

ETHICS OPINION

RO-92-18

QUESTION:

"I enclose a copy of my letter dated August 21, 1992, written to Hon. W. R. [REDACTED] Circuit Judge of B. [REDACTED] County, Alabama, and I believe it is self-explanatory. However, if my question for an ethics opinion should be in a different and more specific format, please call me immediately and I will kindly oblige.

I also enclose a copy of Court Appearance Notice dated August 27, 1992, and as you can see, this capital murder case is set for trial Friday, October 19, 1992. Therefore, time has become of the essence and before I make any move in any direction, I would appreciate having in my hand The Disciplinary Commission's ethics opinion as requested."

ANSWER:

The Rules of Professional Conduct prohibit your representing a criminal defendant whose criminal charges arise from an investigation and Grand Jury indictment wherein you participated as an Assistant District Attorney or the "Acting" District Attorney, unless the District Attorney consents after consultation.

DISCUSSION:

Rule 1.11(a), Alabama Rules of Professional Conduct, states as follows:

"Rule 1.11 Successive Government and Private Employment

- (a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
- (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
  - (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance

with the provisions of this rule."

Therefore, since you participated as the prosecutor in the investigation phase, as well as some follow-up in those proceedings which resulted in the criminal defendant involved in these matters being indicted for capital murder, the above-referenced Rule prohibits your appearance as defense counsel in this matter.

Under the previous Code of Professional Responsibility of the Alabama State Bar, Disciplinary Rule 5-101(C) prohibited a lawyer from representing a party to a cause or his successor after having previously represented an adverse party or interest in connection therewith. Rule 1.11, quoted above, follows that same standard.

It would also appear that you have disclosed to the prosecution in this case certain information known to you personally which information could adversely affect the criminal defendant involved. Even this would give your stated scenario the "appearance of impropriety" which was an applicable standard under the previous Code of Professional Responsibility of the Alabama State Bar.

Indicative of the Commission's application of these rules is RO-90-18 wherein the Commission held that an attorney whose secretary had served on a Grand Jury should not accept appointments and/or retain criminal cases relative to any indictments or cases returned by that Grand Jury.

Since your involvement in the proceedings leading up to the indictment of the criminal defendant in your matter was much more involved and ongoing, said participation prohibits your representation of this criminal defendant in those same matters.

JAM/bm

9/16/92