

Ethics And The Board: The Court Draws The Line

By

Edward J. Cleary, Director

Minnesota Office of Lawyers Professional Responsibility

Reprinted from *Bench & Bar of Minnesota* (May/June 2001)

Several months ago, the Minnesota Supreme Court issued an opinion that appears to have far-reaching implications for the regulation of the profession. In the case that led to the opinion, this office issued an admonition (for isolated and nonserious misconduct, the least serious form of discipline available) to an attorney for allowing a nonlawyer in his firm to withhold a deposition transcript from a client unless and until the client reimbursed the firm for the transcript expense. Not egregious misconduct, to be certain, but the failure to return the deposition to the client did appear to be in violation of a Lawyers Board opinion and perhaps a rule provision as well. The district ethics committee recommended that the attorney be privately admonished and this office agreed. The Court reversed the admonition and in doing so made it clear that Lawyers Board opinions are limited in their authority. [Ftn 1](#)

BEGINNINGS

Almost three decades ago, shortly after the Lawyers Professional Responsibility Board and this office were formed in 1971, the board issued its first opinion noting that "from time to time" advisory opinions would be issued by the board on matters "deemed important." Rule 4(c) of the Rules on Lawyers Professional Responsibility constituted the authority for the issuance of said opinions providing that "the Board . . . may, from time to time, issue opinions on questions of professional conduct." In 1984, the Court held, in a case involving professional misconduct, that a lawyer's refusal to honor a fee arbitration award "violated Opinion 5." [Ftn 2](#) The Court also specifically noted that such a refusal to honor an arbitration agreement after agreeing to arbitrate was professional misconduct. Consequently, language was added to Opinion 1 to notify the bar that, although the opinions (by 1984, 12 opinions had been issued, one had been repealed) had been described earlier as "advisory," now, "failure to comply with the standards set forth in these opinions" could subject a lawyer to discipline.

In the ensuing 17 years, violations of board opinions were treated as similar to rule violations, although the vast majority of the underlying transgressions involved violations of rule provisions as well as opinion violations. However, in some instances, the opinion violated did not directly correlate to a rule provision; in such cases this office issued private discipline for the opinion violation. It is this almost two decade old practice that the Court has ended, and not unreasonably.

While the board, unlike many disciplinary organizations in other states, has seldom issued opinions in recent years (two have been considered in the almost four years that I have been director, one has been adopted), and only does so after a great deal of thought, debate, and, usually, after soliciting comment from the bar, the Court is quite correct in noting that board opinions are "neither drafted nor approved" by the Court and that "only the Court has authority to adopt rules of professional conduct." Since 1984, the board and this office were under the mistaken impression that an implicit delegation of authority had occurred, allowing the board to issue and enforce opinions that expanded and clarified existing prohibitions. As an example, Opinion 19 was adopted in 1999 in an attempt to protect confidences, under Rule 1.6, in a

technological age. The Court has now made clear that such a delegation did not and "cannot occur" and that the 18 opinions currently in existence are advisory in nature only.

THE INSTANT CASE

As noted, the infraction in the instant case was not serious, resulting in the issuance of the lowest form of discipline available, and that discipline was dismissed by the Court. In a footnote in the decision, the Court noted that two previous directors of this office disagreed over an interpretation of 1.16(d) as to whether a lawyer is allowed to withhold a deposition transcript from a client until she or the firm is reimbursed for the transcript expense. The bar should be aware, however, that both previous directors agreed on the general principle that "if there is insufficient time for the client to obtain this transcript without suffering prejudice" the deposition should be released.^{Ftn 3} Although violations of neither Opinion 11 nor Opinion 13 standing alone can now lead to professional discipline, violations of 1.16(d) can and do.

There will continue to be instances where the language of 1.16(d) addressing the "papers and property to which the client is entitled" will be interpreted to mandate the release of discovery that remains unpaid. The situation is even more compelling in the criminal law arena. A case that led to an admonition several years ago shows why. In that case, a criminal defense lawyer agreed to represent a defendant on serious felony charges. While waiting for the sizable retainer to be paid, the attorney took the initiative and hired an investigator who recorded a statement from a witness that was exculpatory in nature. When the entire retainer was not produced, the attorney withdrew from representing the defendant. In returning the file to defendant's new counsel, the attorney refused to give the defendant the tape until he was paid for his out-of-pocket expense. When I first reviewed that case, I understood immediately how the lawyer felt and my initial reaction would have been the same as his. Upon reflection, however, I agreed with the Opinion 13 language mandating release of a "witness statement," particularly where time is of the essence, as in a case of this nature. Further, an exculpatory statement on tape is considerably different than a civil deposition transcript. While on the one hand, both involve out-of-pocket expense, the tape is more crucial (and presumably not available elsewhere) for the defendant whose freedom is at stake while the clock is running. An admonition was issued for violation of Opinion 13 and Rule 1.16(d) and it was accepted by the attorney.

It is arguable that the best practice in either of these situations is to either obtain a cost retainer in advance or to accept that you are assuming a business risk. Holding the discovery hostage is a poor third choice, as attractive at times as it may be. If there is no other way to obtain the information and if the client will suffer prejudice, the attorney should release the discovery and either seek reimbursement from the client civilly or consider it a lesson well-learned.

THE FUTURE

While the Court has made it clear that the opinions issued by the board cannot be the sole basis for professional discipline, opinions will continue to be cited when a predicate rule provision exists and is violated. In most cases the opinions correlate with rule provisions, although in a few instances, the opinions stand alone. As it regards those opinions, the board and this office will in the future decide if and when a rule petition should be filed with the Court requesting the Court to consider whether it is proper and permissible to make provision in the existing rules for amendments to cover the spirit, if not always the language, of the now nonbinding opinions. When and if that happens, the bar will have a chance to be heard, and, as the Court has noted, any such proposal will be subject to comment, public hearing, and the

Court's deliberative process. The Lawyers Professional Responsibility Board never intended to exceed the limit of its authority; the members of the board and this office are, and always have been, cognizant of the fact that the authority to regulate and discipline attorneys rests finally with the Court. The long-time incorrect assumption regarding delegation of that authority has now been corrected. Nevertheless, the hard work and dedication of past and current board members who have contributed their time and expertise to the adoption of these opinions should not be overlooked. These opinions were intended to serve as (and remain as) an effort to protect the public and help the members of our profession understand their obligations. Even those opinions that do not correlate to a rule provision, remain, at the very least, the best practice.

NOTES

¹ In re Admonition Issued in Panel File No. 99-42, C6-00-623, ___ NW2d ___ (Minn. 2001) (filed 1/25/01).

² In re Pearson, 352 N.W.2d 415, 418 (Minn. 1984).

³ While, as the Court notes, the 1983 Director "opined that DR 2-110(A)(2) did not entitle a client to deposition transcripts," in the same article he conditioned this position by noting that the client could be entitled to it under this provision if there was "insufficient time for the client to obtain the transcript without suffering prejudice." See Hoover, "What is a Client Entitled to Receive Upon Conclusion of the Representation?" Bench & Bar (November 1983), 34. The 1989 director went farther and opined that clients were entitled to all file contents, including paid deposition transcripts. See Wernz, "Opinion 13: Copying Costs . . ." Bench & Bar (August 1989), 11.