Utah Ethics Opinions

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111. USB EAOC Opinion No. 111

Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 111

Approved July 29, 1993

Issue: Utah Ethics Advisory Opinion No. 45, issued in 1978, holds that an attorney may not represent a collection company in lawsuits to collect on assigned accounts if he owns stock in or has an interest in the company. Is Opinion No. 45 still valid in light of the relaxation of attorney advertising and solicitation restrictions since 1978?

Opinion: The conclusion of Opinion No. 45 is reversed. Subject to any legal constraints imposed by Utah Code Ann. § 78-51-27(1), it is not *per se* unethical for an attorney who has a financial interest in a collection agency to represent the agency in lawsuits to collect on assigned accounts.

Discussion: This Committee has again been asked to address the issue of whether an attorney who has stock or other financial interest in a collection company may represent that company in a lawsuit to collect amounts assigned to it.1 This Committee concluded in 1978 that such a role was ethically improper. However, Opinion No. 45 was issued before the full development and impact of the cases and rule changes that have loosened the restrictions on lawyer solicitation and advertising.

The current request posits that the 1978 conclusion may have been based on an interpretation of the lawyer advertising and solicitation rules and ethical considerations that have been found unconstitutional by a line of Supreme Court cases beginning with *Bates v. State Bar of Arizona*.2 This hypothesis may derive from the Opinion No. 45's citation to the 1941 Formal Opinion 225 of the ABA Ethics Committee:

It is unethical for a practicing attorney to participate in the collection activities where the management of an agency solicits the collection of a claim.

It is unethical for a practicing attorney who has a financial interest in a collection agency which solicits the collection of a claim to accept employment as an attorney or the creditors when the court proceedings are necessary . . . .

Utah Opinion No. 45 also cited 1962 ABA Informal Opinion No. 600 dealing with a request by an attorney to handle suits on behalf of a collection agency. In that instance, an attorney opened a collection business and asked the ABA Ethics Advisory Committee if he could handle suits for his company at the request of the company's customers. The ABA answered no, on the basis of ABA Informal Opinion No. 225. The ABA Committee found that "the fact that the suit might be handled at the request of the company's customer would not alter the situation; the solicitation of business by the agency would constitute indirect solicitation of professional employment by the lawyer."

Beginning in June 1977 with *Bates*, restrictions on attorney advertising came under scrutiny of the United States Supreme Court. In *Bates*, the Supreme Court found that a blanket suppression of advertising by attorneys violated the free speech clause of the First Amendment, since lawyers may constitutionally advertise the prices at which certain routine legal services are to be performed. However, *Bates* did not reach the problem associated with in-person solicitation of clients.3

In *Shapero v. Kentucky Bar Association* ,4 the court addressed the solicitation issue more directly. A Kentucky attorney had sought approval of a letter soliciting his services to "potential clients who have had a foreclosure suit filed against them." The issue before the Supreme Court was "whether a State may, consistent with the First and Fourteenth Amendments, categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and nondescriptive letters to potential clients known to face particular legal problems."5 The Court held that a ban like the prohibition contained in Rules of Professional Conduct 7.36 was inconsistent with the First Amendment. The Court reasoned that the threat that lawyers would exploit the susceptibility of potential clients does not justify a total ban on protected commercial speech.

At about the same time as *Shapero* was being argued, the Utah Supreme Court modified Rule 7.3, Direct Contact with Prospective Clients, to eliminate many solicitation restrictions:

(a) A lawyer may not solicit, in-person, professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "in-person" includes in-person and telephonic communication directed to a specific recipient, but does not include letters addressed or

advertising circulares distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.7

The change to Rule 7.3 and the underlying case law remove the original foundation for the conclusion in Opinion No. 45. Accordingly, the Committee concludes that the ethical propriety of a collection agency owner-attorney cannot revolve around the issue of what kind of solicitation and advertising is allowed under the Rules of Professional Conduct. Rather, the issue must now be examined from the perspective of whether there is an improper conflict of interest.

The basis for the analysis is found in Rules of Professional Conduct 1.7(b):

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interests, unless:

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) Each client consents after consultation. . . .

There are only three basic types of participants whose interests need to be considered: the original creditors who have made assignments to the agency, the assignee-agency (i.e., its owners, which includes the subject attorney), and the attorney retained as the legal representative of the agency that has the legal right to pursue the claims.

Among these participants, there appear to be no inherent conflicts: (1) The attorney has no direct relationship with the original assignor-creditor; presumably its rights are determined by a contractual relationship with the agency to which the claim has been assigned.8 (2) As between the attorney acting as counselor and the collection agency, the attorney's interests in pursuing claims and obtaining optimal results are those of a standard attorney-client relationship with the assignee. Indeed, the relationship is not dissimilar from that of an attorney who takes a case on a contingent-fee basis.9 (3) The assignor-creditor could be considered a "third person," as the term is used in Rule 1.7(b), but the nature of the attorney's motivations as attorney for the collection agency are the same as those of the assignor-creditor-to optimize the result from pursuing the claim.

From a public-policy point of view, one might also pose the question: What party's interests are prejudiced or harmed by the owner-attorney relationship that has been described? Subject to the independent caveats discussed below, the Committee cannot identify anything inherently prejudicial in this relationship.

Ancillary considerations. Although a collection company may engage in lawful client/customer solicitation, there is clearly a potential for abuse. This is true, for example, where the agency employee soliciting prospective clients may not himself be authorized to practice law. Rule 5.5(b), Unauthorized Practice of Law, states: "A lawyer shall not . . . assist any person in the performance of activity that constitutes the unauthorized practice of law." Notwithstanding that Rule 5.5(b) may be applicable to a specific fact situation, there is nothing inherent in the situation posed to the Committee that would automatically invoke this provision.

Another potential concern for an attorney who owns stock or an interest in the collection company is expressed in Rule 5.4(c), Professional Independence of a Lawyer, which states:

A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein . . . ;

(2) a nonlawyer is a corporate director or office thereof; or;

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.10

According to the comment to the Rules, the purpose of Rule 5.4 is to protect the lawyer's professional independent judgment. After *Shapero*, other state bar ethics committees dealing with similar issues have continued to maintain that a lawyer may not represent a collection agency where he has an ownership interest in the corporation unless he has an independent relationship with the client and does not use the corporation to obtain clients or handle payments from the client.11

The Ohio State Bar's ethics committee reasoned that, for a corporation to hire an attorney on a retainer basis or on a percentage of the gross amounts collected could be in violation of rules against allowing one other than the client to direct a lawyer's independent professional judgment. The committee further stated that lawyers involved in these types of collection matters must carefully avoid aiding the unauthorized practice of law.

This Committee shares the Ohio committee's general concerns, but does not find that these concerns rise to the

level of a *per se* prohibition of the subject relationship. There may be factual circumstances under which a lawyer would violate Rule 5.4 by failing to exercise adequately independent judgment, but the mere possibility is not sufficient to prohibit the relationship. If there is a Rule 5.4 (or Rule 5.5) violation, then the attorney would be accountable on those grounds.

The one participant in the collection agency drama that has not been addressed is the debtor. The ethical considerations in this Opinion and in Opinion No. 45 do not generally deal with the debtor. Although the same ethical and legal requirements attach to the collection lawyer-owner as would in other legal relationships and proceedings,12 there are no advertising/solicitation or conflicts issue that arise with respect to the debtor in the transaction.

Finally, this Opinion would not be complete without a consideration of Utah Code Ann. § 78-51-27(1) (1992):

An attorney or counselor shall not . . . directly or indirectly buy, or in any manner be interested in buying or having assigned to him, for the purpose of collection, a bond, promissory note, bill of exchange, book debt, or other thing in action, with the intent and for the purpose of bringing an action thereon.

The Committee has no authority to interpret statutes; it may only offer advisory opinions on matters of ethics. Whether § 78-51-27(1) plays a legal role in a case of this kind is beyond the authority of the Committee to determine. Thus, if the subject relationship is not in violation of § 78-51-27(1) (or any other statute), the Committee finds that there is no ethical violation for an attorney for a collection agency to own an interest in the agency.

Conclusion. Opinion No. 45's interest-ownership restriction on a lawyer who represents a collection agency was based on a legal premise that has been overruled since that opinion was issued. Because the Committee can identify no other ethical offense in the relationship, the Committee finds that it is not *per se* unethical for an attorney who has a financial interest in a collection agency to represent the agency in lawsuits to collect on assigned accounts.

Footnotes

1. "Collection agencies" are governed by Utah Code Ann. §§ 12-1-1 to -9 (1992). Section 12-1-1 characterizes their business as "soliciting the right to collect or receive payment for another of any account, bill, or other indebtedness."

2. 433 U.S. 350 (1977).

3. *Id.* at 366.

4. 486 U.S. 466 (1988).

5. *Id.* at 468.

6. A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circular distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

ABA Model Rule of Professional Conduct 7.3 (1984). The Kentucky Supreme Court had adopted Model Rule 7.3 in its entirety.

7. Utah Rules of Professional Conduct 7.3(a) (emphasis added). Rule 7.3 was amended by order of the Utah Supreme Court, issued December 19, 1988.

8. "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." Utah Ethics Adv. Op. No. 100, at 1 n.1 (1990).

9. *See* Rules of Professional Conduct 1.5(c).

10. Rules of Professional Conduct 5.5(c) & (d) (1988).

11. Ethics Advisory Committee, Ohio State Bar, Op. No. 90-5 (Aug. 2, 1990).

12. *See, e.g* ., Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o (1988).

Rule Cited: