

ETHICS OPINION

RO-93-22

Rule 1.11 applied to state agency conducting grand jury investigation and pursuing civil action against same party

QUESTION:

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"In February 1992, Congressional hearings were held in Washington investigating shipments over a ten-year period of hazardous waste containing radioactive material from the Department of Energy's nuclear weapons facility by Acme Energy Systems, Inc., to various hazardous waste disposal facilities around the country. One of the disposal facilities was that owned by Widgets, Inc. in Anytown, Alabama.

Acting as, respectively, Assistant Attorney General and Deputy Attorneys General, we convened a Grand Jury in Any County to investigate whether or not these shipments violated the criminal laws of the State of Alabama, particularly the Alabama Hazardous Waste Management and Minimization Act. The focus of the grand jury investigation was initially on Acme Energy Systems as the generator of the waste. During the course of the investigation facts were revealed which indicated that Widgets, Inc., itself might be criminally liable.

Eventually we decided that Widgets, Inc. had no criminal liability, but that its acts could form the basis for a civil lawsuit, and accordingly a civil complaint against Widgets, Inc. has been drafted. This complaint alleges facts which we have become aware of through our examination of witnesses and review of documents in the course of the grand jury investigation. It does not, however, in any way reveal the source of that knowledge or make any reference whatsoever to the grand jury or those witnesses and documents.

In addition we intend at the time of the filing of the civil complaint also to file requests for production of documents and requests for admissions. These requests are based on knowledge of certain facts which we obtained through the grand jury investigation and derived in part from questioning of grand jury witnesses and review of documents obtained pursuant to grand jury subpoenas. The requests themselves, however, do not reveal this fact or make any reference whatsoever to the grand jury or the witnesses or documents.

We hereby request a formal opinion on whether our participation in the filing of this complaint and in the prosecution of this civil lawsuit against Widgets, Inc. in any way violates the Alabama Code of Professional Responsibility, the Alabama Grand Jury Secrecy Act, or any other provision of law."

ANSWER:

The use of information obtained in a grand jury investigation to bring a civil suit against the target of the investigation does not constitute a violation of the Rules of Professional Conduct provided the governmental agency filing the civil action is the same governmental agency which convened and conducted the grand jury investigation.

DISCUSSION:

Your inquiry involves a construction of Rule 1.11(b) which restricts the extent to which a lawyer employed by the government may use confidential information obtained in the course of governmental employment. In substance, this rule prohibits the government attorney from subsequently using confidential information on behalf of a private client or another governmental agency. Specifically, Rule 1.11(b) provides as follows:

"Except as may otherwise be permitted by law, a lawyer, having information concerning a person, which was acquired when the lawyer was a public officer or employee and which the lawyer knows to be confidential government information, may not represent a private client whose interests are adverse to that person in a matter in which such information could be used to that person's material disadvantage. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is precluded from any participation in the matter and is apportioned no part of the fee therefrom."

You will note that the language of the rule limits the ethical prohibition contained therein to representation of "a private client whose interests are adverse to" the subject of the confidential government information. However, in General Motors Corporation v. City of New York, 501 Fed. 2d 639 (2nd. Cir. 1974), the United States Court of Appeals

held that under some circumstances the prohibition could extend to representation of governmental agencies as well as private clients. In that case, an attorney employed by the anti-trust division of the Justice Department criminally prosecuted General Motors for attempting to obtain a monopoly in the manufacture and sale of municipal buses. Some years later, the same lawyer was hired as a special counsel for New York City to file a civil suit on behalf of the City and against General motors based on the same anti-trust violations. The Court held that even though the new client was also a governmental entity, the new employment was "private" for purposes of applying the rule. As pointed out in The Law of Lawyering, the practical effect of the General Motors decision has been to substitute the term "any other client" for "private client".

The Law of Lawyering, Second Edition by Hazard and Hodes §11.11:204. The General

Motors interpretation has become so well established that it has been adopted in the

Comment to Rule 1.11 which provides in pertinent part as follows:

When the client is an agency of one government, that agency should be treated as a private client for purposes of this rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

Although the prohibition contained in Rule 1.11 has been judicially expanded beyond the scope of the interpretation normally placed on the words "private client", that prohibition still would not appear to apply to your inquiry because in this situation the criminal prosecution and civil suit are being brought by the same governmental entity, i.e., the Office of Attorney General of the State of Alabama. Rule 1.11, as interpreted in General Motors, would prohibit an attorney from one governmental agency from obtaining confidential information in a grand jury prosecution, and then going to work for another governmental agency and using the confidential information as a basis of a civil suit against the target of the grand jury investigation. For example, although the Alabama Department of Environmental Management would probably have authority to file the same civil suit the Attorney General plans to file, none of the attorneys who participated in the grand jury investigation could subsequently go to work for ADEM and use the grand jury investigation as a basis for a civil suit by that agency. However, in your fact situation, the Grand Jury was convened by members of the Attorney General's staff, and the information obtained as a result of the grand jury investigation is being used by the same staff attorneys of the Attorney General's Office to bring a civil suit against the corporation the grand jury investigated. We find nothing in Rule 1.11, or any other provision of the Rules of Professional Conduct, which would prohibit these same attorneys from bringing the proposed civil suit against the corporation who was the target of the grand jury investigation. It is, therefore, the opinion of the Disciplinary Commission of the Alabama State Bar that the attorneys in question may proceed with the proposed civil lawsuit.

/LGK

12/8/93