

State Bar of South Dakota

Ethics Opinion 98-7

September 4, 1998

- **Rule: 1.9(a)**
- **Subject: Conflict of interests; Clients of lawyer joining firm**
- **Summary: Whether a law firm may bring suit against the former client of a new attorney in the firm depends on if the suit is substantially related to issues in the former representation. Whether a matter is "substantially related" is a factual issue to be determined case by case.**

FACTS

You represent a person desiring to sue another person in tort including a claim for punitive damages. You've been advised by the prospective defendant's lawyer that a lawyer in your firm drafted wills for the prospective defendant before that lawyer joined your firm. The file contents accompanied the lawyer who has now joined your firm. The prospective defendant claims your firm is ethically disqualified from suing him/her based upon financial information to which your partner/associate has access because of the former attorney-client relationship.

You ask the Committee whether in its opinion your firm is ethically disqualified from representing the prospective plaintiff against your associate/partner's former client.

OPINION

Because we lack sufficient facts to directly answer your question, we provide the principles to guide your determination of the ethical question.

This Committee discussed at length the pertinent considerations in a similar request about four years ago. Ethics Opinion 94-14. We quote that opinion extensively below and reaffirm the opinions stated therein:

Rule 1.9(a) of the South Dakota Rules of Professional Conduct governs your request. Rule 1.9(a) provides:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or in a substantially related matter in which the person's interests are materially adverse to the interests of the former unless the former client consents after consultation.

As this Committee stated in Ethics Opinion 93-4:

Whether or not a matter is substantially related to another matter under Rule 1.9 is a determination that must be made on a case-by-case basis based upon the facts of each particular case.

In Ethics Opinion 93-4, there was no dispute as to the facts concerning the attorney's prior representation and this Committee concluded that the two matters were substantially related. Your

request, however, is significantly different than Ethics Opinion 93-4 because the facts surrounding your firm's prior representation are clearly in dispute. This Committee has no jurisdiction or authority to act as a fact-finding body and resolve disputed factual issues.

Because the answer to your question turns on a dispute factual issue and this Committee cannot resolve disputed factual issues, this Committee is unable to express an opinion as to whether or not your firm has a conflict of interest under Rule 1.9(a). Resolution of this factual dispute will have to come from the courts.

Even though this Committee is unable to opine as to whether or not there is a substantial relationship between your firm's prior representations and the current representation, this Committee would like to elaborate for your benefit and the benefit of the Bar on the phrase "substantially related" as used in Rule 1.9(a). As this Committee stated in Ethics Opinion 93-4:

According to the ABA/BNA Lawyers Manual on Professional Conduct, "[a]ll three subsections of Model Rule 1.9 (as amended in 1989) are limitations upon a representation of a former client; the subject of confidences is explicit in subsections (b) and (c); and is treated implicitly in subsection (a) because the substantial relationship test it sets forth, if answered in the affirmative, leads to the presumption that the lawyer gained confidential information from the former client and is not in a position to use it to the former client's disadvantage. The fundamental idea concerning the substantial relationship test is the information gained in representing the former client. According to one court:

'If there is a reasonable probability that confidences were disclosed which could be used against the former client in the later adverse representation, . . . a substantial relationship between the two cases will be presumed.'

Thomas v. Municipal Court of Antelope Valley Judicial District of California, 878 F2d 285, 288 (9th Cir. 1988). "[A] lawyer may not represent an adversary of his former client if the subject matter of the two representations is 'substantially related' which means: information in the first representation that would have been relevant in the second." *Snalytica, Inc. v NPD Research, Inc.*, 708 F2d 1263, 1266 (7th Cir. 1983).

In addition, it should be noted that the burden of proving a substantial relationship is on the party asserting the conflict. *Duncan v. Merrill Lynch, Pierce Fenner & Smith*, 646 F2d 1020 (5th Cir. 1981). Lawyers are not necessarily prohibited from representing a client whose interests are adverse to a former client. *Duncan, supra*; *Gaumer v. McDaniel*, 811 F2d 1113, 1117 (DMD 1991). The Fifth Circuit Court of Appeals in the *Duncan* case has pointed out that:

Although rigidly enforcing the ethical obligation of confidentiality, the courts have seen no need to fashion a rule that prevents an attorney from ever representing an interest adverse to that of a former client.

Duncan, 646 F2d at 1027, 1028.

The courts have adopted various tests of when matters are "substantially related." The Supreme Court of Connecticut in *Bergeron v. Mackler*, 623 A2d 489 (Conn. 1993), has commented on the test thusly:

This test has been honed in its practical application to grant disqualification only upon a showing that the relationship between the prior and present cases is 'patently clear' or when the issues are 'identical' or 'essentially the same.' [citations omitted]

Bergeron, 623 A.2d at 493, 494.

The Supreme Court of New Mexico has held similarly. The disqualification of an attorney is mandatory only when the relationship between the prior representation and the present litigation is patently clear. *Leon Ltd. v. Carver*, 715 P2d 1080 (NM 1986). In the *Leon Ltd.* case, it was noted that even a superficial resemblance between the current and former representations will not, without more, create a violation of the ethical canons.

The Supreme Court of Nevada, like the New Mexico court, has held that even the more similarity between prior and present representations is insufficient to justify disqualification of an attorney. The Nevada court, quoting the Fifth Circuit Court of Appeals' *Duncan* opinion, has stated that the focus should be on the precise nature of the relationship between the present and former representations. *Robbins v Gillock*, 862 P2d 1195 (Nev. 1993).

Where separate and distinct subject matter and the factual context of the former and present representations are not the same, the courts will hold that the matters are not the same or substantially related. See *Nachazel v. Mira Co. Mfg*, 466 NW2d 248 (Iowa 1991). It is only where there are similar issues involved in the former and subsequent representations or where confidential information that is useful or germane in the present representation that it will be held that the matters are "substantially related." *Analytical, Inc. v. NPD Research, Inc.*, 708 F2d 1263 (7th Cir. 1983).

It is the opinion of the Committee that you and your firm would only be ethically disqualified if there are similar issues involved or if the former representation involved confidential information that is useful or germane to any issue in the new case you are contemplating.

Lonnie R. Braun

Chair, Ethics Committee