

DIGEST OF ETHICS ADVISORY PANEL
OPINION #90-8, REQUEST #80
Issued January 18, 1990

An attorney seeks Panel advice as to the proper course of action in the circumstances he describes.

The attorney advises the Panel that he brought suit against a real estate salesperson, among others, in connection with his clients' attempt to purchase a new home. The attorney states that the salesperson obtained a listing for the sale of the home his clients already owned and brought his clients together with a contractor for the construction of a new home. After his clients' old home was sold, the contractor defaulted for reasons the attorney alleges the salesperson knew or should have known. The attorney's clients were left with no home.

The attorney states that the salesperson is being represented by a lawyer, "Lawyer L," who was formerly with the firm representing the real estate office where the salesperson was employed. The attorney indicates that the dispute was referred to the insurance company which had issued an Errors and Omissions policy to the real estate office. The real estate office has now retained Lawyer L to represent its interests. The attorney notes that Lawyer L still purports to represent the salesperson.

The attorney advises the Panel that he made a demand to settle the case for \$15,000, and has received an offer of \$12,000 which apparently comes from the insurance company. The attorney states that he asked Lawyer L whether he has told the salesperson that the insurance company is refusing to pay the \$3000. difference between the attorney's demand and its offer. The attorney indicates that Lawyer L refuses to tell him. The attorney describes other aspects of the case to the Panel which suggest that the salesperson has far greater liability than she, as a layperson, may realize. The attorney states that the salesperson ought to be made aware of her rights. The attorney asks whether he may contact the salesperson to explain these rights to her if Lawyer L does not.

Rule 4.2, entitled "Communication with Person Represented by Counsel" provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The Panel takes the position that Rule 4.2 bars you from contacting the salesperson directly absent Lawyer L's consent no matter how laudable your motive.

Rule 8.3, entitled "Reporting Professional Misconduct" provides, in pertinent part:

0-8) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate professional authority.

* * *

(c) This rule does not require disclosure of information otherwise protected by Rule 1.6.

In In re Himmel, 125 Ill.2d 531, 127 Ill. Dec. 708, 533 NE.2d 790 (1989) the Illinois Supreme Court had occasion to review the implications of the concept embodied in Rule 8.3. In Himmel Attorney Himmel was hired to assist a client in recovering funds due her and wrongfully converted by her previous attorney. Himmel negotiated an agreement with this attorney under which the attorney agreed to pay Himmel's client a substantial sum of money in exchange for the client's agreement not to pursue any claims she might have against the attorney for misappropriation of her funds. Himmel later testified that the client had instructed him not to report the misappropriation of funds to the disciplinary authorities. When the first attorney defaulted on the agreement, Himmel filed suit against him, and the entire situation was ultimately subjected to the scrutiny of the disciplinary authorities and the state supreme court.

The court found that a one year suspension imposed on Himmel for failing to report unprivileged information concerning another attorney's misconduct was appropriate. The court stressed that a lawyer is an officer of the court and as such must uphold its rules. The court noted that an attorney's failure to report misconduct under the circumstances constituted interference with the administration of justice.

The Panel's Rules do not empower it to rule on the propriety of attorney conduct other than that of the inquiring attorney. The Panel has also taken the position that its "single party procedure" is not equipped to resolve contested fact questions such as the question of which actions Lawyer L did or did not take. See digest of advisory opinion 89-7. The Panel thus cannot advise the attorney as to whether the principles enunciated in Himmel require him to report Lawyer L's conduct to the disciplinary authorities or not. The fact remains, however, that the information the attorney has communicated to the Panel concerning Lawyer L's conduct was not obtained from his clients, and is not protected by the attorney-client privilege. See 8 J Wigmore, Evidence 2292.

The Panel takes the position that if the attorney reasonably believes that the conduct of the opposing counsel rose to the level of seriousness outlined above, Rule 8.3 obligates the attorney to report it to the disciplinary authorities. If, however, the attorney does not reasonably believe that the conduct rose to the requisite level of seriousness then the Panel takes the position that the attorney is under no obligation to report it

to the disciplinary authorities.

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.