

ETHICS ADVISORY PANEL
OPINION #93-72 REQUEST #411
Issued September 14, 1993

The inquiring attorney represented a criminal defendant in a criminal matter involving allegations of driving under the influence of alcohol and reckless driving resulting in death. The criminal defendant accepted a plea bargain prior to trial. Subsequently, a civil complaint was filed against the criminal defendant and Tavern A. The civil suit is based on the same facts as the criminal matter and the criminal defendant has not retained the inquiring attorney to represent him/her on the civil matter. The inquiring attorney asks whether he/she may represent Tavern A in the civil action.

Rule 1.9 entitled "Conflict of Interest: Former Client" states that:

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; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.

Under this Rule, the propriety of subsequent representation depends on whether the former and present matters are substantially related, so that confidences obtained in the first representation may not be used to the disadvantage of the former client during the representation of the present one.

The Panel believes that under these facts, a substantial relationship does exist between the past representation of the defendant and Tavern A. In order for the inquiring attorney to undertake representation of Tavern A, it will therefore be necessary for him/her to obtain the consent of the criminal defendant pursuant to subsection (a). The Panel further notes that under subsection (b), confidential information may not be used to a former client's disadvantage even after termination of the client-lawyer relationship.