BOYCE, MURPHY, McDOWELL & GREENFIELD

ATTORNEYS AT LAW

Jeremiah D. Murphy
Russell R. Greenfield
David J. Vickers
Gary J. Pashby
Vance R.C. Goldammer
Thomas J. Welk
Terry N. Prendergast
James E. McMahon
Douglas J. Hajek
Michael S. McKnight
Gregg S. Greenfield

Norwest Center, Suite 600
101 North Phillips Avenue
P.O. Box 5015
Sioux Falls, South Dakota 57117-5015

Telephone 605 336-2424
Telecopier 605 334-0618

Of Counsel
John R. McDowell

J.W. Boyce (1884-1915)
John S. Murphy (1924-1966)

December 18, 1992

Re: Request for Ethics Opinion 92-8

Dear

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

FACTS

In 1986 you were contacted by an elderly client from an adjoining county about making a new will for him. He had previously made a will through the office of an attorney who was no longer practicing and had some changes that he wished to make. The gentleman had never been married and had no children. You had a couple of meetings with the gentleman in 1986 and eventually drafted a new will according to his instructions.

Although you did a new will, and it contained a number of variations from his previous will, it was generally a similar type of testamentary plan. Specifically, both the will you did for him and his previous will had provided for a number of specific charitable bequests, a couple of small bequests to family members, a somewhat larger devise to a friend of his who was also named as his executor, and the residue being left to a nationally known charitable institution.

Based on the information given to you by the client at the time the will was prepared, the assets should have been more than sufficient to pay all of the bequests, and leave a rather substantial sum to the residuary beneficiary.

The client left the original of his will in your custody. Thereafter, in 1987, you were again contacted by the client in connection with his will. At that time, he had sold a piece of property that had been specifically devised and, as a result, executed a codicil dealing with that particular change in his circumstances.

Thereafter, although you continued to hold the original of his will and codicil, you have no further contact with the gentleman that you can recall.

The gentleman recently died. You were contacted by his friend who is the executor in connection with settling his affairs and met with the executor during the first week in September. At that time, the executor informed you that the gentleman had gone into a nursing home about three years prior to his death. The executor further informed you that the expenses of the gentleman's nursing home care, medical expenses, etc., had eaten away at his assets until there was "practically nothing left." In further discussion of the details, the executor revealed to you that the only assets that the client had at the time of his death were a couple of bank accounts. After payment of the funeral bill and some outstanding medical expenses, it appears that the balance that may be available for distribution pursuant to the will will be in the neighborhood of $1,000 to $2,000.

You then asked the executor whether the client had made any substantial gifts to anyone during his lifetime. The executor then responded that yes, as a matter of fact, the deceased had made a gift of $50,000 to him. In response to additional questioning by you, the executor stated that the gift had been made "about three years ago" and that the deceased "would have given me everything if I had let him. He said he didn't need it anymore. But I told him that he had to keep some for himself."

In response to further questioning by you, the executor stated that the client had been mentally sharp until just a short time before his death and he certainly knew what he was doing.

The executor further informed you that he had been assisting the client with the client's financial affairs, under a power of attorney. You did not draft the power of attorney, do not have a copy of it and do not know when it was executed.

You were concerned that the $50,000 gift to the executor which was disclosed to you by the executor was the product of undue influence or otherwise improper. You were further concerned whether the deceased was competent to make a gift at the time the gift was made, in view of the apparent temporal conjunction of the gift and his entry into the nursing home.

Based on these facts, you have asked this Committee if you have any obligation to:

(1) Investigate the facts more fully to be certain that the gift was made by the deceased when he was competent and that it was not the product of undue influence or abuse of the executor's fiduciary relationship under the power of attorney;

(2) Inform the beneficiaries named under the will of the facts as you now know them and/or the conclusions of any

investigation that you might be ethically obligated to conduct.

OPINION

With respect to your first question, it is the opinion of this Committee that you do have an obligation to investigate the facts concerning the gift more fully.

With respect to your second question, it is first necessary to determine who your client is in the above-described situation. This is not an easy question to answer and the Rules of Professional Conduct does not provide a definitive answer to the question. According to the comment to Rule 1.7:

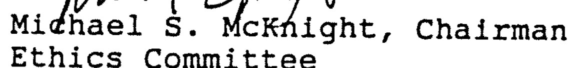
> "Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved."

In the most common situation the client is the executor and the lawyer owes a duty to the executor. This is so because advising the executor how to act appropriately as a fiduciary is ultimately in the best interest of the estate and its "beneficiaries." Your situation is not, however, the common situation as the possibility exists that the executor has engaged in conduct which may not be in the best interest of the estate and its beneficiaries. It is the opinion of this Committee that counsel employed by the executor, but paid with funds from the estate, has a duty to both the executor and the estate. This view is consistent with an earlier opinion of this Committee. See Ethics Opinion 87-1. The attorney's duty of loyalty runs to the executor as a primary client but also extends to the protection of the beneficiaries interests as secondary clients. Thus, it is the opinion of this Committee that the correct response for you is to make disclosure to the beneficiaries of what you currently know and what you learn from your investigation. Support for this position is found in Rules 1.2, 1.6, and Rule 3.3.

If you have any questions please call.

Sincerely,

BOYCE, MURPHY, McDOWELL & GREENFIELD



Michael S. McKnight, Chairman
Ethics Committee