

MASSACHUSETTS BAR ASSOCIATION COMMITTEE ON ADMINISTRATION OF JUSTICE

SUBCOMMITTEE ON ETHICS

Opinion No. 74-9

Summary of Opinion: It is unethical for a lawyer to incur obligations for a court reporter's services if he does not intend to pay for such services within a reasonable period of time. Such intent may be inferred from unexplained long delay in payment, unexplained repeated instances of nonpayment, or other circumstances.

Facts: The Executive Director of the Massachusetts Bar Association reports receiving a substantial number of complaints from court reporters about lawyers who have failed to pay for services rendered to them (and particularly from court reporters who have not been paid for deposition transcripts), and inquires as to whether such conduct should be referred to the Grievance Committee as possibly being unethical in character.

Discussion: Under Massachusetts law, a lawyer is obligated to pay for services rendered by a court reporter at his request, unless the lawyer and the court reporter have agreed that the court reporter will look only to the client or some other person for payment. Burt v. Gahan, 351 Mass. 340 (1966). Presumably the same rule would apply to other services rendered at the request of the lawyer, such as the services of a real estate appraiser, physician, or other expert witness.

Informal inquiry indicates that some lawyers apparently follow a practice of not paying court reporters for deposition transcripts until the particular case is brought to a conclusion, especially in contingent fee cases. We do not view such a practice as unethical if the court reporter agrees to it in advance of rendering his services and is assured of eventual payment regardless of the outcome of the case. (If payment to the court reporter were made wholly or partially contingent upon the outcome of the case, a serious problem of division of fees with a nonlawyer would be presented. See Disciplinary Rule DR 3-102 and our Opinion No. 73-2).

Disciplinary Rule DR 1-102(A)(4) provides that a lawyer shall not "Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." See also ABA Ethical Consideration EC 1-5 ("...he should refrain from all illegal and morally reprehensible conduct.")

When a lawyer requests and accepts the services of a court reporter, there is at least an implied understanding, in the absence of other express agreement between the lawyer and the reporter, that the lawyer will pay for such services within a reasonable time after they are rendered. If the lawyer requests and accepts such services with an actual intention not to pay for them within a reasonable time, he is guilty of conduct which fairly may be characterized as involving dishonesty, deceit, or misrepresentation.

We believe that the crucial consideration is the intention of the lawyer at the time when he incurs the obligation. In most instances such intention cannot be objectively determined and must be inferred from circumstances.

An original intention not to pay might reasonably be inferred from a lengthy and unexplained passage of time without payment in a particular instance, or from unexplained repeated instances of nonpayment or unreasonably delayed payment.

As a rule of thumb, we suggest that unexplained nonpayment of a specific bill for a period in excess of ninety days after demand might warrant inquiry by the Grievance Committee; but this is not meant to suggest that any lawyer consistently should delay in payment of his just professional obligations for such a period of time.

October 9, 1974