

# 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  
Tamara A. Wilka  
Roger A. Sudbeck

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)

July 20, 1994

Re: Request for Ethics Opinion 94-3

Dear

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

## FACTS

You are involved in a lawsuit in which depositions of the plaintiffs were recently taken. During those depositions, information came forward that suggests the possibility that fraud was committed by the plaintiffs during a bankruptcy proceeding several years ago. You do not intend to bring this matter into the present lawsuit. However, as an indirect result, it is possible that a fraud conviction, if such would occur, could become a piece of evidence in a subsequent trial.

Based upon these facts you have asked this Committee whether there is any impropriety in you providing this information to the U.S. Trustee's office and any safeguards or procedure that this Committee would suggest as to avoid any ethical transgression.

## OPINION

It is the opinion of this Committee that there is nothing improper under the South Dakota Rules of Professional Conduct with reporting this potential fraud. It is further the opinion of this Committee that there is no obligation under the South Dakota Rules of Professional Conduct for you to report this potential fraud. Any obligation which you believe exists to report this fraud exists outside of the Rules of Professional Conduct and must be found in substantive law. Whether or not such obligation exists under substantive law is a question which this Committee has no jurisdiction to determine or opine.

July 20, 1994  
Page 2

The South Dakota Rules of Professional Conduct do not prohibit a lawyer from using the possibility of presenting criminal charges against the opposing party in a private civil matter to gain relief for a client, provided that the criminal matter is related to the client's civil claim, the lawyer has a well-founded belief that both the civil claim and the criminal charges are warranted by the law and the facts, and the lawyer does not attempt to exert or suggest improper influence over the criminal process. See, ABA Formal Opinion No. 92-363.

Finally, it should be mentioned that the South Dakota Supreme Court has adopted the Restatement (Second) Torts § 682 (1977) which defines abuse of process as follows:

"One who uses a legal process whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process."

Miessner v. All Dakota Ins. Assoc., 94 SDO 267 (S.D. 1994).

It should be noted that Committee member Larry Von Wald did not participate in this request due to a relationship with the party requesting the opinion.

Sincerely,

Michael S. McKnight, Chairman  
Ethics Committee