

ETHICS OPINION

RO-96-06

Law firms not required to notify respective clients that one firm is representing the other if the attorneys involved determine such will not adversely affect their relationships with their clients

QUESTION:

"We are writing to you to request, on behalf of the law firms A and B, an informal opinion concerning the respective ethical obligations of the firms in the circumstances described below. This request seeks advice as to whether Firm B may represent Firm A in certain employment law matters, without both firms disclosing this representation to their respective clients (who are adverse in litigation) and obtaining their consent. This request is urgent in that the Firm A anticipates the imminent filing of a lawsuit and, therefore, the firms respectfully request the Bar's guidance on an urgent basis.

Firm A is a professional corporation providing legal services in Anytown, Alabama. Among other practice areas, it engages in a substantial employment discrimination practice, primarily on behalf of plaintiffs. Although empirical data is not readily available, the employment discrimination practice of Firm A is likely the largest in the City of Anytown, as well as the State of Alabama. Firm B is a general law partnership practicing primarily civil law in Anytown. Among other practice areas, Firm B represents employers and defends employment discrimination litigation. As a result of the practice of both firms, Firm A and Firm B are frequently and routinely adverse as litigants. That is, Firm B lawyers routinely defend employment discrimination claims brought by Firm B on behalf of its clients primarily in the federal courts in Alabama. A number of such cases are now pending in the federal courts. By Alabama standards, both Firm A and Firm B are large law firms.

Firm A has three employment discrimination charges, one of which may matriculate into a lawsuit at any time. These claims involve employees, or former employees, of Firm A. Firm A seeks immediate counseling with respect to these matters and may, or may not, elect to secure the representation of Firm B in the event of litigation.

Firm A reasonably believes, because of the breadth of its plaintiffs' employment law practice, that it cannot retain experienced employment discrimination defense counsel locally who is not defending actions brought by that firm. In short, if it is that Firm A cannot retain Firm B without disclosure and consent of the clients of both firms, then the same ethical impediment will affect its ability to engage other experienced defense counsel in Alabama. While Firm A is widely experienced in employment law, it desires the perspective of defense counsel for advice.

In considering this engagement, Firm B does not believe that it has any conflict in terms of representing another law firm (including one representing clients with whom it is litigating) with respect to a claim of this type. However, because of the number of active cases it has with Firm B, it does not believe that it is practicable to notify the firm's existing clients, which are in litigation with Firm A and disclose the fact of the representation of the Firm A and seek their consent. Such disclosure would, of course, also first require the consent of Firm A. Firm B has reached the decision not to accept the engagement, if it is required to notify its clients. Firm A has reached the same conclusion and for that reason, we seek instructions from the Bar.

Specifically, the firms request instructions from the Bar, in the event that the engagement proceeds whether they would be required to disclose the fact of representation to their existing clients and obtain their consent.

In examining this question, we believe that the rules implicated are 1.7(a) and (b), Alabama Rules of Professional Conduct. We note that three Bar associations have taken the position that such representation does not involve unethical behavior and does not require disclosure and consent: Iowa State Bar Association, Committee on Professional Ethics and Conduct, Formal Opinion 92-28 (February 18, 1993); Philadelphia Bar Association, Professional Guidance Committee, Opinion 86/163 (December 18, 1996); and Kentucky Bar Association, Ethics Committee, Formal Opinion E-355 (1993). Other ethics committees have reached contrary results; see, e.g., New Jersey Advisory Committee on Professional Ethics, Opinion 679 (1995); Maryland State Bar Association, Inc., Committee on Ethics, Docket 82-4 (December 3, 1981); Illinois State Bar Association, Committee on Professional Ethics, Opinion 822 (April 9, 1983).

We point out that the circumstances presented by this issue and the local representation of Firm A are not unique to Firm B. Moreover, the lawyers involved do not anticipate that the proposed representation would affect either the anticipated attorney/client relationship between Firm B and Firm A or the existing attorney/client relationships between those firms and their traditional present and anticipated clients. Both firms would anticipate that they would aggressively pursue the interests of their clients in matters where they remain (or will be) adverse litigants and that the relationship between Firm A and Firm B would be nothing other than the relationship between an employer and its counsel. See, e.g., Krane, 'When Lawyers Represent Their Adversaries: Conflicts of Interest Arising Out of the Lawyer-Lawyer Relationship,' 23 Hofstra L. Rev. 791 (1995)."

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ANSWER:

Your law firms are not required to notify their respective clients of the fact that one firm is representing the other if, but only if, the attorneys involved can make a good faith determination that the attorney-client relationship between the firms will not cause the lawyers in either firm to be less aggressive or zealous in the representation of their clients, or interfere in any way with their independent professional judgment.

DISCUSSION:

The type of conflict here presented is addressed in Rule 1.7(b) of the Rules of Professional Conduct of the Alabama State Bar. This rule provides as follows:

"Rule 1.7 Conflict of Interest
General Rule

- (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."

Under the provisions of this section, a lawyer has a conflict of interest if his ability to represent his client could be "materially limited" by his responsibilities to another person or by his own interests. If a lawyer's relationship with another person or considerations for his own interests could interfere with the exercise of his independent professional judgment, or if it could cause him in any way to be less aggressive or zealous in the course of representing his client, then he would be if the relationship or the personal interests did not exist, then the lawyer has a conflict of interest. In other words, a lawyer has a conflict of interest if there are factors, personal or professional, which might cause the lawyer, either consciously or subconsciously, to "pull his punches", so to speak, when dealing with opposing counsel or otherwise advocating his client's interest. Obviously, the attorneys involved in the representation and those who have a personal interest in the outcome of the litigation against the firm are the individuals best qualified, and perhaps the only individuals totally qualified, to make this determination in advance. Some of the factors which should be considered in reaching this determination are: (1) the size of the two firms since this will impact on whether the attorneys involved in the litigation against the law firm are also involved in representing clients against the other law firm; (2) the extent to which an adverse ruling could affect the continued existence or success of the firm being sued; (3) the complexity, monetary value, seriousness and contentiousness of the cases in which the two firms are on opposing sides; and (4) the relationship between lawyers in both firms and their individual clients.

There are other factors which, while possibly not determinative on the issue of whether the representation will be materially limited, are nonetheless relevant to consideration of this issue. One such factor is whether other representation is available. If there are other firms which could provide Firm A substantially the same caliber of

representation, but who are not that firm's opposing counsel in pending cases, the Disciplinary Commission is of the opinion that the possibility of representation by such a firm should be pursued exhaustively. Another factor is the number of clients of both firms who could conceivably be impacted. Rule 1.7(b)(1) requires consultation with the client prior to consent. If the number of clients is so large that the process of obtaining consent after consultation is impractical to the point of impossibility, then this consideration would, as a practical matter, have a significant bearing on the issue, and would tend to lend support for a more liberal application of 1.7(b).

If after taking all relevant factors into consideration, the individual lawyers involved can make a good faith determination that the representation of one firm by the other will not threaten the exercise of their independent professional judgment in those cases where the two firms are on opposing sides, and if the attorneys involved are satisfied in their own mind that the attorney-client relationship between the two firms would not cause them to be less aggressive or less zealous in representing their clients when the other firm is opposing counsel, then it is the opinion of the Disciplinary Commission that there is not a conflict of interest which would require both firms to notify all of their clients of the relationship and obtain the client's consent thereto. Obviously, the attorneys making this determination bear the risk of making it in good faith. If it should develop in the course of any of the pending representations that the attorneys were not able to exercise their independent professional judgment or failed to be as aggressive and zealous in the representation of their clients as they would be under other circumstances, then those attorneys would bear the burden of accountability to their clients and to their profession.