THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 652

January 2016

QUESTIONS PRESENTED

1. May a lawyer use a collection agency to collect past due attorney's fees without violating the Texas Disciplinary Rules of Professional Conduct?

2. May a lawyer report nonpaying clients to a credit bureau without violating the Texas Disciplinary Rules of Professional Conduct?

STATEMENT OF FACTS

A Texas lawyer has clients (or former clients) who are delinquent in paying fees that have been earned. The lawyer has been unsuccessful in collecting many of the past due accounts and asks whether it is permissible under the Texas Disciplinary Rules of Professional Conduct to (1) use a collection agency to collect the debt, and (2) report nonpaying clients to a credit bureau.

DISCUSSION

Most of the issues involved were the subject of Professional Ethics Committee Opinion 495 (March 1994), which involved disclosing confidential information to a collection agency to collect delinquent attorney's fees and Opinion 556 (May 2005), which involved the use of borrowed employees of a collection agency. These opinions concluded that a lawyer could not release delinquent account information without the informed consent of the client.

Opinions 495 and 556 were based on Rule 1.05, Texas Disciplinary Rules of Professional Conduct, which has not changed in substance since those opinions were issued.

Rule 1.05 provides in relevant part:

"(b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and (f), a lawyer shall not knowingly:

(1) Reveal confidential information of a client or a former client to:
(i) a person that the client has instructed is not to receive the information; or

(ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.

(2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultation.

(3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.

(4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.

(c) A lawyer may reveal confidential information:

…

(2) When the client consents after consultation.

…

(5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.

…."

As recognized in Opinion 495, in almost all cases the amount due from a client to a lawyer for legal services will involve to some degree confidential information relating to the client. This confidential information, to the extent not subject to the attorney-client privilege, is "unprivileged client information," which is defined in Rule 1.05(a) as "all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client." In some cases, the fact that the lawyer was engaged by the client may be confidential; in many cases, the nature of the legal services resulting in the fee statement will be confidential; and in most cases, the amount of the fee owing and the fact that the fee has not been paid will be confidential.

Opinion 495 held consent of the client is the only permissible basis for the disclosure of confidential client information to a collection agency. Although a lawyer may use another lawyer to collect fees owed by a client, Opinion 495 held a lawyer may not turn over to an independent collection agency confidential client information even though the collection agency would be acting as an agent of the lawyer in the collection process. Opinion 495 concluded that the use of a collection agency and the disclosure of client information to such an agency are not necessary for the enforcement of the lawyer's claim. Similarly, Opinion 556 concluded, that without prior consent from the client, a

lawyer may not provide confidential client information to employees of a collection agency who would be treated as borrowed employees of the lawyer's law firm while assisting with collecting fees owed by clients.

Opinions 495 and 556 are at odds with virtually every other jurisdiction that has considered the matter. See, e.g. District of Columbia Ethics Op. 298 (2000); Montana Ethics Op. 001027 (2000); Ohio Supreme Court Ethics Op. 91-16 (1991); New York State Ethics Op. 608 (1990); Massachusetts Ethics Op. 89-3 (1989); North Carolina Ethics Op. RPC 7 (1986); and Georgia Ethics Advisory Op. 49 (1985). These opinions generally conclude that a lawyer may provide limited information to a collection agency if the lawyer ensures that the collection agency and its employees maintain the confidentiality of that information. The rationale is that a collection agency acting on the lawyer's behalf is performing a service similar to a bookkeeper or accountant attempting to collect the lawyer's delinquent debts. It would be permissible for a lawyer to retain an accountant or bookkeeper to collect a debt, and a lawyer should also be able to make a business decision to use a collection agency for the same purpose.

The question now before the Committee is whether a lawyer may, in an effort to collect before filing suit, use a collection agency to collect unpaid fees after exhausting other reasonable efforts to collect the fees. Upon reconsideration, the Committee overrules Opinions 495 and 556 and holds that a lawyer may ethically use a collection agency to collect past due fees under certain circumstances. First, the lawyer must no longer be handling the client's matter for which the fees are unpaid in order to avoid a conflict between the lawyer's pecuniary interests and the interests of the client. Second, the fee must not be unconscionable under Rule 1.04(a). Third, the lawyer should attempt other reasonable means of collection short of using a collection agency. This should include written notice of the amount due and the services performed, consideration of alternatives such as fee arbitration or mediation, and at least one demand letter stating the consequences of continued non-payment, including the possibility that the fee may be turned over to a collection agency for further collection efforts. Fourth, the lawyer must retain control over the collections process because lawyers are ethically responsible for the conduct of those retained or associated in the collection process. Rule 5.03. Finally, the lawyer may only reveal to the collection agency the minimum amount of client information necessary to collect the debt.

This view is consistent with a lawyer's obligations under the Texas Disciplinary Rule of Professional Conduct, including Rule 1.05(c)(5), which specifically permits a lawyer to disclose confidential client information "[t]o the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client."

Comment 15 to Rule 1.5 explains the rationale for the exception to confidentiality that allows a lawyer to collect his or her fee:

> "A lawyer entitled to a fee necessarily must be permitted to prove the services rendered in an action to collect it, and this necessity is recognized

> by sub-paragraphs (c)(5) and (d)(2)(iv). This aspect of the rule, in regard to privileged information, expresses the principle that the beneficiary of a fiduciary relationship may not exploit the relationship to the detriment of the fiduciary. Any disclosure by the lawyer, however, should be as protective of the client's interests as possible."

A lawyer may hire another lawyer to sue a client for delinquent fees. See, e.g., Opinion 464 (August 1989). A lawsuit is a matter of public record, and it will force a client to either hire an attorney for representation in the suit or proceed *pro se*. In addition, a lawsuit is highly adversarial. The Committee is of the opinion that a lawyer may disclose limited confidential information to a collection agency as a step prior to litigation, provided that the requirements of this opinion are met, because such a disclosure fits within the exception to confidentiality contained in Rule 1.05(c)(5). The Committee's conclusion is consistent with that of virtually every other state that has considered the issue and is consistent with the Restatement (Third) of the Law Governing Lawyers § 41 cmt. d (2000), which provides, "In collecting a fee a lawyer may use collection agencies or retain counsel."

Addressing the second question, a lawyer should not report a delinquent client to a credit bureau, either directly or through a collection agency, because this is not necessary to the collection of the debt, the effect is punitive, and it unjustifiably risks the unauthorized disclosure of confidential client information.

CONCLUSION

A lawyer may use a collection agency to collect past due fees owed by a client without violating the Texas Disciplinary Rules of Professional Conduct if the following conditions are met: (1) the lawyer is no longer handling the client's matter, (2) the fee is not unconscionable, (3) the lawyer has attempted other reasonable means of collection short of using a collection agency, (4) the lawyer retains control over the collection process, and (5) the lawyer reveals to the collection agency only the minimum amount of client information necessary to collect the debt.

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer may not, directly or indirectly, report a delinquent client to a credit bureau as this is not necessary to the collection of the debt, the effect is punitive, and it unjustifiably risks the unauthorized disclosure of confidential client information.