FORMAL OPINION NO. 36*

The several questions submitted to the Bar Commission for an opinion with reference to collection agencies have been broken down and subdivided by the Commission as follows:

> 1. Is a duly licensed collection agency engaged in the practice of law where, in receiving accounts for collection, it takes an assignment thereof and institutes a suit thereon in its own name, hiring an attorney therefor?
>
> 2. Is it unethical for a lawyer to represent a collection agency in a suit on an assigned claim solicited by the agency for collection, where the lawyer is hired and paid by the agency?
>
> 3. Is it unethical for an attorney representing a collection agency under the facts stated in Question 2, to arrange with the agency for a share of the commission received by the collection agency as his fee for a legal service?
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> 4. If, instead of a division of the commission as set forth in question 3, and under the same set of facts as Question 2, is it unethical for an attorney to accept either a specific retainer fee or a definite percentage or a definite suit fee for his legal services to be paid by the agency?

Question 1:

It is the opinion of the Board that the collection agency is not engaged in the practice of law. The right of a collection agency to do the things set forth in the question is impliedly recognized by the Supreme Court of the State of Idaho in Goranson v. Brady-McGown Co., 48 Idaho 261, 281 P. 370 (still recognized as the law in Allis-Chalmers v. Harris, 56 Idaho 769, 59 P.2d 345). The

Goranson case holds that an assignment for collection can only be made to a licensed collector, and such licensed collector is the only one who can sue on such an assigned account. Since the collection agency is authorized to sue on assigned accounts taken by it for collection, there can be nothing unlawful in such an act on its part, and it cannot be said that the agency is engaged in the unlawful or unethical practice of law in such an instance.

Further, in the case of Cohn v. Thompson (Cal.), 16 P.2d 364, it was held that a collection agency is not engaged in the practice of law in hiring his own lawyer at his own expense to bring suit on an assigned claim.

The Supreme Court of Washington, in Washington State Bar Association v. Merchants' Rating and Adjusting Co., 49 P.2d 26, held that a collection agency had the right to solicit assignment of claims for collection and sue thereon in its own name through an attorney employed solely by it.

Both California and Washington have collection agency statutes. The same are sufficiently similar as that of Idaho to justify this Board in following those cases.

What constitutes the unauthorized practice of law in any given state is a matter for the courts of that jurisdiction to determine (American Bar Ass'n. Opinion No. 198).

We are, however, of the opinion that a collection agency would be engaged in the unauthorized practice of law under the holding in the case of Wayne v. Murphy-Favre Co., 56 Idaho 788, 59 P.2d 721, if it should agree to furnish legal services for the original creditor. This would be true in any instance where the agency did not get an assignment of the account, but contracted to furnish legal services to the creditor and to bring suit in the creditor's name, the agency arranging for an attorney to represent the creditor and controlling the actions of the attorney.

Under the facts in question number 1, the creditor has nothing to do with the collection after the assignment. He parts with the title to the claim, and gives the agency the sole control of the method and means of collection.

The creditor's only interest is being paid the proceeds of the collection. The agency retains an attorney to represent it and not the creditor. However, an agreement on the part of the agency with the creditor to sue in its own name on an assigned claim if necessary to collect, is not objectionable. Cohn v. Thompson, supra.

The American Bar Association Committee on the Unauthorized Practice of Law has given as its opinion that it is improper for a collection agency "To solicit and receive assignments of commercial claims for the purpose of suit thereon," and in this connection those of the Ada County Bar who urge upon us the proposition that under the facts of question 1 a collection agency is engaged in the illegal practice of law, rely upon the opinion of Edwin M. Otterburg of New York City, the Chairman of such Committee of the American Bar Association, in an address delivered June 16th, 1941, which has been submitted to us, that the practice on the part of a collection agency in hiring a lawyer to sue on an assigned claim constitutes the illegal practice of law. We have given this opinion serious consideration, and believe that at the most this opinion can only be made to apply in those states which have held or would hold that a collection agency has no authority to take an assignment of a claim and sue thereon. His opinion and reasoning would not be applicable in Idaho in view of our opinion that our Supreme Court has recognized the right of a licensed collection agency to institute suits on assigned claims.

It necessarily follows that an agency in bringing such a suit must be and should be represented by an attorney. If the act of the collection agency is legal and lawful, they are entitled to have services of an attorney in performing that act. We further believe that as a general proposition it is carrying the matter too far to hold that a collection agency is engaged in the practice of law under the facts in question 1, since our legislature has licensed collection agencies to do business, and our Court has recognized their right to sue on assigned claims.

Question 2:

In answer to question 2, it is our opinion that it is not unethical for a lawyer to represent a collection

agency in a suit on an assigned claim solicited by the agency for collection, where the lawyer is hired and paid by the agency. We assume, of course, that the lawyer is not financially interested in the agency, and does not participate in the management of the same in violation of Opinion No. 225, A.B.A.

We see no violation of Canon 27, which forbids the solicitation of professional employment. It is true the collection agency solicits business, but in so doing, it is not soliciting business primarily for a lawyer but solicits business on its own behalf, and the lawyer is not himself directly or indirectly soliciting business in accepting employment from the collection agency to bring suit on an assigned claim.

Neither is Canon 28, which forbids the stirring up of litigation or employing runners to obtain business, violated, since the lawyer himself is not engaged in stirring up litigation. Neither is the agency so engaged. The primary work of the agency is collecting accounts, not bringing law suits. The lawyer in accepting employment from an agency under the facts involved in these questions, is not in our opinion in any way engaged even indirectly in stirring up litigation.

Canon 35 forbids the control or exploitation of the professional services of a lawyer by any lay agency which intervenes between client and lawyer. There is no violation of this canon on the part of a lawyer in representing a collection agency. The agency does not arrange with the assignor of the claim to provide a lawyer for such assignor. It does not intervene in that respect. The lawyer has no relationship with the assignor. The agency alone is his client and he owes no duty to anyone but the agency. The agency does not bring about the relationship of attorney and client between its assignor and the lawyer. It does not stand in a position of intervening to in any way control the services of an attorney.

Canon 47 provides that no lawyer shall permit his professional services or his name to be used in aid of or to make possible the unauthorized practice of law by any lay agency.

Inasmuch as it is our opinion under question 1 that the agency is not engaged in the illegal or unauthorized practice of law under the facts in the foregoing questions, the lawyer is not in any way violating this canon by representing a collection agency. The act of the agency being legal and permitted under our law, there is nothing unethical in a lawyer representing a client doing a lawful act.

Question 3:

With reference to question number 3, it is our opinion that it is unethical for an attorney representing a collection agency in a suit on an assigned claim to arrange with the agency for a share of the commission received by the collection agency as his fee for his legal services. While this is a close question, and perhaps Canon 34, which provides:

> "No division of fees for legal services is proper except with another lawyer based upon a division of services or responsibility,"

is not violated since the lawyer is not dividing his fee within the meaning of that canon, and the agency's commission is not for legal services, yet the better practice for a lawyer is to have a fee arrangement as provided for in question 4. It is no concern to the lawyer what the agency receives for its services. Its services are distinctly different than those the lawyer renders, and a lawyer should not be in a position of having an interest in the proceeds which the collection agency gets for its services. It may be true that the agency from a business standpoint has to pay a lawyer out of its commission or suffer a financial loss. It is our opinion that an arrangement whereby the collection agency shares its commission with the lawyer places the lawyer in a position of having a financial interest with the agency in the claim, and thereby in the business of the agency itself which he cannot do under Opinion 225 of the American Bar Association Ethics Committee above referred to. Further, the lawyer is representing the collection agency alone, and no one

else, and his fee for his services should in no way be dependent upon payment of an amount by third party whom he does not represent.

Question 4:

In view of our opinions on questions 1, 2 and 3 above set forth, it is our opinion that it is not unethical for an attorney to accept a specific retainer fee or a definite percentage of the amount sued for, or a definite suit fee for his legal services to be paid for by the agency and the agency alone for the reasons hereinabove set forth.

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*Undated opinion. See, DR 2-107(A), DR 3-101(A), DR 5-101(A) and DR 5-107, Idaho Code of Professional Responsibility; I.S.B. Opinion No. 37 (October 3, 1962).