

**ALASKA BAR ASSOCIATION
ETHICS OPINION 2000-3**

**Reaffirmation of Ethics Opinion 86-3,
Referral of Client Identity to Credit Bureau**

The Alaska Bar Association Ethics Committee (“Committee”) received a request to reconsider Ethics Opinion No. 86-3. Relying on former DR 4-101(C)(1), that opinion held that “the referral of any client information to a credit bureau should not be permitted in Alaska, except with the knowing consent of the client.” The Committee concludes that the underlying rule of this opinion remains valid. Attorneys in Alaska may not refer information about present or former clients to a credit bureau without the knowing consent of the client.

In opinion number 86-3 the Committee was concerned that the dissemination of client information to third parties might constitute a breach of an attorney’s duty to keep information about a client confidential. Although DR 4-101(C)(4) permitted an attorney to reveal “confidences or secrets necessary to collect his fee,” the Committee concluded that reporting a client to a credit bureau did not fall under this exception “(s)ince the credit bureau will not be collecting the fee for the attorney.”

Since then, Alaska has adopted the Model Rules of Professional Conduct, which are silent as to the method an attorney or law firm may employ to collect legal fees. ARPC 1.6(b)(2), which addresses confidentiality of information, provides: “A lawyer may reveal such information to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client.” Similarly, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 117 (Proposed Final Draft No. 1, March 29, 1996), which concerns “Using or Disclosing Information in Compensation Dispute,” states:

A lawyer may use or disclose confidential client information when and to the extent that the lawyer reasonably believes necessary in order to permit the lawyer to resolve a dispute with the client concerning compensation or reimbursements that the lawyer reasonably claims to be due.

Section 53 of the Restatement, which concerns “Fee Collection Methods,” states:

In seeking compensation claimed from a client or former client, a lawyer may not employ collection methods forbidden by law, use confidential information (as defined by Chapter 5) when not permitted under § 117, or harass the client.

Neither Section 53 nor Section 117 explicitly addresses whether a lawyer may disclose confidential information to a credit bureau. But comment d to § 53 states, “In collecting a fee a lawyer may use *collection agencies* or retain counsel.” (emphasis added). The majority of states that have addressed the issue allow a lawyer to use a collection agency to collect delinquent accounts provided that strict guidelines are followed:¹

Failure to adhere to these guidelines places a lawyer in jeopardy of violating Rules of Professional Conduct 1.5, 1.6, 1.7, 1.8(b), 5.5(b), and/or 8.4(a-d).²

It is important to note the difference between employing a collection agent and reporting a delinquent client to a credit bureau. A collection agency seeks the unpaid fees directly from the delinquent client. The client is assured of procedural safeguards because legal proceedings must be commenced in order to collect the unpaid sum. By comparison, listing a delinquent client with a credit bureau is at best an indirect method of collecting an unpaid fee whereby notice is provided to other businesses that the client is a potential credit risk. In theory, listing an unpaid fee with a credit bureau will prompt a delinquent client to pay his or her bill. However, the pressure to pay an unpaid

¹ W. Virginia State Bar, Comm. on Legal Ethics, Op. 94-01, at 2-3, & fn. 2 (citing other states allowing attorney to employ collection agents); see NYSBA Op. # 608 (“The conditions involving the use of collection agents have changed substantially since [1975]. The collection process has been subjected to increasing public scrutiny and government regulations 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.”); Ohio Sup. Ct. Bd. of Comm’rs on Grievances and Discipline, Op. 91-16 (6/14/91); Vt. Bar. Ass’n, Op. # 97-4; Tex. Comm. on Prof. Ethics, Op. 495 (3/94) (Confidential information is broadly construed and includes both privileged and unprivileged client information such as: “(1) Name, address, telephone number of the client; (2) The amount the law firm contends the client owes; (3) Copies of actual billings that are outstanding; (4) Copies of the fee agreement and previous correspondence with the client concerning billings; and (5) A copy of the entire file to which the account receivable relates.”); Pa. Bar Ass’n, Op. # 96-09 (3/14/96).

² *Id.*

fee results more from the *in terrorem* affect of a bad credit rating than from any merit to the claim.

The referral of a client's debt to a credit bureau is fraught with questions of procedural fairness. When a collection agency files an action to collect fees, the requirements of the legal process must be followed. Similarly, the Alaska Bar Rules provide for a procedure, including reasonable safeguards, to resolve attorney fee disputes. If an attorney concludes that the matter should be referred to a credit bureau however, it automatically becomes a stain on the client's credit record. A delinquent client may respond to a listing by filing an exception to his or her credit report, which must be included in a credit bureau's file.³ Even so, the potential to damage a client's credit rating remains high because potential lenders have reason to be suspicious.

Further, while the statute of limitations for commencing a collection action is likely to be only three years under present Alaska law, the credit bureau report may include negative information for as long as seven years. The Committee can see no rationale under the rules of professional conduct that justifies a continuing penalty in the form of a bad credit rating long after the attorney's ability to collect the fee has been barred by the applicable statute of limitations.

New York and South Carolina prohibit the referral of a delinquent client to a credit agency. The New York State Bar Association concluded that "a [l]awyer may not report [an] unpaid client account since status of [an] account is a client secret that may not be disclosed except as necessary to collect [a] fee."⁴ The NYSBA premised its holding on three maxims: (1) a lawyer has a duty to avoid public dispute over an unpaid fee whenever possible⁵; (2) a lawyer's right to compensation should be balanced against his or her duty to avoid injury to the client⁶; and (3) a lawyer is obligated to keep client secrets confidential even if a fee is past due, except to the extent necessary to utilize the services of a collection agency. The NYSBA also favored the use of

³ Kansas Bar. Ass'n Ethics Op. # 94-5, at 4 (8/15/94).

⁴ NYSBA Op. # 684 (11/27/96), construing DR 2-110(C), 4-101(A)(B), (C)(4), EC 2-23, and EC 2-32.

⁵ The NYSBA cited EC-23, which provides: "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."

⁶ "[A] lawyer should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client." EC-23.

alternative dispute resolution methods such as negotiation, arbitration, and mediation to resolve fee disputes.

Similarly, the South Carolina Bar Association ruled that a lawyer should not refer a delinquent client to a credit bureau because: “(a) it is not necessary for establishing the lawyer’s claim for compensation, (b) it risks disclosure of confidential information, and (c) it smacks of punishment in trying to lower the client’s credit rating.”⁷

Other jurisdictions reach the opposite conclusion. The Florida Bar determined that referral of a delinquent client to a credit bureau to collect an unpaid fee is permissible under the following circumstances: “(1) only former clients, rather than current clients, may be reported to the credit bureau; (2) confidential information unrelated to the collection of the debt must not be disclosed; and (3) the debt must not be in dispute.”⁸ The Kansas Bar Association reasoned that “modern debt collection law makes few distinctions between collection agencies, collection attorneys or credit bureaus.”⁹ Accordingly, it adopted the Florida requirements and added several more:

- (4) the lawyer should first advise the former client that unless the fee is resolved the firm intends to refer the matter to a credit bureau;
- (5) the lawyer should set forth accurately what may happen to client’s credit rating if such a referral is made;
- (6) the credit bureau should have had nothing to do with the fee being earned;
- (7) the lawyer must reasonably believe the client would be able to afford the fees when the fee agreement was made; and
- (8) the lawyer must be satisfied that the credit bureau will not use illegal means to collect the amount owed.¹⁰

⁷ South Carolina Bar Ethics Op. # 94-11 construing RPC 1.6.

⁸ Florida Bar Ass’n Ethics Op. # 90-2 construing RPC 1.6.

⁹ Kansas Bar Ass’n Ethics Op. # 94-5, fn. 8 (“The Fair Debt Collection Practices Act defines all three entities as “debt collectors” under the Act. Consumer remedies regarding any of these three entities are the same.”).

¹⁰ Kansas Op. # 94-5 construing RPC 1.6, 1.8.

Despite the contrary authority, the Committee believes that the rationale and reasoning of Opinion 86-3 remains valid. As the Committee concluded in its earlier Opinion:

(R)eferral of the client's delinquent status to a credit bureau is at best an indirect method of collecting the unpaid fee. The only direct effect is to sully the client's credit rating. The Committee concludes that the probability of collection by such indirect methods as referral to a credit bureau is too small to justify its use. Referral to the credit bureau may intimidate a client without ever resulting in payment of the fee or even direct efforts to collect the fee.

Although the law has advanced since the earlier opinion, and provides for some protection against wrongful listings with credit bureaus, the underlying fact remains that an attorney who lists a client with a credit agency has revealed confidential information about the client for a purpose not permitted by ARPC 1.6(b)(2) since such a referral is at most an indirect attempt to pressure the client to pay the fee. For these reasons the Committee reaffirms the conclusions of Opinion 86-3.¹¹

Approved by the Alaska Bar Association Ethics Committee on May 4, 2000.

Adopted by the Board of Governors on August 18, 2000.

G:\DS\COMM\Ethics\OPINIONS\2000-03.doc

¹¹ Counsel has the responsibility under this opinion for insuring that there is no confusion when a matter is referred to someone else for collection. If there is any possibility that a collection agency might also act to refer a matter to a credit bureau, counsel must take steps to ensure that the collection agency has been instructed not to do so.