

**OPINION NO. 7 REPEALED BY THE
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD**

By
Michael J. Hoover, Director
Minnesota Office of Lawyers Professional Responsibility

Reprinted from *Bench & Bar of Minnesota* (March 1983)

At its January 7, 1983 meeting, the Lawyers Professional Responsibility Board repealed Opinion No. 7. The Board has requested that I inform the bench and bar of the Board's rationale for its decision.

LEGAL BASIS FOR OPINION NO. 7

Opinion No. 7, adopted June 26, 1974, and 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, 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.

Opinion No. 7 was a response to numerous complaints from service providers that attorneys would order services without explicitly stating that the provider should look only to the client for payment. Later, when billed for the services, the attorneys would disclaim liability.

Opinion No. 7 is grounded both in the Code of Professional Responsibility and in case law. Disciplinary Rule 1-102(A)(4) provides that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Disciplinary Rule 1-102(A)(5) provides that a lawyer shall not engage in conduct that is prejudicial to the administration of justice. These Code provisions have been the basis for disciplining lawyers who have used deceitful or fraudulent means to avoid their financial obligations. *Cf.* DR 7-101(A)(1), (2), (7).

The Nevada Supreme Court has held that an attorney ordering reporting services in connection with litigation is to be treated as a principal and is liable, severally and jointly with his or her client, to pay for such services, in the absence of an express disclaimer of such liability. *Molezzo Reporters v. Patt*, 94 Nev. 540, 579, P.2d 1243 (1978); *accord, Burt v. Gahan*, 351 Mass. 340, 220 N.E.2d 817 (1966). Both cases state that there is no hardship in the holding as it would be a simple matter for the attorney to exclude him or herself from liability by a statement to that effect to the court reporter. Opinion No. 7 likewise recognized this available option and required that there be an explicit written disclaimer at the time the services are ordered.

I have previously emphasized that we shun the role of collection agency for the creditors of lawyers. Nevertheless, Opinion No. 7 represented a legitimate involvement of the disciplinary agency in lawyers' financial dealings. The debts covered by Opinion No. 7 are business debts incurred by the attorney in the course of his or her law practice. Failure of an attorney to honor such obligations reflects badly, not only

upon him or her, but on the profession as a whole. The argument that court reporters, doctors and others dealing with lawyers should know that it is the client, not the attorney, who is liable for payment, may have fleeting appeal, but it does not represent reality. In most cases, providers of professional services rely upon the credit and the standing of the lawyer in rendering services without advance payment. Providers who would be required to look to clients, with whom they have never dealt and who are often in serious financial difficulties which have required the retention of a lawyer, would no doubt require advance payment before the services are rendered.

Opinion No. 7 never required a lawyer to be responsible for payment of professionally related services. It merely recognized that realities of the commercial world demanded that lawyers who did not desire to be responsible so advise the provider at the time the services were requested.

ENFORCEMENT OF OPINION NO. 7

After Opinion No. 7 was promulgated by the Board, disciplinary files were routinely opened when complaints alleging non-payment of professional indebtedness were received. Because of its clear terms, Opinion No. 7 was enforced even in cases of isolated violations. Usually isolated violations were disposed of with private warnings or admonitions. Chronic violators received private reprimands or in egregious cases, public discipline by the Minnesota Supreme Court.

By 1981 an increasing amount of disciplinary resources were devoted to Opinion No. 7 matters. By that time, complaints alleging violations of Opinion No. 7 had increased to five percent of the total disciplinary case load. At the same time, a substantial backlog in processing disciplinary matters had developed both at the district committee level and in the Director's office.

In mid-1981, after consultation with the Board, we determined that enforcement of Opinion No. 7 would be confined to cases involving aggravated circumstances. These included cases where a judgment had been obtained against a lawyer and had not been honored, and instance of chronic violations, large sums of money, or demonstrably fraudulent conduct by the lawyer. Complaints alleging isolated violations of Opinion No. 7, but not alleging any of the aggravated circumstances mentioned above, were summarily dismissed without disciplinary action as an exercise of prosecutorial discretion by the Director.

The Director's office, like other prosecutorial agencies, must make decisions about the proper allocation of prosecutorial resources. Given the enormous demands upon our office in 1981, our decision to give low priority to the enforcement of Opinion No. 7 was appropriate. We also considered that unlike a number of other ethics violations, the complainants had available to them civil remedies and were, in many cases, economically and otherwise in a stronger position to protect themselves than consumer complainants who had been harmed by their attorney's misconduct. Nevertheless, our decision not to enforce Opinion No. 7 in cases of isolated violations placed us in the apparent posture of refusing to enforce a formal opinion of the Board. Explaining this apparent inconsistency, even if the explanations are clothed in prosecutorial discretion, is difficult, and itself, time-consuming. The Board's January, 1983 action was intended to eliminate the apparent discrepancy between policy and enforcement.

THE RATIONALE FOR OPINION NO. 7 STILL STANDS

The repeal of Opinion No. 7 is not a declaration by the Board that the expression of ethical standards which it represented was erroneous. In short, it is not now suddenly ethical for attorneys to order professional services and then disclaim liability only at the time the bill is rendered. Ethical lawyers will

still follow Opinion No. 7 and expressly disclaim liability in writing at the time the services are requested.

Similarly, the repeal of Opinion No. 7 is not an announcement by the Board that the Director and the Board will no longer be interested in this area. The repeal merely permits the Director to exercise discretion to decline action in cases of isolated violations. Disciplinary action will be pursued in cases where there are chronic complaints against lawyers in this area or where other aggravated circumstances, such as failure to honor judgments, large amounts of money, or other fraudulent conduct are involved. Although the repeal of Opinion No. 7 precludes us from relying upon it as a basis for disciplinary action, the Code of Professional Responsibility, including the sections cited above, provides ample grounds for reaching the aggravated situations which are still of interest to the disciplinary agency.

The Board was very insistent that I inform the profession that it expects attorneys to continue to abide by the practices outlined in Opinion No. 7 and that in the aggravated circumstances described above, it will entertain disciplinary actions brought by the Director. From my perspective, I have no reason to believe that the repeal of Opinion No. 7 will result in any significant change in practice by the vast majority of lawyers who have always taken their financial obligations seriously. Lest there be any misunderstanding by the few who do not, however, the repeal of Opinion No. 7 is not intended as a relaxation of professional standards or as condonation of financial and professional irresponsibility.