

State Bar of South Dakota

Ethics Opinion 96-3

April 26, 1996

- **Rules 1.7(b); 1.16(c)**
- **Subject: Conflict of interest; Criminal appeal**
- **Summary: An attorney may withdraw from a criminal representation when the client decides to argue on appeal that the attorney was ineffective, if the client wants him to and the attorney reasonably believes that continued representation would be adverse.**

FACTS

Attorney is court appointed to represent a Defendant on a criminal charge. Defendant is convicted at trial. Defendant informs attorney that he wishes to raise ineffective assistance of counsel on direct appeal of the conviction and asks that attorney be removed from the case.

Based on these facts; you have asked this Committee whether or not under Rule 1.7(b) a conflict of interest exists.

OPINION

Rule 1.7(b) provides that "A lawyer shall not represent a client if the representation of that client may be materially limited by ... the lawyer's own interest" The comments to Rule 1.7 provide "If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice." Whether or not the lawyer's own conduct will be considered "in serious question" is going to depend upon the facts of the particular case. Further, Rule 1.16(c) provides that "When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." Thus, even if the lawyer has good cause for terminating the representation, the final decision rests with the court and when a court orders the lawyer to continue the representation, the lawyer must do so or risk contempt.

It is this Committee's opinion that if an attorney reasonably believes that his or her work has been deficient in the trial and reasonably believes that such deficiency affected the outcome of the trial, the attorney has an obligation under the South Dakota Rules of Professional Conduct to explain this situation to the client. The attorney should also advise the client regarding the legalities of raising an ineffective assistance of counsel issue on direct appeal. *See, State v. Tchida*, 347 NW2d 338, 340 (SD 1984). If the client wishes that the attorney be removed from the case, or if the attorney reasonably believes that the continued representation will be adversely affected by the attorney's own interests, the court should be notified of the client's wishes that the attorney be removed, or of the attorney's motion to withdraw. It is then up to the court to determine whether or not the circumstances justify removal of the attorney or withdrawal of the attorney based on the specific facts of the case. *See, Rule 1.16(c)*.

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Chair, Ethics Committee
State Bar of South Dakota