

DIGEST OF ETHICS ADVISORY PANEL  
Opinion #90-37, Request #16  
Issued September 18, 1990

An attorney seeks Panel advice as to the proper course of conduct under the circumstances he describes.

The attorney advises the Panel that he rents office space from Lawyer A. He and Lawyer A are not partners or associates and do not hold themselves out as partners or associates. The attorney states that a client ("Client") consulted with Lawyer A regarding the purchase of two vacant lots. The attorney states that Lawyer A advised Client that the purchase and sale agreement must provide that the lots are, in fact, "legal non-conforming" lots. Client and the seller drafted and signed a purchase and sale agreement but failed to advise Lawyer A of the terms until after the agreement was signed by both Client and the seller.

The attorney indicates that Lawyer A searched the title for client. Client purchased the lots and then applied for and received two building permits. A neighbor appealed the issuance of the permits to the local zoning board.

The attorney states that when Lawyer A was advised of the appeal of the building permits, he was convinced that he would be a witness at the zoning hearing. At his suggestion Client consulted with the inquiring attorney. The inquiring attorney agreed to represent Client before the zoning board and to consult with him on all matters affecting the proceeding before the zoning board. The inquiring attorney and Client agreed that Lawyer A would testify as a witness regarding the title examination he had performed. The zoning board ruled against Client.

When the inquiring attorney met with Client, Client indicated that if the seller did not agree to rescind the agreement then he, Client might look to Lawyer A for damages. At this point both the inquiring attorney and Lawyer A advised Client that a conflict had arisen and that neither wished to be involved in the case anymore.

The inquiring attorney states that Client telephoned him the next day and told him that he misspoke and that he wished both the inquiring attorney and Lawyer A to continue to represent him. Lawyer A was unwilling to do so without obtaining a release from Client releasing him from any claim for malpractice arising out of the purchase of the property. The inquiring attorney met privately with Client and told Client that he was concerned that Client would feel that the attorney's loyalty was compromised by the attorney's friendship with Lawyer A and the fact that he was Lawyer A's tenant. The attorney states that he also advised Client that he would not offer an opinion as to Lawyer A's liability and in no event would he take a position adversarial to Lawyer A. The inquiring attorney advises the Panel that he does not believe Lawyer A committed malpractice but that he didn't share this opinion with Client. The inquiring attorney advised Client that he was willing to continue representing him on the condition that Client get independent advice from an independent attorney regarding Attorney A's

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liability. Client again told the inquiring attorney that he misspoke and that he would sign a release in favor of Lawyer A. Client asked the inquiring attorney to draft a release. The inquiring attorney states that he told Client that his relationship with Lawyer A precluded him from drafting the release. Client asked him to negotiate a settlement with the seller. The inquiring attorney suggested that Client negotiate directly with the seller and explained that he could offer no advice on settlement since Client might later view any settlement advice as tainted by the inquiring attorney's relationship with Lawyer A.

The inquiring attorney first asks the Panel if he may decline to represent Client unless Client releases Lawyer A.

Rule 1.1, titled "Competence", provides:

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

The comment to Rule 1.2 provides, in pertinent part:

An agreement concerning the scope of representation must be in accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

The Panel takes the position that the inquiring attorney may not condition his continued representation of Client on Client's release of Lawyer A from liability. To do so would impermissibly circumscribe Client's options and compromise the quality of the representation, contrary to Rule 1.1.

The attorney's second question is whether he or Lawyer A may draft a release for Client to sign releasing Lawyer A. His third question is whether Client must see another attorney to draft the release. With regard to both questions the Panel takes a position consistent with the foregoing discussion. It is impermissible for the attorney to condition his continued representation of Client on his release of Lawyer A or, indeed, to agree to Client limiting his future options in that way. The identity of the drafter of the release is not pertinent.

The attorney's fourth question is whether he may decline to represent Client unless Client consults with independent counsel regarding the liability, if any, of Lawyer A. Rule 1.4 titled "Communication," provides, in pertinent part that

(b) A lawyer shall explain to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Since requiring a client to obtain additional, impartial advice may be the only means of ensuring that a client will be able to make the requisite informed decision, the Panel takes the position that the attorney may properly

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condition his continued representation of Client on Client obtaining advice from independent counsel.

The attorney's final question is whether he may condition his continued representation of Client on Client's release of Lawyer A if independent counsel advises Client that Lawyer A was not negligent. The fact that Client reports to the inquiring attorney that another attorney has told him that Lawyer A was not negligent does not change the Panel's position, articulated above. For the inquiring attorney to agree to Client's release of Attorney A in connection with his continued representation of Client is impermissible.

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.