

# ETHICS FOR CREDITORS RIGHTS ATTORNEYS

Donald S. Maurice, Esq.  
Maurice & Needleman, P.C.  
Philadelphia, PA & Flemington, NJ

Presented Nov. 9, 2012  
Commercial Law League of America  
Fall Conference  
New York City

This Presentation is available at:

*The Consumer Financial Services Blog*

<http://consumerfsblog.com/ccla2012>

Follow Don on Twitter @dsmaurice

Contact: 908-237 4570

[dsm@mnlawpc.com](mailto:dsm@mnlawpc.com)

## Legal Disclaimer

This information is not intended to be legal advice and may not be used as legal advice. Legal advice must be tailored to the specific circumstances of each case. Every effort has been made to assure this information is up-to-date. It is not intended to be a full and exhaustive explanation of the law in any area, however, nor should it be used to replace the advice of your own legal counsel.

## Tensions Between the FDCPA and the RPC



*After today's ruling, attorneys can be punished for advocacy reasonably deemed to be in compliance with the law or even required by it. This distorts the legal process. Henceforth, creditors' attorneys of the highest ethical standing are encouraged to adopt a debtor-friendly interpretation of every question, lest the attorneys themselves incur personal financial risk.*

*Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 130 S. Ct. 1605, 1634 (2010)(Kennedy, J., dissent)*

## Tensions Between the FDCPA and the RPC

To the extent the FDCPA imposes **some constraints** on a lawyer's advocacy on behalf of a client, it is not unique; lawyers have a duty, for instance, to comply with the law and standards of professional conduct.



*Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1607 (2010)(emphasis added)

## Tensions Between the FDCPA and the RPC



It is most disturbing that this Court now adopts a statutory interpretation that will interject an attorney's personal financial interests into the professional and ethical dynamics of the attorney-client relationship. These consequences demonstrate how untenable the Court's statutory interpretation is and counsel in favor of a different reading.

*Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1634 (2010)(Kennedy, J., dissent)



## Violation Of FDCPA as a Basis for Attorney Discipline

*In the matter of Jack H. Boyajian*, Supreme Court of New Jersey Disciplinary Review Board, 08-264 (March 12, 2009)

## RPC 4.3 and the FDCPA

### "Safe Harbor" Notice:

This *advice* pertains to your dealings with me as a debt collector. It does not affect your dealings with the court, and in particular it does not change the time at which you must answer the complaint.

State of Minnesota	Case No.	Casefile No.	Casefile No.
<b>STATEMENT OF CLAIM AND SUMMONS</b>			
Plaintiff:	Defendant:	Case No.:	Casefile No.:
Address:	Address:	City:	City:
City:	City:	State:	State:
County:	County:	County:	County:
Case No.:	Casefile No.:	Case No.:	Casefile No.:
1. The undersigned hereby certifies that the foregoing is a true and correct statement of the facts and circumstances of the case as known to the undersigned at the time the same was filed.			
2. The undersigned hereby certifies that the foregoing is a true and correct statement of the facts and circumstances of the case as known to the undersigned at the time the same was filed.			
3. The undersigned hereby certifies that the foregoing is a true and correct statement of the facts and circumstances of the case as known to the undersigned at the time the same was filed.			
4. The undersigned hereby certifies that the foregoing is a true and correct statement of the facts and circumstances of the case as known to the undersigned at the time the same was filed.			
5. The undersigned hereby certifies that the foregoing is a true and correct statement of the facts and circumstances of the case as known to the undersigned at the time the same was filed.			
6. The undersigned hereby certifies that the foregoing is a true and correct statement of the facts and circumstances of the case as known to the undersigned at the time the same was filed.			
7. The undersigned hereby certifies that the foregoing is a true and correct statement of the facts and circumstances of the case as known to the undersigned at the time the same was filed.			
8. The undersigned hereby certifies that the foregoing is a true and correct statement of the facts and circumstances of the case as known to the undersigned at the time the same was filed.			
9. The undersigned hereby certifies that the foregoing is a true and correct statement of the facts and circumstances of the case as known to the undersigned at the time the same was filed.			
10. The undersigned hereby certifies that the foregoing is a true and correct statement of the facts and circumstances of the case as known to the undersigned at the time the same was filed.			
11. The undersigned hereby certifies that the foregoing is a true and correct statement of the facts and circumstances of the case as known to the undersigned at the time the same was filed.			
12. The undersigned hereby certifies that the foregoing is a true and correct statement of the facts and circumstances of the case as known to the undersigned at the time the same was filed.			
13. The undersigned hereby certifies that the foregoing is a true and correct statement of the facts and circumstances of the case as known to the undersigned at the time the same was filed.			
14. The undersigned hereby certifies that the foregoing is a true and correct statement of the facts and circumstances of the case as known to the undersigned at the time the same was filed.			
15. The undersigned hereby certifies that the foregoing is a true and correct statement of the facts and circumstances of the case as known to the undersigned at the time the same was filed.			
16. The undersigned hereby certifies that the foregoing is a true and correct statement of the facts and circumstances of the case as known to the undersigned at the time the same was filed.			
17. The undersigned hereby certifies that the foregoing is a true and correct statement of the facts and circumstances of the case as known to the undersigned at the time the same was filed.			
18. The undersigned hereby certifies that the foregoing is a true and correct statement of the facts and circumstances of the case as known to the undersigned at the time the same was filed.			
19. The undersigned hereby certifies that the foregoing is a true and correct statement of the facts and circumstances of the case as known to the undersigned at the time the same was filed.			
20. The undersigned hereby certifies that the foregoing is a true and correct statement of the facts and circumstances of the case as known to the undersigned at the time the same was filed.			

*Thomas v. Law Firm of Simpson & Cybak*, 392 F.3d 914, 919 (7th Cir. 2004) *superseded by* 15 U.S.C. § 1692g(d).

## Model RPC 4.3



*A lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.*



Down the Rabbit Hole . . .

Concept of an attorney having “meaningful involvement” in the handling of a collection account.

*Clomon v. Jackson*, 988 F.2d 1314, 1321 (2d Cir. 1993)

## The Practice of Law and the FDCPA

Just another way of saying: Has an attorney acted engaged in the practice of law?

## *Greco, Gonzalez & Lesher*

The concept of “disclaiming attorney involvement”

*At this point in time, no attorney with this firm has personally reviewed the particular circumstances of your account. . .*

## FDCPA Conflicts with NJ Supreme Court



*A lawyer cannot disclaim the fact that he or she is engaging in the practice of law when using law firm letterhead.*

Joint Opinion 48 *Comm. on Unauth. Prac. Law* and Opinion 725 *Adv. Comm. On Prof. Ethics* (5/30/2012)



Model Rule 1.6

## Conflict between the RPC and the Consumer Financial Protection Bureau



The CFPB intends to compel production of confidential information.

It believes that it has “inherited” from prudential regulators the authority to compel production of information.

*The Bureau continues to adhere to the position that it can compel privileged information pursuant to its supervisory authority.*

77 FR 39617, 39619  
(July 5, 2012)

## Conflict between the RPC and the Consumer Financial Protection Bureau

Prudential Regulators do not have authority to compel production of privileged information.

American Bar Association (“ABA”) Comment Letter on Proposed Rule on Confidential Treatment of Privileged Information, April 12, 2012.

The statutory protections are afforded to the *voluntary* production of privileged information. 12 U.S.C. 1785(j) and 1828(x))

## Conflict between the RPC and the Consumer Financial Protection Bureau

There are no Prudential Regulators of Lawyers under the Dodd-Frank Act.

12 USCS § 5481 (24)

## Conflict between the RPC and the Consumer Financial Protection Bureau

No statutory protection for attorney disclosure.

*[S]ubmission by any person of any information to [a prudential regulator] . . . shall not be construed as waiving, destroying, or otherwise affecting **any privilege such person may claim** with respect to such information under Federal or State law as to any person or entity other than such Board, supervisor, or authority.*

12 U.S.C. 1828(r) (emphasis added)

## Conflict between the RPC and the Consumer Financial Protection Bureau

Attorneys cannot claim a client's information is privileged – the privilege belongs to the client and must be asserted by the client.

*United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-359 (D. Mass. 1950).

## Conflict between the RPC and the Consumer Financial Protection Bureau

Model Rule 1.6(a) prevents an attorney from releasing information related to her representation of a client. The Model Rule is broader than the evidence privilege in the sense that it covers information that is not be protected by privilege evidence rules.

## Conflict between the RPC and the Consumer Financial Protection Bureau

Model Rule 1.6(b)(6), provides that disclosure can be made “to comply with other law or a court order.”

However, if the ABA’s Comments are correct, then the CFPB lacks any authority to compel disclosure and making such a disclosure is not protected by 12 U.S.C. 1785(j) and 1828(x).



## And the Practice of Law

### CFPB and the Practice of Law

It is questionable whether the CFPB can regulate *all* *conduct* of attorneys primarily engaged in consumer debt collection.

Consumer Financial  
Protection Bureau

### CFPB and the Practice of Law



Consumer Financial  
Protection Bureau

### Attorney Regulation

*[T]he Bureau may not exercise any supervisory or enforcement authority with respect to an activity engaged in by an attorney as part of the practice of law under the laws of a State in which the attorney is licensed to practice law.*

§ 5517(e)(1)

## CFPB and the Practice of Law



Consumer Financial  
Protection Bureau

### Attorney Regulation

*12 U.S.C. 5517(e)(3) preserves the Bureau's authority over attorneys who are otherwise subject to any "enumerated consumer law" within the meaning of the Act.*

Larger Participant Rule, 10/24/12

## CFPB and the Practice of Law



### Attorney Regulation

Prior to Dodd-Frank, the FDCPA did not permit the FTC to make regulations

*Neither the Commission nor any other agency . . . Shall promulgate trade regulation rules or other regulations . . .*

§ 1692l(d), prior to 7/21/10

*Except as provided in [12 USCS § 5519(a)], the Bureau may prescribe rules with respect to the collection of debts by debt collectors . . .*  
§ 1692l(d), on 7/21/10

## CFPB and the Practice of Law



Consumer Financial  
Protection Bureau

### Attorney Regulation

*Collection attorneys are subject to the Fair Debt Collection Practices Act . . . See Heintz v. Jenkins, 514 U.S. 291 (1995).*

Request for Comments, 2/8/12, fn. 28

### Heintz and "Implicit Exceptions"

*We need not authoritatively interpret the Act's conduct-regulating provisions now, however. Rather, we rest our conclusions upon the fact that it is easier to read § 1692c(c) **as containing some such additional, implicit, exception** than to believe that Congress intended, silently and implicitly, to create a far broader exception, for all litigating attorneys, from the Act itself.*

*Heintz v. Jenkins, 514 U.S. 291, 296-97 (1995)*  
(emphasis added)



## More “Implicit Exceptions”

*A recent amendment nullified the holding of Thomas: legal pleadings no longer need be preceded or accompanied by verification notices. Pub. L. 109-351, 120 Stat. 1966, 2006 (Oct. 13, 2006), adding 15 U.S.C. § 1692g(d). Given this amendment and the limited rationale of Thomas itself, it is far from clear that the FDICPA controls the contents of pleadings filed in state court.*

*Bellet v. Blact, Hoss, Miller, Leishon & Moore, LLC, 480 F.3d 476, 475 (7th Cir. Ill. 2007) (emphasis added)*

## “Implicit Exceptions” are Everywhere!

*[T]he diverse situations in which potential FDICPA claims may arise during the course of litigation, and the Supreme Court's caution in Heintz that careful crafting may be required in applying the statute's prohibitions to attorneys engaged in litigation, counsel against anything other than a **case-by-case approach**.*

*Hemmingsen v. Messerli & Kramer, P.A., 674 F.3d 81 (8th Cir. 2012)*

## Ethics and Consumer Collection Law

Supervision of Non-Attorneys  
Assisting Non-Attorneys in UPL

## Supervision

RPC 5.3 - Responsibilities Regarding Non-Lawyer Assistants

RPC 5.5 - Assisting in the Unauthorized Practice of Law



## Supervision

### Rule 5.3 Responsibilities Regarding Non-Lawyer Assistants

With respect to a non-lawyer employed or retained by or associated with a lawyer:

- (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority . . .
- (b) a lawyer having direct supervisory authority over the non-lawyer . . .
- (c) (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or  
(2) the lawyer is a partner or has comparable managerial authority 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.

## Supervision

### Debt Collection Attorneys

Structure of practice can include many non-attorneys being supervised by one attorney. The practice may include the sending of numerous letters demanding payment of debt, telephone communications with debtors to obtain settlements and other non-litigation related practices.

## Supervision

### RPC 5.5 Assisting in the Unauthorized Practice of Law

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

## Supervision

### Arizona

Attorneys engaged in debt collection disciplined when non-attorney staff appropriated client funds. The basis for discipline was that the attorneys played no supervisory role in the collection practice. An attorney violates RPC 5.3 when they take “no precautionary steps whatsoever” in supervising non-lawyer staff, “regardless of whether or not the non-lawyer assistants misbehave.” *Matter of Miller*, 178 Ariz. 257, 872 P.2d 661 (1994); *Matter of Galbasini*, 163 Ariz. 120, 786 P.2d 971 (1990).

## Supervision

### Pennsylvania

Paralegal may send a demand letter provided an attorney has supervised and reviewed the paralegal's work for accuracy and completeness.

*Phila. Eth. Op.* 90-5 (1990)

## Supervision

### South Carolina

Non-lawyers may not draft legal documents, institute, negotiate, or settle lawsuits without the proper supervision of a lawyer.

*S.C. Bar Ethics Adv. Op.* # 91-18.

## Supervision

### New Jersey

Solo attorney who sent collection letters under his law firm letterhead and managed more than 100,000 collection accounts using staff leased from his client, assisted non-lawyers in the unauthorized practice of law by allowing, among other things, non-lawyers to settle the accounts without his knowledge.

*In re Hecker, N.J. Disciplinary Review Bd.*, 09-372 (August 9, 2010)

## Internet Advertising

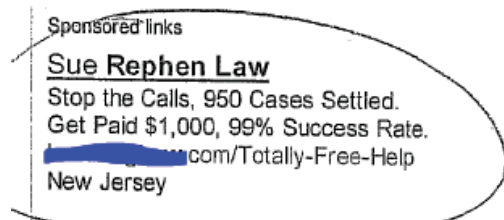
## Content of Ad

*An advertisement that truthfully reports a lawyer's achievements . . . may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that **the same results** could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. . .*

ABA Model RPC 7.1, Comment 3 (2004)(emphasis added)

## Internet Advertising

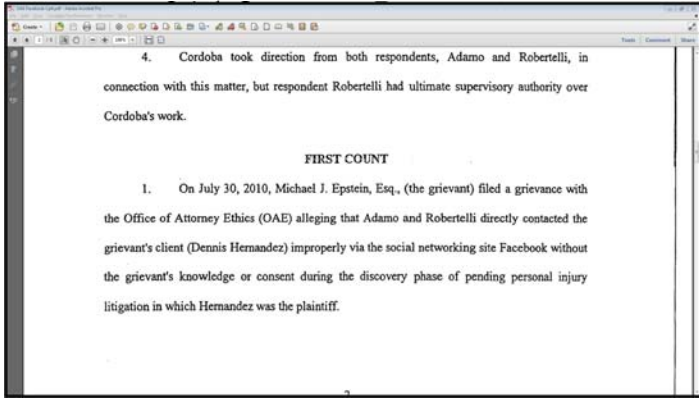
Google Adwords – Content of Ad  
RPC 7.1



## Social Media

## 21<sup>st</sup> Century Pretexting

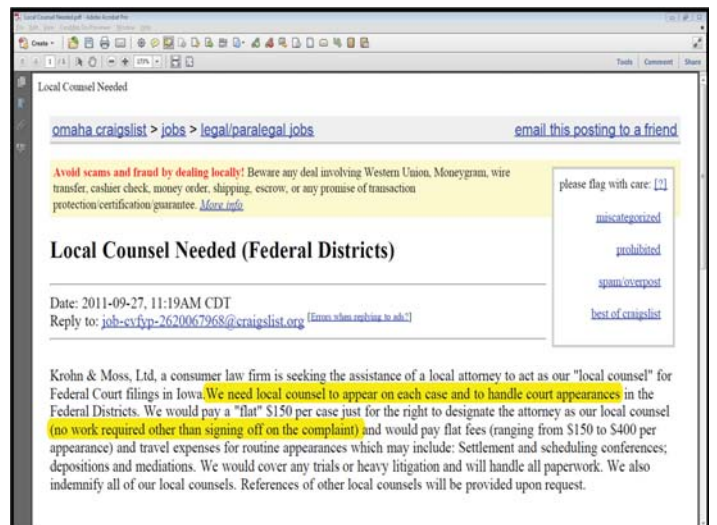
*Office of Attorney Ethics v. Adamo and Robertelli*, Supreme Court of New Jersey, District XIV Ethics Comm., XIV-2010-0484E & -0485E



## 21<sup>st</sup> Century Pretexting

- 4.2 (Communicating with a Person Represented by Counsel)
- 5.1 (failure to supervise subordinate lawyer)
- 5.3 (failure to supervise non-lawyer assistants)
- 8.4(a)(inducing another to violate the RPC)
- 8.4(c)(dishonesty, fraud, deceit)
- 8.4(d)(conduct prejudicial to the administration of justice)

## RPC and the Business of FDCPA Lawsuits



- Attorneys not admitted in New Jersey were retained by a New Jersey resident
- Conducted the client interview
- Directed the course of the litigation, independent of the participation or supervision of local counsel
- “[F]ailed to engage in [] a reasonable course of professional conduct.”

*Bilazzo v. Portfolio Recovery Assocs., LLC*, 2012 U.S. Dist. LEXIS 89094, 29-30 (D.N.J. June 25, 2012)

ABA 20/20

ABA 20/20

ABA 20/20

### 5.3 Non-Lawyer Assistance

Lawyers with managerial authority should “make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm **and nonlawyers outside the firm who work on firm matters** act in a way compatible **with the professional obligations of the lawyer.**” (additions in **bold**).

### 5.3 Non-Lawyer Assistance

Nonlawyers outside the firm

- document management firms
- storage of client information in “cloud” services

## ABA 20/20

### 5.3 Non-Lawyer Assistance

Level of supervision depends on the circumstances  
Consider


- the education, experience and reputation of the nonlawyer;
- the nature of the services involved;
- the terms of any arrangements concerning the protection of client information;
- the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality.

## Parting Notes

### Trust accounts and ISF Checks

### The Disciplinary Board of the Supreme Court of Pennsylvania, Attorney E-Newsletter, March 2010

Also, 12 attorneys paid their annual fees with checks marked as drawn on a trust or escrow account, prompting an immediate inquiry from Disciplinary Counsel.<sup>13</sup> Eighty-seven paid with checks drawn on insufficient funds; four of which were still outstanding at press time. Not smart.

 *The ethical equivalent of a "Please kick me" sign.*

**Don Maurice** is President of Maurice & Needleman, P.C., whose attorneys specialize in all areas of creditors' rights and financial services litigation. In nearly 25 years of practice, Don has successfully litigated for the financial services industry in both State and Federal courts. He has provided defense for claims brought under the Truth in Lending Act, Equal Credit Opportunity Act, FDCPA, Fair Credit Reporting Act, New Jersey Consumer Fraud Act, Magnuson-Moss Act and other state consumer lending regulations. Don is peer-rated AV by Martindale-Hubbell, the worldwide guide to lawyers. He has been recognized by Law & Politics Magazine as a New Jersey Super Lawyer in Bankruptcy & Debtor/Creditor Law and as a Corporate Counsel Super Lawyer. His firm has been named a "Go-to Law Firm for the Top 500 Companies," and a "Go-to Financial Law Firm" by Corporate Counsel Magazine/ALM Publications. He currently serves as vice chair of the Debt Collection Practices and Bankruptcy Subcommittee of the American Bar Association's Consumer Financial Services Committee, Business Law Section.

Credentials: Admitted to Bar in 1988, New Jersey and U.S. District Court, District of New Jersey; 2011 District of Columbia and District of Columbia U.S. District Court; New York, 2012; Supreme Court and U.S. Court of Appeals for the Second, Third Circuit, and Eighth Circuits.

Don's full CV is available at: <http://www.mnlawpc.com/attorneys/dsm.htm>