

You have presented a hypothetical situation in which a North Carolina attorney, who represented a plaintiff, employed an off-duty deputy sheriff to serve process on a defendant in a diversity action. In an attempt to serve additional papers on the defendant, the attorney discovered that the off-duty officer had been contacted by the defendant's attorney, a member of the Virginia Bar. The communication involved a payment of \$250 to the officer to refrain from effecting any further services upon the defendant in the officer's off-duty capacity.

You have asked the Committee to opine whether, under the facts of the inquiry, it is unethical for an attorney to pay monies to prevent service of papers on his client.

The appropriate and controlling disciplinary rules related to your inquiry are DR:1-102(A)(3) and DR:7-102(A)(1). Disciplinary Rule 1-102(A)(3) provides, in pertinent part, that a lawyer shall not commit a deliberately wrongful act that reflects adversely on the lawyer's fitness to practice law. In addition, DR:7-102(A)(1) provides, in pertinent part, that in his representation of a client, a lawyer shall not delay a trial or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

The Committee directs your attention to LE Op. 305 in which the Committee opined that a client liable for debt and avoiding service of process, when his whereabouts are known to the attorney, should be advised to either pay the debt or accept service of process if a valid defense exists. (See also, West Virginia State Bar Legal Ethics Opinion 85-3 (1985), ABA/BNA Law. Man. on Prof. Conduct, 801:9006 (A lawyer may not interfere with or delay the service of civil process. Following the custom or practice of bar members in a given locality is not a substitute for adherence to standards set forth in the Code.)

The Committee believes that by intentionally preventing service of process on a client, an attorney is interfering with the effectiveness of judicial procedure. Paying monies to a process server to refrain from effecting further services unduly delays trial proceedings and such action may provide an unfair advantage to one party. These actions are equivalent to making a client unavailable for litigation in derogation of the principle found in Ethical Consideration 7-24 [ EC:7-24].

Furthermore, the Commission believes that this conduct is in violation of DR:1-102(A)(3) in that it involves the commission of a deliberately wrongful act which adversely reflects on a lawyer's fitness to practice law. The Committee is of the opinion that, by paying a process server, an attorney is engaging in a practice designed to mislead others and attempting to manipulate the judicial process.

Although this conduct may not be expressly prohibited by the established rules of procedure, violation of which would be per se improper under DR:7-105(C)(5), it is not necessarily acceptable. The Virginia Supreme Court has held that "... [m]ore is expected of lawyers than mere compliance with the minimum requirements [of the Code of Professional Responsibility] ... conduct may be unethical ... even if it is not unlawful." *Gunter v. Virginia State Bar*, 238 Va. 617, 621 (1989).

It is the opinion of the Committee, therefore, that an attorney's payment of monies to prevent service of papers on his client constitutes a deliberately wrongful act that serves to delay and interfere with the judicial process.

Committee Opinion  
March 12, 1991