

ETHICS ADVISORY PANEL
OPINION #94-66 REQUEST #537
Issued September 28, 1994

The inquiring attorney seeks Panel advice regarding the following circumstances. The attorney represents A, a purchaser of a home in a suit against B, the developer. During the pendency of litigation, A encounters financial problems and sells the home to D. The sales agreement contains an addendum drafted by the real estate broker which detailed in summary "(1) the house is sold by "A" to "D" in an "as is" condition, (2) notice of the pending suit is given and (3) the "successful outcome of litigation would require the repair of the house and no settlement would be made without the approval of "D." Subsequent to the sale of the house, the good relationship between A and D dissolved and A has terminated the attorney's services.

The attorney asks the following: whether he/she has an attorney-client relationship with D; whether or not there is a conflict of interest if the attorney represents either A or D and must the attorney notify D of his motion to withdraw.

The inquiring attorney first asks whether he/she has an attorney-client relationship with A or D. The Panel opines that the inquiring attorney has an attorney-client relationship with A only, and not D. This being the case, the attorney owes "A" all the duties pursuant to the Rules of Professional Conduct including Rule 1.6 entitled "Confidentiality of Information." The following rules also are applicable to this inquiry.

Rule 1.9 entitled "Conflict of Interest: Former Client" states: 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.

Rule 1.17 entitled "Declining or Terminating Representation" states in pertinent part:

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned.

Rule 1.9 is relevant in this inquiry since A is a former client, the attorney must acquire A's consent after consultation if he/she represents D because the matters are "substantially related." The attorney must also return A's file to A and refund any advance payment of an unearned fee pursuant to Rule 1.17(d). D is not entitled to receive notice regarding the inquiring attorney's motion to withdraw from legally representing A. In addition, the Panel cautions the attorney regarding Rule 4.3 entitled "Dealing With Unrepresented Person" when dealing with D.