

ETHICS ADVISORY PANEL
OPINION #93-58 REQUEST #374
Issued October 5, 1993

SUPREME COURT
ETHICS ADVISORY PANEL
JOHN E. FOGARTY
JUDICIAL ANNEX
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PROVIDENCE, RI 02903

A and B hired the inquiring attorney to form a corporation for the operation of a new business. The inquiring attorney previously represented A in various unrelated matters, but had no prior client-lawyer relationship with B. The inquiring attorney prepared all of the documentation necessary to form a close corporation; A and B are the only shareholders. A holds a majority of the stock. For two (2) years following incorporation, the inquiring attorney served as legal counsel to the corporation. The inquiring attorney's fees were paid by the corporation. Contemporaneously, the inquiring attorney represented A in other unrelated matters for which A personally paid the attorney's legal fees. Subsequently, A and B had a dispute with respect to the operation of the corporation. The attorney asks whether he/she may represent A in the dispute with B and whether he/she may represent A in the event that B sues to dissolve the corporation.

Rules 2.2 entitled "Lawyer as Intermediary" applies to this inquiry. The comment to the Rule states that a lawyer acts as intermediary in seeking to establish a relationship between clients, and gives as an example helping to organize a business in which two or more clients are entrepreneurs. Rule 2.2 states in part:

(a) A lawyer may act as intermediary between clients if:

- (1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;
- (2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and
- (3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

The Panel believes that under the circumstances of this inquiry, it is unclear whether the attorney acted as intermediary in helping to organize the corporation in which A and B were entrepreneurs. Further, it is unclear whether the inquiring attorney consulted with each client concerning the implications of common representation as required by subsection (a). That notwithstanding, the Panel opines that intermediation may no longer be possible inasmuch as the conditions listed in subsection (a) may no longer be satisfied. The Panel concludes that if the inquiring attorney acted as intermediary, the inquiring attorney must withdraw as intermediary pursuant to subsection (c) and shall not continue to represent A in matters involving the subject of the intermediation.

Under these facts it is apparent that the inquiring attorney also acted as lawyer to the corporation. Rule 1.13 entitled "Organization as Client" therefore applies to this inquiry. Subsection (e) of the Rule states:

A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Subsection (e) permits a lawyer to represent both an organization and one (1) or more of its constituents subject to Rule 1.7 governing conflict of interest. Further, subsection (e) mandates that when a conflict of interest arises, the lawyer must obtain the consent of an appropriate individual seeking representation.

The Panel believes that under these facts a conflict of interest may exist pursuant to Rule 1.7(b). That Rule states as follows:

(b) 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. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

It appears to the Panel that the inquiring attorney's responsibilities to the corporation may be materially limited if he/she undertakes representation of A. Client consent is therefore required in order to permit representation. The Panel notes, however, that in this instance consent may not be given by A as he/she is the individual who is to be represented. The inquiring attorney must therefore obtain client consent by B for him/herself and for the corporation in order to represent A and/or the corporation.