



HONORING FINANCIAL OBLIGATIONS

BY KENNETH L. JORGENSEN

Most would agree that the payment of debts is necessary for social order.¹ While the vast majority of lawyer financial obligations are honored, the profession's standards also recognize that lawyers may refuse to honor financial or other legal obligations "upon a good faith belief that no valid obligation exists."² So when, if ever, should a lawyer's failure to honor financial obligations serve as a basis for professional discipline?

Take, for example, a recent ethics complaint filed by a court reporter alleging a lawyer's failure to pay for court reporting services despite the fact that a judgment, which was no longer appealable, had been obtained against the lawyer. Even though he had opted not to appear in court to contest the court reporter's claim, the lawyer claimed he disputed the amount of the court reporter's bill. In responding to this complaint, the lawyer stated:

Each and every one of the [court reporter's] allegations is correct. However, it is my understanding, upon review of the Rules of Professional Conduct, including specifically Rule 8.4, that disputing a debt is not professional misconduct. The facts of this case are not in dispute (other than I continue to dispute the validity of the [court reporter's] bill). If my understanding of the Rules is incorrect, I assume that you or the board will soon advise me of the error of my ways. I must state, however, that it will be a shock to be advised that the Rules require payment of every bill that comes my way, regardless of its validity.

While some might find the lawyer's response disingenuous, it is hardly atypical. Over the past several years, at least three other attorneys have presented nearly identical arguments to the Minnesota Supreme Court under similar circumstances.³ One lawyer refused to pay a judgment obtained by a law library due to his belief he had been overcharged.⁴ Another refused to pay a malpractice judgment because he "did not believe that he

lawyers are not restrained from legitimately disputing their financial obligations

had committed malpractice."⁵ The third acknowledged his indebtedness to the judgment creditor for copy supplies but claimed his refusal to pay voluntarily was not improper because his creditor should be "required to resort to remedies such as garnishment or execution."⁶

In each case, the Court rejected the lawyers' claims that they were insulated from discipline by their "good faith belief" that they had no valid obligation to pay their debts. The flaw in these three lawyers' arguments was that the debts had been reduced to a final judgment. In its most recent decision, the Court erased any doubt about the efficacy of these arguments when it unequivocally declared that "a lawyer cannot assert, in good faith, that no 'valid' obligation exists once a debt is reduced to judgment and the lawyer's legal challenges have been exhausted."⁷ Without expressly stating it, the Court applied an objective rather than a subjective standard to determine whether the lawyers possessed a good faith belief that no valid obligation existed.⁸ The application of an objective standard is evidenced by the Court's blanket rejection of the lawyers' arguments about why they believed their debts were invalid and its pronouncement that "the rules of professional conduct do not recognize 'good faith beliefs' in the face of final judgments."⁹ In all three cases, the Court found that refusal to pay final judgments was prejudicial to the administration of justice in violation of Rule 8.4(d). According to the Court, the prejudice results from behavior that "reflects adversely on [the lawyer's] commitment to the rights of others."¹⁰ Curiously absent from the Court's decisions, however, is the idea that the judicial system may also suf-

fer from the public's perception that lawyers themselves are not compelled to honor or comply with final decisions of the courts before which they practice.

Clearly lawyers can be disciplined for failure to satisfy final judgments. But, as the lawyer above contended, do the profession's standards in fact require payment of every bill, regardless of its validity? The answer is that while not every unpaid debt invokes professional scrutiny, new and different financial obligations have become cause for professional concern.

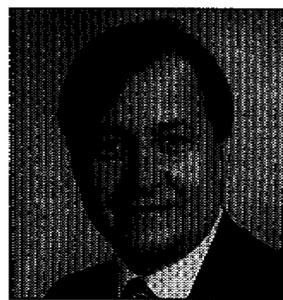
PROFESSIONAL INDEBTEDNESS

In 1974 the Lawyers Board adopted a formal opinion governing professionally incurred indebtedness. The impetus for the opinion was numerous complaints about lawyers failing to pay for services rendered by doctors, engineers, accountants, and other professionals in legal cases. Opinion No. 7 (as amended October 26, 1979) provided:

It is professional misconduct for an attorney to deny responsibility for the payment of compensation for services rendered by doctors, engineers, accountants, or other attorneys or other persons, if the attorney has ordered or requested the services without informing the provider of the service, by express written statement at the time of the order or request, that he will not be responsible for payment.

Within seven years, complaints alleging Opinion No. 7 violations accounted for 5 percent of the disciplinary caseload. After concluding that this constituted a dispro-

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PROFESSIONAL RESPONSIBILITY

portionate use of disciplinary resources, in 1981 the board began limiting enforcement of Opinion No. 7 to cases involving "aggravating circumstances." Examples of aggravating circumstances included failure to pay judgments, lawyers with chronic failure to pay indebtedness problems, and other situations involving demonstrably fraudulent conduct. In January 1983 the Board repealed Opinion No. 7 but announced that disciplinary action would continue to be pursued in cases involving these aggravating circumstances.¹¹

Since 1983 the Director's Office has limited its investigation of complaints by most creditors to those complaints involving aggravating circumstances. Becoming involved in legitimate disputes between creditors and lawyers as debtors constitutes an imprudent use of limited resources. Consequently, the vast majority of complaints from lawyers' creditors today are dismissed on the basis that the Director's Office is without the resources to become a specialized collection agency for lawyers. In 1996 alone, 34 complaints from lawyer creditors were summarily dismissed without investigation.

The aggravating circumstances giving rise to today's investigations have not changed dramatically. Failure to pay judgments obviously constitutes the most recurring scenario warranting investigation. Other aggravating circumstances which have invoked the *demonstrably fraudulent* standard include lawyers who continue to incur liability for professionally incurred services without any reasonable expectation of being able to pay, failure to pay a court reporter after obtaining funds from the client to pay the court reporter, and failure to pay an expert after the expert's fee had been taxed as a cost and recovered from the adverse party.

OTHER FINANCIAL OBLIGATIONS

Lawyers need to be aware that exposure to discipline is not limited to nonpayment of traditional creditors. Other forms of financial obligations can similarly give rise to discipline. For example, Rule 30, Rules on Lawyers Professional Responsibility, mandates the administrative suspension of law licenses for those who fail to comply with child support and maintenance obligations. Rule 30 follows the statutory scheme enacted by the Legislature to suspend other professional licenses for nonpayment of child support and maintenance.¹² In addition, lawyers who fail to pay employer withholding taxes¹³ or who continue to practice after being suspended for failing to pay their annual attorney registration fee¹⁴ can face

PROFESSIONAL RESPONSIBILITY

disciplinary suspension. Discipline can also result from failing to pay binding fee arbitration awards,¹⁵ failing to honor a letter of protection to a client's creditor,¹⁶ improperly disbursing funds in accordance with an escrow agreement,¹⁷ and failing to repay loans obtained from clients.¹⁸

Like other members of society, lawyers are not restrained from legitimately disputing their financial obligations. Nor should they be. Where the scrutiny of lawyers differs, however, is when the legitimacy or objectivity of the dispute is called into question. For these types of violations, the "empty head — pure heart" defense does not appear viable. Moreover, while not every unpaid lawyer debt is cause for professional review, increasingly lawyers must be on the lookout for those financial obligations which are capable of transforming themselves into professional obligations. □

NOTES

1. *The French Philosopher Simone Weil in On Bankruptcy (1937) opined that payment of debts was necessary for social order. He also took the position that nonpayment of*

debts was equally necessary for social order.

2. Comment to Rule 8.4, *Minnesota Rules of Professional Conduct*.

3. *In re Stanbury*, 1997 WL 152220

(Minn. 1997); *In re Ruffenach*, 486 N.W.2d 387 (Minn. 1992); *In re Pokorny*,

453 N.W.2d 345 (Minn. 1990). See also *In re Haugen*, 543 N.W.2d 372 (Minn. 1996).

4. *Stanbury*, 1997 WL 152220.

5. *Ruffenach*, 486 N.W.2d 387.

6. *Pokorny*, 453 N.W.2d 345.

7. *Stanbury* at p. 4.

8. This is not surprising given the Court's similar treatment of another attorney who made false statements about judges in violation of Rule 8.2 (a) but claimed he did so out of a genuine belief that his statements were true.

See *In re Graham*, 453 N.W.2d 313

(Minn. 1990). The Court found that

Graham's genuine feelings did not negate the violation of Rule 8.2(a) because an objective standard, rather than a subjective standard, should be applied in lawyer discipline cases.

9. *Stanbury* at p. 4 and *Ruffenach* at 390, fn. 3.

10. *Stanbury* at p. 3. This analysis is similar to that used to find that bar applicants are

lacking in good moral character when there exists evidence of substantial financial irresponsibility. See e.g. *In re Admission of Gahan*, 279 N.W.2d 82 (Minn. 1979).

11. See Hoover, "Opinion No. 7 Repealed," *Bench & Bar* 40:3 (March 1983) at p. 35.

12. See Marcia Johnson, "Discipline for Failure to Pay Child Support," *Bench & Bar* 53:8 (September 1996), p. 12.

13. *In re Gurstel*, 540 N.W.2d 838, 842 (Minn. 1995).

14. *In re Lallier*, 555 N.W.2d 903 (Minn. 1996).

15. *In re Hartke*, 529 N.W.2d 678, 683 (Minn. 1995). See also *Opinion No. 5 of the Lawyers Board*.

16. See Marcia Johnson, "Summary of Admonitions," *Bench & Bar* 50:2 (February 1993), p. 11.

17. See Marcia Johnson, "Summary of Admonitions," *Bench & Bar* 51:2 (February 1994), p. 12.

18. *In re Wyant*, 533 N.W.2d 397 (Minn. 1995). Moreover, simply borrowing money from clients can by itself be a basis for discipline. See Rule 1.8 (a).



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