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**WHY CHANGES MUST BE MADE TO THE STANDARDS OF REVIEW  
USED TO DETERMINE MEANINGFUL ATTORNEY INVOLVEMENT  
UNDER THE FAIR DEBT COLLECTION PRACTICES ACT**

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# Why Changes Must Be Made to the Standards of Review Used to Determine Meaningful Attorney Involvement Under the Fair Debt Collection Practices Act

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## I. INTRODUCTION

Collection attorneys have come under attack for sending dunning letters to consumers. Consumers claim that the issuance and delivery of the initial dunning letter is a violation of the Fair Debt Collection Practices Act<sup>1</sup> (FDCPA) if the collection attorneys lack “meaningful involvement” with the consumers’ accounts prior to issuing each dunning letter. The lack of meaningful attorney involvement causes each dunning letter to be a “false, deceptive and misleading representation”<sup>2</sup> that the communication (dunning letter) is from an attorney.<sup>3</sup>

Courts have crafted standards of review in cases in which attorneys who sent dunning letters to consumers clearly had no meaningful involvement in the collection process.<sup>4</sup> In those cases, the defendants had sold the use of their letterhead to collection agencies or creditors and had no participation in the actual collection of the debt. However, no clear standard has emerged in cases where the law firm sending the dunning letter has the actual authority to act on behalf of the creditor to settle or otherwise dispose of the debt, and actively does so.

The courts have focused on three main areas of concern. First, what authority must a collection attorney have from a client to act on its behalf, and what actions must the collection attorney take on behalf of its client to be meaningfully involved? Second, what level of review must a collection attorney conduct prior to issuing a dunning letter?

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1. Consumer Credit Protection Act, 15 U.S.C. §§ 1692-1692(o) (2003).

2. 15 U.S.C. § 1692e(10) (2003).

3. 15 U.S.C. § 1692e(3) (2003).

4. *Avila v. Rubin*, 84 F.3d 222 (7th Cir. 1996); *Boyd v. Wexler*, 275 F.3d 642 (7th Cir. 2001); *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993); *Nielsen v. Dickerson*, 307 F.3d 623, 2002 WL 31255777 (7th Cir.); *Taylor v. Perrin*, 103 F.3d 1232 (5th Cir. 1997).

Finally, is the review of electronic data transmitted by a client sufficient to allow a meaningfully involved collection attorney to issue a dunning letter in compliance with the FDCPA?

This article will attempt to analyze these issues from the viewpoints of: (1) the use of electronic data in commerce and the practice of law; (2) consumer protection under the FDCPA in comparison to attorneys' obligations under the Federal Rules of Procedure and Federal Rules of Evidence; and (3) attorneys' obligations under the Code of Professional Responsibility, Disciplinary Rules, and caselaw. However, before these viewpoints are discussed, it is important to review the Fair Debt Collection Practices Act.

## II. THE FAIR DEBT COLLECTION PRACTICES ACT

The FDCPA was adopted in 1977. It is concerned with unlawful debt collection practices, not mere disputes over the legality of the underlying debts.<sup>5</sup> Its purpose is to eliminate abusive practices by debt collectors, insure that those debt collectors refraining from using abusive debt collection practices are not competitively disadvantaged, and promote consistent state action to protect consumers against debt collection abuses.<sup>6</sup> Originally, attorneys were exempted from the provisions of the Act.<sup>7</sup>

In 1986 the attorney exemption was revoked.<sup>8</sup> Attorneys were added to the definition of debt collectors<sup>9</sup> and became subject to the requirements of the Act.<sup>10</sup> The loss of the exemption created a legal tension, leaving a collection attorney caught between the duties a "debt collector" has under the FDCPA and an attorney's responsibilities under the Code of Professional Responsibility and Disciplinary Rules. The resulting conflict has become a contentious source of litigation - whether a dunning letter sent to a debtor by an attorney (or law firm) is truly a communication from that attorney.

Section 1692e of the FDCPA provides:

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

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5. *Chambers v. Habitat*, No. 02-1990, 2003 U.S. App. LEXIS 11569, at \*9 (7th Cir. June 9, 2003), *reh'g denied en banc* Jul. 22, 2003.

6. 15 U.S.C. § 1692e (1977).

7. 15 U.S.C. § 1692a(6)(F) (1977).

8. A 1986 amendment to the Act, Pub. L. 99-361, 100 Stat. 768 (Jul. 9, 1986), deleted the attorney exemption provided in 15 U.S.C. § 1692(6)(F).

9. 15 U.S.C. § 1692a(6) (1986).

10. *Heintz v. Jenkins*, 514 U.S. 291 (1995).

- (2) The false representation of
  - (A) the character, amount, or legal status of any debt; or
  - (B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.
- (3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.
- (10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.<sup>11</sup>

Notably, there is no definition or reference to “meaningful attorney involvement” in the statute.

Consumers argue that a collection attorney is not “meaningfully involved” and cannot independently make the judgment necessary to issue a dunning letter if the attorney fails to review all or some not yet defined amount of account information maintained by the creditor. Creditors customarily refer large numbers of cases in the form of a spreadsheet or data file, and consumers claim that the review of the data incorporated therein alone is *prima facie* inadequate to serve as the basis of independent judgment. Though the basis of this alleged breach is ethical, not statutory, the lack of meaningful involvement causes any communication sent by the attorney to a consumer to be false, deceptive, and misleading, thus a violation of the FDCPA.

The resulting problem is a somewhat simplistic standard of review, easily applied to clear-cut cases of abuse, but which fails to consider the nature of the relationship a legitimate collection law firm has with its clients, including its duties, obligations, and grants of authority. This standard also fails to take into account the use and regulation of modern technology in commerce and the effect technology has had on the practice of law.

The following sections will discuss the three primary areas courts have focused their concern.

### III. AUTHORITY AND ACTIONS

What authority must a collection attorney have from a client to act on its behalf, and what actions must the collection attorney take on behalf of its client to be meaningfully involved?

Determining if an attorney is meaningfully involved in the prosecution of a client’s claim may appear simple, but it is quite vexing in application. “Defining the practice of law has been a difficult question for the legal profession for many years. The emergence of new

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11. 15 U.S.C. § 1692e (2003).

technologies such as the Internet has expanded the number of ways in which legal advice and information can be disseminated, which has increased the complexity of the task.”<sup>12</sup> “One size doesn’t fit all.”<sup>13</sup>

Commencement of the attorney-client relationship is when an attorney renders advice or service to one who believes the attorney is using legal knowledge or skill. This time is also when one is deemed to be practicing law.<sup>14</sup> Courts and bar agencies struggling to define the somewhat amorphous concept of the practice of law have come up with several different tests. For example, the “commonly understood” test defines the practice of law as composed of activities that lawyers have traditionally performed.<sup>15</sup> Another test used to define the practice of law focuses on the existence of an attorney-client relationship. “[I]t is from the relation of attorney and client that any practice of law must be derived.”<sup>16</sup>

These opinions focus on the relationship existing between an attorney and his client, not the attorney and his adversary. “For a person’s conduct to be considered the practice of law, there must be another person toward whom the benefit of that conduct is directed . . . . The conduct also must be targeted toward the circumstances or objectives of a specific person.”<sup>17</sup> If an attorney-client relationship exists in which the attorney is actively participating and providing services to his client, and the client benefits from the provision of such services, there is meaningful involvement.

FDCPA caselaw also examines the attorney-client relationship, but its focus is on the lack of a meaningful relationship between an attorney and his clients. If there is no meaningful relationship, there can-

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12. *Comments on the American Bar Association’s Proposed Model Definition of the Practice of Law*, Letter from the Federal Trade Commission to the Task Force on the Model Definition of the Practice of Law, ABA (12/20/02), available at <http://www.ftc.gov/opa/2002/12/lettertoaba.htm>. (Last visited April 30, 2003) [hereinafter FTC letter].

13. John Gibeaut, *Bid to Define Law Practice Scaled Back — Task Force Instead Urges Jurisdictions to Craft Their Own Standards*, ABA Journal e-Report, Apr. 25, 2003 (quoting ABA President Alfred P. Carlton Jr., available at <http://www.abanet.org/journal/ereport/a25define.html>). (Last visited Apr. 30, 2003).

14. VA. SUP. CT. R., Pt. 6, § 1(B).

15. FTC Letter, *supra* note 12 (citing *State Bar of Ariz. v. Ariz. Land Title & Trust*, 366 P.2d 1, 9 (Ariz. 1961) (“We believe it sufficient to state that those acts, whether performed in court or in the law office, which lawyers customarily have carried on from day to day through the centuries must constitute ‘the practice of law.’”)).

16. *Id.* (citing *Virginia v. Jones*, 41 S.E.2d 720, 727 (Va. 1947) (“As a practical solution of the question, it was deemed advisable to permit a real estate broker to prepare simple contracts of sale, options, leases, etc., and to prohibit him from preparing legal instruments whereby the legal title to property passes from the seller to the purchaser.”)).

17. Task Force on the Model Definition of the Practice of Law, *Definition of the Practice of Law*, at cmt. 1 (Sept. 18, 2002).

not be meaningful involvement. In the following cases there was no meaningful involvement because the defendants did little more than allow their letterhead to be used by their clients for the purpose of sending out dunning letters.

In *Clomon v. Jackson*,<sup>18</sup> the U.S. Court of Appeals for the Second Circuit held that a letter from a law firm implies that an attorney has actually reviewed the claim and is actually handling the file. In this case, Defendant Jackson acknowledged:

[T]hat he did not have any direct personal involvement in the mailing of letters to Clomon (or to any other debtor): [sic] he never reviewed Clomon's file; he never reviewed or signed any letter that was sent in his name to Clomon.<sup>19</sup>

The court held the letters "were not 'from' Jackson in any meaningful sense of that word" since he did not play any day to day role in the debt collection process.<sup>20</sup>

In *Avila v. Rubin*, the Seventh Circuit found no real involvement when the attorney was not personally or indirectly involved in sending the dunning letters to debtors and no real judgment was being rendered.<sup>21</sup> Instead the court characterized the attorney as having a "cozy relationship with the 'referring' collection agency."<sup>22</sup> Furthermore, the court stated:

Albert G. Rubin, acting *as* an attorney, was not the real "source" of the letters in this case. The true source of the "attorney" letters was the collection agent who pressed a button on the agency's computer. "Albert G. Rubin & Associates, Ltd." is a collection agency, not a law firm at all in any real sense of the term. The "law firm" does not have a retainer agreement with plaintiffs' creditor. No attorney working in the "law firm" ever files a lawsuit or goes to court on behalf of a client.<sup>23</sup>

It is a violation of 15 U.S.C. § 1692e(3) for a lawyer to rent his letterhead to a collection agency.<sup>24</sup> A debt collector is prohibited to "use any false, deceptive, or misleading representation or means in connection with the collection of any debt."<sup>25</sup> In *Boyd v. Wexler*, the Seventh Circuit found that an attorney's renting of his letterhead to a collection agency would be in effect allowing the collection agency to impersonate an attorney, and would violate the statute in that it uses a

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

19. *Id.* at 1317.

20. *Id.* at 1320.

21. *Avila v. Rubin*, 84 F.3d 222 (7th Cir. 1996).

22. *Id.* at 228-29.

23. *Id.* at 230.

24. *Boyd v. Wexler*, 275 F.3d 642, 644 (7th Cir. 2001).

25. *Id.* (quoting 15 U.S.C. § 1692(e)).

“false representation or implication that any individual is an attorney or that any communication is from an attorney.”<sup>26</sup>

An attorney plays a mere ministerial role in sending the dunning letters when he does not take any legal action in pursuit of the debt; merely forwarded the letters to the collection agency rather than handling responses; had no authority to negotiate the claim; and was paid a flat fee per letter, regardless if the letter produced any result.<sup>27</sup> The Seventh Circuit held in *Neilsen v. Dickerson*, that, “the fixed and quite modest nature of Dickerson’s [the attorney] remuneration strongly suggests that Household [collection agency] was paying for the marquee value of Dickerson’s name rather than his professional assistance in the collection of its debts.”<sup>28</sup>

The attorney’s review of the file and confirmation that the particular debtor’s account was in fact outstanding prevented the Second Circuit from granting summary judgment in *Miller v. Wolpoff*, on the issue of meaningful involvement<sup>29</sup> and use of attorney’s letterhead.<sup>30</sup>

In *Shapiro v. Riddle & Associates, P.C.*, the Second Circuit did find that summary judgment was appropriate because Riddle “followed its established procedures, comprised of eighteen steps, to ensure that, *inter alia*, (1) an agreement between a debtor and creditor authorizes the debt collection, (2) Riddle has the requisite and accurate information on a debtor’s account, (3) a debtor has no legal defenses, such as bankruptcy, to assert against his or her debt, (4) a debtor’s account meets Riddle’s criteria, such as minimum balance due and whether a partial payment has been made, and (5) a collection letter to the debtor complies with the FDCPA, based upon the determination of Riddle’s full-time compliance attorney.”<sup>31</sup>

The common thread running through these decisions (other than *Miller* and *Shapiro*) is that there was no relationship between the attorney and client beyond the sending of dunning letters.<sup>32</sup> The *Clomon*, *Avila*, *Boyd*, and *Neilsen* courts emphasized the lack of actual attorney involvement in their cases by underscoring the lack of a

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26. *Id.*

27. *Nielsen v. Dickerson*, 307 F.3d 623, 638 (7th Cir. 2002).

28. *Nielsen*, 307 F.3d at 634. Flat rating is a violation of §1692j(a) of the FDCPA.

29. *Miller v. Wolpoff & Abramson*, 312 F.3d 292, 295 (2d Cir. 2003).

30. *Id.*

31. *Shapiro v. Riddle & Assocs., P.C.*, 240 F. Supp. 2d 287 (S.D.N.Y. 2003), *aff’d Shapiro v. Riddle & Assocs.*, 2002 U.S. App. LEXIS 24482, at \*2 (2d Cir. 2003).

32. Unlike the defendant law firms in the other cases, both *Wolpoff & Abramson* and *Upton, Cohen & Slamowitz* regularly and actively collect the accounts referred to them by their clients. In *May Co. v. Miller*, Index No. 62272/2000, (N.Y. Civ. Ct. Civil 2000), Mr. Miller was sued and settled the debt collection case. The plaintiff was represented by *Upton, Cohen & Slamowitz*.

retainer agreement, the lack of review of letters or files, the lack of day to day participation, the lack of supervision and control of the collection process, the lack of the authority to respond to debtors' letters, and the lack of authority to negotiate settlements or otherwise dispose of cases.

A. *What Must an Attorney do to be Meaningfully Involved?*

The Los Angeles County Bar<sup>33</sup> concluded that an attorney would not mislead debtors (and therefore not violate ethical constraints and professional responsibilities) by mass mailing collection letters on an attorney's letterhead when (1) the attorney established a procedure by which determinations were made to mail particular letters to particular people, (2) the form letter was initially reviewed by the attorney, (3) the attorney supervised the staff, and (4) the staff followed the procedures.<sup>34</sup> The Ethics Committee concluded:

If in fact a particular account is turned over to the attorney for collection in the usual sense and a special attorney-client relationship is thus created, then certainly it would not be improper for the attorney to use the letterhead described for collection purposes. . . . In the opinion of the Committee, under the facts, an attorney-client relationship has been created.<sup>35</sup>

Furthermore, deception does not occur even when an attorney can reasonably predict that no further action than the dunning letter will be taken on the account, due to their diminimis value, other than generating computer originated attorney letters.<sup>36</sup> The Committee found that the accounts "have in fact been turned over to the attorney for collection 'in the usual sense.'"<sup>37</sup> Regardless of the attorney's consideration of economic factors or the computer generated letters, the previously established criteria used by the attorney in handling accounts satisfies "collection in the usual sense."<sup>38</sup> The Committee also is of the opinion that even as to those accounts which the attorney can reasonably predict (e.g., by reason of the small amount involved, etc.), will be returned to the corporation's credit department without any action by the attorney section other than sending the computer prepared attorney letters, such accounts have in fact been turned over to the attorney for collection "in the usual sense" and, therefore, no deception is practiced. The attorney has previously established criteria in

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33. L.A. County B.A., Formal Op. 338 (1973).

34. *Id.* at 37-39.

35. *Id.*

36. *Id.*

37. *Id.*

38. L.A. County B.A., Formal Op. 338.

accordance with which all accounts are to be handled. All the accounts have been referred and turned over to the attorney for collection in accordance with previously established criteria. This is collection "in the usual sense" even though economic factors may enter into an attorney's decision to terminate collection efforts, and the automatic implementation of such factors does not change the situation.

Though the *Clomon*, *Avila*, *Boyd*, *Neilsen*, and *Miller* courts did not set a standard which could be relied upon by collection attorneys, they did provide some guidance by highlighting actions the defendants failed to take. To paraphrase these decisions, to be meaningfully involved, a collection attorney must do the things that Jackson, Rubin, Wexler and Dickerson did not do. They must actively participate in the collection of referred accounts. The courts did note that collection attorneys can be in compliance with the FDCPA even if the attorneys delegate part of the review process to paralegals or computer programs and do not have access to their clients' entire files prior to issuing dunning letters. Most importantly, as discussed in *Shapiro v. Riddle*, attorneys must have procedures in place, as well as control, supervise, and actively participate in the collection process.

Limitations of the FDCPA affect lawyers engaged in consumer debt collection, even where their conduct involves litigation.<sup>39</sup> However, lawyers do not receive increased scrutiny under the act solely because of their profession, instead they are treated equally with debt collectors under the FDCPA.<sup>40</sup> As the Fourth Circuit held in *Amond v. Brincefield, Hartnett & Associates, P.C.*,<sup>41</sup>

[The FDCPA] does not say that the collector's status as an attorney should add a requirement of independent legal analysis for each aspect of the creditor's claim . . . . To interpret the FDCPA as not to treat lawyers and debt collectors equally would contort the statute's meaning, and ignore Congress' drafting and the Supreme Court's interpretation.<sup>42</sup>

In his discussion of the application of the FDCPA to litigation in *Heintz v. Jenkins*,<sup>43</sup> U.S. Supreme Court Justice Stephen Breyer wrote that a litigating attorney who lost his case would not be liable if the violation was unintentional and "resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to

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39. *Amond v. Brincefield, Hartnett & Associates, P.C.*, 1999 U.S. App. Lexis 4815, at \*8-9 (4th Cir. 1999) (citing *Heintz v. Jenkins*, 514 U.S. 291(1955)).

40. *Id.*

41. *Amond v. Brincefield*, 1999 U.S. App. Lexis 4815, at \*8-9 (4th Cir. 1999).

42. *Id.* (citing *Jenkins v. Heintz*, 124 F.3d 824, 833-34 (7th Cir. 1997)).

43. *Heintz v. Jenkins*, 514 U.S. 291, 295 (1995).

avoid any such error.”<sup>44</sup> The standard of review used in this instance is preponderance of the evidence.<sup>45</sup> In *Taylor v. Luper, Sheriff & Niedenthal Co., L.P.A.*, cited by the Tenth Circuit Court of Appeals in *Johnson v Riddle*, involving an attorney sued under the FDCA, the court explained that a bone fide error defense to FDCA actions must be available to attorneys who make mistakes of law because otherwise, “[i]f a lawyer who in good faith asserts a claim in litigation may be held personally liable under the FDCA, then he or she is presented with an irreconcilable ethical dilemma.”<sup>46</sup> “Ethical duties to the client require the assertion of the client’s best case. This collides with strict liability if the legal argument loses.”<sup>47</sup>

To determine if meaningful attorney involvement exists, courts should consider the totality of the attorney-client relationship. Examination of the extent of the authority granted by the client and the actual role performed by the collection attorney in the entire collection process should be done. Courts should determine if there are procedures in place and if the procedures are implemented and supervised by attorneys. In doing so, the courts will find that many of the following benchmarks are evident when a legitimate collection attorney is meaningfully involved:

- (3) There is a retainer agreement setting forth the obligations, responsibilities and liabilities of both attorney and client.
- (4) The attorney has knowledge and understanding of client practices and procedures including those related to delinquent accounts.
- (5) The attorney and client regularly communicate in regard to collection practices and procedures and regularly update information concerning individual accounts.
- (6) The attorney and client have established processes and procedures for the transmission of account information and the collection of the referred accounts.
- (7) The attorney has reviewed and retained copies of the consumer contracts which govern the referred accounts.
- (8) The attorney has actual authority from the client to act on its behalf including the duties and obligations to contact debtors, settle accounts, negotiate payment arrangements, respond to communications from debtors and their representatives, and otherwise dispose of the debt.
- (9) The law firm is actively involved in the collection process if:

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44. *Id.*

45. *Id.*

46. *Johnson v. Riddle*, 305 F.3d 1107 (10th Cir. 2002) (citing *Taylor v. Luper, Sheriff & Niedenthal Co.*, 74 F.Supp.2d 761, 764 (S.D. Ohio 1999)).

47. Janet Flaccus, *Fair Debt Collection Practices Act: Lawyers and the Bone Fide Error Defense*, 2001 ARK L. NOTES, 95, 97 (2001).

- (a) The firm has processes and procedures for collection in place and regularly collects account for its clients.
- (b) Attorneys control the collection process and supervise staff to insure that the processes and procedures are properly implemented.
- (c) Attorneys supervise the review of all information received from clients.
- (d) Attorneys draft the letters used in the collection process.
- (e) Attorneys and staff regularly communicate with debtors.
- (f) The law firm regularly negotiates settlements of accounts.
- (g) The law firm regularly accepts and receives payments on behalf of its clients.
- (h) The law firm regularly responds to communications including disputes and demands for validation from consumers and their representatives.

Thus, a collection law firm is meaningfully involved when the law firm's attorneys and staff actively participate in the collection process under the supervision and control of attorneys, and the firm has actual authority from its clients to collect and dispose of the referred accounts.

B. *What Level of Review Must a Collection Attorney Conduct Prior to Issuing a Dunning Letter?*

Neither case law nor the Code of Professional Responsibility defines the minimum review a collection attorney must conduct prior to issuing a dunning letter. Both indicate that collection attorneys can rely on information provided by clients, so long as the attorneys are meaningfully involved and have a reasonable good faith belief that their clients are providing current and accurate information. With these components in place, a collection attorney is in compliance with the FDCPA when a dunning letter is issued, following a cursory review of the initial information provided by a client.<sup>48</sup>

In *Boyd v. Wexler*, the Seventh Circuit declined to set a minimum standard of review.<sup>49</sup> As long as the attorney is assigned to the ultimate professional judgment in determining the existence of a valid debt, the FDCPA can be complied with.<sup>50</sup> Compliance in this instance occurs regardless of whether part of the review is delegated to a paralegal or computer program.<sup>51</sup> A minimum standard of review did not need to be established, since the outcome of the case will depend

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48. The review necessary to determine if litigation is appropriate prior to filing a lawsuit is not discussed herein.

49. *Boyd v. Wexler*, 275 F.3d 642, 647 (7th Cir. 2001).

50. *Id.*

51. *Id.*

on the jury's convictions.<sup>52</sup> If the jury believes the plaintiffs, the attorney did not review the dunning letter.<sup>53</sup> If the jury believes the attorney, then enough review was rendered.<sup>54</sup> Therefore, establishing a minimum standard of review would be fruitlessly non-determinative.<sup>55</sup>

In *Miller v. Wolpoff*, the Second Circuit also declined to set a minimum standard of review.<sup>56</sup> The court rejected plaintiffs request for determination a minimum standard "requiring attorneys to review a copy of the contract, a credit report, and a full payment history or statement of account," reasoning that in many instances an attorney's familiarity with the client's file would negate the need to review some if not all of the documents the *Miller* plaintiffs seek to require.<sup>57</sup>

Debt collectors have the right to rely upon the information provided by their clients. In *Smith v. Transworld Systems, Inc.*, the debt collector made a mistake as to the amount of the debt because of a clerical error on the part of the creditor.<sup>58</sup> The Sixth Circuit rejected adoption of a requirement of independent investigation of the collection debt. The court in *Bible v. Allied Interstate*,<sup>59</sup> found it reasonable for debt collectors to rely on the information submitted by creditors and to believe creditors assertions that the debtor has not filed bankruptcy.<sup>60</sup> Attorneys are not held to any higher standard than collection agencies in relying upon their clients' files.<sup>61</sup>

In *Shapiro v. Riddle & Associates, P.C.*, the Second Circuit found that the attorney's precautions taken before sending the dunning letters were sufficient under the FDCA.<sup>62</sup> Prior to sending the letters, the attorney:

examined the agreement with plaintiff to ensure that charging a fee was authorized, screened the group of accounts (including plaintiff's) that were referred for collection in order to ensure that they met criteria necessary for inclusion in its information system and that each involved a minimum overdue balance, screened the ac-

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52. *Id.*

53. *Id.*

54. *Id.*

55. *Boyd*, 275 F.3d at 647.

56. *Miller v. Wolpoff & Abramson*, 312 F.3d 292, 295 (2d Cir. 2003).

57. *Id.* at 304.

58. MANUEL H. NEWBURGER & BARBARA M. BARRON, 1 FAIR DEBT COLLECTION PRACTICES, FEDERAL AND STATE LAW AND REGULATION ¶ 1.07[10][e] at 1-45, (A.S. Pratt & Sons 2003) (citing *Smith v. Transworld Sys.*, 953 F.2d 1025 (6th Cir. 1992)).

59. *Bible v. Allied Interstate*, 2001 WL 1618494, at \*3 (D.Minn. 2001).

60. *Hyman v. Tate*, 2003 U.S. Dist. LEXIS 4822, at \*23; 2003 WL 1565863, at \*8 (N.D. ILL. 2003).

61. NEWBURGER & BARRON, *supra* note 58 (citing *Jenkins v. Heintz*, 124 F.3d 824 (7th Cir. 1997), *cert. denied*, 523 U.S. 1022 (1998); *Amond v. Brincefield*, 175 F.3d 1013 (4th Cir. 1999)).

62. 240 F. Supp. 2d 287, 289-90 (S.D.N.Y. 2003).

counts to ensure that partial payment had not been made, conducted bankruptcy, change of address and current phone number checks, and had a compliance attorney review both the account and the collection letter. All of this takes time and costs money, as do the insurance premiums that Riddle pays to cover its business and the administrative and technical staffs it employs and the information systems it operates.<sup>63</sup>

Due to the work done by Riddle (the attorney) for his client, Riddle did not violate the FDCPA, and was entitled to summary judgment on his claim for attorney collection costs.<sup>64</sup>

Inasmuch as there are no specific standards of review proffered by the law or the courts, there is no exact location to set the bar. It is enlightening to compare the mandates of the Federal Rules of Civil Procedure (“Rules”) and the ethical obligations under the Code of Professional Responsibility (“Code”) to the requirements of the FDCPA, particularly since the Rules and the Code are primarily concerned with matters already before the court, not the issuance of the first communication from an attorney to a consumer.

Federal Rule of Civil Procedure 11(b) provides:

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented person is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

- (1) it is not being presented for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation;
- (2) the claims, defenses and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification or reversal of existing law or the establishment of new law;
- (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. . . .<sup>65</sup>

The pre-filing inquiry must only be objectively reasonable under the circumstances.<sup>66</sup> When the pertinent facts are beyond immediate investigation, the plaintiff’s pre-filing investigation may be somewhat

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63. *Id.*

64. *Id.*

65. FED. R. CIV. P. 11(b).

66. 2 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 11.11, at ¶ [2] (3d ed. 2003).

cursory.<sup>67</sup> As to the factual basis, Rule 11(b)(3) provides that in presenting a paper to the court, counsel is certifying that the allegations and other factual contentions have evidentiary support or are likely to have evidentiary support after the opportunity for further investigation or discovery.<sup>68</sup> If, at the time an attorney filed a pleading, reasonable practitioners could have disagreed over the existence of a good faith argument in support of that paper, sanctions are inappropriate.<sup>69</sup> Rule 11(b)(2) is aimed at deterring legally frivolous filings and should not be applied in a way that would chill advocacy.<sup>70</sup> Legal contentions that are unsuccessful, but nevertheless merit serious consideration, should not be sanctioned under Rule 11.<sup>71</sup>

Similar in purpose to the FDCA's validation requirements<sup>72</sup> and penalty provisions,<sup>73</sup> Rule 11(c) provides, "if, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may . . . impose an appropriate sanction upon the attorneys, law firms or parties that have violated subdivision (b) or are responsible for the violation."<sup>74</sup> A party may make a motion for sanctions<sup>75</sup> or the court, on its own initiative,<sup>76</sup> may issue an order to show cause why the attorney or party has not violated subdivision (b). However, the alleged miscreant has twenty-one days to withdraw or correct the challenged paper, claim defense, contention, allegation or denial before sanctions can be levied.<sup>77</sup> In other words, if the claim cannot be validated, the matter must be dropped.

Contained within Canon Seven of the New York Code of Professional Responsibility ("A Lawyer Should Represent a Client Zeal-

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67. *Id.* § 11.11, at ¶¶ [2]-[4] (citing *Dubois v. USDA*, 270 F.3d 77, 82-83 (1st Cir. 2001) (it was reasonable for government attorneys to rely on highly technical factual information obtained from client, so that sanctions were properly denied); *See also Lichtenstein v. Consol. Servs. Group, Inc.*, 173 F.3d 17, 23-24 (1st Cir. 1999) (viewed at time of filing of amended complaint, facts known to plaintiff justified suspicious activities of illegal activities by defendants).

68. *Id.* § 11.11, at ¶ [1].

69. *Id.* § 11.5

70. *Id.*

71. *Id.* (citing *Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 153-157 (4th Cir. 2002); *Matta v. May*, 118 F.410, 414-16 (5th Cir. 1997) (though plaintiff lost, his claims were warranted under existing state law, so sanctions were improper); *Montrose Chem. Corp. v. American Motorists Ins. Co.*, 117 F.3d 1128, 1133-1136 (9th Cir. 1997) (sanctions are appropriate for lack of pre-filing inquiry only if that failure results in a baseless filing)).

72. 15 U.S.C. § 1692g (2003).

73. 15 U.S.C. § 1692k (2003).

74. FED. R. CIV. P. 11(c).

75. MOORE, *supra* note 61, at § 11.01 (citing Fed. R. Civ. P. 11(c)(1)(A)).

76. MOORE, *supra* note 61, at § 11.01 (citing FED. R. CIV. P. 11(c)(1)(B)).

77. MOORE, *supra* note 61, at § 11.01 (citing FED. R. CIV. P. 11(c)(1)(A)).

ously within the Bounds of the Law”), Disciplinary Rule 7-102(A) provides:

(A) In his representation of a client, a lawyer shall not:

- (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.<sup>78</sup>

However, Canon Seven recognizes that the law is under constant change and that the law’s boundaries are difficult to establish due to factors such as, varying factual situations, developing constitutional interpretations, poor statutory construction, and areas without precedent.<sup>79</sup> Therefore, attorneys may propound theories and constructions of law that favor their clients, so long as they are not frivolous.<sup>80</sup> “The lawyer’s conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law.”<sup>81</sup> As with Rule 11, the attorney should have a reasonable good faith belief that the client’s position can be substantiated.<sup>82</sup>

Interpreting the law in a light most favorable to one’s own client is permitted when confronted with a dubious question, due to the attorney’s obligation to his client.<sup>83</sup> Sometimes it is necessary to file the suit before all the facts are known.<sup>84</sup> According to the U.S. Supreme Court, “beyond all doubt, the general rule is that the obligation of the attorney is to his client and not to a third party . . . It is the attorney’s reasonable belief that the client has a tenable claim and not the attorney’s conviction that the client will prevail which is the measure of probable cause . . . ”<sup>85</sup> There will be no liability for the attorney absent an “‘improper purpose on the part of the unsuccessful attorney’. . . [supported by evidence] ‘independent of the evidence establishing that the action was brought without probable cause.’”<sup>86</sup>

Nevertheless, other restraints on attorney conduct are still in force. Canons of professional conduct, as well as liability in instances of fraud, collusion, or malicious prosecution remain in place to regulate

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78. N.Y. CODE OF PROF’L RESPONSIBILITY DR 7-102, at (A)(1) (2002).

79. N.Y. CODE OF PROF’L RESPONSIBILITY Canon 7-2 (2002).

80. N.Y. CODE OF PROF’L RESPONSIBILITY EC 7-4 (2002).

81. N.Y. CODE OF PROF’L RESPONSIBILITY Canon 7-4 (2002).

82. N.Y. CODE OF PROF’L RESPONSIBILITY EC 7-4.

83. State Bar Grievance Adm’r v. Corace, 390 Mich. 419, 434 (Mich. 1973).

84. Norton v. Hines, 49 Cal. App. 3d 917, 923 (1975).

85. Savings Bank v. Ward, 100 U.S. 195, 200 (1879).

86. Callahan v. Simmons, No. 93-2024, 1995 WL 75418 at \*5 (6th Cir. Feb. 23, 1995) (citing Friedman v. Dozorc, 312 N.W.2d 585, 607 (Mich. 1981)).

attorney conduct.<sup>87</sup> “An attorney’s liability does not end with being answerable to his client. He is also liable to third persons who have suffered injury or loss in consequence of fraudulent or tortious conduct on his part.”<sup>88</sup>

Normally, attorney liability only extends to intentional torts, such as fraud or abuse of process, when adversaries in litigation bring suit against the attorney himself. Negligence in bringing or pursuing an action usually fails to meet the standards for attorney liability. Policy reasons are at the forefront of justification for this rule:

Public policy favors open access to the courts, a policy that would be discouraged if an attorney was liable in the absence of malice. The attorney is a zealous advocate for the client, and the attorney’s zeal should not be diminished by concern that an error in judgment will result in liability to an adversary. The interests of the defendants are protected, and the attorney is deterred from wrongful conduct, in other ways, such as by the actions for abuse of process or malicious prosecution and by disciplinary rules.<sup>89</sup>

Within the litigation context, the attorney’s role is succinctly defined and regulated. Ethical obligations, disciplinary rules, judicial rules, and tort law all operate together to shape the attorney’s role. The attorney is obligated to be an advocate for the client and officer of the court. He “owes the client loyalty, dispassionate judgment, and aggressive advocacy. . . . [He] is constrained by prohibitions against fraud to the adversary or the court, concealment or destruction of evidence, maintaining spurious claims or arguments, and other similarly egregious acts. Within those constraints, however, the duty to the client is primary of being exclusive.”<sup>90</sup>

The issue of attorney liability was clearly laid out in *Amond v. Brincefield*.<sup>91</sup> Plaintiff claimed that lawyers, operating in the role of debt collectors hold a “heightened duty to investigate” and cannot rely on their clients’ statements due to the FDCPA and attorney duties under Federal Rule of Civil Procedure 11.<sup>92</sup> The plaintiff further argued that “Rule 11 duty of reasonable inquiry should extend to any activity by a lawyer that constitutes debt collection under the FDCPA,

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87. *Friedman v. Dozorc*, 83 Mich. App. 429, 435 (1978) (citing *Sefi Fabricators, Inc. v. Tillim*, 360 N.Y.S. 2d 146 (1973)).

88. *Rosenberg v. Cyrowski*, 227 Mich. 508, 513 (1924); 1 EDWARD M. THORNTON, A TREATISE ON ATTORNEYS AT LAW § 295 (1914).

89. Jay M. Feinman, *Attorney Liability to Nonclients*, 31 TORT & INS. L.J. 735-52 (1996).

90. Feinman, *supra* note 89, at 752.

91. *Amond v. Brincefield, Harnett & Assoc., P.C.*, No. 97-2582, 1999 U.S. App. LEXIS 4815 (4th Cir. Mar. 22, 1999).

92. *Id.* at \*7.

thereby diminishing the ability of lawyer-debt collectors to rely on the representations of their clients.”<sup>93</sup>

However, as noted above, the Fourth Circuit rejected those claims and refused to create a heightened duty of investigation for lawyer debt-collectors through a combination of Rule 11 and the FDCPA.<sup>94</sup> As the court stated:

While a letter sent by an attorney after a lawsuit is filed arguably presupposes that the attorney-collector has put on a new hat and is now a litigator, not a collector, the Act still defines him as a collector, and the Supreme Court has confined [sic] the litigator to the standards of a collector. Filing a lawsuit does not insulate a lawyer from the restrictions of the Act, nor does it expose him to standards under the Act not applied to non-lawyer collectors.

Of course, Rule 11 (and equivalent state law sanction provisions) applies to lawyers when they act in their capacity as litigators (as opposed to debt collectors). Conduct by lawyers that violates the established norms of Rule 11 remains subject to sanction.<sup>95</sup>

Thus, if they are meaningfully involved, collection attorneys can rely on the information provided by their clients and issue dunning letters without additional investigation. So long as the attorneys have the reasonable good faith belief that the information provided by their clients is current and accurate, they do not violate the FDCPA when they issue dunning letters following their review of the data received from their clients, even if the attorneys have not had the opportunity to review their clients' entire file.

*C. Is the Review of Electronic Data Transmitted by a Client Sufficient to Allow a Meaningfully Involved Collection Attorney to Issue a Dunning Letter in Compliance with the FDCPA?*

The New York Civil Practice, Law and Rules defines “Electronic Means” as being “any means of transmissions of information between computers or other machines designed for the purpose of sending and receiving such transmissions and which allows the recipient to reproduce the information transmitted in a tangible medium of expression.”<sup>96</sup> The Federal Rules of Evidence (FRE) allow the use of electronic data as evidence of a form of writing or recording.<sup>97</sup>

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93. *Id.* at \*9.

94. *Id.*

95. *Id.* (citing *Jenkins v. Heintz*, 124 F.3d 824, 833 (7th Cir. 1997)).

96. JACK B. WEINSTEIN, N.Y. CIVIL PRACTICE LAW & RULES R 2103(f)(2) (2003).

97. 2 JAMES WM. MOORE, *Moore's Federal Practice: Federal Rules of Evidence* R 1001 (2003).

“‘Writings’ and ‘recordings’ consist of letters, words or numbers or their equivalent, set down by handwriting, typewriting, printing . . . magnetic impulse, mechanical or electronic recording, or other form of data compilation.”<sup>98</sup> The definition of “original” includes an accurate printout of any data stored in a computer.<sup>99</sup>

Rather than “reproducing the information transmitted in a tangible medium of expression,” namely printing statements of account and sending them to their attorneys for collection, financial institutions now deliver delinquent account information through electronic transmission. Groups of accounts numbering in the hundreds or thousands are regularly transmitted to large collection law firms. The transmissions are in the form of an electronic spreadsheet or other data file and contain the consumer’s personal information including name, address, telephone number and social security number, and account information such as the account number, the amount owed, the date of last payment and the date the alleged debt accrued. Consumers claim that an attorney’s reliance on electronically transmitted information is a *per se* violation of the FDCPA.

The consumer’s position, in addition to being archaic and lacking validity in light of the current developments in the law and business practices, has no basis in law. Commerce in the twenty-first century would be impossible without the use of electronic data. Financial institutions used to maintain their account information in large paper ledgers. The courts did the same with their dockets. Neither do so now. Computers and other electronic devices are used to maintain and disseminate information. Consumers use the internet and automated teller machines to access their financial records<sup>100</sup> and make purchases and payments.<sup>101</sup> Lawyers use PACER<sup>102</sup> and other commercial software products to access the courts. Federal and State Rules of Civil Procedure provide for electronic service and document filing.<sup>103</sup> Judges use computers in their courtrooms to access a variety of data providers including electronic information furnished by the parties before them.

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98. *Id.* § 1001.6.

99. *Id.* § 1001(3).

100. Privacy of Consumer Financial Information, 16 C.F.R. § 313.9(b)(iii) - (iv) (2003).

101. Electronic Funds Transfer Act, 15 U.S.C. § 1693 (2003).

102. Public Access to Court Electronic Records System, *available at* <http://pacer.psc.uscourts.gov/>.

103. FED. R. CIV. P. 5(b)(2)(D); E.D.N.Y. CIV. R. 5.2; N.Y. C.P.R., §§ 304 & 2103(b)(7). The State of New Jersey has established an electronic filing system called “Judiciary Electronic Filing/Imaging System” (JEFIS), which is *available at* <http://www.judiciary.state.nj.us/jefis/index.htm> (last visited June 4, 2003); A list of other jurisdictions using electronic filing can be found at the web-site of Verilaw, *available at* <http://www.verilaw.com>. (Last visited June 4, 2003).

In his testimony before the Federal Trade Commission, Alfred P. Carlton, Jr., president of the American Bar Association, stated:

Today, the Internet presents an exciting opportunity for creating new competition in distributing both physical and digital products, and in providing services. At the same time, the Internet may pose a threat to the public interest in other respects, by undermining sectors of the economy that serve the public efficiently and responsibly.

....

The delivery of legal resources in the online world represents an evolutionary change from the delivery of legal resources in the off-line world.

....

[W]e need to look at the use of the Internet as a resource permitting lawyers to interface with one another, as well as their clients. This too advances e-commerce and makes the practice of law more efficient, less expensive and, therefore, more widely available.<sup>104</sup>

The Committee on Professional Ethics of the New York State Bar Association recognized that the conversion and storage of paper documents to electronic data was commonplace.<sup>105</sup> The Committee ruled that as an ethical matter, attorneys may utilize electronic storage of such items as, retainer and compensation agreements, statements to clients showing disbursements of funds, and bills to clients.<sup>106</sup> Furthermore, it permitted the storage and use of such records by reliable electronic means.<sup>107</sup> To support its Opinion, the Committee noted "that the staff of the Securities and Exchange Commission ("SEC") has recently . . . concluded that storage on optical disks was acceptable to satisfy the records-retention requirements imposed upon investment advisers under SEC rules."<sup>108</sup>

The Committee also reviewed security and abuse issues. Recognizing the readily available mechanisms for transferring material from an unalterable format to a readily manipulable one, thus rendering the detection of alteration impossible without the inspection of the original disk, the Committee found that this avenue for fraud no more present with electronic records than already exists in the paper record

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104. Alfred P. Carlton, *Possible Anticompetitive Efforts to Restrict Competition on the Internet: Federal Trade Commission Public Workshop*, available at <http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/carlton.pdf>.

105. N.Y. St. B.A. Comm. on Prof'l Ethics, Opinion 680 (1996), available at 1996 WL 421805 [hereinafter Opinion 680].

106. *Id.* However, attorneys must keep the original hard copy records such items as: check-books, check stubs, and bank statements.

107. *Id.*

108. *Id.* (citing 1995 SEC NO-ACT. LEXIS 684 (Aug. 28, 1995)).

system; since in the paper system records can be altered via use of a photocopier or electronic scanner.<sup>109</sup>

Congress has clearly approved the use of and reliance on electronic data. It has subjected financial institutions to numerous statutes and regulations governing the use of consumer electronic data, including the data's integrity, security and maintenance.<sup>110</sup> Financial institutions are required to maintain and report accurate information.<sup>111</sup> If a mistake is made, the laws and regulations provide consumers with means to correct the mistake prior to the consumer's account being referred for collection. If an item on a billing statement is incorrect, a consumer has the right to dispute that item.<sup>112</sup> If an item on a credit report is incorrect, the consumer has the right to challenge that item and have it corrected.<sup>113</sup> If an electronic transfer is incorrect, it too may be challenged.<sup>114</sup> If an item is not disputed, the financial institution has the right to treat that item as being correct.

The Gramm-Leach-Bliley Act<sup>115</sup> (GLBA), through the enforcement procedures assigned to the Federal Trade Commission, protects the privacy of consumer non-public personal information (NPI) maintained by financial institutions. Financial institutions are required to "insure the security and a confidentiality of customer records and information;"<sup>116</sup> "protect against any anticipated threats or hazards to the security or integrity of such records;"<sup>117</sup> and "protect against un-

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109. *Id.* The Committee stated, "Paper copies retained as such are also susceptible of being intentionally altered, however, by the use of a photocopier - or in a more technologically sophisticated manner by transferring the paper document (even one that has been retained for years in that form) to a computer file by means of an electronic scanner, altering it, and then printing it back out onto paper before producing it in connection with a disciplinary proceeding. In short, the various different means of record storage do not by themselves appear to affect the potential for fraud in a material way." *Id.*

110. *See, e.g.*, Financial Recordkeeping, 12 U.S.C. § 1953 (2003) (allowing uninsured bank or financial institutions to retain or maintain records in an electronic or automated form); Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t (2003); Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6809 (2003); Home Mortgage Disclosure Act, 12 U.S.C. §§2801-10 (2003); Truth in Lending Act (TILA), 15 U.S.C. § 1601- 1667e (2003); *See generally*, Federal Reserve Board Regulations, at <http://www.federalreserve.gov/regulations/default.htm>.

111. Fair Credit Billing Act, 15 U.S.C. § 1666(a) (2003); Fair Credit Reporting Act, 15 U.S.C. § 1681(s)(2) (2003).

112. 15 U.S.C. § 1666.

113. 15 U.S.C. § 1666(a); 15 U.S.C. § 1681(i)(1)(A) (2003).

114. Electronic Funds Transfer Act, 15 U.S.C. §§ 1693f(a) (2003); Regulation E, 12 C.F.R. § 205.11 (2003).

115. 15 U.S.C. §§ 6801-6809 (2003).

116. 15 U.S.C. § 6801(b)(1); Standards for Safeguarding Customer Information, 16 C.F.R. § 314.1(a) (2003).

117. 15 U.S.C. § 6801(b)(2).

authorized access to or use of such records or information which could result in substantial harm or inconvenience to any customer.”<sup>118</sup>

Under the GLBA, “nonpublic personal information” “means personally identifiable financial information - (i) provided by a consumer to a financial institution; (ii) resulting from any transaction with the consumer or any service performed for the consumer; or (iii) otherwise obtained by the financial institution.”<sup>119</sup> Financial institutions are authorized to transmit this information “as necessary to affect, administer, or enforce the transaction.”<sup>120</sup> They may do so provided that:

the disclosure is required, or is a usual, appropriate, or acceptable method, to carry out the transaction or the product or service business of which the transaction is a part, and record or service or maintain the consumer’s account in the ordinary course of providing the financial service or financial product, or to administer or service benefits or claims relating to the transaction or the product or service business of which it is a part.<sup>121</sup>

The Fair Credit Reporting Act,<sup>122</sup> regulates the transmission and use of consumer data by consumer credit reporting agencies (CCRAS) such as, Equifax, Experian, and TransUnion. All data delivered by financial institutions to the CCRAS is submitted via disk, computer tape or electronic transmission. The reported data does not consist of a list of every transaction on a consumer’s account. It includes the current status of each account, essentially a summary of the consumer’s NPI.<sup>123</sup> The data is maintained by the CCRAS on their computers and is made available to their subscribers via the internet and on-line systems. There is no distinction made regarding the storage medium<sup>124</sup> and this data may be used in the collection process.<sup>125</sup> CCRAS are required “to maintain ‘reasonable procedures’ to avoid improper disclosures of consumer credit information.”<sup>126</sup>

The Health Insurance Portability and Accountability Act<sup>127</sup> (HIPAA) provides for the use and protection of consumers’ “Pro-

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118. 15 U.S.C. § 6801(b)(3).

119. 15 U.S.C. § 6809(4)(A).

120. 15 U.S.C. § 6809(7).

121. 15 U.S.C. § 6809(7)(A).

122. 15 U.S.C. §§ 1681-1681v (2003).

123. NPI is the information that financial institutions transmit to their attorneys when an account is referred for collection.

124. 15 U.S.C. § 1681a(g).

125. 15 U.S.C. § 1681b(a)(3)(A).

126. *TRW, Inc. v. Andrews*, 534 U.S. 19, 19 (2001) (citing 15 U.S.C. § 1681e(a)).

127. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996).

tected Health Information” (PHI) which is defined as being a subset of individually identifiable health information that is transmitted by electronic medium or transmitted in any other form of medium.<sup>128</sup> “Individually Identifiable Health Information” (IIHI) “is information that is a subset of health information, including demographic information collected from an individual” including information that relates to “the past, present, or future payment for the provision of health care to an individual; and [ ] identifies the individual; or . . . there is a reasonable basis to believe the information can be used to identify the individual.”<sup>129</sup> “Electronic Protected Health Information refers to protected health information that is created, received, maintained, or transmitted by or on behalf of the health care component of the covered entity.”<sup>130</sup>

The Department of Health and Human Services proposed that security standards would apply to all electronic maintenance or transmission of health information. “Electronic transmissions” would include transactions using all media, regardless of its form: Even “transmissions over the Internet (wide-open), extranet (using Internet technology to link a business with information only accessible to collaborating parties), leased lines, dial-up lines, and private networks would be included.”<sup>131</sup>

HIPAA allows the transmission of transaction information including payment and remittance advice.<sup>132</sup> For all practical purposes, the non-medical information included in the PHI and IIHI is the same information included in the NPI.

Another electronic data issue raised by consumers is that the initial transmission lacks sufficient information to allow collection attorneys to make decisions concerning the status of the individual accounts included in the transmission. Consumers demand that collection attorneys have the entire paper file in their hands prior to issuing the initial dunning letter. They claim that no independent decision regarding an account can be made absent the review of the entire paper file. The consumers are wrong.

The initial electronic data transmitted by financial institutions to their collection attorneys consist of summaries of all account transactions as of the transmission date for all included accounts. The transmission contains the same information reviewed by the financial

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128. 45 C.F.R. § 160.103 (2003).

129. *Id.*

130. 45 C.F.R. § 164.105(a)(2)(i)(D) (2003).

131. Health Insurance Reform: Security Standards, 68 Fed. Reg. 8334-01 (Feb. 20, 2003).

132. 42 U.S.C. § 1320d-2(a)(2)(E) (2003).

institution prior to referring accounts out for collection, and is the same information, which was formerly sent out in paper form. Financial institutions are not required to repeatedly print every transaction that took place throughout the history of the account on every statement of account. They only list the transactions that took place during the statement period. The initial electronic transmissions actually contain more information than those final statements because the statements mailed to consumers do not include the date of charge-off or the date the last payment was made unless those transactions took place during that statement period.

FRE Rule 1006 allows the use of summaries.<sup>133</sup> “Rule 1006 does not apply solely to documentary charts or summaries. It also permits witnesses to give summary testimony of their review of voluminous writings, recordings, or photographs.”<sup>134</sup> Summarized data has been admitted into evidence even though the data was summarized for litigation purposes.<sup>135</sup> Summary of payroll records was, itself, evidence, admitted in lieu of payroll records.<sup>136</sup> Courts have admitted summaries into evidence when the originals or duplicates of voluminous writings, recordings, or photographs are made available for examination or copying at a reasonable time or place.<sup>137</sup> Unless the underlying documents are provided when demanded, the matter cannot go forward.<sup>138</sup>

The initial dunning letter must contain a validation notice setting forth the consumer’s rights and providing the consumer with the opportunity to review information used to validate the debt.<sup>139</sup> If the consumer disputes the debt, the attorney must cease collection efforts

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133. MOORE’S FEDERAL RULES PAMPHLET, 2003, PART 2: FEDERAL RULES OF EVIDENCE, § 1006.5.

134. *Id.* (citing *United States v. Caballero*, 277 F.3d 1235, 1247 (10th Cir. 2002) (witness’ testimony summarizing voluminous business records was clearly permissible under Rule 1006)).

135. *AMPAT/Midwest, Inc. v. Ill. Tool Works, Inc.*, 896 F.2d 1035, 1045 (7th Cir. 1990).

136. *United States v. Weaver*, 281 F.3d 228, 232 (D.C. Cir. 2002).

137. MOORE *supra* note 155, § 1006.5 (citing *Air Safety v. Roman Catholic Archbishop*, 94 F.3d 1, 7-8 (1st Cir. 1996)).

138. 15 U.S.C. § 1692g (2003); 15 U.S.C. § 1692e(11) (2003); *See Swanson v. S. Or. Credit Serv., Inc.*, 869 F.2d 1222, 1225-1226 (9th Cir. 1988).

139. 15 U.S.C. § 1692g (2003). For example, the letter should state: This firm serves as a debt collector for our client. The purpose of this communication is to collect a debt and any information obtained will be used for that purpose. Unless you notify us within thirty (30) days after receiving this notice that you dispute the validity of the debt or any portion thereof, we will assume this debt to be valid. If you notify us in writing within thirty (30) days of receiving this notice, we will obtain and forward to you verification of the debt, or if the debt is founded upon a judgment, a copy of the judgment, and we will mail you a copy of such verification or judgment. If the original creditor is different from the creditor named above, then upon your written request within thirty (30) days of the receipt of this notice, we will provide you with the name and address of the original creditor if different from the current creditor).

until the validation is obtained and provided to the consumer.<sup>140</sup> This is still another chance for a consumer to challenge any mistake that has survived the billing process, credit reports and notices of electronic fund transfers. The FDCA validation notice requires only that validation be provided upon the consumer's request, and unlike the FRE,

[V]erification of a debt involves nothing more than the debt collector confirming in writing that the amount being demanded is what the creditor is claiming is owed; the debt collector is not required to keep detailed files of the alleged debt. Consistent with the legislative history, verification is only intended to eliminate the . . . problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid. . . There is no concomitant obligation to forward copies of bills or other detailed evidence of the debt.<sup>141</sup>

So long as the electronic transmission incorporates a current summary of each account, a collection attorney's review of electronically transmitted data should be treated no differently than a review of printed statements of account. The process of review is no different from reading a printed statement of account except that the same information, formerly spread out over a one or two page paper document, now appears in a row on an electronic spreadsheet. A collection attorney would be in no better position to make an independent decision concerning the validity of an alleged delinquency if the attorney was given a paper statement of account to review. If the information is incorrectly maintained the paper documents will contain the same mistakes as the transmitted files.

The law does not require a meaningfully involved collection attorney review an entire file before acting on it. It does not require the attorney to review paper documents. It does require that before acting, the attorney must have a reasonable good faith belief that the data submitted by the client is current and accurate. The form and sufficiency of that data is not defined. Financial institutions are permitted to use electronic data and are highly regulated in its use. A meaningfully involved collection attorney can reasonably rely in good faith on the electronic data supplied him by financial institutions, and in doing so, is in compliance with the FDCA.

Thus, the review of electronic data provided by a client prior to issuing a dunning letter is sufficient to satisfy the requirements of the FDCA, so long as the meaningfully involved collection attorney has

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140. Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097-02, at 50109 (Dec. 13, 1988).

141. *Chaudhry v. Gallerizzo*, 174 F.3d 394, 406 (4th Cir. 1998).

a reasonable good faith belief that the information provided is current and accurate.

#### IV. CONCLUSION

Collection attorneys actively engaged in the collection of their clients' accounts are meaningfully involved if evidence shows that they have actual authority to act on their clients' behalf and regularly do so, and that they have processes and procedures for the collection of debt in place under the control and supervision of attorneys. If they are meaningfully involved, collection attorneys can rely on and use electronic data transmitted to them by their clients. If they are meaningfully involved, collection attorneys are in compliance with the FDCPA when they issue dunning letters following the receipt and review of electronically transmitted information from their clients.