

## **ETHICS OPINION**

**RO-94-10**

**District attorney (and assistants) not vicariously disqualified even though newly employed assistant has participated in criminal cases as defense counsel so long as new assistant is adequately "screened" from participation**

### **QUESTION:**

"I am writing in response to a written ethical inquiry from you dated August 23, 1994. I am doing this for a clarification of one of the prior decisions submitted in the letter particularly RO-90-57. I would especially like to address Issue One and Two in the opinion with regard to the principle of 'vicarious disqualification.' I notice that under these rulings the Code of Professional Responsibility disqualified subsequent associate attorneys from participation in any cause in which the new associate had previously participated.

I also note the decision in Issue Two states that if this decision was revisited under the 'new' rules it would probably be addressed in a 'different fashion.'

Reviewing the new rules particularly Rule 1.11(c)(1) which is footnoted to the fact that 'Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.'

Probably more simply stated, the issues would be:

1. Are District Attorneys and Assistant District Attorneys disqualified from participation in pending criminal cases by the principle of vicarious disqualification when the newly employed assistant has participated in the pending criminal case as a defense attorney?
2. Are District Attorneys and Assistant District Attorneys disqualified from participation in pending criminal cases by the principle of vicarious disqualification when the newly employed assistant has participated in a pending criminal matter through previous representation of a co-conspirator?
3. Are District Attorneys and Assistant District Attorneys disqualified from participation in pending criminal cases by the principle of vicarious disqualification

**when the newly employed assistant has participated in a pending criminal case through previous representation of an alleged co-conspirator who is a husband or wife of the subject case?"**

**ANSWER QUESTION ONE:**

**District Attorneys and Assistant District Attorneys are not vicariously disqualified pursuant to Rule 1.11, Alabama Rules of Professional Conduct when a newly employed assistant has participated in criminal cases as a defense attorney so long as the "new" attorney is adequately "screened" from participation in the governmental activity.**

**ANSWER QUESTION TWO:**

**Same as Answer One, above.**

**ANSWER QUESTION THREE:**

**Same as Answer One, above.**

**DISCUSSION:**

**The Disciplinary Commission previously issued formal opinion RO-90-57 which dealt with similar issues proposed in the instant inquiry. The Disciplinary Commission determined in that matter that the determination reached therein might be different if the Supreme Court of Alabama adopted the Model Rules of Professional Conduct. On January 1, 1991, the Supreme Court's order adopting the Model Rules effectively established the new standard by which vicarious disqualification of governmental and private attorneys would be determined.**

**Rule 1.11(c)(1), Alabama Rules of Professional Conduct, states as follows:**

**"Rule 1.11 Successive Government and  
Private Employment**

\* \* \*

- (c) Except as law may otherwise expressly permit,  
a lawyer serving as a public officer or employee  
shall not:**
  - (1) Participate in a matter in which the lawyer  
participated personally and substantially  
while in private practice or nongovernmental  
employment, unless under applicable law  
no one is, or by lawful delegation may be  
authorized to act in the lawyer's stead in the  
matter;...."**

The pertinent provision of the Comment states:

**"Paragraph (c) does not disqualify other lawyers in  
the agency with which the lawyer in question has  
become associated."**

Further, Hazard and Hodes, in their treatise *The Law of Lawyering*, state:

**"When a lawyer moves into the government from  
private practice, he is still bound by Rules 1.6 and  
1.9. He may not divulge any information about a  
former client and may not oppose the client in a  
matter in which he had previously represented him,  
or in a matter substantially related thereto. This bar  
can be lifted only by the consent of the former client.**

**On the other hand, imputed disqualification of the  
government, treating it as a new 'firm' under Rule  
1.10, is inappropriate. If Rule 1.10(a) were to apply  
to the government, the government would either have**

**have to forego certain enforcement matters, or hire lawyers who had never been in private practice, or who had represented only clients who would never be adverse to the governmental unit hiring the lawyer.**

**The only practical escape from this dilemma is to screen the affected lawyer from participation in government activity that is adverse to his former clients and related to work that he performed for to work that he performed for them; Rule 1.11(c)(1) so directs." §1.11:400.**

**Further, the Supreme Court of Alabama, in a footnote to its opinion in *Roberts v. Hutchins*, 572 So.2d 1231 (Ala. 1990), affirms the availability of the "Chinese Wall" in certain cases involving the movement of lawyers between the government and private law firms. 572 So.2d 1234, n.3.**

**Based on the foregoing, it is the opinion of the Disciplinary Commission that an effective application of the "Chinese Wall" to the newly employed assistant would allow the District Attorney and other Assistant District Attorneys to participate in pending criminal cases even though the newly employed Assistant had represented a co-conspirator of a pending case, specifically, husband and wife co-conspirators.**

**The new assistant would have to insure his compliance with Rules 1.6 and 1.9, Alabama Rules of Professional Conduct. He could in no way participate in the pending criminal matters absent the consent of his client. The remaining members of the District Attorney's Staff, employing the effective "Chinese Wall" concept,**

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**would not be vicariously disqualified from further participation in the other  
pending criminal matter.**

**To the extent that RO-90-57 is inconsistent with the holding herein, that  
opinion is modified accordingly.**

**JAM/vf**

**9/7/94**