

OPINION 17: WHO GETS THE TOASTER?

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It is the age of rebates; it is the time of perks and incentives. Companies need a gimmick. Even companies that sell services to lawyers. And the perks aren't just toasters these days. They start with coffee makers, Walkman radios, or tickets to the Guthrie and they progress in value of color TVs, compact disc players, and airline tickets, as well as hard cold cash.

Imagine the following scenario: a managing partner of a medium-sized law firm is called in to resolve a dispute between two secretaries that has quickly escalated. The dispute is this: who is the owner of a free vacation in the Caribbean, offered by a local court reporting firm in exchange for scheduling a certain number of depositions?

One secretary has been responsible for scheduling the depositions in a large piece of litigation at the firm. She has earned almost enough credit with the court reporting firm to qualify for the vacation trip, when she goes on maternity leave. She requests her replacement to continue to schedule the depositions with the same firm. The replacement secretary does so, but also takes the free tickets.

The lawyer is temporarily nonplused ...

Who is the rightful owner of the free vacation? Secretary 1, secretary 2, the lawyer who conducted the depositions, or the client, who is ultimately responsible for paying for the court reporting services?

The answer is, the client. But there are other questions that must be answered besides that of ownership. What are a lawyer's ethical obligations with respect to the acceptance by the lawyer, or a nonlawyer employee of the firm, of rebates, gratuities, or incentives for simply scheduling services for which the client is expected to pay?

The Lawyers Board adopted Opinion 17, "Accepting Gratuities from Court Reporting Services and Other Similar Services," at its June 18, 1993 meeting. The opinion, reprinted below, clarifies the Board's position with respect to a lawyer's ethical obligations regarding gratuities from service providers.

OPINION NO. 17

ACCEPTING GRATUITIES FROM COURT REPORTING SERVICES AND OTHER SIMILAR SERVICES

It is improper for a lawyer to accept, or to permit any nonlawyer employee to accept, a gratuity offered by a court reporting service or other service for which a client is expected to pay unless the client consents after consultation. However, a lawyer may accept nominal gifts, such as pens, coffee mugs, and

other similar advertising-type gifts without consent of the client.

See Rules 1.4, 1.5(a), 1.8(f) (1), and 5.3, Minnesota Rules of Professional Conduct (MRPC). *See also* definition of “consultation” in the MRPC terminology section.

The rationale of the opinion is self-evident. If a lawyer receives something of value, for ordering a service for which the client must pay, the lawyer is really receiving additional compensation to which he or she is not entitled, absent client consent. ABA Opinion 278 (undated) decided that “if a lawyer accepts a gratuity from anyone without his client’s knowledge and consent ... the gratuity really belongs to the client.”

The fact that it is not a lawyer, but a nonlawyer employee of the firm who may have received the benefit does not relieve the attorney of his or her professional obligations. While nonlawyers are not subject to professional discipline, the lawyer for whom they work is responsible for ensuring that their conduct is compatible with the professional obligations that apply to the lawyer. The lawyer may herself be guilty of a violation of the Rules of Professional Conduct if she knows of the conduct, ratifies it, or having direct supervisory responsibility over the nonlawyer and knowing of the conduct at a time when the conduct can be avoided or remedial measures can be taken, fails to do so.[Ftn 1](#)

Attorneys are not prohibited from accepting gifts and awards from court reporting firms, or other services for which a client is expected to pay, so long as the client is consulted and consents. What, then, does the client need to know about such gifts? “Consultation” is defined by the MRPC as “information reasonably sufficient to permit the client to appreciate the significance of the matter in question,” *e.g.* the nature of the gift or incentive, whether the services could be obtained for less money if the gifts or incentives were refused, and whether the cost of service is comparable to that charged by other providers of like services in the area that do not offer such a gratuity or incentive.

No client consent is necessary for those gifts that are truly nominal in value. But what is nominal? Calendars with the company logo? Sure. Popcorn? Well, it may not be an “advertising-type” gift, but surely there can be an exception for popcorn. Gift certificates to Dayton’s? Cash bonuses of up to \$100? Trips to the Bahamas? No. The safest course is to consult your client, if in doubt.

NOTES

¹ *See also* Lawyers Board Opinion No. 8: “Nonlawyers must be supervised by an attorney who is responsible for their work. If the attorney-supervisor permits violations of these guideline, she shall be guilty of professional misconduct.”