

DIGEST OF ETHICS ADVISORY PANEL  
OPINION 89-7, REQUEST #53  
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 several months ago an out-of-state attorney met with him to discuss Rhode Island's law and procedure in domestic relations matters. The attorney advises the Panel that the out-of-state attorney told him that he represented an individual by the name of Mr. Doe, but that there was no discussion of the particulars of Mr. Doe's case. The attorney states that he billed the out-of-state attorney directly for the services he rendered in this consultation. The attorney states that approximately one month later Mr. Doe's wife, Mrs. Doe asked him to represent her in a domestic relations case.

The consultation with the out-of-state attorney resulted in an employment relationship between the inquiring attorney and the out-of-state attorney. Thus, the inquiring attorney had an attorney client relationship with Mr. Doe, albeit a temporary one. This attorney client relationship, moreover, centered on an individual whose interests are specifically and diametrically opposed to Mrs. Doe's present interests.

The Panel has no information as to whether or not the inquiring attorney learned anything relevant to Mrs. Doe's case. The fact remains, however, that the attorney could have been privy to extremely pertinent data.

Rule 1.8(b) provides in pertinent part: "

A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation . . .

Rule 1.9 provides, in pertinent part:

1.9 CONFLICT OF INTEREST: FORMER CLIENT

(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 . . .

These general prohibitions were 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 4. 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). Moreover, "it is irrelevant whether . . . the lawyer is a firm rather than an individual practitioner (even where) . . . different people in the firm . . . scrupulously avoided discussing [client confidences]." (citations omitted)

The United States District Court for the District of Rhode Island again had occasion to approve the substantial relation test in Pfarr et al v. Island Services Co. Inc. et al. C.A. No. 88-031121L, Report and Recommendation, (D.R.I. January 12, 1989). The federal magistrate reviewed Rule 1.9 and 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 . . ."

"Preserving confidentiality is a question of access to information," Comment, Rule 1.10. The Panel takes the position that unless Mr. Doe expressly consents after consultation to the inquiring attorney's representation of Mrs. Doe it would be a violation of Rules 1.8(b) and 1.9 for the inquiring attorney to represent Mrs. Doe.

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.