

**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NO. 13-01**

THIS OPINION IS ADVISORY ONLY

QUESTION PRESENTED

The Ethics Committee has been asked to render its opinion on whether an attorney may use the services of an outside collection agency or other third party recovery service to collect outstanding client accounts receivable before litigation is filed, after litigation is filed, and after judgment is entered.

OPINION

An attorney or law firm may use the services of an outside collection agency or other third party recovery service to collect outstanding client accounts receivable if the fee arrangement with the outside collection agency or other third party recovery service does not constitute improper fee sharing with a non-lawyer.

If an attorney or law firm uses the services of an outside collection agency or other third party recovery service to collect outstanding client accounts receivable, the attorney or law firm must consider the requirements of Rule 1.6, N.D.R. Prof. Conduct to not reveal confidential information.

APPLICABLE NORTH DAKOTA RULES OF PROFESSIONAL CONDUCT

Rule 1.6(a), N.D.R. Prof. Conduct: Confidentiality of information

Rule 5.4(a), N.D.R. Prof. Conduct: Professional independence of a lawyer

FACTS PRESENTED

None

DISCUSSION

Confidentiality of information about the client in relation to collections and attorney-client privilege is the primary ethical concern with outsourcing collection of unpaid legal fees. The client's identity, the nature of the legal services, the amount of the fee owing, and the fact that the fee hasn't been paid is information contained in the billing statement that the average client would expect to remain confidential. See Tx. State Bar Prof'l Ethics Comm. Op. 464 (Aug. 10, 1989). Nevertheless, courts generally hold that "information about fee arrangements is not protected because the payment of fees is not usually considered a confidential communication between a client and lawyer." ABA/BNA Manual on Prof'l Conduct 55:309 (1994). In In re Grand Jury Subpoena (Alexiou), 39 F.3d 973, 976 (9th Cir. 1994), the court held the attorney-client privilege

does not ordinarily protect against disclosure of the identity of a client and the fee arrangement between an attorney and the client. There is an exception to this rule when the identification of a client conveys information that itself is privileged. For example, if revealing the client's identity would constitute an acknowledgment of guilt of the offense which led the client to seek legal assistance, then the identity of the client would be privileged. In re Grand Jury Subpoena (Horn), 976 F.2d 1314, 1317 (9th Cir.1992); In re Grand Jury Subpoena (Alexiou), 39 F.3d 973, 976 (9th Cir. 1994) (citing Baird v. Koerner, 279 F.2d 623, 630 (9th Cir. 1960)).

The North Dakota confidentiality rule is straightforward in addressing the confidentiality issue in relation to unpaid bill collection. Rule 1.6(a), N.D.R. Prof. Conduct: Confidentiality of information, provides: "A lawyer shall not reveal information relating to the representation of the client unless the client consents . . . or the disclosure is . . . permitted by paragraph (c)." Rule 1.6(c), N.D.R. Prof. Conduct provides: "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: . . . (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client" The comment to Rule 1.6(c)(4), N.D.R. Prof. Conduct states: "A lawyer entitled to a fee is permitted by paragraph (c)(4) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary." Id. at cmt. 11.

If an attorney uses the services of an outside collection agency or other third party recovery service to collect client outstanding accounts receivable, no more than the essential information needed to establish and defend a collections claim should be disclosed, unless the client consents in writing at the outset of representation. For example, if the charge for services stems from a legal action of public record, the lawyer could refer to the case title, case number, the date range of services rendered, and the total attorney's fees and costs involved, with no itemized detail or substantive information about the provided legal services being revealed unless challenged by the client. Prior to litigation, limiting disclosed information to the minimal information necessary to effectively use collection services is advisable. Once litigation commences, due care should be exercised to not reveal confidential information that is irrelevant in establishing the unpaid amount for legal services rendered, with the information revealed being of public record and available for use to the collection agency during and after litigation for unpaid legal fees. See Ga. State Bar Disciplinary Bd. Op. 49 (July 26, 1985).

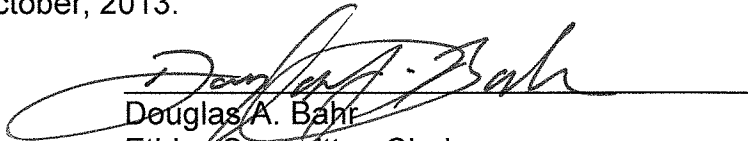
Another ethical issue with outsourcing collections is the payment arrangement. Rule 5.4(a), N.D.R. Prof. Conduct states that a "lawyer or law firm shall not share legal fees with a non-lawyer" A payment arrangement between an attorney or a law firm with an outside collection agency or other third party recovery service that is a percentage of the amount recovered would constitute improper fee sharing, in violation of Rule 5.4(a), N.D.R. Prof. Conduct. A best practice in utilizing an outside collection agency or other third party recovery service is to 1) hire an attorney specializing in collections if fees are to be paid on a percentage of successful collections, 2) pay a non-

lawyer entity a set hourly rate, regardless of their collection success, or 3) sell and assign the unpaid accounts receivable. Other states have held the outsourcing attorney is ultimately responsible for any ethical improprieties of its collection agents, regardless of the payment arrangement. Fla. Ethics Op. 81-3, Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 1994-9 (July 27, 1994); Montana Ethics Op. 960828.

CONCLUSION

An attorney or law firm may assign its unpaid client accounts receivable to an outside collection agency or other third party recovery service. The fee arrangement with the outside collection agency or other third party recovery service, however, may not constitute improper fee sharing with a non-lawyer, such as by being based upon a percentage of collection proceeds. Moreover, unless the client consents in writing at the outset of representation to a waiver of confidentiality for collection purposes, only the debtor's contact information, the amount due, and the general nature of the provided legal services should be disclosed for pre-litigation collection outsourcing. Once collection litigation commences, due care in revealing as little substantive confidential information as possible must be exercised in legally establishing the amount of unpaid legal services rendered.

This opinion was drafted by R.T. Gordon and was unanimously approved by the Ethics Committee on the 23th day of October, 2013.


Douglas A. Baht
Ethics Committee Chairperson

This opinion is provided under Rule 1.2(B), North Dakota Rules for Lawyer Discipline, which states:

A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the ethics committee of the association is not subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct that is the subject of the opinion or advisory letter.