

ETHICS ADVISORY PANEL
OPINION # 94-77, Request # 551
Issued March 23, 1995

The inquiring attorney, a director of a non-profit legal services agency, seeks guidance with respect to ethical issues arising out of the potential merger of that agency with another non-profit legal services agency. Following the merger, the combined entity will operate as one non-profit legal services agency.

The Panel refers the inquiring attorney to Rule 1.7, 1.9, 1.10, and 1.6. Rule 1.7 addresses the inquiring attorney's concern regarding conflicts of interest between clients of the combined entity in cases where prior to the merger, no conflict existed as the clients were represented by two separate agencies. However, following the merger, clients of two previously separate entities became clients of a single entity. Rule 1.7 entitled "Conflict of Interest: General Rule" states:

(a) 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.

Rule 1.10 "Imputed Disqualification" prohibits the combined entity from representing a client when either of the predecessor agencies would have been prohibited from doing so.

Accordingly, the combined entity must review its caseload to identify instances where clients' interests are directly adverse. If there is a reasonable belief that the representation will not adversely affect the combined agency's relationship with each client, each client must consent after consultation. Absent such consent, the combined entity cannot represent either party and information with respect to each such client must be kept confidential in accordance with Rule 1.6.

Rule 1.9 "Conflict of Interest: Former Client" read together with Rule 1.10 "Imputed Disqualification" is also applicable to the combined entity. Rule 1.9 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 1.10 prohibits the combined entity from representing a client in a matter materially adverse to the interests of any former client of either of the predecessor agencies, absent consent after consultation. In no event may information with respect to any former client of either predecessor agency be used to the disadvantage of the former client except as provided in Rule 1.9(b).

The Panel opines that the combined agency should formulate systems and procedures to identify conflicts of interest arising both on the date of the merger and thereafter. Practical guidance can be found in the following sources. See, Cantor, "How to Merge Law Practices," in 1 Barbier, "The Dynamics of Merger," 64 Mich. B.J. § 1208 (Nov.1985); Rose, "Merging of Firm's Increases Capacity to Serve Clients," 28 Law Off. Econ. & Mgmt. 30 (1987); Altman, "Ingredients of a Successful Law Firm Merger," 59 N.Y. St. B.J. 48 (Oct.1987); McGinity, "Small Law Firm Mergers," 132 N.J. Law. 30 (Jan/Feb 1990).

The Panel's guidance is restricted to interpretations of the Rules of Professional Conduct and does not extend to issues under the State Ethics Code or any other rules, regulations or laws that may have a bearing on the issues raised by this inquiry.