Over the past three years, more than 25% of the "Ethics Helpline" calls to the Board of Bar Overseers have been calls relating to "conflicts of interest."

The Ethics Commission has issued many decisions over the past 30 years which bear on the subject, beginning with Opinion # 2 issued on October 17, 1979.

Opinion # 2 dealt with litigation against a former client. In a nutshell, the opinion reminds us that the duty to preserve a client's confidences and secrets continues after representation. The Opinion stated "[i]f the subject matter of the present suits in fact encompasses the subject matter of the former employment, or if confidential information derived from the former employment may be involved in the new representation, neither Lawyer A nor his firm may represent these Plaintiffs without the former client's written consent. [former Maine Bar] Rule 3.4(e) and (k). On the other hand, if there is no identity of subject matter and no possibility of use of confidential information, then no impediment exists to Lawyer A's firm continuing the new representation."  

The Commission stated that in the context of an advisory opinion, it was not in a position to resolve disputed facts to determine whether or not confidences were being used against the former client, or may be used against the former client, or whether there is an identity of subject matter in the two representations. While the Commission's inability to resolve factual disputes rendered it impossible to determine a potential "violation of the minimal standard of conduct set forth in [former] Rule 3," it went on to consider "the fabric from which our present Code was derived," and concluded that it "would be the better practice for Lawyer A's firm to withdraw from the present representation" and avoid representation where there "may be" a possible violation of confidence, an "appearance of conflict of interest" or result in a former client believing he "may have been wronged" by the subsequent representation (citations omitted).

The Commission also cited former Rule 3.2(f) (4) as bearing on the problem. That Rule prohibited a lawyer from engaging in conduct that is "prejudicial to the administration of justice." The Commission found that continued representation of the plaintiffs by Lawyer A or his firm might well prejudice the administration of justice in two respects:

1. **By fostering the erosion of public confidence in the confidentiality of lawyer communications, as discussed above, and**
2. **By risking the necessity to withdraw, after further proceedings and in the light of deeper involvement in the case, thus placing greater burdens upon substitute counsel and the client.**

The Comments to Rule 1.9 of the Rules of Professional Conduct as well as the Reporters' Notes suggest Opinion # 2 remains intact under the new rules. The underlying message of Rule 1.9 is identical to that of former M.Bar R. 3.4 and the foundation for Opinion # 2, in that it is a lawyer's duty to preserve a client's confidences and secrets continues beyond the end of the attorney-client relationship. Thus, as to confidential information about a former client, a lawyer has a duty which continues "in perpetuity unless otherwise required by Maine Rule of Professional Conduct.
1.6 or 3.3; in subsequent representation of another client, a lawyer cannot use that confidential information to the disadvantage of the former client." Both Rule 1.9 and former M. Bar R. 3.4(d)

preclude representation of a client that is adverse to a former client in the same or substantially related matter, but they approach differently the issue of potential use of confidential information which is not substantially related. M. Bar R. 3.4(d)(1) states that the representation is prohibited if representation adverse to a former client may involve the use of confidential information obtained through such former representation. Model Rule 1.9 Comment [3] (2002) addresses the same point in its definition of when matters are "substantially related": "if they involve the same transaction or legal dispute, or if there is otherwise a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." This is an objective test. Using information about, for example, a former client's financial difficulties or a client's ability to weather the stress of litigation, may very well materially advance the current client's position in a subsequent adverse matter-even if the matters involve different transactions, facts or legal disputes. Representation without consent is prohibited in both situations. In order to make clear to the reader without the benefit of the Comments that the new Rule 1.9 continues to prohibit representation where there is a substantial risk that confidential factual information could materially advance the new client's position, the Task Force moved the Comment 3 definition of "substantially related" to a new subsection (d) in the body of the rule itself.

Reporters' Notes to Rule 1.9.

Absent signed written consent, the better path is to avoid the potential conflict or appearance thereof.

1Former M. Bar R. 3.4(d) addressed conflicts of interest between the representation of a current client and a former client. The current Rules of Professional Conduct present a different organization for the conflict-of-interest rules, allowing each type of conflict its own rule. The conflict-of-interest rules outlining the rules governing conflicts between current clients and former clients are found in Rule 1.9.

2The Commission noted that "were the issue presented as a grievance, factual issues would be determined after hearing."

3The wording of Maine Bar Rule 3.2(f) is identical to its replacement in the Maine Rules of Professional Conduct, Rule 8.4(d)