

State Bar of South Dakota

**Ethics Opinion 98-8**

October 9, 1998

- **Rules: 1.6, 1.7, 2.3(a), 4.3**
- **Subject: Conflict of interests; Charitable organization; Charitable gifts to client by another client**
- **Summary: Attorney providing advice to third persons on behalf of an estate planning organization client must advise the third person that he represents the organization, not the third person and that person should seek advice of their own counsel.**

**FACTS**

You are in private practice and your practice involves estate planning. You are considering providing service to an organization that assist nonprofit entities to structure charitable gifts from individual donors. Your service to the organization would involve advising attorneys and potential donors of the tax benefits of the potential gifts and provide guidance in making the gifts. Your client organization would find the donors. You would simply provide the advice discussed above.

You asked whether you may ethically accept this employment as long as none of the potential donors are your estate planning clients.

**OPINION**

SDCL 16-18 Appx, Rule 1.7 forbids a lawyer from representing a client "if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person. . ." with limited exceptions that do not apply here. Your facts indicate that the organization would be your client and the Committee concurs that you should not be involved in advising your "estate planning clients" about possible gifts for or through your "organization client."

The question of "advising" potential donors is more difficult. From your statement of facts, it appears that the organization will pay the fees and you would "advise" the potential donors. Several rules are implicated. First, Rule 1.8(f) provides:

A lawyer shall not accept compensation for representing a client from one other than the client, unless

- (1) the client consents after consultation;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.

In addition, Rule 2.3(a) provides:

A lawyer may undertake an evaluation of a matter affecting a client for use of someone other than the client if:

1. The lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and
2. The client consents after consultation.

From your statement of facts, it is clear that the organization would be your client and not the potential donors who you would advise. In this context, the potential donors would likely be unrepresented persons. In that regard, Rule 4.3 provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

A Comment to Rule 4.3 states, "During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel." The ABA/BNA *Lawyers' Manual on Professional Conduct* further states, "The lawyer has an obligation to make clear in any discussion with unrepresented persons the exact nature of the lawyer's role and his interest in the matter under discussion." ABA/BNA Manual § 71:501.

Based upon the above, it is the opinion of the Committee that you are not precluded from the employment you are considering. However, it is fraught with peril. You must disclose to the potential donors that you represent the organization and not the potential donors. You must not state or imply that your advice is disinterested. Finally, you should advise the potential donors that they should seek the advice of their counsel in making final decisions.

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State Bar of South Dakota