

ETHICS ADVISORY PANEL  
OPINION #94-29 REQUEST #489  
Issued July 27, 1994

The inquiring attorney seeks advice regarding the following circumstances. Five years ago, Client X, a real estate developer, purchased land relying on the real estate agent's representation that the zoning permitted single family residential development. Client X was represented by a law firm in which the inquiring attorney was an associate at the time of the real estate closing. The inquiring attorney became a partner in the law firm approximately one year later. The financing for the real estate was handled by a partner, Partner Y in the law firm.

After the closing, Client X was made aware that the zoning did not permit single family residential development. Partner Y directed the inquiring attorney to meet with Client X in his/her capacity as a litigation associate to file suit against the listing agent and seller. The inquiring attorney was under the supervision of two law partners in this matter.

One year ago, the inquiring attorney left the law firm and established his/her own office. He/she was permitted to keep the litigation files including this law suit. During the course of discovery the inquiring attorney learned of an opinion letter signed by Partner Y and addressed to the bank in connection with the financing of the real estate purchase which stated that the proposed single family development would not be contrary to the zoning regulations. Client X was not aware of the existence of the opinion letter.

The inquiring attorney asks whether or not he/she has a conflict of interest in representing Client X because he/she was a member of the law firm issuing the opinion. Partner Y will most likely be called as a witness in this matter by opposing counsel in defense of the real estate agent and seller. Client X is aware of the attorney's concern and expresses a desire to continue the representation. The attorney has offered to withdraw from representing Client X if a conflict exists.

The rules regarding conflict of interest are Rule 1.7, the General Rule, Rule 1.8 entitled "Prohibited Transactions" and 1.9 entitled "Former Clients."

Rule 1.7 entitled, "Conflict of Interest: General Rule" and the comments thereto, states that:

(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.

The comments state that:

The lawyer's own interests should not be permitted to have adverse effect on representation of a client . . . . If the probity of a lawyer's own conduct on a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.

The Panel cannot render a definitive answer in this matter because it is unable to determine the extent of "the lawyer's own interests." Because there is an issue of malpractice and the attorney was once a partner in the law firm, it is the attorney's decision to make whether he/she's representation of the client will be "materially limited" because he/she was a partner in the law firm with partner Y. If the attorney believes his/her interests will impact the representation then the attorney should withdraw from representing the client pursuant to Rule 1.17.