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Ernest W. Stephens, Retired

Jerry L. Wattier

March 5, 1987

Re: Ethics Opinion 87-1

Dear

We write this in response to your recent inquiry to the Ethics Committee. The question propounded by you was as follows:

"You were employed by the administrator of an estate to conduct a probate thereof. Upon finally receiving information from the Administrator to complete an accounting, you learned that the Administrator had used some of the estate money for her own purposes. You advised the Administrator of the exact amount and that it should be immediately replaced, but to date you are unaware that the shortage has been replaced.

You have been paid for your services in the estate and costs of administration have already been paid. It appears quite likely that the estate will be insolvent, particularly in light of the monies used by the Administrator herself. You have had inquiries from both the heirs and from some of the creditors as to the status of the estate.

Your specific inquiry is whether or not you are obligated to advise the heirs or creditors of the shortage. Additionally, you inquire as to whether the bonding company should be advised of the shortage, and inasmuch as the shortage has not been replaced, you would like to notify the Administrator that you are withdrawing as attorney. You have prepared an accounting and served it upon the parties entitled to notice, so they have themselves learned that the Administrator has used some of the monies for her own purposes. You write and inquire as to whether your conduct has been appropriate."

The first issue is whether the Administrator for the estate is the client, or whether the beneficiaries and/or creditors are your clients. While 12 to Model Rule 1.7 would indicate that counsel should resolve those matters at the time of employment, the South Dakota statutes involved and the Code of Professional

Responsibility, while providing guidance, do not clearly answer the question as to whom your responsibilities must be directed. See, e.g. In Re Engebretson's Estate, 1 NW2d 351 (SD 1941). The majority of the committee felt that counsel employed by the Administrator, but paid with funds from the estate, has a duty to both. In general, counsel can serve both as their interests are not conflicting. However, in instances of misconduct on the part of the Administrator, counsel has obligations to the Administrator and the estate.

We believe you properly distributed the accounting which provided notice to the heirs and other appropriate parties regarding the shortage of funds in the estate. Separate notice does not appear necessary nor warranted since the proper way, required by law, to account for funds is through the submission of an accounting. Hence, we believe your conduct in that regard is appropriate.

As an additional factor in the protection of the estate, the bonding company should receive notification.

Based upon the above, it is also our opinion that as counsel for the estate you have an obligation to two groups, whose interests may now be in conflict. When that occurs it is our opinion that counsel must safeguard to the maximum extent possible, the interests of each, and withdraw from the proceeding. EC 5-17, 5-18 and 5-19.

Very truly yours,

Robert C. Riter, Jr.

Robert C. Riter, Jr., Chairman
Ethics Committee