
E-83-11 Garnishment action to secure fees

Facts

An attorney represents Mr. S in the sale of his business and in a subsequent divorce. After the divorce, Mr. S moves out of Wisconsin without leaving a forwarding address, and without paying the attorney. The attorney reduces the \$500 outstanding fee balance to a judgment.

Mr. R, the purchaser of Mr. S's business, has been paying Mr. S \$515 per month in the following fashion, pursuant to arrangements made for Mr. S's convenience: \$400 per month to the clerk of courts for child support and \$115 per month to the attorney's trust account for disbursement to the former wife of Mr. S. The attorney understands that legally neither the funds paid to the clerk of courts nor the funds subject to specific directions for disbursement may be attached. *See* 7A C.J.S. sec. 332.

Question

May the attorney satisfy the judgment through a garnishment action against Mr. R?

Opinion

This opinion addresses only the ethical propriety of commencing a garnishment action to collect fees under the above circumstances. It will not address the likelihood of success or the legal issues surrounding the proposed garnishment action. The opinion is further based upon the assumption that the client has not discharged the lawyer, has not asserted improper conduct on the part of the lawyer, and has not asserted excessive fees or inability to pay the fees.

The Code of Professional Responsibilities provides that an attorney should be "zealous in his or her efforts to avoid controversies over fees and should attempt to resolve amicably any differences on the subject. He or she should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client." SCR 20.06(6)(g).

Therefore, assuming the client's failure to pay the fees constitutes a gross imposition or fraud, commencement of the garnishment action does not constitute a per se violation of the Code of Professional Responsibility.

"Gross imposition" has been described in ABA Informal Opinion 1461, and was found to be present when "the client is financially able but deliberately refuses to pay a fee that was clearly agreed upon and is due. . . ." However, that opinion, which addressed the ethical propriety of a lawyer enforcing his legal right under state law to impose a retaining lien, also cautioned that a lawyer must weigh his or her legal right to exercise a lien against the potential prejudice to a client's ability to defend against a criminal charge, or to similarly defend a personal liberty. The opinion states:

Similarly, if the court, other parties or the public interest would be adversely and seriously affected by the lien. The lawyer should be hesitant to invoke it. Financial inability of the client to pay the amount owing should also cause the lawyer to forego the lien because the failure to pay is not deliberate, and therefore does not constitute fraud or gross imposition by the client.

It is not apparent from these facts whether the husband's ability to pay support would be affected by the proposed action, nor is it apparent that the payments are essential to the recipient. It is not clear that Mr. R's installment payments do not exceed \$515, or for how long he must continue to make the payments. The facts do indicate that the payments of Mr. R to the court and to the former wife were not ordered by the court, but were structured by the attorney for his client's convenience.

Accordingly, the attorney may commence a garnishment action against Mr. R under these circumstances if the action will not render it impossible for the husband to continue payments to the wife and if the settlement and support payments are not depleted by the action, causing serious and adverse consequences to the wife.