Opinions Of The Lawyers Board

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Beginning with the publication of Opinions 1 and 2 adopted October 27, 1972, the Lawyers Professional Responsibility Board issued a number of advisory opinions intended as guidelines for the conduct of lawyers in the state of Minnesota. The Board adopted the most recent of these opinions, Opinion 19, regarding the use of technology for communications, on January 22, 1999. (The full text of the Board opinions can be found online at *http://www.courts.state.mn.us/lprb/opinions.html*).

Decisions of the Supreme Court of Minnesota have cited various opinions as authority in the course of ordering discipline for a violation of the Minnesota Rules of Professional Conduct.Ftn 1 For this reason, Opinion 1 provides, in pertinent part, "failure to comply with the standards set forth in these opinions may subject the lawyer to discipline."

In January, 2001, the Minnesota Supreme Court decided *In re: Admonition issued in Panel File No. 99-42*, 621 N.W.2d 240 (Minn. 2001). In that case, the Minnesota Supreme Court held that an attorney is not subject to professional discipline solely for violating a Board opinion. The Court reversed an admonition issued for a violation of Opinion 13 concerning copying costs of client files, papers, and property.Ftn 2

Thereafter, in *In Re Westby*, 639 N.W.2d 358 (Minn. 2002), the Supreme Court reinforced its clear holding in *Panel File No. 99-42*, again stating that "an attorney cannot be disciplined simply on a violation of an opinion of the Lawyers Professional Responsibility Board."

Against this backdrop the Lawyers Professional Responsibility Board decided to undertake a comprehensive review of the Board's Opinions. A working group, originally chaired by (now the Hon.) Regina Chu and consisting of the Opinion Committee of the Board, other members of the Professional Responsibility Board, and Kenneth Jorgensen, first assistant director of the Office of Lawyers Professional Responsibility (hereinafter "the committee") met and discussed the various opinions still in force,Ftn 3 seeking consensus. That committee reported to the Lawyers Board and the Board now seeks input from the Bar.

POTENTIAL RULE AMENDMENTS

As an initial matter, the committee found that several of the opinions contain detailed directions which are important aids for practicing lawyers to understand their obligations under the Minnesota Rules of Professional Conduct, (hereinafter "MRPC"). These opinions primarily serve to provide safe harbors for attorneys and as enforcement tools. The committee believes that these opinions set out clear expectations that both attorneys and clients may rely on, but only if the expectations are enforceable. In light of the

Court's holding in *Panel No. 99-42*, the committee is contemplating whether the Board should petition the Court to have the directions and expectations contained in some of these opinions added to the Minnesota Rules of Professional Conduct.

Opinions 9, 12, and 15 give practicing attorneys clear direction as to the maintenance and operation of trust accounts. Opinion 9 contains direction concerning the required maintenance of books and records for such accounts. Opinion 12 deals with lawyer responsibility and accountability for disbursements from trust accounts. Opinion 15 addresses when retainers must be deposited into a trust account. Because clarity in terms of an attorney's obligations regarding trust accounts is not only important, but necessary, the committee is considering whether these opinions should be proposed as amendments to Rule 1.15 of the MRPC.

Opinions 11 and 13 deal with the return -- usually upon termination of an attorney/client relationship -- of clients' files and papers, as well as property. Given the holding of the Court in *Panel No. 99-42,* the enforcement of these opinions has been seriously impaired. These opinions, and especially Opinion 13, have been very useful and important in reducing needless ancillary disputes over client files between lawyers and clients. Because clarity of direction will assist both clients and members of the bar, the committee is considering incorporating these two opinions into a proposed amendment to Rule 1.16, MRPC.

Another opinion possibly warranting codification is Opinion No. 5 concerning the failure of an attorney to honor a fee arbitration award. The obligation would be codified into the MRPC, likely as an amendment to Rule 8.4. The committee determined that attorneys should be obligated to honor a truly final and enforceable arbitration decision once the process has been completed.

REPEAL OR MODIFICATION

In contrast to the above opinions, there were a number of opinions that the committee determined require repeal, or, at the very least, modification. The most obvious of these is the provision of the second paragraph of Opinion 1 stating that opinions can serve as a basis for discipline. That is obviously no longer accurate in light of the Supreme Court's holding in *Panel File No. 99-42*.

Repeal of Opinion 3 concerning practice by part-time judges is also being considered. Since Opinion 3 was adopted, the Board of Judicial Standards clarified the definition and disqualification of part-time judges. The imputed disqualification portion of Opinion 3 appears without a basis in the current imputed disqualification rule (MRPC, Rule 1.10).

Similarly, Opinion 4 is being considered for repeal. The second paragraph of the opinion is simply a recitation of Rule 1.16(c) and (d). The switch in the burden of proof contained in the first paragraph of this opinion seems without support in the MRPC.

Other opinions being considered for repeal are Opinion 10 concerning debt collection procedures and Opinion 16 regarding interest on fees. Opinion 10 appears to be duplicative of the Fair Debt Collection Practices Act. Opinion 16 deals with interest on fees. Most states simply require lawyers to comply with the Truth-in-Lending and state usury laws. In any event, the opinion's safe-harbor provision has no clear basis in the MRPC.

REMAINING OPINIONS

Opinion 14 concerning attorneys' liens on homesteads requires special discussion and consideration. The opinion was originally premised on a violation of Rule 3.1, MRPC, concerning frivolous claims by lawyers because attorneys' liens against homesteads could not be foreclosed against exempt homesteads. However, in 1999 the Minnesota Legislature limited the dollar amount of homestead exemptions to $200,000. Hence attorneys' liens against homesteads with equity exceeding that amount can now be foreclosed.

Further complicating the issue is the Minnesota Court of Appeals opinion in *Peterson v. Hinz*, 605 N.W.2d 414 (Minn. App. 2000). In dicta, the court said that the homestead exemption waiver is not valid unless signed by both husband and wife. While this is not the holding of the court, it seems to be the only reported pronouncement by a Minnesota state court on the subject. The Opinion Committee and the Lawyers Professional Responsibility Board expect to continue examining Opinion 14 with the above issues in mind.

Finally, there are several opinions that are primarily advisory in nature, and which may be left in effect. Opinions 2 and 6 concerning the defense of criminal cases by part-time city and county attorneys have been particularly useful in guiding lawyers who undertake part time municipal and county representation.

Opinion 8 is another primarily advisory opinion that finds clear support in Rules 7.1, 7.5, and 5.3 of the Minnesota Rules of Professional Conduct. Amendment of the opinion is being considered to clarify the basis for the guidelines and to clarify the application of the opinion to all "non-lawyer" employees. (*Cf*. Rule 5.3 MRPC).

Other opinions being considered for retention are Opinions 17 concerning court reporter gratuities and Opinion 19 concerning the use of email and cell phones. These opinions are rarely, if ever, used to discipline a lawyer, but were adopted in response to requests from the bar for ethical guidelines. Opinion 17 addresses the substantial premiums offered to law office employees by court-reporting services and the associated concern that clients were unwittingly underwriting the cost of these premiums. Given the very high fiduciary obligations owed by an attorney or a firm of attorneys to their clients set out in multiple places in the Minnesota Rules of Professional Conduct, the advisory nature of this opinion serves a valuable purpose.

The very high value that our profession places on confidential communications between an attorney and client served as the basis for the bar's request which resulted in Opinion 19 concerning the use of cell phones and email. The advisory, as opposed to enforcement nature of this opinion caused it to be recommended for retention.

CONCLUSION

The examination of these opinions is a process, still underway. The Board would be happy to have comments from practicing lawyers concerning the opinions, the above recommendations of the working committee, or other problems being encountered by attorneys in the course of their practice.

NOTES

[1] See e.g. In re: Pearson, *352 N.W.2d 415 (Minn. 1984)*.

[2] See *Cleary, Edward J. "Ethics and the Board: The Court Draws the Line,"* Bench & Bar of Minnesota,

(May/June 2001), p. 20.

[3] *Opinion No. 7 concerning professionally incurred indebtedness was repealed in 1983. Opinion No. 18 concerning tape recording by attorneys was repealed at the April, 2002, meeting of the Board.*