Opinion No. 74-28

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BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Larry D. Coughenour, Director Administrative Office of the Courts Supreme Court Building Santa Fe, New Mexico 87501

QUESTIONS

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What is the meaning and effect of the case of **State ex rel. Norvell v. Credit Bureau of Albuquerque,** 85 N.M. 521, 514 P.2d 40 (1973), on collection agency practice in the various courts?

CONCLUSION

See analysis.

OPINION

*{*54}* **ANALYSIS**

In **State ex rel. Norvell v. Credit Bureau,** 85 N.M. 521, 514 P.2d 40 (1973), the New Mexico Supreme Court struck down "collection practices of long standing," **Id.** at 530, and outlined its view of the parameters of conduct a collection agency may engage in without running afoul of the judicial and statutory prohibitions against the unauthorized practice of law. This opinion covers the two major elements of the unauthorized practice issue:

(1) To what extent can a non-lawyer collection agency employee or agent prepare pleadings, orders, judgments or appear in court on behalf of another?

(2) To what extent can a collection agency solicit claims for collection, take assignments of those claims, and file suit thereon in its own name in **any** court if represented by legal counsel?

This opinion will analyze these two questions separately.

(1) **The Practice of Law in Magistrate Court by Non-Lawyer Employees or Agents of Collection Agencies.**

The court, in its opinion, defined the practice of law relating to court proceedings as follows:

". . . (1) representation of parties before judicial or administrative bodies, (2) preparation of pleadings and other papers incident to actions and special proceedings, (3) management of such action and proceeding, and non-court related activities such as (4) giving legal advice and counsel, (5) rendering a service that requires the use of legal knowledge or skill, (6) preparing instruments and contracts by which legal rights are secured. 7 Am. Jur. 2d Attorneys at Law, § 73; Annot., 151 A.L.R. 781. Denver Bar Association v. Public Utilities Commission, 154 Colo. 273, 391 P.2d 467, 13 A.L.R.3d 799 (1964); Clark v. Austin, 340 Mo. 467, 101 S.W.2d 977 (1937)." **State ex rel. Norvell v. Credit Bureau of Albuquerque,** 85 N.M. at 526.

The court went on to conclude that there were a limited number of exceptions where the practice of laymen might be allowed, expressly approving Judge Fowlie's enumeration of these exceptions:

". . . (1) by individual persons appearing pro se (2) by a non-lawyer in an isolated instance, assisting an individual person appearing pro se, and with permission of the court (3) by a law *{*55}* student pursuant to Rule 94, Rules of Criminal Procedure. There may be other circumstances not covered by the foregoing, e.g., 'guard-house lawyers' preparing and filing briefs for prison inmates less familiar with criminal law." **State ex rel. Norvell v. Credit Bureau of Albuquerque,** 85 N.M. at 525.

The court, however, specified these special circumstances would **not** be allowed unless this type of practice occurred only on a ". . . casual and non-recurring basis without the contaminating aspects of solicitation and charging of fees." **State ex rel. Norvell v. Credit Bureau of Albuquerque,** 85 N.M. at 529. The court went on to conclude:

"We will not permit the practice of law by unlicensed magistrate courts' lawyers who are unfettered by the strictures which apply to the legal profession." **State ex rel. Norvell v. Credit Bureau of Albuquerque,** 85 N.M. at 529.

The court took great pains to make it clear that it did **not** reach the question of the extent to which corporation, individual, association, partnership or group of any kind can represent itself pro se:

"Notwithstanding the contention of the state that the court erred in not concluding that corporations cannot appear pro se, we want to make it clear that the question of pro se appearances, whether by an individual, partnership, corporation, association or group of any kind, and whether on an isolated or recurring basis, is not before the court for decision." **State ex rel. Norvell v. Credit Bureau of Albuquerque,** 85 N.M. at 529.

In summary, lay employees or agents of collection agencies are prohibited from engaging in those activities defined by the court as the practice of law (85 N.M. at 526) **unless** the activities can fall within the enumerated exceptions (85 N.M. at 525) and they are done on a "casual and non-recurring" basis (85 N.M. at 529).

(2) **The Practice of Law by Collection Agencies Which Solicit Claims and File Suit Thereon, but Which are Represented in Court by Legal Counsel.**

As noted above, the court specifically held that the lower court judge committed reversible error by not enjoining the Credit Bureau from:

". . . soliciting claims on a contingency fee basis, and filing suit thereon on the same contingency fee basis by its own attorneys in its own name in any of the courts of the State of New Mexico . . ." **State ex rel. Norvell v. Credit Bureau of Albuquerque,** 85 N.M. 529-30.

Since the party in court was represented by legal counsel and presumably all of the pleadings were at least reviewed by this legal counsel, the unauthorized practice issue was different than the one involved where a layman represents others in court as an "unlicensed magistrate court lawyer." The court, in reaching its conclusions regarding the unauthorized practice, quoted with approval the language of the Utah, Wisconsin and Iowa Supreme Court regarding the unauthorized practice issue.

" **When the defendants solicit the placement of claims with them for collection, they are asking third parties to allow them to render the service of collecting the claim.** At that time the collection agency has absolutely no interest, either legal or beneficial, in the claim. The only interest they ever get comes by virtue of a promise to prosecute the claim. **Courts cannot remain blind to the fact that the assignment of the claim to the defendants for collection is not made as a gratuity. The percentage of the amount collected which is allowed to the defendants is given to them for one purpose only; to compensate them for services rendered in the collection thereof. Where the collection practice involves the preparing of legal papers, furnishing legal advice *{*56}* and other legal services, the compensation allowed must be assumed to be in part allowed to pay for the legal services so rendered.** No matter how one looks at it, this constitutes the rendering of legal services for others as a regular part of the business carried on for financial gain. This essential fact cannot be hidden by the subterfuge of an assignment.

. . . it is clear that any attorney furnished to perform the legal services which the defendants agree as a usual business practice, to perform or cause to be performed would be the employee of the defendants. **There would, under these circumstances, be no contract or privity** between the owners of the various claims and the attorneys furnished by the defendants." (Emphasis added). **State ex rel. Norvell v. Credit Bureau of Albuquerque,** 85, N.M. 426-7, citing with approval **Nelson v. Smith,** 107 Utah 382, 397, 154 P.2d 634 (1944).

And

"Undoubtedly one might for example engage in the business of buying claims as investments and might take assignments of them to himself and maintain actions thereon in his own name. But when he does not purchase the claims and only takes

colorable assignment of them so he may render or cause to be rendered legal service to others and holds himself out as engaged in such practice, it is a quite different matter. In one case he is dealing in property on his own account, in the other he is selling service and merely adopting the guise of an investor to conceal the real nature of his operations.

And so with the right of a plaintiff to try his own lawsuit in any court. If it is really his own litigation the right is unquestioned and unquestionable. But if it is another's lawsuit or action, placed in plaintiff's name so as to enable him to render service to that other under the pretext of trying his own case, it does not come under the protection of the rule. And if it is done by one who engages in it as a business and holds himself out as peculiarly qualified or equipped, it comes under the ban of illegal practice of law." (Emphasis added). **State ex rel. Norvell v. Credit Bureau of Albuquerque,** 85 N.M. at 528, citing with approval **Bump v. Barnett,** 235 Iowa 308, 312, 16 N.W.2d 250 (1967).

"Thus we have a situation where the the defendants, La Belle, the individual, and Bonded Collections, Inc., the corporation, advise the creditor when to start a lawsuit. Upon taking a limited assignment **the defendants hire an attorney who, at their direction, commences suit. The direction of lawsuit, defendants admit, is vested in them not in the creditor who is the true client.** If the suit is successful, the collection agency pockets a fee for services rendered. We conclude that habitual conduct of this nature for a fee constitutes the practice of law. (Citations omitted). State v. Bonded Collections, Inc., supra, 36 Wis.2d at 653, 154 N.W.2d at 255." (Emphasis added). **State ex rel. Norvell v. Credit Bureau of Albuquerque,** 85 N.M. at 530.

Relying on these cases, the stated rationale of the New Mexico Supreme Court was:

"Under the facts stipulated and found by the trial court, **even where court proceedings are initially handled by Credit Bureau attorneys, there** is still the element of **solicitation** and **charging of compensation** for legal services by the Credit Bureau. The fact that it elects to use its own attorneys from inception is in itself control of the litigation. . . The assignments procured by the Credit Bureau **were not, in truth taken for the purpose of acquiring title and ownership but rather to facilitate the furnishing of legal services for a consideration.** " (Emphasis added). **State ex rel. Norvell v. Credit Bureau of Albuquerque,** 85 N.M. 530.

*{*57}* Thus, collection agency conduct amounts to unauthorized practice of law whenever:

(1) The collection agency in any way engages in solicitation by "holding out" it has the capacity to perform or procure the performance of legal services;

(2) The collection agency actually engages in the "business" of furnishing legal services by taking a mere pro forma interest in the claim so that it can file the action in its own name and substitute itself for the real party in interest, i.e., the creditor; or

(3) It procures attorneys for others and manages their litigation thus intervening between the attorney and the client.

The holding and rationale of the Opinion guides us to the following conclusions concerning permissible collection agency conduct:

(1) A collection agency may solicit claims for collection, so long as it does not advise creditors it has in any way the capacity to bring legal actions as a part of its services;

(2) If methods short of litigation fail, the collection agency must refer the claim back to the creditor who should be advised to select the attorney of his choice; and

(3) If the creditor should select an attorney who is also an attorney for the collection agency, the collection agency must insure that it in no way controls the litigation or interferes with a bona fide attorney-client relationship between the creditor and his attorney.

Presumably, a collection agency could purchase claims outright from creditors, but this purchase must be "for the purpose of acquiring title and ownership; and not ". . . to facilitate the furnishing of legal services for a consideration." **State ex rel. Norvell v. Credit Bureau of Albuquerque,** 85 N.M. at 530. Any purchase short of an absolute, no-strings-attached sale, would be contrary to the Opinion, and any partial contingent assignment or quasi-partnership would be a subversion of the Supreme Court decision and unlawful.

By: Thomas Patrick Whelan, Jr.

Assistant Attorney General