

ETHICS ADVISORY PANEL
Opinion #92-37, Request #257
Issued July 23, 1992

An attorney seeks Panel advice with regard to the following circumstances. The attorney is a co-owner of a close corporation with a non-client. At all times, both the attorney and the co-owner were represented by independent legal counsel. The attorney has been approached by Client A to represent the client in a matter which is adverse to the co-owner's unrelated business venture. The attorney asks whether the attorney may represent Client A against the co-owner.

The Panel believes that the cautionary language of Rule 1.7 and the comments thereto addresses this inquiry. Rule 1.7(b) specifically mandates that:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation.

The language in the comment to Rule 1.7 strongly cautions an attorney as to potential problems when choosing to undertake such representation. The Panel is unable to conclude that the client's informed consent is sufficient to avoid a conflict of interest. Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the third party, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

The Panel believes that this situation is fertile with potential conflicts for the attorney. The Panel agrees that the outcome would be quite different if the attorney surrendered or abandoned the attorney's shares in the corporation.