

ETHICS OPINION

RO-92-20

[REDACTED]

QUESTION:

"By this letter, our firm requests a written opinion from the Alabama State Bar through its general counsel concerning the following question of conflict of interest in the context of corporate representation under the following facts:

May a lawyer represent a wholly owned subsidiary of a publicly traded parent company and then institute separate litigation against the parent company. For purposes of this question, the parent company and the wholly owned subsidiary are separate corporate entities. Further, what other facts or circumstances, if found to exist, would create a conflict of interest assuming that the separate corporate identities of these two corporate entities would normally, in and of itself, eliminate a conflict of interest under the general rule provided in Rule 1.7 of the Alabama Rules of Professional Conduct.

Our firm would appreciate your written opinion in this regard and is awaiting that written opinion before making its decision to undertake representation of a prospective client in an action against the parent or holding company referred to above which is a separate corporate entity from the firm's existing corporate client. Please let me know if any additional information would be of assistance or necessary in order for your office to provide its written opinion in this regard."

ANSWER:

You may represent a wholly owned subsidiary of a publicly traded corporation while, at the same time, instituting litigation against the parent company if the subsidiary and parent are separate corporate entities. You may represent both entities in unrelated litigation if both entities have separate corporate identities, there is no risk that confidential information will be misused, and your representation of the subsidiary is not limited by your litigation involving the parent.

DISCUSSION:

Rule 1.13 of the Alabama Rules of Professional Conduct recognizes that an organizational client is a legal entity and thus, the entity is the client as opposed to its officers, directors, employees, shareholders, or other constituents. Consequently, the parent corporation, even when it owns 100% of the stock of the subsidiary, is still a shareholder and constituent

of the subsidiary. See California State Bar Ethics Opinion 1989-113 (7/6/90).

The Disciplinary Commission of the Alabama State Bar reached a similar conclusion in RO-90-96 (incorporated and made a part of this opinion) when it held that a law firm may represent a plaintiff in a suit against an insurance company that is a subsidiary of a large corporation, even though the firm represented other subsidiaries of the corporation in unrelated litigation, if each subsidiary has its own corporate identity and there is no risk that the firm will misuse confidential information.

From a practical standpoint, the entity theory has more validity when applied to large publicly held corporations. Professor Wolfram addressed this point in his Hornbook on Modern Legal Ethics, as follows:

"The position of the Code and the Model Rules, that the lawyer represents only the corporate entity, makes sense primarily in the setting of large, publicly held corporations. As corporate stock ownership is concentrated in fewer and fewer hands, the distinction between corporate entity and shareholders begins to blur. In the case of a sole-owner corporation, they may merge. Often a lawyer for such a partnership corporation will provide personal legal services for corporate principals interchangeably with services to the corporate entity. In recognition of that common reality, one court has held that for conflict of interest purposes, a small and closely held corporation and its shareholders are to be treated as virtually identical and inseparable. Wolfram, Modern Legal Ethics, West Publishing (1986) p.422, citing In re Brownstein 602 P.2d 655, 656-657.

Thus, a lawyer may represent a client in an action against a corporation that is a wholly owned subsidiary of an existing corporate client so long as the parent corporation is not the alter ego of the subsidiary. See also Maryland State Bar Ethics Opinion 87-19.

RWN/vf

9/22/92

ETHICS OPINION

RO-90-96

QUESTION:

"The purpose of this letter is to request an opinion from the Alabama State Bar concerning whether our firm has a conflict of interest in representing the plaintiff in a lawsuit against [REDACTED] Insurance Company.

[REDACTED] Insurance Company is a wholly owned subsidiary of [REDACTED] Inc. Our firm has never represented [REDACTED] Insurance Company in any of its litigation. However, our firm in the past has represented the local [REDACTED] Hospitals in worker's compensation litigation. This representation was obtained through the worker's compensation insurance carrier. The [REDACTED] s. The local [REDACTED] Hospitals are owned and operated by a corporation named [REDACTED] Medical Corporation, which is also a wholly owned subsidiary of [REDACTED] Inc. Our firm no longer represents the local [REDACTED] Hospitals in their worker's compensation litigation and has no pending cases.

Several years ago our firm represented the parent company, [REDACTED] Inc., in two lawsuits arising out of injuries to two nurses at [REDACTED] Hospital [REDACTED]. The theory asserted against [REDACTED] Inc., in those cases was that [REDACTED] Inc., exercised such extensive control over the operation of the local hospitals that it was liable for the negligence of the fellow employees at the hospital which allegedly caused the injuries to the two nurses. This litigation was also obtained through The [REDACTED]' employer's liability policy. In connection with that litigation, I did travel to the home office of [REDACTED] Inc., in [REDACTED], Kentucky, and meet with representatives of [REDACTED] Inc., concerning the involvement of [REDACTED] Inc., in the operation of the local hospitals. The only information I was privy to in this representation of [REDACTED] Inc., was the relationship between the parent company and the affiliated company which operated the local hospitals. I was not privy to any information about [REDACTED] Insurance Company or the nature of the relationship between [REDACTED] Insurance Company and [REDACTED] Inc.

The current litigation which I am writing about involves a suit against [REDACTED] Insurance Company for failure to pay benefits owed to the plaintiff under an insurance policy issued to him, by [REDACTED] Insurance Company. It has nothing whatsoever to do with the local [REDACTED] hospitals. In fact, the treatment in question was not even rendered at a [REDACTED] hospital, but was rendered at University Hospital in [REDACTED]. [REDACTED] Inc., was named as a party defendant in the complaint because I did not know whether [REDACTED] Insurance Company was a separate corporation. I have been advised by counsel for [REDACTED] that [REDACTED] Insurance Company is in fact a separate corporation, and I have advised [REDACTED]'s counsel that once my interrogatories are answered concerning this issue, I will dismiss [REDACTED] Inc. as a defendant. I am not making any contention in this case that [REDACTED] Inc., should have any liability if in fact [REDACTED] Insurance Company is a separate, viable entity and it issued the insurance policy involved.

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ANSWER:

Pursuant to Rule 1.9 of the Rules of Professional Conduct a lawyer is prohibited from representing another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of a former client, unless the former client has consented after consultation. This Rule goes on further to prohibit the use of information relating to the prior representation to the disadvantage of the former client. Thus, in substance, Rule 1.9 continues the prior practice of disallowing representation adverse to a former client when the

representation is substantially related to the former representation and when the use or misuse of confidential information is involved. On the facts presented for our review we do not see an opportunity for use or misuse of confidential information. While there is undoubtedly a "family" relationship among [REDACTED] Insurance Company, [REDACTED] Inc., [REDACTED] Hospital [REDACTED] and other business concerns operating under the [REDACTED] Inc. umbrella", the relationship among these enterprises does not seem to be so close as to require us, for purposes of this opinion, to consider them all a part of the same entity. Each of these corporate structures has its own identity. Indeed, even if these companies were all one and the same and to be considered a single entity, the mere fact that your firm had previously represented [REDACTED], Inc. would not necessarily preclude subsequent representation adverse to [REDACTED], Inc. Once again the standards of substantial relationship and use or misuse of confidential information would apply.

Accordingly, it is our opinion that, on these facts, it would be permissible for your firm to represent the plaintiff in a lawsuit against [REDACTED] Insurance Company. Your previous representation of [REDACTED] Hospitals, [REDACTED] Medical Corporation and/or [REDACTED] Inc. would not, and does not, in our view preclude the current represent described in your request.

The Comment to Rule 1.9 is both illuminating and informative in regard to the present fact situation. The Comment provides, for example that "When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another

client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client."

The Rule further states, in the Comment, that "Information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client."

In summary, and on these facts, is our opinion that the proposed representation is ethically permissible.

AWJ/vf

1/4/91