

DIGEST OF ETHICS ADVISORY PANEL
OPINION #90-2, REQUEST #72
Issued January 18, 1990

An attorney seeks Panel advice as to whether he may continue to represent a certain client under the circumstances he describes.

The attorney advises the Panel that in January of 1989 an individual we shall refer to as Mr. X retained Attorney A to represent him in a divorce action. Several months later Mr. X's wife, Mrs. X retained the inquiring attorney. Approximately five months after the inquiring attorney began representing Mrs. X, Attorney A advised him that his client, Mr. X had met with the inquiring attorney two or three years earlier, apparently concerning his domestic problems. The inquiring attorney states that he asked Attorney A whether Mr. X objected to his representation of Mrs. X. The inquiring attorney indicates that Attorney A stated that Mr. X did not object. The inquiring attorney relied upon Attorney A's representations and continued to serve as attorney for Mrs. X. Approximately three weeks passed. The inquiring attorney states that Mr. X apparently changed his mind during this time and now objects to his representation of Mrs. X.

The inquiring attorney advises the Panel that he meets with hundreds of potential clients per year. He states that it is his practice not to take notes or keep any record of these preliminary meetings. He adds that he has absolutely no recollection of the conference with Mr. X, but that a review of his office records shows that in 1986 Mr. X sent his office a check for \$150 to cover the cost of the conference with him. The inquiring attorney asks whether he may properly continue his representation of Mrs. X.

Mr. X's consultation with the inquiring attorney created an attorney-client relationship. The fact that he had an attorney-client relationship with Mr. X activates the pertinent provisions of Rule 1.9.

Rule 1.9, entitled "Conflict of Interest - Former Client" provides, in pertinent part:

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;

* * *

In advisory opinion 89-7, we took the position that even though the inquiring attorney did not believe that he had learned anything from a former client which was pertinent to his representation of a present client's adverse interests, the attorney could not represent the present client's position absent the express consent after consultation of both the former client and the present client. We cited Putnam Resources, Limited Partnership v. Sammartino Inc., et al, C.A. No. 87-0414B, Report and Recommendation, (D.R.I. January 13, 1989):

The First Circuit in Kevlik v. Goldstein, 724 F.2d 844 (1st Cir. 1984), citing with approval Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1266 (7th Cir. 1983) has recognized that a substantial relation is found where ". . . a lawyer could have obtained confidential information in the first representation that would have been relevant in the second." Where this showing can be made, the court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. (citations omitted) (Emphasis supplied). Digest of opinion 89-7, issued May 4, 1989.

In the absence of Mr. X's express consent after consultation, then, Rule 1.9(a) would clearly bar the inquiring attorney from representing Mrs. X. The inquiring attorney states, however, that in August of 1989 Mr. X consented to his continued representation of Mrs. X and that he relied on this consent.

The purpose of Rule 1.9 is to protect client confidences made within the scope of a past attorney-client relationship and to insure complete loyalty to the client. See I. G. Hazard the Law of Lawyering 174.1. The rule is not intended to enable a former client to deprive a present client of the services of counsel when it becomes convenient or advantageous. See I G. Hazard The Law of Lawyering 180. Thus, if Mr. X, as former client, consents after consultation to the inquiring attorney's representation of Mrs. X, and he continues to represent Mrs. X, relying on that consent, Mr. X would not ordinarily be permitted to withdraw his consent three weeks later and interrupt the inquiring attorney's relationship with his client.

A former client's consent must be informed consent, however, and informed consent requires full disclosure. See, e.g., New Jersey Advisory Committee on Professional Ethics Opinion 373. "Full disclosure" is not an illusory concept. It involves a reasonable effort to expose present problems and to anticipate future perils. Full disclosure is not a set of conclusory statements but a recitation of specific details and an explanation of foreseeable consequences DeBott v. Parker, 560 A.2d 1323 at 1329 (1988).

The Panel cannot determine whether Mr. X had the benefit of the full disclosure necessary to make his consent valid under Rule 1.9. The extent or adequacy of disclosure is a factual determination; we believe contested fact situations are better handled in an adversarial proceeding. See, eg. digest of advisory opinion 89-4, issued February 21, 1989. We must decline to take a position as to whether Mr. X consented, whether his consent was valid and whether he is bound by that consent. The Panel therefore declines to offer the inquiring attorney any protection.

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.

DIGEST OF ETHICS ADVISORY PANEL
OPINION #90-3, REQUEST #74
Issued January 18, 1990

An attorney seeks Panel advice concerning his obligations, if any toward a client under the circumstances he describes.

The attorney advises the Panel that his client, Ms. A, and her father, Mr. X, lived together in a home owned by Ms. A and insured for \$100,000. A fire broke out in the house, injuring both Ms. A and Mr. X. Mr. X ultimately died of the injuries he sustained. Ms. A's daughter filed suit against Ms. A as administratrix of her grandfather, Mr. X's estate. Mr. X died without a will; his sole beneficiary was the defendant, Ms. A.

The attorney states that no settlement could be reached in the daughter's suit against Ms. A, and that a verdict was rendered against Ms. A which totalled approximately \$400,000. The attorney indicates that Ms. A's insurance company had reserved its rights from the outset with regard to its obligation to indemnify Ms. A, and that after the verdict was rendered the insurance company filed suit in federal court to determine the extent of its obligation.

The attorney states that after filing an appeal in the state court action he received a communication from Ms. A stating that she wanted him to drop the appeal and settle the case. The attorney indicates that these instructions concerned him because he was afraid that Ms. A did not realize that if he were to do as she asked, her insurance coverage would be placed at risk. The attorney states that he wrote to Ms. A explaining the potential risks in detail and asking her to sign and return a copy of his letter. The attorney also included some specific questions with regard to any settlement offers he might be able to negotiate. He states that Ms. A did not respond, even after several written reminders.

The attorney states that he recently received a letter from Ms. A discharging him as her attorney. He states that upon receiving this letter he again wrote to Ms. A concerning the problems which might arise from pursuing this course of action. The attorney adds that he told Ms. A that he would file a motion to withdraw from her case, but that the court would ultimately determine whether or not he would be allowed to withdraw from her case.

The attorney states that he is concerned that Ms. A does not understand the dangers inherent in what she has asked him to do. He asks what obligations he has to protect Ms. A under these circumstances.

Rule 1.2, entitled "Scope of Representation" provides, in pertinent part:

- (a) A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued.

The Panel first notes that the detailed letters the attorney sent to Ms. A, coupled with the reminder notices sent to her satisfied the requirement set forth in Rule 1.2(a) that the lawyer "consult" with his or her client.

The Panel takes the position that an attorney may not superimpose his or her judgment on a client, no matter how praiseworthy the lawyer's motives may be. If the inquiring attorney feels that Ms. A's judgment is so flawed at this point that a question as to her competency arises, it is certainly permissible for him to bring as much information as he feels is necessary to the attention of the trial justice. No violation of the Rules of Professional Conduct arises under the circumstances he has outlined if he files a motion to withdraw.

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.