

Final

ETHICS ADVISORY PANEL
OPINION 96-07, - RREQUEST # 650
ISSUED - April 10, 1996

FACTS:

The inquiring attorney prepared an estate plan for both husband and wife which included trusts and wills. Years later, wife asked the inquiring attorney to redesign her estate plan because she is divorcing her husband. Both husband and wife have other counsel for the divorce.

ISSUES PRESENTED:

May the inquiring attorney redesign wife's estate if her intention is to exclude her husband.

OPINION:

No. If the wife's modification of her estate becomes materially adverse to her husband's interests, then the husband must consent to the representation pursuant to Rule 1.9.

REASONING:

This inquiry involves a discussion of Rule 1.9 entitled "**Conflict of Interest: Former Client.**" Rule 1.9 provides:

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.

The issue faced by the inquiring attorney is whether the interests are "the same or a substantially related matter." Rule 1.9's "substantially related" language prohibits any situation in which a "lawyer could have obtained confidential information in the first representation that would have been relevant in the second." Ogden Energy Resource Corp. v. The State of R.I.,

1993 WL 406375, 4 (D.R.I.), citing Kevlik v. Goldstein, 724F 2nd 844, 851 (1st Cir. 1984). Once a substantial relationship is found, there arises a presumption of the disclosure of confidential information. Ogden, 4 citing Putnam Resources, Limited Partnership v. Sammartino, Inc., 124 F.R.D. 530, 531-32 (D.R.I. 1988).

In accordance with the above-described analysis, if the husband's and wife's interests are materially adverse, and if the inquiring attorney obtained confidential information in the first representation that is relevant in the second representation, then the husband must consent after consultation to the inquiring attorney's representation of the wife. See also, PFARR v. Island Services Co., Inc., 124 F.R.D. 24 (D.R.I. 1989) for a discussion of Kevlik and the "substantially related" test.