

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD OPINIONS

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Rule 4(c), Rules on Lawyers Professional Responsibility, authorizes the Lawyers Professional Responsibility Board to “issue opinions on questions of professional conduct.” Since 1972, the board has issued 13 opinions, the latest of these having been adopted in June 1989. Twelve of those opinions remain in effect. Opinion No. 7 was repealed in January 1983.

In December 1987, at the recommendation of its Rules Committee, the board approved amendments to six different opinions. With the exception of amendments to Opinion No. 10, the 1987 amendments were relatively minor and consisted of citation changes necessitated by the adoption of the Minnesota Rules of Professional Conduct. An Opinion Committee, formed by the board early in 1989, recommended additional amendments to Opinion No. 9 which were adopted by the board in September of this year.

Shortly after the 1987 amendments were approved, the Minnesota Supreme Court denied a petition of the Minnesota State Bar Association to amend the comment to Rule 2.2, Minnesota Rules of Professional Conduct, on the basis “that unless specifically adopted by this court, any comments to the rules are those of the committee or organization submitting them in conjunction with a proposed rule or amendment. *“In the Matter of the Petition of the Minnesota State Bar Association, a Corporation, with Regard to the Minnesota Code of Professional Responsibility*, No. C8-84-1650 (Minn. Sup. Ct., Jan. 29, 1988). Although the board and the Director’s office continue to use the comments to analyze and interpret the rules, the Court’s order leaves the status of the comments to the rules somewhat in doubt.

All 12 board opinions currently in effect, including the amendments, are set forth below in their entirety. The board’s Opinion Committee is continuing to consider other issues with the aim of recommending further opinions for adoption.

OPINION NO. 1

The Legal Force and Effect of Opinions Issued by the State Board of Professional Responsibility

It is the policy of the State Board of Professional Responsibility to issue, from time to time, advisory opinions as to the professional conduct of lawyers, whether as a result of a specific request or its own initiative, on matters deemed important by the board.

The board considers these opinions to be guidelines for the conduct of lawyers in the state of Minnesota. Failure to comply with the standards set forth in these opinions may subject the lawyer to discipline. *See, e.g., In Re Pearson*, 352 N.W.2d 415 (Minn. 1984).

Opinions issued by the board will be subject to change from time to time as deemed necessary by the board, or as required by decisions of the Minnesota Supreme Court.

Adopted: October 27, 1972

Amended: December 4, 1987

OPINION NO. 2

Defense of Criminal Cases by a County Attorney

It is improper for a county attorney of one county to accept the defense of a criminal case in another county of the state. Nevertheless, this rule would be outweighed in any case where the accused would be deprived of competent counsel or put to an unreasonable burden of expense by the application of this rule. In this event, the county attorney to be retained, as soon as practicable after he is asked to represent the accused, shall petition a judge of the court before which the matter is to be tried for permission to represent the accused. Upon a proper showing of good cause, the judge may issue an order approving defense of the case by the petitioner. If the court decides that the facts of the situation do not justify granting this exception, the attorney involved shall then withdraw from the case. In any event, defense counsel who is also a county attorney shall scrupulously refrain from any reference to his position as a county attorney in the course of all proceedings.

Adopted: October 27, 1972

OPINION NO. 3

It is improper for a part-time judge, or his partners or associates, to practice law in the court on which the part-time judge serves, or in any court of record subject to the appellate jurisdiction of the court on which the part-time judge serves.

Adopted: November 20, 1972

OPINION NO. 4

It is professional misconduct for a lawyer, having accepted a fee to represent a client, to refuse to proceed with the client's matter until any remaining fee is paid in full unless the client has failed to honor an agreement or obligation to the lawyer as to expenses or fees. If the attorney raises the client's failure to honor a fee agreement as a defense for his failure to proceed, the agreement must be established by clear and convincing evidence or be in writing, signed by the attorney and the client.

It is professional misconduct for a lawyer to withdraw from representation in a proceeding before any tribunal without first giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and obtaining permission to withdraw from the tribunal where required. *See* Rule 1.16, Minnesota Rules of Professional Conduct, concerning a lawyer's obligations upon the termination of representation.

Adopted: October 12, 1973

Amended: December 4, 1987

OPINION NO. 5

It is professional misconduct for an attorney who has signed an agreement to arbitrate a fee dispute to refuse to honor and carry out the final decision reached in such proceedings. *See In Re Pearson*, 552 N.W.2d 415 (Minn. 1984).

Adopted: April 19, 1974

Amended: December 4, 1987

OPINION NO. 6

Defense of Criminal Cases by Municipal Attorneys

It is improper for a city or municipal attorney to accept the defense of a criminal case arising within the limits of the city or municipality which he serves. It is not improper for a city or municipal attorney to accept the defense of criminal cases in other areas provided he is not required to challenge the validity of a state statute which he would otherwise be required to support while acting in his capacity as a prosecutor, and provided there is no other actual conflict of interest. If such a challenge or conflict arises, he should withdraw from the case.

In any event, defense counsel who is also a city or municipal attorney shall scrupulously refrain from any reference to his position as a city or municipal attorney in the course of all proceedings.

Adopted: June 26, 1974

OPINION NO. 7

Repealed: January 7, 1983

OPINION NO. 8

Attorneys' Guidelines for Law Office Services by Nonlawyers

Except to the extent permitted by the Supreme Court of the state of Minnesota, (*e.g.*, Student Practice Rules) neither law students nor any other person not duly admitted to the practice of law shall be named on pleadings under any identification.

Legal assistants, or other paralegal employees, may be listed on professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices, so long as the paralegals are clearly identified as such, and so long as no false, fraudulent, misleading, or deceptive statements or claims are made concerning said paralegals, their legal status and authority, or their relationships to the firms by which they are employed. Paralegals may use business cards so identifying themselves, which cards carry the law firm's name and address.

Such a paralegal, so identified, may sign correspondence on behalf of the law firm, provided he or she does so by direction of an attorney-employer.

Nonlawyers must be supervised by an attorney who is responsible for their work. If the attorney-supervisor permits violations of these guidelines, he shall be guilty of professional misconduct. *See also* Rule 5.3 and comment, Minnesota Rules of Professional Conduct.

Adopted: June 26, 1974

Amended: June 18, 1980 and December 4, 1987

OPINION NO. 9

Maintenance of Books and Records

To establish compliance with the applicable provisions of the Minnesota Rules of Professional Conduct relating to funds and property held in a fiduciary capacity, every attorney engaged in the private

practice of law, or partnerships or professional corporations of which the attorney is a member, associate or employee, should maintain the books and records described below. Equivalent books and records demonstrating the same information in an easily accessible manner and in substantially the same detail would be acceptable. Books and records may be prepared manually, by machine or by computer.

The following books and records should be maintained for funds and property received and disbursed other than in a fiduciary capacity:

1. A cash receipts journal reflecting monies received on his own account such as fees received and other nonfiduciary receipts. The receipts journal should identify the source of the receipt and show the date of the receipt. Receipts should be deposited intact and the duplicate deposit slip should be sufficiently detailed to identify each item.
2. A cash disbursements journal reflecting all monies disbursed on his own account.
3. A record in the form of a fees book or file of copies of billing invoices reflecting all fees charged and other billing to clients.
4. Bank statements, canceled checks, and duplicate deposit slips.
5. A periodic reconciliation of the cash balance derived from the cash receipt and disbursements journal totals, the checkbook balance and the bank statements balance.

The following books and records should be maintained for funds and property received and disbursed in a fiduciary capacity for clients or others:

1. An identification of all trust accounts maintained, including the name of the bank or other depository, account number, account name, dates account is open, agreement with bank establishing account and its interest-bearing nature. A record should also be maintained showing clearly the type of each such account as pooled, with net interest paid to the Lawyers Trust Account Board (IOLTA accounts) [Rule 1.15(d), Minnesota Rules of Professional Conduct (MRPC)], or pooled with allocation of interest [Rule 1.15(e)(2), MRPC], or individual, including the client name [Rule 1.15(e)(1), MRPC].
2. A cash receipts journal (separate from the nonfiduciary funds journal) listing the sources of the receipt and the date of the receipt. Receipts should be deposited intact and the duplicate deposit slip should be sufficiently detailed to identify each item.
3. A disbursements journal listing the date of the disbursement and payee. All disbursements should be made by check.
4. A subsidiary ledger containing a separate page for each person or company for whom monies have been received in trust showing the date of receipt and the amount, monthly accruals of interest, if any, the date and amount of each disbursement, including disbursements from accrued interest for costs of establishing and administering the account and any unexpended balance. For IOLTA accounts established pursuant to Rule 1.15(d), MRPC, interest accruals and transaction costs need not be entered in ledgers or in monthly trial balances if such accruals and costs are completed by the depository and net interest paid by the depository to the Lawyers Trust Account Board.
5. A monthly trial balance of the subsidiary ledger showing the name of the client and the

balance of the client's account at the end of each month.

a) For pooled trust accounts that pay the net interest to the Lawyers Trust Account Board (IOLTA accounts), the subsidiary ledger trial balance, cash balance and checkbook register balance should all reconcile with the adjusted monthly bank statement balance computed by taking the month-end bank statement balance, adding (1) monthly service charge and (2) outstanding deposits and deducting (1) interest accrued and (2) outstanding checks. Sample trial balances and reconciliations are available from the Director's Office.

b) For pooled trust accounts that allocate interest to each client, the total of the monthly trial balance should reconcile with the control figure computed by taking the beginning balance, adding (1) the total monies received in trust for the month and (2) the interest accrued for the month and deducting (1) the total of monies disbursed for the month and (2) the costs paid for establishing and administering the account. Sample trial balances from reconciliations are available from the Director's office.

6. A monthly reconciliation of the cash balance derived from the cash receipts and cash disbursements journal totals, the checkbook balance, the bank statement balance, and the subsidiary ledger trial balance total.

7. Bank statements, canceled checks, duplicate deposit slips, and bank reports showing trust account interest accrued, transaction costs and net amounts paid to the Lawyers Trust Account Board.

8. A record showing all property, specifically identified, other than cash, held in trust from time to time for clients or others, provided that routine files, documents and items such as real estate abstracts which are not expected to be held indefinitely need not be so recorded but should be documented in the files of the lawyer as to receipt and redelivery.

Adopted: September 10, 1976

Amended: June 22, 1977, June 23, 1983, December 4, 1987 and September 15, 1989

OPINION NO. 10

Debt Collection Procedures

In order to prevent the possibility of misleading the public regarding its dealings with attorneys, it is imperative that the activities of attorneys be separate from – and be perceived by the public to be separate from – the activities of debt collection agencies. The blurring of the distinction between the actions of a lawyer seeking to collect on a claim for a client and the actions of a debt collection agency seeking to collect an account for a creditor may lead to abuses of debtors and adversely reflect upon the legal profession.

To prevent the possibility of (a) misleading the public, or (b) abusing debtors, violations of the following guidelines by attorneys in connection with debt collection work may constitute grounds for discipline:

1. If an attorney is engaged both in the practice of law and in the debt collection agency business:
 - a) The attorney shall not identify himself/herself as a lawyer in, or on, any building office

sign, building tenants' directory, office sign or door sign of the debt collection agency.

b) The attorney shall not have, or use, the same telephone number as that used by a debt collection agency.

c) The attorney may perform legal services for the debt collection agency but in doing so shall use separate letterhead and shall not utilize the debt collection agency letterhead.

d) All advertising or solicitation for business by the debt collection agency which identifies the attorney as a lawyer shall be subject to Rules 7.1 through 7.5, Minnesota Rules of Professional Conduct (MRPC).

2. If an attorney represents or performs legal work for a debt collection agency:

a) the attorney shall not have, or use, the same telephone number as that used by a debt collection agency.

b) The attorney shall not use the same office address as that used by a debt collection agency.

c) The attorney shall not use the same letterhead as that used by the collection agency.

3. If an attorney is employed by a debt collection agency as in-house counsel:

a) The attorney may use the same telephone number used by the debt collection agency.

b) The attorney may use the same office address used by the debt collection agency.

c) The attorney may use the same letterhead used by the debt collection agency, provided however, that all communications on agency letterhead which includes the attorney's name and/or title of in-house counsel, general counsel, or counsel for the debt collection agency shall be subject to the requirements set forth in paragraphs 4 through 9 of this opinion.

4. An attorney who represents, or performs legal work for, a debt collection agency shall exercise reasonable care to insure that confidences and secrets of the attorneys' clients are not disclosed by employees of the debt collection agency to any person not authorized by the client to receive such information. Rule 1.6(c), MRPC.

5. An attorney who represents, or performs legal work for, a debt collection agency shall be responsible for all acts of the attorney's own lay employees, and the attorney may not permit, expressly, by implication or by nonaction, lay employees to engage in conduct which, if engaged in by an attorney, would be in violation of the Rules of Professional Conduct. Rule 8.4(a), Rule 5.3, and Rule 5.5(b), MRPC.

6. Form letters, pleadings, or other legal documents shall be signed by an attorney who represents or performs legal work for a debt collection agency in the completed form in which they are to be sent, served or delivered.

7. Except for purposes of effecting service of legal process according to law, no attorney shall

permit any correspondence, pleadings, garnishment summonses, executions, releases, or other documents which bear his or her signature (or a facsimile thereof) to be used, or mailed, by persons who are not in the exclusive employ of the attorney's law office.

8. An attorney who represents, or performs legal work for, a debt collection agency shall not deliver to, or otherwise make available to, lay persons who are not in the exclusive employ of the attorney's law office:

- a) Rubber stamp signatures;
- b) Reproduced signatures;
- c) Mechanized signatures;
- d) Other facsimile signatures of the attorney;
- e) Lawyer's stationery; or

f) In the case of in-house counsel, debt collection agency letterhead bearing the attorney's name and/or title; for purposes of allowing use of the same on demand letters, original pleadings, or on any other documents used in debt collection. Rule 8.4(d); Rule 5.5(b), MRPC.

9. An attorney shall not aid, abet or assist any debt collection agency in the violation of the provisions of Minnesota Statutes §332.37, prescribing prohibited practices of debt collection agencies. Similarly, an attorney shall not aid, abet or assist a debt collection agency in the violation of any other state or federal laws, rules or regulations governing debt collection agency practices.

Adopted: June 22, 1977

Amended: December 4, 1987

OPINION NO. 11

Attorney's Liens

It is professional misconduct for an attorney to assert a retaining lien on the files and papers of a client. This prohibition applies to all retaining liens, whether they be statutory, common law, contractual, or otherwise.

Adopted: October 26, 1979

OPINION NO. 12

Trust Account Signatories

Every lawyer engaged in the private practice of law shall by appropriate direction provide that every check, draft, or other withdrawal instrument drawn against a law firm trust account, or other similar or separate account maintained by a lawyer or law firm for the deposit of client funds and property, shall be signed by at least one lawyer associated with the lawyer or law firm.

Every lawyer engaged in the private practice of law shall by appropriate direction provide that no withdrawal from a law firm trust account or other similar separate account maintained for the deposit of client funds and property shall be made except at the direction of at least one lawyer associated with the

lawyer or law firm.

Adopted: May 6, 1983

OPINION NO. 13

Copying Costs of Client Files, Papers and Property

Client files, papers and property, whether printed or electronically stored, shall include:

1. All papers and property provided by the client to the lawyer.
2. All pleadings, motions, discovery, memorandums, and other litigation materials which have been executed and served or filed regardless of whether the client has paid the lawyer for drafting and serving and/or filing the document(s).
3. All correspondence regardless of whether the client has paid the lawyer for drafting or sending the correspondence.
4. All items for which the lawyer has advanced costs and expenses regardless of whether the client has reimbursed the lawyer for the costs and expenses including depositions, expert opinions and statements, business records, witness statements, and other materials which may have evidentiary value.

Client files, papers and property, whether printed or electronically stored, shall not include:

1. Pleadings, discovery, motion papers, memoranda and correspondence which have been drafted, but not sent or served if the client has not paid for legal services in drafting or creating the documents.
2. In nonlitigation settings, client files, papers and property shall not include drafted but unexecuted estate plans, title opinions, articles of incorporation, contracts, partnership agreements, or any other unexecuted document which does not otherwise have legal effect, where the client has not paid the lawyer for the services in drafting the document(s).

A lawyer who has withdrawn from representation or has been discharged from representation, may charge a former client for the costs of copying or electronically retrieving the client's files, papers and property only if the client has, prior to termination of the lawyer's services, agreed in writing to such a charge. Such copying charges must be reasonable. Copying charges which substantially exceed the charges of a commercial copy service are normally unreasonable.

A lawyer may not condition the return of client files, papers and property on payment of copying costs. Nor may the lawyer condition return of client files, papers or property upon payment of the lawyer's fee. *See* Opinion No. 11 of the Lawyers Professional Responsibility Board.

A lawyer may withhold documents not constituting client files, papers and property until the outstanding fee is paid unless the client's interests will be substantially prejudiced without the documents. Such circumstances shall include, but not necessarily be limited to, expiration of a statute of limitations or some other litigation-imposed deadline. A lawyer who withholds documents not constituting client files, papers or property for nonpayment of fees may not assert a claim against the client for the fees incurred in preparing or creating the withheld document(s).

Adopted: June 15, 1989