

**STATE BAR OF NEVADA
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**

**Formal Opinion No. 2
May 23, 1986**

QUESTION

May an attorney write to a person who a client says owes the client money, demand payment, and threaten to sue if the person does not pay?

ANSWER

Yes, with some qualifications. The attorney must reasonably believe that the client's claim and the intention to sue are legitimate. Threats of criminal prosecution and predictions of the consequences of litigation amounting to legal advice are improper, as are communications with persons represented by counsel.

AUTHORITIES RELIED ON

Model Code of Professional Responsibility
DR 7-105(a) (1980)
Nevada Revised Statutes § 73.040 (1985)
Nevada Rules of Professional Conduct
(Supreme Court Rules) 150(1), 181(1), 182, 184, 202(2), 203 (1986)

DISCUSSION

This opinion responds to a request for a discussion of the ethical considerations applicable to collection letters, that is, letters sent by lawyers to third parties demanding payment of debts owed to the lawyers' clients. Although framed in general terms, the request raises a number of specific, subsidiary issues: whether a lawyer may demand payment from a third-party debtor on behalf of a client; whether the lawyer may threaten the debtor with litigation if payment is not made; whether the lawyer may warn the debtor of the potential costs of that litigation (e.g., costs of suit, attorneys' fees); and whether the attorney may advise the debtor of the possible consequences of a judgment (e.g., garnishment of the debtor's wages, sale of the debtor's property). In the opinion of the Committee, collection letters are proper as long as certain principles of honesty and fairness are observed.

Lawyers may demand that third parties pay debts owed to their clients. Collection letters may be sent to adverse parties before suit is filed and before adverse parties are represented by counsel. If the debtor is represented by counsel in connection with the debt, however, the lawyer may not communicate directly with the debtor unless the other attorney consents. Nevada Supreme Court Rule 182 [hereinafter cited as S.C.R.]. The lawyer should inquire of the client whether the debtor has responded to previous demands for payment or otherwise communicated with the client through counsel. If so, the lawyer should communicate only with that counsel.

Collection letters must be accurate and truthful. "In the course of representing a client a lawyer shall not knowing . . . [m]ake a false statement of material fact or law to a third person" S.C.R. 181(1); see also S.C.R. 203 (It is professional misconduct for a lawyer to . . . [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation"). Demand letters must be sent in good faith and for the purpose of reaching a settlement. A lawyer must not send a collection letter whose only purpose is to harass or burden the recipient. See S.C.R. 184. Accordingly, before sending a collection letter on behalf of a client, the lawyer should examine the pertinent documents and otherwise investigate sufficiently to satisfy him - or herself that the purported debt is in fact owed.

Generally, collection letters may threaten litigation if the debt is not paid. But this general statement must be tempered by the requirements of truth and accuracy. If litigation is not reasonably likely or the attorney knows suit will not be brought, either because the claim is so small as to make litigation economically unfeasible or for any other reason, it would be untruthful for the attorney to state that suit will be brought if payment is not made. Similarly, a lawyer should not state that a suit will include a claim for costs or attorneys' fees if such awards could not be made in the particular circumstances. See, e.g., Nev. Rev. State § 73.040 (1985) (awards of attorneys' fees barred in small claims actions).

Collection letters should be dignified; they should not threaten or intimate dire consequences. They may not state that nonpayment will injure the debtor's credit or reflect on his moral standing. General allusions to the well-known costs and inconveniences of litigation are permissible, but the lawyer must be careful not to appear to be harassing the debtor or offering unsolicited legal advice.

Similarly, a lawyer may not threaten the debtor with criminal prosecution if the debt is not paid. Indirect threats of criminal prosecution are equally impermissible; for example, an attorney should not state in a collection letter that certain conduct is a crime or violates a statute.¹

There is less agreement about the propriety of other statements in collection letters. One state bar ethics committee has apparently held that collection letters may include legal theories, conclusions of law, citations to law, statutes, rules, and similar authorities, and copies of proposed complaints. See ABA/BNA Manual, supra note 1, at 801:8105 (1986) (digesting Ethics Comm., Board of Professional Responsibility of the Supreme Court of Tennessee, Op. 81-F-22 (Nov. 20, 1981). Others apparently disagree. See, e.g., O. Maru, 1970 Supplement to the Digest of Bar Association Ethics Opinions 6844, at 238 (1972) (digesting New Jersey State Bar Association Op. 144) (demand letter threatening suit if payment is not made may not be accompanied by copy of proposed summons and complaint).

On this point, we believe lawyers should be guided by the general principle that collection letters may not contain legal advice, other than advice to seek counsel. Extensive explanations of the legal consequences that might follow nonpayment constitute legal advice for these purposes. Therefore, detailed explanations of the grounds for recovery and the consequences of nonpayment should be avoided; while they may be appropriate in a demand letter to another attorney, a nonlawyer is more likely to perceive them as harassing and unduly threatening. Speculation about the possibility and meaning of wage garnishment, execution of judgment, and other specific post-judgment remedies are best left to the debtor and the debtor's own attorney.

1. Threats of criminal prosecution to gain an advantage in a civil matter were specifically prohibited under the Model Code of Professional Responsibility, DR 7-105(A) (1980). This specific prohibition was not carried forward in the Model Rules of Professional Conduct, which were adopted, with amendments, by the Nevada Supreme Court as its Rules of Professional Conduct. S.C.R. 150(1). The reason for omitting the specific provision was "that the misconduct to which [the prohibition] is directed is proscribed more narrowly by specific Model Rules provisions." ABA/BNA Lawyers' Manual on Professional Conduct 101:1001 (1986) [hereinafter cited as ABA/BNA Manual]. For example, because repayment of a debt is not a direct, inevitable result of a criminal prosecution brought against a debtor, threatening the debtor with criminal prosecution amounts to extortion, which, of course, is itself a criminal act proscribed by the Nevada Rules of Professional Conduct. See S.C.R. 202(2): see generally ABA/BNA Manual, supra, at 101:1001 to 1002. Therefore, the Committee is of the opinion that it is improper for a lawyer to threaten a client's debtor with criminal prosecution if the debt is not paid, even though the Nevada Rules of Professional Conduct do not contain an express provision to that effect.

CONCLUSION

Lawyers with collections practices must strive on behalf of their clients to induce debtors to pay legitimate debts. At the same time, lawyers must remain sensitive to the dignity of debtors and to the principles of honesty, integrity, and fair dealing that govern our profession. These conflicting objectives make it difficult to formulate precise standards for collection letters. Lawyers must strike a balance to ensure that

collection letters to debtors not represented by counsel encourage payment by adequately and accurately emphasizing the advantages of payment without overstating the disadvantages of nonpayment.

This opinion is issued by the standing committee on ethics and professional responsibility of the State Bar of Nevada, pursuant to SCR 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its board of governors, any persons or tribunals charged with regulatory responsibilities, or any member of the state bar.