

ETHICS OPINION

RO-93-09

[REDACTED]

QUESTION:

"As you know, I serve as the Assistant District Attorney on a part-time basis and also maintain a full-time civil practice in H [REDACTED]. On or about January 6, 1993, J [REDACTED] B [REDACTED] was shot by another hunter while both were hunting on adjacent lands in L [REDACTED] County, Alabama. The decedent was from J [REDACTED], Alabama and Estate proceedings have been instituted in the Probate Court of W [REDACTED] County by other counsel. At the time of his death, the late Mr. B [REDACTED] was visiting and hunting with a former client of mine. This former client recommended my services to the family.

The personal representatives of the Estate of J [REDACTED] B [REDACTED], deceased, (i.e., his mother, father and one of his sisters, as Co-Administrators) have asked me to represent them in the prosecution of a civil wrongful death action against the person who fired the fatal shot. I have agreed to do so on the express condition precedent that the Office of the General Counsel approve the propriety of that representation. The personal representatives have consented to my seeking your advice in this matter and understand that my participation in the civil matter will preclude participation in any criminal matter that may be forthcoming.

The District Attorney has consented to my representation of the family in the civil case with the full understanding that I will not be able to participate in any criminal proceedings that may arise out of the death of Mr. B [REDACTED]. As a matter of policy in this circuit, all such deaths are investigated and then presented to the next available grand jury. In the normal course of events, this case will be presented to the grand jury that meets in September of 1993.

My participation in this matter to date has been limited and routine. On the morning that the body was discovered, I received a call from the sheriff notifying me that someone had been killed in a hunting accident. In accordance with our usual policy, I advised him to proceed with an autopsy of the body and to otherwise assist in the investigation of the circumstances surrounding this death. The investigation is being conducted by the L [REDACTED] County Sheriff's office, the Conservation Department and the Alabama Bureau of Investigation. I have had the usual contact with the officers involved in the investigation and I have had a conference with some of the family and friends of the late Mr. B [REDACTED]. The conference consisted of a short meeting in my office in H [REDACTED]. Apparently, a rumor had gotten out that the case was not being investigated and that it was not going to be investigated. I assured them that rumor was not true, that the case was being actively investigated and that the results of that investigation would be presented to the grand jury as soon as one was convened after the investigation was complete."

* * *

ANSWER:

You may represent the personal representatives of the estate of the deceased having obtained the consent of both the personal representatives of the estate of the deceased as well as the consent of the District Attorney under whom you serve.

DISCUSSION:

Rule 1.11(c)(2), 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:

* * *

(2) Negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b)."

The Comment portion to this Rule states that:

* * *

"Paragraphs (a) and (c) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law."

Rule 1.7(b) states:

"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."

According to your inquiry, both the representatives of the estate of the deceased and the District Attorney have consented to your representation of the estate of the deceased in the civil matter, even though you participated in an administrative capacity in the initial investigation of the homicide in question. Based on these waivers, the Rules of Professional Conduct do not prohibit you from representing the estate of the deceased and/or its legal representatives in pursuing any civil claim available.

However, since you do occupy the position of Assistant District Attorney, you are urged to contact the State Ethics Commission or other appropriate governing body to determine whether any financial benefit you might derive from this representation would constitute a violation of any provision of the State Ethics Commission or other applicable state law. Accordingly, this opinion is restricted to the Rules of Professional Conduct of the Alabama State Bar, and confines itself to same.

JAM/vf

4/7/93