

# DONALD E. COVEY

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RE: Ethics Opinion 91-22

Dear

You request the advisory opinion of the Ethics Committee. I summarize your factual situation as follows:

## FACTS

A lawyer outside of your firm asked you to consider acting as an expert witness in a case against an insurance company "X" for bad faith. Before any factual discussion took place, you discussed your past relationship with insurance company X as an expert witness in their behalf and also as attorney for a subsidiary division of insurance company X. Because of this past relationship with insurance company X, you perceived it as an uncomfortable situation for you to appear adversely to that company and the conversation was closed. Again, you learned no facts or allegations extant in the requesting lawyer's case.

Sometime later, another attorney contacted you and asked you to look at a file for insurance company X on a bad faith claim arising out of a jury verdict in excess of policy limits. The second attorney delivered a file to you for your review. In that review you learned that insurance company Y was making the claim against insurance company X as insurance company Y had paid the excess verdict.

One of the partners in your firm was defending one of insurance company's Y's insureds in a wholly separate and distinct lawsuit. Prior to the time that you received or reviewed the insurance company's X file for the second requesting lawyer, your partner asked you to assume responsibility for the insurance company Y's insureds matter.

Currently, insurance company Y personnel have contacted you complaining about your appearance as an expert witness on behalf of insurance company X in the bad faith claim.

At no time have you represented insurance company Y or insurance company X, however, in this one instance, you are currently representing an insured of insurance company Y.

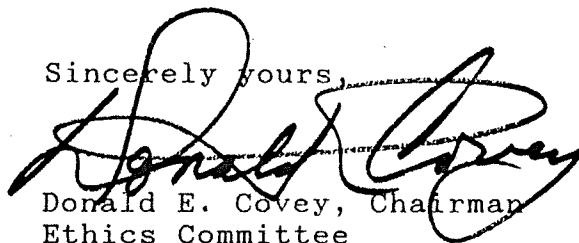
OPINION

It is the advisory opinion of the Ethics Committee that you have no ethical constraint prohibiting you from acting as an expert witness on behalf of insurance company X in the action brought by insurance company Y. Insurance company Y is not your client in the current action you are defending, rather, the insured is your client. On Rules 1.7(b) and 1.6 are of guidance in this particular situation. This is especially true where you learned no confidential information about insurance company X or insurance company Y during the initial conversation with the first lawyer.

As is often the case, no Rule precisely fits the issue, if that were true, we would not need advisory opinions. In this instance, the preamble to the South Dakota Rules of Professional Conduct SDCL 16-18, Appx., page 27 of the 1991 Supplement it is provided "The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgement guided by the basic principle underlying the Rules."

In summary, it is the advisory opinion of the Ethics Committee that there is no ethical problem raised by your circumstances.

Sincerely yours,



Donald E. Covey, Chairman  
Ethics Committee