client’s confidences. Assuming the prior representation was joint, defendants are quite correct that neither of the parties to this suit can assert the attorney-client privilege against the other as to matters comprehended by that joint representation. But the ethical duty is broader than the evidentiary privilege: “This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge.” “A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client.” The use of the word “information” in these Ethical Considerations as opposed to “confidence” or “secret” is particularly revealing of the drafters’ intent to protect all knowledge acquired from a client, since the latter two are defined terms. Information so acquired is sheltered from use by the attorney against his client by virtue of the existence of the attorney-client relationship. This is true without regard to whether someone else may be privy to it. The obligation of an attorney not to misuse information acquired in the course of representation serves to vindicate the trust and reliance that clients place in their attorneys. A client would feel wronged if an opponent prevailed against him with the aid of an attorney who formerly represented the client in the same matter. As the court recognized in *E.F. Hutton & Co. v. Brown*, this would undermine public confidence in the legal system as a means for adjudicating disputes. We recognize that this concern implicates the principle embodied in Canon 9 that attorneys “should avoid even the appearance of professional impropriety.” We have said that under this canon there must be a showing of a reasonable possibility that some specifically identifiable impropriety in fact occurred and that the likelihood of public suspicion must be weighed against the interest in retaining counsel of one’s choice. The conflict of interest is readily apparent here, however, and we think that the balance weighs in favor of disqualification. The need to safeguard the attorney-client relationship is not diminished by the fact that the prior representation was joint with the attorney’s present client. Since the district court's findings of prior representation and substantial relationship are not disputed, we affirm the disqualification of Mr. Wegmann.

III

Whether Mr. Sprung should be disqualified presents a more difficult case. He has never had an attorney-client relationship with plaintiff; the district court disqualified him by imputation of Mr. Wegmann's conflict. Up to this point we have accepted, for the sake of argument, defendants’ assertion that they were formerly joint clients with plaintiff of Mr. Wegmann. There is no dispute that plaintiff and defendants were previously represented by Mr. Wegmann simultaneously, but plaintiff maintains that, at least with respect to the registration of the service marks, Mr. Wegmann was representing plaintiff alone. The district court made no findings on the issue. Because we think that the disqualification of Mr. Sprung may turn on this fact and others not found by the court below, we vacate that part of the court's order relating to Mr. Sprung and remand the cause for further proceedings. For the guidance of the court on remand, we set forth our view of the applicable ethical standards.

If the court finds that Mr. Wegmann previously represented plaintiff and defendants jointly, we can see no reason why Mr. Sprung should be disqualified. As between joint clients there can be no “confidences” or “secrets” unless one client manifests a contrary intent. Thus, Mr. Sprung could not have learned anything from Mr. Wegmann that defendants did not already know or have a right to know. Plaintiff argues that this permits the defendants indirectly to gain the benefit of Mr. Wegmann’s services when they could not do so directly. If the representation was joint, however, defendants possess no information as to which plaintiff could have had any expectation of privacy in relation to the defendants. The only remaining ground for disqualification then would be an appearance of impropriety. In Part II of this opinion, we decided there is such an appearance when an attorney represents an interest adverse to that of a former client in a matter substantially related to the subject of the prior representation. Mr. Sprung has never been plaintiff’s counsel, however; he is only the cocounsel of one who was. We are enjoined not to give Canon 9 an overly broad application and to maintain “a reasonable balance between the need to ensure ethical conduct on the part of lawyers and other social interests, which include the litigant's right to freely chosen counsel.” In the case of Mr. Sprung, we think the balance weighs against disqualification. Assuming that Mr. Wegmann’s prior retainer was joint, plaintiff has suffered no actual prejudice from communications between Mr. Wegmann and Mr. Sprung. There is a possibility that Mr. Sprung has obtained informally information that he would otherwise have had to seek through discovery. The Second Circuit has indicated that circumvention of the discovery rules is grounds for automatic disqualification. This seems to us an overly rigid approach. In a disqualification case, it is well to remember that “in deciding questions of professional ethics men of good will often differ in their conclusions.” As the Second Circuit itself has said:

When dealing with ethical principles, we cannot paint with broad strokes. The lines are fine and must be so marked. Guideposts can be established when virgin ground is being explored, and the conclusion in a particular case can be reached only after painstaking analysis of the facts and precise application of precedent.

Under the peculiar facts of this case, we do not think there would be such an appearance of impropriety in Mr. Sprung's continued representation of defendants as to warrant his disqualification.

If the district court finds that Mr. Wegmann did not previously represent these parties jointly, it does not necessarily follow that Mr. Sprung should be disqualified. The courts have abjured a per se approach to the disqualification of cocounsel of disqualified counsel. In the absence of an attorney-client relationship between Mr. Sprung and plaintiff, a presumption of disclosure of confidences is inappropriate. Mr. Sprung should not be disqualified unless he has learned from Mr. Wegmann information the plaintiff had intended not be disclosed to the defendants.

[***Marcum v. Scorsone*, 457 S.W.3d 710 (Ky. 2015)**](https://scholar.google.com/scholar_case?case=2842193516980210637)

**Summary:** Appellants Marcum, Conway, Foster Northrop, and Cheney sought a writ of prohibition in the Court of Appeals to bar enforcement of an order disqualifying their lawyers, the firm Miller, Griffin & Marks, PSC (MGM), in a shareholder-derivative suit brought by Paul R. Plante, Jr., where the order was granted based on a finding of an “appearance of impropriety.” The court held that MGM’s representation of two shareholders and officers of the company while advising the company’s board of directors did not create an actual conflict of interest. Moreover, the mere appearance of any resulting impropriety was not sufficient to merit MGM’s disqualification.

OPINION OF THE COURT BY Justice, NOBLE.

Appellants, Frank D. Marcum, James D. Conway, Foster Northrop, and Mark Cheney, sought a writ of prohibition in the Court of Appeals to bar enforcement of an order disqualifying their lawyers, the firm Miller, Griffin, & Marks, PSC (MGM), in a shareholder-derivative suit brought by the Real Party in Interest, Paul R. Plante, Jr., where the order was granted based on a finding of an “appearance of impropriety.” The Court of Appeals denied the writ, concluding that one of the prerequisites for a writ, specifically a showing of irreparable harm, had not been made. This Court concludes that the Appellants have adequately shown the prerequisites for the availability of a writ and that the trial court applied an incorrect legal standard (“an appearance of impropriety”) in disqualifying the firm. Moreover, disqualification was improper under the correct standard (a showing of actual conflict), at least based on the current record and findings of the trial court. Thus, this Court reverses and remands for entry of the requested writ.

I. Background

The shareholder-derivative suit underlying this writ action gives an excellent corporate representation of the infamous “Gordian knot.” The Real Party in Interest (Plante) and the Appellants (Marcum, Conway, Northrop and Cheney), along with Bill Seanor, began their journey as the shareholders of Arthrodynamic Technologies Animal Health Division, Inc. (ADT), a Kentucky corporation that sells veterinary products. Originally, Marcum and Conway each owned 37.5% of the shares; Cheney owned 10%; and Northrop, Plante, and Seanor each owned 5%. All six shareholders were originally on the board of directors. Over time, disputes among the shareholders led to changes in the officers and membership of the corporate board.

In late 2010, Plante and Seanor seized control of the board, apparently having convinced a majority of the directors that Marcum and Conway had acted improperly, and caused Marcum and Conway to be removed from the board. Plante and Seanor were installed as the secretary and president respectively. In February 2011, Conway and Marcum, holding a total of 75% of the shares of ADT, returned to the board, though Plante and Seanor remained in their role as officers.

In March 2011, a majority of the board caused the corporation to file a lawsuit against Marcum and Conway in Fayette Circuit Court alleging breach of fiduciary duties, misappropriation of corporate funds, and other claims. The suit was later transferred to Woodford Circuit Court. Miller, Griffin and Marks (MGM) represented Marcum and Conway individually in that action through the services of Thomas Miller.

On August 29, 2011, Bioniche Animal Health USA, Inc., which had been ADT’s manufacturer, filed suit against ADT in federal court over a contract dispute. ADT was defended in the litigation by Stites Harbison PLLC, a Kentucky law firm, and Sutherland Asbill & Brennan LLP, a firm headquartered in Atlanta.

In October and November 2011, there was some shaking up of the board’s membership related to Marcum’s claimed purchase of shares owned by Northrop, Cheney, and Conway. Northrop tendered his resignation from the board, which was accepted at an October board meeting. In October, Cheney also executed a resignation letter, addressed to Seanor as president, but the letter was never delivered and was instead held by Marcum’s counsel. Upon acceptance of Northrop’s resignation, Bob Watson was named to the board in his stead. On October 31, 2011, a board meeting was held at which Seanor was removed as president and replaced by Marcum, Cheney was made vice-president, Seanor was made secretary, and Watson was made Treasurer.

At the board meetings in October and November 2011, MGM attorneys were present, recorded minutes, and participated in discussions with the board members. Before the November meeting, Marcum, acting as president, sent letters to the litigation firms asking that they take no further action in the Bioniche litigation. At the November 2011 meeting, MGM advised the directors to settle with Bioniche. Plante was a director at the time, and he objected to the settlement. Three of the four Appellants (Marcum, Cheney, and Conway) were also on the board at that time, however, and they, along with Watson, voted in favor of settling. Though the record does not disclose the exact timing, it appears that the lawsuit by ADT against Marcum and Conway was also discussed at these meetings, and it was dismissed soon after.

That, however, means that the suit by ADT against Marcum and Conway overlapped with the Bioniche litigation against ADT. Both were ongoing actions as of the October and November 2011 board meetings. As a result, MGM represented the two individuals, Marcum and Conway, in an action brought by ADT, at the board’s behest, at the same time that the firm was advising the board in some capacity about the Bioniche suit.

On January 3, 2012, the underlying shareholder derivative action was filed by Plante and Seanor (who has since settled his claim) in Fayette Circuit Court. The original complaint named only two of ADT's directors, Marcum and Conway, as defendants. On April 18, 2012, Northrop came back on the board, replacing Watson. After some discovery, the complaint was amended to also name Cheney and Northrop as defendants. The suit alleges, among other things, that the Appellants had violated various provisions of ADT’s shareholder agreement with respect to sales of stock. MGM was retained to represent Appellants as they defended against this claim. Another law firm, Stoll Keenon Ogden, represents ADT, which was included in the suit as a nominal party on whose behalf Plante has brought the suit.

On June 18, 2012, Plante moved to disqualify MGM as the counsel for the Appellants, alleging that because MGM had represented the board, including Plante, in giving advice on the Bioniche litigation, and because MGM had represented Marcum and Conway individually in ADT’s suit against them in Woodford County, MGM’s participation in the underlying shareholder action created a conflict of interest or at least an appearance of impropriety sufficient to require MGM’s disqualification. In other words, because MGM represented Marcum and Conway against ADT (of which Plante was a board member) in the Woodford County suit, and then represented the board in the Bioniche suit (by advising the board), MGM effectively acted as counsel both against the board and for the board. By extension, Plante, as a shareholder, argued that MGM had taken a position against him and represented him at the same time.

In January 2013, Marcum, Conway, Cheney, and Northrop met, acting as a quorum of the board. They adopted a resolution stating that there was no conflict of interest in MGM’s representation of them “with respect to ADT,” and purporting to waive any conflict that might exist.

Briefing and arguments regarding this motion and other matters occurred for some period of time. (The exact scope of these proceedings is not clear because a writ action does not contain the entire record of an underlying lawsuit.) Eventually, however, the motion was submitted for decision, and the trial court ruled in Plante’s favor, granting his motion to disqualify MGM from representing the Appellants. The court specifically found that “during the course of MGM's representation of Conway and Marcum in the lawsuit filed against them by ADT, MGM also provided legal advice to the board of directors of ADT in a separate lawsuit with Bioniche.”

But then the trial court specifically found, in the next two sentences, that it was making “*no finding* on whether Miller and MGM provided legal advice in their capacity as representative of Conway and Marcum or with the intent to represent ADT in settlement negotiations with Bioniche,” and “*no finding* as to any actual impropriety on the part of Miller and MGM.” (Emphasis added.) The court then said that it was difficult to see how Plante, as a part owner of the corporation ADT, could perceive that he got “utmost advocacy” when MGM represented “both the corporation in advising about Bioniche and individuals adverse to the corporation in the suit against Conway and Marcum.” The court then concluded that disqualification of MGM was required based on “the appearance of impropriety” under *Lovell v. Winchester*.

The Appellants filed a writ action at the Court of Appeals. The court denied the writ because they had not shown irreparable injury, one of the usual prerequisites for issuance of such a writ.

The case is appealed to this Court as a matter of right.

II. Analysis

In disqualifying MGM, the trial judge, to his credit, was simply following precedent, namely, *Lovell v. Winchester*. He justified the disqualification because he saw an appearance of impropriety. He was bound by this Court’s decision to apply that standard.

But this Court is not so bound, except by the force of stare decisis. And this Court has concluded that disqualification based on an appearance of impropriety is inappropriate under the existing Rules of Professional Conduct. It is telling that the appearance-of-impropriety standard does not appear in those rules, except in commentary condemning its use and noting that it has been deleted from the rules. Although this Court has previously upheld the use of that standard in deciding lawyer disqualification questions, the standard must now be rejected. Disqualification under that standard is “little more than a question of subjective judgment by the former client.” In essence, all the former client has to do is claim discomfort with the subsequent representation to create the appearance that something untoward is going on and thus that there is an appearance of impropriety. Moreover, “since ‘impropriety’ is undefined, the term ‘appearance of impropriety’ is question-begging.” Even if impropriety is the same as an actual conflict, there should be something more substantive than just a possible conflict before disqualification takes place.

The simple fact is that disqualification is easier to achieve under the appearance-of-impropriety standard. While that is appropriate for judicial recusal questions, because there is a heightened concern about public confidence in the judiciary, that concern is less pressing when dealing with the private lawyer-client relationship. If anything, use of such a low standard in that context creates a “greater likelihood of public suspicion of both the bar and the judiciary” and “would ultimately be self-defeating,” because it creates the impression that courts are ruling based on appearances rather than facts. Before a lawyer is disqualified based on a relationship with a former client or existing clients, the complaining party should be required to show an actual conflict, not just a vague and possibly deceiving appearance of impropriety. And that conflict should be established with facts, not just vague assertions of discomfort with the representation.

There is no doubt that personal choice of representation is based on a litigant's belief in the competency of chosen counsel, and the confidence placed in counsel. Even though all practicing lawyers are presumed to be competent, common sense dictates that not all lawyers share the same degree of competence. Otherwise, clients would not care who their lawyers were, and there would be little competition among lawyers for business. A litigant has the reasonable expectation that he will have the best representation he can and is willing to afford, and taking his chosen counsel away based on an “appearance” alone creates the belief that the court is arbitrary or capricious. That undermines faith in the judicial process, which, in turn, clearly affects the orderly administration of justice negatively in general and, in that specific case, irreparably. On the other hand, specific findings of an actual conflict refute arbitrariness, and promote faith in the fairness of the proceeding.

*Lovell* applied a standard that is no longer a part of the Rules of Professional Conduct and is simply inadequate to preserve the interests involved when a conflict of interest is alleged. To the extent that Lovell and other cases have approved the appearance-of-impropriety standard, they are overruled. Instead, in deciding disqualification questions, trial courts should apply the standard that is currently in the Rules of Professional Conduct, which at this time requires a showing of an actual conflict of interest.

To resolve that question, the trial court must hold an evidentiary hearing. And before disqualifying counsel, the court must find that an actual conflict exists, and state on the record what that conflict is. To the extent that the trial judge did not do this, consideration of a special-cases writ is appropriate in this case. Thus, a writ is available as a remedy.

Moreover, this Court concludes that the writ should issue. In many ways, the trial court in this case complied with what we require today for disqualification of counsel. The trial court ordered briefing on the disqualification issue, and conducted multiple hearings. The court heard evidence and did not rely merely on allegations in motions and pleadings. And, as noted above, the trial court applied the standard previously approved by this Court.

But, also as noted above, that standard is no longer appropriate under the Rules of Professional Conduct. A mere appearance of impropriety, as found by the trial court in this case, cannot support disqualification of counsel. Such an extreme remedy must be based on an actual conflict of interest. And the trial court’s order specifically stated it was not finding an actual impropriety, that is, an actual conflict.

Although the Court's order stated that MGM had represented ADT at the same time that it represented individuals adverse to ADT, that does not, by itself, support disqualification in the shareholder-derivative suit. First, it is not entirely clear that MGM actually represented the corporation when providing advice on whether to settle the Bioniche litigation. In fact, the trial court’s order specifically states that it “makes no findings on whether Miller and MGM provided legal advice in their capacity as representatives of Conway and Marcum or with the intent to represent ADT in settlement negotiations with Bioniche.” And ADT, as a corporate entity, had been represented by other counsel in that litigation. Although Plante has argued that MGM represented the corporation, whether that was actually the case is less than clear. Thus, the concern that MGM may have been both for and against ADT at the same time may be unfounded. At the very least, there are insufficient findings in the trial court’s order to show an actual conflict.

Second, even if there was an actual conflict when MGM advised the board about the Bioniche litigation, while also representing Marcum and Conway against ADT, that conflict only extended to the Bioniche litigation. Once that case settled, and the Marcum-Conway case was dismissed, there was no longer a conflict stemming from the simultaneous representation—and certainly not one that extends to the derivative suit underlying this action.

For that reason, this Court concludes the trial court’s disqualification order was improper under the standard articulated today. A writ of prohibition barring its enforcement is the appropriate remedy.

This is not to say, however, that Plante cannot show a sufficient conflict to have MGM disqualified once this case returns to the trial court. It is possible that by advising the board, of which Plante was a member, about the Bioniche litigation, MGM was representing Plante. Since the allegedly improper resolution of the Bioniche litigation is part of the underlying derivative suit, among other things, it is possible that MGM may have an actual conflict under Rule of Professional Conduct 1.9, which governs duties to former clients. There has also been some suggestion that MGM now represents the entire board, including Plante, in the derivative action, although only the Appellants appear to have been named as defendants. If MGM is representing the entire board, that could give rise to a conflict with an existing client under Rule 1.7.

But the focus in the trial court appears not to have been these possible conflicts, but the conflict that previously existed in the Bioniche litigation itself. Regardless, the trial court's order does not have findings sufficient to show such a conflict based on duties to former clients, and this Court cannot make such findings, especially based on the limited record in a writ action. If the issue is raised again in the trial court, it will be necessary to establish exactly who represents and has represented whom, and when the representation occurred before the conflict issues can be resolved. It will also be necessary to establish the precise relationship of the parties to each other and in what capacities they have sued or been sued.

III. Conclusion

The Court concludes that review of the disqualification order in this case is available through the special-cases exception for writs. Further, this Court concludes the trial court applied a disqualification standard that is no longer appropriate under the Rules of Professional Conduct, and that the trial court's factual findings are insufficient to allow disqualification under the proper standard of a showing of actual conflict. For those reasons, a writ of prohibition barring enforcement of the trial court's order is appropriate at this time, even though the issue of disqualification may be revisited in the trial court. The Court of Appeals’ decision to deny the writ is therefore reversed, and this matter is remanded to that court to issue the writ.

1. Liz Phair, *Divorce Song*, Exile in Guyville (1993). [↑](#footnote-ref-0)
2. To prevent identification of the company and the possible disclosure of confidential information concerning its affairs, the district court granted the defendant corporation's motion to seal the record; require the suit to be prosecuted without revealing the name of either the lawyer or the corporation; and enjoin Doe and his co-counsel from pursuing any actions arising out of the facts on which his suits were based, communicating with other persons to induce them to bring a similar action, and disclosing or using any information Doe gained during his employment by the corporation. [↑](#footnote-ref-1)