

## ETHICALLY COLLECTING A DEBT FROM A CLIENT

by  
Martin A. Cole, Senior Assistant Director  
Minnesota Office of Lawyers Professional Responsibility

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Among the recent requests for advisory opinions received by the Director's Office was whether a lawyer may ethically use an outside collection agency to handle past-due accounts, and if so, what issues are there as to confidentiality.

Because the Minnesota Lawyers Board has not issued a formal opinion on this topic, before issuing the answer to this request, the opinions of others states were reviewed.

Most states authorize attorneys to use a collection agency to collect past-due fees, and allow the lawyer to disclose the identity of the client, their last known address and telephone number and the amount due.

In general, all states caution that disclosures must be the minimum information necessary for the collection effort, and no more. *See, e.g., Missouri Op. 960203 (1996).*

Rule 1.6(b)(5), Minnesota Rules of Professional Conduct (MRPC), also supports the latter statement ("A lawyer may reveal confidences or secrets necessary to establish or collect a fee").

The Director's Office would certainly agree with such basic state opinions.

Several states have issued opinions going at least one step further by placing one particular limitation on the lawyer's conduct.

While authorizing use of a collection agency and the limited disclosures set out above, these states prohibit the reporting of non-paying clients to credit bureaus. Since disclosures are to be limited only to those necessary to collect a fee, revealing the client's identity and debt to a credit bureau is deemed unnecessary to that task and is considered punitive, since it only seeks to damage the client's credit rating, not secure payment of the debt. *See, e.g., South Carolina Op. 94-11 (May 1994).*

Again, the Director's Office would agree with this position.

Some states have issued far more thorough and thoughtful opinions on this topic, such as West Virginia's *Op. 94-1 (1994)*, which sets out a complete list of criteria to be met before referral of a debt to a collection agency is proper: that

- (1) the fee is legally and ethically valid;
- (2) the lawyer did not believe the client would be unable to pay when the agreement was made;
- (3) the lawyer is no longer handling the client's matter;

- (4) there is no genuine dispute over the debt;
- (5) the lawyer has exhausted all reasonable means of collection short of litigation;
- (6) the lawyer has informed the client in writing that she intends to refer the matter to a collection agency;
- (7) the lawyer exercises caution in choosing the collection agency and does not select one known to have acted improperly in the past; and
- (8) does not disclose information beyond what is necessary or that is unrelated to the debt.

Whew! While Minnesota is unlikely to require full compliance with this approach, it offers an ethical lawyer excellent guidance. In particular, item (7) is worth a cautionary word. Rule 5.5(b), MRPC, prohibits a lawyer from assisting a non-lawyer in activities that would constitute the unauthorized practice of law. Rules 5.3(c) and 8.4(a), MRPC, make an attorney responsible for the conduct of retained non-lawyers in many situations, if that conduct would violate the ethics rules if engaged in by the attorney.

So you may use an outside collection agency, but choose the agency with care and inquire as to their collection methods.