

# BOYCE, MURPHY, McDOWELL & GREENFIELD

ATTORNEYS AT LAW

Jeremiah D. Murphy  
Russell R. Greenfield  
David J. Vickers  
Gary J. Pashby  
Vance R.C. Goldammer  
Thomas J. Welk  
Terry N. Prendergast  
James E. McMahan  
Douglas J. Hajek  
Michael S. McKnight  
Gregg S. Greenfield  
Tamara A. Wilka  
Roger A. Sudbeck

Norwest Center, Suite 600  
101 North Phillips Avenue  
P.O. Box 5015  
Sioux Falls, South Dakota 57117-5015

Telephone 605 336-2424  
Telecopier 605 334-0618

Of Counsel  
John R. McDowell

J.W. Boyce (1884-1915)  
John S. Murphy (1924-1966)

August 8, 1994

Re: Request for Ethics Opinion 94-14

Dear

You have requested an opinion from this Committee based upon the following facts:

## FACTS

Your firm represents some individuals who were solicited to invest in a small corporation. Your firm is attempting to get back these investors' money. One of the owners of the corporation is an individual who will be referred to as A.

In years past, your firm represented A's interest in a different corporation. Your firm has had no involvement with the corporation involved in the claim brought by the individual investors. According to the information provided to this Committee, your firm has sued this corporation in years past and has acted in matters adverse to A personally.

A question of conflict of interest has been raised by another attorney on behalf of A. According to information provided to this Committee by that attorney, A feels that your firm has represented A and her family on every kind of matter from adoptions to business disputes and represented the corporation involved in the very business which is at issue in the matter brought by the individual investors. Again, according to the information provided by the attorney on behalf of A, A feels that your firm has information related to her property, her holdings, her potential inheritance, and other matters which makes it inappropriate for your firm to represent the individual investors in this matter.

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Based upon this disputed set of facts, you have asked this Committee whether or not your firm may represent the investors in their efforts to recover the money invested in the corporation.

#### OPINION

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 persons interests are materially adverse to the interests of the former client 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 disputed 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 answers 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 F.2d 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." Analytica, Inc. v. NPD Research, Inc., 708 F.2d 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 F.2d 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 F.2d 1113, 1117 (D.M.D. 1991). The 5th Circuit Court of Appeals in the Duncan case has pointed out that:

Although rigidly enforcing the ethical obligation of confidentiality, the court's 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 F.2d at 1027, 1028.

The court's have adopted various tests of when matters are "substantially related." The Supreme Court of Connecticut in Bergeron v. Mackler, 623 A.2d 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 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 P.2d 1080 (N.M. 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 mere similarity between prior and present representations is insufficient to justify disqualification of an attorney. The Nevada court, quoting the 5th 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 P.2d 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 N.W.2d 248 (Ia. 1991). It is only where there are similar issues involved in the former and subsequent representations or where confidential information, which was provided to the attorney in the former representation that is useful or germane in the present representation, that it will be held that the matters are "substantially related." Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263 (7th Cir. 1983).

This Committee would like to specially recognize Committee Larry Von Wald's contribution to the research cited above. Committee member Lori Wilbur did not participate in this request due to a conflict.

Sincerely,

Michael S. McKnight, Chairman  
Ethics Committee