The Fair Debt Collection Practices Act: Overview, Update and Ethical Issues

CREDIT LAW INSTITUTE and

THE CONFERENCE ON CONSUMER FINANCE LAW

CONSUMER DEBT COLLECTION,

LOAN SERVICING and BANKRUPTCY

THE FAIR DEBT COLLECTION PRACTICES ACT

OVERVIEW, UPDATE and ETHICAL ISSUES

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DALLAS, TEXAS

MIKE and SHARON VOORHEES

SHELTON VOORHEES LAW GROUP

7701 S. Western, Suite 201

Oklahoma City, OK 73139

Phone: 405-682-5800

Fax: 405-601-0677

mv@lawofficeokc.com

The Fair Debt Collection Practices Act is found at 15 U.S.C. § 1692, will be referred to as the Act or FDCPA, and will be referred to by section number only. The purpose of the Act is seemingly simple: "...to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers...". However, the FDCPA has been described as a misdirected and poorly drafted statute, and has resulted in unforeseen consequences that go well beyond the original purposes, and are probably contributing to the current mortgage crisis.

The Oklahoma Rules of Professional Conduct are found at Title 5 O.S., App. 3-A, will be referred to as the Rules, and will referred to by rule number only.

There is an overlap of various provisions of the FDCPA and the Rules, and this paper will point out a few things to worry about.

COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

Rule 4.2., Communication with Person Represented by Counsel, provides: In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation or transaction, who is represented by counsel concerning the matter to which the communication relates. This Rule does not prohibit communication with a represented party, or an employee or agent of such a person, concerning matters outside the representation. In the case of an organization, this Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation with persons having managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. The prohibition of communication with a represented person only applies, however, in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that a lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances.

Under Oklahoma law, the rule prohibiting attorneys from engaging in ex parte communications with certain employees of a party organization includes employees below the level of corporate management, since the comment to rule refers separately to both persons having a managerial responsibility on behalf of the organization and persons whose statements may constitute an admission on the part of the organization. Weeks v. Independent School Dist. No. I-89 of Oklahoma County, OK., Bd. of Educ., 230 F.3d 120, (C.A.10 Okla. 2000), certiorari denied 121 S.Ct. 1959, 149 L.Ed.2d 755.

Plaintiff's attorney was not prohibited from communicating ex parte with any former employees of defendant corporation, under rule relating to communication with parties represented by counsel. Fulton v. Lane, 829 P.2d 959 (Ok 1992).

The FDCPA contains a specific prohibition on communicating with a debtor represented by an attorney. Section 1692c provides in part that, without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address unless the attorney fails to respond within a reasonable period of time.

Naturally, once the debt collector attorney is aware that the consumer debtor is represented by an attorney, if the validation notice was not previously given to the debtor, it should be sent to its attorney.

Blum v. Fisher and Fisher, 961 F. Supp. 1218 (N.D. Ill. 1997). The validation provision allows the debt collector to send a validation notice to the attorney for the represented consumer rather than to the consumer himself.

The debt collector must be shown to have had "actual knowledge" the debtor was represented by an attorney. Raimond v. McAllister & Associates, Inc., 50 F. Supp. 825 (N.D. Ill. 1999).

A consumer's attorney notified the creditor of representation and settled the debt. The creditor then retained a debt collector who wrote to the consumer seeking payment of the balance of the debt not knowing of the consumers' representation and payment. Summary judgment was granted for the defendant: An agent cannot be imputed with information that his principal failed to give him. See, Jones v. Weiss, 95 F. Supp. 2d 105 (N.D.N.Y. 2000).

The consumer must demonstrate actual knowledge by the debt collector of the consumer's legal representation to establish a violation. Hubbard v. National Bond & Collection Assocs., Inc., 126 B.R. 422 (D. Del. 1991).

Once it is known that the consumer debtor is represented by an attorney, the debt collector can not communicate directly with the consumer unless the attorney expressly authorizes it or fails to respond to communications within a reasonable period of time. What period of time is reasonable? The best procedure is to always follow up with a communication to let the attorney know that you believe he or she has not responded within a reasonable time and that you will communicate with the consumer if you do not have a response by a certain date. Providing too short of a deadline, such as demanding a response within 24 hours may not be found to be reasonable when defending a FDCPA suit.

The only time continued communication with the consumer might be allowed is when they refuse to provide the name of their attorney. Our firm policy is, if they state they have an attorney, to request that they provide the attorney's name. If they still refuse to do so, we request they have their attorney contact us. If there is still no contact within a reasonable amount of time, it should not be a violation to assume they really don't have an attorney and contact them directly. Of course, it is very important that your file be carefully documented regarding all such contacts. All telephone calls must be carefully documented, including what both parties to the call said and that the debt collector provided the fair debt warning to the consumer.

DEALING WITH THE UNREPRESENTED PERSON

Rule 4.3., Dealing with Unrepresented Person, provides: In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. A lawyer shall not give advice to such a person other than the advice to secure counsel, if the interests of such person are, or have a reasonable possibility of being, in conflict with the interests of the client.

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. When the lawyer knows or reasonably should know that the unrepresented person

misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. An attorney who represented the bankruptcy petitioner's creditor and failed to advise the pro se petitioner to obtain advice of an independent lawyer before giving her advice regarding her bankruptcy violated the disciplinary rule which prohibits an attorney, in dealing with a person who is not represented by counsel, from implying that lawyer is disinterested or from giving advice if there is conflict, where there was conflict of interest between creditor and petitioner, as attorney had filed suit against petitioner on his client's behalf and attorney did not explain this to petitioner. State ex rel. Oklahoma Bar Ass'n v. Berry, 969 P.2d 975 (OK 1998).

The Act contains a specific section regarding false or misleading representations. Section 1692e provides in part that a debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt.

Some attorneys in their validation notices and/or other collection letters make threats of certain specified legal action or paint pictures of doom and gloom to result from debtor's nonpayment. Such collection letters can run afoul of both Rule 4.3 and the FDCPA.

The consumer collection attorney must also understand that both Rule 4.3 and the FDCPA suggest and/or presume that the debtor is susceptible to "misunderstandings" and really is a "least sophisticated consumer."

Rule 4.3 suggests that the unrepresented consumer debtor may somehow misunderstand the role of the attorney consumer debt collector as that of being "disinterested in loyalties" or a "disinterested authority on the law."

The language "grace period about to expire" did not suggest to the least sophisticated consumer that he had less than 30 days to dispute the debt. In addition, stating that the consumer "may eliminate the possibility of additional costs" was "no threat whatsoever, false or otherwise." See Goldberg v. Transworld Systems, Inc., 164 F.3d 617 (2d Cir. 1998).

In evaluating the debt collector's conduct under the "unsophisticated" or "least sophisticated consumer" standard, the courts view such conduct objectively from the perspective of a consumer whose circumstances make him relatively more susceptible to harassment, oppression or abuse. Indeed, the debt collector's and the debtor's own respective individual perceptions of harm are irrelevant as the courts view the debt collector's conduct through the eyes of this theoretical "least sophisticated consumer," who according to various decisions are "uninformed, naive, trusting and below intelligence," "not a Philadelphia lawyer" or even an average everyday common consumer and are "closer to the bottom of the sophistication meter."

Therefore, in dealing with the "unsophisticated or least sophisticated" consumer debtor who is typically unrepresented, the attorney debt collector, while on the one hand under Rule 4.3 is prohibited from giving "advice," on the other hand is required by the FDCPA to provide the debtor certain "information or disclosures." For example, from an ethical standpoint, a debt collector's demand letter to an

unrepresented party containing a detailed explanation of legal consequences of non payment constitutes giving advice on the law.

From the standpoint of the FDCPA, an attorney may not represent or imply that certain specific legal remedies specified in § 1692e(4) may result from nonpayment of a debt, unless each such remedy is both lawful and is actually intended to be taken. In Cacace v. Lucas, 775 F. Supp. 502, (D. Conn. 1990), the defendant attorney sent a demand letter to the plaintiff stating that:

"If litigation is started it can cause:-attachment of your real estate or checkbook - payment of the court costs - payment of the above creditors - reasonable attorney's fees, if permitted by contract or statute."

The court found that those statements were misleading because the start of litigation by itself cannot cause any of the effects stated in the letter. The court thus found the statements to be in violation of §1692e(4) which prohibits "the representation or implication of non-payment of any debt will result in...the seizure, garnishment, attachment or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action." Moreover, whether the inclusion of notice of contractually-allowed attorneys fees in the collection demand was misleading, when such fees only might be incurred in the future, was a question for the finder of fact.

In Blum v. Fisher and Fisher, 961 F. Supp. 1218, (N.D. Ill.1997), the court held that the statutory list of FDCPA deceptive debt collection practices is not exhaustive. A single act of deception is sufficient to trigger liability under the FDCPA. Inclusion in the debt collection letter of a note stating the consumer-mortgager might be able to continue living on mortgage property rent-free for seven months after foreclosure may have created a false or misleading impression which lulled the unsophisticated consumer into inaction. Inclusion in the debt collection letter of partial remedies available to debtor-mortgager may have created a false or misleading impression that the collection lawyer was looking out for the interests of the debtor and lulled the unsophisticated consumer into inaction.

RESPECT FOR RIGHTS OF THIRD PERSONS/HARASSMENT OPPRESSION AND ABUSE

Rule 4.4., Respect for Rights of Third Person, provides: In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons.

An attorney's filing of a parental rights termination petition after receiving an adverse ruling on similar petition in another county violated professional conduct rules prohibiting frivolous litigation and conduct prejudicial to the administration of justice. State ex rel. Oklahoma Bar Ass'n v. Patmon, 939 P.2d 1155 (OK 1997).

Rule 4.4 dovetails with § 1692d which provides in part that a debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.

Although a debt collector's conduct may not fall under one of the six specific prohibitions, courts will examine the conduct to determine if it violates the general prohibition against harassment, oppression or abuse.

The case of United States of America v. Central Adjustment Bureau, Inc., 667 F. Supp. 370 (N.D. Texas 1986), contains a lengthy discussion of numerous activities, words and phrases which violate the Act. The defendant in that case violated almost every provision of the Act. The results included an injunction and a civil fine of $150,000.00. The government alleged and proved that the defendant and many of its employees consistently and repeatedly violated the Act. Without a doubt, the "F" word is a violation, and so are most of the four letter words you tell your children to never say. Some of the racial slurs included: "I don't know why they let people like you (blacks) go to school in the first place", "You people (blacks) think you can get a free ride in society", "You (blacks) call each other brother because you don't know who your father is", and "Don't put off payment until manana because isn't that what you people (Hispanics) do anyway, put off things until manana". Other terms and phrases found to be violations included: "bitch", "hell", "damn", "stupid", "idiot", "liar", "deadbeat", "crook", "pay this damn bill", "it's people like you that screw up this world because you don't pay your bills", "take her car", "serve an arrest warrant and arrest her at work and create a scene", and "low-down son of a bitch". The evidence even established a pattern of continuing the calls after the debts had been paid. The defendant made repeated phone calls to the same debtor, sometimes as many as 4-5 phone calls per day. In one instance, the collector called the consumer debtor at work 5 times in one day and then 3 times at home that same day. One of the consumer debtors testified that a collector yelled at her and claimed that he could cause her to lose her job at the bank. Another debtor testified that a collector claimed that she would be dragged to court like a common debtor and then stated "I don't know why they lent you the money anyway". Other consumer debtors testified to language such as "it was crooks and people like us that give credit a bad name", and then stated that Central Adjustment would put them both in jail and take their home and car. Another consumer debtor testified that a collector stated that "by the time I get finished with you are going to need three jobs". Another consumer debtor testified that she was threatened with the prospect of her daughter's college credits being revoked. Other factors the Court used in ordering the penalties included that the training of new collectors was nonexistent; supervisors engaged in the activities which violated the Act; supervisors condoned the actions by the employees; not a single employee was ever disciplined for violations; and violators were promoted.

In Rutyna v. Collection Account Terminal, Inc., 478 F. Supp. 980 (N.D. Ill. 1979) the Court was presented with a collection demand letter stating:

"You have shown that you are unwilling to work out a friendly settlement with us to clear the above debt.

Our field investigator has been instructed to make an investigation in your neighborhood and to personally call on your employer.

The immediate payment of the full amount, or a personal visit to this office, will spare you this embarrassment."

The Court held:

"Without doubt defendant's letter has the natural (and intended) consequence of harassing, oppressing, and abusing the recipient. The tone of the letter is one of intimidation, and was intended as such in order to effect collection. The threat of an investigation and resulting embarrassment to the alleged debtor is clear....Defendant's violation of § 1692d is clear."

In Rosa v. Gaynor, 784 F. Supp. 1, (D. Conn. 1989), the defendant Ohio

attorney sent a letter to a Connecticut debtor which stated in part:

"The above account has been referred for collection in full.

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Otherwise, we may be forced to proceed with a lawsuit. After judgment, any remedy may be filed against you that is available to attorneys in your area. This may include garnishment, levy on real or personal property, or calling you into court for a debtor's examination."

The court entered summary judgment for the plaintiff, finding that the letter misrepresented the immediacy of litigation and that aside from the fact that Gaynor was not licensed to practice in Connecticut and therefore not authorized to file suit, the list of possible remedies was "particularly intimidating, and particularly extraneous for any purpose other than bullying plaintiff."

There is a distinction between advocacy for the client and vexatious practices of attorneys in debt collection. A Kansas attorney was ultimately suspended from practicing law, partly based on the following type of letters sent for collection purposes:

"OH THE JOY OF BEING SUED!!

_____

How do you explain to the neighbors and the kids when the Sheriff's car pulls up front and an officers hands you the summons?

OR, how do you explain a garnishment to the boss, and the other fellows at work??

I don't know, but I guess you do; at least you didn't bother to answer my letter. You do not need to send me your check immediately to pay your account because I am not going to bother you any more - - - but the Sheriff will.

Oh yes, I will see you in court.

You owe _____ $_____

PAY ME NOW!!!"

This communication not only would be considered unethical, but today would also certainly violate the FDCPA. The attorney was suspended for conduct involving deceit and misrepresentation which adversely reflected on the attorney's fitness to practice law. State v. Zeigler, 538 P.2d 643 (Kan. 1975).

SUPERVISING NONLAWYER STAFF/UNAUTHORIZED PRACTICE OF LAW

Rule 5.3., Responsibilities Regarding Nonlawyer Assistants, provides: With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

The lawyer must supervise work done by lay personnel as agents of the lawyer, and stands responsible for its product. State ex rel. Oklahoma Bar Ass'n v. Braswell, Okla., 663 P.2d 1228 (1983).

An attorney violated the rules requiring lawyers who directly supervise a nonlawyer to make reasonable efforts to ensure that nonlawyer's conduct is compatible with the lawyer's professional obligation, and prohibited inducing another to violate the rules of professional conduct and assist a person in the unauthorized practice of law by permitting her secretary to file a misleading motion. State ex rel. Oklahoma Bar Ass'n v. Patmon, Okla., 939 P.2d 1155 (1997).

Most collection law firms rely heavily on the assistance of non-attorneys such as collectors, skip tracers, and paralegals in both their litigation and non-litigation collection activities. Therefore, all non-attorneys in a firm must be aware of and follow the applicable rules of professional conduct in their debt collection activities to avoid ethical ramifications for the partners and/or supervising attorneys within the firm.

Moreover, with regard to non-attorney employee debt collectors and the FDCPA, the doctrine of respondeat superior applies. Therefore, an FDCPA violation or alleged violation by a non-attorney debt collector (collector, paralegal, secretary, skip tracer, etc.) employed by a law firm can easily result in a suit or claim against both the individual non-attorney debt collector and the law firm entity employer.

The furnishing of deceptive forms under §1692j creates the same civil liability as other FDCPA violations. Once again, under this section, an attorney must never provide letterhead to his or her creditor client so that the client can make it appear that a debt collection letter has been sent by the attorney's office! This could be a violation of the Rules which prohibit an attorney from assisting a non-member of the bar in the unauthorized practice of law.

Generally, the courts in the past had limited the bona fide error defense to clerical mistakes. Now, mistakes of law may qualify as bona fide errors under the FDCPA in certain circumstances. Taylor v. Luper, 74 F. Supp. 2d 761 (S.D. Ohio 1999). The court found that a bona fide error defense applied to a mistake of law. The reason was that there was a division in the case law on the ability to collect fees in such a case. The Court seemed to base its decision on a policy that the ethical rules can not require an attorney to zealously advocate for his client, then place him in violation of the FDCPA for doing so. Even though the Court's ultimate decision was that the fees were not recoverable, the attorney did not commit a fair debt violation by putting forth this argument for his client when the decisions were divided.

Rule 5.5., Unauthorized Practice of Law, provides: A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in governing agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

REASONABLENESS OF FEES

Rule 1.5 provides: (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, whether the client is to be liable for reimbursement of litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is

calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter, and, if there is a recovery showing the remittance to the client and the method of determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the result obtained, other than actions to collect past due alimony or child support; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) the client is advised of and does not object to the participation of all of the lawyers involved; and

(3) the total fee is reasonable.

When handling a debt collection matter, the attorney should promptly establish an understanding as to the fee with the client. If hourly, the rate can be stated. A fixed amount or estimated amount can also be stated. While a written contract for the attorney's fee reduces the possibility of any misunderstanding in any case, note that contingent fee contracts are required to be in writing. The reasonableness component prohibits unreasonably high fees, and all fees charged are subject to Rule 1.1 - that the attorney be competent in the area of representation.

A debt collector did not violate the FDCPA merely by seeking an "outlandish" amount of attorney fees where the consumer had agreed to pay only "reasonable" attorney fees in the event of default. Once a consumer has agreed to pay attorney fees in the event of default, he cannot use the FDCPA to contest the reasonableness of the fees. See Bull v. Asset Acceptance, LLC, 444 F. Supp. 2d 946 (N.D. Ind. Aug. 15, 2006).

An overstatement of amount of attorney fees in court application did not violate FDCPA where court modified the amount upon consumers' objection. See Kaiser v. Braje & Nelson, LLP, 2006 WL 1285143 (N.D. Ind. May 5, 2006).

CANDOR WITH THE TRIBUNAL

Rule 3.3 provides: (a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take the following remedial measures:

(A) when a client has offered false evidence, the lawyer shall promptly call upon the client to rectify the same; if the client refuses or is unable to do so the lawyer shall promptly reveal its false character to the tribunal; or

(B) when a person other than a client has offered false evidence, the lawyer shall promptly reveal its false character to the tribunal.

(b) The duties stated in paragraph (a) are continuing, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Normally, the attorney is responsible for preparation of pleadings and other litigation documents, but does not necessarily have personal knowledge of the matters contained therein, which are based on the knowledge of the client or someone on the client's behalf. If the attorney makes an assertion in an affidavit or statement in open court, it may properly be made only if the attorney either knows the statement to be true or believes it is true, based on reasonably diligent inquiry. In addition, it is possible that failing to disclose can be equivalent to an affirmative misrepresentation. The attorney is required by Rule 1.2c not to counsel a client to commit, or assist the client in committing, a fraud. If a person who is not the client provides false evidence to the attorney, the attorney must refuse to offer it even if the client wishes to do so.

Where conflict arises is when false evidence is offered by the client. In that case, the attorney has a duty to keep the client's information confidential but also has a duty of candor to the court. The best method of proceeding would be for the attorney first to attempt to persuade the client that the evidence should

not be offered or if it already has, to disclose that it was false. If that is ineffective, the lawyer must take reasonable remedial measures.

Another issue is presented in ex parte proceedings, in which the opposing party has no opportunity to present its position. In that case, the attorney should disclose any material facts know to the attorney and which the attorney believes are necessary to an informed decision by the court. In State ex rel. Oklahoma Bar Ass'n. v. Todd, 833 P.2d 260 (Okla. 1992), it was deemed appropriate for the attorney to receive a six-month suspension because of failure to inform the judge at a default judgment hearing that the client had been reimbursed for the amount of actual damages. In that case, the attorney had no prior conduct warranting discipline and had others to vouch for his general honesty.

FTC ANNUAL 2008 REPORT - FDCPA

Each year the Federal Trade Commission reports to Congress on the Fair Debt Collection Practices Act. The following is a summary of the details of this year's Report.

COMPLAINTS BY CATEGORY

DEMANDING A LARGER PAYMENT THAN IS PERMITTED BY LAW: The FDCPA prohibits debt collectors from misrepresenting the character, amount, or legal status of a debt. The types of complaints that fall in this category include, for example, allegations that a collector is attempting to collect either a debt the consumer does not owe at all or a debt larger than what the consumer actually owes. Other complaints in this category allege demands for debts that have been discharged in bankruptcy. In 2007, far more FDCPA complaints - 38.6%, representing 27,393 consumers - described this conduct than any other. In 2006, 40.3% of FDCPA complaints reported that collectors engaged in these practices.

The FDCPA also prohibits debt collectors from collecting any amount unless it is "expressly authorized by the agreement creating the debt or permitted by law." In 2007, 2.3% of the FDCPA complaints, or 1,637 consumers, alleged that collectors demanded interest, fees, or expenses that were not owed (such as collection fees, late fees, and court costs) down from 3.4% in 2006.

HARASSING THE ALLEGED DEBTOR OR OTHERS: Under the FDCPA, debt collectors may not harass consumers to try to collect on a debt. In 2007, 19.7% of FDCPA complaints the Commission received, or 13,989 consumers, alleged that collectors harassed them by calling repeatedly or continuously. Six thousand five hundred and thirty-six consumers, or 9.2% of FDCPA complaints, claimed that a collector had used obscene, profane or otherwise abusive language. One thousand four hundred and two consumers, or 2% of FDCPA complaints, alleged that collectors called them before 8:00 a.m., after 9:00 p.m., or at other times that the collectors knew or should have known were inconvenient to the consumer. Two hundred nineteen consumers, or 0.3% of FDCPA complaints, alleged that collectors used or threatened to use violence if consumers failed to pay. As a proportion of total FDCPA complaints, the complaint levels declined slightly from 2006 levels for repeated or continuous calling, obscene, profane

or otherwise abusive language; and calling before 8:00 a.m. or after 9:00 p.m. Threatening the use of violence for failure to pay stayed at the same level as 2006.

THREATENING DIRE CONSEQUENCES IF CONSUMER FAILS TO PAY: The FDCPA bars debt collectors from making threats as to what might happen unless the collector has the legal authority and the intent to take the threatened action. Among other things, collectors threaten to initiate civil suit or criminal prosecution, garnish salaries, seize property, cause job loss, have a consumer jailed, or damage or ruin a consumer's credit rating. In 2007, 6.5% of FDCPA complaints, or 4,592 consumers, alleged that third-party collectors falsely threatened a lawsuit or some other action that they could not or did not intend to take, down from the 8.4% of complaints that alleged the same conduct in 2006. In 2007, 2.6% of FDCPA complaints, or 1,876 consumers, alleged that such collectors falsely threatened arrest or seizure of property, which was down slightly from 3% of FDCPA complaints in 2006.

IMPERMISSIBLE CALLS TO CONSUMER'S PLACE OF EMPLOYMENT: Under the FDCPA, a debt collector may not contact a consumer at work if the collector knows or has reason to know that the consumer's employer prohibits such contacts. By continuing to contact consumers at work under these circumstances, debt collectors may put the consumers in jeopardy of losing their jobs. In 2007, 5.9% of FDCPA complaints or 4,162 consumers, related to calls to consumers at work, virtually unchanged from 5.8% of FDCPA complaints in 2006.

REVEALING ALLEGED DEBT TO THIRD PARTIES: The FDCPA generally prohibits third-party contacts for any purpose other than obtaining information about the consumer's location. Collectors calling to obtain location information also are prohibited from revealing that a consumer allegedly owes a debt.

Improper third-party contacts typically embarrass or intimidate the consumer who allegedly owes the debt and are a continuing aggravation to the third parties. Contacts with consumers' employers and co-workers about consumers' alleged debts also jeopardize continued employment or prospects for promotion.

In 2007, 3.8% of FDCPA complaints, or 2,672 consumers, alleged that debt collectors illegally disclosed a purported debt to a third party, down somewhat from 4.3% in 2006. The third parties contacted include employers, relatives, children, neighbors, and friends. This past year, 13.2% of complaints, or 9,361 consumers, alleged that collectors called a third party repeatedly to obtain location information about the consumer, up from 12% in 2006.

FAILING TO SEND REQUIRED CONSUMER NOTICE: The FDCPA requires that debt collectors send consumers a written notice that includes, among other things, the amount of the debt, the name of the creditor to whom the debt is owed, and a statement that, if within thirty days of receiving the notice the consumer disputes the debt in writing, the collector will obtain verification of the debt and mail it to the consumer. Many consumers who do not receive the notice are unaware that they must send their dispute in writing if they wish to obtain verification of the debt. Last year, 3.1% of the FDCPA complaints to the Commission, or 2,182 consumers, alleged that collectors did not provide the required notice, down somewhat from 3.9% in 2006.

FAILING TO VERIFY DISPUTED DEBTS: The FDCPA also mandates that, if a consumer submits a dispute in writing, the collector must cease collection efforts until it has provided written verification of the debt. Many consumers complained that collectors ignored their written disputes, sent no verification, and continued their collection efforts. Other consumers reported that some collectors continued to contact them about the debts between the date the consumers submitted their dispute and the date the collectors provided the verification. Last year, 2.6% of all FDCPA complaints, or 1,848 consumers, alleged that collectors failed to verify disputed debts, nearly identical to the figure of 2.5% in 2006.

CONTINUING TO CONTACT CONSUMER AFTER RECEIVING "CEASE COMMUNICATION" NOTICE: The FDCPA requires debt collectors to cease all communications with a consumer about an alleged debt if the consumer communicates in writing that he or she wants all such communications to stop or that he or she refuses to pay the alleged debt. This "cease communication" notice does not prevent collectors or creditors from filing suit against the consumer, but it does stop collectors from calling the consumer or sending dunning notices. In 2007, 4.9% of FDCPA complaints, or 3,466 consumers, alleged that collectors ignored consumers' "cease communication" notices and continued their collection attempts, up from 2.9% in 2006.

DEFINITIONS - SECTION 1692A

It is fundamental in attempting to understand and comply with the Act to first look at the definitions.

Section 1692a defines certain key words that trigger application of the Act:

• The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

• The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

• The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

• The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

• The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusions provided by this definition at subsection 1692a(6)(F) (for

fiduciary and escrow arrangements, debts originated by the same creditor or acquired when the debt was not in default, and commercial credit transactions, as noted below), the term "debt collector" includes any creditor who, in the process of collecting its own debts, uses any name other than its own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f (6), which prohibits threats to take unintended enforcement actions, the term "debt collector" also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. Under subsections 1692a (6)(A)-(F), the term "debt collector" does not include:

•• any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

•• any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

•• any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his or her official duties;

•• any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

•• any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

•• any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (I) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person;(iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

• The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

The defined term "debt collector" is mainly what triggers application of the Act. If a person is a debt collector, he or she is subject to all provisions of the Act.

VALIDATION OF DEBTS -- SECTION 1692G

Within five days after the initial communication with a consumer in connection with the collection of any debt, the debt collector must, unless the following information was contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing:

• the amount of the debt;

• the name of the creditor to whom the debt is owed;

• a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

• a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

• a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

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If the consumer notifies the debt collector, in writing and within the thirty-day period described above that the debt, or a portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector must cease collection of the debt, or any disputed portion thereof, until the debt collector has obtained verification of the debt or any judgment, or the name and address of the original creditor (as required), and a copy of such verification or judgment or the name and address of the original creditor is mailed to the consumer by the debt collector.

Under section 1692g, the failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

ACQUISITION OF LOCATION INFORMATION -- SECTION 1692B

A debt collector is entitled to communicate with third parties under limited circumstances.

Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information the consumer shall:

• identify himself or herself, state that he or she is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his or her employer;

• not state that such consumer owes any debt;

• not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information;

• not communicate by post card;

• not use any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt; and

• after the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not communicate with any person other than that attorney, unless the attorney fails to respond within a reasonable period of time to the communication from the debt collector.

COMMUNICATIONS IN CONNECTION WITH DEBT COLLECTION -- SECTION 1692C

COMMUNICATION WITH THE CONSUMER GENERALLY

Under section 1692c(a), absent the prior consent of the consumer given directly to the collector, or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt: (1) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. (In the absence of knowledge of circumstances to the contrary, a debt collector must assume that a convenient time for communicating with a consumer is after 8:00a.m. and before 9:00p.m., local time at the consumer's location); (2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, the attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer; or (3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communications.

COMMUNICATIONS WITH THIRD PARTIES

Except as provided in section 1692b (acquisition of location information), without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, under section 1692c(b) a debt collector may not communicate, in connection with the collection of any debt, with any

person other than the consumer, his or her attorney, a consumer reporting agency as otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

LIMITS ON COMMUNICATION

Under section 1692c, if a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector may not communicate further with the consumer with respect to such debt, except: (1) to advise the consumer that the debt collector's further communication efforts are being terminated; (2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or (3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy. If the notice from the consumer is delivered by mail, the notification is complete upon receipt (not upon mailing).

Under section 1692c(d), for the purpose of section 1692c, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

HARASSMENT OR ABUSE -- SECTION 1692D

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of this principle, the following conduct is stated to be a violation of this requirement:

• the use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person;

• the use of obscene or profane language the natural consequence of which is to abuse the hearer or reader;

• the publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency as that term is defined in the Fair Credit Reporting Act (FCRA) at 15 U.S.C. section 1681a(f) or to a person who meets the permissable purpose requirements for obtaining a consumer report under the FCRA at 15 U.S.C. section 1681b(3);

• the advertisement for sale of any debt for the purpose of coercing payment of the debt;

• causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with the intent to annoy, abuse, or harass any person at the called number;

• except as provided in section 1692b (acquisition of location information), the placement of telephone calls without meaningful disclosure of the caller's identity.

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The words "harass," "abuse," "obscene," and "profane" are not defined in the Act and therefore should be given their ordinary meanings, although creative judicial interpretations are always possible. Generally, courts will look to whether or not the debt collector's actions and communications have the natural consequence of harassing, oppressing or abusing the consumer. It is very easy for a consumer to allege a cause of action for this type of violation of the Act. Moreover, this type of violation may also give rise to a cause of action under state law.

FALSE OR MISLEADING REPRESENTATIONS - SECTION 1692E

A debt collector is prohibited from using any false, deceptive, or misleading representation or means in connection with the collection of debt. Without limiting the general application of this principle, the following conduct is specifically stated to be a violation of section 1692e:

• the false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof;

• the false representation of:

•• the character, amount, or legal status of any debt; or

•• any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt;

• the false representation or implication that any individual is an attorney or that any communication is from an attorney;

• the representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action;

• the threat to take any action that cannot legally be taken or that is not intended to be taken;

• the false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to:

•• lose any claim or defense to payment of the debt; or

•• become subject to any practice prohibited by this title;

• the false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer;

• communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed;

• the use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval;

• the use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer;

• the failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action;

• the false representation or implication that accounts have been turned over to innocent purchasers for value;

• the false representation or implication that documents are legal process;

• the use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization;

• the false representation or implication that documents are not legal process forms or do not require action by the consumer; and

• the false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by the FCRA at 15 U.S.C. section 1681a(f).

Section 1692e prohibits the use of false, deceptive, or misleading representations or means in connection with the collection of any debt. A debt collector cannot misrepresent the character, amount, or legal status of a debt, or falsely represent that the debt collector is an attorney or that a communication is from an attorney when it is not. Also prohibited are threats of arrest or seizure, garnishment, or sale of property or wages of any person unless the action is lawful and the debt collector or creditor intends to take that action.

DECEPTIVE THREATS

The threat by a debt collector that the creditor will pursue legal action is deceptive if the debt collector had no basis to believe the creditor would do so.

Subtle threats of suit are made frequently by debt collectors. Theoretically, assuming the debt is valid, such suits are always possible. But if no suit is being contemplated, such threats are unfounded. Where the threat of suit is oblique, legal questions are raised as to whether the least sophisticated consumer would reasonably construe the threat to be one of a lawsuit and whether that threat was deceptive. The threat of suit has been implied from statements that:

• the debt collector is willing to attempt to settle the debt out of court;

• the debt collector "can" sue;

• the debt would be referred to a lawyer or "for collection action;"

• the debt collector is authorized to proceed with legal action;

• the debt collector was sending a complaint and summons to a consumer before filing them;

• action will be taken to secure payment in full and the like;

• list creditor litigation remedies; and

• legal matter is enclosed in the envelope.

Threats of activities other than suit may be deceptive. The following threats have been found to be deceptive:

• threatened referral to the creditor for legal action;

• threatened referral to an attorney;

• threatened referral to a credit reporting agency or other threatened harm to the consumer's credit rating;

• threats of drastic action or unspecified action;

• a threat to contact third parties;

• a threat to add unauthorized charges to the debt collector's claim, falsely implying the charges were owed; and

• mentioning postjudgment remedies before suit is filed.

In addition, statements that are not threats may be deceptive and violate the Act. Deceptive statements under section 1692e may include:

• misrepresentations of the consumer's legal rights;

• mass mailing of dunning letters on attorney letterhead by a debt collection agency's staff, without review of the debtor files by the attorney;

• use of a deceptive or false name by a debt collector or a creditor;

• use of a letter simulating a telegram creating a false sense of urgency;

• misrepresenting the creditor's membership in the debt collector's organization;

• misrepresenting the debt collector's involvement in the collection of the debt;

• falsely accusing a consumer's spouse of lying when she stated that she did not know spouse's whereabouts;

• misrepresenting that the debt collector had widespread offices or affiliates;

• filing a false affidavit in a debt collection suit;

• misrepresenting the effects of commencing litigation;

• misrepresenting that the debt collector had verified the consumer's employment; and

• impersonating a lawyer.

CONCLUSION

When all else fails, section 1692k(d) may provide some help for the besieged debt collector. An action to enforce liability created by the Act may be brought within one year from the date on which the violation occurs.

Assuming no pending lawsuits against the debt collector, all such sins are forgiven after one year.