February 10, 2011 Advisory Letter---Pro Se Collection Agencies

The Honorable Jane E. Powdrell-Culbert
New Mexico State Representative
PO Box 2819
Corrales NM 87408

Re: Opinion Request: *Pro Se* Collection Agencies

Dear Representative Powdrell-Culbert:

You requested our opinion regarding whether the owner of a collection agency may represent himself in state court when taking certain types of collection actions. As discussed below, we conclude that the case law and the Collection Agency Regulatory Act, NMSA 1978, §§ 61-18A-1 through 61-18A-33 (1987, as amended through 1999), do not permit either the collection agency or its manager to appear in court if they have received an assignment from a creditor.

The statutory provision, in relevant part, provides as follows:

> Nothing in the Collection Agency Regulatory Act shall be construed to prevent collection agencies from *taking assignments of claims in their own name as real parties in interest* for the purpose of billing and collection and *bringing suit in their own names* thereon, provided that no suit authorized by this section may be instituted on behalf of a collection agency in any court unless the collection agency appears by a duly authorized and licensed attorney-at-law. In such suit, the court may, in its discretion, authorize payment of reasonable attorney fees and costs to the prevailing party.

NMSA 1978, § 61-18A-26 (emphasis added).

The statute has two key terms. First, there is an issue of whether a collection agency is defined as a "real party in interest." That term is defined as a "[p]erson who will be entitled to benefits of action if successful, that is, *the one who is actually and substantially interested in the subject matter* as distinguished from one who has only a nominal, formal, or technical interest in or connection with it." *Black's Law Dictionary* 1264 (6th ed. 1990) (emphasis added).

Second, there is an issue of what constitutes an assignment of the creditor's rights. This is significant because a federal district court concluded that assignments to a collection agency on a contingency basis allowed the creditor to retain a controlling interest in the right of action and permitted the collection agency to take title to facilitate the provision of legal services for a fee. Consequently, according to the court, the collection agency was engaged in the unauthorized practice of law. See Kolker v. Duke City Collection Agency, 750 F.Supp. 468, 472 (D.N.M. 1990). The federal court found that "[i]f § 61-18A-26 was construed to authorize prosecution by a collection agency in its own name

of its creditor's contingency assignment, the statute would be unconstitutional," and chose not to construe the statute in that manner. Id. at 473. This means a collection agency cannot appear in court when it executes a contract with a creditor where the collection agency: (a) purchases judgments on a future pay basis; (b) advances expenses and legal costs; (c) purchases assignments on a contingency fee basis; (d) pays the creditor a portion of the recovered money; or (e) is listed as an interested party on a case caption. See id. at 470-471.

The Rules of Civil Procedure for both the Metropolitan Court and the Magistrate Courts address "pro se and attorney appearances" in these courts for purposes of collection of judgments and claims:

> Collection agencies may *take assignments of claims in their own names as real parties in interest* for the purpose of billing and collection and *bringing suit in their own names*; provided that no suit authorized by this section may be instituted on behalf of a collection agency in any court unless the collection agency appears by a licensed attorney-at-law.

Rule 2-107(D) NMRA 2008 (Rules of Civil Procedure for the Magistrate Courts), Rule 3-107(D) NMRA 2008 (Rules of Civil Procedure for the Metropolitan Courts) (emphasis added). The language of these two judicial rules is consistent with and mirrors the language of Section 61-18A-26.

The New Mexico Supreme Court long ago determined that when a collection agency procures an assignment of a claim from the creditor that allows the collection agency to file suit in its own name, the subsequent rendering of legal advice and legal services requires the collection agency to hire an independent attorney. State ex rel. Norvell v. Credit Bureau of Albuquerque, 85 N.M. 521, 525-529 (1973). In denying the collection agency the ability to take assignments on collection for purposes of bringing pro se suits for judgment recovery in its own name, the Supreme Court cited as support cases from other states:

> if it is another's lawsuit or action, placed in [the collection agency's] name so as to enable [it] to render service to that other under the pretext of trying [its] own case, it … comes under the ban of illegal practice of law.

Norvell, 85 N.M. at 528 (quoting Bump v. Barnett, 235 Iowa 308, 312, 16 N.W.2d 579, 582 (1944)). Therefore, a collection agency cannot enter a pro se appearance in these cases. The Supreme Court concluded that the defendant Credit Bureau was not appearing in court "pro se but is rather rendering a service to others." Norvell, 85 N.M. at 529. The exception to this rule is when a collection agency purchases the judgment outright and becomes the sole plaintiff in the litigation. "If it is really his own litigation, the right [to appear] is unquestioned and unquestionable." Id. at 528 (quoting Bump v. Barnett, 235 Iowa at 312, 16 N.W.2d at 582). The creditor would have to have no further role or compensation relief in the process. "Any purchase short of an absolute, no-strings attached sale, would be contrary … and any partial contingent assignment or

quasi-partnership would be a subversion of the Supreme Court decision and unlawful." N.M. Att'y Gen. Op. 74-28 (1974).

Under the judicial and other legal authorities discussed above, a collection agency that takes an assignment of a creditor's claim in the collection agency's name for the purpose of billing and collection and bringing suit in the agency's name must be represented by a licensed attorney. A collection agency may appear pro se and represent itself in a lawsuit only in connection with its own claims, including a claim it purchases outright from a creditor. In those cases, the agency's collection efforts in court or otherwise are made solely on the agency's behalf as the sole owner of the claim.

We understand that your request was made on behalf of a constituent who owns a collection agency. Evidently, he has attempted to bring collection actions in the collection agency's name and has been informed by the courts that the collection agency could not appear unless represented by a licensed attorney. We have no knowledge of the specific facts or issues presented in your constituent's collection actions and have no authority to second-guess the courts' rulings in those cases. This letter is addressed solely to the questions you posed and is this office's interpretation of the applicable law.

If we may be of further assistance, please let us know. Your request was for an Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of this letter instead of a formal Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Very truly yours,

MARY H. SMITH
Assistant Attorney General