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DIGEST OF ETHICS ADVISORY PANEL
Opinion #90-58, Request #119
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 two individuals ("Mr. A" and "Mr. B") are general partners pursuant to a written partnership agreement. The business of the partnership is developing and selling lots in a certain subdivision. All past legal work was done by Lawyer One. The partners subsequently discharged Lawyer One and retained the inquiring attorney, Lawyer Two. The inquiring attorney advises the Panel that he has represented Mr. A in the past in matters unconnected with the partnership and continues to do so. The inquiring attorney does not represent Mr. B in any matter other than the partnership.

The inquiring attorney states that he is presently handling several items of partnership business which require varying degrees of attention. The inquiring attorney advises the Panel that differences have arisen between Mr. A and Mr. B and that Mr. B has threatened to sue Mr. A. Mr. A and Mr. B. have each retained independent counsel, Lawyers Three and Four respectively.

Title to the real estate developed by the partnership is in the name of Mr. A. Mr. B, through his attorney, Lawyer Four, has informed the inquiring attorney that the inquiring attorney is not to perform any legal work relative to the conveyance of any of the lots. The inquiring attorney has also been instructed to perform no services for the partnership except those necessary to preserve the status quo.

Mr. A, through his attorney, Lawyer Three, has informed the inquiring attorney that since he, Mr. A, holds title to the property in his name he expects the inquiring attorney to perform the necessary legal work to continue conveying lots. Mr. A also instructed the inquiring attorney, through his attorney to move forward on certain other partnership business.

The inquiring attorney indicates that he believes that unless certain items of partnership business are advanced, advantages and momentum will be lost and the partnership business will be damaged. The inquiring attorney states that neither Mr. A nor Mr. B want him to "drop the ball," but that he finds it almost impossible to work under contrary instructions. At present he is performing services only when specifically instructed to do so by both Lawyer Three and Lawyer Four.

The inquiring attorney first asks whether he may prepare real estate closing documents that are part of the continuing partnership business when instructed to do so by Mr. A. If not, can he properly assist or advise Mr. A's attorney, Lawyer Three, in the preparation of the documents?

The Rhode Island state legislature has adopted the Uniform Partnership Act with minor changes and additions not pertinent here. See G.L.

1956 (1985 Reenactment) § 7-12-1, et seq. Under the Partnership Act, as at Common Law "a partnership is not recognized as a entity apart from its members," Henn and Alexander, Laws of Corporations § 19 at 63 (1983).

When the inquiring attorney is given contrary instructions by the two business partners, then the situation must be resolved by reference to the Rules governing conflicts of interest between two present clients.

Rule 1.7(a), titled "Conflict of Interest: General Rule," provides:

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.

In the situation the inquiring attorney has described, Mr. A and Mr. B have explicitly declined to agree as to the legal work he is to perform for the business. The provisions of Rule 1.7(a) thus cannot be satisfied and the Panel takes the position that the inquiring attorney may neither prepare nor assist another attorney in the preparation of real estate closing documents pertaining to the partnership business. Accord: Professional Ethics Committee of the Kansas Bar Association, Opinion 81-2 reported at ABA/BNA Manual of Professional Conduct 801:4305.

The inquiring attorney's second question involves what he is to do with regard to pending matters when Mr. B instructs him to maintain the status quo and Mr. A asks him to advance partnership business. If Messrs. A and B do not agree that he ought to perform any legal services in connection with the partnership business, then the provisions of Rule 1.7(a) prevent the inquiring attorney from performing any legal services, whether they are to maintain the status quo or to advance the business.

The inquiring attorney's third question is whether he has an obligation to the partnership which is different from his obligation to the two partners. Since a partnership formed under the laws of Rhode Island does not exist, for most purposes, apart from its members, the Panel takes the position that the inquiring attorney has no independent obligations to the partnership as an entity.

The inquiring attorney's final question involves what he ought to do with the original partnership files and documents if, as the Panel has concluded, the inquiring attorney may not properly represent either of the partners under the circumstances described. Both Mr. A and Mr. B were, at one time properly the inquiring attorney's clients, thus both are entitled to the file prepared for them as clients. Any arrangement to which Messrs A & B will agree under which one retains the original partnership file and the other a

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facsimile thereof thus satisfies the Rules. It is possible that no arrangement can be agreed upon. It is then permissible for the inquiring attorney to turn complete copies of the partnerships files over to each partner and advise Lawyers Three and Four that he will retain the originals in escrow until such time as their clients notify him as to the agreed upon recipient.

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.