

## Pitfalls in Debt Collection Practice Result in Discipline

by  
Eric T. Cooperstein, Assistant Director  
Minnesota Office of Lawyers Professional Responsibility

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**Issue:** What ethical repercussions follow from an attorney's prejudgment garnishment of a debtor's bank account for an amount in excess of the claim permitted by statute?

**Rules:** 3.1 (Meritorious Claims), 8.4(d) (Conduct Prejudicial to the Administration of Justice).

**Background:** Attorneys routinely represent creditors in debt collection actions against individuals. Because the amounts of the debts are often small and the prospects of recovery equally slim, creditors' attorneys take on a high volume of client matters and leverage their time through the efficient use of paralegals and computer-generated forms. Minnesota law facilitates this type of practice through the attorney summary execution and prejudgment garnishment statutes, Minn. Stat. Chs. 551 and 571, which grant attorneys an exclusive franchise to initiate garnishment of a debtor's assets after pleadings have been served but prior to hearing or judgment.

Aggrieved debtors often complain to the Director's Office, usually alleging that the creditor's attorney treated the debtor rudely, refused to agree to reasonable payment plan, or failed to return the debtor's phone calls. The Director routinely dismisses most of these complaints because the debtor is clearly not the attorney's client and the attorney generally owes no duty to the debtor to speak kindly, to negotiate or to communicate.

Nevertheless, aggressive creditors' attorneys do sometimes run afoul of the Rules of Professional Conduct by overstating their claims against debtors.

**Facts:** Attorney's client, a hospital, refers an unpaid emergency room bill for collection. The debtor's insurance company authorizes payment of the bill but sends the check to the debtor, who fails to forward the funds to the hospital. Attorney properly serves the summons and complaint and has some communication with the debtor, who tenders nominal payments toward the debt. After several months, attorney serves a prejudgment garnishment on the debtor's bank. The garnished amount includes a filing fee of \$132.00, which costs the attorney has not yet incurred.

As required by statute, the bank segregates from the debtor's bank account 110% of the garnishment amount. Within a few days the debtor authorizes the bank to release the amount of the underlying debt, and the attorney authorizes the bank to desegregate the amount of the filing fee and the excess funds. While the funds were segregated, however, the debtor's account became overdrawn by an amount equal to the filing fees included in the garnishment, and the bank charged the debtor \$80.00 in overdraft fees.

**Discussion:** The statutory definition of a prejudgment garnishment "claim" includes only those costs paid or incurred in the proceeding, not future costs. Minn. Stat. Ch. 571.712. Although a minor sum to the attorney, the unnecessary segregation of the \$132.00 filing fee had a detrimental effect on the debtor. The fee was not authorized by statute, hence the attorney's claim violated Rule 3.1, MRPC.

The attorney included the filing fee in the garnishment for the convenience and advantage of having all the funds garnished at once. Otherwise, the attorney would have had to obtain a second judgment if the debtor refused to release the funds and the attorney was forced to file the pleadings to obtain the judgment and writ of execution. By favoring convenience over the statutory scheme, the attorney's conduct prejudiced the administration of justice, in violation of Rule 8.4(d).

**Discipline:** When these types of ethical violations are limited to a single complaint and the seriousness is mitigated by the absence of any intent to violate the Rules, by the attorney's corrective action after the complaint has been filed and by the lack of significant harm to the debtor, the misconduct typically warrants a private admonition.