Ethics Opinion

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QUESTION PRESENTED: May an attorney or attorney's professional corporation act as trustee to collect client's delinquent accounts receivable, bringing suit, when necessary?

ANSWER: Yes, if trust is properly established.

ANALYSIS:

A. Professional Corporation Status. Different rules apply to corporations which act as trustee and attorneys. The rules of professional conduct and statutes governing attorneys at law discussed herein apply to individual attorneys. However, because an individual who renders professional services as an employee of a professional corporation is liable for negligent or wrongful acts or omissions in which the individual participates to the same extent as if he had acted as a sole practitioner, Section 35-4-404, MCA, for purposes of this discussion the corporation will be viewed as the alter ego of the attorney and subject to the same standards as the attorney.

B. Contingency Fee. The attorney's acceptance of a contingency fee on the collections appears to be sanctioned by the following rule of professional conduct:

> (j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
>
> (1) acquire a lien granted by law to secure the lawyer's fee or expense; and
> (2) contract with a client for a reasonable contingent fee in a civil case.

Rule 1.8(j) Rules of Professional Conduct. While the attorney, as trustee holding bare legal title, does not appear to have any proprietary interest in the cause of action or subject matter of the transaction, the attorney, as the attorney for the trustee, does. However, the nature of the interest appears to be limited to a sanctioned contingency fee arrangement. Assuming that the attorney has appropriately contracted with the clients concerning the contingency fee, and the contingency fee is reasonable, the activity would not appear to run afoul of the Rules of Professional Conduct.

C. Trust Arrangement. Creation of a trust, transfer of claims into the trust, and collection by a trustee, per se, are not prohibited by statutory rules or ethical considerations. Under Montana's Trust Code, the term "trust" does not include:

> . . . trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind and any arrangement under which a person is nominee or escrowee for another.

Section 72-33-108(4), MCA. Interestingly, Montana's recently revised Trust Code does not include the additional language found in the California equivalent that the term "trust" excludes "transfers in trust for purpose of suit or enforcement of a claim or right." Cal.Prob.Code Section 82. By statute, "[a] trust may be created for any purpose that is not illegal or against public policy," Section 72-33-204, MCA, and it is permissible for a trustee of an express trust to "sue in his own name without joining the party for whose benefit the action is brought," Mont.R.Civ.P. 17(a).

The attorney's clients create trusts through the statutorily approved method of "a transfer of property by the owner . . . to another person as trustee," Section 72-33-201(2), MCA, Designating themselves as beneficiaries, Section 72-33-206, MCA. As trustee capable of making decisions concerning the trust, and as attorney receiving a contingency fee, the attorney could face potential conflicts of interest. However, the language of the trust agreement requiring beneficiary's consent to suit or compromising of claims removes a great deal of the conflict risk.

Another difficulty with respect to the attorney's involvement is encountered when consideration is given to the following provision relating to an attorney at law practice:

> An attorney and counselor must not directly or indirectly buy or be interested in buying a bond, promissory note, bill of exchange, book debt, or other thing in action with the intent and for the purpose of bringing an action thereon.

Section 37-61-408(1), MCA. In these circumstances, the attorney as trustee holds bare legal title to the action, and the attorney as attorney for the trust is receiving a contingency fee. Not only is receipt of the contingency fee authorized as discussed above, but also if the two roles are kept separate and distinct there would never be any suggestion that the attorney had in any manner "bought" a thing in action.

Moreover, it does not appear that the attorney has devised this trust arrangement with the intent and purpose of bringing actions on the claims. In fact, the stated purpose of the trust is to provide a service to clients, the attorney represents that civil suits are commenced in a small fraction of the claims transferred into trust, and the beneficiaries are required to consent to the bringing of actions.

A stated rationale for the rule against attorneys buying things in action is to discourage litigation and keep it within certain bounds in the interest of sound public policy. *Streetbeck v. Benson*, 107 Mont. 110, 114, 80 P.2d 861, 863 (1938). Without the prohibition, an attorney's ability to purchase claims at a discount and bring actions for collection could easily be abused.

The rationale relating to discouraging litigation has also been cited as a purpose behind the rule of procedure which mandates that actions be brought by the real party in interest:

> Every actions shall be prosecuted in the name of the real party in interest. A personal representative, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; . . .

Rule 17(a) Mont.R.Civ.P. In fact, both rules were discussed in Streetbeck v. Benson which is the second in a string of four cases discussing the propriety of assigning claims and the real party in interest rules.

In the initial cases, the courts were concerned that assignments of claims and transfers into trusts were merely "simulated transfers" and resulted in actions being pursued by someone other than the "real party in interest." Specifically, in *Streetbeck v. Benson*, the creation of an express trust was considered to be for an "illegal purpose" in violation of a statute relating to trust purposes. Eventually, however, the court resolved that the purpose of the real party in interest statute was really to avoid duplication of actions, and thus eventually became less concerned with the intent of the parties in assigning accounts or placing them in trust. In fact, in the final case of the series, *Rae v. Cameron*, 112 Mont. 159, 114 P.2d 1060 (1941), the court concluded that allowing the assignment of claims made it possible "for wage earners with legitimate claims to unite in one action to enforce rights which individually would, as a practical matter, be lost to them by reason of the smallness of the amount involved." Id. at 176, 114 P.2d 1060, 1068. The court concluded:

> It is well settled that an assignment for collection, without any consideration being paid by the assignee, vests the legal title in the assignee, which is sufficient to enable him to recover, although the assignor retains an equitable interest in the thing assigned.

Id.

The evolution of cases suggests that unless an assignment of claim is made for an illegal purpose, the claim may be brought by the assignee, or, as in this case, the trustee for an express trust. Thus, the question which remains is whether the assignment of claims to an express trust managed by a lawyer-trustee and represented by the lawyer receiving a contingency fee constitutes an illegal purpose in light of the prohibition against an attorney directly or indirectly buying a thing in action with the intent and for the purpose of bringing an action thereon.

It does not appear that the creation of a trust and appointment of the attorney's corporation as trustee has been devised for any illegal purpose. The service is provided for the benefit of clients who desire to keep a low profile in the collection process, and civil suits are commenced in a small fraction of the matters transferred into trust.

CONCLUSION: If properly established, the attorney's trust arrangement is not expressly prohibited by ethical or statutory rules affecting attorneys at law. Care should be taken that any contingency fees received by the attorney are contracted freely and are reasonable. The attorney should carefully define the roles of trustee and counsel for the trust, and should be acutely sensitive to conflict which may arise from participation in dual roles.

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