

ETHICS OPINION

RO-94-14

Former commissioner of state agency now representing plaintiffs in case adverse to said agency

QUESTION:

"This is to request an advisory opinion on an issue of professional ethics, stated as follows:

May a lawyer represent a private client in connection with a case where the lawyer had participated personally and substantially as a public officer or employee, in another case which involved some identical legal issues, but had different parties and different subject matter? If so, does the attorney's disqualification work to effect a disqualification of his firm as well?

This question is submitted at the request of the court before which a case is pending, raising the issue involved. The dispute arises out of the fact that I formerly served as commissioner of a state agency. Subsequent to my serving in this capacity, I filed suit on behalf of three named plaintiffs purporting to represent a class of plaintiffs who have been wronged by the state agency. The agency has objected to my representing these plaintiffs and has moved to disqualify me and my law firm from such representation. The circuit judge before whom the case is pending, has requested that the parties obtain an advisory opinion from the office of the general counsel.

During the time that I served as commissioner of the state agency, there was a case involving me and the agency which was resolved in the courts. I participated personally and substantially in that case. I was the chief executive officer of the state agency, and took a particular interest in legal matters. Since the case involved a significant sum of money which otherwise would have gone to the Alabama Special Educational Trust Fund, I was directly involved in the action. This case was concluded adversely to the state agency when the Supreme Court of Alabama denied a petition for writ of certiorari.

More than twenty (20) months after leaving the state agency, and more than one (1) year after the case discussed above was concluded, I filed an action in the Circuit Court of Any County. This case involves a purported class action which had some legal issues identical to those involved in the case discussed above. The facts are such that the decision in that case may be controlling in the present case. The present case involves different parties from the former, and the subject matter of the cases is different. In the former case, the subject matter was retirement benefits paid to federal retirees. In the present case, the subject matter is wages of federal law enforcement officers. The parties are different, the subject matter of the lawsuits is different, and only some legal issues are identical. Further, the parties in the present case did not make their claim for refund of taxes until after I had long since departed my position with the state agency.

Based on these facts, the state agency seeks to disqualify me and my firm from representing the plaintiffs in the present case. The basis for this is Rule 1.11(a) of the Alabama Rules of Professional Conduct dealing with 'Successive Government and Private Employment,' which provides as follows:

... 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 unless the appropriate government agency consents after consultation.

The word "matter" is defined in Rule 1.11(d)(1) to include:

[A]ny judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or party or parties;...

From this language, the state agency seeks to disqualify the attorney for the plaintiffs and the attorney's firm.

Plaintiffs' attorney believes that disqualification is not justified by the language of the Rule, nor do the facts indicate any violation of the Rule. This situation does not violate the Rule for the following reasons:

(1) The emphasized language in the definition of matter makes it clear that a matter involves a specific party or parties. The parties in these two cases are different. Thus, present case is not the same matter as the former, nor is it any matter in which I participated personally or substantially while I served in an official capacity. The class in the former consisted of 'all recipients of military or other federal non-civil service retirement or survivor benefits who have paid, or are subject to payment of, state income tax on such benefits.' In contrast, the proposed class described in the complaint in the present case consists of 'all individuals employed by the United States of America or any of its agencies, as law enforcement officers, who earned wages in Alabama for such employment...' (emphasis supplied). Since the parties are different, the two cases are not the same matter, and my participation in the earlier case as commissioner of the state agency does not prevent my participation in the recent case.

(2) The present case was filed in Circuit Court of Any County more than 20 months after I left the position of commissioner of the state agency. The plaintiffs had never discussed this matter with me, and never considered any remedial actions, until more than a year after I left my position as commissioner of the state agency. Therefore, the recent case is not a matter in which I participated as a public officer. I could not have done so, since the matter did not arise until I was no longer a public officer.

(3) The subject matter of the cases is different. The former case involved non-civil service retirement or survivor benefits, while the present involves wages of law enforcement officers, both civil service and non-civil service.

Were the present case the same matter as the former, the former case would have made this case unnecessary. The former case did not resolve the questions sought to be resolved by plaintiffs. Certainly, the former case may be a precedent for the court to consider in this case, and, in fact, plaintiffs believe it is controlling. However, it is by no stretch of the imagination the same matter within the meaning of Rule 1.11. If the state agency can use this Rule in the manner it seeks, it would effectively prevent me forever from representing clients in cases where there was legal precedent established while I was commissioner.

Even if I should be prevented from representing the plaintiffs, my firm is not barred by the Rule from pursuing the case for the plaintiffs. Rule 1.11(a) specifically provides that another attorney in the firm may participate if the former public official 'is screened from any participation in the matter.'

This is to request an advisory opinion, therefore, on the question previously stated. Your prompt response to this inquiry would be most sincerely appreciated. The case pending before the circuit court is being held in abeyance until your opinion can be received."

ANSWER:

It is the opinion of the Disciplinary Commission that your participation in the former case while you held the position of commissioner of the state agency does not preclude your representation of the class in the present case.

DISCUSSION:

Rule 1.11(a) of the Rules of Professional Conduct prohibits a former government lawyer from representing a private client in a matter that he or she participated in personally and substantially while a public officer or employee. Since you participated personally and substantially in the former case, the question then becomes whether the two cases involve the same matter as defined in Rule 1.11(d).

Rule 1.11(d) provides as follows:

**"Rule 1.11 Successive Government and
Private Employment**

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(d) As used in this rule, the term 'matter' includes:

- (1) Any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties;
and;**
- (2) Any other matter covered by the conflict of interest rules of the appropriate government agency."**

According to Professors Hazard and Hodes in *The Law of Lawyering*, 368 (2d ed. 1990), the definition of matter as contained in Rule 1.11(d) "codifies the essentials" of a discussion of the term matter contained in ABA Formal Opinion 342 (1975). That discussion is as follows:

"[T]he terms seems to contemplate a discrete and isolatable transaction or set of transactions between identifiable parties. Perhaps the scope of the term 'matter' may be indicated by examples. The same lawsuit or litigation is the same matter. By contrast, work as a government employee in drafting, enforcing or interpreting government or agency procedures, regulations, or laws, or in briefing abstract principles of law, does not disqualify the lawyer from subsequent private employment involving the same regulations, procedures, or points of law; the same 'matter' is not involved because there is lacking the discrete, identifiable transactions or conduct involving a particular situation and specific parties."

In *Securities Investor Protection Corp. v. Vigman*, 587 F.Supp. 1358 (C.D. Cal. 1984), the court found that a discrete series of transactions involving a specific situation and specific parties in a ten-year-old civil action was 'part and parcel' of a subsequent, broader suit alleging wide-spread securities fraud and disqualified the former regional administrator for the Securities Exchange Commission from representing the plaintiff in the later suit.

Applying the above to the question presented here, it is the Commission's view that the cases in question do not involve the same matter. While there is likelihood that the same points of law will be involved in the two cases this, without some other connection, does not constitute the same matter. The parties are different, the subject matter is different and in no way could one be considered "part and parcel" of the other. As pointed out in ABA Opinion 342, there is no "discrete identifiable transactions or conduct involving a particular situation and specific parties."