New York State Bar Association

Committee on Professional Ethics

OPINION 684 (32-96) - 11/27/96

TOPIC:	Reporting by Law Firm to Credit Bureau of Unpaid Client Account
DIGEST:	Lawyer may not report unpaid client account since status of account is a client secret that may not be disclosed except as necessary to collect fee.
CODE:	DR 2-110(C), 4-101(A)(B),(C)(4), EC 2-23 and EC 2-32.

QUESTION

May a lawyer report an unpaid client account to a credit bureau?

OPINION

An attorney inquires whether he may ethically report to a credit bureau his client's failure to pay a fee that the lawyer believes is past due. We conclude that the lawyer may not make such a report.

In our prior opinions addressing the lawyer/creditor-client/debtor relation, beginning even before the enactment of the Code and including our opinions permitting the use of collection agencies, several dominant concerns emerge:

First, as provided in EC 2-23, "a lawyer should be zealous in efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject." Cautioning lawyers to avoid unseemly public dispute over fees, we reminded inquirers that "the profession of law is not a mere money-making trade." N.Y. State 87 (1968). If action on fees is unavoidable, the lawyer must "use good judgment," having in mind that "what methods are necessary and appropriate ... should be a matter of the attorney's sense of decency and propriety." *Id.*

Second is the important need to balance the lawyer's legitimate claim and right to compensation against the duty to avoid injury to the client. *See* EC 2-23, which provides, "a lawyer should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client." Mere non-payment does not warrant

action. Indeed, non-payment may not authorize even the termination of representation. N.Y. State 212 (1971). DR 2-110(C)(1)(f) makes permissive withdrawal possible in such circumstances only if the client "deliberately disregards" a fee obligation. N.Y. State 598 (1989) held that "a client 'deliberately disregards an agreement or obligation' to pay legal fees whenever the failure is conscious rather than inadvertent, and is not *de minimis* in either amount or duration."

These concerns underlay the prohibition, maintained by this Committee until 1990, on a lawyer's use of a collection agency to recover a fee due from a client. In N.Y. State 608 (1990) [overruling N.Y. State 400 (1975)], following review of the question in other jurisdictions, we sketched some of the considerations governing the permissible use by a lawyer of a collection agency to collect a debt owed the lawyer by a client. These included the zealous avoidance of fee controversy with clients, EC 2-23; the attempt amicably to resolve such disputes; the unseemliness of the collection agency as a money-getting device; the need to determine whether the indebtedness is "justly owed," N.Y. State 591 (1988); consideration of the client's ability to pay and the lawyer's "sense of decency and propriety should the client be financially pressed," N.Y. State 87 (1968); and the contemplation of alternatives including negotiation, arbitration and mediation.[1]

Third, a lawyer naturally must protect a client's secrets and confidences even if a fee is past due, except to the limited extent a departure from this strict obligation is provided by the Code in DR 4-101(C)(4). The general rule provides that

> a lawyer shall not knowingly:
>
> (1) Reveal a confidence or secret of a client.
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> (2) Use a confidence or secret of a client to the disadvantage of the client.
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> (3) Use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

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[1] We concluded that after "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." N.Y. State 608 (1990). Even that authorization was limited, however, as our opinion also provides:

> 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...[A]nd 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.

DR 4-101(B).

We believe that the client's unpaid account status will almost always constitutes a "secret" within the meaning of DR 4-101(B), because it is information "gained in the professional relationship," and because revelation "would be embarrassing or would be likely to be detrimental to the client," in the words of the Rule's definition of the term "secret" in DR 4-101(A). Since a lawyer will be hard pressed to collect if even that limited information cannot be revealed, however, the Code provides in DR 4-104(C) an exception to the general rule of DR 4-101(B).

The exception in DR 4-101(C)(4) permits a disclosure of "[c]onfidences or secrets necessary to establish or collect the lawyer's fee." The question at issue here therefore reduces to whether the report of a client's delinquent account to a credit bureau qualifies as necessary "to establish or collect the lawyer's fee" within the meaning of that exception.

We believe that it does not. First, such a report is hardly "necessary" to collect a fee because a delinquent fee can be collected without it. Second, to the extent it aids the collection process at all, it would appear to do so only by virtue of its *in terrorem* effect on the client, arising from the likely adverse impact of the report to the credit bureau on the client's credit rating. Such use of a client's secret by a lawyer would plainly violate DR 4-101(B)'s prohibitions on the use of a client secret "to the disadvantage of the client" and "for the advantage of the lawyer."

Where the client's potential injury arising from the disclosure of the client secret is the very vehicle of collection, such disclosure cannot be viewed as the type that is "necessary" for the collection that justifies a departure from the client's reasonable expectation of confidence. *See* EC-2-32, (even where withdrawal is permitted "on the basis of compelling circumstances," a lawyer must "minimize the possible adverse effect" upon the client "and otherwise [endeavor] to minimize the possibility of harm.")

CONCLUSION

For the reasons stated above the question is answered in the negative.

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