

DIGEST OF ETHICS ADVISORY PANEL
Opinion 90-52, Request #110
Issued August 2, 1990

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

The attorney advises the Panel that his office has been engaged by the heirs of A to represent them with regard to their positions as beneficiaries of the estate of A. The attorney states that the heirs want an accounting of the estate of A and that no accounting has been filed in the three years or more that the estate has been open. The attorney indicates that the heirs also seek removal of the present executor for breach of fiduciary duty in handling the estate and other improprieties.

The attorney advises the Panel that approximately three years ago, shortly after the estate of A was opened he represented a business, "the T Corp," which expressed an interest in purchasing certain assets of the X Company. The attorney states that the X Company was one of the assets of the estate of A. In connection with the representation of the T Corp, members of the attorney's firm entered into negotiations with the executor of the estate of A. The attorney indicates that during the period in which his firm was representing the T Corp in its attempt to purchase certain assets of the X Company the heirs of A were preparing an offer to purchase other assets of the X Company with the assistance of other counsel. The attorney states that his records show that offers from the T Corp and from the heirs of A were scheduled to be submitted at approximately the same time, but that he had "no direct knowledge of the nature and intent" of the heirs' offer. The estate did not accept the T Corp's proposal and the attorney states that his representation of the T Corp ceased forever at that point, approximately six weeks after it began. The attorney indicates that the attorney from his firm who represented the T Corp in its negotiations with the estate of A will probably be called as a witness. The attorney asks whether a conflict of interest arises with regard to his present representation of the heirs of A under the circumstances he has described.

Rule 1.9, titled "Conflict of Interest: Former Client" provides:

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; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.

In order for Rule 1.9 to apply to bar an attorney accepting subsequent representation, the attorney's second client's interests must be presently adverse to the attorney's first client's interests.

The fact that the T Corp and the heirs of A could have taken opposing positions with regard to a single asset of the X Company and thus become adverse parties is not relevant if opposing postures are never taken. The Panel takes the position that Rule 1.9 does not apply to the situation described because any potential adverseness between the heirs and the T Corp did not develop.

It is important to note that the Panel's single party proceeding is not designed to resolve factual disputes. In order to provide useful guidance to the bar the Panel accepts an inquiring attorney's representations as accurate and bases its opinion solely thereon. The Panel assumes the factual accuracy of material an attorney submits for review. See, e.g. digest of Opinion 87-3.

Rule 3.7, titled "Lawyers as Witness" provides in pertinent part:

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Rule 1.7 addresses the situation in which an attorney is asked to represent a client whose interests are directly adverse to another present client of the attorney's. That is not the situation before us. Rule 1.9, as noted earlier does not apply to the circumstances outlined. Thus, the fact that another member of the attorney's firm may be called as a witness does not affect the propriety of his representation of the heirs of A.

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.