



January 6, 2017

The Honorable Chairman Charles E. Grassley
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510-6050

VIA EMAIL:

Dear Sen. Grassley:

Introduction. You have asked us, Ronald D. Rotunda,¹ and W. William Hodes,² for our expert opinion on the significance today of an ethics complaint leveled against Senator Jeff

¹ Ronald D. Rotunda is the Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence at Chapman University, the Dale E. Fowler School of Law. See, www.ronaldrotunda.org. His current resume is attached at the end of this Opinion Letter.

² W. William Hodes is Professor Emeritus of Law at Indiana University, and President of the William Hodes Law Firm. See www.hodeslaw.com. His current resume is attached at the end of this Opinion Letter.

Professor Rotunda is a coauthor of, **Legal Ethics: The Lawyer's Deskbook on Professional Responsibility**, which the ABA co-publishes with Thomson Reuters (ABA Thomson-West & ABA, 14th ed. 2016), a one-volume treatise on Legal Ethics, updated annually. He is also a coauthor of the most widely-used course book on Legal Ethics, **Problems and Materials on Professional Responsibility** (Foundation Press, St. Paul, MN. 12th ed. 2014)(*Unabridged Edition*), and **Problems and Materials on Professional Responsibility** (Foundation Press, St. Paul, MN. 12th ed. 2014)(*Abridged Edition*).

Professor Hodes is the coauthor (with Geoffrey C. Hazard, Jr. and Peter R. Jarvis) of **The Law of Lawyering** (Wolters, Kluwer, 4th ed. 1985, 2014), one of the leading treatises on legal ethics and related issues in the United States, which is updated twice annually.

Sessions approximately a quarter-century ago. We have read the material discussed herein and have evaluated the charges.

For simplicity, we present our conclusion first, and then explain in more detail how we reached it.

Conclusion. Almost a quarter century ago,³ when Senator Sessions was the Attorney General of Alabama, lawyers for a company that had been criminally indicted sought dismissal of the charges in part on the grounds of prosecutorial abuse (that was not described in factual detail). Although the trial court adopted that allegation (*verbatim*) as part of its dismissal order, the Alabama State Ethics Commission and the Alabama State Bar each separately investigated the matter, and both found, unanimously,⁴ that there was insufficient evidence to find any ethics violation against General Sessions (who had already been elected to the U.S. Senate at that point).

In addition, when related civil litigation continued in federal court between the company and the customer it had been accused of defrauding, the United States Court of Appeals for the Eleventh Circuit found that because the statement of the Alabama state court judge was little more than a convenient adoption of a party's argument, it was "particularly unreliable and misleading"—so much so that admitting it into evidence in the federal district court trial was an abuse of the (federal) trial court's discretion that required reversal.

In our view, the contemporaneous actions of two Alabama state agencies and the Eleventh Circuit demonstrate clearly that the mere nonspecific allegations of a party, uncritically adopted by a state court judge and rejected by the state agencies with jurisdiction over ethics complaints, cannot possibly have any bearing on Senator Sessions's ethical standing today. A supposed blot on one's record that has been so thoroughly debunked is no blot at all.

³ The whistle blower alleging fraud by Tieceo first raised his charges in May, 1995, *U.S. Steel, LLC, v. Tieceo, Inc.*, 261 F.3d 1275, 1281 (11th Cir., Aug. 17, 2001).

In addition to the criminal case in state court, there was extensive litigation in federal court, because USX and Tieceo sued each other. See, e.g., *USX Corp. v. TIECO, Inc.*, 189 F.R.D. 674 (N.D. Ala., Nov. 09, 1999), affirmed in part, vacated in part, reversed in part by *U.S. Steel, LLC, v. Tieceo, Inc.*, 261 F.3d 1275 (11th Cir. Aug. 17, 2001), rehearing and rehearing *en banc* denied, *U.S. Steel LLC v. Tieceo, Inc.*, 277 F.3d 1381 (11th Cir. Nov. 8, 2001). Related cases include, *USX Corp. v. TIECO, Inc.*, 929 F.Supp. 1455 (N.D. Ala., June 21, 1996); *USX Corp. v. TIECO, Inc.*, 929 F.Supp. 1460 (N.D. Ala., June 21, 1996); *USX Corp. v. TIECO, Inc.*, 227 F.R.D. 680 (N.D. Ala., Sep. 01, 2004), affirmed by, *USX Corp. v. Tieceo, Inc.*, 132 Fed. Appx. 237 (11th Cir. May 16, 2005).

⁴ The Disciplinary Commission of the Alabama State Bar, ASB No. 98-116(A), dismissed the ethics charges on Feb. 16, 2000. Those charges were brought on April 16, 1998. The Alabama Ethics Commission dismissed the ethics charges on July 10, 1996.

Factual background.

In 1995, a whistleblower from a company called Tieceo, Inc. informed United States Steel, LLC (USX) that Tieceo was receiving payment for goods not delivered. USX took the information to the Office of the Attorney General of Alabama, which sought and obtained a search warrant and eventually a criminal indictment against Tieceo after demonstrating probable cause.

The Attorney General's Office voluntarily dismissed some counts in the indictment, and Tieceo then moved to dismiss the remaining counts, alleging prosecutorial misconduct, among other things. The state trial judge granted the motion, copying *verbatim* key passages from court papers that Tieceo's lawyers had drafted. There was no appeal from the dismissal order, but the issue of prosecutorial abuse was thoroughly litigated in related civil litigation in federal court and in two state disciplinary proceedings. As described below, the Eleventh Circuit found the allegations to be "particularly unreliable and misleading," while the state agencies both unanimously found insufficient merit in the allegations and dismissed the ethics complaints.

The Alabama criminal case aside, USX sued Tieceo civilly in federal court, under the Racketeer Influenced and Corrupt Organizations Act (RICO). Tieceo counterclaimed, asserting claims under 42 U.S.C. §1983 for violation of its due process rights, and under state law for malicious prosecution. The federal trial court permitted Tieceo to introduce the earlier Alabama state court order (that included language taken *verbatim* from Tieceo's own filings), and the jury awarded Tieceo \$7.2 million on its counterclaims.

The Eleventh Circuit unanimous reversed the jury verdict in Tieceo's favor. Even looking at the record in the light most favorable to Tieceo, there could be no §1983 claim, the Court said, because the criminal prosecution, although eventually dismissed, was supported by probable cause.⁵

The Court then turned to the Alabama trial judge's order that dismissed the criminal case, which Tieceo had introduced in its civil case in federal court. The Eleventh Circuit said that the criminal trial judge had simply adopted "a statement of facts prepared by TIECO in connection with its motion to dismiss the indictment. Not surprisingly, the statement of facts is quite favorable to Appellees [Tieceo] and relied upon heavily by Appellees in their brief to this Court."⁶ Again,

⁵ See 261 F.3d 1275, 1289-90. USX cooperated with the criminal investigation by the state attorney general's office into the actions of equipment vendor Tieceo. That resulted in criminal charges being brought, but that did not violate Tieceo's due process rights, and thus could not support a §1983 claim against the steel company because the vendor had no substantive due process right to be free from a criminal prosecution (even though ultimately successful) that was supported by probable cause. "Thus, no violation of procedural due process could have occurred." 261 F.3d 1290 (footnote omitted).

⁶ 261 F.3d 1275, 1286.

according to the Eleventh Circuit, the trial judge merely repeated Tieco's memorandum "*in toto*,"⁷ – a memorandum "that neatly conformed to Appellees' allegations"⁸ The trial judge had said (quoting the lawyers representing Tieco), "[T]he misconduct of the [AG] in this case far surpasses in both extensiveness and measure the totality of any prosecutorial misconduct ever previously presented to or witnessed by this Court."⁹

That was a damning statement, to be sure, but the Eleventh Circuit Court of Appeals found that it was "particularly unreliable and misleading." Moreover, introducing it in the federal trial required the Circuit Court to reverse. The Alabama trial court's statement, said the Eleventh Circuit,

"was *particularly unreliable and misleading*. Although the statement of facts was presented to the jury *as Judge Garrett's finding*, it was prepared entirely by *Appellee' counsel*. In effect, the admission of the statement of facts permitted counsel to testify on his client's behalf, without being cross-examined. Further, the statement of facts was intended to exculpate TIECO, and thus, it was *self-serving and unreliable*. . . . unfairly prejudicial and *misleading*."¹⁰

Introducing this "particularly unreliable and misleading" statement of the Alabama trial judge was serious error. "The district court *abused its discretion* in admitted Judge Garrett's opinion."¹¹

In addition to its involvement in the civil litigation in federal court, in May 1996 Tieco filed an ethics complaint against then Attorney General Jeff Session, while he was running his first Senate campaign. The Alabama State Ethics Commission investigated the Tieco charges, which were buttressed by the trial judge having copied them in his opinion. The Commission held a hearing, heard witnesses, and heard argument. But, as later related by the Eleventh Circuit, "On July 10, 1996, the Commission concluded there were insufficient facts to find the AG had violated

⁷ 261 F.3d 1275, 1286 (emphasis in original). The judge's opinion "adopted *in toto* a memorandum of facts prepared by TIECO in connection with its motion to dismiss the indictment."

⁸ 261 F.3d 1275, 1286.

⁹ 261 F.3d 1275, 1286.

¹⁰ 261 F.3d 1275, 1287 (emphasis added), citing *United States v. Reme*, 738 F.2d 1156, 1168–69 (11th Cir.1984).

¹¹ 261 F.3d 1275, 1288 (emphasis added).

Alabama ethics laws.”¹² Indeed, the Alabama State Ethics Commission found *unanimously* (5 to 0) that then Attorney General Sessions had not violated Alabama ethics laws.

Tieco’s counsel also filed a complaint against Attorney General Sessions with the Alabama State Bar. Once again, Tieco relied on the state court order, which Tieco had largely drafted and the state judge had copied, *in haec verba*. The State Bar dismissed that complaint as well.

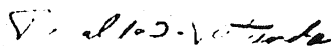
Ultimately, the historical record shows only that Tieco and its lawyers filed one charge after another, attacking the office of the Attorney General of Alabama, various lawyers connected with it, and also then General Sessions. But the historical record also shows that the charges remained unsubstantiated, and ultimately went nowhere.

Some media sources have suggested that these charges were well founded, or that Senator Sessions failed to disclose them to your Committee. As to the latter, we have been informed that disclosure was made in materials that the Committee has not yet released, but have no independent knowledge on that score. As to the former, it is our experience that it is much easier to *file* charges than to make them stick. It is not uncommon, unfortunately, for disgruntled opposing parties or clients to file ethics complaints that do not hold up under scrutiny.

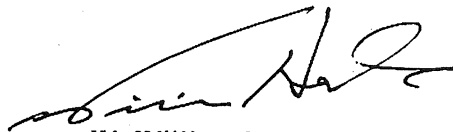
Whether Tieco’s long-ago allegations were made in good faith, or made in bad faith as a tactical ploy, is of no moment today. What is significant is that the charges were looked at and rejected decades ago by the courts and state agencies. Your Committee should have no concern, in our opinion, about any ethical violations said to have arisen out of the Tieco matter.

If you have further questions, please do not hesitate to contact us.

Sincerely,



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