DONALD E. COVEY

Lawyer

Telephone
605-842-2601

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

August 23, 1990

Attorney at Law

RE: Ethics Opinion No. 90-9

Dear

You have requested an opinion regarding how the designation "of counsel" relates to the Rules of Professional Conduct.

OPINION

It is the opinion of the Ethics Committee of the State Bar of South Dakota that the relationship known as "of counsel" is that of an independent contractor and as such the "of counsel" lawyer is not a member nor associate nor outside consultant of a firm. Therefore, a division of fees may be made between the firm and such an "of counsel" lawyer only if the criteria of Rule 1.5(e)(1), (2) and (3) are met. As cited by Committee Member Michael S. McKnight, Arizona Ethics Opinion 86-3 (3-1-86) and District of Columbia Ethics Opinion 197 (1-17-89) are in conformity with this view. Mr. McKnight also points out Texas Ethics Opinion 450 (11-5-87) which appears to state a minority view that so long as the "of counsel" relationship with the firm is publicly represented, and there is a regular, continuing and substantial relationship with the firm, Rule 1.5 does not apply. Texas appears to treat and "of counsel" lawyer as a member of the firm for purposes of Rule 1.5.

It is the opinion of this Committee that the "of counsel" lawyer in South Dakota is not a member of a firm and therefore any division of fees must satisfy Rule 1.5(e)(1), (2) and (5).

Respectfully submitted,
Ethics Committee

Donald E. Covey