

## RULE 11 AND ETHICS CONCERNS

DEBT COLLECTION PITFALLS,  
PART DEUX.

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PRACTICE  
TIPS  
FROM BAR  
COUNSEL

The economy continues its meltdown and, so far, there's no sign regarding when things might get better. For most of us, we sit tight and wait for the turnaround.

Of course, the bad fortune of one person often represents opportunity for another. A bankruptcy attorney I know always smiles at news reports of a weakening economy. For him, a society able to pay its unsecured debts is bad for business.

Similarly, law firms specializing in debt collection often see increased work when the economy tanks. Such appears to be the case now. The evidence is on my desk.

At the State Bar of Nevada, we notice societal trends through changes in complaints regarding attorneys. In recent months, the Office of Bar Counsel is seeing more and more grievances from people who allege improper conduct by lawyers who represent creditors. And the number of grievances keeps increasing.

Last month, this space discussed problems associated with collection attorneys targeting the wrong person.<sup>1</sup> The usual scenario involves a law firm which gets a legitimate judgment against Jane Smith, who owes a bunch of money to some creditor, but then tries to collect from the wrong Jane Smith.

The innocent Ms. Smith begs the state bar to stop the collection firm – or, more likely, the firm's nonlawyer assistants – from harassing her with constant phone calls and threatening letters.

As we discussed last month, targeting the wrong person can impact various Rules of Professional Conduct, particularly RPC 1.1 (Competence), RPC 1.3 (Diligence), RPC 3.1 (Meritorious Claims and Contentions), RPC 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers), RPC 5.3 (Responsibilities Regarding Nonlawyer Assistants) and RPC 8.4(d) (Misconduct: Engaging in conduct that is prejudicial to the administration of justice).

The other major problem we're seeing these days involves collection attorneys suing persons who no longer owe their debt. Sure, John Jones owed money sometime in the past, but he paid the outstanding balance. At some point after eliminating his debt, Mr. Jones is sued by our collection attorney.

Let's all look up "frivolous" in our law dictionaries. Then let's look at RPC 3.1 (Meritorious Claims and Contentions), which prohibits an attorney from bringing claims "unless there is a basis in law and fact for doing so that is not frivolous...."

Unless Mr. Jones paid his debt almost simultaneously with the attorney filing the civil complaint, there's going to be a problem with RPC 3.1.

Eventually, the civil case will be dismissed, but not before the defendant gets served with a bogus complaint and probably receives a bunch of threatening letters and telephone calls. When the process is completed, guess how the former defendant feels about lawyers, especially lawyers in Nevada.

Attorneys caught in this situation usually blame their client. It was the creditor, the lawyer says, who didn't update information regarding the debtor's payment history. Please.

A review of Nevada Rule of Civil Procedure 11 (Signing of pleadings) is helpful for attorneys who wish to blame the client. NRCPC 11(b) (Representations to court) states that by signing a pleading, such as a civil complaint, the attorney is thereby certifying that to best of his/her "knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," that the allegations have "evidentiary support" or are likely to have such evidentiary support after further investigation or discovery.

If the debt's been paid, there's not much evidentiary support for a claim that it's not paid. A just-before-filing-the-complaint conversation with the client probably is a good idea as part of the due diligence process. In fact, failing to do so will surely impact RPC 1.3 (Diligence) and some of the other ethics rules noted above.

We can't just take the client's word that he/she/it has been wronged or, in our scenario, still is owed money. To do otherwise can bring an attorney face-to-face with the Rules of Professional Conduct noted herein and language regarding sanctions in Rule 11.<sup>2</sup>

A last-minute phone call to the creditor could save us all a lot of time and paperwork. It also will keep the guy who shouldn't have been sued from bad-mouthing Nevada lawyers to everyone he knows. **NL**



1 See *Nevada Lawyer*, "Debt Collection is Fine, With the Correct Debtor," December 2008.

2 NRCPC 11(c).

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