

REPORT . . . LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

By

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The Lawyers Professional Responsibility Board has traditionally limited its opinions to issues about which there have been recurring questions and which affect significant numbers of attorneys. Recently, the Board amended Opinion No. 7, originally issued in June, 1974, and issued a new Opinion No. 11.

Opinion No. 7 deals with indebtedness incurred for professional services on behalf of clients. As amended by the Board, it now provides:

“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 services, by express written statement at the time of the order or request, that he will not be responsible for payment.”

Opinion No. 7 was issued in response to the recurring complaints of professionals that attorneys ordered professional services and then denied liability on the ground that their clients or others were responsible for the bills. It gave clear guidance to attorneys as to the proper method of avoiding liability for professional services. At the same time, its title contains a clear limitation to services performed on behalf of clients. Ethics Committees and the Board were thus removed from the role of collection agency for the personal creditors of attorneys.

Because Opinion No. 7 originally listed “doctors, engineers, accountants, or other persons”, as beneficiaries of the rule, some argued that the omission of “attorneys” from the specific listing was significant. By adding “other attorneys” to Opinion No. 7, the amended Opinion clearly applies to situations in which an attorney obtains the services of another attorney to assist in a legal matter being handled for a client.

The New Opinion, Opinion No. 11, addresses the frequent and vexatious problem of retaining liens on the files and papers of clients. It provides as follows:

“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.”

The Legislature previously eliminated the statutory lien on client files and papers. Since the repeal of the statutory lien, some attorneys have ignored or have claimed to be unaware of the repeal. Others have attempted to substitute a contractual retaining lien on retainer agreements.

The purpose of Opinion No. 11 is to underscore the legislative abolition of the statutory retaining lien. It goes further, however, in holding that all retaining liens are impermissible.

The Board recognized the sound public policy reasons for the elimination of the retaining lien on client files and papers. The right of free selection of counsel should not be impeded by a rule which permits an attorney to hold the file and papers necessary to proceed with a pending action hostage to the payment of a fee. In some cases, termination of the attorney by the client is prompted by attorney inaction, incompetence, neglect or overcharging. Requiring the client to pay a disputed fee before he can obtain the file necessary to proceed with an action is unjust. Additionally, the retaining lien appears to be one of the significant sources of public contempt for the profession.

Opinion No. 11 has its roots in at least two disciplinary rules. DR 2-110(A)(2) provides, in part:

“In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including . . . delivering to the client all papers and property to which the client is entitled. . . .”

DR 9-102(B)(4) provides:

“(B) A lawyer shall:

- (4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.”

Opinion No. 11 now holds that failure to deliver the file is prejudicial to the client, in violation of DR 2-110(A), and the file is now held to be property in the possession of the lawyer which the client is entitled to received, under DR 9-102(B)(4).