



Suing Your Client for Unpaid Fees

Clients who cannot, do not or will not pay are certainly one of the principal frustrations of our profession. Although we have long been admonished not to sue clients for unpaid fees,¹ and to be even “zealous” in our efforts to avoid controversies over fees with our clients,² Comment [13] to ER 1.6 (Confidentiality of Information)³ specifically sanctions disclosure of otherwise confidential client information in an action to collect a fee, impliedly condoning lawyers who sue their clients to recover unpaid fees and expenses.

But before you set sail for the courthouse, there are some very well-defined ethical limitations in any collection procedures lawyers can take against current and former clients. These considerations are in addition to your own comfort level in filing suit against a client, and those admonitions from our errors and omissions insurance carriers about the risk of counterclaims. Not necessarily in the order of their importance, consider the following:

- It is unethical to instigate a criminal prosecution against a former client whose personal check for your legal services has bounced.⁴ The general consensus here seems to be that such an action would be “overkill,” and that you can recover just as much through the civil courts.
- You may not sue a current client in a civil action while continuing to represent him in the same representation that generated your bill.⁵ Actually, the only kind of client you sue in any matter should be a former client.
- You cannot sell a client’s account receivable to a factor, particularly if the factoring agreement permits the factor to resell the account receivable to third persons, or if it permits direct contact with the client, or if it allows the factor to recoup the discounted fee portion that constitutes its charges.⁶
- You shouldn’t report or threaten to report a client’s delinquent account to a credit reporting agency, essentially because such an action is generally deemed not necessary to establish the lawyer’s claim for unpaid fees, and might involve disclosures that would adversely affect a client’s interests.⁷
 - You cannot, without your client’s prior consent, use a collection agency that either discloses past due accounts to a credit reporting agency, or threatens the client that it will do so. Remember that ER 8.4(a) prohibits a lawyer from violating the Rules of Professional Conduct through the acts of a third party, and that the lawyer will be responsible for assuring that the collection agency exercises the same ethical integrity required of the lawyer.⁸ If the collection agency used by the lawyer does use a credit reporting agency, then such use requires the informed consent of the client.⁹ Remember that “informed consent” is a defined term and denotes the agreement to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to what’s being proposed. Be careful here, and understand in addition that you can disclose to the collection agent only the minimum amount of client information necessary to collect the debt.¹⁰
 - It is unethical to charge the cost of collection to the client unless the client has given informed consent to the arrangement, and the actual cost so determined is reasonable.¹¹

Ethics Opinions and the Rules of Professional Conduct are available at www.azbar.org/Ethics



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The ethical basis for all of this proscribed activity is that of client confidentiality as set forth in ER 1.6, and as further modified by ER 1.6(d)(4). This is the part of the rule that allows a lawyer to reveal such information relating to the representation to the extent the lawyer reasonably believes necessary “to establish a claim” on behalf of the lawyer “in a controversy between the lawyer and the client.” The “controversy” here would obviously be the fact that the client has not paid the lawyer’s bill, certainly “information relating to the representation” otherwise protected by ER 1.6(a), as is the fact of the amount of the delinquency and the nature of the services rendered for which the fees were charged.

In any dispute with a client about unpaid fees, regardless of any personal animosity resulting, you must continue to honor the obligations of client confidentiality as provided by the ethics rules, and disclose only as much client information as is reasonably necessary to collect the fee.

endnotes

1. ABA Formal Ethics Op. 250 (1943) (“Ours is a learned profession, not a mere money-getting trade. ... Suits to collect fees should be avoided.”); *accord*, Ariz. Ethics Op. 76-14 (July 23, 1976); and *see* Comment [10] to ER 1.5, Rule 42, ARIZ.R.S.CT.
2. EC2-23, former Code of Professional Responsibility.
3. Rule 42, ARIZ.R.S.CT.
4. Ariz. Ethics Op. 93-11 (Sept. 28, 1993).
5. Ariz. Ethics Op. 00-03 (March 2000).
6. Ariz. Ethics Op. 98-05 (March 1998). *See also* *In the Matter of Struthers*, 988 P.2d 789 (Ariz. 1994) (sharing fees with collection agency violates ER 5.4(a), prohibiting the sharing of a fee with a non-lawyer).
7. Ariz. Ethics Op. 94-11 (Sept. 19, 1994); and *see* ER 1.8(b) (lawyer shall not use information relating to representation to disadvantage of current client) and ER 1.9(c) (lawyer may not use or reveal information relating to representation to disadvantage of former client). *See also* N.H. Ethics Op. 1987-8/8 (Jan. 12, 1988) (same).
8. Ariz. Ethics Op. 94-11, *supra* note 7; and *see* N.Y. State Bar Ass’n Ethics Op. 608 (May 10, 1990) (same).
9. Ariz. Ethics Op. 00-07 (Oct. 2000), *citing* Ariz. Ethics Op. 94-11, *supra* note 7 (client confidences may be disclosed only after consultation and consent, and a lawyer may only give such information to a credit reporting agency or engage a collection agency that uses a credit reporting service when the lawyer has the prior consent of the client).
10. “Informed consent” is defined in ER 1.0 (e) and further explained in Comments [6], [7] and [8] thereto.
11. Ariz. Ethics Op. 00-07 (Oct. 2000).