

Memorandum in Opposition

NYSBA #4

May 17, 2021

S. 3121-B

By: Senator Kavanagh
Senate Committee: Banks
Effective Date: 180th day after it shall have
become a law

AN ACT to amend the banking law and the civil practice law and rules, in relation to licensing consumer debt collectors.

THE NEW YORK STATE BAR ASSOCIATION **STRONGLY OPPOSES THIS LEGISLATION**

The New York State Bar Association strongly opposes the passage and enactment of this legislation to the extent that it does not wholly exempt attorneys and law firms not employed by a debt collector or acting as a debt collector.

The bill would require the licensing of “consumer debt collectors,” which is defined in relevant part as “any person who engages in a business, a principal purpose of which is the collection of consumer debts or of debt buying, or who regularly collects or attempts to collect, directly or indirectly, consumer debts owed or due to another person.”

Although the initial part of the definition refers to a business “a principal purpose of which” is consumer debt collection, that is not a necessary part of the definition. Rather, consumer debt collectors also include “any person...who regularly collects or attempts to collect” consumer debts. “Consumer debt” is defined in relevant part as a natural person’s debt arising from a transaction “primarily for personal, family, or household purposes.” The practical application of these broad definitions will likely result in attorneys being considered “Consumer debt collectors”.

The bill provides a narrow exception for certain attorneys collecting debt on behalf of a client through activities that may only be performed by a licensed attorney. Thus, for example, any law firm whose clients may include a landlord of residential property and which collects rent arrears several times a year will not be deemed a consumer debt collector. However, the exemption goes on to state certain attorneys, law firms, or parts thereof, which engage in “activities traditionally performed by debt collectors” are not exempt. Notably, activities “traditionally performed by debt collectors” under the bill includes, but is not limited to “contacting a debtor through the mail or via telephone with the purpose of collecting a debt or **other activities as determined by rule of the superintendent.**” This language is ambiguous, fails to draw a bright line between debt collectors and attorneys and likely will inappropriately subject attorneys and law firms to licensing requirements and oversight by the Division of Financial Services (DFS).

Lawyers are licensed by the Appellate Division of the Supreme Court and subject to extensive rules regarding ethical and legal obligations that balance many interests and concerns of confidentiality and professional responsibility unique to the profession of law. Law firms must be owned exclusively by attorneys. It is inappropriate for DFS to be given licensing, regulatory and examination authority over law firms functioning as law firms or attorneys practicing law individually. Moreover, this separation between licensing by the courts and licensing, and examination authority, of the Superintendent of Financial Services, is especially significant when it comes to the protection of the attorney-client privilege. Under no circumstances do we believe it appropriate for a government agency to have the authority to review and examine law firm communications with its own clients. Lawyers have a special professional position in our society in which they act as advocates for clients and they have express duties to those clients. Their behavior is governed by the court-approved Rules of Professional Conduct and they are subject to discipline by the applicable grievance committee, and by the appellate division, for violating those rules or committing other offenses. It is inappropriate to create a separate set of rules governing their conduct in a narrow field when conflicts between competing interests are inevitable, and clients may be unable to obtain competent representation when their own lawyer is subject to additional third-party licensing, examination and regulation.

Based on the forgoing, the New York State Bar Association **OPPOSES** this Legislation.