STATE OF CONNECTICUT

DEPARTMENT OF BANKING

260 CONSTITUTION PLAZA • HARTFORD, CT 06103-1800

Howard F. Pitkin
Commissioner

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IN THE MATTER OF:

Petition of Persels & Associates, LLC For Declaratory Ruling

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DECLARATORY RULING

I. Introduction

On March 21, 2012, Persels & Associates, LLC ("Persels") filed with the Banking Commissioner a Petition for Declaratory Ruling ("Petition") pursuant to Section 4-176 of the Connecticut General Statutes and Section 36a-1-84 of the Regulations of Connecticut State Agencies.

Persels is a Maryland limited liability company that describes itself as a Maryland-based, national consumer advocate law firm. Persels states that it does not advertise in Connecticut and that all of its clients in Connecticut are acquired via third party referrals, primarily through Care One Services, Inc. ("Care One").[1] According to the Petition, Persels' clients sign a retainer agreement wherein Persels agrees (for a fee) to provide its clients with, among other things, debt negotiation services.[2] Persels indicates that these "other things" provided to its clients are as follows:

> As part of the representation, the firm assigns a Connecticut attorney to consult with each client about their legal options. This includes legal advice on topics such as the applicable statute of limitations, the advantages and disadvantages of bankruptcy, garnishment exemptions, and litigation options and strategies. If litigation develops, the assigned Connecticut attorney assists the client in preparing answers to complaints and arbitration demands, drafts responses to discovery (if applicable), drafts cease and desist letters to creditors, and, when appropriate, helps the client assert claims against creditors who violate the law on collection practices. For an additional fee, the firm also offers to provide bankruptcy consultations to those clients who cannot settle their debts outside of bankruptcy.

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[1]Care One Services, Inc. is a licensed debt adjuster in Connecticut.

[2]A copy of the Persels' retainer agreement was not attached to the Petition. While Persels does not expressly say so, this ruling presumes that the debts Persels negotiates are covered by Section 36a-671(a) of the 2012 Supplement to the General Statutes.

According to the Petition, Connecticut attorneys provide these services, including debt negotiation services, in accordance with requirements of an October 2011 settlement agreement between Persels and the Office of the Chief Disciplinary Counsel. That settlement agreement requires that any Connecticut attorney performing debt negotiation services for Persels have an initial consultation with the Connecticut client and comply with Rule of Professional Conduct 5.3 with respect to supervision of support staff.

The Petition further states that in return for a fee, Care One provides Persels with various administrative services under a written contract,[3] including "preparing client in-take folders and managing client information" using Care One's proprietary software. The Petition provides that Persels pays Care One the "fair market value" for such services based on a flat fee per client per month.

The Petition requests that I:

1. Issue a declaratory ruling stating that, pursuant to Section 36a-671c of the 2012 Supplement to the General Statutes, a law firm that offers debt negotiation services to a client using Connecticut attorneys is not required to have a debt negotiation license from the Department when the debt negotiation services are delivered in aid of the law firm's representation of the client, as evidenced by a retainer agreement, the offering of legal advice and the delivery of other services constituting the practice of law; or

2. Issue a declaratory ruling clarifying the Commissioner's interpretation of the attorney exemption provided in Section 36a-671c of the 2012 Supplement to the General Statutes, with specific guidance as to when a Connecticut attorney or law firm must have a license from the Department to offer legal services in the field of debt negotiation.

The Petition also requests that:

> [T]he Commissioner . . . consider scheduling a public declaratory ruling proceeding, or initiate regulation-making proceedings under Conn. Gen. Stat. §4-168, on the subject of the exemption. . . . Such an approach should ensure that there is a forum for public comment from the Connecticut bar, representatives of the judicial branch (including the Office of Chief Disciplinary Counsel), and other interested parties . . . .

In accordance with and pursuant to Section 4-176(e)(2) of the Connecticut General Statutes, I ordered the matter set for specified proceedings by providing written notice of a public comment period ("Notice"). A copy of the Notice was provided to Persels on April 13, 2012, and published in the *Connecticut Law Journal* on April 24, 2012. A copy of the Notice was also posted on the Department's website. The Notice required that all comments be submitted by May 24, 2012.

The Notice advised that while additional proceedings concerning the declaratory ruling, including a hearing pursuant to Section 4-176(g) of the Connecticut General Statutes, might be held, no such proceedings were set through the Notice. The Notice also stated that a declaratory ruling constitutes a statement of agency law which is binding upon the parties to the proceeding, and may also be utilized by the Department, on a case-by-case basis, in future proceedings. *See* Section 4-176(h) of the Connecticut General Statutes and Section 36a-1-83 of the Regulations of Connecticut State Agencies.

[3] A copy of Persels' contract with Care One was not attached to the Petition.

Thirteen comments were timely filed in response to the Notice. One comment submitted on behalf of other law firms offering debt negotiation services can be broadly characterized as supporting the Petition. *See* Memorandum in Support of Persels & Associates' Petition for Declaratory Ruling by Proposed Parties Macey Bankruptcy Law, P.C. and Macey, Aleman & Searns, d/b/a The Mortgage Law Group, LLC (collectively "Macey"); and Ruling on Joint Petition by Macey for Party Status in Proceeding for Declaratory Ruling. One comment submitted by the Deputy Chief Court Administrator for the State of Connecticut Judicial Branch can be broadly characterized as expressing concern that the Department not unduly encroach on the Judicial Branch's authority to regulate attorney conduct.

The remainder of the comments received can be broadly characterized as opposing the Petition because Persels misinterpreted the attorney exemption provided in Section 36a-671c and omitted material facts about Persels' business operations. All of the comments, except for those submitted by debt negotiation firms, noted numerous reports and consumer complaints that unscrupulous entities holding themselves out as debt negotiation firms frequently take advantage of consumers by charging large, upfront fees while providing little or no relief to desperate consumers.

Having reviewed the Petition, the legislative history of Sections 36a-671 through 36a-671d,[4] and all the comments filed in response to the Notice, I conclude that the issues presented by the Petition are legal questions that can be answered without further fact-finding procedures. Accordingly, I will not hold an administrative hearing, and herein issue this declaratory ruling in accordance with Section 4-176 of the Connecticut General Statutes and Section 36a-1-87 of the Regulations of Connecticut State Agencies.

The questions posed by the Petition can be read as essentially asking what the scope of the attorney exemption contained in Section 36a-671c is, and whether Persels qualifies for that exemption.

For the reasons set forth below, I rule as follows:

Section 36a-671c(1) of the 2012 Supplement to the General Statutes provides an exemption from Sections 36a-671 to 36a-671d, inclusive, only for a natural person who: (a) is an attorney admitted to the practice of law in Connecticut; and (b) is not retained to perform, and does not perform, debt negotiation services, as defined in Section 36a-671 of the 2012 Supplement to the General Statutes, as the primary purpose of the representation, which shall be determined on a case-by-case basis in light of all of the facts and circumstances.

In addition, this Department will take a no-action position for a law firm that is a partnership, limited liability company or professional corporation engaging or offering to engage in debt negotiation services, as defined in Section 36a-671 of the 2012 Supplement to the General Statutes, to be performed and performed exclusively by an attorney admitted to the practice of law in Connecticut who is: (a) a partner or shareholder of the law firm, as the case may be; and (b) the only contact with the debtor and the debtor's mortgagee(s) or creditor(s), as the case may be; and provided that the firm is not retained to perform, and does not perform, debt negotiation services as the primary purpose of the representation, which shall be determined on a case-by-case basis in light of all of the facts and circumstances.

Based on the information provided in its Petition, Persels would require licensure because it does not qualify for the attorney exemption or the law firm no-action position under the standards set forth in this ruling.

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[4]The debt negotiation provisions also encompass Section 36a-671e of the 2012 Supplement to the General Statutes, but that provision pertains to mortgage loan originator licensure requirements not implicated by the facts set forth in the Petition.

II. Background and Legislative History

At the outset, it is important to provide the factual background and context for the Department's regulation of debt negotiation.

Since the economic downturn in 2007, the Department has seen a rising number of complaints against debt negotiation firms. *See* comments of the Consumer Credit Division of the State of Connecticut Department of Banking, p. 2 ("Division Comments"). Connecticut residents and consumers struggling financially are turning to debt negotiators as an alternative to bankruptcy and as a potential solution to their increasing consumer debt levels. *Id.* As evidenced by a number of the submitted comments, many debt negotiators mislead debtors, collecting thousands of dollars in upfront fees without performing any debt negotiation work and often making a debtor's circumstances worse. *See id.*; comments of the Connecticut Association for Human Services, p. 2 ("CAHS Comments") and attachment ("Peddling Relief, Firms Put Debtors in Deeper Hole", NY Times, June 18, 2010); comments of the Legal Assistance Resource Center of Connecticut, Inc., pp. 1-2 ("LARCC Comments") (describing the "growing concern about practices harmful to consumers caused by debt negotiation services," which "commonly included substantial up-front and periodic fees . . . but produced few results, often leaving . . . customers worse off than when they started," including "the most common business model in the industry [which] requires consumers to stop paying their debts," during which time "the debtor falls f[u]rther behind in his or her bills, the debt itself increases through interest and collection fees, lawsuits may be brought against the debtor, and the debtor's already weak credit rating will be damaged even further."); comments of the Center for Responsible Lending, the Consumers Union, and the National Consumer Law Center, p. 1 (collectively "CRL Comments") ("[D]ebt negotiation companies entice debt-burdened families desperate to relieve their financial struggles to enter into a debt negotiation program. Unfortunately, enrolling in a debt negotiation program worsens the family's financial situation in the overwhelming majority of cases . . . because debt settlement requires consumers to stop all payments on their credit cards, which typically exacerbates the family's problems with creditors."); comments of Tobin & Melien, p. 2 ("Tobin Comments") and attachment ("Profiteering From Financial Distress: An Examination of the Debt Settlement Industry," New York City Bar, Civil Court Committee, Consumer Affairs Committee, May 2012); comments of Sarah Poriss, Attorney at Law, LLC, p. 1 ("Poriss Comments") ("I am a consumer protection attorney in private practice who helps consumers who are sued by their credit card companies for non-payment, who are harassed by debt collectors and who are in foreclosure. . . . [C]ompanies like Persels & Associates . . . lure in new customers, take hard-working consumers' limited funds, and ultimately provide little or no value for that money."); comments of Action Advocacy, P.C., p. 10 ("Action Advocacy Comments"); comments of Mark A. Dubois of Geraghty & Bonnano, LLC, Attorneys at Law, p. 1 ("Dubois Comments") ("For over 7 years, I was Connecticut's Chief Disciplinary Counsel . . . . In that position, I dealt with a number of individuals and companies who offered debt negotiation services. . . . I did a fair amount of research, and found much commentary suggesting that the services offered by these individuals and companies were of little use or value to many members of the public. As this service was offered at the time, fees came out up-front, and few consumers ever successfully completed the program. The net result was that they found themselves further in debt."); comments of Joanne S. Faulkner, Attorney at Law, p. 1 ("Faulkner Comments") ("Licensing laws were adopted because of widely recognized abuses of debt settlement companies who prey on financially distressed consumers."); comments of the State of Connecticut Judicial Branch, p. 1 ("The Judicial Branch shares the Department of Banking's concerns regarding the infiltration of debt negotiation firms into our state and the goal of protecting our citizens from unscrupulous tactics used and ineffective services rendered by these unlicensed entities."); *see also* "Debt Settlement: Fraudulent, Abusive, and Deceptive Practices Pose Risks to Consumers," Testimony of Gregory D. Kutz, U.S. General Accountability Office, before the Committee on Commerce, Science, and Transportation, U.S. Senate, April 22, 2010, GAO-10-593T.

Because of these serious problems, I sought statutory authority to regulate the debt negotiation industry in 2009. *See* Division Comments, p. 2. In 2009, Representative Stripp, a former Ranking Member of the Banks Committee and one of the co-sponsors of Senate Bill 950, which became Public Act 09-208 containing the provisions concerning the requirements for debt negotiators, stated that the bill "is going to make the consumer better protected, particularly if they may fall on hard times where they're dealing with debt adjusters, nonprofit and profit debt settlers and debt negotiators as well as consumer collectors. . . . [T]his [bill] is going to update and increase the power of the Commissioner to try to protect people who find themselves in difficult times and dealing with these kinds of organizations." 52 H.R. Proc., Pt. 31 2009 Sess., pp. 9947-9948; *see* Division Comments, p. 2.

Public Act 09-208 created a regulatory scheme whereby any person engaging in debt negotiation services would be required to be licensed by the Department and subject to fee limitations, bonding requirements and contract disclosures. P.A. 09-208; *see* Division Comments, p. 3. Section 31 of Public Act 09-208, however, excluded from such regulatory authority "[a]ny attorney admitted to the practice of law in this state, when engaged in such practice." Section 31 of Public Act 09-208 was later codified at Section 36a-671c of the Connecticut General Statutes.

Around the same time that the legislature enacted Public Act 09-208, the Federal Trade Commission ("FTC") also took action with respect to the debt relief industry. Division Comments, p. 3. To curb deceptive and abusive practices in the industry, the FTC passed amendments to its Telemarketing Sales Rule ("FTC Rule"), which set forth disclosure requirements for the industry, prohibited certain misrepresentations in the telemarketing of debt relief services, and banned debt relief service companies within the FTC Rule's purview from charging fees to consumers in advance of renegotiating, settling or reducing unsecured debt balances. 16 C.F.R. Part 301, 75 Fed. Reg. 48460 (Aug. 10, 2010); *see* Division Comments, pp. 3-4. The FTC Rule provides some leeway with respect to attorney conduct in that it does not apply to attorneys who provide bona fide legal services without telemarketing, have face-to-face meetings with their clients, and comply with state bar rules (which typically prohibit attorneys from making outbound telemarketing calls to prospective clients and providing services to consumers in multiple states or nationwide). 16 C.F.R. Part 301, 75 Fed. Reg. at 48468; *see* Division Comments, p. 5. Nevertheless, the FTC Rule does not provide a specific exemption for attorneys. *See* 16 C.F.R. Part 301, 75 Fed. Reg. at 48467-69; Division Comments, p. 5. The FTC recognized that there were "deceptive and abusive practices engaged in by some attorneys in this industry," and felt that the applicability of the FTC Rule to attorneys "reflects the reality that the number of attorneys who have engaged in unfair, deceptive, and abusive acts that fall within the Commission's law enforcement authority is not *de minimis*." 16 C.F.R. Part 301, 75 Fed. Reg. at 48468, 48469; *see* Division Comments, p. 5.

The increase in state regulation, such as Public Act 09-208, and the advance fee ban of the FTC Rule caused a paradigm shift in the industry whereby debt relief companies changed their business models in an attempt to avoid the FTC Rule and state regulation. *See* Division Comments, p. 4. One of these models is the so-called "attorney model," whereby a debt relief company affiliates itself with local attorneys who purport to do "legal services" on behalf of clients. *Id.*; *see* Tobin Comments, p. 3 and attachment ("Profiteering From Financial Distress: An Examination of the Debt Settlement Industry"); CRL Comments, pp. 1-2; LARCC Comments, p. 2; CAHS Comments, pp. 1-2. The attorney model has not alleviated the problems in the debt negotiation industry, but at times has created another avenue to mislead consumers. Consumers are told that an attorney will represent them in negotiations with creditors and provide legal assistance when, in fact, the attorney's involvement is minimal or nonexistent. *See* Division Comments, pp. 4, 6-7; Tobin Comments, p. 3 and attachment ("Profiteering From Financial Distress: An Examination of the Debt Settlement Industry"); Poriss Comments, pp. 1-2; CAHS Comments, pp. 1-2; CRL Comments, pp. 1-2; LARCC Comments, p. 2; Action Advocacy Comments, pp. 11-12; Faulkner Comments, p. 1. In many cases, newly admitted attorneys are employed by national

debt negotiation firms and consumers are charged excessive upfront fees for legal services that consist only of debt negotiation services. *See* Division Comments, p. 6; Poriss Comments, pp. 1-2.[5]

To combat abuse of the statutory exemption for attorneys, the Department proposed changes to Section 36a-671c that would clarify and narrow the exemption. *See* Dubois Comments, pp. 2-3. In 2011, the General Assembly enacted Section 43 of Public Act 11-216, which narrowed the attorney exemption by specifying that it applies only in those instances where a Connecticut attorney engages or offers to engage in debt negotiation as an "ancillary matter to such attorney's representation of a client." P.A. 11-216, § 43; *see* Division Comments p. 5; comments of the Law Offices of Howard Lee Schiff, P.C., p. 1 ("Schiff Comments"); Tobin Comments pp. 1-2; LARCC Comments, p. 2. Senate Bill 1110, which eventually became Public Act 11-216, went through several committees. On March 8, 2011, the Banks Committee held a public hearing on Senate Bill 1110, during which I submitted testimony with regard to certain aspects of the bill. *See* Schiff Comments, pp. 1-2; Tobin Comments p. 2.

III. Legal Analysis

A. Statutory Framework – Debt Negotiation

The Department is statutorily obligated to regulate the debt negotiation industry in this state. The legislative history, *see* Section II supra, and provisions of the debt negotiation statutes themselves demonstrate that these statutes are intended to protect consumers from abusive practices and to further the public interest. *See* 2012 Supplement to the General Statutes § 36a-671(d). (The commissioner may issue a debt negotiation license if, upon an application for such a license, he finds, among other things, that the "financial responsibility, character, reputation, integrity and general fitness of the . . . applicant . . . [and its partners, members, officers, directors and principal employees] are such as to warrant belief that the business will be operated soundly and efficiently, in the public interest and consistent with the purposes of sections 36a-671 to 36a-671d, inclusive . . . .")

Section 36a-671(b) of the 2012 Supplement to the General Statutes provides, in pertinent part, that:

> No person shall engage or offer to engage in debt negotiation in this state without a license issued under this section for each location where debt negotiation will be conducted. . . . A person is engaging in debt negotiation in this state if such person: (1) Has a place of business located within this state; (2) has a place of business located outside of this state and the debtor is a resident of this state who negotiates or agrees to the terms of the services in person, by mail, by telephone or via the Internet; or (3) has its place of business located outside of this state and the services concern a debt that is secured by property located within this state.

The scope of the licensure requirement is further prescribed by reference to statutory definitions of the terms "person," "company," "debt negotiation" and "debtor."

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[5]In her comments, Attorney Poriss recounts that she had been actively recruited by a New York debt settlement company to provide legal services to the company's Connecticut clients. Poriss Comments, p. 2. Attorney Poriss states that the company offered to pay her a flat fee for each case, and that a significant portion of the money withdrawn from the clients' accounts by the company went to the company's fees, leaving very little with which to negotiate settlement of the clients' debts. *Id.* Attorney Poriss rejected the offer to work for this company. *Id.*

Section 36a-2(48) of the 2012 Supplement to the General Statutes[6], provides, in pertinent part, that:

> As used in this title, unless the context otherwise requires: . . . "[p]erson" means an individual, company, including a company described in subparagraphs (A) and (B) of subdivision (11) of this section, or any other legal entity, including a federal, state or municipal government or agency or any political subdivision thereof . . . .

In turn, Section 36a-2(11) of the 2012 Supplement to the General Statutes, provides, in pertinent part, that "company" means:

> [A]ny corporation, joint stock company, trust, association, partnership, limited partnership, unincorporated organization, limited liability company or similar organization, but does not include (A) any corporation the majority of the shares of which are owned by the United States or by any state, or (B) any trust which by its terms shall terminate within twenty-five years or not later than twenty-one years and ten months after the death of beneficiaries living on the effective date of the trust . . . .

Section 36a-671(a) of the 2012 Supplement to the General Statutes provides definitions for the terms "debt negotiation" and "debtor" as follows:

> As used in this section and sections 36a-671a to 36a-671d, inclusive, (1) "debt negotiation" means, for or with the expectation of a fee, commission or other valuable consideration, assisting a debtor in negotiating or attempting to negotiate on behalf of a debtor the terms of a debtor's obligations with one or more mortgagees or creditors of the debtor, including the negotiation of short sales of residential property or foreclosure rescue services; (2) "debtor" means any individual who has incurred indebtedness or owes a debt for personal, family or household purposes . . . .

In addition to a licensure requirement, the debt negotiation statutes require debt negotiators to adhere to certain other requirements, including, but not limited to, a requirement for a written service contract with specified terms, and various limitations on when and what fees may be charged and collected. *See* Connecticut General Statutes § 36a-671b; *see also* Schedule of Maximum Fees (http://www.ct.gov/dob).

Exceptions from the debt negotiation provisions are provided in Section 36a-671c of 2012 Supplement to the General Statutes, which provides, in pertinent part, that:

> The provisions of sections 36a-671 to 36a-671d, inclusive, shall not apply to the following: (1) Any attorney admitted to the practice of law in this state who engages or offers to engage in debt negotiation as an ancillary matter to such attorney's representation of a client . . . .

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[6]Section 36a-2 was amended by Public Act 12-96, which amendment took effect on June 8, 2012. The relevant definitions used herein were not amended.

B. Statutory Construction

Section 1-2z of the Connecticut General Statutes provides:

> The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.

The plain language of the above-quoted statutes and definitions, when read together, produce the following unambiguous rule of law:

You must obtain a license if:

(a) you are an individual, a corporation, a joint stock company, a trust, an association, a partnership, a limited partnership, an unincorporated organization, a limited liability company or similar organization, any corporation the majority of the shares of which are owned by the United States or by any state, any trust which by its terms shall terminate within twenty-five years or not later than twenty-one years and ten months after the death of beneficiaries living on the effective date of the trust, or any other legal entity, including a federal, state or municipal government or agency or any political subdivision thereof; **AND**

(b) you, for or with the expectation of a fee, commission or other valuable consideration, either engage or offer to engage in, these services: assisting an individual in negotiating, or attempting to negotiate on behalf of such individual, the terms of that individual's personal, family, or household obligations with a mortgagee or creditor of that individual, including the negotiation of short sales of residential property or foreclosure rescue services; **AND**

(c) you (1) have a place of business in Connecticut; **OR** (2) have a place of business outside Connecticut, but are either negotiating with or providing agreed upon services to an individual who is a Connecticut resident; **OR** (3) have a place of business outside Connecticut, and the services concern debt secured by Connecticut property.[7]

C. Application to Persels

A straightforward application of the general rule of law articulated above to the facts proffered by Persels in its Petition produces the following result:

Persels:

(a) is a limited liability company; **AND**

(b) engages in debt negotiation; **AND**

(c) has a place of business outside Connecticut, but provides services to Connecticut residents.

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[7]The Department notes that one does not have to be an attorney to provide licensed debt negotiation services in Connecticut. Division Comments, p. 10.

The attorney exemption from licensure set forth in Section 36a-671c(1) of the 2012 Supplement to the General Statutes requires four things: (1) status as an attorney; (2) admission to the Connecticut bar; (3) representation of a client; and (4) debt negotiation services provided "ancillary" to such representation.

In Connecticut, only natural persons can be attorneys admitted to practice law. *See generally* Connecticut General Statutes §§ 51-80 and 51-88; Rules of the Superior Court Regulating Admission to the Bar § 2-2; *see also* Rules of the Superior Court Regulating Admission to the Bar §§ 2-8 (listing qualifications that must be satisfied in order to be admitted to practice law, including certain age, citizenship, education and testing requirements) and 2-44A (defining the practice of law and the term "Connecticut lawyer," which means, in pertinent part, "a natural person who has been duly admitted to practice law in this State"); *State Bar Assn. v. Connecticut Bank and Trust Co.*, 145 Conn. 222 (1958).[8]

Because Persels is not a natural person, *see* Petition, p. 2, Persels cannot be an attorney admitted to the practice law in Connecticut and, therefore, the attorney exception set forth in Section 36a-671c(1) of the 2012 Supplement to the General Statutes cannot apply to it.

D. Enforcement Position Regarding Law Firms

The Petition raises the issue of whether the individual attorney exemption extends to the legal entities that individual attorneys might operate under when providing debt negotiation services. *See* Petition, p. 1. Corporations or other legal entities do not practice law. *See* Section III.C supra. Nevertheless, Connecticut law recognizes that attorneys may form legal entities when representing clients, even though the professional obligations of an attorney belong to the individual attorney, not the legal entity. *See, e.g.*, Connecticut General Statutes §§ 33-182a through 33-182l; *King v. Guiliani,* 1993 Conn. Super. LEXIS 1889 at *9 (1993); *Cooney & Bainer, P.C. v. Milum,* 1995 Conn. Super. LEXIS 1837 at **4-5 (1995).

In connection with regulation of law firms as consumer collection agencies in this state,[9] the Department historically has taken a no-action position with regard to licensure requirements for law firms *if* at least one partner, in the case of a partnership or limited liability company, or at least one shareholder

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[8]In *State Bar,* the Supreme Court held:

> The practice of law is open only to individuals proved to the satisfaction of the court to possess sufficient general knowledge and adequate special qualifications as to learning in the law and to be of good moral character. A dual trust is imposed on attorneys at law. They must act with fidelity both to the courts and to their clients. They are bound by canons of ethics which are enforced by the courts. The relation of an attorney to his client is pre-eminently confidential. It demands on the part of the attorney undivided allegiance, a conspicuous degree of faithfulness and disinterestedness, absolute integrity and utter renunciation of every personal advantage conflicting in any way directly or indirectly with the interests of his client. Only a human being can conform to these exacting requirements. Artificial creations such as corporations or associations cannot meet these prerequisites and therefore cannot engage in the practice of law.

145 Conn. at 234.

[9]The consumer collection agency statutes administered by this Department have historically contained and presently contain a carve-out from the definition of that activity for "any member of the bar of this state," which similarly does not require licensure of an individual Connecticut attorney, but otherwise would require licensure of a law firm. *See* Connecticut General Statutes § 36a-800(1)(D).

in the case of a professional corporation, is admitted to practice law in Connecticut, *and* that individual is the *only* individual performing such work. *See* letter dated August 24, 1994 to Herbert A. Schectman, Esq.; letter dated February 22, 1995 to Richard deY. Manning; letter dated December 14, 2011 to Mark D. Spinner, Esq. (opinions on file at the Department). Consistent with this approach, the Department will take a "no-action" position in the context of debt negotiation licensure requirements for a law firm that is a partnership, limited liability company or professional corporation engaging or offering to engage in debt negotiation services, as defined in Section 36a-671 of the 2012 Supplement to the General Statutes, to be performed and performed exclusively by an attorney admitted to the practice of law in Connecticut who is: (a) a partner or shareholder of the law firm, as the case may be; and (b) the only contact with the debtor and the debtor's mortgagee(s) or creditor(s), as the case may be; and provided further that the firm is offering and performing the debt negotiation service only as an ancillary matter to representation of the client.

E. Application to Persels

Based on the representations made in the Petition, I conclude that Persels does not meet the standards set forth in Section III.D above regarding who is performing the debt negotiation services. As an initial matter, Persels has not identified any of its Connecticut attorneys and has not established that such Connecticut attorneys are partners in this limited liability company. Even Persels had provided this information, the Petition is clear that Persels uses Connecticut lawyers "in tandem with paraprofessional staff" to provide debt negotiation services. *See* Petition, p. 2. Similarly, because Care One "prepares client in-take folders and manages client information" for Persels for a fee, it may be that staff at Care One could be involved in the provision of debt negotiation services, as defined in Section 36a-671 of the 2012 Supplement to the General Statutes, depending on additional facts. *See* Petition, p. 4. For our purposes here, and according to the Petition, debt negotiation work at Persels is done, at least in part, by non-attorney paraprofessional staff for whom the statute provides no licensure exemption. The Department will take a no-action position with respect to legal entities only where the only debt negotiation work done within the entity complies with the standards set forth in Section III.D above.

F. The Meaning of "As An Ancillary Matter"

Section 36a-671c(1) of the 2012 Supplement to the General Statutes provides:

> The provisions of sections 36a-671 to 36a-671d, inclusive, shall not apply to the following: (1) Any attorney admitted to the practice of law in this state who engages or offers to engage in debt negotiation as an ancillary matter to such attorney's representation of a client . . . .

Basic tenets of statutory construction require that the phrase "as an ancillary matter to such attorney's representation of a client" be given meaning. *See Hall v. Gilbert & Bennett Mfg. Co.,* 241 Conn. 282, 303 (1997) ("[w]e presume that the legislature had a purpose for each sentence, clause or phrase in a legislative enactment, and that it did not intend to enact meaningless provisions.") (internal quotation marks omitted); *State v. Szymkiewicz,* 237 Conn. 613, 621 (1996) ("It is a basic tenet of statutory construction that the legislature did not intend to enact meaningless provisions. . . . Accordingly, care must be taken to effectuate all provisions of the statute.") (internal quotation marks omitted); *State v. Spears,* 234 Conn. 78, 93 (1995), *cert. denied,* 516 U.S. 1009 (1995) ("[S]tatutes must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant") (internal quotation marks omitted).

As the Petition points out, Black's Law Dictionary defines "ancillary" as "[a]iding; attendant upon; describing a proceeding attendant upon or which aids another proceeding considered as principal . . . [a]uxillary or subordinate." *See* Black's Law Dictionary (6th Ed. West 1991). Webster's Ninth New Collegiate Dictionary defines "ancillary" to mean "subordinate" or "auxiliary." Similarly, the Consumer Credit Division points out that Merriam-Webster's Collegiate Dictionary 43 (10th ed. 2001) defines "ancillary" as "subordinate, subsidiary." There is no appreciable difference between the Black's Law and the Merriam-Webster definitions. Using these definitions, a matter that is "ancillary" is a matter that is subordinate to, or in aid of, something else.

The Petition argues that the reference in Section 36a-671c to an "attorney's representation of a client" is both general and broad and, therefore it cannot be limited to any particular substantive area of the law. Persels argues the attorney exemption must be read to refer broadly to "*any professional engagement by a lawyer whereby the lawyer holds him or herself out to the public as a lawyer and agrees to provide legal services to a client.*" Petition, p. 10 (emphasis added). I disagree.

The net effect of Persels' argument is to seek to replace the phrase "as an ancillary matter to such attorney's representation of a client" with a blanket exemption for attorneys engaged in any form of debt negotiation. I cannot accept this argument because it reads the phrase "ancillary matter to . . ." out of the statute. It is well established that an administrative agency "cannot modify, abridge or otherwise change the statutory provisions . . . under which it acquires authority unless the statutes expressly grant it that power." *Tele Tech of Conn. Corp. v. Dep't of Pub. Utility Control*, 270 Conn. 778, 789 (2004) (internal quotation marks omitted). The Department "may not by construction supply omissions in a statute simply because it appears that good reasons exist for adding them . . . ." *Battersby v. Battersby*, 218 Conn. 467, 470-71 (1991). Rather, it "must construe a statute as it finds it, without reference to whether it thinks the statute would have been or could be improved by the inclusion of other provisions." *Id.* at 471.

The Connecticut General Assembly decided that Connecticut attorneys who perform debt negotiation services in a manner that is *something more than* just "subordinate", "subsidiary" or "auxiliary" to a representation require licensure by the Department and are subject to regulation by the Department with respect to their debt negotiation activities. The legislature specifically added the term "ancillary" to the debt negotiation statute, and I am required to give effect to the legislature's intent in doing so. *Donahue v. Veridiem, Inc.*, 291 Conn. 537, 547 (2009). ("When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself . . . .") (internal quotation marks omitted.) It is not my function "to alter the will of the legislature merely because the results are unfair[,]" *McDonald v. Haynes Medical Laboratory, Inc.*, 192 Conn. 327, 334 (1984), and I "cannot read into the terms of a statute something which manifestly is not there in order to reach what . . . [I think] would be a just result[,]" *Johnson v. Manson*, 196 Conn. 309, 315 (1985) (internal quotation marks omitted). I am also mindful of the legislative history and real world circumstances surrounding the enactment and amendment of Connecticut's debt negotiation statutes. *See* Section II supra. In interpreting a statute, I am required to carry out the legislature's intent in enacting the statute. *See Donahue*, 291 Conn. at 547. The clear intent of the Connecticut debt negotiation statutes, as relevant to the Petition, is to protect vulnerable consumers from abusive practices and to provide attorneys exemption from licensure only in limited circumstances.

In an effort to provide reasonable notice to attorneys regarding the scope of the exemption in Section 36a-671c(1) of the 2012 Supplement to the General Statutes, and in connection with my position on law firms set forth in Section III.D above, I herein enunciate the basic rule that the Department will employ to analyze whether a matter is ancillary to representation.

The Department will employ a "primary purpose" test. It will seek to take enforcement action in those cases for unlicensed debt negotiation activity where retention of an otherwise qualifying attorney or firm was, or could have reasonably been understood by the debtor to be, for debt negotiation services as a primary purpose of the relationship, or where debt negotiation on behalf of the debtor was the primary purpose of the services actually performed. This will be ascertained on a case-by-case basis through investigation of all of the facts and circumstances. The mere existence of a written retainer agreement purporting to offer only services other than debt negotiation, or purporting to offer other services in addition to debt negotiation, is not in and of itself dispositive, particularly if other facts and information available indicate that the services intended to be performed (or actually performed) were different in substance or degree than those reflected in the retainer agreement.

As for Persels' argument that any licensure requirement for law firms or attorneys offering or engaging in debt negotiation services violates the constitutional doctrine of separation of powers, "[i]t is well established that adjudication of the constitutionality of legislative enactments is beyond the jurisdiction of administrative agencies." *St. Paul Travelers Cos. v. Kuehl*, 299 Conn. 800, 814 (2011) (internal quotation marks omitted); *see also* Connecticut General Statutes § 4-176(a) (prescribing my jurisdiction as it relates to declaratory ruling proceedings); Regulations of Connecticut State Agencies §§ 36a-1-83 and 36a-1-84 (same). As for Persels' arguments that regulation in this arena violates public policy, I find far more compelling the number of comments that describe the abuses of the attorney business model in the debt negotiation industry. In any event, the legislature has made a public policy determination that attorneys should be exempt from licensure only if debt negotiation is ancillary to such attorney's representation of a client. I cannot alter the decision of the legislature. *Johnson*, 196 Conn. at 315; *McDonald*, 192 Conn. at 334.

IV. Conclusion – Ruling

Section 36a-671c(1) of the 2012 Supplement to the General Statutes provides an exemption from Sections 36a-671 to 36a-671d, inclusive, only for a natural person who: (a) is an attorney admitted to the practice of law in Connecticut; and (b) is not retained to perform, and does not perform, debt negotiation services, as defined in Section 36a-671 of the 2012 Supplement to the General Statutes, as the primary purpose of the representation, which shall be determined on a case-by-case basis in light of all of the facts and circumstances.

In addition, this Department will take a no-action position for a law firm that is a partnership, limited liability company or professional corporation engaging or offering to engage in debt negotiation services, as defined in Section 36a-671 of the 2012 Supplement to the General Statutes, to be performed and performed exclusively by an attorney admitted to the practice of law in Connecticut who is: (a) a partner or shareholder of the law firm, as the case may be; and (b) the only contact with the debtor and the debtor's mortgagee(s) or creditor(s), as the case may be; and provided that the firm is not retained to perform, and does not perform, debt negotiation services as the primary purpose of the representation, which shall be determined on a case-by-case basis in light of all of the facts and circumstances.

Based on the information set forth in its Petition, and for the reasons set forth herein, Persels would require licensure.

Issued at Hartford, Connecticut,
this 18th day of September 2012.

Howard F. Pitkin
Banking Commissioner

This Declaratory Ruling was sent by certified mail, return receipt requested, or hand delivered as noted, on September 11, 2012, to the Petitioner, persons who submitted comments or their respective representative.

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