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John R. McDowell

J.W. Boyce (1884-1915)  
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April 27, 1993

RE: Ethics Opinion 93-5

Dear

You have requested an opinion from this Committee concerning the following facts:

**FACTS**

An attorney works for a municipality for five years as an assistant city attorney. While so employed, this attorney is involved in criminal and civil enforcement of municipal ordinances. While employed by the municipality, this attorney becomes involved in prosecuting an alleged violation of municipal ordinances. An individual made multiple complaints about a business to the municipality. The complaints proceed through the investigative stage with this attorney directing the investigation and representing the municipality.

Ultimately, the municipality decides not to prosecute either criminally or civilly. This attorney leaves the municipality's employ and shortly thereafter initiates a private civil lawsuit against the business on behalf of the individual that made the complaints to the municipality. This lawsuit is based in part on confidential information gained while the attorney was employed by the municipality. The municipality is aware of the civil litigation.

The issue presented by these facts is as follows:

Whether the former municipal attorney may use confidential information gained in that capacity concerning a business in connection with the representation of a private party in litigation against the business.

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OPINION

It is the opinion of this Committee that the former municipal attorney may not use confidential information gained in that capacity concerning a business in connection with the representation of a private party in litigation against the business. Rule 1.11(b) addresses this issue and provides as follows:

Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. 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 adverse party to enable that person to ascertain compliance with the provisions of this rule.

The term "confidential government information" is defined in Rule 1.11(e) as follows:

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.

Your letter specifically states that the lawsuit is based in part on "confidential information" gained while the attorney was employed by the municipality. Without more information, this Committee assumes that such information falls within the definition of "confidential government information" found in subparagraph (e) of Rule 1.11. As such, the attorney may not use that information in litigation against the business.

The comment to Rule 1.11 makes clear its philosophy. This comment states:

-This Rule prevents a lawyer from exploiting public office for the advantage of a private client . . . .

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Subparagraph (b) of Rule 1.11 prohibits a lawyer from using confidential government information about a person acquired when the lawyer was a public officer for the benefit of a private client whose interests are adverse to such person.

Thank you.

Sincerely,

BOYCE, MURPHY, MCDOWELL & GREENFIELD

Michael S. McKnight, Chairman  
Ethics Committee