E-61-1 Collection agencies

The opinion of the Ethics Committee has been requested on the question of whether or not any violations of Canons 27, 34, 35, 41, 47, or other of the Canons of Professional Ethics are involved under the following circumstances:

The X Collection Agency retains B, an attorney, on an annual retainer basis. In the course of its collection business, the agency frequently reaches the point where a particular debtor fails to respond to its request for payment of an account placed with the agency for collection.

When this point is reached, a notice is sent to the creditor by X Agency in substantially the following form:

Dear Sir: Re:

This debtor does not respond to our request for payment. If it is your desire that suit or garnishee be taken in this case, PLEASE SIGN and RETURN, in an ENVELOPE, with TWO ITEMIZED STATEMENTS AT ONCE.

Make no settlement without our consent.

Please give this your prompt attention as it will mean money for both of us.

X Adjustment Co., Inc.
_______________ Building
_______________, Wisconsin

Attached to this notice is a form which may be torn off at a perforated line, and the form reads:

Suit Authorization

(I) (We) authorize the X (Adjustment) Co., Inc. __________, Wis., to act as (my) (our) agent in bringing suit or garnishment against:

Name-Address Due Date Prin. Amt.
Interest Total

Attorney __________ shall represent me if necessary. It is understood that costs will be paid by the debtor or by me if claim is disallowed by the court. (I) (We) agree to refer this debtor to your office before any settlement is made. Itemized Statement in Duplicate enclosed.

Date

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Creditor Sign Here
Return to X Adjustment Co., Inc. _____________, Wisconsin.

Another form for suit which is sometimes used reads as follows:

Written Authorization For Suit

I (We) hereby authorize the __________ of ____________, Wis., to act as my (our) agent in bringing suit or garnishment action against ___________ of ___________ in the Amt. of $_________ in any court of their choosing; the attorney, if one is used, will be ___________ of ___________.

It is my (our) understanding that the costs will be paid by the above debtor if the account is paid, or by me (us) if no settlement is made.

Date _______________

Signed _____________________
(Name of Creditor firm)
By______________________
(Title)

This form is usually signed by the creditor at the time the collection agency solicits the account for collection.

Upon the basis of the so-called Written Authorization for Suit or Suit Authorization, X Agency obtains a summons either in Justice Court or a small claims court. The name of the creditor is inserted as plaintiff and the name of the debtor is inserted as defendant. The name of B is added as attorney for the plaintiff, and the summons is regularly served.

If the case is in small claims court, the blanks in a prepared form for complaint in an action in debt are properly filled out and in addition at the top of the complaint there is added the wording:

Suit
X Collection Agency

On the line reading: Plaintiff's Attorney _________ By: __________ the blanks are filled out so that when completed it reads:

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Plaintiff's Attorney B
By: X Collection Agency

Attorney B has not notice or knowledge that any specific case has been commenced although he has a working agreement with X agency, permitting the use of his name as attorney generally. Attorney B does not appear on the return date to join issue. If the case is a default one, a representative of the collection agency asks for judgment, and it is granted. If the case is settled, B never hears about it and receives no fee other than that which is involved in his annual retainer. However, if the defendant answers and denies liability, Attorney B is called and arrangements are made for a trial date and the case proceeds as any other case. An additional charge over and above that embodied in the annual retainer is made by the attorney. The attorney's contacts, if any, with the client are made through the collection agency, and the final accounting with the client, where the lawsuit has resulted in collection of the account either in full or in part, is made through the collection agency. If the debtor should go to Attorney B's office to try to settle the account, the lawyer advises him to work out the arrangements at the X Agency, where the records are kept.

Opinion

It seems amply clear to the committee that an attorney may not accept employment from a lay collection agency to litigate claims of the agency's customers where such employment (a) involves payment of the attorney's fees by the agency, or (b) involves division of fees with the lay agency, or (c) subjects the attorney to the control of the agency, or (d) involves acceptance of professional retention arising out of solicitation by the lay agency, or (e) permits the agency to use the attorney's name or process, or (f) serves as an aid to the unauthorized practice of law by the lay agency.

Under no circumstances may a member of the State Bar permit his professional services to be controlled or exploited by any lay agency or other intermediary, personal or corporate, by intervention between himself and any client. A member of the State Bar shall avoid all relationships by which the performances of his duties may be directed by or in the interest of such intermediary. A member's responsibilities and qualifications shall be and are individual. A member's relationship to his client shall be personal and his responsibility shall be directly to his client. This clearly precludes the lawyer from furnishing blank

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process signed by the lawyer, or permitting any collection agency to bring suit in the name of the lawyer or to use process in the name of the lawyer or to instruct a debtor to negotiate a settlement with the agency after suit is begun.

For reasons which will be made clear below, it is equally improper for an attorney to become a regular employee or become a partner in a lay collection agency, and carry on the legal work for customers of the agency, for which the agency collects fees.

The whole question is a rather involved one requiring consideration of at least five of the Canons of Professional Ethics: Canon 34, which deals with the division of fees; Canon 27, which deals with advertising; Canon 35, which deals with intermediaries; Canon 41, dealing with deception; and Canon 47, which deals with aiding the unauthorized practice of law. Because of the great interest in the problem, and to clarify this matter for all members of the bar so that no future misunderstanding will arise, the committee's opinion is somewhat detailed.

In instances where the attorney is personally and specifically designated by the creditor, so that a bona fide relationship of attorney-creditor exists, there is no difficulty. However, where there is no valid assignment of a claim from creditor to collection agency, and the collection agency seeks to commence the suit through the lawyer without the lawyer personally handling the matter, or where any of the decisions relating to the lawsuit are delegated by the lawyer to the lay agency, an improper relationship exists and the lawyer may not permit his name to be so used. The conduct described in the question above stated is a clear case of the professional services of a lawyer being controlled and exploited by a lay collection agency. Such conduct is contrary to Canon 35.

Certainly the attorney should be free to communicate directly with, and secure his instructions and compensation from, the creditor for whom he is acting.

Any action by a collection agency through which it attempts to collect its principals' claims in the courts constitutes the unauthorized practice of law. *Richmond Ass'n of Credit Men v. Richmond Bar Ass'n*, 189 S.E. 153, Va. (1937); *Nelson v. Smith*, 154 P. 2d 634, Utah (1944); *Bay County Bar Ass'n v. Finance System*, 345 Mich. 434, 76 N.W.2d 23 (1957); *DePew v. Wichita Ass'n of Credit Men*, 142 Kan. 403, 49 P. 2d 104 (1935).

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For the same reason it is not permissible for a collection agency to solicit a claim on the express or implied representation that the agency will pursue the matter to its conclusion, taking legal action if necessary. ''To determine whether a lawsuit may properly be commenced and therefore whether it is justifiable to commence requires special knowledge of the legal elements constituting a cause of action. To make a business of acting or of advising others in these matters partakes of the practice of law.'' *In re Lyon*, 16 N.E. 2d 74 (Mass.), cited at 157 A.L.R. 526. It is clear that a lawyer cannot handle such claims for the agency for no lawyer may permit anyone to solicit work for him. (Canon 27)

It is equally improper for a collection agency to take a colorable or feigned assignment of a claim for the purpose of suit thereon. This is only a sham, because no real interest passes from the creditor to the agency. The device technically permits the agency to come within the area of statutory or case law which holds that persons may prosecute their suits *pro se*. *Bump v. Barnett*, 167 N.W. 2d 579 (Iowa), cited at 157 A.L.R. 525. In Wisconsin, legal actions must be prosecuted in the name of the *real party in interest*. Wis. Stat. s. 260.13. Canon 41 dealing with deception would seem to prevent any attorney from handling such cases.

How then may a collection agency bring suit on the claim of a creditor? In order to enable the agency to properly control the litigation, including the naming of the attorney, there must be a bona fide assignment for value of the claim to the collection agency and the creditor shall have relinquished all right and title to the claim. This requires the agency to purchase the claim outright. *Bay County Bar Assn. v. Finance System*, supra, *State v. James Sanford Agency*, 167 Tenn. 339, 69 S.W.2d 895 (1934).

The basic problem has been the subject of two opinions of the American Bar Association Committee on Professional Ethics, that of May 2, 1933 (Opinion 96), and that of October 21, 1939 (Opinion 198), which reconsidered the Committee's Opinion 96 reconciling the same with Canons 35 and 47, and ''The Statement of Principles in Reference to Collection Agencies'' adopted by the Committee on Unauthorized Practice of Law in 1937 and later by the Wisconsin Bar Association and Wisconsin Collectors Association in 1947. From the point of view of the collection agency, it is important to consider the following excerpt from the last mentioned Statement:

It is improper for a collection agency:

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1. To furnish legal advice or to perform legal services or to represent that it is competent to do so; or to institute judicial proceedings on behalf of other persons.

2. To communicate with debtors in the name of an attorney or upon the stationery of an attorney; or to prepare any form of instrument which only attorneys are authorized to prepare.

3. To solicit and receive assignments of commercial claims for the purpose of suit thereon.

4. In dealing with debtors to employ instruments simulating forms of judicial process, or forms of notice pertaining to judicial proceedings, or to threaten the commencement of such proceedings.

5. To solicit claims for the purpose of having any legal action or court proceeding instituted thereon, or to solicit claims for any purpose at the instigation of any.

6. To assume authority on behalf of creditors to employ or terminate the services of any attorney or to arrange the terms or compensation of such services.

7. To intervene between creditor and attorney in any manner which would control or exploit the services of the attorney or which would direct those services in the interest of the agency.

8. To demand or obtain in any manner a share of the proper compensation for services performed by an attorney in collecting a claim, irrespective of whether or not the agency may have previously attempted collection thereof.

The arrangement which is proposed in the present case hardly conforms to that which Canon 35 requires of the lawyer. To quote from Opinion No. 798 of the American Bar Association Committee:

> The responsibility of the lawyer must be to the principal and he must look to the principal for his compensation. His services must be free from the control of the lay adjuster. He must be allowed to communicate directly with, and obtain his instructions directly from, the insurance company when he so desires.

If, in the above quotation, the words ‘‘collection agency’’ are substituted for ‘‘adjuster,’’ and ‘‘client’’ for ‘‘the insurance company,’’ the situation then was expressly dealt with in the American Bar Association committee’s Opinion 198 which parallels that which is present in the instant case.

Canon 34 makes it improper for an attorney to share or divide fees other than with another attorney. Likewise, Wis. Stat. s. 256.46 prohibits attorneys from sharing or splitting fees with a layman.

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This opinion necessarily involves the unauthorized practice of law aspects of the collection agencies' activities. It goes without saying that it is unethical for an attorney to aid or participate in any such practice, under Canon 47. The committee's position is amply substantiated by a long line of decisions, perhaps best summarized by the Supreme Court of Missouri, in the case of *State, Etc. v. C.S. Dudley & Co.*, 340 Mo. 852, 102 S.W.2d 895 (1937), which used the following language in holding the proper manner for a collection agency to act when it could not collect a claim and suit appears to be necessary:

> We therefore conclude that the respondent has the right to collect debts for others provided it does not employ an attorney or promise to employ one, or threaten the debtor with suit if he does not pay. If collections cannot be made without the services of an attorney, the respondent should return the claim to the creditor who should be free to select and employ his own attorney. The respondent should not engage directly or indirectly, in the business of employing an attorney for others to collect claims or to prosecute suits therefor, nor have any interest in the fee earned by the attorney for his work.

The essential danger of the arrangement which is suggested in the question here lies in five fields: The danger of solicitation (Canon 27); the fact that there is a division of fees other than with another lawyer (Canon 34); the fact that there is a violation of the requirement of Canon 35 that ‘‘a lawyer's responsibilities and qualifications are individual. . . . A lawyer's relation to his client should be personal and the responsibility should be direct to the client . . .''; the deception practiced on the court if in fact there has been no bona fide assignment of claim (purchase) by the collection agency, in violation of Canon 41; and, the further danger that the program outlined will, in fact, serve as an aid to the unauthorized practice of law by the credit and collection agency exposing the lawyer who works with it to a violation of Canon 47.

We hold, for the foregoing reasons, that it would constitute unprofessional conduct for an attorney to accede to the proposal which the collection agency has made, as quoted in the first part of this opinion. An attorney cannot ethically sell his name or legal process to a collection agency for its uncontrolled use. He must deal directly with the true owner of the claim, and not through a lay intermediary. Neither may he handle claims solicited by an agency, or split fees with the agency, nor may he practice law on behalf of the agency's customers while in the employ of that agency.

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(Note—The same opinion would be reached under principles set forth in Canons 2, 3, and 9, Code of Professional Responsibility.)

(Note—This opinion by the Committee on Professional Ethics was prepared in conjunction with an investigation by the State Bar of Wisconsin of the activities of certain collection agencies, as requested by the Supreme Court, in *Drugsvold v. Small Claims Court*, 13 Wis. 2d 228 (1961). Because of the inherent problems of unauthorized practice of law, certain portions of the opinion stress this topic. The Committee on Unauthorized Practice of Law concurs in this opinion.)

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