

BOYCE, MURPHY, McDOWELL & GREENFIELD

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Of Counsel
John R. McDowell

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

May 18, 1994

Re: Request for Ethics Opinion 94-11

Dear

You have requested an opinion from this Committee based upon the following facts:

FACTS

In late summer of 1991, you represented the Seller of a business. The sale was by a contract for deed with an independent escrow agent. After the sale was consummated, the Seller's left South Dakota. Subsequent to the Seller's leaving South Dakota, the selected escrow agent declined to act and another escrow agent had to be located. The escrow agent initially selected returned the escrow fee to you and you deposited these funds in your trust account.

After considerable searching, in April of 1992, an escrow agent acceptable to all parties was located and the escrow fees were paid out of the funds in your trust account, which payment was in accordance with the parties' agreement. The second escrow agent was less expensive than the first, and you ended up with a trust account balance of \$175.

Throughout that time, you were in contact with your clients. In August of 1992, you sent your clients a letter, regular mail, explaining that you had the \$175 in your trust account, explaining your bill that had been incurred in resolving the escrow agent problem, asking for authorization to apply the trust account funds against your bill and asking that your clients pay you the balance of your statement. You received no response to that letter, either written or telephonic, and the letter was not returned by the post office.

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In July of 1993, you again raised this subject with your clients by certified mail, return receipt requested, and the letter was returned, marked "MLNA". You understand that this means "moved, left no forwarding address".

Based upon these facts you have asked this Committee whether or not you may simply apply the \$175 in your trust account against your clients' statement that is still due and owing. If not, you want to know what further efforts you need to make to find your clients. Finally, you want to know if you are still unsuccessful in locating your clients after your efforts what should you do with the money in your trust account.

OPINION

It is the opinion of this Committee that you may not simply apply the funds in your trust account against your clients' statement that is still due and owing. See, Ethics Opinion 93-11; Rule 1.15. Under SDCL 16-18-21 you would have an attorney's lien on the funds held in trust. You must, however, comply with the attorney's lien statutes and you cannot simply apply the funds in your trust account without doing so.

With respect to what further efforts you need to make to find your clients perhaps you should check with the current escrow agent who may have a better address for your clients so that you can notify them. Beyond that, this Committee does not know what else you can do to find your clients.

In the event that you do not find your clients and do not elect to foreclose on your attorney's lien, the funds of your client held in your trust account must remain in your trust account subject to the provisions and the applicability of the Unclaimed Property Act of SDCL 43-41B et seq.

Sincerely,

BOYCE, MURPHY, MCDOWELL & GREENFIELD

Michael S. McKnight, Chairman
Ethics Committee