DONALD E. COVEY
Lawyer

Telephone
605-842-2601

409 Main Street • P.O. Box 1766
Winner, SD 57580

February 20, 1990

RE: Ethics Opinion 90-2

Dear

You have requested the advisory opinion of the Ethics Committee of the State Bar of South Dakota. The facts and opinions reviewed by the Committee are as follows:

FACTS

In recent years, you, along with other individuals invested in the publication and marketing of a book. Your investment contract provides that 33% of all gross proceeds received by the seller from the book would be paid to the investors. Thereafter, the publisher permitted nearly the entire book to be reprinted in a magazine. This conduct is viewed by the investors as a violation of their contract with the publisher as well as a copyright violation.

The other investors desire that you be co-counsel in an action to enforce the contract and recover damages on whatever theory. A lawsuit would be handled on a contingent fee basis. In the event of recovery you as one of the investors would receive a pro rata distribution of the recovery under your investment contract. In addition, you would receive your attorney fee. You have associated with another law firm to assist in the lawsuit.

OPINION

The Committee generally views the situation as presenting a conflict under Rule 1.8(j). The conflict may avoid disqualification if you irrevocably assign your interest in the investment contract to another person. It is strongly suggested that an assignment to a relative is tainted with the attributes of the original ownership and would most likely not cure the conflict situation.

A very strong minority of the Committee very cogently identified the language of the Rule which states that "[a] lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation ... ." The minority view is that since the interest in the investment contract was not acquired with a view toward litigation, no conflict is presented.

The majority analyzes the situation that because of the personal financial interest in the subject matter of the litigation your judgment may not be the independent legal judgment that the other investors and plaintiffs (clients) expect and are entitled to.

Respectfully submitted,
Ethics Committee
State Bar of South Dakota

Donald E. Covey, Chairman

DONALD E. COVEY
Lawyer

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409 Main Street • P.O. Box 1766
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August 11, 1989

RE: Ethics Opinion 89-3

Dear :

You have requested a formal opinion from the Ethics Committee as to whether or not a member of The State Bar of South Dakota is required to ascertain that a non resident attorney who is associated with the resident attorney is complying with the South Dakota Sales Tax Laws prior to the resident attorney moving the ad hoc admission of the non resident attorney?

The Rules of Professional Conduct are silent as to this particular question. The South Dakota Supreme Court rejected a proposed rule which would have required a non resident lawyer seeking temporary admission to practice in connection with a particular case to certify that he or she had in fact obtained a sales tax license. The ethical responsibility of the moving attorney is to be responsible for the "reputation" of the non resident attorney and not to act as an instrument of the South Dakota Department of Revenue.

Respectfully,

Donald E. Covey, Chairman
Ethics Committee

R. C. Riter
E. D. Mayer
Robert D. Hofer
Robert C. Riter, Jr.

Jerry L. Wattier

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57501-0280

Telephone
605-224-5825

Ernest W. Stephens, Retired

September 29, 1988

Re: Ethics Opinion 88-8

Dear :

You inquire of us whether you are disqualified from representing the seller in an eviction action against the buyer. The facts as presented are as follows:

> While you were a partner in a law firm in 1986, the "buyer" was interviewed by an associate in the firm and by your law clerk, regarding a slip and fall case against the sellers. The basis for the claim arose out of buyer's possession of a mobile home. She was in possession of the mobile home under color of a contract for purchase of that mobile home. The Contract was silent as to repairs or modifications of the mobile home and hence, the buyer refused to execute the Contract as she claimed the sellers agreed to do a number of things, including putting in a new stairway. After the Contract was tendered and the buyer went into possession of the mobile home, she fell on the stairs. The sellers did not acknowledge any responsibility for the stairways.
>
> Some time after the interview with the buyer, your law firm dissolved and you established a new law firm. Working under your supervision, as an associate, is the same law clerk who participated in the interview in 1986. The sellers now seek to retain you to evict the buyer who is in possession of the mobile home under the disputed sale contract involved in the slip and fall case.

The issue presented is whether this is the same or a substantially related matter as was the subject of the 1986 interview. Model Rule 1.9. A lawyer who formerly represented a client in a matter is prohibited from representing another person in the same or a substantially related matter in which the

person's interests are materially adverse to the interest of the former client. Additionally, one must determine whether you acquired information from your associate or your clerk which would be protected by Model Rule 1.6a.

From the facts as we reviewed them, there is no doubt that there were protected communications with the buyer during the 1986 interview, and that you had access to that information. This is particularly obvious because of the small size of your firm, your status as a partner, and your continued association with the law clerk, who is now your associate. Additionally, the eviction action appears substantially related to the personal injury matter. Hence, you are prohibited from representing the sellers of the mobile home in proceedings to evict the buyer or to foreclose the sale contract.

Where your participation is challenged, the burden is on you to prove that you acquired no knowledge protected by confidentiality. EZ Painter Corp. v. Padco, Inc., 746 F. 2d 1459 (8th Cir. 1984).

Finally, under Rule 1.10, disqualification would be imputed to you because of your law clerk's participation and knowledge from the prior representation. A firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client.

We trust this answers your inquiry.

Very truly yours,

Robert C. Riter, Jr., Chairman
Ethics Committee

R. C. Riter
E. D. Mayer
Robert D. Hofer
Robert C. Riter, Jr.

Jerry L. Wattier

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Ernest W. Stephens, Retired

May 31, 1988

Re: Ethics Opinion 88-6

Dear :

You have submitted the following inquiry to the Ethics Committee:

> The law office in which you are involved is a non-profit public interest law firm. It is run by a board of directors appointed by local Bar associations. Recently an attorney has been appointed to the board of directors of the law office and this same attorney represents a defendant in a lawsuit brought by a plaintiff represented by the public interest law firm. The lawsuit has been a difficult and complex case, and the defense attorney/proposed board member has threatened the public interest law firm and the attorney representing the plaintiff with Rulle 11 sanctions based on accusations of improper filing and misconduct.
>
> You inquire as to whether the defense counsel who has threatened the public interest law firm with Rule 11 sanctions could appropriately serve as a member of the board of directors while the particular case is pending, or whether such would constitute a conflict of interest, or an appearance of impropriety so as to prevent the defense attorney from becoming a board member.

Apparently the By-laws of the corporation are silent on this matter, but we would think that is the place to start your review to determine whether there are specific procedures and instructions contained therein. If not, it might be well for the corporation to amend its By-laws to prevent such obvious conflicts in the future.

It is the general rule that the governing board of a non-profit public interest law firm has moral and ethical obligations to the community to determine policy matters, selection of various services the firm will make available, setting priorities and determining the type of cases that will be handled and the types of clients that will be represented. The board does not interfere with an assigned attorney's independent professional judgment in handling the matters of the client. As such, service on the board of a non-profit public interest law firm does not include involvement in the handling of any particular case. While a member of the board may serve notwithstanding that he might have interests adverse to the client served by the non-profit public interest law firm, the board member should avoid conflicts of interest with the corporation. That is, of course, subject to Model Rule 6.3 and the comments thereto. See also, ABA formal opinions 324, 334 and 345 regarding members of the boards of legal services programs.

If a board member does represent parties in an action adverse to clients represented by a public interest law firm, extra care must be exercised by the board member to insure that there is no undue influence, conflict of interest or constraint on the full and independent action on behalf of either client, or the appearance of any impropriety.

In the circumstances you set forth, defendant's counsel has made broad and serious allegations of misconduct against the public interest law firm, which are likely to be a matter of interest and concern to the board of directors. That appearance of conflict of interest and impropriety should prevent the board member from serving. If the defense counsel is presently a member of the board of directors he should withdraw from the board until final resolution of the pending case.

We would also suggest that board members attempt to avoid conflicts of interest with a non-profit corporation such as is involved herein. Additionally, if an attorney has a grievance against the corporation, he or she would be generally better served by resolving it through judicial or bar association activities, and when the matter is completed, he or she would then be eligible for membership on the board.

We trust this answers your inquiry.

Very truly yours,

By:
Robert C. Riter, Jr., Chairman
Ethics Committee