

## Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 96-09

Approved November 1, 1996

**Issue:** May an attorney recover attorney's fees for a collection action pursued on behalf of the attorney's partner?

**Opinion:** There is no prohibition against an attorney's hiring another attorney to collect the debts of the first attorney, even though the two attorneys are in the same law firm. Whether the second attorney may collect attorney's fees from the debtor is a question of law that the Committee has no authority to decide. If the debt is incurred in connection with legal services provided by the firm of the two lawyers, Utah case law clearly prohibits the recovery. Under other factual circumstances, such as a debt arising out of a lawyer's non-legal, personal business, the matter would be judicially resolved, but the lawyer attempting to collect such fees has an ethical obligation under the Rules of Professional Conduct—particularly under Rule 3.3(a)(3)—not to mislead the court as to the attorney's right to collect such fees.

**Facts:** An attorney seeks to collect a debt that is owed to him personally or to a law firm in which he participates. Under either statute or contract, the attorney-creditor is entitled to collect attorney's fees in addition to the principal amount of the debt. The original request for this opinion did not state whether the debt was incurred in connection with the lawyer's (or his firm's) legal services or for non-legal-service obligations. The attorney wants to have another member of his firm pursue collection, of the debt. He postulates that such an arrangement would be genuine—that is, that the second attorney would indeed do the legal work involved in the collection and the first attorney would not participate. The request did not detail the firm's financial arrangements for the treatment of firm revenues, payment of firm expenses and the like.

**Analysis:** Under Utah case law, a lawyer may not collect attorney's fees in a pro se collection action, and a law firm may not collect attorney's fees in a collection action in which the firm uses its own lawyers to collect debts of the

firm.

In *Smith v. Batchelor*, (fn1) the Utah Supreme Court held that, for public policy reasons, a pro se litigant should not recover statutorily authorized attorney's fees, regardless of the litigant's status as an attorney. More recently, in *Jones, Waldo, Holbrook & McDonough v. Dawson*, (fn2) the court held that a law firm does not "incur" legal fees to be collected when the firm uses its own lawyers to collect the firm's debts and, therefore, cannot extract them from a debtor even when it is contractually or statutorily provided for.

While the Court's rulings on these specific fact situations are clear, there are facts that could lead to a different outcome. For example, a lawyer could hire another lawyer in the same firm to collect a personal debt related to the first lawyer's rental properties. In this case, the firm would not be using its own lawyers to collect on firm debts, as in *Jones, Waldo*. Still, the Ethics Advisory Opinion Committee cannot opine as to how the Utah Supreme Court's rulings would be applied in any given factual circumstance different from those on which the Court has ruled in these *Batchelor* and *Jones, Waldo*.

Likewise, it is beyond our scope to render an opinion on whether collection of attorney's fees for a partner's personal, non-legal receivables would depend on the specific financial agreement of the partnership. (fn3) Yet another variation, for example, could involve a lawyer who hires another lawyer with whom he shares offices to collect legal fees owing to the first lawyer. Utah Ethics Advisory Opinion No. 34 imputes a partnership relationship for certain ethical considerations (such as conflicts) to some office-sharing arrangements, although the Rules and our ethics opinions do not dictate the financial arrangements under which partners must operate.

As we have indicated, the ultimate issue of whether recovery of attorney fees in fact situations that vary from those in *Batchelor* and *Jones, Waldo* is beyond the scope of the Committee's jurisdiction. It is unethical, however, for an attorney or a law firm to engage in a sham transaction solely for the purpose of avoiding the rulings of the Utah Supreme Court or to mislead a court as to that transaction when seeking attorney's fees. It would also be unethical to fail to disclose to the court when requesting attorney's fees applicable legal decisions and the particular facts of the relationship between the attorneys.

Therefore, in pursuing recovery of such fees, an attorney should pay close attention to the following Rules of Professional Conduct:

Rules 8.4(c) and (d) (fn4) prohibit an attorney from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, or which is prejudicial to the administration of justice. An arrangement between the two attorneys involved that is a sham, designed to allow one to recover attorney's fees in a pro se situation by using the other's name would violate these rules.

Rule 3.3(a)(1) (fn5) prohibits an attorney from making a false statement of material fact or law to a tribunal. A relationship between attorneys created solely to avoid the impact of Utah law may violate this rule.

Rule 3.3(a)(3) prohibits an attorney from failing to disclose to the tribunal legal authority contrary to the client's position. Even assuming there is no sham transaction between the two attorneys, the attorney seeking fees would be well advised to disclose the pertinent case law and explain the particular relationship between the two attorneys, especially in an office-sharing or partnership arrangement. Armed with the pertinent facts, the judge would then be in a position to apply the applicable rulings of the Utah Supreme Court.

In sum, there is no prohibition against one attorney hiring another attorney to collect debts. Whether the litigating attorney can collect attorney's fees is a question of law not to be decided here. Attorneys should, however, be aware of the provisions of the Rules of Professional Conduct that prohibit behavior that could mislead the court as to the attorney's right to collect these fees.

#### Footnotes

1. 832 P.2d 467 (Utah 1992).
2. 923 P.2d 1366 (Utah 1996).
3. Would it, for example, make a difference if each partner collected and retained her own fees, paying into a common fund for office expenses?
4. "It is professional misconduct for a lawyer to: . . . (c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or] (d) Engage in conduct that is prejudicial to the administration of justice; . . ."
5. Rule 3.3(a): "A lawyer should not knowingly: (1) Make a false statement of material fact or law to a tribunal. . . . [or] (3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel . . ."

#### Rules Cited: