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Of Counsel
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J.W. Boyce (1884-1915)
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November 22, 1994

Re: Request for Ethics Opinion 94-18

COPY
You have requested an opinion from this Committee based upon the following facts.

FACTS

You have represented a client in a lawsuit for more than a year. The plaintiff's counsel made application to the court and withdrew as counsel. Thereafter, an attorney who lives in another town and practices in another town, but who is in partnership with yourself in the ownership of the office building in which your office is located, advised you that he was going to take the plaintiff's case. As one of the owners of the building, the attorney involved has a key to your office building and would have access to your office. This attorney uses the library in your building and has access to all of the rest of the office. You do not share cases in any way with this attorney and are only partners with this attorney in the ownership of the building.

You made a full disclosure of these facts to your client and your client has objected and feels there is a conflict of interest. You have asked this Committee to review these facts and advise you if, in fact, there is a conflict under the South Dakota Rules of Professional Conduct.

OPINION

It is the opinion of this Committee that this situation poses no conflict under the South Dakota Rules of Professional Conduct. Based upon the facts set forth above, it does not appear to this

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Committee that the relationship between you and this attorney meets the definition of a "firm" under Rule 1.10. The comment to Rule 1.10 specifically notes that "two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm". You and this attorney do not share office space nor does it appear as though you consult or assist one another. The comment goes on to provide that if two practitioners present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for the purposes of the Rules. In this case, it does not appear as though you have any professional association with this attorney other than as partners in a partnership owning the office building in which you happen to have your office. It does not appear as though you and this attorney hold yourselves out to the public as a firm or conduct yourselves as a firm in any way. The comment to Rule 1.10 also notes that it is important to the analysis to determine if the lawyers have mutual access to confidential information concerning the clients they serve. In your case, however, the access this attorney would have to your files does not arise because of any professional relationship with the attorney but only by reason of this attorney's ownership interest in the building. This Committee does not see any conflict of any interest within the meaning of any of the applicable Rules of Professional Conduct.

It should be noted that under Rule 1.15 a lawyer has an obligation to safeguard a client's property. It would be advisable for you to take some practical steps to assure your client that the client's confidences will be maintained. You would certainly have better knowledge of the physical layout of your office than this Committee but perhaps such things as locking files, doors, etc. might be considered. It might also be reasonable for you and this attorney to consider amending any written agreement that may exist between you concerning the ownership of the building so that this written agreement expressly includes a provision acknowledging that this attorney shall not have access to any of your client files, etc.

Thank you.

Sincerely,

Michael S. McKnight, Chairman
Ethics Committee