



# NEW YORK STATE BAR ASSOCIATION

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## New York State Bar Association Committee on Professional Ethics

Opinion 1097 (5/26/2016)

**Topic:** Non-legal employment; misrepresentation of lawyer's professional status.

**Digest:** If a lawyer is hired as a debt collector, and not as a lawyer, to make phone calls to collect commercial debts, the lawyer is not required to disclose his or her status as a lawyer. But if a debtor asks whether the caller is a lawyer and the lawyer answers the question, the response must be truthful and not misleading.

**Rules:** 8.4(c)

### FACTS

1. The inquirer is a New York lawyer employed by a debt collection agency as a commercial debt collector. The inquirer is responsible for making routine phone calls to collect debts on behalf of the agency. The inquirer is admitted to practice law but is not engaged as a lawyer on behalf of the agency.
2. During these phone calls, a debtor often asks whether the inquirer is a lawyer. Currently, the inquirer responds, truthfully, "I happen to be a lawyer but I am neither acting in a legal capacity nor representing either the collection agency or the client who owns the debt."
3. The collection agency prefers that the inquirer not disclose the inquirer's status as an attorney or even deny that the inquirer is an attorney (since the inquirer is not acting as one).

### QUESTION

4. May a lawyer who is hired by a debt collection agency to make collection calls to debtors but who is not retained as a lawyer refuse to identify his or her status as an attorney when asked by the debtor?

### OPINION

5. Lawyers often work for businesses that provide nonlegal services<sup>1</sup> but whose activities may trigger legal questions. *See, e.g.* N.Y. State 1081 (2016) (debt management company), N.Y. State 951 (2012) (letter writing service), N.Y. State 832 (2009) (selling shelf corporations over the Internet); N.Y. State 803 (Lawyer may engage in debt collection activities outside New York that do not constitute the unauthorized practice of law, as long as the firm avoids misleading

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<sup>1</sup> Rule 5.7(c), which applies when lawyers or law firms provide "nonlegal services" to clients, defines "nonlegal services" as "those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer."

debtors); *cf.*, N.Y. State 898 (2011) (lawyer who sends a legally mandated notice regarding the expiration of the statute of limitations on a debt is not giving legal advice to an unrepresented person in violation of Rule 4.3).

6. We assume for purposes of this opinion that the debt collection agency is not providing legal services. We also assume that the debt collection agency does not represent to its customers that it is providing legal services, does not appear in court on behalf of the customers and does not provide lawyers for its customers. We have no authority to determine whether the services of the debt collection agency are legal services because what constitutes the practice of law is a legal question that is beyond this committee's jurisdiction to answer.

7. As we noted in N.Y. State 1081, if a lawyer is providing nonlegal services (and the clients do not believe they are legal services) then the only applicable ethical rules in the New York Rules of Professional Conduct (the "Rules") would be the rules that apply even where the lawyer is not representing a client, such as Rule 8.4(c), which prohibits a lawyer from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation." This obligation exists whether or not the activities of the lawyer constitute the practice of law. *Compare* Rule 4.1 ("In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact to a third person.")

8. When the debtor specifically asks if the inquirer is a lawyer, the inquirer is not obligated to answer the question. The inquirer may, for example, decline to answer or avoid responding to the question by changing the subject or ignoring the question. However, if the inquirer answers the question, the answer must be truthful and not misleading. A truthful statement should make clear that the lawyer is a lawyer but is acting as a debt collector only and not as a lawyer. *Cf.*, N.Y. State 803 (2006) (a lawyer providing non-legal debt collection services must 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.)

## **CONCLUSION**

9. If a lawyer is hired as a debt collector, and not as a lawyer, to make phone calls to collect commercial debts, the lawyer is not required to disclose his or her status as a lawyer. But if a debtor asks whether the caller is a lawyer and the lawyer answers the question, the response must be truthful and not misleading.

(17-16)