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J.W. Boyce (1884-1915)
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July 2, 1993

Re: Ethics Opinion 93-4

Dear

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

FACTS

You practice in a rural law office which, in addition to general legal services and criminal prosecution, offers income tax preparation services to the public generally. "A" has been a client of your office for more than ten years. Past services to "A" have covered a broad range of legal representation and work in numerous and different matters. "A" considers the attorneys at your law office to be "his" lawyers.

Your law office represented "B" in an insurance claim matter in 1988 and performed income tax preparation services for several years for "B" until February of 1991. In December of 1991, "B" became disgruntled with the preparation fee and decided to take his business elsewhere. No further legal work has been performed by your office for "B".

A legal dispute developed between "A" and "B" in 1992. "A" owns farm land on which "B" claims to be a share tenant. "A" claims to have provided adequate notice to "B" of the termination of his tenancy. "B" claims the notice was deficient and demands his share of the 1992 crop. Each of the parties acted on their own without the assistance of any attorney in the facts underlying the dispute. "B" hired an attorney from a different law office to represent him on that claim. "B's" claim includes lost profits. "A" attempted to engage your law office to represent him on this matter but "B" has objected to your office representing "A" on ethical grounds, namely, that your office provided tax preparation work for "B" two

years ago and would have an unfair advantage and access to "B's" past tax returns dealing with the tenancy in dispute. You indicated in your request that "B" may have shown prior losses on the tenancy in issue.

Based upon those facts, you pose the following questions:

1. Is income tax preparation representation within the meaning of Rule 1.9 of the Rules of Professional Conduct?;

2. Does "B's" claim for lost profits preclude representation of "A" under the "same or substantially related matter" language of Rule 1.9?;

3. If your office, in performing the state's attorney's duties, encounters a tax client as a criminal defendant, must it seek an outside prosecutor for the case? What if the criminal matter is a non-support criminal case?;

4. If the tax files of "B" are within the ordinary scope of discovery, does your law office have an unfair access to information "to the disadvantage of the former client" within the meaning of Rule 1.9?;

5. Given the potential of the tax preparer to become a witness on the "lost profits" issue, does SDCL 19-1-3, in effect, preclude your office from representing "A"?

OPINION

It is the opinion of this Committee that your law office is precluded from representing "A" in this matter by reason of Rule 1.9(a). Addressing each of your questions in the order presented above, the following constitutes the opinion of this Committee on each of these questions.

1. The Rules do not define what it means to "represent" or have "represented" or to be engaged in "representation" of a client. If, however, a client/lawyer relationship exists between the lawyer and the tax client, then it seems logical based on the common usage of the word that the lawyer "represented" the client while doing the tax preparation work. According to the preamble to the Rules, "principles of substantive law external to these Rules determine whether a client/lawyer relationship exists." Under SDCL 19-13-2, a "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who has rendered professional legal services by a lawyer, or who consults a lawyer with the view to obtaining professional

legal services from him. Further, according to the comment to Rule 7.4, "Taxation Law-Income Tax Returns" is a designated field of law. Based on that definition of a "client" and the fact that income tax preparation is deemed by the Board of Bar Commissioners to be a field of law, it is clear to this Committee that when preparing an income tax return a lawyer is representing a client and rendering professional legal services to a client. Thus, it is the opinion of this Committee that income tax preparation constitutes representation of a client under the Rules.

2. Based upon the facts that you have presented, "B's" claim for lost profits is substantially related to the tax returns which you have prepared for "B". Whether or not a matter is substantially related to another matter under Rule 1.9 is a determination that must be made on a case-by-case basis based upon the facts of each particular case. According to the ABA/BNA Lawyers Manual on Professional Conduct, "[a]ll three subsections of Model Rule 1.9 (as amended in 1989) are limitations upon a lawyer's use of information generated in the representation of a former client; the subject of confidences is explicit in subsections (b) and (c); and is treated implicitly in subsection (a) because the substantial relationship test it sets forth, if answered in the affirmative, leads to the presumption that the lawyer gained confidential information from the former client and is now in a position to use it to the former client's disadvantage. The fundamental idea concerning the substantial relationship test is the information gained in representing the former client. According to one court:

> "If there is a reasonable probability that confidences were disclosed which could be used against the former client in the later adverse representation, . . . a substantial relationship between the two cases will be presumed."

Thomas v. Municipal Court of Antelope Valley Judicial District of California, 878 F.2d 285, 288 (9th Cir. 1988). "[A] lawyer may not represent an adversary of his former client if the subject matter of the two representations is 'substantially related' which means: if the lawyer could have obtained confidential information in the first representation that would have been relevant in the second." Analytica, Inc. v. NPD Research, Inc.,708 F.2d 1263, 1266 (7th Cir. 1983).

Under the facts you have presented, the income tax returns which you have prepared for "B" and the confidential information you learned from "B" to prepare the returns would be relevant evidence and used by you in representing "A" on "B's" claim for lost profits. Accordingly, this Committee finds under these facts that the two matters are substantially related. Therefore, your office is precluded under Rule 1.9(a) from representing "A" in this matter unless "B" were to consent to the representation after consultation. According to the facts recited above, "B" is not willing to consent and, in fact, has objected to your representation of "A".

3. The same analysis that is set forth in numbers 1 and 2 above applies to your question concerning whether or not you, in performing state's attorney's duties, may prosecute a former tax client. As concluded in number 1 above, income tax preparation constitutes representation of a client under the Rules. The threshold issue then is whether or not the matters are the same or substantially related. Again, this must be decided on a case-by-case basis and if the matters are substantially related, you would be precluded from prosecuting your former tax client unless the client consented after consultation. If the income tax returns and confidential information learned by you were relevant to the criminal prosecution and would be used by you against the former client in the criminal prosecution, which it may be in a non-support criminal case, it is the opinion of this Committee that the matters are substantially related and you would be precluded from prosecuting the former tax client. In other criminal matters, however, the income tax returns and information learned by you when preparing the returns may be wholly unrelated to the criminal charge. In such a case, absent some other conflict of interest, you would not be precluded from performing your state's attorney's duties.

4. Rule 1.9(c) prohibits a lawyer who has formerly represented a client in a matter from using information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known. The fact that the tax files may be discoverable does not allow you to use the files to the disadvantage of your former client. In your situation, you would not even have to go through the necessary discovery procedures to obtain the information. Clearly, you have unfair access to this information. Perhaps even more important is the

confidential information you gained when preparing the returns. The Rules simply do not allow for the use of this information to the disadvantage of your former client.

5. This question is moot in light of this Committee's opinion that under Rule 1.9 your office is precluded from representing "A". SDCL 19-1-3 is clear and if the situation was such that the attorney would have to be a witness for his client at trial except as to merely formal matters such as the attestation or custody of an instrument or the like, the lawyer shall not further participate in such trial.

Thank you.

Sincerely,

BOYCE, MURPHY, MCDOWELL & GREENFIELD

Michael S. McKnight, Chairman
Ethics Committee