NEW YORK STATE BAR ASSOCIATION
Committee on Professional Ethics

Opinion #608 - 5/10/90 (17-89)

Overrules N. Y. State 400 (1975)

Topic: Attorney's use of collection agent for collection of legal fees

Digest: Only if all other reasonable efforts short of litigation have been undertaken and have been unsuccessful may an attorney employ the services of a collection agent to collect a legal fee

Code: EC 2-23; DR4-101(C)(4)

QUESTION

Are there circumstances wherein it is permissible for an attorney to use a collection agent to collect an unpaid legal fee?

OPINION

EC 2-23 of the Code of Professional Responsibility provides that a lawyer should (1) zealously avoid controversies with clients over legal fees, (2) attempt amicably to resolve differences with clients with respect to fees, and (3) not sue clients for fees unless necessary to prevent fraud or gross imposition by them. This inquiry assumes prior compliance with steps (1) and (2) and seeks a determination as to whether an attorney's employment of a collection agent to collect delinquent legal fees may properly follow them preliminary to the initiation of step (3).

In N. Y. State 400 (1975), we stated that the legal profession is a learned profession, not a mere money-getting trade, and that the use of a collection agency as a method for the recovery of attorneys' fees is inconsistent with the dignity and honor of the legal profession and, therefore, improper.

Fifteen years later, the employment of a collection agent continues to have the appearance primarily of a "money-getting" utilization of effort. It does not involve a determination of whether the indebtedness is "justly owed for professional services properly rendered." N Y State 591 (1988). It does not permit consideration of a client's ability to pay or the application of an attorney's sense of decency and propriety should the client be financially pressed. See NY State 87 (1968). And it does not normally contemplate negotiation, mediation or arbitration. See NY State 567 (1984). Clearly, therefore, the employment of a collection agent prior to the consideration and determination of such issues and the reasonable use of other means of collection short of suit would be improper.

The question remains, then, whether, after a consideration and determination of all such issues and the exhaustion of all such other reasonable efforts, an attorney may properly employ a collection agent in a final effort to collect a fee prior to suit. See N Y. State 567 (1984); NY. State 399 (1975); NY State 87 (1968).

Other jurisdictions have addressed this and related issues. Some have prohibited or severely restricted the use of third parties for the collection of legal fees. For example, W.Va. 80-1 (1981) recites that lawyers must not allow personal financial interests to dilute the zeal and loyalty owed to their clients and that the injection of collection agents, even where lawyers retain some general control over their agents, would present an unacceptably high possibility of injury to the attorney-client relationship. Me. 47 (1977) considers the use of collection agencies undesirable at best and in some circumstances potentially violative of disciplinary rules. Alaska 86-3 (1986) holds

that the referral of a client's delinquent status to a credit bureau (not a collection agent) would at best be an indirect method of collection but a direct effort publicly to impair a client's credit rating in violation of the aspirational avoidance of public conflict over legal fees. Accord, N. H. 1987-8/8 (1988).

On the other hand, Arizona, Florida, Illinois, Maryland, Missouri, North Carolina, Oregon, Utah, Virginia and the District of Columbia all permit the use of collection agents for the collection of attorneys' fees under specified conditions. For example, Mo. 47 (1977) states that collection agents must operate within legal limits and not attempt to engage in the unlawful practice of law in the collection of such accounts. Fla. 81-3 (1981) recites that as long as attorneys, themselves, make reasonable attempts to collect their fees and, having failed in that effort, are careful not to divulge details regarding the representation of their clients except to the extent necessary for the collection of the debts owed, the use of collection agencies is permissible. Va. 946 (1987) requires that attorneys carefully preserve their clients' confidences and avoid both fee controversies with them and the "splitting" of fees (without defining the term). Fla. 81-3 (1981) also imposes a duty upon attorneys to assure that collection agents, as "non-lawyer personnel," conform their services in all respects to the applicable provisions of that state's Code of Professional Responsibility. Iowa 83-21 (1983) requires that its attorneys' use of collection agents must first be disclosed to their former clients.

Ala. 86-126 (1987) permits attorneys to assign their claims for legal fees to third parties, including collection agents, provided the assignments are bona fide and attorneys retain no title to their claims, whether legal or equitable. Accord, Colo. 20-1961.

N. C. 7 (1986) recites that attorneys may utilize the services of collection agents to assist in collecting delinquent accounts as long as, (1) The fee arrangements out of which such accounts arise are lawful and permitted by the rules of professional conduct; (2) the attorneys, at the time of making such fee arrangements, did not believe and had no reason to believe that they were undertaking to represent clients who were unable to afford their services; (3) the legal services that give rise to the delinquencies have been completed; (4) there are no disputes about the existence, amount or delinquent status of such indebtednesses; and (5) attorneys do not believe, and have no reason to believe, that the agencies employed will utilize illegal means to collect their accounts. The payment of compensation to collection agents is even permitted on the basis of a percentage of amounts collected. This opinion reversed prior North Carolina rulings.

D.C. 60 (1979) permits the referral of delinquent legal fee accounts to collection agents provided that, among other things, in collecting accounts, the collection agents (1) do not furnish legal advice, (2) do not perform legal services or represent that they are competent to do so, (3) do not communicate with debtors in the name of attorneys or upon attorneys' stationery, (4) do not otherwise engage in the unlawful practice of law, (5) do not solicit or receive assignments of accounts for the purpose of suit, (6) do not utilize instruments resembling forms of judicial process or of notice pertaining to judicial proceedings or threaten the commencement of such proceedings, (7) do not intervene between creditors and attorneys in any manner that would control or exploit the services of attorneys, and (8) do not demand or obtain a share of the proper compensation for services performed by attorneys. Collection agents' compensation may be contingent upon their success and may be measured by a percentage of amounts collected.

Ill 632 (1978) permits the use of collection agencies after all amicable efforts to collect have failed, but warns that collection agencies occasionally resort to tactics that might create adverse impressions about lawyers in the community and, therefore, adjures termination of their services if their activities might erode the public's confidence in the legal profession.

Ga. 49 (1985) also permits the use of collection agencies for the collection of legal fees as a measure

of last resort after all other reasonable means have been attempted, including offers to arbitrate. The opinion recites that fees sought should be reasonable and that attorneys should consider each case individually. Where refusal to pay constitutes willful indifference, rather than inability or circumstances beyond the clients' control, and nonpayment constitutes fraud or gross imposition by clients, referral to reputable collection agencies is proper. Client confidences and secrets must be protected beyond what is necessary to effect collection, and so long as the fees sought to be collected have been earned without participation by agencies, no prohibited splitting of fees is involved.

See also Ariz. 120 (1963) and 82-2 (1982); Md. 82-24 (1981); Ore. 225 (1972); Utah 8 (1972)

The conditions involving the use of collection agents have changed substantially since the publication of NY State 400 (1975). The collection process has been subjected to increasing public scrutiny and government regulation over the years (e. g. the Fair Debt Collection Act, 15 U.S.C. §1692 et seq.) and the use of collection agents no longer appears to us to be inconsistent with the dignity and honor of legal professionals, provided that all other reasonable efforts short of litigation have first been exhausted, and provided also that appropriate measures to assure the collection agents' strict adherence to law and regulations and to the highest ethical standards in the process of collection are taken by the attorneys retaining them. We stress that referrals should be limited to responsible collection agents only, that attorneys are legally and ethically responsible at all times for the conduct of their agents in the collection process, and that their agents must adhere strictly to both the spirit and the letter of the law and the Code of Professional Responsibility and should not engage in the unlawful practice flaw. Fees referred to agents for collection should already be fully earned so as to avoid the pitfalls of fee splitting, and attorneys must at all times seek to avoid conditions that would tend to erode public confidence in the profession and must terminate the collection process should such a result appear likely to occur.

DR4-101(C)(4) permits lawyers to reveal client confidences and secrets that are necessary to establish or collect fees. The revelation of client confidences and secrets should be strictly limited to those necessary for such purposes and attorneys should make every reasonable effort to assure that their collection agents will also preserve those confidences and secrets that have been revealed except to the extent necessary to establish or collect such indebtednesses.

To the extent that this opinion is inconsistent with N.Y. State 400 (1975), it is overruled.

CONCLUSION

If all reasonable efforts short of litigation to collect a fee fully earned have been undertaken without success, and adherence to appropriate standards of professionalism is enforced, an attorney may utilize the services of a collection agent to collect a legal fee.