

# Ethics Opinion

## 001027

*Ethics opinions are provided by the State Bar of Montana's Ethics Committee upon a Bar member's request. The opinions are non-binding and advisory only.*

### **FACTS:**

A fee dispute arose between attorney and client after the attorney performed legal work without a signed fee agreement. The client had represented that she would sign the written fee agreement presented to her, but never did. The attorney claims the client entered into a verbal contract for a stated hourly fee plus costs.

As the work progressed monthly bills were sent to the client, but no payments were received.

After the attorney-

client relationship terminated, bills were still sent monthly. The bills have never been paid but the client has made an offer of compromise.

### **QUESTIONS PRESENTED:**

1. May an attorney pursue delinquent payment from his former client through a collection agency?
2. May an attorney report and disclose the unpaid fees to a credit bureau?

### **SHORT ANSWERS:**

1. Yes. However, a lawyer should abide by Rule 1.6(b)(2) to avoid revealing confidential information beyond that which is necessary.

2. No. A lawyer should not report non-paying clients to credit bureaus. It is not necessary for establishing the lawyer's claim for compensation, it risks disclosure of confidential information and its effect is primarily punitive.

### **DISCUSSION:**

Rule 1.6 of the Montana Rules of Professional Conduct provides:

- (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
- (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
  - (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
  - (2) to establish a claim or defense on behalf of the lawyer in a 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.

A lawyer may use a collection agency to collect unpaid legal fees if all other reasonable efforts short of litigation have first been exhausted. Those efforts should include the mailing of regular billing statements and case status reports; the contemplation of alternatives including fee arbitration, negotiation and mediation; and at least one demand letter setting out the ramifications of continued non-payment.

In the instant case, the failure to accomplish a written fee agreement does not preclude use of a collection agency to pursue the delinquent account. However, it is best practice to always obtain a written fee agreement and it is best practice to specifically include in that agreement the consequences of non-payment.

Six sample written fee agreements are included in the Lawyers' Deskbook and Directory. The State Bar's Fee Arbitration Program, authorized by the Montana Supreme Court, provides an arbitration alternative that is free to all members of the Montana Bar. The rules of the process and forms to initiate an arbitration are also included in the Deskbook. Finally, it is appropriate to use the collection agency only after having withdrawn, in writing, as counsel. A lawyer using a collection agency should know that the lawyer is legally and ethically responsible for the conduct of the agent in the collection process. *Montana Ethics Opinion 960828*.

Also, a lawyer may reveal only such client confidences and secrets as are necessary to establish or collect fees or as required by the Court. The lawyer must take care to disclose no more information about the client and the client's legal affairs than is reasonably necessary for the agency to collect the debt. That said, a lawyer should not report non-paying clients to credit bureaus.

Reporting to a credit agency is not necessary to collect a fee because a delinquent fee can be collected without it.

The effect of a negative report is primarily punitive. Finally, it risks disclosure of confidential information about the former client which the lawyer is not permitted to reveal under Rule 1.6.

**THIS OPINION IS ADVISORY ONLY**