

May 1, 1987

RE: Fee Relationship With Attorneys (32 MRSA §11013(3)(J))

It is customary for collection agencies to seek some form of compensation when their efforts at collecting a debt prove unsuccessful but later efforts by an attorney to whom they have referred the debt succeed. One common practice had been for collection agencies to claim a percentage of whatever the attorney collected as their fee for efforts to date. In May, 1980 the Bureau took the position in an Assurance of Discontinuance it entered with five collection agencies that this practice violated 32 M.R.S.A. §576. It is the purpose of this Advisory Ruling to rescind the earlier stated position.

Specifically, in its Assurance of Discontinuance the Bureau determined that a collection agency's fee had to be limited to a "sum certain," to be negotiated between the agency and the creditor-client in their original agreement. The theory that underlaid this interpretation was that permitting an agency to earn a commission based on the success of legal work performed by a third-party attorney was the "sharing of legal fees," a practice expressly prohibited by §11013(3)(J). That provision provides in pertinent part: "No collection agency may...demand or obtain in any manner a share of the compensation for services performed by a lawyer in collecting a claim...." Negotiating a sum certain, the Bureau reasoned, was the only way in which a fee could be paid to an agency upon its forwarding of the account to an attorney and not violate §11013(3)(J).

Considerable confusion has surrounded this position in years subsequent, principally involving the appropriate manner of compliance. In an effort to eliminate this confusion the Bureau voluntarily undertook a review of its past position.

The prohibition in §11013(3)(J) against sharing legal compensation is subject to various interpretations. Because of lack of clarity in the words themselves it is appropriate to look to other sources for guidance on legislative intent. The most common source, legislative history, is unavailing, unfortunately, because there is no legislative history on this particular provision.

There is, however, a comparable provision in the Maine Bar Rules, governing attorney conduct in sharing compensation with non-lawyers. (The Maine Bar Rules are rules adopted by the Supreme Judicial Court which govern attorney conduct, among other things.) Rule 3.3(e) prohibits the sharing of legal fees with non-lawyers.

Pursuant to Bar Rule 11(c)(2) the Bureau requested an opinion from the Professional Ethics Commission within the Board of Overseers of the Bar on the meaning of Rule 3.3(e)'s prohibition on sharing legal fees. Specifically, the Bureau asked if it would be a violation of that section for an

Section 576 of Title 32 was the predecessor of §11013(3)(J) of Title 32. P.L. 1985, c. 702 repealed 32 MRSA c. 10, where 576 was located, and replaced it with 32 MRSA c. 111, the Maine Fair Debt Collection Practices Act.

attorney to pay a portion of what he collected to a third party collection agency, pursuant to an agreement in which the attorney's (and the collection agency's) client agreed to such an arrangement.

In Advisory Opinion No. 62 the Professional Ethics Commission ruled that as long as the payment to the collection agency of a percentage of the funds collected by the attorney was authorized by the prior written agreement between the creditor client and the collection agency, and that those fees were for the separate, non-legal services provided by the agency, the practice did not constitute the sharing of legal fees with a non-lawyer.

The Bureau finds the logic of the Advisory Opinion persuasive and the conclusion supported by sound public policy. As long as the client is fully informed at the outset, and consents, that the collection agency will seek as its fee for unsuccessful services rendered a portion of whatever an attorney might later collect, there is no harm to the client. This arrangement is nothing more than a rearrangement of a fee agreement. If more parties become involved in collecting a claim, it will necessarily cost the client more. Because the law prohibits charging the debtor more than his debt (32 MRSA §11013(3)(A)), there is no harm to the debtor from this arrangement. If the client does not agree with the fee proposal, he is free to cease doing business with the collection agency or to seek modification in the specific terms of the agreement. Because the Advisory Opinion is interpreting a virtually identical provision of law, the Bureau also adopts its analysis of the meaning of "sharing compensation" for purposes of interpreting §11013(3)(J).

In short, the Bureau rescinds its earlier interpretation of §11013(3)(J) that required the use of a "sum certain" as a fee upon the forwarding of an account with the client's permission to an attorney. So that there is no misunderstanding, the Bureau takes this opportunity to reiterate the other conditions that must precede such an arrangement.

1. All forwardings by a collection agency to an attorney for collection shall be to the attorney chosen by the creditor. If no attorney is designated, the collection agency may suggest an attorney, but may refer the account only upon specific written authorization by the creditor-client. Because §11013(3)(J) prohibits a collection agency from exercising authority on behalf of a client to employ an attorney, or to interfere in the attorney-client relationship once established, it is inappropriate for collection agencies to identify in their contracts with clients specific attorneys who would be employed, or the compensation they would receive for collection services.

The exact hypothetical posed involved an agreement between a collection agency and client in which the commission for the collection agency's successful collection of a debt was 40%, rising to 50% if the account was referred to an attorney. It was understood that the attorney's fee - 33% in the example - would be subtracted from the 50%, leaving the collection agency a net fee of 17% of the amount collected.

2. When a collection agency forwards an account to an attorney, the instructions and permission for instituting any proceeding, incurring any expense, making any compromise or granting any extensions shall be the responsibility of the creditor.

/s/ Robert A. Burgess
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Superintendent

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