

**LOS ANGELES COUNTY BAR ASSOCIATION  
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE**

OPINION NO. 522  
June 15, 2009

WHETHER A LAWYER FOR CORPORATE ENTITY ENGAGED IN DEBT  
COLLECTION AIDS AND ABETS THE UNAUTHORIZED PRACTICE OF LAW OR  
VIOLATES THE RULES OF PROFESSIONAL CONDUCT FOR FAILURE TO  
SUPERVISE EMPLOYEES, AND SEEKING ATTORNEYS' FEE AWARDS BASED  
UPON THE LEGAL WORK OF THE ENTITY'S UNLICENSED EMPLOYEES

**SUMMARY**

X Corporation (the "Company") operates a collection business. It has a staff of employed paraprofessionals such as researchers, collectors and clerks who prepare legal documents, including prejudgment pleadings (complaint, motions, discovery, etc.) and post judgment pleadings, abstracts, writs, memorandum of costs, levy, etc. The Company hires a part-time attorney ("Attorney") on an hourly contract basis to serve as the attorney of record on all legal filings. The Attorney reviews, approves and signs various legal pleadings prepared on behalf of the Company by its employees. Attorney appears in court to represent Company in such legal proceedings.

In some instances, Company purchases debt originated in California and prosecutes collection claims in its own behalf. Wherever possible, by statute or contractual provision, the Company requests and obtains an award of attorney's fees, including fees for the services of its paraprofessional staff. In other instances, Company receives an assignment from third parties of the right to sue for collection. In those instances, Company files lawsuits as the named plaintiff and receives a contingent fee from the principal amount collected, Company retains the awarded fees it collects from the debtor. Attorney treats the third party assignment cases the same as Company owned debts, and does not communicate with the third parties who own the debt.

In both contexts, Company retains all attorneys' fees awarded and does not share them with Attorney, who receives compensation only by the hour. What are the ethical obligations of the Attorney?

**TABLE OF AUTHORITIES**

**State Cases**

Alderman v. Jacobs (1954) 128 Cal.App.2d 273, 276

Bluestein v. State Bar (1974) 13 Cal.3d 162

Cohn v. Thompson (1932) 128 Cal.App.Supp 783, 788

Jacoby v. State Bar of California (1977) 19 Cal 3d 359

Le Doux v. Credit Research Corporation (1975) 52 Cal.App.3d 451  
Matter of Bragg, 3 Cal. St. Bar. Ct. Rptr. 615 (Rev.Dept. 1997)  
Merco Construction Engineers, Inc. v. Municipal Court (1978) 21 Cal.3d 724  
Moore v. State Bar (1964) 62 Cal.2d 74  
McGregor v. State Bar of California (1944) 24 Cal.2d 283  
PCLM Group v. Drexler, (2000) 22 Cal. 4<sup>th</sup> 1084  
Rodgers v. State Bar (1989) 48 Cal.3d 300, 315-316  
Sanchez v. State Bar (1976) 18 Cal.3d 280  
Snyder v. State Bar (1976) 18 Cal.3d 286 (290-291)  
Spindell v. State Bar (1975) 13 Cal.3d 253, 261  
Townsend v. State Bar (1930) 210 Cal. 362  
Trousil v. State Bar (1985) 38 Cal. 3d 337, 342  
Vaughn v. State Bar (1972) 6 Cal.3d 847, 857  
Zamora v. Clayborn Contracting Group, Inc. (2002) 28 Cal.4<sup>th</sup> 249, 259

### **Federal Cases**

Abels v. JBC Legal Group, P.C. 227 F.R.D. 541 (N.D. Cal.2005)  
Martinez v. Albuquerque Collection Services, Inc., 867 F. Supp. 1495 (D.N.M.1994)  
Masuda v. Thomas Richards & Co., 759 F. Supp.1456, 1460-61 (C.D. Cal. 1991)  
Navarro v. Eskanos & Adler , 2007 U.S. Dist. Lexis 15046 (N.D. Cal. 2007)  
Taylor v. Perrin, Landry, deLaunay & Durand,103 F. 3d 1232 (5<sup>th</sup> Circuit, 1997)  
White v. GMRI, Inc. (Civ. S-04-0620 (E.D. Cal. April 12, 2006))

### **Statutes**

#### ***California Business and Professions Code:***

6068(d)  
6105  
6106  
6125  
6450

#### ***California Civil Code:***

1788.2(c)  
1788.13(c)

#### ***Rules of Professional Conduct:***

1-120  
1-300  
3-200  
3-210  
3-110  
5-200

### **Opinions**

COPRAC Formal Opinion 1982-68

## FACTS AND ISSUES PRESENTED

### DISCUSSION

The fact pattern presents areas of ethical concern regarding whether Attorney is aiding and abetting the employees of Company to engage in unauthorized practice of law. It also raises issues with respect to Attorney's duty of competence, the supervision of paraprofessional staff and the duty of honesty as applied to seeking an award of fees.<sup>1</sup>

#### I. Is Company Engaged in the Unauthorized Practice of Law (“UPL”) Merely Because it Handles Collections on Assigned Claims?

Company uses its own employees to draft pleadings and process collection claims through the courts. Attorney, working only on a part time basis, signs the collection action pleadings including those seeking an award of attorneys' fees for the Company's employed staff, and appears in court on these matters. Does Attorney aid and abet in the unauthorized practice of law?

To opine on the propriety of Attorney's conduct we must first assess whether Company itself is engaged in UPL. Rule 1-300 of the Rules of Professional Conduct (“RPC”) provides that a lawyer “*shall not aid any person or entity in the unauthorized practice of law.*” In addition, under RPC Rule 1-120, a lawyer “*shall not knowingly assist in, solicit, or induce any violation of these rules or the State Bar Act.*”

Section 6125 of the Business & Professions Code (“B&PC”) provides: “*No person shall practice law in California unless he or she is an active member of the bar.*”<sup>2</sup> In Le Doux v. Credit Research Corporation (1975) 52 Cal.App.3d 451, 453-454, the Court of Appeal defined the practice of law as including “*legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be depending in a court.*”

California has long recognized that commercial necessity permits collection agencies to prosecute lawsuits where, without providing legal advice, the collectors merely take assignment for the purpose of collection and retain counsel to prosecute the claim. “*The assignee for collection merely contracts to file suit in his own name, if necessary to make collection. But he does not agree to furnish any legal services whatsoever to the assignor. The assignee employs the attorney and controls his action. No legal services are performed for the assignor.*” *Id.*, at 454-56, citing to Cohn v. Thompson (1932) 128 Cal.App.Supp 783, 788.

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<sup>1</sup> The fact pattern presented to the Committee raised legal questions as to whether Company may retain the attorneys' fee awards it receives for the services of its employed clerks and paralegals. To the extent this seeks legal advice on such matter, the Committee declines to opine.

<sup>2</sup> As an exception to B&PC 6125, California Rules of Court 9.43 through 9.48 do permit non-California attorneys to practice law in California for limited purposes.

However, in court proceedings, with limited exceptions applicable only to small claims actions, the corporation must be represented by legal counsel. Merco Construction Engineers, Inc. v. Municipal Court (1978) 21 Cal.3d 724, 731-733. Thus, in order to prosecute a lawsuit, the Company must have a lawyer handling the proceedings.

Therefore, the Company does not engage in the practice of law if it (1) collects its own debt or merely undertakes to collect as the named plaintiff the claims assigned to it for collection by third parties; (2) uses the services of a lawyer to handle the litigation; and (3) does not directly provide legal advice or prepare legal instruments or contracts on behalf of the assignor of the debt.

## **II. Does Attorney Aid or Abet UPL by Allowing Company's Use of Employed Researchers and Clerks to Draft Pleadings?**

If Company does not engage in UPL by operating as a traditional collection agency, could Attorney nevertheless be aiding and abetting UPL by the Company's employees? The answer is affirmative. The Company is required to be represented by legal counsel in litigation matters. Its employees draft pleadings, abstracts, and engage in collection activity. These are legal functions within the context of litigation. Even though it is permissible for the Company to assist in these functions, Attorney has a duty to supervise the activities of persons performing legal functions within the scope of his or her representation. Were Attorney to allow those functions to be performed without adequate supervision, the Company would effectively be representing itself in litigation, which is impermissible. Attorney must have an active role and may not act as merely a rubber stamp for the work done by the Company's employees.<sup>3</sup>

In Jacoby v. State Bar of California (1977) 19 Cal. 3d 359, 363, the California Supreme Court observed that legal services may be less expensively delivered through the extensive use of paralegal assistants to gather information, conduct interviews and to fill out routine forms. Today, the use of paralegal staff is commonplace and it is not unusual even for clients to have their own employed legal assistants.<sup>4</sup> Nevertheless, the services of such legal assistants must be appropriately supervised by a lawyer.<sup>5</sup>

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<sup>3</sup> This opinion does not attempt to define adequate supervision or provide a comprehensive list of examples of what may or may not constitute adequate staff supervision in every instance.

<sup>4</sup> Paralegals are regulated in California under B&PC section 6450, *et seq.* The terms "paralegal" and "legal assistant" are virtually synonymous under B&PC section 6454. To the extent that a law firm or client seeks to recover fees for services of a paralegal or legal assistant, the qualifications of that person may be subject to review, and could impact the ability to recover such fees. See, White v. GMRI, Inc. (Civ. S-04-0620 (E.D. Cal. April 12, 2006)) (District Court denied recovery of fees for person characterized as paralegal where their qualifications were not established under B&PC section 6450(c)(4).

<sup>5</sup> See the American Bar Association's ABA Guidelines on Paralegals, ABA Standing Committee on Paralegals (2004), which provide: "A lawyer is responsible for all of the professional actions of a paralegal performing services at the lawyer's direction and should take reasonable measures to ensure that the paralegal's conduct is consistent with the lawyer's obligations under the rules of professional conduct of the

Under B&PC section 6105, an attorney may not lend his or her name to be used by an unlicensed person. ("*Lending his name to be used as attorney by another person who is not an attorney constitutes a cause for disbarment or suspension.*") The power and privileges attendant to the right to practice law may not be delegated to a nonlicensed person. Townsend v. The State Bar, (1930) 210 Cal. 362, 364-365. To facilitate or assist an unlicensed person such as a legal assistant to engage in the practice of law would constitute aiding and abetting UPL. Bluestein v. State Bar (1974) 13 Cal.3d 162.

The critical issue is whether there is adequate supervision and active participation by the Attorney to say that the services performed are those of the Attorney, rather than the Company representing itself. An attorney's duty of competence under RPC Rule 3-110(A) includes the obligation "to supervise the work of non-attorney employees or agents." Numerous discipline cases have addressed the lawyer's obligation to adequately supervise his or her employees and paralegal assistants or staff.<sup>6</sup> In McGregor v. State Bar of California (1944) 24 Cal.2d 283, a lawyer violated B&PC section 6105 by allowing an unsupervised lay employee to fix fees, interview clients, operate a collection agency and sign letters in the lawyer's name. When a lawyer allows a non-lawyer employee to accept clients, evaluate cases, negotiate and settle matters with minimal or no supervision, such conduct enables an unlicensed person to engage in UPL and violates Rule 1-300(A). Matter of Bragg, 3 Cal. St. Bar. Ct. Rptr. 615 (Rev.Dept. 1997). Thus, the lawyer's ethical duties necessitate that he or she exercise the proper degree of supervision. The actions of unlicensed employees performing legal tasks must be "so immediately under a lawyer's supervision as to not run afoul of the underlying purpose of current Rule 1-300(A) or sections 6125 and 6126" [of the B&PC]. Id.<sup>7</sup>

The fact that the employees work for the client and are made available to the lawyer will make no difference in terms of the lawyer's obligation to supervise their legal activities. In its Formal Opinion No. 1982-68, the Standing Committee on Professional Responsibility and Conduct of the State Bar of California ("COPRAC") considered the propriety of a lawyer allowing the creditor-client's employees to prepare and send dunning letters under the

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jurisdiction in which the lawyer practices." The ABA Guidelines are not binding in California, but may provide guidance on supervisory duties.

<sup>6</sup> See, Sanchez v. State Bar (1976) 18 Cal.3d 280, 284 (discipline warranted where unlicensed employee of lawyer prepared and filed complaint without supervision and signed lawyer's name); Spindell v. State Bar (1975) 13 Cal.3d 253, 261 (discipline warranted where unlicensed employee of attorney conveyed incorrect legal advice to client); Vaughn v. State Bar (1972) 6 Cal.3d 847, 857 (discipline warranted where unsupervised employees of attorney routinely signed client's name to pleadings); Moore v. State Bar (1964) 62 Cal.2d 74, 75, 80-81 (discipline warranted where lawyer entrusted client's defense to a suspended lawyer and proven unreliable assistants.) Trousil v. State Bar (1985) 38 Cal. 3d 337, 342 (lawyer found responsible for failure to supervise secretarial assistant, which resulted in delay of settlement distribution);

<sup>7</sup> The lawyer's duty to supervise has also been applied in civil cases, such as Zamora v. Clayborn Contracting Group, Inc. (2002) 28 Cal.4<sup>th</sup> 249, 259 (typographical error of assistant held attributable to lawyer for purposes of evaluating motion for relief under Code of Civil Procedure Section 473); Alderman v. Jacobs (1954) 128 Cal.App.2d 273, 276 (secretary's inadvertent disposal of a pleading attributed to counsel).

lawyer's letterhead or name. COPRAC opined that the lawyer must take an active role in the matter and adequately supervise those employees to ensure they do not violate the law.<sup>8</sup>

Attorney must have an active role in supervision and direction of the client's employees. Attorney may not serve as mere a rubber stamp, showing up only to sign pleadings prepared by nonlicensed persons without his or her supervision. Proper supervision would require not only exercising due control over the preparation of legal pleadings and correspondence, but also monitoring the client's employee's compliance with laws peculiar to collection agency practice.<sup>9</sup>

With very limited exceptions, Attorney also may not advise the client in the violation of any law. Thus it would be improper for the Attorney to advise or permit a client's staff under his or her supervision to establish or utilize procedures that violate the FDCPA.<sup>10</sup>

### **III. May Attorney Ethically Appear and Argue for an Award of Attorneys' Fees for the Services of Company's Employees?**

In its collection litigation, Company applies for and retains court-awarded attorney's fees. Since the focus of this opinion is only upon the Attorney's professional conduct, the Committee offers no opinion as to whether Company's actions in seeking to recover and retain such fees is proper.

To the extent that Attorney assists the client to pursue an award of fees for the services of the client's employed legal assistants, Attorney may not misrepresent the role of

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<sup>8</sup> While we agree with the 1982 COPRAC Opinion, we caution that it cites to superseded provisions of California law and does not address relevant provisions of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. Section 1692 *et seq.*, originally enacted in 1978. The opinion should be read with due consideration to more recent developments in the law.

<sup>9</sup> (See, FDCPA Section 1692(e) and California Civil Code Section 1788.2(c). While the FDCPA does not normally apply to creditors trying to collect debts owed to them, it does apply to a creditor who, in the process of collecting its own debts uses a name other than its own, such as the suggestion that a lawyer is involved in the collection effort. Id., Section 1692a(6). The FDCPA prohibits sending collection letters under a lawyer's name unless the lawyer has been directly involved in making decisions and reviewing the file. Attorneys may not assist the creditor to prepare such forms or letters. See, Martinez v. Albuquerque Collection Services, Inc., 867 F. Supp. 1495 (D.N.M.1994) (debt collector violated the Act when attorney, who did not otherwise participate, signed letters at the direction of the agency); Masuda v. Thomas Richards & Co., 759 F. Supp.1456, 1460-61 (C.D. Cal. 1991) (debt collector liable where the letters made false representations that they came from the attorney.) Liability extends to a lawyer who assists the creditor to prepare forms or letters that falsely convey that a person other than the creditor itself is collecting the debt. Taylor v. Perrin, Landry, deLaunay & Durand (5<sup>th</sup> Circuit, 1997) 103 F. 3d 1232, 1234. Abels v. JBC Legal Group, P.C. 227 F.R.D. 541, 547-548 (N.D. Cal.2005); Navarro v. Eskanos & Adler , 2007 U.S. Dist. Lexis 15046 (N.D. Cal. 2007).

<sup>10</sup> Rule 3-210 provides: "A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal."

these persons or their qualifications. It would be improper for Attorney to seek the recovery of attorney's fees if no attorney was in fact involved in supervising the services of these non-lawyer personnel.<sup>11</sup> Attorney has a duty of honesty under B&PC section 6106.<sup>12</sup> Attorney also has a duty under RPC Rule 5-200 and B&PC section 6068(d) to maintain those causes only as are consistent with truth, and to never mislead the Court. See, Snyder v. State Bar (1976) 18 Cal.3d 286 (290-291) (attorney disbarred for moral turpitude after presenting false evidence, willfully altering documents and other acts involving dishonesty in court proceedings); Rodgers v. State Bar (1989) 48 Cal.3d 300, 315-316 (attorney suspended for concealment in probate court proceedings).

Consistent with the duty of honesty, when seeking an award of fees for the services of the Company's employees, Attorney should be completely forthright when informing the court of their capacity as employees of the client, their qualifications and the degree of supervision exercised by the Attorney over their services.

The Committee expresses no opinion as to whether or not Company is permitted to seek or recover attorney's fees for its own employed staff under the fee schedules established by local courts for default awards in collection matters.

This opinion is advisory only. The committee acts on specific questions submitted *ex parte*, and its opinion is based on the facts set forth in the inquiry submitted.

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<sup>11</sup> In PCLM v. Drexler (2000) 22 Cal.4<sup>th</sup> 1084, the California Supreme Court held that it was proper for a litigant to recover the reasonable value of the fees of in-house counsel, under a Civil Code Section 1717 recovery, as the prevailing party. The case did not address the recovery of fees for unlicensed, non-lawyer personnel who work only for the litigant, nor did it address fee awards for non-lawyer employees do not work under the direct supervision of the in-house lawyer.

<sup>12</sup> Section 6106 reads, in relevant part: "The commission of any act involving moral turpitude, dishonesty or corruption whether the act is committed in the course of his relations as an attorney or otherwise... constitutes a cause for disbarment or suspension."