

ETHICS OPINION

RO-92-21

[REDACTED]

QUESTION:

"I wanted to receive a written opinion on the following set of facts in order to determine whether our firm has a conflict in representing one long-time client of the firm against another for whom we have also provided representation. Let me set the facts out for you in greater detail, without identifying the names of the clients.

B [REDACTED] B [REDACTED] is presently representing a corporation in a personal injury matter. He has represented that corporation in the past in other personal injury cases and also in front of the Public Service Commission. For purposes of this letter, I will refer to this particular client as Client One. B [REDACTED] B [REDACTED] has also represented another corporation, involved in the same business as Client One. He has represented this client in personal injury matters, as well as in business matters. Additionally, he represented this client, whom I will call Client Two, in matters before the Public Service Commission. Both G [REDACTED] H [REDACTED] and L [REDACTED] C [REDACTED] have represented Client Two on various business matters and personal matters of the president of that corporation.

At the present time, B [REDACTED] B [REDACTED] is representing Client One in a personal injury case. Client One is a corporate defendant being sued for injuries sustained allegedly as a result of Client One's negligence. Because of Client One's financial situation, it is in Chapter 11. Client One's personal injury matter has been stayed.

Client Two has contacted this firm about representing it in an anti-trust matter against Client One. I would be lead counsel in that matter and B [REDACTED] B [REDACTED] would not necessarily participate in the prosecution of that anti-trust case. I would probably work with John B [REDACTED], as we have worked on an anti-trust matter together in the past. In communicating with lead counsel for Client Two in the anti-trust case, he stated that he felt we may have a problem representing Client Two in an anti-trust case against Client One. He stated that he felt we would be required to receive the consent of Client One to our handling of Client Two's anti-trust matter against it. The problem with revealing this matter to Client One, however, is that Client Two does not wish Client One to know about the pendency of the suit. Client Two does not want Client One to know that the suit is being considered and Client Two is afraid that we would be required under the Canons of Ethics to reveal to Client One the nature of the suit and the fact that we are considering taking it. Client Two's lead counsel also feels that we would be required to seek permission from Client One to represent Client Two in the matter.

I would like an opinion as to whether or not we would be able to represent Client Two in an anti-trust matter against Client One. The anti-trust case would not be related to any type of litigation we had handled for Client One in the past, nor would it have any relation to the litigation B [REDACTED] B [REDACTED] is presently handling for Client One which has been stayed in bankruptcy. I can conceive of no information that we would have received in representing Client One which would be used against Client One

in the anti-trust matter. Is this a situation in which we can simply withdraw from representation of Client One, without explanation, and proceed to represent Client Two without Client's One's knowledge or consent? Would it be necessary to even withdraw from the personal injury matter prior to representing Client Two in the anti-trust matter?"

\* \* \*

ANSWER:

You may not represent a client in a matter if the representation of that client would be directly adverse to another client unless you reasonably believe the representation would not adversely affect the relationship with the other client, and, each client consents after consultation.

The underlying concept of the conflicts rules is the duty of loyalty owed by an attorney to his client. This duty is canonized in Rule 1.7, Alabama Rules of Professional Conduct, which states as follows:

"Rule 1.7 Conflict of Interest:  
General Rule

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
  - (1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
  - (2) Each client consents after consultation.
- (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 Comment to Rule 1.7 states that "... loyalty is the essential element in the lawyer's relationship to a client."

Therefore, you would be prohibited from representing Client Two in the anti-trust litigation against Client One.

In RO-90-81, the Disciplinary Commission of the Alabama State Bar analyzed Rule 1.7, both Sections (a) and (b). The opinion request in that matter dealt with the dual representation by a law firm of two insurance companies. A potential witness in separate, unrelated lawsuits involving the two insurance companies would present favorable testimony for one of the clients, but disfavorable testimony to the other. The Disciplinary Commission, in assessing the situation, found that such a conflict existed as to the firm's possible representation of these two clients that they could not undertake representation of both in the two separate lawsuits. The Commission did note that the clients, after full disclosure, could waive any conflicts.

However, in your inquiry, you state that such a disclosure would be contrary to the request of Client Two. This shows the obvious inherent conflict in that Client Two requests that you take a course of action contrary to the best interests of Client One who is presently being represented by your firm.

Therefore, you would be prohibited from undertaking representation of Client Two since that would, by necessity, adversely affect your ability to represent Client One by refusing to disclose to him information essential to representation of him.

With regard to your proposition that you could withdraw from representation of Client One, "without explanation", and then proceed to represent Client Two without Client One's knowledge or consent, in RO-91-08, the Disciplinary Commission again dealt with the conflicts principles enunciated under Rule 1.7. The Commission, also addressing the mandates of Rule 1.9, stated that the firm in that matter could not, by discontinuing representation of a client, take advantage of a less stringent conflict rule regarding former clients and thereby continue to represent a more advantageous client.

Based on the facts disclosed in your inquiry, your ability to represent Client One is obviously impaired by the request and/or concerns of Client Two. Since you are already representing Client One in pending matters,

withdrawal, without explanation, as to this representation, would appear to frustrate the loyalty concept of the conflicts rules. The employment proffered by Client Two should therefore be refused thereby eliminating any further conflicting positions which could further impede your representation of these respective clients.

JAM/vf

10/14/92