

ETHICS ADVISORY PANEL
OPINION #94-22 REQUEST #477
Issued March 23, 1994

The inquiring attorney represents a therapist and several of his/her patients. The therapist rented office space from a doctor, who placed an electronic listening device in the therapist's office and tape recorded patient sessions. The doctor's wife, a patient, discovered the tapes and provided them to the therapist, who, then notified the patients. The therapist and five patients brought suit against the doctor.

The inquiring attorney explained to the patients that there may be a potential conflict with regard to the representation of both therapist and patient. The five patients did not seek individual counsel. The attorney explains that the therapist may be ordered by the court to reveal privileged information regarding the patients. The patients are upset that this may occur. The attorney asks if the therapist is compelled to testify, should he/she withdraw and help the patients obtain new counsel.

The Panel agrees that the inquiring attorney should withdraw from representing the patients in this matter. A lawyer should not represent a client "unless it can be performed competently, promptly, without improper conflict of interest and to completion." See, Comments to Rule 1.7. At the point of withdrawal, the patients become the former clients of the inquiring attorney and Rule 1.9 governs this inquiry.

Rule 1.9 entitled "Conflict of Interest: Former Client" provides as follows:

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 interest 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.

Based upon the facts as presented, the Panel concludes that the inquiring attorney may continue to represent the therapist in conformity with Rule 1.9, but only if the patients consent after consultation to the attorney's representation of the therapist. In addition, the inquiring attorney must comply with the confidentiality principles of Rule 1.6 and may not use information that was obtained in the former representation of the patients to the disadvantage of the patients.