

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)

February 10, 1994

RE: Ethics Opinion 94-2

Dear

You have requested an opinion from this Committee concerning the following facts.

FACTS

You are in the process of hiring a recent law school graduate as an associate under an employment contract. You propose to include the following language in the employment contract:

Section Eight

Payments After Termination of Employment

It is agreed that Employee is receiving substantial and valuable benefits of the contacts to be made in [certain specified counties] in South Dakota through introduction by Employer to the members of the various communities. Therefore, in the event of the termination of this agreement and the termination of the employment of Employee by Employer, and, in the event Employee retains an office for the purposes of law in either of [certain specified counties] in South Dakota, then, in that event, Employee agrees to pay Employer for consideration of all of the contacts Employer has promoted Employee to make and to sustain, a sum which shall equal one-third of Employee's gross billings for legal fees performed by Employee during each of the first three years following termination of this employment. It is understood and agreed that in the event Employee does not continue to maintain an office and practice law in any of the above referenced 4 counties, then, the valuable contacts Employee has developed

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which were promoted and attributed directly to Employer, shall be inapplicable and valueless and Employee shall not then be required to make any such payment to Employer.

You have requested an opinion from this Committee as to whether or not the above-quoted language violates any provisions of the South Dakota Rules of Professional Conduct.

OPINION

It is the opinion of this Committee that the above-quoted language violates Rule 5.6(a). Rule 5.6(a) provides as follows:

A lawyer shall not participate in offering or making:

- (a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement;

It is the opinion of this Committee that the above-quoted contractual provision restricts the rights of a lawyer to practice after termination of the relationship and violates Rule 5.6(a).

Further, the above-quoted contractual language is in essence an arrangement for the division of fees under certain circumstances. As such, the proposed contractual language would violate the provisions of Rule 1.5(e)(1). See also, SDCL 53-9-11.

Thank you.

Sincerely,

BOYCE, MURPHY, MCDOWELL & GREENFIELD

Michael S. McKnight, Chairman
Ethics Committee