

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-90
Issued: March 1974

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), especially Rules 7.01-7.50 and the Attorneys' Advertising Commission Regulations, before relying on this opinion.

Question: May an attorney ethically represent on retainer a corporation engaged in the business of selling to customers a package of computerized collection letters which includes two letters from the attorney with his pre-printed signature thereof?

Answer: No.

References: DR 2-101, 2-102, 2-103, 3-102, 5-107

OPINION

An attorney contemplates representing a corporation engaged in the business of selling to customers a package of computerized collection letters. Two of the letters would be from the attorney and would be sent out by the computer with his pre-printed signature on them after receiving authorization from the attorney to do so. Both letters advise that the attorney represents the corporation, as well as the fact that the corporation has been employed to effect collection of an account from the debtor. The letters instruct the debtor to contact his creditor, and one of them indicates that the attorney is prepared to make recommendations to the creditor unless arrangements are made with the latter within five days. In return for this service, the attorney would receive a fixed monthly retainer from the corporation. The attorney expresses a desire to avoid any unethical conduct and has asked the Ethics Committee to determine whether he may undertake such representation.

An answer to this question requires analysis of several canons and disciplinary rules. Former Canon 27 prohibited solicitation of employment by an attorney. This injunction has been continued in DR 2-101, DR 2-102 and DR 2-103 of the new Code of Professional Responsibility. Old Canon 35 forbade control or exploitation of a lawyer by any lay agency intervening between lawyer and client. The philosophy of this rule has been continued in DR 5-107(B). By former Canon 34, the division of legal fees with a layman was declared unethical. A similar rule is found in DR 3-102. The present inquiry in some measure involves each of these rules.

The problem of solicitation in this area received special attention in ABA Formal Opinion 225 (dated July 12, 1941). There, the Committee held that it is unethical for a practicing attorney to participate in the collection activities or management of an agency

which solicits the collection of claims. Of particular significance was its finding that some services lawfully rendered by laymen become professional services when provided by an attorney. Applying this to collection agencies, the Committee concluded that the collection of claims was a professional service when performed by an attorney. In such circumstances, said the Committee, an attorney is professionally responsible for the activities of the agency, and they must meet the ethical requirements of the legal profession. Since solicitation of employment is forbidden by the Canons, employment in behalf of an agency engaged in such activity was declared to be improper.

Here, the principal activity of the corporation in question is the solicitation and sale of a computerized package of collection letters. When an attorney becomes part of this process, it constitutes indirect solicitation and is ethically impermissible. The inquiring attorney expresses the opinion that no solicitation is involved, because he would not represent the creditor and would be on a fixed retainer from the corporation. In our view this is no answer to the principles stated in Opinion 225. The attorney would be on the payroll of the corporation and ostensibly representing it. Opinion 225 clearly indicates that in this situation solicitation by the corporation is attributable to him. Moreover, it goes without saying that solicitation of sales is what makes possible the employment of an attorney on a retainer basis.

The proposed conduct is objectionable from another standpoint. In ABA Informal Opinion C 735 (dated May 19, 1964), the Committee said:

If, when you receive a claim for collection, there does not arise a direct and personal attorney-client relationship between you and the creditor, or if the agency, rather than the creditor, directs and controls your performance of your legal services in connection with your collection efforts, there is a violation of Canon 35.

The inquiring attorney admits that there is no direct relationship at all between him and the creditors for whose benefit his legal services are performed. In our view the attorney has “received” a claim for collection under the facts of his inquiry. It follows that the failure to establish a personal relationship with the creditor runs contrary to the letter and spirit of existing rules against the injection of an intermediary between the lawyer and those for whose benefit his services are undertaken.

An additional problem is presented by the proposed fee arrangement. ABA Formal Opinion 180 (dated May 10, 1938) holds that an attorney may not accept a commercial claim from a lay forwarder on a basis which contemplates division of his fee for legal services with the lay forwarder. The facts of our inquiry indicate that the charge for the computerized package of letters, including those of the attorney, is paid directly to the corporation. While the attorney is then paid a monthly retainer, from all that appears in the facts presented it is certainly arguable that the corporation has received a fee partly attributable to the lawyer’s efforts in violation of DR 3-102.

There is a final objection inherent in the suggested representation. It is clear that the significant product offered for sale by the corporation is a letter on legal stationery purporting to come from an attorney’s office. Mere referral of a collection matter to an

attorney carries with it the connotation that the creditor is prepared to take any necessary legal action if payment is not forthcoming. In such circumstances an attorney's letterhead is no doubt a highly salable commodity, but the services of an attorney are not to be hawked as the wares of a company in the marketplace. Yet, that is precisely what would happen if we approved of the proposed conduct. The conclusion is inescapable that such conduct is simply beneath the dignity of our profession.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.