

# DONALD E. COVEY

Lawyer

Telephone  
605-842-2601

409 Main Street • P.O. Box 1766  
Winner, SD 57580

June 10, 1991

RE: Ethics Opinion 91-14  
Rule 5.4(a) and (b) and (c)

Dear

## FACTS

You received a letter from \_\_\_\_\_ seeking a working relationship in estate planning, estate tax minimization and probate avoidance work. The offer suggests by way of example but not by way of direct solicitation the payment of a "commission arising out of the relationship". The solicitor (not in the sense of the English legal practice), has all of the contacts with the client. He completes a "personal and financial organizer for a living trust" which is then forwarded to the lawyer or law firm for the preparation of the documents. The solicitor makes the statement that the lawyer or law firm works for him and not the clients.

The offer is couched in the terms of looking for a lawyer to become involved in this relationship for twenty-five to one hundred or more "written living trusts".

## OPINION

Rule 5.4(a) provides: "A lawyer or law firm shall not share legal fees with a non-lawyer[.]" There are three exceptions to this Rule: For the payment of money to a deceased lawyer's estate or heir; the fees earned by a deceased lawyer prior to his death may be paid to his estate for unfinished business; and the compensation or retirement plan may include non-lawyer employees even though the plan is based in whole or in part upon a profit sharing arrangement.

Rule 5.4(b) provides: "A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consists of the practice of law."

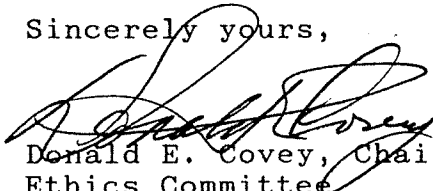
Rule 5.4(c) provides: "A lawyer shall not permit a person who recommends, employees, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such a legal services".

From these facts, it is the opinion of the Committee that the proffered "relationship" is a direct violation of Rule 5.4(a). It is further arguable that the proffered relationship constitutes the appearance of a partnership which is flatly prohibited by Rule 5.4(b). Finally, Rule 5.4(c) appears to be vulnerable if not violated by the suggested relationship in that the independence of the lawyer's judgment is or appears to be subject to compromise.

Further, Rule 1.7(b) prohibits the representation of a client if the lawyer's responsibilities to another client or to a third person materially limits that representation or if the lawyer's own interests interfere unless the lawyer has a reasonable basis for belief that the representation will not be adversely affected and the client consents after full and complete consultation which includes an explanation of advantages and risks. Again, it appears that this Rule cannot be served in the proffered relationship.

Finally, Rule 1.8(f) clearly prohibits a lawyer receiving compensation from a third party unless the client consents after consultation; there is no interference with the lawyer's independent professional judgment or interference with the lawyer/client relationship; and, all information received by the lawyer relating to the representation of the client is governed by the confidentiality guarantees of Rule 1.6. In this instance, it does not appear that this Rule is satisfied either and therefore the proffered relationship is in further violation.

Sincerely yours,



Donald E. Covey, Chairman  
Ethics Committee

\*Editor's Note:

The investment firm whose agent's proposal prompted the foregoing ethics opinion has apologized to the State Bar and the lawyers who received the solicitation and reprimanded the agent. In fairness to the investment firm, the agent acted unilaterally and in violation of firm policies. The firm was provided with a copy of this ethics opinion and is in total agreement with it. TCB