

RE: Advisory Opinion 2002-01
DATE: June 26, 2002

SUBJECT: FORMER GOVERNMENT ATTORNEY APPEARING AS EXPERT WITNESS

Facts: During the mid 1980s, the attorney was employed by a federal administrative agency. He served in a number of senior administrative positions, including enforcement counsel. In those positions he reviewed major enforcement actions, agency policies, proposed regulations and documents. Since that time he has been engaged in the private practice of law.

In 2002 the agency commenced a lawsuit against corporate defendants in federal court in another jurisdiction. The attorney has now been asked to be an expert witness on behalf of the corporate defendants. His testimony will include statements as to the enforcement policies followed during his time with the agency, general comments on enforcement strategy, and discussions on particular enforcement actions and refusals to act. Much of this testimony will be based on his six years with the agency, and his discussions at that time with others in the agency.

Discussion: Arkansas Rule of Professional Conduct 1.11(a) governs lawyers who leave the public sector and enter private practice. Limitations are placed on their ability to represent private clients in matters in which they participated personally and substantially as a public officer or employee. Arguably that rule is not applicable here because the attorney will not be an attorney of record, but merely an expert witness. But the policy of that rule and the intent behind it suggests that the same analysis should apply.

Several issues must be addressed:

1) Is the lawyer/expert witness participating in the same "matter" that he participated in as a public officer 15 years earlier? Rule 1.11(d) defines matter as:

"(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."

The lawsuit commenced in 2002 was not the subject of an agency investigation pending in 1987. Nor does the subject matter of the lawsuit appear to have been a claim or controversy or accusation during the time the lawyer/expert witness was with the agency.

2) The rule requires disqualification when a former government officer or employee participated "personally and substantially" in the matter. In the absence of the same matter being

present in the agency 15 years ago and in the current litigation, an examination of whether the attorney personally and substantially participated is not relevant.

3)Arkansas Rule of Professional Conduct 1.11(b) bars a former government attorney from using "confidential government information" to the material disadvantage of the subject of that information. Again, that rule on its face may not be at all applicable. The attorney is not representing a private client; he is merely a witness. He is not using the information against a third person, but on behalf of a person and against the government. The general intent behind the rule however, requires, some consideration.

Rule 1.11(e) defines the term:

"(e) As used in this rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public."

The general statements that the attorney intends to make do not fall within these parameters. It is not information obtained under governmental authority.

4)Arkansas Rule of Professional Conduct 1.6 sets forth a broader sense of confidentiality; broader in that it includes all attorneys, all information received by the attorneys regardless of the source, all information relating to the representation even if not privileged, and all information regardless of the passage of time or the death of the client. The comment to the Rule is clear: "The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."

Indeed the language is equally clear with regard to government lawyers: "The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance."

Our conclusion is that the intent behind these rules is not to cover information that is general in nature, not directed toward a particular client or matter, and not recent in its derivation. An element of practicality must be applied in such a situation. For example, if the attorney were to write a book describing his experiences, his conversations and his insights acquired at the agency 15 years ago, it is inconceivable that the Arkansas Supreme court Committee on Professional Conduct would bring disciplinary charges.

5)Finally, we note that the Arkansas Supreme Court, unlike other jurisdictions, has continued to apply the rubric of the "appearance of impropriety". In *First American Carriers, Inc. v. Kroger Co.*, 302 Ark. 86, 787 S.W.2d 669 (1990) and *Burnette v. Morgan*, 303 Ark. 150, 156, 794 S.W.2d 145, 148 (1990), the Arkansas Supreme Court applied that method of analysis in relation to the former client issue: "the principle is a rock in the foundation upon which [are] built the rules guiding lawyers in their moral and ethical conduct. This is a factor that should be

considered in any instance where a violation of a rule of professional conduct is at issue." The Court has applied that language in instances involving lawyers opposing former clients in violation of Rule 1.9.

Admittedly the passage of time is not a barrier. The court has disqualified an attorney who was, 17 years earlier, in a firm that represented the opposing party. *Norman v. Norman*, 333 Ark. 644, 970 S.W. 2d 279 (1998). However, the Court has not used that language in other situations and we conclude that given the combination of factors here, it does not appear improper for the attorney to now give expert testimony of this type.

Conclusion: For the reasons stated, the attorney may appear as an expert witness on the general enforcement strategies and policies of the agency during his tenure 15 years earlier.

NOTICE

"This is an opinion only of the Arkansas Bar Association which is a voluntary association of the attorneys licensed to practice in the State of Arkansas, and reliance thereon is voluntary and relieves any Association member from liability for the content hereof. This opinion is intended to be the Association's best interpretation of the Model Rules of Professional Conduct as promulgated by the Supreme Court of Arkansas as that code applies to the written facts presented to the Committee."

ARKANSAS BAR ASSOCIATION

By: _____

Howard W. Brill
Reporter for Professional Ethics
Committee