

New York State Bar Association

Committee on Professional Ethics

Opinion 803 – 11/29/06

Topic: Provision of out-of-state non-legal services.

Digest: If permitted by other jurisdictions' regulation, including their regulation of the unauthorized practice of law, a law firm may engage in debt collection activities outside the state that do not constitute the practice of law, provided the firm makes appropriate disclosures to the client and avoids misleading debtors.

Code: DR 1-102(A)(4); DR 1-104(A); DR 1-106; DR 3-101(B).

QUESTION

1. A law firm whose lawyers are admitted to practice in New York represents creditors in New York. It seeks to engage in debt collection activities outside New York without engaging in the practice of law. Under what circumstances may it assist its clients in debt collection activities as a non-legal service in jurisdictions where its lawyers are not licensed to practice?

OPINION

2. The threshold question is whether the collection activities will violate the regulatory provisions of the jurisdictions in which the activities take place. If so, the law firm may not undertake these activities. For example, the collection activities may constitute the practice of law by the firm's lawyers in the states in which they are not licensed to practice and may therefore constitute the unauthorized practice of law in violation of laws or rules of those other states. If the proposed activities would violate

another state's regulation of the unauthorized practice of law, the activities would subject the firm to discipline in New York as a result.¹

3. Assuming that a firm may engage in collection activities outside New York consistently with other states' regulations, it is not *per se* impermissible for a firm to do so under the New York Code. Assuming that collection services comprise non-legal services that are not prohibited as the unauthorized practice of law, DR 1-106 makes clear that a law firm may provide such services independently of the legal services it provides to its clients. DR 1-106(C) defines "non-legal services" to "mean those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a non-lawyer." With respect to lawyers or law firms providing "non-legal services" to clients, DR 1-106(A) provides in pertinent part that:

1. A lawyer or law firm that provides non-legal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these Disciplinary Rules with respect to the provision of both legal and non-legal services.

2. A lawyer or law firm that provides non-legal services to a person that are distinct from legal services being provided to that person by the lawyer or law firm is subject to these Disciplinary Rules with respect to the non-legal services if the person receiving the services could reasonably believe that the non-legal services are the subject of an attorney-client relationship.

...

4. For purposes of DR 1-106(A)(2) . . . , it will be presumed that the person receiving non-legal services believes the services to be the subject of an attorney-client relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of an attorney-client relationship does not exist with respect to the non-legal services

Because collection activities outside New York will presumptively be subject to the disciplinary rules governing an attorney-client relationship, a law firm seeking to avoid the obligations of an attorney-client relationship must advise the client in writing that the services are not legal services and that the protection of an attorney-client relationship does not exist with respect to the non-legal services. Further, the law firm must otherwise avoid misleading the client to believe that it is rendering legal services subject to the protection of an attorney-client relationship.

¹ See New York Lawyer's Code of Professional Responsibility, Disciplinary Rule ("DR") 3-101(B) ("A lawyer shall not practice law in a jurisdiction where to do so would be a violation of regulations of the profession in that jurisdiction."); DR 1-104(A) ("A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules.").

4. Similarly, the firm must avoid misleading debtors with whom it communicates pursuant to the collection activities.² For example, it may not use its law firm letterhead in communicating with debtors and must otherwise avoid suggesting to debtors in such communications that the firm or its representatives are functioning as lawyers engaged in the representation of the creditor-client or that the firm or its representatives might undertake legal action on the creditor-client's behalf.

5. This Committee has recognized that, notwithstanding the adoption of DR 1-106, there will be situations in which concurrently providing legal and non-legal services to a client is impermissible under the conflict-of-interest rules.³ While a conflict may arise in particular situations, a law firm's collection activities for a creditor-client outside New York ordinarily would not be reasonably likely to impair the firm's exercise of professional judgment in legal matters in New York relating to other collections on behalf of the same or other clients.

CONCLUSION

6. A New York law firm may assist its clients in debt collection activities as a non-legal service in jurisdictions where its lawyers are not licensed to practice if (1) permitted by the applicable rules of the other jurisdictions, including their regulation of the unauthorized practice of law, (2) the firm advises clients in writing that the services are not legal services and that the protection of an attorney-client relationship does not exist with respect to the non-legal services, and (3) the law firm does not use its law firm letterhead in communicating with debtors and otherwise avoids misleading debtors.

(16-06)

² See DR 1-102(A)(4) (law firm shall not "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation.").

³ See N.Y. State 753 (2002) (lawyer may not represent buyer or seller and also act as mortgage broker or title abstractor in same transaction); N.Y. State 752 (2002) (lawyer may not act as lawyer and also real estate broker/other roles in same transaction).