

# ADVISORY ETHICS OPINION 84-03

## SYNOPSIS:

A collection agency employs an attorney to file law suits if necessary to collect claims which the agency has solicited for collection. The agency pays the attorney a regular salary whether or not particular law suits result in recovery. The agency pockets the contingent percentage fee it receives when the lawyer's efforts are successful.

The attorney has placed himself in the position of aiding a corporation in the unauthorized practice of law, contrary to the mandate of DR 3-101. The attorney has also accepted employment with an organization that promotes the use of his services, in a manner not sanctioned by DR 2-103(D).

## OPINION:

The facts set forth in the request for an opinion may be summarized as follows:

- (1) X is a Vermont corporation engaged in the business of collecting claims and accounts on behalf of others. (hereinafter "clients").
- (2) A is an attorney at law, licensed to practice in the State of Vermont. He is employed by X and receives a salary. Except for filing fees and sheriff's fees, X absorbs all costs incident to A's representation of clients.
- (3) X, through its sales force, solicits agreements from clients. The client pays X a fee when the agreement is executed and pays X a contingency fee when money is collected. Pursuant to the third paragraph of the agreement, the client authorizes X at X's option to place accounts with attorneys for collection.
- (4) If an account cannot be collected from a debtor residing in Vermont through a mailing program and telephone contact, the account may be turned over to A for collection.
- (5) After various procedural steps, including contacts with the client, A signs and files pleadings on behalf of the client pursuant to VRCP 11.
- (6) All monies received by A in settlement of law suits or as the result of pre-suit negotiations are deposited into X's checking account. After a period of time sufficient to allow checks to clear, X deducts its contingent fee of 45% and remits net proceeds to the client. Unexpended cost deposits are refunded to the client at this time.

While the questions A propounds have to do with handling conflicts of interest between X and X's clients under Canon 5 and the proper handling of client funds under Canon 9, about which facts not repeated above are presented, we do not reach these questions, because we find A's relationship with X in violation of the Disciplinary Rules of Canons 2 and 3.

DR 2-103(D) limits the organizations by which an attorney may be employed that promote the use of his services. X does not fit into the designated categories: i.e., a legal aid or public defender office, a military legal assistance office, a lawyer referral service sponsored or approved by a bar association, a non-profit organization recommending, furnishing or paying for legal services for its members or beneficiaries, or an organization organized for profit in connection with matters where such organization bears the ultimate liability of its member or beneficiary.

X purely and simply is a profit-making corporation that is offering services which can only be provided by a lawyer and making a profit thereon. For A to assist X in this enterprise on salary constitutes aiding a non-lawyer in the unauthorized practice of law, contrary to DR 3-101(A) and dividing legal fees with a non-lawyer, contrary to DR 3-101 (B).

An early opinion of the American Bar Association's Committee on Professional Ethics, Formal Opinion No. 35, was based on similar facts, which it found to constitute fostering the unauthorized practice of law. The opinion has been consistently followed and expanded upon in connection with collection agencies.<sup>1</sup>

In Informal Opinion No. C-735, it is stated:

If your employment and compensation are by the agency in its own behalf, rather than on behalf of the creditor, and the agency is indebted to you for your legal fees whether or not it receives full reimbursement from the creditor, it would appear that your client is the agency and not the creditor, and that you are permitting your professional services to be used in aid of the unauthorized practice of law by an agency which is employed and compensated by the creditor to furnish legal services as well as legitimate collection agency services . . .

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<sup>1</sup> See, Formal Opinion Nos. 188, 225, 294, et al.

[f]f the agency receives from the creditor, in addition to legitimate compensation for its own services and expenses, an amount greater than the amount of fees paid to the attorney for his services, the attorney is in effect splitting or dividing fees for legal services with the agency and thus is violating Canon 34. Also, if the agency is compensated by the creditor on a fixed basis, either on a percentages-of-collections arrangement or in another amount agreed upon by the agency and the creditor, regardless of the amounts paid by the agency to the attorney for his legal services, it would appear that the attorney is actually an employee of an agency, which has contracted with the creditor to supply all services necessary to collect claims, including legal services which would constitute unauthorized practice of law by the agency and a violation of Canon 47 by the attorney.<sup>2</sup>

The canons cited in the ABA opinions were incorporated into the ABA Code of Professional Responsibility, which was adopted by the Vermont Supreme Court, as part of the Disciplinary Rules noted above.

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<sup>2</sup> See also Informal Opinion Nos. 600, 799, and 957.