

DIGEST OF ETHICS ADVISORY PANEL  
OPINION #89-4, REQUEST #46  
Issued February 21, 1989

An attorney seeks Panel advice as to whether it is proper for him to continue to represent his client under the circumstances he outlines.

The attorney advises the Panel that he represents the plaintiff in a personal injury action. His client was the passenger in a car. The attorney states that since filing suit on behalf of his client he has learned that the driver of the car was apprehended on suspicion of driving under the influence of liquor. The attorney states that the police report indicates that the driver contacted the attorney himself. The attorney is emphatic that he has no recollection of this call, even after reviewing the report.

Rule 1.7 provides, in pertinent part:

Rule 1.7 CONFLICT OF INTEREST GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

If the defendant driver consents to the attorney's representation of the plaintiff passenger, then continued representation of the plaintiff would, of course, be proper. In the absence of such consent, however, the question of whether or not an attorney-client relationship arose by virtue of the defendant's telephone call to the attorney becomes a question of fact.

Based on the information contained in the attorney's letter, the Panel does not believe itself to be in a position to decide whether, as a matter of fact an attorney-client relationship arose between the attorney and the defendant driver. The Panel believes that this type of contested fact situation is better handled in an adversarial proceeding such as the one the attorney has initiated in court rather than in the "single party" procedure which Panel review offers.

Ethics Advisory Panel Rule 2, entitled "Jurisdiction," provides, in pertinent part that the Panel may decline to render an advisory opinion if:

(e) The request is not in the form required by Rule 3 hereof.

Rule 3 sets forth the required form for all advisory opinion requests. It provides, in pertinent part:

3. FORM OF REQUEST. A request shall be in writing, shall set out the factual situation in detail and, if possible, the applicable sections of the Code of professional responsibility. It shall also contain a representation by the inquirer that the factual situation described directly affects the inquirer's professional conduct and that the opinion of the panel will not affect interests of parties to any pending action. (Emphasis supplied)

The Panel declines to exercise jurisdiction to respond to the attorney's inquiry in view of the requirements of Panel Rules 2 and 3.

Ethics Advisory Panel advice is protective in nature. There is no requirement that an attorney abide by a Panel opinion, but if he or she does, he or she is fully protected from any charge of impropriety.