

## Utah Ethics Opinions

1990.

100. USB EAO Op. No. 100

Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 100

Effective Date July 27, 1990

**Issue:** Is it ethically proper for a collection agency to retain and pay a lawyer a flat monthly fee to handle all of its collection litigation while seeking and recovering attorneys' fees from the debtor based upon higher market rates?<sup>1</sup>

**Opinion:** If a collection agency recovers attorneys' fees from a debtor which exceed the actual cost of legal services for a particular matter, the agency profits from the services of the attorney. Such an arrangement violates Rule 5.4 of the Rules of Professional Conduct, which prohibits lawyers from sharing fees for legal services with non-lawyers.<sup>2</sup>

**Rationale:** Rule 5.4 of the Rules of Professional Conduct prohibits lawyers from sharing fees for legal services with non-lawyers "to protect a lawyer's professional independence of judgment."<sup>3</sup> We perceive no difference between "sharing" fees for legal services and "profiting" from them. In either case, a non-lawyer has the potential power to wield influence over the handling of the legal matter which is inconsistent with the lawyer's obligation to exercise independent professional judgment.

This conclusion is supported by *National Treasury Employees' Union v. United States Department of Treasury*,<sup>4</sup> in which the court was confronted with a factual situation very similar to the arrangement under consideration here. Two salaried lawyers employed full time by the union provided legal services to a union member under a prepaid plan. The union member prevailed, and the union sought recovery of its attorneys' fees based upon the market value of the legal services rendered rather than the actual cost of legal services incurred by the union. The union admitted, however, that the fees would be paid to the union, not to its attorneys.

The court refused to award the union more than the actual cost of legal services, concluding that the union could not profit from the provision of legal services under the ABA version of Utah's Rule 5.4.<sup>5</sup> The court stated, however, that there would be no objection if the market value fees were paid to the attorneys directly, in which case the lawyers

would be free to donate some or all of their fees to charity, or even to their employer, "just as they may spend their other monies as they please."<sup>6</sup>

The holding of the court is, therefore, quite narrow: A lay person paying for legal services may recover only the actual cost of those services to the lay person. An attorney, however, may recover more than the actual cost of the legal services if the market value of those services is greater than their actual cost.<sup>7</sup>

This opinion is also consistent with ethics advisory opinions of other jurisdictions. In 1986, Idaho considered the retention of attorneys' fees by collection agencies and concluded that a lawyer could not contract with a collection agency to accept only a retainer fee allowing the agency to keep any attorneys' fees awarded by the court in excess of the retainer.<sup>8</sup> Arizona has decreed that there "may not be, under any guise, any division of fees between a lawyer and a collection agency. Whatever is charged for legal services must go to the lawyer."<sup>9</sup> A Philadelphia opinion concluded that since the collection service comprises non-lawyers, an arrangement pursuant to which a lawyer received a percentage of the agency's contingency fee violated the code's prohibition against sharing legal fees with a non-lawyer.<sup>10</sup> Similarly, a Kansas advisory opinion discussed a practice pursuant to which both the collection agency and the lawyer charged contingency fees, finding the practice valid as long as there was no division of fees with the collection agency for legal services rendered.<sup>11</sup>

If an attorney is paid a monthly retainer, then the actual cost of services for a particular matter must be calculated and only that amount, including expenses ordinarily associated with legal services, are recoverable by the agency as attorneys' fee.

## Footnotes

1. The Bar is not concerned with the relationship between the collection agency and the creditor. The Rules of Professional Conduct do not apply to the conduct of lay persons.

2. See also ABA Formal Op. 294 (1958); ABA Formal Op. 180 (1938).

3. Comment, Rules of Professional Conduct 5.4.

4. 656 F.2d 848 (D.C. Cir. 1981).

5. *Id.* at 852.

6. *Id.* at 852-53.

7. *See also* Rule 4-505 of the Utah Code of Judicial Administration, which governs the award of attorneys' fees in the trial courts of the State of Utah and provides in pertinent part as follows:

(1) Affidavits in support of an award of attorneys' fees must be filed with the court and set forth specifically the legal basis for the award, the nature of the work performed by the attorney, the number of hours spent to prosecute the claim to judgment, or the time spent in pursuing the matter to the stage for which attorneys' fees are claimed, and affirm the reasonableness of the fees for comparable legal services . . . .

8. Idaho Ethics Op. No. 117 (1986).

9. Arizona Ethics Op. No. 81-23 (1981).

10. Philadelphia, Pennsylvania, Ethics Op. No. 87-3 (1987).

11. Kansas Ethics Op. No. 83-5 (1983).

Rule Cited:

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