

DIGEST OF ETHICS ADVISORY PANEL
OPINION 89-6, REQUEST #51
Issued May 4, 1989

An attorney seeks Panel advice as to whether he may properly undertake representation of an individual under the specific circumstances he describes. The attorney states that the individual, Mr. X, was previously a member of the City Planning Board. The attorney explains that he appeared before the Board representing Mr. Y while Mr. X was still a member of the Board. The attorney states that during one of the hearings in which he appeared before the Board representing Mr. Y, Mr. X raised a question concerning a boundary line dispute between his property and Mr. Y's property. The attorney indicates that he neither examined title to Mr. Y's property nor ever gave his opinion as to boundary locations. The attorney advises the Panel that he no longer represents Mr. Y and, in fact that he has forwarded Mr. Y's file to his new attorney. The inquiring attorney states that Mr. X has now asked him to represent him in resolving the X-Y boundary dispute.

Rule 1.9 provides, in pertinent part:

1.9 CONFLICT OF INTEREST: FORMER CLIENT

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation . . .

This general prohibition was formerly embodied in Canon 4 of the Code of Professional Responsibility. The United States Court of Appeals for the First Circuit has adopted a "substantial relation" test to assess whether an attorney must be disqualified in view of Canon four. This test was recently applied by the federal magistrate in Putnam Resources, Limited Partnership v. Sammartino Inc., et al, C.A. No. 87-0414B, Report and Recommendation, (D.R.I. January 13, 1988), page 3:

The First Circuit in Kevlik v. Goldstein, 724 F.2d 844 (1st Cir. 1984), citing with approval Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1266 (7th Cir. 1983) has recognized that a substantial relation is found where ". . . a lawyer could have obtained confidential information in the first representation that would have been relevant in the second." Where this showing can be made, 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. (citations omitted) (Emphasis supplied).

The United States District Court for the District of Rhode Island again had occasion to apply the substantial relation test in Pfarr et al v. Island Services Co. Inc. et al, C.A. No. 88-0312L, Report and Recommendation, (D.R.I. January 12, 1989). The federal magistrate reviewed Rule 1.9 and

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observed that although the matter before it involved conduct occurring prior to the Rhode Island Supreme Court's adoption of the Rules of Professional Conduct, "[a]n application of the new Rules would have produced the same result . . ."

The Panel takes the position that unless Mr. Y expressly consents after consultation to the attorney's representation of Mr. X, it would be a violation of Rule 1.9 for the attorney to represent Mr. X.

Ethics Advisory Panel advice is protective in nature. There is no requirement that an attorney abide by a Panel opinion, but if he or she does, he or she is fully protected from any charge of impropriety.