

## Lawyers Board Repeals Four Opinions

by  
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At its Oct. 25, 2002, meeting, the Lawyers Professional Responsibility Board repealed four of its 17 remaining formal opinions. The opinions were repealed as part of the Board's ongoing review of its opinions in light of the Supreme Court's decision in *In re Panel File No. 99-42*, 621 N.W.2d 240 (Minn. 2001). In that decision, the high court held that a lawyer could not be disciplined solely for violating a Lawyers Board Opinion. The Lawyers Board process for the ongoing review of its opinions is discussed in more detail in the November 2002 issue of *Bench & Bar*. (See Bateman, "Opinions of the Lawyers Board," 59 *Bench & Bar* 10 at p. 6.)

The four opinions recently repealed are:

- Opinion No. 3 concerning part-time judges,
- Opinion No. 4, which addresses withdrawal for nonpayment of fees,
- Opinion No. 10 governing debt collection procedures, and
- Opinion No. 16 relating to interest and late charges on attorney fees.

### **Opinion No. 3**

Opinion No. 3 was adopted in 1972 and prohibited part-time judges from practicing law in the court in which the part-time judge serves. The opinion also extended the disqualification to the part-time judge's law partners and associates.

Over the past decade, amendments to the Code of Judicial Conduct codified and clarified the application of the part-time judge disqualification. See e.g., Section C of the Application of the Code of Judicial Conduct and its related comment.

In addition, Rule 1.10 of the Rules of Professional Conduct delineates the types of conflicts that are imputed to other members of a law firm. With the evolution of substantive ethics rules that more comprehensively address the issue, Opinion No. 3 became obsolete, thus necessitating its repeal.

### **Opinion No. 4**

Adopted in 1973, Opinion No. 4 addressed a lawyer's withdrawal from representation for nonpayment of fees. The opinion contained *res ipsa loquitur* or switching burden of proof provision that placed higher burden of proof upon lawyers who failed to enter into written fee agreements with clients. Specifically, the opinion required lawyers without written fee agreements to justify their withdrawal for nonpayment of fees by proving the client's noncompliance with the oral fee arrangement by a standard of clear and convincing evidence.

The switching burden of proof provision, although laudable for its encouragement to use written fee agreements, has little, if any basis in the Rules of Professional Conduct. Without a sufficient nexus to the substantive ethics rules, this requirement appeared to be a regulation that went beyond that authorized by the Supreme Court, especially in light of the *Panel File No. 99-42* decision.

### **Opinion No. 10**

The comprehensive set of guidelines contained in Opinion No. 10 was intended to keep a clear demarcation between the activities of law firm and nonlawyer debt collection agencies. The opinion was premised upon the notion that blurring the distinction between law firms and collection agencies could lead to abuse of debtors and adversely reflect upon the legal profession.

Since the opinion was adopted in 1977, federal and state consumer protection laws, including most notably the Fair Debt Collection Practices Act (FDCPA), have encompassed and far exceeded the regulation of collection activities proscribed by the Lawyers Board opinion.

Within the past several years, federal court rulings have made it clear that the FDCPA applies not only to collection agencies, but also lawyers. Like Opinion No. 3, this opinion became obsolete due to the evolution of more comprehensive substantive law regulations.

### **Opinion No. 16**

Opinion No. 16 created a safe harbor from lawyer discipline prosecution for *de minimis* violations of Truth-in-Lending (TIL) violations associated with interest assessed by lawyers on past due legal fees.

In short, lawyers who charged 6 percent or less without disclosure in a written fee agreement, or 8 percent or less disclosed in a written fee agreement, were exempt from lawyer discipline for noncompliance with TIL disclosure requirements under the opinion. Attorneys who charged interest outside of the opinion's guidelines remained subject to lawyer discipline prosecution for TIL disclosure violations.

Opinion No. 16's connection to the Rules of Professional Conduct was the reasonable fee requirements of Rule 1.5(a). The opinion postulated that the fee charged was unreasonable if the interest

charged was usurious or in violation of TIL because required disclosures were not made. However, the opinion's safe harbor provision, which used the rate of interest charged to draw the line between de minimis and significant TIL violations, was based upon prosecutorial discretion standards and did not originate from any authority in the Rules of Professional Conduct.

The court's denouncement in *Panel File No. 99-42* of Lawyers Board opinions creating standards not found in the Rules of Professional Conduct led the repeal of the opinion.

The Lawyers Board is continuing to examine its formal opinions in conjunction with the ABA's Ethics 2000 proposed amendments to the Rules of Professional Conduct. The Board welcomes bar comment concerning its opinions. The opinions can be accessed on the Lawyers Board Web site at [www.courts.state.mn.us/lprb](http://www.courts.state.mn.us/lprb).

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