-- *N.J.L.J.* --
(June --, 2012)
Issued by UPLC and ACPE May 30, 2012

COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

Appointed by the Supreme Court of New Jersey

JOINT OPINION

OPINION 48

COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW

OPINION 725

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

Debt Collection Practices
Reaffirming UPLC Opinion 8 and ACPE Opinions 259 and 506

The Supreme Court requested the Committee on the Unauthorized Practice of Law (UPLC) and the Advisory Committee on Professional Ethics (ACPE) to review UPLC Opinion 8 and ACPE Opinions 259 and 506 in light of current methods used by collections firms and consider whether modification to the opinions may be appropriate. The Committees hereby reaffirm the basic holdings of these opinions. The Committees further reaffirm that, before sending a debt collection letter, lawyers must exercise professional judgment by independently evaluating collection demands and determining that proceedings to enforce collection are warranted.

The Court requested the Committees to review these opinions after it imposed discipline on a New Jersey lawyer for having lent his name and letterhead to a collection agency in exchange for a monthly fee. The lawyer permitted the collection agency to use his law firm letterhead and status as an attorney. Collection agency employees, not the lawyer, exercised judgment in collection efforts. The collection agency was found to have engaged in the unauthorized practice of law and the lawyer was found to have violated RPC 5.5(a)(2) (assisting a nonlawyer in the unauthorized practice of law) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation).

As the UPL Committee expressly stated forty years ago in Opinion 8, 95 N.J.L.J. 105 (February 10, 1972), when a collection agency sends a letter to a debtor threatening legal action or implying that the collection letter is sent at the direction of a lawyer, the agency is engaging in the unauthorized practice of law. In contrast, when a law firm sends a debtor a collection letter, the recipient has reason to believe that "there has been an evaluation by an attorney of the claim asserted with a determination by the attorney that proceedings to enforce collection are warranted."

In accordance with these principles, the ACPE thereafter issued two opinions, ACPE Opinion 259, 96 N.J.L.J. 754 (June 21, 1973), and Opinion 506, 110 N.J.L.J. 408 (October 7, 1982), expressly stating that a lawyer may not lend law firm letterhead to clients to write and send collection letters. The ACPE concluded in those opinions that a lawyer who lends letterhead to clients is engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, in violation of RPC 8.4(c).

This issue was also addressed by the American Bar Association in 1976. ABA Informal Ethics Opinion 1368, "Mass Mailing of Form Collection Letters" (July 15,

1976). The inquiring lawyer represented a large retail organization that sold consumer goods on credit. The lawyer drafted three form letters seeking payment from debtors for amounts past due and stated that "the letters will be prepared and dispatched under his 'direct supervision' but that he will not review any account to determine its 'validity' before any of the letters is sent. He will rely on the client's written certification that the debts on each list furnished are 'justly due.'" The ABA concluded that "it is not enough that the lawyer rely upon the client's certification of the 'validity' of the account. The lawyer must take responsibility for the reasonable accuracy of each letter and must exercise due care that no letter misstates a fact with respect to the account of the debtor." The ABA stressed that the lawyer must "accept[] full professional responsibility" for the collection effort; "independent judgment [is] required to see that each letter sent is accurate and appropriate as to the account of the debtor when it is sent." The UPLC and ACPE agree with this ABA opinion.

Exercising independent professional judgment is a fundamental and indispensable element of the practice of law. A lawyer who fails to exercise independent professional judgment has abdicated the practice of law, has demonstrated a lack of competence, and has committed gross negligence, in violation of RPC 1.1(a).[1]

When a lawyer does not properly supervise nonlawyer staff, or the supervision is merely illusory, the nonlawyers are engaging in unauthorized practice of law. In re Opinion No. 24 of the Committee on the Unauthorized Practice of Law, 128 N.J. 114, 127 (1992). Similarly, when a lawyer permits his or her nonlawyer staff, or a client, to

[1] RPC 1.1(a) (Competence) provides that "[a] lawyer shall not . . . [h]andle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence."

send collection letters that the lawyer has not personally reviewed under the professional standard set forth above, the lawyer has assisted in the unauthorized practice of law in violation of RPC 5.5(a)(2)[2], and engaged in deceptive conduct in violation of RPC 8.4(c).[3]

While the New Jersey ethics rules and the federal Fair Debt Collection Practices Act, 15 U.S.C.A. Section 1692 et seq. (FDCPA), are distinct bodies of law, developments in FDCPA case law touch on the analysis of the practice (and unauthorized practice) of law. FDCPA cases differentiate between lawyers acting in a "lawyer capacity" – which would require the exercise of professional judgment and meaningful involvement in the collection matter – and lawyers not acting in a "lawyer capacity," acting as a lay debt collector. Hence, FDCPA case law provides that when a law firm sends a debtor a collection letter and clearly explains that no lawyer has reviewed the file, the law firm is not acting in a "lawyer capacity" but, rather, is acting as a mere lay debt collector. See, e.g., Gonzalez v. Kay, 577 F.3d 600, 607 (5th Cir. 2009) ("The disclaimer must explain to even the least sophisticated consumer that lawyers may also be debt collectors and that the lawyer is operating only as a debt collector at that time"); Miller v. Wolpoff & Abramson, 321 F.3d 292, 301 (2nd Cir. 2003) ("some degree of attorney involvement is required before a letter will be considered 'from an attorney' within the meaning of the FDCPA"); Avila v. Rubin, 84 F.3d 222, 229 (7th Cir. 1996) ("The attorney letter implies that the attorney has reached a considered, professional judgment that the debtor is

---

[2] RPC 5.5(a)(2) (Lawyers Not Admitted to the Bar of this State and the Lawful Practice of Law) provides that "[a] lawyer shall not . . . assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."

[3] RPC 8.4(c) (Misconduct) provides that "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

delinquent and is a candidate for legal action"); Lesher v. Law Offices of Mitchell N. Kay, PC, 650 F.3d 993, 1003 (3d Cir. 2011), cert. den. __ U.S. __ (2012) (the recipient of a demand letter sent by a law firm "may reasonably believe that an attorney has reviewed his file and has determined that he is a candidate for legal action").

While the FDCPA arguably permits a law firm to send debt collection letters in a lay capacity, New Jersey ethics rules have always prohibited the practice. The ACPE, in Opinion 657, 130 N.J.L.J. 656 (February 24, 1992), 1 N.J.L. 129 (February 17, 1992), found that a lawyer may engage in both a legal and a nonlegal business provided the two businesses are entirely separate, in physically distinct locations, and there is no joint advertising or marketing or demonstration of a relationship between the two businesses. Hence, while a lawyer may engage in a nonlegal or lay debt collection business, a lawyer may not operate that nonlegal business from a law firm. Therefore, a New Jersey law firm may not engage in the lay debt collection business.

Since the UPL Committee issued Opinion 8 in 1972, it has been clear that lawyers who send collection letters are engaged in the practice of law. A lawyer cannot disclaim the fact that he or she is engaging in the practice of law when using law firm letterhead. A lawyer who has not reviewed the file, made appropriate inquiry, and exercised professional judgment has engaged in an incompetent and grossly negligent practice of law in violation of RPC 1.1(a). A lawyer who permits office staff, or a client, to send collection letters when the lawyer has not individually reviewed the file, made appropriate inquiry, and exercised professional judgment, is assisting in unauthorized practice of law in violation of RPC 5.5(a)(2) and engaging in deceitful conduct in violation of RPC 8.4(c).

Accordingly, UPLC Opinion 8 and ACPE Opinions 259 and 506 are hereby reaffirmed. A lawyer who fails to exercise professional judgment by independently evaluating collection demands and determining that proceedings to enforce collection are warranted before sending a debt collection letter on law firm letterhead fails to satisfy ethical requirements of competence and has committed gross negligence.