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8 **IN THE SUPERIOR COURT OF ARIZONA**
9 **COUNTY OF YAVAPAI**

10 **JOHN B. CUNDIFF** and **BARBARA C.**)
11 **CUNDIFF**, husband and wife; **ELIZABETH**)
12 **NASH**, a married woman dealing with her)
13 separate property; **KENNETH PAGE** and)
14 **KATHRYN PAGE**, as Trustee of the)
15 Kenneth Page and Catherine Page Trust,)

16 Plaintiffs,

17 vs.

18 **DONALD COX** and **CATHERINE COX**,)
19 husband and wife,)
20 Defendants.)

Case No. **CV 2003-03994**

Division 1

Plaintiffs' Motion to Disqualify
Defendants' Counsel
and,
Motion for Protective Order

(Oral Argument Requested)
(~~Expedited Ruling Requested~~)

21 Plaintiffs, by and through undersigned counsel, hereby move to disqualify Defendants'
22 counsel, Jeffrey Adams, and the law firm of Musgrove, Drutz & Kack, P.C., in this matter for an
23 impermissible conflict of interest. Plaintiffs further move pursuant to Rule 26(c), Ariz.R.Civ.Proc.,
24 for a protective order precluding Defendants from conducting any discovery pending resolution by the
25 Court on the issue of disqualification of opposing counsel.

26 This motion is not brought in bad faith, and is not interposed for an improper purpose, for
harassment or delay in proceedings; and, therefore, an expedited ruling is requested to ensure the
prompt administration of justice, without unnecessary delay to any party. This motion is supported
by the following memorandum of points and authorities, attached exhibits, as well as the entire record
in this proceeding.

JUL 2 2004

23

1 RESPECTFULLY SUBMITTED this 30th day of June, 2004.

2 FAVOUR, MOORE & WILHELMSSEN, P.A.

3
4
5 By Marguerite Kirk
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11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **I. SUMMARY OF RELEVANT FACTS AND PROCEDURAL HISTORY**

13 1. Pleadings Filed, Attempts at Mediated Settlement and Scheduling of Depositions. On May
14 15, 2003, Plaintiffs, all residents of Coyote Springs Ranch, filed their complaint and request for
15 injunctive relief against Defendants on the grounds that Defendants' nursery enterprise located in the
16 sub-division, violated the recorded Declaration of Restrictions prohibiting business or commercial
17 activity. *Cundiff, et al. v. Cox, CV 2003-0399, Complaint for Injunctive Relief, May 15, 2003.*¹ In
18 order to allow the parties an opportunity to engage in mediation, the Court vacated Plaintiffs' order
19 to show cause hearing.² Mediation was held on September 9, 2003, and, again on February 10, 2004.
20 However, mediation was unsuccessful.

21 Having not yet filed an answer, Defendants' current counsel notified undersigned counsel on
22 or about March 3, 2004 that the law firm of Musgrove, Drutz & Kack, P.A., was representing

23 ¹At the time of filing their complaint for injunctive relief, Plaintiffs were represented by former
24 counsel, Robert Launders. The Court granted Launders' June 30, 2003 motion to withdraw on July
25 23, 2003, and undersigned counsel filed their notice of appearance on August 11, 2003. As of that
26 date, Defendants had not yet entered an appearance in the case, although personal service had been
effected on Defendants on June 16, 2003.

²At that time, Defendants were represented by counsel, Michael Bourke.

1 Defendants. *Letter from opposing counsel (unsigned), March 5, 2004 (a true and correct copy*
2 *attached hereto and by this reference incorporated herein as Exhibit "1.")* Shortly thereafter,
3 Plaintiffs filed their first amended complaint. *Cundiff v. Cox, CV 2003-0399, Amended Complaint,*
4 *March 18, 2004.* Opposing counsel accepted service on April 12, 2004.

5 Plaintiffs then filed an application for preliminary injunction on April 30, 2004, seeking to
6 prevent Defendants' continued commercial development of the property as a nursery. By order dated
7 May 27, 2004, the Court set a hearing on Plaintiffs' application for preliminary injunction for July 12,
8 2004. *Cundiff v. Cox, CV 82003-0399, Order, June 2, 2004.* That hearing was subsequently vacated
9 by the parties' stipulation, filed with the Court on June 7, 2004. *Cundiff v. Cox, CV 82003-0399,*
10 *Stipulation, June 7, 2004; and, Order, June 10, 2004.* In the interim, Defendants filed their verified
11 answer to the amended complaint on May 21, 2004, specifically raising the affirmative defenses of
12 laches, waiver and estoppel. *Cundiff v. Cox, CV 82003-0399, Answer to First Amended Complaint,*
13 *May 21, 2004.* Defendants additionally claimed as an affirmative defense that the complaint was
14 "barred because of Plaintiffs' own negligence, acts, omissions, carelessness and/or inattention." *Id.*
15 Defendants further requested an award of their attorney's fees and costs. *Id.*

16 In anticipation of the filing of, and the Court setting a hearing on, the application for
17 preliminary injunction, undersigned counsel contacted opposing counsel's office on April 27, 2004,
18 to inquire as to availability of dates in late-May or mid-June, 2004, for the taking of Defendants'
19 depositions. Plaintiffs' counsel was informed by opposing counsel's assistant that no dates could be
20 provided, and that it appeared the earliest availability for the scheduling of their clients' depositions
21 would be late July or sometime in August, 2004. Following two subsequent telephone conversations
22 in early May, 2004, undersigned counsel was informed by opposing counsel's assistant that
23 Defendants' depositions could be scheduled for the last two weeks in June, 2004. From approximately
24 May 11 to May 14, 2004, respective counsel's offices coordinated the scheduling of each Plaintiff and
25 Defendant's depositions to occur June 21, 22 and 24, 2004. The party's depositions were
26 appropriately noticed; the Plaintiff depositions for June 21 rescheduled by opposing counsel to June

1 23, 2004, due to a conflict on his calendar.

2 2. Plaintiffs Kathryn and Kenneth Page's Depositions. Plaintiff Kathryn Page was deposed
3 on June 23, 2004. During her deposition, opposing counsel posed several questions concerning why
4 Plaintiffs filed suit in 2003, as opposed to an earlier time. Presumably this line of inquiry was sought
5 to obtain favorable discovery on his clients' affirmative defenses of laches, estoppel and waiver.³ In
6 response to opposing counsel's repeated questions on this issue, Plaintiff Kathryn Page testified, *inter*
7 *alia*, that litigation was expensive, and she and her husband could not independently bear the expense
8 of litigation.⁴ When questioned by opposing counsel, the parties' finances were also the stated reason
9 Plaintiffs Page had not initiated litigation, or whether they intended to file suit in the future, against
10 other homeowners for violation of various covenants in the Declaration of Restrictions, in particular
11 the restriction prohibiting business operations. Plaintiff Kathryn Page also testified to the amount of
12 time she and her husband resided at their Coyote Springs Ranch residence.⁵ Opposing counsel further
13 elicited testimony from Plaintiff concerning whether her home violated provisions of the Declaration
14 of Restrictions (specifically, with regard to above-ground water storage containers).

15 Plaintiff Kenneth Page's deposition commenced in the afternoon on June 23, 2004, following
16

17
18 ³Defendant Catherine Cox testified during her deposition the previous day, June 22, 2004, that
19 she and her husband had purchased the property in April, 1998, but had left it as vacant unimproved
20 land until August, 2000 when they began making a series improvements over time, starting with
drilling a well. No Plaintiff was able to attend the depositions of either Defendant conducted that day.

21 ⁴The deposition transcripts for Kathryn and Kenneth Page were not available at the time of
22 filing this motion. Therefore, all references to occurrences during the depositions are based upon
undersigned counsel's notes and recollection of occurrences. In subsequent discussions with opposing
23 counsel, no objection has been made as to the content of the exchange between Plaintiff Kenneth Page
and opposing counsel during the deposition, which prompted subsequent events and the filing of this
24 motion to disqualify opposing counsel. The description of Plaintiffs' testimony in this motion is not
a waiver of any objection as to form and foundation of any question answered lodged during their
25 depositions.

26 ⁵Plaintiffs Page testified to having a residence in the Phoenix area.

1 the deposition of his wife. Opposing counsel's line of questioning to Plaintiff Kenneth Page was
2 similar to that posed earlier to Plaintiff Kathryn Page. In response to a line of questioning by opposing
3 counsel as to the deponent's recollection of the time-frame a conversation had occurred with a third-
4 party witness, Plaintiff Kenneth Page repeatedly stated he could not recall the date, or year, that the
5 conversation had occurred. Expressing his inability to recall the date of the occurrence, Plaintiff
6 Kenneth Page reiterated to opposing counsel his earlier comment that he was 73 years old, his memory
7 was not as good as it used to be, and indeed, *he could not even recall when opposing counsel's firm*
8 *represented him in a prior matter.* It was this testimony that first alerted and drew undersigned
9 counsel's attention to a potential conflict of interest.

10 3. Discussion between Counsel regarding a Potential Conflict of Interest by Defendants'
11 Counsel in Violation of Rule 42, E.R. 1.9, Ariz.R.Sup.Ct. After conclusion of depositions that
12 afternoon, undersigned counsel telephoned opposing counsel to inquire as to the specifics of his firm's
13 prior representation of Plaintiffs Kenneth and Kathryn Page, and what conflicts check had been
14 accomplished prior to his firm undertaking representation of Defendants. Defendants' counsel stated
15 he was unaware of the prior representation by his firm of Plaintiffs Page, and that he would review
16 the file in the morning as, apparently, he was out of the office at the time.

17 The next morning, June 24, 2004, shortly before the depositions of Plaintiffs Nash and
18 Cundiffs, opposing counsel spoke with undersigned counsel stating, in relevant part, that he had
19 reviewed the Page's file, had discussed the matters with other attorneys in his firm, and reached the
20 conclusion that there was no conflict of interest between the firm's prior representation of Plaintiffs
21 Page in the current case where the firm now represented Defendants. The basis for opposing counsel's
22 position was that his firm's prior representation a few years ago⁶ of Plaintiffs Page dealt with defective
23 construction claims against a contractor who built their home located in Coyote Springs Ranch.

24
25 ⁶The specific dates of opposing counsel's firm's prior representation of Plaintiffs Page was not
26 provided his letter.

1 Defendants' counsel took the position that the matters were "not substantially related" as his firm's
2 former representation of the Pages dealt with construction defects of their residence (as opposed to
3 a business), and not the enforcement of the Declaration of Restrictions. Based upon an obvious
4 disagreement between counsel as to the meaning and application of Rule 42, E.R. 1.9, to the facts of
5 the instant case, Plaintiffs' counsel informed opposing counsel that neither she nor her clients would
6 attend the depositions scheduled for that day in order to allow sufficient time for a more careful
7 evaluation of the matter. *See, Letter from Plaintiffs' counsel to Defendants' counsel, June 24, 2004*
8 *(a true and correct copy attached hereto and by this reference incorporated herein as Exhibit "2.")*
9 Defendants' counsel repeatedly stated during that conversation that the depositions had been properly
10 noticed, apparently implying that Plaintiffs' counsel's and her clients failure to appear was
11 inexcusable. Plaintiffs' counsel's position was confirmed later that day in a letter responding to
12 opposing counsel's office's inquiry as to the scheduling of a non-party witness's deposition. *See,*
13 *Letter from Plaintiffs' counsel to Defendants' counsel, June 24, 2004 (a true and correct copy*
14 *attached hereto and by this reference incorporated herein as Exhibit "3.")*

15 Late in the afternoon on Friday, June 25, 2004, opposing counsel forwarded to undersigned
16 counsel his opinion as to the absence of a conflict of interest, and consequent refusal to withdraw. *See,*
17 *Letter from Jeffrey Adams, Musgrove, Drutz & Kack, P.A. to undersigned counsel, June 25, 2004 (a*
18 *true and correct copy attached hereto and by this reference incorporated herein as Exhibit "4.")* It
19 should be noted at this juncture that opposing counsel's correspondence includes pejorative comments
20 regarding Plaintiffs' counsel's conduct at the depositions. The absence of objections to opposing
21 counsel's conduct at his clients' and Plaintiffs' Page's depositions in undersigned counsel's
22 correspondence (*Exhibits 3 and 4*), nor inclusion as an exhibit undersigned counsel's response to those
23 derogatory comments, is not in *any way* an admission of alleged disruptive conduct, nor an admission
24 that opposing counsel conducted himself appropriately during the depositions. Rather, it is
25 undersigned counsel's position that to maintain professionalism, and promote the public's image of
26 the profession, such "personality conflicts" between counsel that fall short of mandating Court

1 intervention under the rules of civil procedure, are best addressed in a manner divorced from
2 references to the substantive legal dispute. In this way, the record is not clouded, and the Court is not
3 distracted, by “bickering” between attorneys.

4 **II. ATTORNEY DISQUALIFICATION FOR BREACH OF CONTINUING DUTY**
5 **OF CONFIDENTIALITY TO FORMER CLIENT**

6 **A. Legal Standards for Disqualification in Successive Representation Cases**

7 It is axiomatic that one of the most safeguarded and important privileges that attach to the
8 attorney-client relationship is that accorded to client confidences. The privilege is rooted in the
9 attorney’s fiduciary duties to the client, particularly the duty of loyalty. Further, the privilege ensures
10 that clients can fully confide in their counsel, so that the client’s best interests are protected. *Rule 42,*
11 *Ariz.R.Sup.Ct., E.R. 1.6, Comment at ¶2.* Modern professional rules essentially codify the common
12 law fiduciary duty of an attorney to a client. *Rule 42, Ariz.R.Sup.Ct., Preamble at ¶20; T.C. Theatre*
13 *Corp. v. Warner Bros. Pictures, 113 F.Supp. 265 (N.Y.Dist. 1953) (recognized in subsequent case law*
14 *as the seminal modern case on issue of successive representation); In re American Airlines, Inc. v.*
15 *AMR Corp., 972 F.2d 605, 616-17 (5th Cir. 1992) (rule barring successive adverse representation*
16 *developed at common law, and not in reliance to Model Rules or Model Code of professional ethics.)*

17 “Confidential client information” gained by an attorney during representation is not a narrow
18 concept limited to client “confidences” or “secrets.” Rather, attorney-client confidentiality “applies
19 not only to matters communicated in confidence by the client but also **to all information relating to**
20 **the representation, whatever its source.**” *Rule 42, Ariz.R.Sup.Ct., E.R. 1.6(a) “Confidentiality of*
21 *Information,” Comment at ¶3 (emphasis added).* Thus, an attorney must hold inviolate information
22 concerning a client, gained by virtue of the representation, unless disclosure is otherwise authorized
23 by the client, by law, or by other ethical rules. *Id., E.R. 1.6(b-d).* An attorney’s duty of confidentiality
24 “continues after the client-lawyer relationship has terminated.” *Id., E.R. 1.6, Comment at ¶21.*

25 Attorneys are further bound by their duty of loyalty to a client to avoid conflicts of interest
26 between the client, other current clients, former clients, or personal interests. *Id., E.R. 1.7 “Conflict*

1 of Interest: Current Clients”; E.R. 1.8; and, E.R. 1.9 “Duties to Former Clients.” This case presents
2 the issue of whether Defendants’ counsel, Adams and the law firm of Musgrove, Drutz & Kack, P.A.,
3 are subject to disqualification on the grounds of impermissible subsequent adverse representation
4 where the firm previously represented Plaintiffs Page in a matter involving alleged defects to the
5 construction of their Canyon Springs Ranch home.

6 Disqualification on the grounds of successive representation is addressed in E.R. 1.9. This
7 ethical rule provides, in relevant part:

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

* * *

11 (c) A lawyer who has formerly represented a client in a matter shall not thereafter:

12 (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

13 (2) reveal information relating to the representation except as these Rules would
14 permit or require with respect to a client.

15 *Id.*, E.R. 1.9(a) and (c), (emphasis added). With respect to whether matters are “substantially related,”
16 Comments to E.R. 1.9 state:

17 Matters are “substantially related” for purposes of this Rule if they involve the same
18 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.

19 *Id.*, E.R. 1.9, Comment at ¶3 (emphasis added). The burden is on the movant to show a sufficient
20 basis for disqualification.

21 Finally, under the rule of imputed disqualification, if one attorney in a firm has handled a
22 matter for a former client, no other attorney in that firm may then adversely represent the former client
23 in a subsequent proceeding where the other attorney in the firm could not. *Id.*, E.R. 1.10 “Imputation
24 of Conflict of Interest: General Rule” at §(a). The purpose of imputed disqualification in the situation
25 of a law firm “gives effect to the principle of loyalty to the client as it applies to lawyers who practice
26

1 in a law firm.” *Id.*, *E.R. 1.10, Comment at ¶2*. Thus, the fact that John Mull previously provided
2 representation to Kenneth and Kathryn Page, and Jeffrey Adams is current counsel for Defendants Cox
3 in Plaintiffs Page, Nash and Cundiff’s suit, does not act as a shield to counsel’s disqualification, as
4 the attorneys are both associates of the firm Musgrove, Drutz & Kack, P.C.⁷

5 **B. Opposing Counsel’s Prior Representation of Plaintiffs Page Mandates Disqualification**

6 1. Opposing Counsel’s Assertion of Implied Waiver of the Disqualification Issue. As a
7 preliminary matter, Defendants’ counsel assertion of implied waiver by reason of lapse of time is
8 misplaced. Typically, waiver of an opposing party’s counsel’s disqualification in successive
9 representation cases is generally found where the issue is raised after a significant lapse of time, or on
10 the eve of trial. In *Islander East Rental Program v. Ferguson*, 917 *F.Supp.* 504 (*S.D.Tx.* 1996), the
11 district court held there was no waiver where the issue was raised four months after being on notice
12 of the representation. *Id.* at 507-8. That court specifically noted cases where an implied waiver had
13 been found – typically a lengthy period of time (sometimes years) after the movant had received notice
14 of the potential conflict posed by opposing counsel’s former representation. *Ibid.*, citing *Central Mil*
15 *Produces Co-op v. Sentry Food Stores, Inc.*, 573 *F.2d* 988, 991 (8th *Cir.* 1978) (waiver found where
16 disqualification motion brought more than two years after notice of representation, and one month
17 prior to trial date); *Trust Corp. of Montana v. Piper Aircraft Co.*, 701 *F.2d* 85, 87 (9th *Cir.* 1983)
18 (waiver found where disqualification not raised until more than two and a half years after notice of
19 representation); *Employers Ins. of Wausau v. Albert D. Seeno Constr. Co.*, 697 *F.Supp.* 1150, 1165-66
20 (*N.D. Cal.* 1988) (waiver found where disqualification motion not made until more than a year after
21 moving party became aware of conflict).

22 In sharp contrast to cases finding an implied waiver of the disqualification issue, in this case,
23 immediately following conclusion of Plaintiff Kenneth Page’s deposition, undersigned counsel

24
25 ⁷Applying the imputed disqualification principle, references herein to “opposing counsel” refer
26 to both Jeffrey Adams and Musgrove, Drutz & Kack, P.C., interchangeably, the context of the
sentence making clear the term’s reference to opposing counsel individually and his firm.

1 contacted opposing counsel to determine the nature of the prior representation of Plaintiffs by his firm.
2 This motion was filed as soon thereafter as it was determined that there would be no resolution of the
3 issue between counsel. Thus, the few days that elapsed between notice of the former representation,
4 and filing this motion hardly constitute waiver. *Foulke v. Knuck*, 162 Ariz. 517, 523, 784 P.2d 723,
5 729 (App. 1989) (no waiver where former client immediately objected upon notice that attorney was
6 representing adverse party; and was “not a situation where disqualification is sought after months
7 or years of representation....”)

8 Alternatively, even under Defendants’ counsel’s argument that six months from the time he
9 advised this firm of representation of Defendants in this case (*Exhibit 4 at p.1*) falls far short of the
10 lapse of time found by other courts to warrant a waiver. In actuality, it was not until March 3, 2004,
11 approximately four months ago, that opposing counsel contacted undersigned counsel to state that he
12 would be entering his appearance on behalf of the Defendants.

13 2. Factual Nexus arising from Former Representation and Affirmative Defenses Raised in
14 Current Litigation. There is no argument that opposing counsel’s firm previously represented Kathryn
15 and Kenneth Page. As such, there is no denial that an attorney-client relationship formerly existed
16 between the firm and Plaintiffs Page. The issue is what that former representation entailed, and its
17 substantial relation to the current litigation. There is no bright-line test for whether matters are
18 “substantially related.” However, at a minimum, there must be some relevance between the prior
19 representation and the current adverse successive representation. In other words, there must be some
20 factual or legal nexus between the prior and subsequent adverse representation by counsel.

21 The Fifth Circuit Court of Appeals has held that “the subject matter ‘does not need to be
22 ‘relevant’ in the evidentiary sense to be ‘substantially related.’ It need only be akin to the present
23 action in a way reasonable persons would understand as important to the issues involved.” *In re*
24 *American Airlines*, 972 F.2d 605 (5th Cir. 1992) quoting *In re Corrugated Container Antitrust*
25 *Litigation*, 659 F.2d 1341, 1346 (5th Cir. 1981).

26 The California Court of Appeals has formulated this test of “substantially related” matter in

1 successive representation cases with reference to the factual and legal relevance of the client
2 confidence gained by the former representation sought to be protected in the subsequent case:

3 Successive representations will be substantially related “when the evidence before the
4 trial court supports a rational conclusion that information material to the evaluation,
5 prosecution, settlement or accomplishment of the current representation given its
factual and legal issues is also material to the evaluation, prosecution, settlement or
accomplishment of the current representation given its factual and legal issues.”

6 *Farris v. Fireman’s Fund Insurance Co.*, 2004 Cal. App. Lexis 941, *10 (5th App. Dist 2004), quoting
7 *Jessen v. Hartford Casualty Insurance Company*, 111 Cal.App.4th 698, 712, 3 Cal.Rptr.3d 877
8 (2003). Contrary to opposing counsel’s contention (see *Exhibit 4*), the “substantially related” test “has
9 never been the identity of the specific tasks the attorney was asked to perform in either
10 representation.” *Id.* at *17 (internal citations omitted).

11 Thus, in *Foulke v. Knuck*, *supra*, the appellate court held that an attorney’s previous initial
12 consultation with a father regarding step-parent rights and responsibilities prior to any action being
13 filed was a matter “substantially related” to a subsequent marriage dissolution action where the
14 attorney represented the mother, necessitating the attorney’s disqualification. *Id.*, 162 Ariz. at 520-21,
15 784 P.2d at 726-27. To so hold, the *Foulke* court implicitly found a relevant factual or legal nexus
16 between the initial consultation and subsequent adverse representation.

17 Once a nexus of factual or legal relevance has been established, an irrebuttable presumption
18 arises that the former client has divulged confidential information to the attorney. *See, In re*
19 *Corrugated Container*, *supra*. Hence,

20 “[T]he former client need show no more than that the matters embraced within the
21 pending suit wherein his former attorney appears on behalf of his adversary are
22 substantially related to the matters or cause of action wherein the attorney previously
23 represented him, the former client. ***The Court will assume that during the course of
the former representation confidences were disclosed to the attorney bearing on the
subject matter of the representation. It will not inquire into their nature and extent.***
Only in this manner can the lawyer’s duty of absolute fidelity be enforced and the spirit
of the rule relating to privileged communications be maintained.”

24 *Foulke*, 162 Ariz. at 522, 784 P.2d at 728 quoting *T.C. Theatre Corp*, *supra*, 113 F.Supp. at 268-69
25 (emphasis added). To require the former client to divulge the confidences sought to be protected
26

1 would “place former clients in a ‘Catch-22,’ requiring that they divulge the very same
2 confidences...which they seek to protect, disclosure of which is, in part, the reason for the discomfort
3 of having a prior attorney represent an adversary.” *Id. at 523, 784 P.2d at 729.*

4 Upon this basis, the *Foulke* court rejected arguments that the movant must show harm in the
5 continued representation; that the attorney was not using, or had not used, confidential information
6 obtained from the prior consultation with the movant; or, that the issue discussed between the attorney
7 and the client had later become, or would become, a matter disclosed during litigation. Commenting
8 on the latter point, the appellate court expressly stated that “[m]ere litigation does not change the fact
9 that [the former client] [irrebuttably] divulged confidences which he continues to seek to protect.” *Id.*
10 *at 522, 784 P.2d at 728.*

11 In this case, opposing counsel’s prior representation of Plaintiffs Page concerned the issue of
12 “defects” in construction of their home located in Coyote Springs Ranch. It is reasonable that
13 opposing counsel has knowledge of the purchase contract terms, and their former clients’ personal
14 finances as it relates to the purchase contract and subsequent settlement of that case. In developing
15 the factual basis for his clients’ affirmative defense of laches, a necessary element being
16 “unreasonable” delay in asserting a right, Defendants’ counsel obtained his former clients’ testimony
17 that financial constraints prohibited filing suit sooner. Clearly, opposing counsel has confidential
18 information regarding his former clients’ personal finances. This is “substantially related” to his
19 current clients’ affirmative defense of laches, and is relevant to any potential collection of a judgment
20 for attorney’s fees that, because of their requested relief, Defendants may be awarded.

21 The potential adverse use of a client’s financial information is the basis for mandatory
22 disqualification based upon conflict of interest in the often cited example of an attorney representing
23 one spouse in preparation of a will as barring subsequent representation of the other spouse in a
24 marriage dissolution action. The preparation of a will and marriage dissolution are not on their face
25 the “same or substantially related” matters. Nevertheless, it is the relevant financial information
26 presumptively gained by the attorney in preparation of the will that warrants a finding of the prior and

1 present representation as “substantially related” to merit the attorney’s disqualification, even though
2 the former client’s financial information is subject to disclosure in the dissolution action. *See e.g., In*
3 *re Marriage of Mathias, 188 Wis.2d 280, 525 N.W.2d 81 (App. 1994).*

4 Secondly, Defendants’ counsel elicited testimony from his former clients as to their home’s
5 alleged violation of the Declaration of Restrictions. Prior representation of Plaintiffs Page in their
6 construction defect case would necessarily involve issues regarding compliance with the covenants
7 and restrictions. *See e.g., Declaration of Restrictions for Coyote Springs Ranch, recorded June 13,*
8 *1974 at ¶¶5 and 15 (a true and correct copy attached hereto and by this reference incorporated*
9 *herein as Exhibit “5.”)* Whether or not opposing counsel’s file includes a copy of the Declaration is
10 immaterial. *Exhibit 4 at p.3 (no copy of CC&R’s contained in opposing counsel’s file.)* Protected
11 client confidences include information from any source. *E.R. 1.6, Comment at ¶4.* Moreover, as a
12 practical matter, not every client confidence is reduced to written form and placed in a file. Similarly,
13 what remains in a “closed file” is a more a function of the firm’s procedure in closing files, than it is
14 a reflection of content as to client confidences.

15 Opposing counsel also elicited testimony during Plaintiffs Page’s respective depositions as to
16 the time they have spent at their Coyote Springs Ranch residence, and how often they travel past his
17 current clients’ nursery located in the sub-division. Again, the relevance of this information is readily
18 apparent in light of Defendants’ asserted affirmative defenses. Defendants’ counsel’s prior
19 representation would include relevant information as to when Plaintiffs’ home was constructed, and
20 when and how they became aware of alleged faulty construction, in order to determine whether the
21 claim was barred by the applicable limitations period. Thus, opposing counsel is in a position to use
22 this client information – gained during the course of prior representation and not information that is
23 “generally known” – in a manner adverse to his former clients.

24 Therefore, the client information acquired by opposing counsel during former representation
25 of Plaintiffs Page, is both relevant and material to the affirmative defenses raised by Defendants’
26 counsel and the testimony he elicited during deposition, thereby precluding opposing counsel’s

1 continued adverse representation to his former clients. This is supported by *Restatement (Third) of*
2 *the Law Governing Lawyers (2002)*, §132 which “provides in relevant part that the present
3 representation will be deemed to be ‘substantially related’ to the prior representation if:

4 (2) ‘there is a substantial risk that [the present representation] will *involve the use of*
5 *information acquired in the course of* [the prior representation], unless that
information has become generally known.’

* * *

6 [T]he comment accompanying *section 132* explains that there exists a “substantial
7 risk” the present representation will involve the use of information acquired during the
8 prior representation “where it is reasonable to conclude that it would *materially*
advance the [present] client’s position in the subsequent matter to use confidential
information obtained in the prior representation.”

9 *Farris, supra, 2004 Cal.App. Lexis 941 at *14-15, quoting Rest. 3d, The Law Governing Lawyers,*
10 *§132, com. d(iii) (italics appearing in published decision.)*

11 Where, as here, an attorney acquires information by virtue of prior representation, and the
12 client information may be used “either consciously or unconsciously...to the disadvantage of the
13 former clients” then disqualification is mandatory. *In re Buchanan, 25 B.R. 162, 171 (U.S. Bk.Ct.*
14 *E. Dist. Tenn. 1982) citing Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2nd Cir. 1973).* “In
15 any event, whether [former counsel] actually possesses confidential information that would work to
16 his advantage in his current representation” is immaterial in the analysis, as access to client
17 confidences relevant to the subsequent representation is the standard. *Farris, 2004 Cal.App. Lexis 941*
18 *at *20.*

19 *3. Disqualification is Further Warranted under E.R. 1.9(c).* E.R. 1.9(c) protects against former
20 counsel jeopardizing client confidences by using or revealing information gained during the prior
21 representation to the detriment of the former client. *Id.* In this case, as discussed above, opposing
22 counsel’s prior representation of Plaintiffs Page provides him with relevant, material client
23 confidences that bear on his current clients’ affirmative defenses. Consequently, Plaintiffs Page’s
24 client confidences could be used or revealed by Defendants’ counsel in contravention of E.R. 1.9(c).

25 It is the threat posed by opposing counsel’s current representation to his former clients’
26 confidences that is sought to be protected. *Islander East Rental Program, supra, 917 F.Supp at 510.*

1 An analysis of disqualification under this fiduciary duty to former clients requires only a showing of
2 the category or types of client confidences associated with the former representation. *Ibid.* Thus, it
3 is not necessary that the former client reveal specific confidences in order to sustain a holding for
4 disqualification, even though the irrebuttable presumption applicable to substantially related matters
5 “is not squarely applicable.” *Id. at 511.* The rationale for applying the presumption that a court will
6 not inquire into the confidences sought to be protected is the same in the context of E.R. 1.9(a) or (c).
7 *Ibid.* That is, the former client should not be required to sustain his burden of proof for
8 disqualification by disclosing the very confidences the rule is intended to protect.

9 In light of the material relevance of the nature of Defendants’ counsel’s former representation
10 of Plaintiffs Page “as reasonable persons would understand as important” to the affirmative defenses
11 raised on behalf of his current clients, *In re American Airlines, supra*, and opposing counsel’s ethical
12 and legal obligation against using or revealing those confidences, disqualification of Defendants’
13 counsel is warranted.

14 In this case it is obvious opposing counsel’s duty of loyalty to advance his current clients’
15 interests cannot be served while at the same time protecting against use – however inadvertent or
16 unintentional – of his former client’s confidences gained during the prior representation. *See, E.R. 1.6,*
17 *Comment at ¶1 (“Loyalty and independent judgment are essential elements in the lawyer’s*
18 *relationship to a client.”)* There is no legally recognized procedure that can insulate opposing counsel
19 to ensure that Plaintiffs Page’s confidences are not jeopardized. *See e.g., E.R. 1.11(a) (screening of*
20 *former government attorney previously involved in a matter when s/he moves to private practice.)*

21 4. Appearance of Impropriety. It is equally apparent in this case that opposing counsel’s
22 successive adverse representation against his former clients bears a definite appearance of impropriety.
23 “Appearance of impropriety” remains a relevant factor in determining disqualification⁸, although

24
25 ⁸The proscription against an attorney’s conduct that gave the “appearance of impropriety” was
26 set forth in Canon 9, Code of Professional Responsibility. This particular section does not appear in
the Rules of Professional Conduct. *Gomez, supra.*

1 standing alone, it will not support a claim for disqualification. *Gomez v. Superior Court*, 149 Ariz.
2 223, 225, 717 P.2d 902, 904 (1986) (appearance of impropriety “survives as a part of conflict of
3 interest” analysis.) This factor, when combined with the manifest conflict of interest in opposing
4 counsel’s current representation against Plaintiffs Page, furthers support disqualification of
5 Defendants’ counsel from this case.

6 **C. Disqualification of Opposing Counsel Works No Hardship on Defendants**

7 The Arizona appellate court has stated that where a party seeks to avoid disqualification
8 “because of hardship to the new client, the burden *must far outweigh the injustice to the former*
9 *client* who requested the disqualification.” *Foulke*, 162 Ariz. at 523, 784 P.2d at 729 (emphasis
10 added). This standard takes into account competing interests:

11 ...an absolute prohibition against an attorney accepting representation against a former
12 client is neither practical nor laudable. However, some limitations are necessary to
13 protect confidential information, to ensure attorneys respect their duty of loyalty to
14 their clients, and to preserve public confidence in the legal system.

14 *Islander East Rental Program*, 917 F.Supp. at 508. Plaintiffs Page have an overwhelming interest in
15 protecting their confidences reposed with opposing counsel and his firm. Defendants, on the other
16 hand, suffer no hardship in seeking alternate counsel. Moreover, to the extent that opposing counsel
17 suffers a lost employment opportunity, “the sacrifice is to be born by the attorney, not [at the expense
18 to] the former client.” *Farris, supra*, 2004 Cal.App. Lexis 941 at *31.

19 Indeed, Defendants already have been represented by two other attorneys concerning this case,
20 before recently retaining their current counsel. Defendant Catherine Cox testified that, prior to
21 initiation of this litigation, she and her husband were represented by an attorney who appeared with
22 them at a local community meeting concerning their nursery operation. After service of the complaint,
23 attorney Michael Bourke represented Defendants from approximately June 2003 until March 2004,
24 when opposing counsel informed undersigned counsel that he was representing Defendants. *See*,
25 *Letter from Michael Bourke to Robert Launders, Plaintiffs’ former counsel, June 20, 2003 (a true and*

1 *correct copy attached hereto and by this reference incorporated herein as Exhibit "6.")*⁹

2 Ironically, *Defendants' former counsel* demanded Plaintiffs' former counsel withdraw from
3 representation on the grounds of successive adverse representation. *See, Exhibit 6 at p.2.*¹⁰
4 Furthermore, opposing counsel has hardly proceeded with alacrity on discovery or defense of this case.
5 Aside from noticing Plaintiffs' depositions – and only after undersigned counsel contacted
6 Defendants' counsel for dates to depose his clients – opposing counsel has conducted no other formal
7 discovery. This only confirms that Defendants will sustain no prejudice, much less hardship, in
8 obtaining alternate counsel. No trial date has been set in the matter, no hearings are currently pending,
9 and – as evidenced by the record – no discovery other than two depositions has been conducted by
10 Defendants' counsel. Aside from taking Plaintiffs Page depositions, opposing counsel has done little
11 more than lob vitriolic comments at undersigned counsel. Defendants' own conduct in having now
12 three attorneys represent them in this matter clearly reveals that they have no vested relationship with
13 current counsel and are quite competent in retaining alternate counsel. And, perhaps most importantly,
14 opposing counsel's apparent duplication of Defendants' prior counsel's legal theories in this case
15 indicate his investment in his current clients' defense is merely nominal. *See e.g., Letter from Michael*
16 *Bourke to Robert Launders, June 27, 2003, p.1 at ¶3 (a true and correct copy attached hereto and by*
17 *this reference incorporated herein as Exhibit "7.")*

18 **D. Conclusion**

19 Opposing counsel, and his firm, by virtue of their prior representation of Plaintiffs Page have
20 irrefutably obtained confidential information from their former clients which is both relevant and
21

22 ⁹Correspondence between the parties' prior counsel is submitted only for purposes referenced
23 herein. Plaintiffs otherwise reserve the right to object to admission of the document for another
24 purpose.

25 ¹⁰Plaintiffs' former counsel, Robert Launders, ultimately moved to withdraw based upon the
26 potential that he could be a witness. *Cundiff v. Cox, CV 2003-0399, Motion to Withdraw, June 30,*
2003 at p.1.

1 material to the representation of Defendants Cox. Where, as here, “there is a reasonable probability
2 that confidences were disclosed which could be used against the client in a later representation, a
3 substantial relationship between the two cases” is presumed. *Farris, 2004 Cal.App. Lexis 941 at *21*
4 (*internal citation omitted.*) Accordingly, under *Foulke*, the Court must presume that opposing counsel
5 has obtained from his former client confidences and information that are materially adverse to their
6 interests in this action. *Foule, supra*. Whether his former clients’ confidences could be obtained
7 through discovery is immaterial. Opposing counsel’s current clients are “not entitled to have, through
8 discovery or through the mind and experience of [former counsel], the confidential information [he]
9 is presumed to have acquired during his prior representation....” *Farris, supra, at *27*. Therefore,
10 Defendants Cox’s current counsel must be disqualified for an impermissible conflict of interest arising
11 from his firm’s successive adverse representation to its former clients.

12 **III. PENDING THIS COURT’S RESOLUTION OF DEFENDANTS’ COUNSEL’S**
13 **AND HIS FIRM’S DISQUALIFICATION,**
14 **A PROTECTIVE ORDER AGAINST DEFENDANTS CONDUCTING DISCOVERY**
15 **IS NECESSARY**

16 Rule 26(c)(1), Ariz.R.Civ.Proc., provides that a court may enter a protective order against a
17 party from conducting discovery “which justice requires” to protect that party “from annoyance,
18 embarrassment, oppression, or undue burden or expense....” *Id.* In this case, it would be anomalous
19 to allow opposing counsel and his firm to capitalize on a breach of confidentiality owed to their former
20 clients, by permitting opposing counsel to conduct discovery against Plaintiffs pending this Court’s
21 determination of their motion to disqualify. Therefore, a protective order is mandated.

22 **IV. CONCLUSION**

23 Plaintiffs have sustained their burden of proof by providing ample support for the
24 disqualification of Jeffrey Adams, and the law firm of Musgrove, Drutz & Kack, P.C. for breach of
25 their duty of confidentiality to their former clients, Plaintiffs Page. There is an inescapable factual and
26 legal nexus of relevance and materiality between the former representation and affirmative defenses
Defendants have raised in this action. Hence, the former representation and the current matter are

1 “substantially related.” As such, the Court is required to infer that ““during the course of the former
2 representation confidences were disclosed to the attorney bearing on the subject matter of the
3 representation. [The Court] will not inquire into their nature and extent.” *Foulke, 162 Ariz. at 522,*
4 *784 P.2d 728, quoting T.C. Theatre, supra, 113 F.Supp. at 268-69.*

5 Furthermore, as opposing counsel and his law firm must be disqualified, this Court should in
6 the interests of justice, enter an order precluding Defendants’ counsel from conducting any discovery
7 in this matter until such time as this Court has rendered its order on Plaintiffs’ motion to disqualify.

8 DATED this 30th day of June, 2004.

9 FAVOUR, MOORE & WILHELMSSEN, P.A.

10
11
12 By Marguerite Kirk
13 David K. Wilhelmsen
14 Marguerite Kirk
15 Post Office Box 1391
16 Prescott, AZ 86302-1391
17 Attorneys for Plaintiffs

18 ORIGINAL of the foregoing
19 filed this 30th day of June, 2004 to:

20 Clerk, Superior Court of Arizona
21 Yavapai County
22 Prescott, Arizona

23 A copy hand-delivered this 30th day
24 of June, 2004 to:

25 Honorable David L. Mackey
26 Division One
Superior Court of Arizona
Yavapai County
Prescott, Arizona

///

///

1 and, a copy hand-delivered this
2 30th day of June, 2004 to:

3 Jeffrey Adams
4 MUSGROVE, DRUTZ & KACK, P.C.
5 1135 Iron Springs Road
6 Prescott, Arizona 86302

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By: Marguerite Kirk
Marguerite Kirk

MUSGROVE, DRUTZ & KACK, P.C.

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MARK W DRUTZ

THOMAS P KACK

GRANT K McGREGOR

JOHN G MULL

JEFFREY R ADAMS

CATHY L KNAPP

March 5, 2004

TRANSMITTED VIA FIRST CLASS MAIL

David K. Wilhelmsen
FAVOUR MOORE & WILHELMSSEN, P.A.
Post Office Box 1391
Prescott, Arizona 86302

RE: *Cundiff v. Cox*
Yavapai County Superior Court Cause No. CV 2003-0399

Dear Dave:

This will serve as follow up to our telephone conversation on Wednesday, March 3, 2004 and written confirmation that we are representing Don and Catherine Cox in the above-captioned matter.

Sincerely,

MUSGROVE, DRUTZ & KACK, P.C.

Dictated but not read

By: _____
Jeffrey R. Adams, Esq.

JRA/ljt

The Law Firm of

Favour Moore & Wilhelmsen, P.A.

Marguerite Kirk

1580 Plaza West Drive
Post Office Box 1391
Prescott, Arizona 86302

Telephone (928) 445-2444
Facsimile (928) 771-0450
MargueriteKirk@cableone.net

June 24, 2004
File No. 10641.001

via Facsimile & U.S. Mail

Jeffrey Adams
Musgrove, Drutz & Kack, P.C.
1135 Iron Springs Road
Prescott, Arizona
86305

Re: Cundiff, et al. v. Cox – Yavapai County Cause No. CV 2003-0399

Dear Mr. Adams:

This correspondence is to confirm our telephone conversation yesterday afternoon and again this morning regarding the issue of your firm's former representation of our clients, Kenneth and Kathryn Page, in the current litigation against your clients, Donald and Catherine Cox. During Mr. Page's deposition yesterday afternoon, in response to your questions as to the date of occurrence of a conversation he had with a witness, Mr. Page informed you that he did not remember the date, his memory for dates was not good, and, for instance, he could not even tell you what year it was that your firm handled their case regarding construction of their home at Coyote Springs Ranch. Apparently, John Mull represented Mr. and Mrs. Page in that matter.

Subsequent to the conclusion of Mr. Page's deposition, upon return to my office, I reviewed Rules of Supreme Court, Rule 42, E.R. 1.9 and Comments, concerning the ethical prohibition against an attorney's (and, by application of E.R. 1.10, that attorney's law firm) adverse representation "in the same or substantially related matter...." *Id.* I then telephoned you at your office (your firm's answering service "patching through" my call to you) to inform you of my concern of a potential conflict of interest.

This morning at approximately 8:35 a.m., prior to depositions scheduled for today and set to begin at 9 a.m., you and John Mull called our office, requesting to speak with Dave Wilhelmsen. As Dave was out of the office, and as I was informed by our receptionist that the call was characterized as an "urgent" matter, I took the call. I answered your call, anticipating that it was to discuss my expressed concerns over your firm's potential conflict of interest and continued representation of the Cox's in this litigation involving the Pages. Upon my answering your telephone call, you stated that you did not wish to speak with me over the telephone, and that you wanted to speak with Dave. I informed you that Dave was out of the office at that moment, but was expected to return by 9:30 a.m.

You then proceeded to tell me that you had reviewed the Page's file, spoke with John Mull, Jim Musgrove and one other attorney (whom I did not catch the name of), and had concluded there was no conflict of interest as the matter handled by your firm for Mr. and Mrs. Page regarded home construction issues with the contractor. John confirmed that he handled the case against the contractor. Despite your previous statement that you did not want to speak with me over the telephone, you demanded to know whether I would be appearing with our clients for the depositions scheduled today at 9 a.m., as the court reporter was apparently already at your office.

I told you that if you wished to speak with Dave upon his return to the office, then perhaps the depositions may begin later in the day; to which you responded that you had a prior obligation for the local bar association at noon that would prevent you from taking all the scheduled depositions today if they were commenced later in the morning. You then inquired whether I would appear at 9 a.m. or not. I responded that I had serious concerns regarding the potential conflict of interest, in light of some of the testimony you elicited from Mr. and Mrs. Page during their depositions the previous day. I informed you and John that my reading of E.R. 1.9 and the Comments indicated that "substantially related" was a somewhat broader concept than the view you had taken, which appeared to be whether the issue in each case was the same or similar.

Furthermore, I stated to you and John that I considered this a serious matter, worthy of deliberation which could not be accomplished in the short time you had demanded. Additionally, I stated that there was no current trial date, there was no need to "rush" the depositions today, and that the parties had not yet even exchanged disclosure statements. You informed me that I was being "disingenuous," and that our firm had more than a year to "discover" this potential conflict. However, you apparently had no idea until Mr. Page's deposition that your firm had previously represented the Pages. When I spoke with you yesterday afternoon and again this morning, you could not or would not tell me whether a conflicts check had been done by your office prior to accepting representation, and what that conflicts check contained. Clearly, a conflicts check by our office would never reveal your firm's prior representation of the Pages, a fact that would be disclosed by any conflicts check performed by your office.

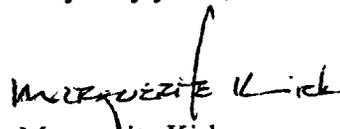
You then wanted to set a date for the exchange of disclosure statements. As I stated during our conversation, I did not want to set a date for the exchange of disclosure statements until this issue of your firm's potential conflict of interest had been resolved. You told me that you were not withdrawing from the case. I stated that it may not be your decision to make.

At that point, you stated that you were making your record as to our non-appearance at the depositions although they had been properly noticed. I suggested that in the interests of candor to the court, you also state when making your record, the reason why the depositions were not proceeding. Based upon your adamant position that the depositions were properly noticed, and, presumptively, that our clients' non-appearance was unjustified, despite my informing you that the ethical issue should first be resolved, I assume you did not state on the record the basis for my and my clients' non-appearance at the depositions this morning.

You demanded to know whether "Dave knew about this," and that I was to tell Dave to call. Again, I informed you he would be back in the office at approximately 9:30 a.m., that you could call then; that I would tell him you had called this morning and I had spoken with you.

It is regretful that you have taken an intractable view of this situation, without any further deliberation or consideration of the matter. This correspondence further confirms that I stated to you during our conversation that I believed it would be a disservice to my clients, as it would be to yours, for the depositions or any further discovery to proceed absent resolution of this ethical matter.

Very truly yours,


Marguerite Kirk
For the Firm

MK

cc: Kenneth and Kathryn Page
John and Barbara Cundiff
Becky Nash

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The Law Offices of
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P O. Box 1391
Prescott, AZ 86302
Telephone (928) 445-2444
Telecopier (928) 771-0450

FAX COVER SHEET

DATE 06/24/04

TO Jeffrey Adams, Esq.

FROM Marguerite Kirk

TELEPHONE NUMBER 445-5935

FAX NUMBER 445-5980

RE Cundiff vs Cox

File No 10641 001

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OPERATOR Nancy

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Our telecopy number is (928) 771-0450

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The Law Firm of

Favour Moore & Wilhelmsen, P.A.

Marguerite Kirk

1580 Plaza West Drive
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Prescott, Arizona 86302

Telephone (928) 445-2444
Facsimile (928) 771-0450
MargueriteKirk@cableone.net

June 24, 2004
File No. 10641.001

via Facsimile & U.S. Mail

Jeffrey Adams
Musgrove, Drutz & Kack, P.C.
1135 Iron Springs Road
Prescott, Arizona
86305

Re: Cundiff, et al. v. Cox – Yavapai County Cause No. CV 2003-0399

Dear Mr. Adams:

We received a message from your legal assistant this afternoon, who called to inquire as to dates of availability in July, 2004 so that you could schedule the deposition of Jeffrey James. As you are aware, Rule 30(a) precludes depositions of third-party witnesses, absent court order or stipulation of the parties. Clearly, based upon our telephone conversation this morning, we will not stipulate to the taking of a third-party witness deposition until the issue of your firm's potential conflict of interest is resolved. Indeed, I specifically told you this morning that we could not proceed with the depositions scheduled for today, nor would I agree to your request for a date for exchange of Rule 26.1 disclosure statements, absent resolution of this ethical issue.

You stated during our conversation this morning that your firm will not be withdrawing, based upon your unsubstantiated position that there is no conflict. Therefore, we are compelled to file a motion to disqualify you and your firm from continued representation of your clients in this case. The filing of this motion is mandated by the circumstances that have arisen since Kenneth Page's deposition.

Additionally, we will request the Court to preclude any discovery until such time as the Court has entered its ruling on our motion. This is necessary to protect our clients' interests in confidential information gained by your firm's prior representation while the motion is pending with the Court. Given the parties' stipulation to maintain the status *quo*; lack of any evidence that your clients have any immediate need to further develop the property; our clients' obvious and important interests; and, the need to maintain high ethical standards of professional responsibility, you should have no objection to this request to the Court during the pendency of our motion.

Very truly yours,

A handwritten signature in black ink that reads "Marguerite Kirk". The signature is written in a cursive style with a prominent vertical stroke at the beginning.

Marguerite Kirk
For the Firm

MK

cc: Kenneth and Kathryn Page
John and Barbara Cundiff
Becky Nash

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FAX COVER SHEET

DATE 6/24/04
TO Jeffrey Adams, Esq
FROM Marguerite Kirk, Esq.
TELEPHONE NUMBER. 445-5935
FAX NUMBER. 445-5980
RE: Cundiff vs Cox
File No 10641 001
TOTAL PAGES TRANSMITTING (INCLUDING COVER SHEET): 3
SPECIAL INSTRUCTIONS. Please see attached letter dated today re matter
If there is a problem with transmittal, please call the operator listed below at
(928) 445-2444
OPERATOR Karen

If you have not properly received this telecopy, please call at (928) 445-2444
Our telecopy number is (928) 771-0450.

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MUSGROVE, DRUTZ & KACK, P.C.

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JAMES B MUSGROVE
MARK W DRUTZ
THOMAS P KACK
GRANT K. MCGREGOR
JOHN G MULL
JEFFREY R. ADAMS
CATHY L. KNAPP

June 25, 2004

File No. 9449-1

VIA HAND DELIVERY

David K. Wilhelmsen
Marguerite Kirk
FAVOUR MOORE & WILHELMSSEN, P.A.
1580 Plaza West Drive
Prescott, Arizona 86305

RE: *Cundiff v. Cox*
Yavapai County Superior Court Cause No. CV 2003-0399

Dear Dave and Marguerite:

I direct this letter to both of you because Dave is Plaintiff's lead attorney on this case and because I have been unable to make any headway with Marguerite even discussing the issues referenced herein.

This letter is in response to our telephone calls over the past two days with Marguerite and Marguerite's letters received yesterday afternoon that touched upon your claim that our Firm has a conflict of interest representing Mr. and Mrs. Cox in the action brought by the Pages based on our Firm's previous representation of the Pages in an unrelated matter. As was clearly explained yesterday and below, no conflict of interest exists and any assumption to the contrary is simply unfounded.

As an initial comment, the timing of your claim is disturbing since you and your clients have known for more than six months that this Firm was representing Mr. and Mrs. Cox. Clearly you could have raised this issue long ago and at the very least before we were in the middle of taking your clients' depositions that took several months to set up and which were properly noticed in accordance with Rule 30, Ariz. R. Civ. P.. As was also explained yesterday morning to Marguerite by John Mull and myself, and which she failed to acknowledge in her letters, following her telephone call Wednesday evening we pulled the Pages' file with this office out of closed file storage and reviewed it. That file was reviewed by John Mull, Tom Kack, Jim Musgrove and myself and we have conferred regarding your alleged conflict claim and none of us believe there is a conflict.

David K. Wilhelmsen
Marguerite Kirk
June 25, 2004
Page 2

Contrary to Marguerite's conflict assertion and as I advised her yesterday, we reviewed our conflict check records to verify whether there was a conflict before we accepted representation. The issue of a potential conflict was reviewed by Mark Drutz and John Mull prior to the first meeting between this Firm and Mr. and Mrs. Cox, at which I was not present.

ER 1.9, Rule 42, Ariz. R. Sup. Ct., provides no conflict exists in representing another party against a former client unless the representation is "in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client...." In discussing ER 1.9, the December 1, 2003, Comments provide:

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.... 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.

Based on the foregoing Rule and the examples contained in the above-referenced Comment, it is clear that our firm has no conflict in its representation of the Coxes.

This firm's prior representation of the Pages did not involve a substantially related matter. As stated yesterday, Mr. Mull's previous representation of the Pages commenced in December, 2000 and was completed approximately six months later. That matter involved a simple dispute between the Pages and their then contractor, Jay Fagelman, regarding construction on the Pages' home (i.e. uncompleted and substandard work as well as a dispute regarding charges for work completed) and was resolved and the file closed in a very short time frame. Specifically, the Pages' dispute with their residential contractor had absolutely nothing to do with (i) the property owned by Mr. and Mrs. Cox, (ii) any claim or issue involving Mr. and Mrs. Cox, (iii) the Declaration of Restrictions that may or may not encumber the property owned by Mr. and Mrs. Cox, (iv) the Coxes' use of their property or (v) any other issue in the pending case.

Likewise, this firm obtained no confidential information relating to the pending matter. Indeed, there is no "substantial risk that confidential factual information as would normally be obtained in the prior representation would materially advance the clients (Coxes) position in the subsequent (this) matter." By way of example, the fact that the Pages' air conditioning was not

David K. Wilhelmsen
Marguerite Kirk
June 25, 2004
Page 3

working properly, that there was painting left to be done or that certain charges were disputed, in no way operated to provide confidential information to our firm regarding the Coxes' later activities on property located several miles distant from the Pages' home. The Pages' file does not even contain a copy of the Declaration of Restrictions in it because the CC&R's were not at issue. The asserted commercial use by anyone in violation of the CC&R's was certainly not at issue in our former representation. There is nothing in the Pages' file, nor did any member of this firm receive any information, that would have any relevance to the current case, much less a use to advance the Coxes' current position. In the event the Pages consent, we will gladly allow you to see the contents of the Pages' file in this office to confirm the foregoing.

I have discussed this issue with Senior Bar Counsel for the State Bar of Arizona. I have been advised that no conflict exists.

The foregoing facts clearly demonstrate that a conflict does not exist. We will oppose any motion to disqualify this firm and we will seek an award of attorneys' fees because such a motion will have no merit.

As a final comment, please be advised that Marguerite objected to virtually every question I asked in deposition in the last two days and frequently asserted her objections in the middle of my questions. She also engaged in theatrics making her objections, which significantly detracted from the orderly conduct of the depositions. (When making her objections she would frequently, *inter alia*, grab her clients, mutter derogatory comments about my questions under her breath and roll her eyes). No attorney is perfect, myself included, but her conduct was clearly inappropriate and unprofessional. Her objections and distractive tactics were so prevalent that Rena Lott was having difficulty making a clear record. I finally put this issue on the record. I have one question. Will she comply with the rules or do I have to include references to her conduct in my Motion to Compel that will be filed in the event you and Marguerite refuse to allow us to proceed with discovery in this case. If so, I will provide the court a copy of the transcript and it will support what I have said. I don't want to do this, but I have clients to represent and we will not tolerate behavior that violates Rule 30, Ariz. R. Civ. P.

I am hopeful that we can timely resolve this conflict issue and that we can have an amicable working relationship between our two Firms. In that regard we are hopeful that we can move forward with the litigation.

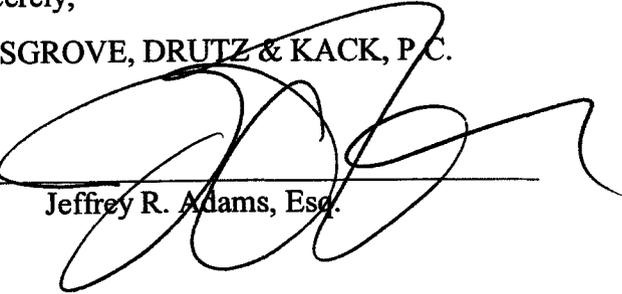
David K. Wilhelmsen
Marguerite Kirk
June 25, 2004
Page 4

Please call with any questions, comments or concerns regarding the foregoing.

Sincerely,

MUSGROVE, DRUTZ & KACK, P.C.

By:


Jeffrey R. Adams, Esq.

JRA/hs

cc: Donald & Catherine Cox

SEND DELIVER TO

Favour, Moore &
Wilhelmsen, P.A.

DATE 4:20pm.

TIME 6/25/04

recorded, return to:
Robert D. Conlin
2233 North 7th Street
Phoenix, Arizona

STATE OF ARIZONA, County of Yavapai
I do hereby certify that the within instrument was filed and recorded at the request of Tom Lynch
on June 13 A.D. 1974 at 1:35 o'clock P.M. Book 944 Official Records
Page 686-681-682 Records of Yavapai County, Arizona.
WITNESS my hand and official seal the day and year first above written.

By Patsy C. Jenney County Recorder
By Caroly & Navigator Deputy

GUYOTE SPRINGS RANCH

DECLARATION OF RESTRICTIONS

KNOW ALL MEN BY THESE PRESENTS:

That Robert D. Conlin and Margaret Dell Conlin, his wife, and David A. Conlin, Jr., husband of Anne Conlin, dealing with his sole and separate property, being the owners of all the following described premises, situated in the County of Yavapai, State of Arizona, to-wit:

GOVERNMENT LOTS One (1) and Two (1) and the South half of the Northeast quarter and the Southeast quarter of Section One (1); all of Section Twelve (12); the East half and the East half of the East half of the Southwest quarter and the East half of the East half of the Northwest quarter and the Northwest quarter of the Northeast quarter of the Northwest quarter of Section Thirteen (13); the East half of Section Twenty-four (24); the East half of Section Twenty-five (25), all in Township Fifteen (15) North, Range One (1) West of the Gila and Salt River Base and Meridian; and

All of Section Six (6); all of Section Seven (7); GOVERNMENT LOTS One (1), Two (2), Three (3), and Four (4), and the Southeast quarter of the Southwest quarter and the South half of the Northeast quarter of the Southwest quarter of Section Nineteen (19), all in Township Fifteen (15) North, Range One (1) East of the Gila and Salt River Base and Meridian.

and desiring to establish the nature of the use and enjoyment of the premises hereinabove described, sometimes hereinafter referred to as property or premises, does hereby declare said premises subject to the following express covenants and stipulations as to the use and enjoyment thereof, all of which are to be construed as restrictive covenants running with the title to said premises and each and every part and parcel thereof and with each and every conveyance thereof hereafter made to-wit:

1. Each and every parcel of the above-described premises shall be known and described as residential parcels; that is to say, mobile, modular or permanent dwellings may be erected and maintained upon said premises, subject to limitations with respect thereto as hereinbelow set forth.
2. No trade, business, profession or any other type of commercial or industrial activity shall be initiated or maintained within said property or any portion thereof.
3. Said property or any portions thereof shall not be conveyed or subdivided into lots, parcels or tracts containing less than nine (9) gross acres, nor shall improvements be erected or maintained in or upon any lot, parcel or tract containing less than such nine (9) gross acres.
4. No structure or improvement of any kind or nature whatsoever shall be erected, permitted or maintained upon, over or across the easements or reservations for utilities or drainage, if any.
5. Residence buildings must be completed within twelve (12) months from commencement of construction. No garage, carport or other building shall be commenced or erected upon any portion of said property until the main dwelling building complying with this Declaration is under construction or has been moved onto the premises. Commencement of construction, for the purposes of this Declaration, shall be deemed to be the date material or otherwise, shall have been placed or stored upon the premises.
6. All residence buildings to be erected, constructed, maintained or moved upon the premises or any portion thereof, as the case may be, shall be of new construction. Residence buildings shall have concrete foundations and hardwood or concrete floorings.

7. (a) All single family residences other than mobile homes shall require 1,000 square feet of ground floor area including storage but exclusive of any portion thereof used for open porches, pergolas, patios, carports or garages, whether or not they are attached to, or adjacent to said residence.

(b) Mobile homes shall (1) contain not less than 720 square feet of ground floor area devoted to living purposes; (2) be not less than 12 feet in width; (3) be placed so that the floor thereof is not more than 8 inches above the ground level;

(c) Travel Trailers or campers may occupy homesites during vacation periods, not to exceed three (3) weeks in any one season, or during the period of residence construction.

(d) No prefabricated or pre-erected dwelling having less than the above applicable square foot requirements, exclusive of open porches, pergolas or attached garage, if any, shall be erected, permitted or maintained on any portion of said property.

(e) No structure whatever other than one single family dwelling or mobile home, as herein provided, together with a private garage for not more than three (3) cars, a guest house, service quarters and necessary out buildings shall be erected, placed or permitted to remain on any portion of said property.

8. No 'Real Estate' or 'For Sale' sign or signs exceeding 24" by 24" may be erected or maintained on said premises. No general advertising signs, billboards, unsightly objects or public or private nuisances shall be erected, placed or permitted to remain on any portion of said premises.

9. No abandoned auto or auto parts or used machinery or other salvage or junk shall be placed or permitted to remain on any portion of said premises.

10. No swine shall be raised, bred or kept upon said premises. Said premises shall not be used in any way or for any purpose that may emit foul or noxious odors.

11. No mobile home shall be used or permitted to remain upon any lot unless such mobile home shall have two hundred (200) square feet of permanent roof, exclusive of mobile home roofing, and two hundred (200) square feet of concrete flooring, including cabanas, porches, storage, carports and garages, but exclusive of any portion thereof used as flooring or base for said mobile home.

12. All structures on said lots shall be of new construction, not exceeding 35 feet in height, and no buildings shall be moved from any other location onto any of said lots with the exception of prefabricated or pre-erected dwellings where the use thereof is permitted.

13. No temporary building may be moved onto or constructed on said premises, with the exception of temporary shop or office structures erected by contractors, or buildings during the actual bonafide construction or a permitted structure upon the premises, provided the contractor or builder agrees to remove such temporary shop or office structure within five (5) days after the actual final completion date of his construction activities of the premises.

14. No construction shed, basement, garage, tent, shack or other temporary structure shall at any time be used as a residence either temporarily or permanently.

15. No residence or dwelling shall be occupied or used prior to installations therein of water flush toilets and sanitary conveniences or facilities and shall be maintained in a sanitary manner and in conformity with all applicable local, county or state laws, as the case may be. No outside toilet or other sanitary conveniences or facilities shall be erected or maintained upon said premises.

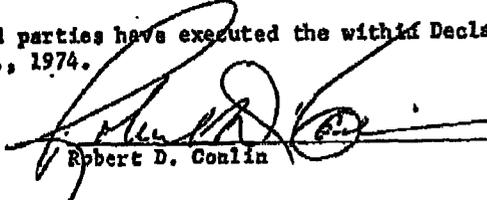
16. All garbage or trash containers, oil tanks, bottled gas tanks and other such facilities must be underground or placed in an enclosed area so as to not be visible from the adjoining properties.

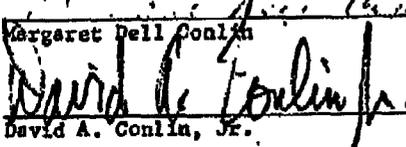
17. The foregoing restrictions and covenants run with the land and shall be binding upon all parties and all persons claiming through them until June 1, 1994, at which time said covenants and restrictions shall be automatically extended for successive periods of ten (10) years, or so long thereafter as may be now or hereafter permitted by law.

18. Invalidation of any of the restrictions, covenants or conditions above by judgment or court order shall in no way affect any of the other provisions hereof, which shall remain in full force and effect.

19. If there shall be a violation or threatened or attempted violation of any of said covenants, conditions, stipulations or restrictions, it shall be lawful for any person or persons owning said premises or any portion thereof to prosecute proceedings at law or in equity against all persons violating or attempting to, or threatening to violate any such covenants, restrictions, conditions or stipulations, and either prevent them or him from so doing or to recover damages or other dues for such violations. No failure of any other person or party to enforce any of the restrictions, rights, reservations, limitations, covenants and conditions contained herein shall, in any event, be construed or held to be a waiver thereof or consent to any further or succeeding breach or violation thereof. The violation of these restrictive covenants, conditions or stipulations or any one or more of them shall not affect the lien of any mortgage now of record, or which hereafter may be placed of record, upon said premises or any part thereof.

IN WITNESS WHEREOF, the above named parties have executed the within Declaration of Restrictions this 12th day of June, A.D., 1974.


Robert D. Conlin

Margaret Dell Conlin

David A. Conlin, Jr.

STATE OF ARIZONA)
County of Maricopa)ss.

On this, the 12th day of June, 1974, personally appeared Robert D. Conlin and Margaret Dell Conlin, his wife.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

My commission expires: 2-2-77


Notary Public

STATE OF ARIZONA)
County of Maricopa)ss.

On this, the 12th day of June, 1974, personally appeared David A. Conlin, Jr.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

My commission expires: 2-2-77


Notary Public

**THE LAW OFFICES OF
MICHAEL A. BOURKE**
990 Copper Vista Dr.
Prescott, AZ 86303
(928)771-8792

RECEIVED
JUN 23 2003

June 20, 2003

Law Office of Robert J. Lauanders, P.C.
8168 E. Florentine Rd., Ste. B
Prescott Valley, AZ 86314

Re: Cundiff et al. v. Cox
Yavapai County Superior Court Case #: 20030399

Dear Mr. Lauanders:

This letter is a follow-up to our telephone conversation of June 19, 2003. In that conversation I advised you that my office represents Mr. and Mrs. Cox in the above-referenced litigation.

I told you that my clients had recently advised me that they recalled a meeting with you in your office in 2001. Donald and Catherine Cox went to your law office and met with you to discuss their plans grow trees in their yard at 7325 North Coyote Springs Road. My clients specifically recall that you discussed the applicable zoning regulations and CC&Rs as they applied to the growing of trees on their property. My clients divulged their plans to grow trees on their residential lot with the intent to sell them later at a commercial location.

In Thursday's telephone conversation you stated that you recalled the meeting and even remembered actually handing my clients a copy of the applicable CC&Rs.

I indicated to you that I believed your recent filing of a lawsuit on behalf of three of the Cox's neighbors presented a hornbook example of a conflict of interest. You responded vigorously that you disagreed with my initial impression. You stated four reasons for your opinion:

- 1.) You stated that my clients just showed up at your office to discuss their plans to plant trees. You indicated they did not have an appointment and the meeting did not last long.
- 2.) You stated that my clients never paid for your services or signed a retainer with your firm.

- 3.) You advised Mr. and Mrs. Cox that if they conducted a commercial operation on their property they could be sued by one of their neighbors.
- 4.) You stated that you did not intend to call yourself as a witness at the trial of the instant matter because other witnesses exist on the issue of actual notice.

In our conversation I told you that I believed that your single meeting with Mr. and Mrs. Cox was sufficient to create a conflict of interest with your new clients' complaint against them arising from the same operative facts. Since our telephone conversation I have researched the issue and confirmed my first impression.

The ethics rules and case law in Arizona is clear. None of your stated reasons is sufficient to overcome the reality that my clients sought your opinion on a land use issue at 7325 North Coyote Springs Road. During that consultation you provided legal advice (after apparently learning enough facts to base said opinion). And, approximately two years later, you filed a Superior Court lawsuit against these very same clients.

Enclosed with this letter please find a copy of the Arizona Supreme Court Case, *In re Ockrassa*, 165 Ariz. 576, 799 P.2d. 1350(1990). The decision contains a detailed discussion of the substantial relationship test that the Court applies in determining whether a conflict of interest exists. As I am sure you are aware, the mere appearance of a conflict has been held to be sufficient to justify the disqualification of an attorney.

Lastly, my clients have a significantly different recollection of the legal opinion you offered them two years ago. In fact, my clients went forward with the placement of fixtures and the planting of trees in reliance on the statements you made during that consultation. Therefore, in the event that the *Cundiff et al v Cox* case is not dismissed forthwith, please consider this letter a tender of my clients' defense and indemnity in the above-referenced litigation. I hereby demand that you either forward this letter to your E&O carrier or provide your carrier's name and address along with your policy number for me to contact them directly.

Your immediate response to this letter is required, as my clients are expending a great deal of time and money investigating and defending this matter at present.

Very truly yours,



Michael Bourke

cc: Mr. and Mrs. Cox

**THE LAW OFFICES OF
MICHAEL A. BOURKE**
990 Copper Vista Dr.
Prescott, AZ 86303
(928)771-8792

June 27, 2003

Law Office of Robert J. Launders, P.C.
8168 E. Florentine Rd., Ste. B
Prescott Valley, AZ 86314

RECEIVED
JUN 30 2003

Re: Cundiff et al. v. Cox
Yavapai County Superior Court Case #: 20030399

Dear Mr. Launders:

This letter is in response to your letter dated June 23, 2003. Once your clients have retained new counsel I would appreciate being advised me of said substitution. I would also appreciate your allowing my clients an extension of time to respond to the complaint until 30 days after a substitution of attorneys is filed.

My clients are disappointed in your stated interest in pursuing the above-referenced litigation. Our investigation indicates that the plaintiffs may be merely nominal parties. Please be advised that if facts are discovered to support this theory, your personal liability will not be limited to the consequential damages incurred. Both of my clients feel betrayed by your conduct to date.

In both of our two telephone conversations, I told you that our investigation has uncovered numerous commercial enterprises in the Coyote Springs development. At last count there appear to be 27 commercial enterprises in the area covered by the June, 1974 CC&Rs. My clients and I have always contended that the CC&R your complaint is based on was abandoned many years ago.

It was our first telephone conversation that caused me to question my clients about your dealings with them. I inferred from your statements that you knew exactly when my clients learned of the existence of the CC&Rs. This seemed a little strange from opposing counsel. Immediately after my clients told me that they met with you in your office two years ago and discussed the very same issues being litigated, I called your office and told you of my concerns. My recollection of that telephone conversation is spelled out in my letter to you dated June 20, 2003.

Your June 23, 2003 letter does not dispute my recollection of your statements; therefore I will continue to believe that the meeting two years ago in fact occurred and the topics discussed were directly related to the instant litigation.

Finally, I am confused by your assertion that my clients and I somehow interfered with your representation. Are you accusing me of having previously been retained by and/or consulted with the Cundiffs, Nashs or Pages? I have searched my conflict files and am not aware of any prior relationship with any of my clients' neighbors.

Would you please explain to me what unlawful act you are threatening to seek relief for?

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael Bourke", with a long, sweeping horizontal stroke extending to the right.

Michael Bourke

cc: Mr. and Mrs. Cox