

ETHICS OPINION

RO-93-13

QUESTION:

"Attorneys in the Legal Section of the Department of Conservation and Natural Resources are presently defending former Commissioner [REDACTED] in several civil actions brought against him in his individual and official capacities as Commissioner of said Department.

The above noted attorneys are as follows: [REDACTED], Attorney IV, Assistant Attorney General; [REDACTED], Attorney III, Assistant Attorney General; [REDACTED], Deputy Attorney General.

On June 1, 1993, State of Alabama, Plaintiff v. [REDACTED], [REDACTED] and [REDACTED], Defendants, CV-93-1382 was filed in the Circuit Court of [REDACTED] County, Alabama. This action is brought by the Attorney General of the State of Alabama against [REDACTED] and his official surety for alleged malfeasance and/or misfeasance in office and seeks approximately \$400,000.00 in damages.

Under Section 36-15-5.1 Code of Alabama 1975, all newly hired deputy attorneys general serve at the pleasure of the Attorney General. The Attorney General has discretion to determine the compensation of deputy attorneys general from among the salary ranges set by the State Personnel Board. More importantly, the Attorney General has broad authority to direct and determine the State's position in litigation affecting the State, its agencies, departments and officials.

A legal opinion is requested from the Disciplinary Commission as to whether or not the attorneys in the Legal Section of the Department of Conservation and Natural Resources may continue to represent former Commissioner [REDACTED] in light of State of Alabama v. [REDACTED]."

* * *

ANSWER:

The fact situation which you describe places you in circumstances which creates a conflict of interest and mandates your withdrawal from representation of the former Commissioner of Conservation and Natural Resources.

DISCUSSION:

The attorneys in the legal section of the Department of Conservation and Natural Resources, as employees of the State of Alabama, have professional responsibilities to two different public officials and two different state agencies. By virtue of being Assistant Attorneys General and Deputy Attorney

General, they are responsible to the Attorney General and his office. By virtue of being assigned to and employed by the Department of Conservation and Natural Resources, they are also responsible to the Commissioner of Conservation and the State agency which he heads. As a result of the civil action, State of Alabama v. [REDACTED], one of the public officials and state agencies with whom you have employment and professional responsibilities, is in an adversarial relationship with the other public official and state agency to whom you owe also a duty of loyalty and responsibility. While arguably neither public official is your client, your client being the public or the people of the State of Alabama, the duty of loyalty which you owe to both public officials would not appear to be significantly different from the duty an attorney owes to his client.

Rule 1.7 of the Rules of Professional Conduct of the Alabama State Bar provides 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.”

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It conclusively appears that based on the fact situation presented that the interests of the Attorney General are "directly adverse" to the interests of the former Commissioner of Conservation. It equally appears that your representation of the former Commissioner of Conservation may be "materially limited" by your responsibilities to the Attorney General. Rule 1.7 permits representation in spite of the conflict if the client gives informed consent and if the attorney has a good faith belief that the representation will not be adversely affected. The Comment to Rule 1.7 provides in pertinent part as follows:

"A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent."

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The Disciplinary Commission is of the opinion that the circumstances here presented are such that a "disinterested lawyer" would have to conclude that the representation is improper despite the consent of the Commissioner of Conservation or the Attorney General or both. Therefore, it is further the opinion of the Disciplinary Commission that the circumstances here presented, while they occurred through no fault of your own, create a conflict of interest which mandates the termination of your representation of the former Commissioner of Conservation and your withdrawal as counsel of record in the civil action, State of Alabama v. James D. Martin.

LGK/vf

7/21/93