

ETHICS OPINION

RO-93-12



QUESTION:

\* \* \*

"A member of this firm has been asked to serve as a hearing officer for two state agencies: the State Health Planning Agency and the Alabama Department of Environmental Management. Both members of the firm also represent clients before these two agencies. We recognize that we would be unable to represent a client before the agency, and then hear a case involving that same client. We are seeking your opinion, however, as to whether we can continue to represent clients before the agencies generally and recuse ourselves on any cases which involve our clients and/or issues which are the same as issues being addressed in cases involving our clients.

Some background on each agency may be important to your opinion. In the case of the State Health Planning and Development Agency, the firm member would be sitting as a 'fair hearings' officer. This person decides appeals from decisions made by the Certificate of Need Board. The fair hearing officer can override decisions of the Board.

In the case of the Alabama Department of Environmental Management, the hearing officer is appointed by the Environmental Management Commission which oversees the operation of the Alabama Department of Environmental Management. When decisions by the Department are appealed, they are appealed initially to the Commission. The Commission appoints a hearing officer to hear cases for them. The hearing officer makes a recommended decision to the Commission for its consideration. The Commission makes the final determination in these cases.

Please advise if this firm can continue to represent clients before the State Health Planning and Development Agency and/or the Alabama Department of Environmental Management and serve as hearing officer for the respective Board and Commission."

\* \* \*

ANSWER:

You may represent clients before a state agency even though your partner serves as a hearing officer for said agency, provided that your representation involves matters completely unrelated to those in which your partner presided as a hearing officer. However, your partner, who also serves as a hearing officer for a particular state agency, cannot represent clients before the agency.

DISCUSSION:

In RO-91-18, the Disciplinary Commission addressed the inquiry of whether the Alabama Rules of Professional Conduct prevented a lawyer from representing clients before a state board, when that lawyer's partner also served as a hearing officer for matters within the jurisdiction of that same state agency. The Commission determined that the lawyer could represent clients before the state agency in question, provided that the representation involved matters completely unrelated to those in which the lawyer's partner presided as a hearing officer. Therefore, you could continue to represent clients before the state agencies listed in your inquiry, provided that your representation involved matters which were completely unrelated to those matters in which your partner presided as a hearing officer for that state agency.

However, most jurisdictions which have addressed the second portion of your inquiry, i.e., whether your partner can likewise represent clients before the agencies for which he serves as a hearing officer, hold that such is prohibited by the former Disciplinary Rules, and carried forward under the Rules of Professional Conduct as adopted by the Supreme Court of Alabama in January of 1991.

In Opinion 1990-4 of the Committee on Professional Ethics of the Association of the Bar of the City of New York, consideration was had of the situation wherein a lawyer serves as an administrative law judge or a mediator for an assistance program sponsored by the New York City Commission on Human Rights. It was held that such a lawyer or members of his firm could not represent claimants before that Commission when the lawyer served frequently and repeatedly as a part-time administrative law judge; on the other hand, the lawyer and members of his firm would be allowed to represent claimants before the Commission if the lawyer served only occasionally and sporadically as a judge pro tempore.

In Opinion 1985-7 of the State Bar of New Mexico Advisory Opinions Committee, it was held that a lawyer who practices before a state taxation and revenue department may not accept a contract with that agency to serve as a part-time hearing officer. The Committee reasoned that a part-time judge could not appear before his own tribunal as a lawyer, since a hearing officer fills a judicial role in a quasi-judicial forum. Such circumstances

give rise to an appearance of impropriety, even if procedures are established to eliminate conflicts of interest. The Committee based its decision on Disciplinary Rule 9-101(C), which prohibits a lawyer from stating or implying that he is able to influence improperly or on irrelevant grounds any tribunal, legislative body, or public official. The Committee reasoned that in a situation where an individual represented clients before a state agency, that individual also occupying the position of a part-time hearing officer created implications of improper influence so inescapable that such part-time judges would be precluded from appearing before their forums.

Rule 8.4(e), Alabama Rules of Professional Conduct, states as follows:

"Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

\* \* \*

(e) State or imply an ability to influence improperly a government agency or official."

The Commission is of the opinion that this Rule would prohibit an attorney who serves as a hearing officer for a state agency to likewise represent clients before that same state agency. The possible perception of favoritism or influence should be avoided in order to preserve the propriety of the administrative agency process. This would best be accomplished by precluding lawyers who serve as hearing officers for a particular state agency from also representing clients before the same state agency. The relationships developed by the hearing officer in dealing with the personnel of the state agency could appear to continue into a setting where the hearing officer has now changed roles and is appearing as an advocate for a client before that same state agency.

The Commission feels that the purpose of the rules, as well as the integrity of the profession would be best served by prohibiting lawyers from representing clients before state agencies while concurrently serving as a hearing officer for that same state agency.

JAM/vf

6/17/93