FORMER-CLIENT CONFLICTS: THE SUBSTANTIAL RELATIONSHIP TEST AND THE PRESUMPTION OF DIVULGENCE

The question of when a lawyer may represent a present client against the interests of a former client has come before the Alabama Supreme Court three times in the last six years.¹ In two of the cases, the court held that the attorney involved should not be disqualified from the case because of the conflict.² In the third case, the court reversed a State Bar Disciplinary Board decision which found an attorney guilty of violating the Code of Professional Responsibility.³ On appeal, the court held that the attorney was innocent of any impropriety related to a former-client conflict.

The recent decisions of the Alabama court suggest that the court may be reluctant to disqualify an attorney who represents a current client against a former client. Such reluctance to disqualify attorneys is laudable. In order to preserve the client's freedom to choose counsel, the court should be wary of interfering too freely with the attorney-client relationship. Interference by the court with the client's choice of counsel should be limited, because such interference is harshly inconvenient to the client.⁴ The United States Court of Appeals for the Second Circuit discussed the inconvenience of disqualifying counsel in Government of India v. Cook Industries:

A client whose attorney is disqualified incurs a loss of time and money in being compelled to retain new counsel who in turn have to become familiar with the prior investigation which is the core of modern complex litigation. The client moreover may lose the benefit of its longtime counsel's specialized knowledge of its operations.⁵

Disqualification of the attorney is an inconvenience not only to the client, but also to the attorney who is removed from the case. The work

². State Farm, 469 So. 2d at 574, 577; Taylor Coal, 401 So. 2d at 1, 19.
³. Goldthwaite, 408 So. 2d at 504, 510.
⁴. See Government of India v. Cook Indus., 569 F.2d 737, 739 (2d Cir. 1978).
⁵. Government of India, 569 F.2d at 739.
he or she invested in the case is wasted, and the fee received is probably only a fraction of what was expected. Moreover, disqualification of the attorney impedes the litigation process, since the replacement attorney must become familiar with the case. Disqualifying an attorney for a conflict of interest is a time-consuming and inconvenient remedy. Courts, therefore, should be wary of removing lawyers from cases because of former-client conflicts.

If reluctance on the court’s part to disqualify attorneys is commendable, cases do exist where a former-client conflict may warrant disqualifying an attorney. When a lawyer represents a present client against a former client, there arises the opportunity for the lawyer to breach the duty of confidentiality owed to the former client. Every attorney undertakes a duty of confidentiality to his or her client. This guaranty of confidentiality encourages the client to share personal information with the lawyer, which is necessary for effective representation. The duty is breached if a lawyer uses confidential information obtained while representing the former client, in order to advance a current client’s interests against those of the former client.

It is imperative that courts enforce the attorney’s duty of confidentiality. If no check on the attorney’s authority to use confidential information against former clients existed, then clients would be reluctant to disclose information to their attorneys. Thus, the guaranty of confidentiality is essential to free communication between the client and attorney. Furthermore, the threat of future breaches of confidentiality may impair other prerogatives of the client. A client should be free, for example, to discharge its attorney at any time. However, the threat of the attorney’s later adverse use of client confidences may discourage the client from exercising that freedom.

Because former-client conflicts tend to imperil the duty of confidentiality which the attorney owes his client, such conflicts may be grounds for disqualifying the attorney. The decision whether to disqualify an attorney calls for a balancing of interests. On one hand is the

6. See C. Wolfram, Modern Legal Ethics, § 7.4.2(a) Former-Client Conflicts and the Confidentiality Principle (1986).
7. Id.
8. Id.
9. Id.
10. Id.
11. Id.
12. See Government of India, 569 F.2d at 737; Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 753 (2d Cir. 1975); Emile Industries v. Patentex,
client's right to freely select counsel without interference from the court. This interest must be balanced "against the need to maintain the highest standards of the profession." To maintain these standards, the attorney's duty of confidentiality must be preserved. The recent Alabama Supreme Court decisions involving the former-client conflict issue represent that court's attempt to balance the interests of the client with the need to maintain impeccable professional standards. That the three recent Alabama cases exonerate the attorney from any guilt associated with a former-client conflict attests to the stringency of the test for disqualification. The remainder of this Article examines the criteria for disqualification of an attorney which have been applied in the recent Alabama cases and in leading cases from other jurisdictions.

The breach of confidentiality is the most obvious threat posed by a former-client conflict. Since the threat of a breach of confidentiality is so clear, courts tend to analyze whether an attorney should be disqualified for a former-client conflict in terms of whether there is a breach of the duty of confidentiality. The problem with this analysis is how to establish that a breach of confidentiality has occurred. If the former client seeking to have an attorney disqualified must reveal its confidences and prove that the attorney misused them, then confidentiality is compromised. The Second Circuit commented as follows on the disadvantage of this form of proof in Government of India v. Cook Industries: "Such a requirement would put the former client to the Hobson's choice of either having to disclose his privileged information in order to disqualify his former attorney or having to refrain from the disqualification motion altogether." Thus the challenge for the former client is proving the attorney has breached the duty of confidentiality, without revealing the confidences itself.

Various jurisdictions, including Alabama, have adopted a test for breach of confidentiality which does not require the former client to reveal confidential information. This test, called the substantial rela-
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relationship test, requires the client to establish certain factual circumstances which give rise to a presumption that the attorney divulged confidences to the present client. In order to invoke the presumption, the client must prove that the former representation and the present one are adverse in some material way, and that the subject matter is substantially related.20

The Alabama Supreme Court adopted the substantial relationship test in *Ex parte Taylor Coal Co.*21 The party seeking disqualification of the attorney in *Taylor Coal* was a coal company being sued for trespass on certain mining property in Fayette County. The plaintiff in the trespass action was a group called the "Pearson Heirs." Taylor Coal claimed it held a valid leasehold interest in the land through a third party named Willis Crocker. Crocker meanwhile was involved in a dispute with the "Pearson Heirs" over title to the land.

The attorney for the "Pearson Heirs" in the trespass action had prepared title opinions for Taylor Coal two years earlier, covering the land involved.22 The opinions concluded that the "Pearson Heirs" owned the mineral interests in the land. Taylor Coal moved to disqualify the attorney for the "Pearson Heirs" from the trespass action, due to an alleged conflict of interest.23 Taylor Coal claimed that the attorney violated Canons 4 and 9 of the Alabama State Bar Code of Professional Responsibility.24 DR 4-101(B) provides:

Except as permitted by DR 4-101(C) a lawyer shall not knowingly:

1. Reveal a confidence or secret of his client.
2. Use a confidence or secret of his client to the disadvantage of the client.
3. Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.25

Canon 9 provides that a lawyer should avoid "even the appearance of professional impropriety."26 To convince the court to disqualify the attorney for the "Pearson Heirs," Taylor Coal would have to satisfy the court that the attorney used, or revealed to the "Pearson Heirs," confi-

20. See *Taylor Coal*, 401 So. 2d at 7; *T.C. Theatre Corp.*, 113 F. Supp. at 268.
22. Id. at 4.
23. Id.
24. Id. at 5-6.
dences he obtained when he represented Taylor Coal. The court considered whether to apply a “fact-by-fact analysis to determine if there has been any impropriety,” or the substantial relationship test instead. The court chose to adopt the substantial relationship test. In explaining its choice of analysis, the court quoted T.C. Theatre Corp. v. Warner Bros. Pictures. This 1953 case eloquently describes the substantial relationship test and the reasons for applying it as follows:

[T]he former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, 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.

To compel the client to show, in addition to establishing that the subject of the present adverse representation is related to the former, the actual confidential matters previously entrusted to the attorney and their possible value to the present client would tear aside the protective cloak drawn about the lawyer-client relationship. For the Court to probe further and sift the confidences in fact revealed would require the disclosure of the very matters intended to be protected by the rule.

In Taylor Coal the trier of fact in the trespass action was a judge. If the client were compelled to reveal its confidences to the judge in order to establish a breach of the attorney’s duty of confidentiality, then the matters supposedly protected would be disclosed to the trier of fact. “To hold that the trier of fact would not be compromised under such circumstances,” concluded the court, “borders on the ridiculous.” Therefore, the court in Taylor Coal chose to adopt the substantial rela-

27. See Taylor Coal, 401 So. 2d at 6.
28. Id.
29. Id. at 7.
32. Taylor Coal, 401 So. 2d at 7.
The substantial relationship test is problematic in one respect. Once the former client establishes that the present representation and the former one are adverse, and that the subject matter of the counseling is substantially related, is the court then automatically to disqualify the attorney? The strong interest in avoiding disqualification of attorneys has been discussed above.  

Unless that interest is incorporated into the application of the substantial relationship test, then the test may oversimplify the steps for a former client to have an opposing lawyer disqualified.

One way to restate the question of how to apply the substantial relationship test is whether the presumption of divulgence invoked under the test is rebuttable or conclusive. If the present client has the opportunity to rebut the presumption, then there is an additional step in the process of disqualifying an attorney for a former-client conflict. Once the former client has proven adverseness and substantial relationship of subject matter, the current client would then attempt to prove that no confidences were actually revealed.

Some courts have refused to allow rebuttal to the presumption of divulgence. In Westinghouse Electric Corp. v. Gulf Oil Corp., the Seventh Circuit held that the presumption is conclusive. Westinghouse sued various uranium producers, including Gulf Oil and United Nuclear Corporation (UNC), alleging that they conspired to drive up the price of uranium. Gulf Oil moved to disqualify UNC's attorney on the grounds that the attorney had represented Gulf Oil in acquiring certain uranium-laden lands, which Gulf had chosen not to mine. Gulf argued that the substantial relationship requirement was satisfied because the attorney had access to Gulf's reasons for delaying production of uranium from these properties. The adverse representation requirement was satisfied, according to Gulf, even though UNC and Gulf were co-defendants in the Westinghouse action, because UNC was attempting "to exculpate itself by inculpating Gulf."

The court in Westinghouse held that the substantial relationship

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33. See supra notes 4-5 and accompanying text.
34. See Wolfram, supra note 6, at § 7.4.3(b); Substantial Relationship, Rebuttable or Nonrebuttable Nature of the Presumption of Divulgence.
35. See id.
36. 588 F.2d 221, 224 (7th Cir. 1978).
37. Id. at 223.
38. Id. at 225.
39. Id. at 223.
test does not entitle the current client to an opportunity to rebut the presumption of divulgence.\(^{40}\) In an opinion disqualifying UNC's attorney, the court commented as follows:

The rule does not necessarily involve any inquiry into the imponderables involved in the degree of relationship between the two matters but instead involves a realistic appraisal of the possibility that confidences had been disclosed in the one matter which will be harmful to the client in the other. The effect of the Canons is necessarily to restrict the inquiry to the possibility of disclosure; it is not appropriate for the court to inquire into whether actual confidences were disclosed.\(^{41}\)

Under the substantial relationship test, Gulf thus established the possibility that confidences were revealed; and the court held that this possibility was a sufficient ground on which to disqualify UNC's attorney.

The Second Circuit also has held that the presumption of divulgence is irrebuttable, in \textit{Emle Industries v. Patentex, Inc.}\(^{42}\) The plaintiff in \textit{Emle Industries} was a textile manufacturer which alleged that the defendant improperly acquired patents. The plaintiff claimed that Patentex used the patents to control prices in the yarn processing industry. Patentex was partly owned by Burlington Industries. At issue in the litigation was the scope of Burlington's control over Patentex.

The attorney for the plaintiff in \textit{Emle Industries} was a specialist in textile patent litigation. He had represented Burlington in a similar patent suit ten years earlier, which also involved the extent of Burlington's control over Patentex.\(^{43}\) For this reason, Patentex moved for disqualification of the attorney from the \textit{Emle Industries} litigation. Patentex asserted that the attorney could use confidential information acquired during the earlier litigation to Patentex's detriment.\(^{44}\)

The trial court in \textit{Emle Industries} granted the defendant's motion to disqualify the attorney. On appeal, the court affirmed, concluding that the attorney was properly disqualified from representing the plaintiff.\(^{45}\) The court observed that it:

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need not, indeed cannot, inquire whether the lawyer did, \textit{in fact}, receive confidential information during his previous employment
\end{quote}

\(^{40}\) See \textit{id} at 224.
\(^{41}\) \textit{Id.} at 224.
\(^{42}\) 478 F.2d 562, 571 (2d Cir. 1973).
\(^{43}\) \textit{Id.} at 564.
\(^{44}\) \textit{Id.}
\(^{45}\) \textit{Id.} at 565.
which might be used to the client's disadvantage. Such an inquiry would prove destructive of the weighty policy considerations that serve as the pillars of Canon 4 of the Code, for the client's ultimate and compelled response to an attorney's claim of non-access would necessarily be to describe in detail the confidential information previously disclosed and now sought to be preserved.46

Five years after these words were written, the Second Circuit reaffirmed its stance that the presumption of divulgence is conclusive in Government of India v. Cook Industries.47 The Government of India regularly purchased grain from Cook Industries. In 1975 Cook was implicated in a scandal involving deliberate short shipments to India. The Government of India sued Cook for breach of contract and fraud. The attorney for the plaintiff had defended two similar claims against Cook in 1973. When Cook moved for disqualification of the plaintiff's attorney because of the former-client conflict, the trial court granted its motion.48 In granting the motion, the court observed that "[t]he law is clear that if the former action and the present action are substantially related and the attorney's involvement in the former case was more than peripheral, then there is an irrebuttable presumption that the attorney had access to confidential information."49 The lower court ruling disqualifying the attorney was affirmed on appeal.50 In affirming the trial court, the Second Circuit noted that "in order to grant a disqualification motion, a court should not require proof that an attorney actually had access to or received privileged information while representing the client in a prior case."51 The Second Circuit thus appears committed to the proposition that the substantial relationship test raises a conclusive presumption that the attorney under scrutiny has breached the duty of confidentiality.

Courts which hold that the presumption of divulgence is conclusive arguably render it too simple to have the former attorney disqualified. In the cases discussed above, the attorney was always disqualified when the court held that the presumption was irrebuttable.52 Courts

46. Id. at 571.
49. Id. at 1059-1060.
50. Government of India, 569 F.2d at 738.
51. Id. at 740.
52. Westinghouse Elec., 588 F.2d at 221; Government of India, 569 F.2d at 737; Emle Industries, 478 F.2d at 562.
which refuse to hear rebuttal of the presumption purport to compensate for the omission by requiring more stringent proof of the two elements of the substantial relationship test. In *Government of India v. Cook Industries*, for example, the Second Circuit stated that considerations of the client’s interest in avoiding disqualification of counsel “have resulted in honing the substantial relationship test in this Circuit in practical application to granting disqualification only upon a showing that the relationship between issues in the prior and present cases is ‘patently clear.’” 53

In *Westinghouse Electric*, the Seventh Circuit specified a rigorous factual investigation of the elements of the substantial relationship test. 54 According to the court in *Westinghouse*,

[D]isqualification questions require three levels of inquiry. Initially, the trial judge must make a factual reconstruction of the scope of the prior legal representation. Second, it must be determined whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters. Finally, it must be determined whether that information is relevant to the issues raised in the litigation pending against the former client. 55

This heightened scrutiny imposed by the court arguably takes the place of the rebuttable presumption in protecting the interests of the client opposed to the disqualification of counsel.

Notwithstanding the strict analysis for proving a substantial relationship conducted by courts which say the presumption of divulgence is irrebuttable, some recent cases have questioned the wisdom of the irrebuttable presumption. 56 In a concurring opinion to *Government of India v. Cook Industries*, Circuit Judge Mansfield expressed his reluctance to endorse the irrebuttable presumption as follows:

While I appreciate that a “former client-present adversary” should not unnecessarily be put to a Hobson’s choice of revealing confidences in order to obtain a disqualification, its interest may be outweighed in some cases by other interests at stake, including not only the investment of the attorney’s present client but the reputation of the attorney himself, which may needlessly suffer unless he is given an opportunity to clear his name. Disqualification of an at-

55. *Id.*
Attorney may threaten an undeserved and unfair stigma that could result in great professional harm, particularly for one who is on the threshold of his career. For these reasons I believe that the district court should have the discretionary authority to permit the attorney to dispel a false impression that might arise if the presumption were held to be irrebuttable.  

The rebuttable presumption was adopted by the United States District Court in New York in 1981, in *Lemelson v. Synergistics Research Corp.* Lemelson was an inventor. He patented a toy and licensed the patent to Synergistics. Synergistics paid royalties to Lemelson. The two parties argued frequently over the licensing agreement. Eventually Lemelson’s patent was declared invalid, and Synergistics informed the inventor it would pay him no more royalties. Lemelson claimed Synergistics was responsible for invalidating his patent and sued the corporation for breach of contract, fraud, and restraint of trade. Lemelson’s attorney in the action was the lawyer who advised Synergistics in regard to the licensing agreement it entered with Lemelson. Synergistics moved to disqualify the plaintiff’s attorney from the case, because of his former association with Synergistics. Synergistics contended that the attorney’s prior representation of the corporation involved issues of inventorship and scope of certain patents which were relevant to its defense. The court denied the defendant’s motion to disqualify the attorney. Citing Mansfield’s concurrence in *Government of India*, the court observed:

> It may be argued that when, as here, the attorney was personally involved in, indeed in control of, the prior representation, there is an irrebuttable presumption of receipt of confidential information. (Cite omitted). However I would consider the better view to be that the court has latitude to permit the attorney to rebut even this presumption.

The attorney in this case was not called upon to rebut the presumption, because the court held that the movant failed to prove that the issues in the prior and current representation were substantially related.

The rebuttable presumption has drawbacks. If the current client

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57. Id.
59. Id. at 1165.
60. Id. at 1167.
61. Id. at 1168.
rebuts the presumption of divulgence by establishing facts tending to show that no relevant confidences were revealed, then the party seeking disqualification may be compelled to reveal the confidential information himself in order to prove that the attorney should be disqualified. To eliminate the need for this Hobson’s choice was precisely why the substantial relationship test was invented. To reincorporate into the test the requirement that the former client prove specific breaches of confidence seems ludicrous.

Some courts have allowed the presumption of divulgence to be rebutted if the current client establishes that the prior representation involved an area of law in which the lawyer was not in a position to gain client confidences. The danger of these decisions is that they may be interpreted as categorical exceptions to the substantial relationship test for certain types of representation. Such an exception has been suggested for “scriveners” by the Kansas Supreme Court in Mildfelt v. Lair. In Mildfelt v. Lair, Mildfelt was employed as a bank manager by Lair. The employment agreement was initially oral, but eventually Mildfelt hired an attorney to draft a contract. Lair refused to sign the contract and shortly thereafter fired Mildfelt. Mildfelt sued Lair for breach of contract and fraud. Lair’s defense was conducted by the attorney who had drafted the employment contract for Mildfelt. Mildfelt moved for disqualification of Lair’s attorney based upon a conflict of interest. The trial court refused to disqualify the defendant’s attorney. On appeal, the Kansas Supreme Court held that disqualification of the attorney was properly refused, even though the elements of the substantial relationship test were apparently satisfied. “In the instant case,” the court reasoned, “the record is clear that Mr. Fleming (the attorney) acted only as a scrivener; he did not obtain any confidential information from Mildfelt, he gave Mildfelt no advice, and there was no confidential relationship between them.” In spite of the court’s conclusions as to the benign nature of the relationship between Mildfelt and the attorney, the wisdom of recognizing categorical exceptions, such as the scrivener’s exception, to the substantial relationship test is dubious. C. Wolfram, in his treatise Modern Legal Ethics, cautions

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62. See Government of India, 569 F.2d at 740.
63. See Wolfram, supra note 6, at § 7.4.3(b).
64. Id.
66. The trial court granted the defendant summary judgment against all of the plaintiff’s claims. Mildfelt, 561 P.2d at 808.
67. Mildfelt, 561 P.2d at 815.
against such exceptions: "The prophylactic role of the substantial relationship test can be served only if exceptions are not readily admitted. The wholesale proliferation of exceptions would create serious confusion in application of the former-client conflict rules." The issue of whether to allow rebuttal to the presumption of divulgence of confidences is more complex than it appears initially. The decision to allow rebuttal to the presumption invokes a further choice as to what form that rebuttal should take. And whatever form the rebuttal takes seems to compromise the purposes of the substantial relationship test.

In *Ex-parte Taylor Coal Co.,* the Alabama Supreme Court upheld a decision not to disqualify an attorney. The attorney had prepared title opinions for a client, and now opposed that client in a title dispute over the land. The substantial relationship test was satisfied because the representation was adverse, and the subject matter of the current and prior representation was substantially related. The court, however, recognized an exception to the substantial relationship test and concluded that disqualification was improper. The court identified several exceptions to the substantial relationship test:

Some of the exceptions occur where there exist: (1) two or more clients employing the same attorney as in business transactions (drafting of deeds, execution of real estate agreements, etc.), (2) waiver, and/or (3) no public sense of impropriety involved in an attorney's representing a client whose interests are hostile to those of his former client where the subject matter of the litigation is substantially the same.

The court in effect applied a balancing of interests analysis in *Taylor Coal.* The client's interest in preservation of confidences was balanced against the need for free choice of lawyers in Fayette County, with its sparse population of lawyers. The original representation, observed the court, was limited in scope because it involved only the preparation of title opinions. The only information which was given to Mr. Moore (the attorney) was an abstract of title prepared by Lucy Crutcher from

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68. Wolfram, *supra* note 6, at § 7.4.3(b).
69. *Taylor Coal,* 401 So. 2d at 10.
70. *Id.* at 9.
71. *Id.* at 8.
72. The Court is not unaware that Fayette County is a small, principally rural county in western Alabama. There are probably about a dozen lawyers in the whole county. In weighing the important considerations of Canons 4 and 9, we must, of necessity, balance the weighty considerations of those Canons against the need of the public to obtain counsel of its choosing. *Taylor Coal,* 401 So. 2d at 9.
public documents.”\(^7^3\) The court concluded that the current client’s interest in the free choice of an attorney outweighed the former client’s interest in the preservation of confidences. The court commented in conclusion, “we can see a public outcry if we were to strip from the members of this community the opportunity to employ an attorney who apparently has developed some expertise in title work in the Fayette area.”\(^7^4\)

The Alabama court again recognized exceptions to the substantial relationship test in *Goldthwaite v. Disciplinary Board.*\(^7^5\) That the court identified exceptions to the test suggests that it once again was incorporating a balancing of interests analysis into the substantial relationship test. In *Goldthwaite* an attorney was charged by the State Bar Disciplinary Board with violating DR 5-101(C) of the Code of Professional Responsibility.\(^7^6\) DR 5-101(C) provides that “[a] lawyer shall not represent a party to a cause or his successor after having previously represented an adverse party or interest in connection therewith.”\(^7^7\) The attorney, Goldthwaite, was employed by a bank as the executor of the estate of a bank client. Goldthwaite was an heir at law of the client. Six months after the client’s will was admitted to probate, Goldthwaite became a party to a contest of the will. The State Bar alleged that Goldthwaite “violated DR 5-101(C) by representing the will contestants after having been the bank’s attorney” in the client’s estate.\(^7^8\)

On appeal, the Alabama Supreme Court found Goldthwaite innocent. The court held that he technically did not represent the will contestants because he did not enter an attorney-client relationship with them.\(^7^9\) He was an heir at law of the bank client, and was entitled to participate in the action to protect his rights. The court went on to hold, however, that even if Goldthwaite had represented the will contestants, he still would not be guilty of a conflict of interest.\(^8^0\) “We would discern no public sense of impropriety in his actions, thereby bringing him within that exception. Additionally, this case also might come within the second exception to the rule: that of waiver by a for-

\(^7^3\) Id.
\(^7^4\) Id.
\(^7^5\) 408 So. 2d 504, 509 (Ala. 1982).
\(^7^6\) Id. at 508.
\(^7^7\) Alabama State Bar Code of Professional Resp. DR 5-101(C).
\(^7^8\) *Goldthwaite,* 408 So. 2d at 508.
\(^7^9\) Id. at 510.
\(^8^0\) Id.
mer client.” By suggesting these exceptions to the substantial relationship test as alternative grounds for decision, the court in *Goldthwaite* reaffirmed its commitment to overriding the substantial relationship test, if necessary, to achieve a fair balancing of interests.

*Taylor Coal* and *Goldthwaite* are candid applications of a balancing of interests analysis to decide whether a lawyer may represent a present client against the interests of a former client. This balancing test is arguably the fairest approach to comparing the interest of the former client in protecting confidential information with the interest of the current client in the freedom to choose an attorney. However, the balancing analysis undermines the substantial relationship test which the court purports to apply. Herein lies the paradox of the substantial relationship test: a party seeking disqualification of the opponent’s attorney may prove the elements of the test. The court, however, may decide intuitively that disqualification is inappropriate under the circumstances. To reconcile the result of the substantial relationship test with the balancing of interests analysis is not always possible. The recent Alabama cases on the subject suggest that the court may sacrifice strict adherence to the substantial relationship test, in order to reach the conclusion it deems is proper.

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81. Id.

82. See also Ex parte State Farm Mut. Auto Ins. Co., 469 So. 2d 574 (Ala. 1984). In *State Farm*, the Alabama Supreme Court applied the substantial relationship test to find that the circuit court’s denial of a motion to disqualify the plaintiff’s attorney was proper. Resort to an exception to the substantial relationship test was unnecessary, because the court found that the party seeking disqualification failed to satisfy the substantial relationship test. The plaintiff sued its insurer for bad faith. The plaintiff’s attorney had represented the defendant on prior occasions in actions relating to auto insurance. The insurance company moved to disqualify the attorney, but the motion to disqualify merely stated that the plaintiff’s attorneys “have represented the defendant State Farm in the past; the firm of Radney and Morris represented the defendant at the time this suit was filed.” *State Farm*, 469 So. 2d at 576. The court held that State Farm’s assertions were too vague to establish a substantial relationship between the subject matter of the prior and current legal representation. The court noted, in addition, that only twenty-two lawyers practiced in Tallapoosa County, where the case was tried. *State Farm*, 469 So. 2d at 576.