



# NEW YORK STATE BAR ASSOCIATION

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## **New York State Bar Association Committee on Professional Ethics**

Opinion 898 (12/19/11)

**Topic:** Legal advice to unrepresented person

**Digest:** A lawyer does not give legal advice to an unrepresented person in violation of Rule 4.3 merely by including in a letter a legally mandated notice regarding expiration of the statute of limitations on the subject claim.

**Rules:** Rule 4.3

### **BACKGROUND**

1. The debt collection industry, including law firms engaged in the collection of consumer debt, have come under greater regulation and scrutiny since Congress enacted the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. §§ 1692 *et seq.*, in 1978. Many states and various local legislative bodies have followed with legislation modeled upon the FDCPA and, in certain instances, have expanded the obligations imposed upon collection law firms. In particular, the New York City Council has added obligations upon lawyers engaged in the collection of consumer debt within New York City. In this opinion we address New York City’s requirement that lawyers who correspond with an alleged consumer debtor regarding a debt that is beyond the statute of limitations must include a notice that the legal time limit for suing upon the debt has expired.

2. New York City Administrative Code Section 20-490 requires every “debt collection agency” that deals with the consumer public to be licensed by the New York City Department of Consumer Affairs. Under Code Section 20-489(a), a lawyer comes within the definition of a debt collection agency if the lawyer “regularly engages in activities traditionally performed by debt collectors, including, but not limited to, contacting a debtor through the mail or via telephone with the purpose of collecting a debt.”

3. Section 20-493.2(b) provides that a debt collection agency shall not “[c]ontact a consumer about or seek to collect a debt on which the statute of limitations for initiating legal action has expired unless such agency first provides the consumer such information about the consumer’s legal rights as the [Commissioner of Consumer Affairs] prescribes by rule.” The Commissioner has promulgated a rule providing that a

debt collection agency (which, as seen above, may include a lawyer) is required to include the following statement in a communication when the agency is seeking to collect upon a debt beyond the statute of limitations:

WE ARE REQUIRED BY LAW TO GIVE YOU THE FOLLOWING INFORMATION ABOUT THIS DEBT. The legal time limit (statute of limitations) for suing you to collect this debt has expired. However, if somebody sues you anyway to try to make you pay this debt, court rules REQUIRE YOU to tell the court that the statute of limitations has expired to prevent the creditor from obtaining a judgment. Even though the statute of limitations has expired, you may CHOOSE to make payments. However, BE AWARE: if you make a payment, the creditor's right to sue you to make you pay the entire debt may START AGAIN.

6 R.C.N.Y. § 2-191(a) (emphasis in original). If a lawyer were ethically barred from giving this notice, or other mandated notices,<sup>1</sup> it could impede the lawyer's ability to engage in debt collection work.

## QUESTION

4. May a lawyer ethically engage in debt collection activities in compliance with the Commissioner's rule requiring communications to include the above-quoted notice?

## OPINION

5. Under the New York Rules of Professional Conduct, communications between a lawyer and a person unrepresented by counsel are governed by Rule 4.3, which in relevant part provides: "The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client."

6. When a lawyer's client is a creditor seeking to collect a debt, it should be clear that the interests of the debtor "are or have a reasonable possibility of being in conflict with the interests of the client" (the creditor) within the meaning of Rule 4.3. In addition, we assume for the purposes of this opinion that the debtor is unrepresented.

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<sup>1</sup> For instance, every summons issued to a defendant on a consumer debt collection case requires the summons to include specified language to the unrepresented party. The language required in the New York City Civil Court on consumer credit transactions is as follows:

THIS IS A COURT PAPER - A SUMMONS. DON'T THROW IT AWAY!! TALK TO A LAWYER RIGHT AWAY!! PART OF YOUR PAY MAY BE TAKEN FROM YOU (GARNISHEED). IF YOU DO NOT SEE A LAWYER, YOUR PROPERTY CAN BE TAKEN AND YOUR CREDIT RATING CAN BE HURT!! YOU MAY HAVE TO PAY OTHER COSTS TOO!! IF YOU CAN NOT PAY FOR YOUR OWN LAWYER BRING THESE PAPERS TO THIS COURT RIGHT AWAY!!

22 NYCRR §208.6(d) (emphasis in original).

Accordingly, the predicates of Rule 4.3 have apparently been met, and the lawyer is prohibited from giving the debtor “legal advice” within the meaning of the Rule, other than the advice to secure counsel.

7. The term “legal advice” is not defined by the Rules. Whether a particular communication constitutes legal advice may depend not only on the words used but also on the context of their use. See Rule 4.3, Cmt. [2] (whether a lawyer is giving impermissible advice may depend in part on “the setting in which the behavior and comments occur”). When the broadest possible reading of the term “legal advice” would not serve the Rule’s purpose, then a more common-sense reading may be appropriate.<sup>2</sup>

8. Taking into account the purpose of Rule 4.3 and the setting in which the mandated notice is given, we believe that merely providing that mandated notice to the debtor would not constitute giving legal advice within the meaning of the Rule.

9. The basis for the rule against giving legal advice to unrepresented parties is “the possibility that the lawyer will compromise the unrepresented person’s interests.” Rule 4.3, Cmt. [2]. In this case, the notice is designed not to compromise but rather to serve those interests. It is not the lawyer who has made that assessment of the debtor’s interests; rather, the assessment was made in the course of a legislative and administrative process. Nor does the mandate allow the lawyer to vary the form of the notice in any way that could serve the debtor’s interests less effectively. The exact words of the notice are prescribed.

10. Moreover, it is in the nature of giving legal advice that a lawyer exercises professional judgment to apply legal principles to particular facts, and to impart some particular advice rather than some other possible advice so as to help guide decisions of the recipient.<sup>3</sup> None of those features are present here. Far from exercising professional judgment or choosing between different possible forms of advice, the lawyer is doing no more than complying with the explicit requirements of a rule that applies to every debt collection agency. The nature of a mandated notice and the purpose of this particular notice lead us to conclude that a lawyer who gives it is not giving impermissible legal advice.<sup>4</sup>

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<sup>2</sup> See, e.g., Rule 4.3, Cmt. [2] (stating that in “negotiating the terms of a transaction or settling a dispute with an unrepresented person,” if the lawyer has complied with other requirements of the Rule, the lawyer may explain “the lawyer’s view of the underlying legal obligations”); N.Y. State 728 (2000) (“Although the disciplinary rule, by its terms, forbids a lawyer from giving any advice to a party whose interests conflict with those of the lawyer’s client, other than the advice to secure counsel, the rule has been understood to allow a lawyer, additionally, to give certain non-controvertible information about the law to enable the other party to understand the need for independent counsel”).

<sup>3</sup> As expressed in EC 3-5 of our former Code of Professional Responsibility: “The essence of the professional judgment of the lawyer is the educated ability to relate the general body and philosophy of law to a specific legal problem of a client ....”

<sup>4</sup> Cf. Pennsylvania Inf. Opinion 93-139 (opining that lawyer representing a party in a divorce proceeding could ethically send an unrepresented party a letter and concurring affidavit because these materials in part reflected standard notices required by civil procedure rules, and to the extent the papers went

## **CONCLUSION**

11. A lawyer's compliance with the New York City Rule requiring a specified notice as part of a communication to collect a debt beyond the statute of limitations does not constitute giving legal advice to an unrepresented person as prohibited by Rule 4.3.

(28-11)

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beyond that, they constituted merely a recitation of the applicable legal principles and did not constitute legal advice).