

NEW HAMPSHIRE BAR ASSOCIATION

Collecting Attorney's Fees – Debt Forgiveness and Reporting to Regulating Agency

Ethics Committee Advisory Opinion 2010/11-01

ABSTRACT:

In an attempt to collect an unpaid bill, an attorney may not (a) threaten to or actually inform the Internal Revenue Service that the attorney has written off the account receivable and considers the unpaid legal fees a debt that has been forgiven, or (b) inform a regulatory agency that a client owes unpaid fees to the attorney.

ANNOTATIONS:

An attorney violates Rules 1.9 (Duties to Former Client) and 1.6 (Confidentiality of Information) by informing the Internal Revenue Service the attorney has written off an account receivable and considers that the unpaid legal fees are a debt that has been forgiven.

An attorney violates Rules 1.9 (Duties to Former Client) and 1.6 (Confidentiality of Information) by informing a regulatory agency that a client owes unpaid fees to the attorney.

OPINION:

UNDERLYING FACTS:

Attorney met with several members of the board of directors and agreed to provide legal services to an organization. She had a good faith belief that the Board had authority to retain her and obtained a signed fee agreement and retainer.

The work provided by the attorney exceeded the amount of the retainer paid by the organization. When the final bill was presented, an officer of the organization refused to pay the additional amount, stating that the work had not been properly authorized by the organization. Attorney believes this to be an incorrect legal argument. Also, the officer admitted that the work was properly completed, the result was what the members of the board had sought and the organization had benefitted from the work.

The attorney wishes to collect her fee without the need to file a suit. She is aware that filing a fee action often results in a counterclaim for malpractice. Also, she believes her malpractice insurance policy bars her from suing a client for unpaid fees. In order to enhance her chance of getting paid for her work, she would like to inform the client of her intent to file a Form 1099, indicating a taxable debt forgiveness, with the IRS and also to provide information on the debt forgiveness to the governmental agency that regulates the organization, here the Charitable Trust Division of the Attorney General's Office.

QUESTIONS PRESENTED:

1. Whether an attorney who is owed money by a client for services rendered and not paid pursuant to a written fee agreement may write off the account receivable and, without being compelled by federal law, issue a 1099 form to the former client and to the IRS showing forgiveness of the unpaid fees?
2. Whether an attorney who is owed money by a former client for services rendered and not paid for pursuant to a written fee agreement, without being compelled by state law, may report the non-payment of fees to a state agency that regulates the organizational client?

ANALYSIS:

It is perhaps not surprising that attorneys are having greater difficulty in collecting on accounts receivable in this time of economic difficulty. Nonetheless, attorneys need to carefully consider the methods they employ in trying to collect these fees.

It is the bedrock of the attorney-client relationship that the attorney will not reveal information provided during representation of a client, unless expressly or impliedly authorized to do so. The comments to the New Hampshire Rules of Professional Conduct describe the disclosure of client confidences as “an extreme and irrevocable act.” Rule 1.6, New Hampshire Comments.

This fiduciary duty to the client continues after the attorney-client relationship has terminated. Rule 1.9. An attorney must maintain as confidential not only information provided by the client, but “...information relating to the representation...” from whatever source, including information generated by the attorney. Billing records, and the fact that the client owes money to the attorney, are confidential information relating to the representation of the client. In a prior opinion, this committee determined that it may be a violation of the attorney’s duty of confidentiality to reveal billing records to a third-party auditor in an insurance defense case. *See* NH Ethics Opinion #2000-01/05.

There are limited exceptions that permit an attorney to disclose confidential information without obtaining the informed consent of the client. Of particular relevance to this inquiry is Rule 1.6 (b)(3) which permits a lawyer to disclose information necessary “to establish a claim or defense on behalf of the lawyer in controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client;” and Rule 1.6(b)(4), which allows disclosure “to comply with other law or a court order.”

For the attorney to file a Form 1099 with the Internal Revenue Service showing debt forgiveness would potentially subject the former client to liability for payment of income tax for the amount of debt that was written off by the attorney. This would be disclosing confidential information, whether or not the disclosure is to the disadvantage of the former client. The

attorney's intention in providing information to the IRS or to the Attorney General's office is to encourage the client to pay the attorney's bill; it is not to establish a claim or defense in a controversy between the lawyer and client; and it is not information that would be generally known.

In reaching this conclusion, the committee assumes that revealing this information is not required by IRS rules or statutes and thus not necessary to comply with any law or court order. The committee understands that, for example, forgiveness of a mortgage loan by an institution in the business of making secured loans generally must be reported to the Internal Revenue Service, but the committee is unaware of any Internal Revenue Code provision requiring that writing off an amount owed for unpaid legal services be reported to the IRS. Thus, there is no exception to the Rules that would allow the attorney to provide information about the client's unpaid bill to the Internal Revenue Service.

Likewise, there is no exception in the Rules that allows the attorney to reveal the client's debt to a governmental agency that regulates the client. Pursuant to the Rules, the attorney is limited to seeking payment from a client or establishing a claim against a client.

The committee recommends that the attorney consider drafting a more thorough fee agreement prior to representation of the client and perhaps seeking to insure that her retainer payment is current. The attorney should consider including, at a minimum, the scope of representation, rate of fees and expenses, and a statement that the individuals executing the agreement are authorized to do so by the client. *See* Rule 1.5.

The committee further recommends that, when considering creative collection techniques, attorneys should be mindful of extortion law. *See State v Hynes* 159 N.H. 187 (2009) (Catch-all provision of extortion law under which defendant, an attorney, was convicted states that extortion occurs when a person threatens to "[d]o any other act which would not in itself substantially benefit him but which would harm substantially any other person." RSA 637:5. (Defendant threatened to sue hair salon for alleged gender-based price discrimination unless salon agreed to pay him \$1,000.)).

CONCLUSION:

Not being paid by a client is always a frustrating experience. However, in attempting to collect fees from former clients, an attorney may not use or reveal information about a client or use information to the disadvantage of a client, unless permitted by the Rules. The lawyer may use other methods to guarantee payment for work, such as requiring a retainer. Also, should the lawyer seek to collect the fee or be required to defend a suit by the client, she may then use confidential client information as is reasonably necessary. *See* Rule 1.6, ABA Comment 14.

NH RULES OF PROFESSIONAL CONDUCT:

- Rule 1.5
- Rule 1.6
- Rule 1.9

SUBJECTS:

Duties to Former Clients

Confidentiality of Information

Fee Agreements

- **By the NHBA Ethics Committee**

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