

ETHICS ADVISORY PANEL
Opinion #93-11, Request #341
Issued March 15, 1993

An attorney seeks Panel guidance with regard to Rules 1.10 and 5.3. A client (husband) retained the attorney for a domestic action. The attorney's secretary recognized the wife's maiden name while preparing the pleadings. The secretary informs the attorney that her previous employer represents the wife in the divorce and she became privy to confidential information. The attorney instructed the secretary not to divulge this confidential information. The attorney asks whether the law firm may continue to represent the husband against the wife in light of the secretary's knowledge of confidential information and whether a disqualification of representation under Rule 1.10 may be waived by the client in this matter.

The Panel's analysis of this matter begins with Rule 5.3 entitled "Responsibilities Regarding Nonlawyer Assistants". Rule 5.3(c)(2) states that:

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Since the confidential information is directly relating to the representation of a client, this information is protected under Rule 1.6. Rule 5.3 mandates that the secretary's conduct is imputed to the attorney who has direct supervisory authority. In this regard, if the secretary violates a Rule, the attorney is responsible for the secretary's conduct. In addition, because the attorney may have knowledge of information directly relating to the representation of a client, this knowledge is imputed to the entire law firm pursuant to Rule 1.10(b). Rule 1.10 entitled "Imputed Disqualification: General Rule" states that:

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rule 1.6 and 1.9(b) that is material to the matter.

Rule 1.10(d) allows "a disqualification prescribed by this rule [which] may be waived by the affected client under the conditions stated in Rule 1.7". The problem in this situation is in order to obtain the husband's consent, the information must be revealed. The Panel believes that the wife's informed consent must be obtained first in order to protect the information. In addition direct contact with the wife is governed by Rule 4.2 and the attorney is cautioned to adhere to the Rule's mandates.