

ETHICS ADVISORY PANEL
Opinion #92-30, Request #244
Issued May 20, 1992

An attorney seeks Panel advice regarding a factual situation which the attorney describes.

Attorney A previously worked for Attorney B. While in Attorney B's employ, Attorney A assisted Attorney B in some initial discovery exercises in a case for Ms. X. After Attorney A left B's employ, the case for Ms. X was unsuccessfully tried by Attorney B. Ms. X now wants Attorney A to represent her in a malpractice action against Attorney B. Ms. X alleges that Attorney B failed to file a timely notice of appeal and that she would have succeeded at trial, but for B's malpractice. Attorney A inquires whether he/she may handle Ms. X's malpractice claim against Attorney B.

The Panel is of the opinion that Attorney A's representation of Ms. X against Attorney B is not per se prohibited by the Rules of Professional Conduct. Because in both situations Attorney A would be representing the same client - Ms. X - there is no conflict or disqualification governed by Rules 1.9 or 1.10.

The Panel notes, however, that before undertaking to represent Ms. X, Attorney A must give serious consideration to several potential ethical issues that may arise during the course of the representation. For example, because Attorney A was involved with the early stages of Ms. X's case and would have general familiarity with the operation of Attorney B's office, Attorney A may be called upon to testify in the trial of the malpractice claim. See Rule 3.7 ("Lawyer as Witness"). Moreover, Rule 1.7(b) generally prohibits an attorney from undertaking representation of a client when the representation may be "materially limited . . . by the lawyer's own interests . . ." In analyzing Ms. X's malpractice claim, Attorney A must consider whether he/she can objectively evaluate the handling of the matter by Attorney B's office. This analysis may well require Attorney A to evaluate the propriety of his/her own conduct during the initial stages of the original litigation. Even if Attorney A concludes that his/her own interest will not affect representation of Ms. X, Rule 1.7(b)(2) requires Attorney A to alert the client to potential conflicts and to obtain consent after consultation.