



Managing Risk in An Efficient Community Association Law Practice

Presented By:

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and Beth Mulcahy, Esq.



Hiring the Wrong Person

Kenneth E. Chadwick, Esq.



Risks and Inefficiencies Complicating a Law Practice: Hiring the Wrong Person

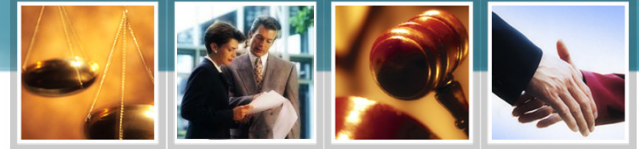
Unfortunately, making the wrong hiring decision can cost you considerable time, effort, and money. As reflected in a study conducted by the Harvard Business School, making poor hiring decisions can cost a company as much as three times an employee's annual compensation package.



I. Things to Consider During the Hiring Process:

A. Job Description

- 1) Make Sure You Understand What You Are Looking For: Have a Detailed Outline of the Tasks, Duties, Functions and Responsibilities of the position.
- 2) Salary: Confirm the Market Rates and Where you Stand: Internal and External Review.



I. Things to Consider During the Hiring Process: (Continued)

B. Acquisition of Resumes – Cast a Broad Net but Do Not Overlook Referrals or Take for Granted Established Networks:

1) Advertising:

- a) Bar Associates and other trade groups;
- b) Journals/Newspapers;
- c) Employment Sites;
- d) Websites and Social Media
- e) Law Schools

2) Personal Contacts;

3) Referrals



I. Things to Consider During the Hiring Process:
(Continued)

C. Pre-Interview Applicant Screening – use of initial telephone screening to narrow down selection pool;

D. Interview Candidates

- 1) Who? Shareholders? Associates? Staff?
- 2) How? Panel Discussions vs. 1-on-1 interview setting!
- 3) How many interviews?



I. Things to Consider During the Hiring Process: (Continued)

E. Reference Checks:

- 1) Personal References
- 2) Others to Consider
- 3) Bar Status
- 4) Back-Ground Checks



II. Employee Candidate Selection:

A. Who Makes the Decisions?

B. Offer and Acceptance – Verbal offer Extended by Appropriate Firm Representative. Follow-up usually made by HR, with written letter to the candidate confirming salary and benefits.



III. Post Hiring:

A. On-Boarding:

- 1) Keep in mind that you never get a second chance to make a first impression, your organization should make absolutely sure that new hires feel welcomed, valued, and connected.
- 2) Effective employee on-boarding has a positive domino effect: it ensures that new hires feel welcome and prepared in their new positions, in turn giving them the confidence and resources to make an impact within the organization, and ultimately allowing the company to continue carrying out its mission.



III. Post Hiring (Continued)

B. Integration and Socialization Into Firm – prioritize interpersonal relationships with key colleagues. Consider assigning welcome mentors to each new hire, so they can immediately get a feel for the personality of your organization. This day of first impressions will have an enormous impact on the employee experience.



III. Post Hiring (Continued)

- C. Initial Training: A written schedule plan detailing objectives, strategy and expectations of future results helps diminish any confusion about a new employee's job functions and instead opens up the floor to discuss concerns or new opportunities.



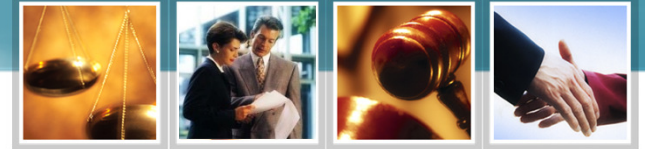
III. Post Hiring (Continued)

- D. On-going Training and Team-Building Meetings: Organized, ongoing training programs will maintain employees' skill levels, and continually motivate them to grow and improve professionally.
- E. Continued Dialog and Feedback: Continue to solicit feedback from the new employee at regular intervals. Take these opportunities to address issues of concern as well as note any accomplishments.



III. Post Hiring (Continued)

F. Encourage and Promote: Create open and communication between employees and management. Hold regular meetings in which employees can offer ideas and ask questions. Have an open-door policy that encourages employees to speak frankly with their managers without fear of repercussion. Get managers involved. Require your managers to spend time coaching employees. Make sure employees know what you expect of them.



IV. The “Other” Side of Hiring: Know When to Terminate the Relationship:

A. Progressive Understating of Ill Fit.

- 1) Differing Work Ethic;
- 2) Personality Clash;
- 3) Product Quality.

B. Don't Delay

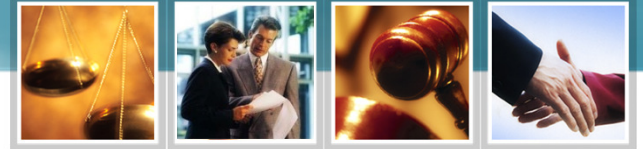
- 1) Not Fair to Employee to Be Terminated;
- 2) Not Fair to Remaining Employees;
- 3) Not Fair to Firm



E & O Coverage Considerations

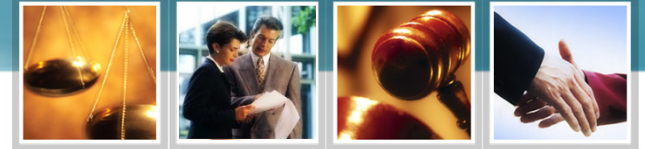
Mark D. Markel, Esq.

What You Want in Your E&O Policy



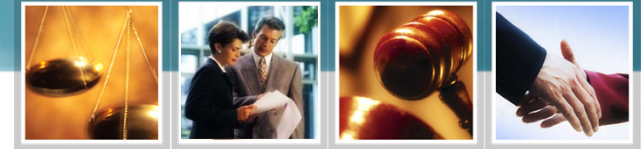
- Choice of Counsel
- DTPA, Fraud and Punitive Damage Coverage
- Cost of Defense + Damages Coverage
- Claims Made vs. Occurrence
- Non-Depleting Policy Limits
- Investigation Defense Coverage
- Arbitration Coverage

Choice-of-Counsel



- Most policies do not allow choice-of-counsel.
 - If the policy does not allow the power to choose counsel
 - Make a request for the counsel of your choice
- It makes sense to be comfortable when a claim is made against you

Choice-of-Counsel



ENDORSEMENT NO. ____

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

COVERAGE I

Option to Select Counsel

This endorsement modifies the insurance provided by the **Policy**, subject to all other terms and conditions of the **Policy**, as follows:

INSURED'S CHOICE OF COUNSEL OPTION

In exchange for the additional premium paid by **You**, the **Insurer** and **You** henceforth agree that **You** shall have the to select his or her own attorney-of-record to defend them under Coverages A through F, notwithstanding anything to the contrary in the **Policy** above; provided however, that: a) the counsel selected by **You** is competent and experienced in the defense of the type of criminal, civil or administrative claims or actions relevant to the defense of **You** under this **Policy**; b) the hourly rates charged by **Your** chosen counsel for their work, and work by their partners and their associates if any, is both reasonable in amount and reasonably close to the average of rates for partners and associates charged by experienced competent counsel in other law firms for similar defense work in the relevant state; and c) **Your** chosen counsel shall be monitored and overseen by the PSDA's national monitoring counsel, Wilson, Elser, Moskowitz, Edelman & Dickler, LLP.

Further, it is a condition precedent to **Your** having a right to choose counsel under this Option, that both **You** and **Your** chosen counsel first agree to provide, and must actually provide, said monitoring counsel with full access to the relevant case file(s), as well as copies of all reports to **You** and/or **Master Policyholder**, written evaluations, memoranda, other materials, information, testimony or evidence, etc., requested by PSDA's national monitoring counsel. Failure to provide such information completely and in a timely fashion shall, at the **Insurer's** sole option, allow **Insurer** to terminate the services of **Your** chosen counsel and appoint alternative, replacement counsel. If **You** refuses to agree to the appointment of the alternative counsel appointed by the **Insurer**, this **Policy** shall become thereafter null and void with respect to **Your** coverage claim(s) under the **Policy** for the relevant **Claim** or **Claims** against **You** defended by **Your** chosen counsel and no coverage shall exist under the **Policy** for **You** with respect to said relevant **Claim** or **Claims** against **You** from the date **You** refuse to accept the alternative, replacement counsel.

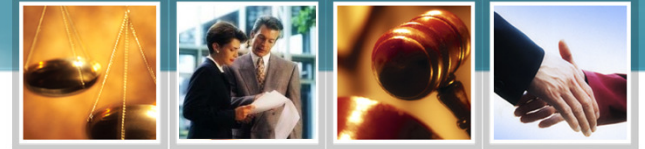
In the event that the **Insurer** and **You**, acting in good faith, are nonetheless unable to agree on the choice of counsel to defend **You** under any Coverage(s) provided to **You** by this **Policy** for any reasonable cause, the **Insurer** may, at its sole option, choose the defense counsel for the Claim(s) at issue by notifying **You** of its intent to do so in writing, by email and U.S. Mail. The **Insurer** will be obligated to return the additional premium paid by **You** for this Option within 15 business days of the date of such written notice, together with simple annual interest thereupon calculated at the prime interest rate prevailing on the first day on which interest is due, such interest on returned premium running from the original date of payment by the Insured for this option and ending on the date of said notice letter.

Choice-of-Counsel



- Endorsement available
 - For an additional fee
 - Counsel must be qualified
 - Counsel must work for rates that are reasonable compared to panel counsel
 - The carrier will engage monitoring counsel
 - Required to provide access to defense file to monitoring counsel
 - Failure to do so could result in selected counsel not being paid by the carrier
 - In which event the carrier will appoint panel counsel

DTPA, Fraud, and Punitive Damage Coverage



- Most E&O policies do not provide coverage for
 - Willful misconduct
 - Harm that the insured expected or intended to cause
 - Punitive damages may be excluded (as punitive damages not based on ordinary negligence)

DTPA, Fraud, and Punitive Damage Coverage



- Look for coverage for DTPA/FRAUD CLAIMS
 - May require advance payment of defense costs by insured until fraud has been disproved
 - DTPA / deceptive practice claims such as: malicious, dishonest, unlawful acts or conscious breach of any law are normally pled as fraud claims
 - Fraud coverage will ensure that your carrier will covers the claim until the allegations of fraud have been disproved

DTPA, Fraud, and Punitive Damage Coverage



- Look for coverage for **PUNITIVE/TREBLE DAMAGES**
 - Punitive or trebled damages may be excluded
 - Could be void in some states as against public policy
 - Carefully review coverage provisions and limitations in your jurisdiction

DTPA, Fraud, and Punitive Damage Coverage



IV. EXCLUSIONS

This Policy does not apply:

A. Intentional Acts

to any claim based on or arising out of any dishonest, fraudulent, criminal or malicious act or omission by an Insured except that:

1. this exclusion shall not apply to personal injury;
2. the Company shall provide the Insured with a defense of such claim unless or until the dishonest, fraudulent, criminal, malicious or intentional act or omission has been determined by any trial verdict, court ruling, regulatory ruling or legal admission, whether appealed or not. Such defense will not waive any of the Company's rights under this Policy. Criminal proceedings are not covered under this Policy regardless of the allegations made against any Insured;
3. this exclusion will not apply to any Insured who is not found to have personally committed the dishonest, fraudulent, criminal, malicious or intentional act or omission by any trial verdict, court ruling, or regulatory ruling.

DTPA, Fraud, and Punitive Damage Coverage



IV. EXCLUSIONS

The **Company** shall not be liable to make payment for **Loss** or **Defense Costs** in connection with any **Claim** made against the **Insured** arising out of, directly or indirectly resulting from or in consequence of, or in any way involving:

A. Any actual or alleged bodily injury, sickness, humiliation, mental anguish, emotional distress, assault, battery, disease or death of any person, or damage to or destruction of any tangible property including any resulting loss of use. This exclusion shall not apply to **Claim** for humiliation, mental anguish or emotional distress resulting from any **Claim** from a **Personal Injury Act**;

B. Any dishonest, fraudulent or criminal **Wrongful Act** by the **Insured**, however, this exclusion shall not apply unless and until a final adjudication or judgment is rendered against the **Insured** as to this conduct;

DTPA, Fraud, and Punitive Damage Coverage

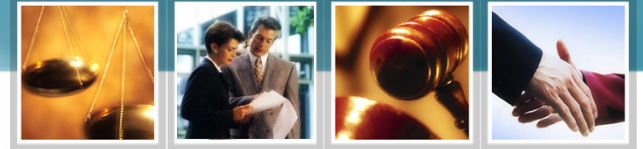


IV Exclusions

The coverage under this insurance does not apply to Damages or Claims Expenses incurred with respect:

- A to any Claim arising out of any criminal, dishonest, fraudulent or malicious act, error or omission of any Insured, committed with actual, criminal, dishonest, fraudulent or malicious purpose or intent. However, notwithstanding the foregoing, the insurance afforded by this policy shall apply to Claims Expenses incurred in defending any such Claim or circumstance which might lead to a Claim, but shall not apply to any Damages which the Insured might become legally obligated to pay;
- B to punitive or exemplary damages, fines, penalties, sanctions or any damages which are a multiple of compensatory damages, except that if a Claim shall have been brought against the Insured seeking both compensatory and either punitive or exemplary damages, fines, penalties, sanctions or damages which are a multiple of compensatory damages, then any coverage which may be afforded by this policy will apply to any Claims Expenses incurred, without liability, however, for such punitive or exemplary damages, fines, penalties, sanctions or damages which are a multiple of compensatory damages;

Cost of Defense + Damages Coverage



- Understand when your deductible applies
- First Dollar Defense
 - The policy pays for the legal defense without deductible
 - Deductible is required only in the case of a settlement or liability judgment
 - Deductible only paid by insured for actual damages
- Policy without First Dollar Defense
 - A deductible might be required upfront when you submit your claim

Cost of Defense + Damages Coverage



4. DEDUCTIBLE

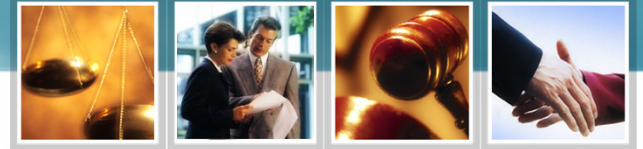
4.1. If *Deductible Option "A"* of Item 4 of the Declarations is selected [*Deductible Amount* applies to **Damages and Defense Expenses**], we shall only be liable for those amounts payable hereunder for **Damages and Defense Expenses** that are in excess of the applicable *Deductible Amount* set forth in Item 4A of the Declarations.

4.2. If *Deductible Option "B"* of Item 4 of the Declarations is selected [*Deductible Amount* applies to **Damages only**], we shall only be liable for those amounts payable hereunder for **Damages** in excess of the applicable *Deductible Amount* stated in Item 4A of the Declarations. The *Deductible Amount* does not apply to **Defense Expenses**.

You shall be liable for the *Deductible Amount* set forth in Item 4A of the Declarations for each **Claim**. The *Deductible Amount* shall apply separately to each **Claim** and shall be borne by **you**. For purposes of the *Deductible Amount*, **Related Claims** shall be considered one **Claim**, and only one *Deductible Amount* shall apply thereto.

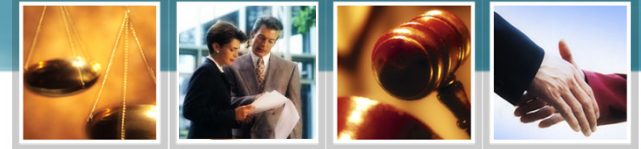
Upon written request by **us**, **you** shall pay the *Deductible Amount* within thirty (30) days of the date of such request.

Claims Made vs. Occurrence



- Occurrence
 - Most policies are "occurrence" policies
 - Coverage reverts back to the policy that was in effect at the time of the accident
 - If not reported may not be coverage

Claims Made vs. Occurrence



- Claims Made

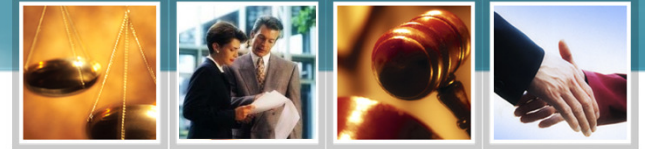
NOTICE: This is a claims made form. Except to such extent as may otherwise be provided herein, the coverage afforded under this insurance policy is limited to liability for only those Claims that are first made against the Insured and reported to the Underwriters while the insurance is in force. The Limit of Liability available to pay Damages shall be reduced and may be completely exhausted by payment of Claims Expenses. Damages and Claims Expenses shall be applied against the deductible. Please review the coverage afforded under this insurance policy carefully and discuss the coverage hereunder with your insurance agent or broker.

- Occurrence

NOTICE: THIS POLICY PROVIDES OCCURRENCE-BASED COVERAGE. A LOWER LIMIT OF LIABILITY APPLIES TO JUDGMENTS OR SETTLEMENTS WHEN THERE ARE ALLEGATIONS OF SEXUAL MISCONDUCT (SEE SECTION V. (C), "MAXIMUM LIMIT OF LIABILITY - SEXUAL MISCONDUCT" IN THE POLICY). PLEASE REVIEW THIS POLICY CAREFULLY AND DISCUSS THIS COVERAGE WITH YOUR LEGAL OR INSURANCE ADVISOR.

In consideration of the payment of the premium and in reliance upon the application submitted in connection with the underwriting of this Policy, which shall be deemed to be attached to, incorporated into, and made a part of this Policy, the Insurer and the first Named Insured, on behalf of all Insureds, agree as follows:

Non-Burning Policy Limits and the Alternative



- Policies with a separate defense limit does not diminish when litigation/defense costs are incurred
- Having a policy with defense costs inside the policy's limit of liability (burning limits policy) diminishes the available coverage

Burning Policy Limits



- b. the Company's maximum limit of liability for all:
- i) Damages; and
 - ii) Defense Expenses which reduce the Professional Services and Network and Information Security Offenses Coverage Limits for each Claim;
- for all Claims made during the Policy Year that result from a Network and Information Security Offense or the rendering of, or failure to render, Professional Services, will not exceed the Professional Services and Network and Information Security Offenses Coverage Limit for all Claims set forth in ITEM 5 of the Declarations; and

Non-Burning Policy Limits

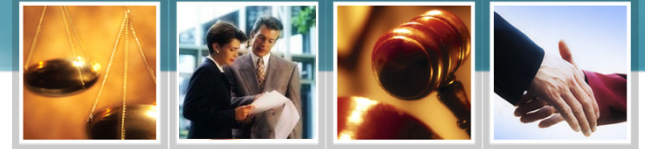


B. The **LIMIT OF LIABILITY** specified in the Policy Declarations as the Limit for **EACH CLAIM** shall be the maximum liability for **Loss** for each **Claim** to which this Coverage Part applies;

C. **Defense Costs** shall be in addition to the **LIMIT OF LIABILITY** as shown in the Policy Declarations, except for when Item G. below applies;

D. Subject to the Limits of Liability provisions stated above, the **Company** shall be liable to pay only **Defense Costs** and **Loss** in excess of the **RETENTION** specified in the Policy Declarations hereof as respects each and every **Claim** to which the Coverage Part applies.

Investigation Defense Coverage



- LICENSE INVESTIGATION DEFENSE COVERAGE
 - Some policies provide defense coverage for an investigation of your professional practice by your State Licensing Agency that is initiated by a complaint
- GOVERNMENTAL INVESTIGATION
 - You may be subject to either routine requests from governmental agencies relating to an investigation
 - You may even be subject to investigation
 - Does your E&O policy provides defense coverage for a State Regulatory Investigation

Investigation Defense Coverage



ITEM 6	ADDITIONAL BENEFITS LIMITS: Crisis Event Expenses Limits: [REDACTED] for each Crisis Event [REDACTED] for all Crisis Events Disciplinary or Regulatory Proceeding Expenses Limits: [REDACTED] for each Disciplinary or Regulatory Proceeding [REDACTED] for all Disciplinary or Regulatory Proceedings
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Investigation Defense Coverage



INSURING AGREEMENTS 1.2 Disciplinary Proceedings, is deleted and replaced by the following:

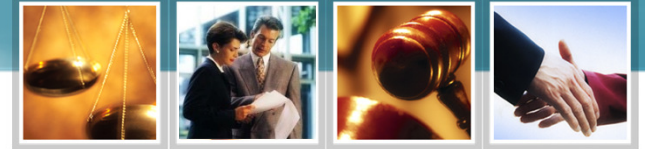
1.2. Disciplinary Proceedings

Subject to a Limit of Liability of \$12,500, we will pay on your behalf **Defense Expenses** you incur responding to a **Disciplinary Proceeding**, including an actual or alleged violation of a client identity theft, that occurred in the rendering of **professional services** first commenced against you and reported to us in writing during the **Policy Period**, or an **Extended Reporting Period**, if applicable, as a result of a **Covered Act** committed by you on or after the **Retroactive Date**.

The Limit of Liability applicable to this insuring agreement is the maximum amount payable for the **Policy Period**, regardless of the number of **Disciplinary Proceedings** first commenced during the **Policy Period** or the number of you subject to **Disciplinary Proceedings** and is in addition to the Aggregate Limit of Liability as set forth in the Declarations. No Deductible shall apply to this insuring agreement.

All other terms and conditions of this Policy remain unchanged.

Arbitration Coverage



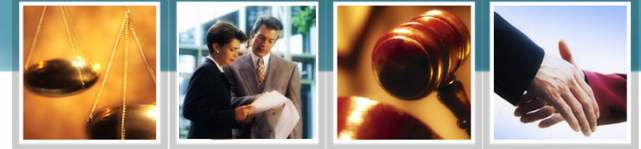
- Many lawyers' fee agreements provide arbitration clauses
- Typically an E&O claim will arise when you take your client to arbitration for unpaid fees
- Look for a broad definition of "claim" that would cover arbitration expenses
- Look for reimbursement of arbitration fees

Arbitration Coverage



21. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:
- a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
 - b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent or the "underlying insurer's" consent.

Arbitration Coverage

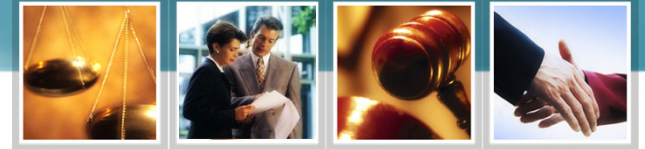


1.4 Expense Reimbursement

Subject to a Limit of Liability of \$500 each day and an aggregate of \$10,000 for the **Policy Period**, we will reimburse each of **you** for actual loss of earnings and reasonable expenses incurred when **you** attend a hearing, trial or arbitration proceeding at **our** request in the course of defending an otherwise covered **Claim**.

The aggregate Limit of Liability applicable to this insuring agreement is the maximum amount payable for the **Policy Period**, for all of **you** regardless of the number of **Claims**, and is in addition to the Aggregate Limit of Liability as set forth in the Declarations. No Deductible shall apply to this insuring agreement.

Summary



- With Knowledge in Hand you Can:
 - Select Your Counsel When Necessary
 - Have DTPA, Fraud and Punitive Damage Coverage
 - Negotiate First Dollar Coverage
 - Protect Yourself When Selecting a Claims Made vs. Occurrence Policy
 - Have Separate Limits for Defense Costs
 - Have Investigation Defense Coverage
 - Have Arbitration Coverage



Fair Debt Collection Practices Act

Beth Mulcahy, Esq.



The Fair Debt Collection Practices Act (“FDCPA”) establishes general standards of proscribed conduct, defines and restricts abusive collection acts (in detail), and provides specific rights for consumers. General standards of proscribed conduct protect a consumer from invasion of privacy, harassment, abuse, false or deceptive representations and unfair or unconscionable collection methods.

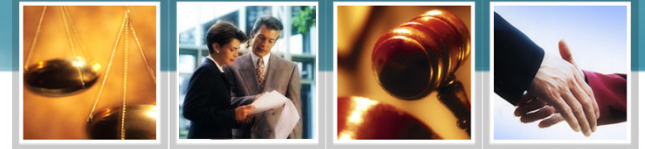


The FDCPA only applies to debt collectors and its applicability is largely determined by the definition of debt collector. The debt collector must be attempting to collect a debt, either directly or indirectly from a natural person who owes, or allegedly owes a consumer debt.

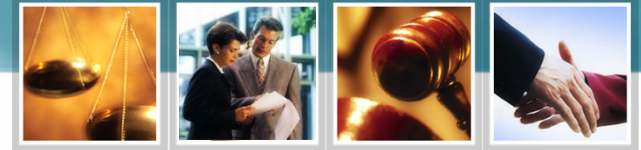


The FDCPA was amended in 1986 to remove the provision excluding attorneys from the definition of debt collectors. The Supreme Court in *Heintz v. Jenkins* [514 U.S. 291, 299 (1995)] made it clear that the FDCPA applies to attorneys “regularly” engaging in debt collection activity, including such activity in the nature of litigation. The issue comes down to whether the attorney regularly collects debts so as to fall within the definition of a debt collector under the FDCPA. Different circuits take different approaches to this question.

What is Debt?



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 a transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment. 15 U.S.C. Section 1692a(5).



In *Caron v. Charles E. Maxwell, P.C.*, 48 F. Supp 2d 932 (D. Ariz. 1999), the Court held that homeowners' association fees satisfied the "personal, family or household" requirement of a debt under the FDCPA. The debt collector argued that because all unit owners benefitted from the collection of fees, they were more analogous to past-due tax obligations; however, the Court rejected this argument, finding that the fees were for more specific household purposes than taxes.



In *Durso v. Summer Brook Preserve Homeowners Ass'n*, 641 F. Supp. 2d 1256 (M.D. Fla 2008), the Court held that fines assessed against homeowners by a homeowners association did not create a debt under the FDCPA as the fines were penalties against homeowners for violations of association rules, and were not the result of a business transaction or obligation to pay for goods and services.



The FDCPA defines “communication” broadly as the “conveying of information regarding a debt directly or indirectly to any person through any medium.” 15 U.S.C. Section 1692a(2).



Courts define “communication” both narrowly and broadly:

- 1) Communication must specifically mention the debt [Bailey v. Security National Servicing Corporation, 154 F. 3d 384 (7th Cir. 1998)]
- 2) “Communications that convey, directly or indirectly, any information relating to a debt and not just when the debt collector discloses specific information about a particular debt being collected.” *Foti v. NCO Financial Systems, Inc.*, 424 F. Supp. 2d 643, 657 (S.D. N.Y. 2006) (leaving a telephone message without conveying any specific information about an alleged debt is a “communication” under FDCPA).

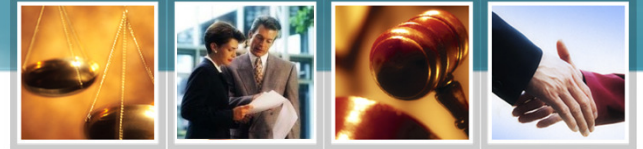
Twenty Common FDCPA Violations



1. Ask debtor to pay a debt the debtor does not owe at all or more than debtor owes

The debt collector cannot misrepresent the character, amount, or legal status of a debt. [15 USC 1692e] . Be careful not to attempt to collect on debts that have been discharged in bankruptcy.

Twenty Common FDCPA Violations



2. Ask debtor to pay interest, fees, or expenses that are not allowed by agreement creating the debt or by law

The debt collector can't add on any extra fees unless such amount is expressly authorized by the agreement creating the debt or permitted by law. [15 USC 1692f]

Twenty Common FDCPA Violations



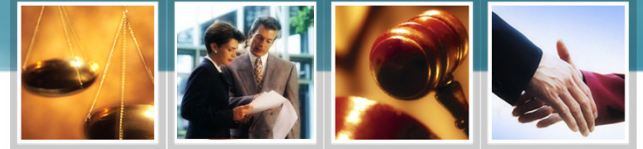
3. Call debtor repeatedly or continuously

The FDCPA considers repeat calls as harassment.
[15 USC 1692d]

4. Use obscene, profane, or abusive language

Using this kind of language is considered harassment. [15 USC 1692d]

Twenty Common FDCPA Violations



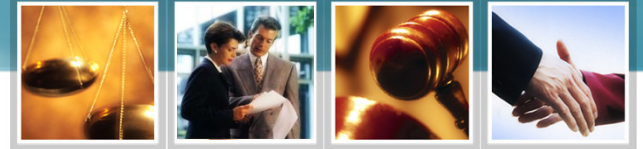
5. Call before 8:00 am or after 9:00 pm

Calls during these times are considered harassment.
[15 USC 1692c]

6. Call at times the debt collector knew or should know are inconvenient for debtor

Calls at these times are considered harassment. [15
USC 1692c]

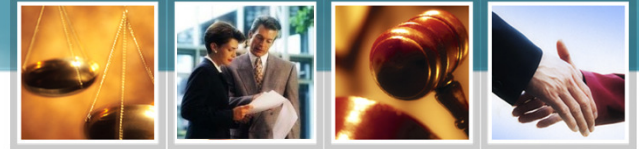
Twenty Common FDCPA Violations



7. Use or threaten to use violence if debtor doesn't pay the debt

Collectors can't threaten violence against a debt collector. [15 USC 1692d]

Twenty Common FDCPA Violations



8. Threaten dire consequences or action the debt collector cannot or will not take

Collectors can't threaten to initiate a civil suit or criminal prosecution, garnish wages, take property, cause job loss, have a consumer jailed, or ruin a debtor's credit when the collector cannot or does not intend to take the action. [15 USC 1692e]

Twenty Common FDCPA Violations

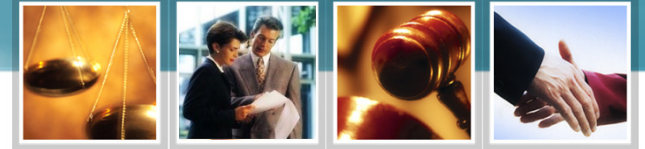


9. Illegally inform a third party about a debtor's alleged debt

- Unless a debtor expressly gives permission, debt collectors are not allowed to inform anyone about a debtor's debt except:
 - The debtor's attorney
 - a credit reporting agency
 - debtor's spouse
 - debtor's parent (s) (if debtor is a minor)

[15 USC 1692c]

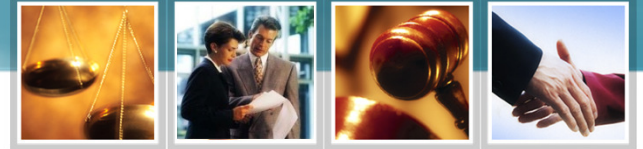
Twenty Common FDCPA Violations



10. Repeatedly call a third party to get debtor's location information

The debt collector can only contact a third party once unless it has reason to believe the information previously provided is false. [15 USC 1692b]

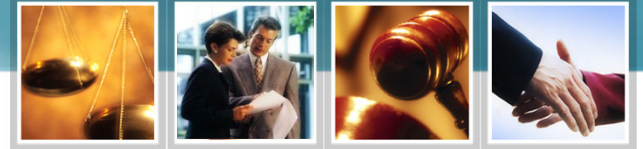
Twenty Common FDCPA Violations



11. Contact a debtor at work knowing the debtor's employer doesn't approve

A debt collector is not allowed to contact a debtor at work if the debtor let the debt collector know the debtor's employer doesn't approve of these calls. [15 USC 1692c]

Twenty Common FDCPA Violations

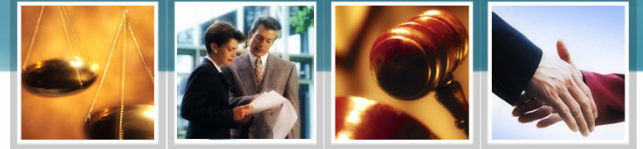


12. Fail to send a written debt validation notice

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

- 1) the amount of the debt;
- 2) the name of the creditor to whom the debt is owed;

Twenty Common FDCPA Violations

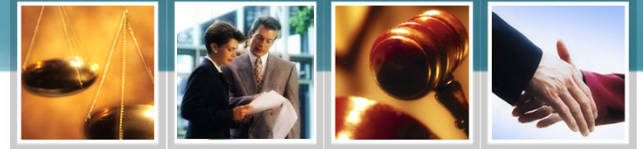


12. Fail to send a written debt validation notice

(Continued)

- 3) a statement that unless the consumer, within 30 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;

Twenty Common FDCPA Violations



12. Fail to send a written debt validation notice

(Continued)

- 4) a statement that if the consumer notifies the debt collector in writing within the 30- 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

Twenty Common FDCPA Violations



12. Fail to send a written debt validation notice

(Continued)

- 5) a statement that, upon consumer's written request within the 30-day period, the debt collector will provide the consumer with the name and address of the original creditor if different from the current creditor.

[15 USC 1692g(a)]

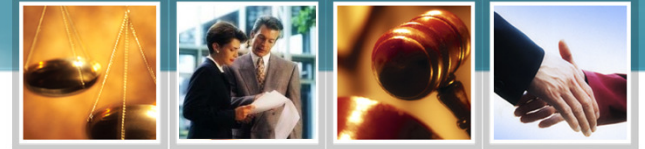
Twenty Common FDCPA Violations



13. Ignore your written request to verify the debt and continue to collect

A debt collector can't continue to collect on a debt after a debtor has made a written request to verify the debt as long as the request was made within 30 days of the collector's written notice. [15 USC 1692g]

Twenty Common FDCPA Violations



14. Continue to collect on the debt before providing verification

After receiving a debtor's written dispute, the collector must stop collecting on the debt until the debtor has received verification. [15 USC 1692g]

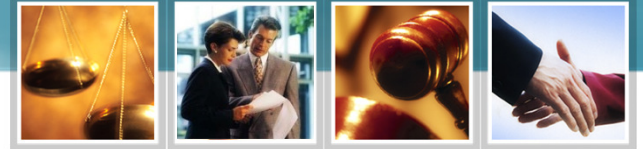
Twenty Common FDCPA Violations



15. Continue collection attempts after receiving a written “cease communication” notice

If a debtor makes a written request for the collector to cease communication (“I’m not going to pay this debt” or “stop contacting me”), the debt collector can only contact the debtor one more time, via mail to let the debtor know one of the following: that further efforts to collect the debt are terminated, that certain actions may be taken by the collector, or that the collector is definitely going to take certain actions. This “cease communication” notice does not prevent collectors or creditors from filing suit against the consumer to collect. [15 USC 1692c]

Twenty Common FDCPA Violations



- 16. Depositing post-dated checks prior to its date and accepting a post-dated check by more than five (5) days unless timely written notice is given to the debtor prior to the deposit. [15 USC 1692f]**

Twenty Common FDCPA Violations



17. Failure to Identify Self as a debt collector

A debt collector must disclose in all communications with a consumer that he or she is a debt collector and, in the first communication with the debtor, that he/she is attempting to collect a debt and that any information obtained will be used for that purpose.

[15 U.S.C. 1692e(11)]

Twenty Common FDCPA Violations

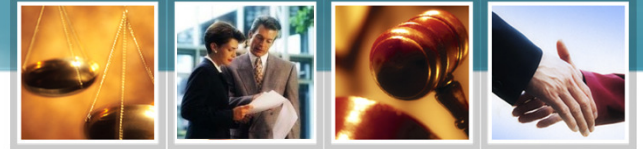


- 18. Filing or attempting to Collect Beyond the Statute of Limitations. [15 U.S.C. 1692(e) and (f)]**

- 19. Allowing a Collection Agency to Use Letterhead and or fax signature of lawyer who was not actually participating in the collection process [Taylor v. Perrin, 103 F.3d 1232 (5th Cir. 1997)]**

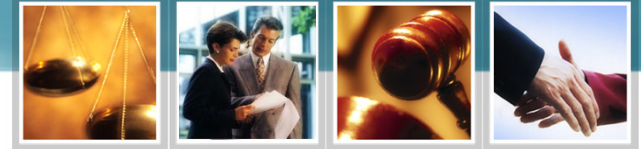
- 20. Suing the Wrong Debtor.[15 U.S.C. 1692(e)(2)(A)]**

Enforcement of FDCPA Violations



The FDCPA can be enforced against debt collectors in two ways: (1) by way of private lawsuit (under 15 U.S.C. Section 1692k); or (2) by way of an enforcement action by the Federal Trade Commission (FTC) under 15 U.S.C. Section 1692l.

Private Lawsuit:



Under the FDCPA, a plaintiff can recover actual damages, statutory damages of up to \$1,000, attorneys' fees and costs from a debt collector who has violated the FDCPA. 15 U.S.C. Section 1692k(a). FDCPA actions must be brought within one year of the date on which the alleged statutory violation occurs. 15 U.S.C. Section 1692k(d).

FTC Enforcement Action:



In 2010, 140,036 debt collection complaints were made with the FTC. An FTC enforcement action begins with an investigation of a debt collector identified in a complaint made to the FTC or through some other source, and continues if the FTC finds FDCPA violations with either (1) a lawsuit by the FTC seeking injunctive relief, consumer restitution, disgorgement by the debt collector and other ancillary relief; or (2) a request by the FTC to the U.S. Department of Justice that it file suit on the FTC's behalf.

Bona Fide Error Defense



Jerman v. Carlisle 130 S. Ct. 1605 (S. Ct. 2010): The court held that the bona fide error defense in Section 1692k(c) of the FDCPA did not apply to a violation of the Act resulting from the attorney's incorrect interpretation of the Act.

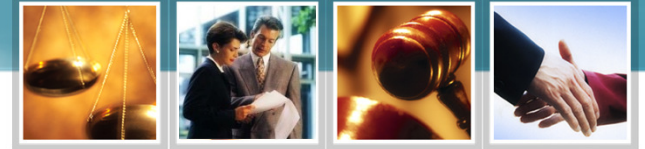
Implementing Reasonable Procedures (training manuals and in-house seminars, specific internal procedures for handling telephone calls, form letters, automated signatures on emails, fax cover sheets, and voice mail messages to debtors).



Attorney Client Privilege

Mark D. Markel, Esq.

Attorney Client Privilege



- Important to have
- Easy to lose
- Difficult to preserve

Definition



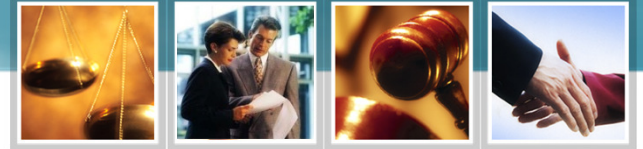
A **client** has a **privilege** to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client.

Who can assert the privilege



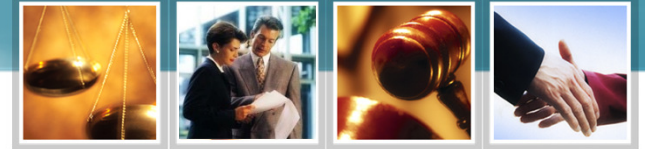
- A person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client, or
- Any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client

Usual Exceptions to the Privilege



- Furtherance of crime or fraud
- Claimants through same deceased client
- Breach of duty by a lawyer or client
- Document attested by a lawyer
- Joint Clients

Waiver-Failure to Consistently Assert Privilege



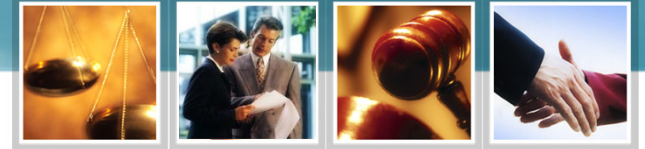
- Ordinarily, the privilege is waived by the failure to assert it when a question is asked about a confidential communication.
- Voluntary production of a document during discovery or trial can also waive an objection based on the privilege.

Waiver-Failure to Consistently Assert Privilege



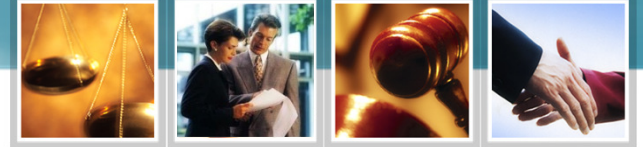
- When talking to a board remind them of the privilege and the effect of not keeping it.
- Who will go home and talk to their wife who will talk to the neighbor
- The email that will be forwarded beyond the client.

Waiver by Inadvertent Disclosure-Snap-Back Provision



- Documents produced in a court action by accident could potentially “snapped back” if permitted by statute

Other ways to waive privilege



- Written client communications may also lose the protection of the attorney-client privilege if they are used at trial or in a deposition to refresh the witness' recollection.

See Fed. R. Evid. 612,

Other High Risk Areas Where Waiver May Occur



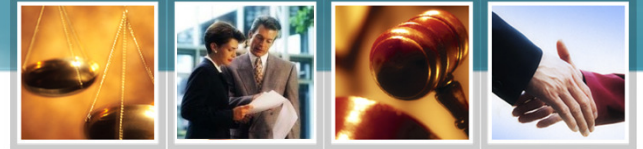
- Some of the more frequently encountered "high risk" areas for waiving the privilege by selective disclosure of information may occur in the following situations:
 - Responding to a government investigation
 - Information supplied to government agency
 - Insurance renewals
 - Auditor or accountant inquiry
 - Public financial disclosure documents (SEC forms)
 - Any disclosure to third parties not working under the attorney, or not at the attorney's direction, or for nonlegal purposes.

Preventing Waiver of Privilege



- Mark all appropriate documents as "privileged" and "prepared as confidential communications at request of counsel".
- Ensure that memos seeking information identify counsel by title as "counsel", and in legal opinions state that they are "in my opinion as counsel".

Preventing Waiver of Privilege



- Keep circulation and distribution of *legal* memos severely limited to "control group" personnel.
- Establish litigation committees if the matter involves continuing litigation that will go beyond a board term.



Things They Did Not Teach in Law School

Kenneth E. Chadwick, Esq.



Risks and Inefficiencies Complicating a Law Practice: Business Considerations They Did Not Teach in Law School:

- I. Develop a Firm Philosophy, Live it, Instill it In Others
 - A. What is your Purpose
 - B. How Will the Purpose Be Achieved



Risks and Inefficiencies Complicating a Law Practice: Business Considerations They Did Not Teach in Law School: (Continued)

II. Train and Supervise New Employees:

- A. Give All New Employees a Perspective of the Firm:
Where you have Been; Where you are going.
- B. Continuing Attorney Training and Education:
 - 1) National and State Continuing Education Training
 - 2) In-House Training

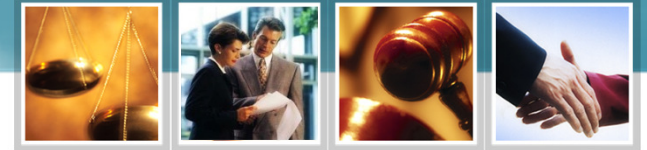


Risks and Inefficiencies Complicating a Law Practice: Business Considerations They Did Not Teach in Law School: (Continued)

II. Train and Supervise New Employees: (continued)

C. Attorney Supervision:

- 1) Review of Work Product;
- 2) Meeting with Clients;
- 3) Court Appearances and Conduct.



Risks and Inefficiencies Complicating a Law Practice: Business Considerations They Did Not Teach in Law School: (Continued)

III. Set Goals

- A. As a Firm
- B. As Individuals



Risks and Inefficiencies Complicating a Law Practice: Business Considerations They Did Not Teach in Law School: (Continued)

IV. Client Service and Coverage:

- A. Primary and Back-Up Attorney
- B. Responsiveness
- C. Tracking Client Projects and Deadlines



Risks and Inefficiencies Complicating a Law Practice: Business Considerations They Did Not Teach in Law School: (Continued)

- V. Take Time to Listen:
 - A. To Clients
 - B. To Business Associates
 - C. To Employees