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J.W. Boyce (1884-1915)
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February 10, 1994

COPY

Re: Request for Ethics Opinion 94-1

Dear

You have requested an opinion from the Ethics Committee concerning the following facts:

Attorney is a part-time state's attorney in South Dakota. In March of 1992, two vehicles were involved in an accident. The drivers of each vehicle were minors and each driver received citations which were referred to the court probation officer for informal adjustment.

Vehicle one was owned by that driver's parents. Vehicle two was owned by the parents of one of the passengers in vehicle two. There were two additional passengers in vehicle two who were severely injured in the accident. These two passengers and their parents have been negotiating a settlement with the insurance company relating to damages they incurred in the accident. The focus of the negotiation has been on the issue of damages and not on issues relating to liability. The two injured passengers and their parents have requested attorney's assistance.

Based upon this factual scenario, you have asked this Committee whether or not the attorney may represent the clients in their settlement and possible suit relating to this matter.

OPINION

In responding to your request, this Committee has assumed that the part-time state's attorney referred to was the state's attorney who primarily dealt with the two drivers' citations and has information concerning the two drivers' citations that was obtained in his capacity as part-time state's attorney. Assuming that to be true, it is the opinion of this Committee that the attorney may not represent the two passengers in their settlement and/or suit against the drivers. Rule 1.11(b) provides:

Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

- (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- (2) written notice is promptly given to the adverse party to enable that person to ascertain compliance with the provisions of this rule.

Rule 1.11(e) defines "confidential government information" as follows:

As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

It is the opinion of this Committee that based upon the facts recited above, the attorney has obtained confidential government information about the minor drivers of the two vehicles acquired when the attorney was acting as a part-time state's attorney and may not represent a private client in a matter adverse to those two minor drivers because the information would be used to the material disadvantage of the two minor drivers.

Further, the South Dakota Supreme Court's decision in State v. Basham, 170 N.W.2d 238 (S.D. 1969) and SDCL 7-16-18 and 7-16-19.1 would also appear to prohibit attorney's representation of the two injured passengers in this matter.

Thank you.

Sincerely,

BOYCE, MURPHY, MCDOWELL & GREENFIELD

Michael S. McKnight, Chairman
Ethics Committee