LIABILITY FOR FDCPA VIOLATIONS AND EXPOSURE TO STATE BAR DISCIPLINE IN CONSUMER DEBT COLLECTION PRACTICE IN 2011: RECENT DEVELOPMENTS

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CHAPTER 11

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I. INTRODUCTION

Well, what do you do when the essence of your MCLE paper topic is rendered moot by a 4 to 1 vote of the members of the State Bar of Texas? This paper tries to answer that question. Sort of. This paper originally was to be written about the revisions to the Texas Disciplinary Rules of Professional Conduct that were to go into effect after a referendum in early 2011. However, to the (possible) surprise of many (some?), that referendum (and hence, the revisions) was soundly defeated roughly 80% to 20% when voting closed on February 17, 2011. So, rather than write another paper solely about the existing Disciplinary Rules, I thought I'd look for something else to write about that might be a little fresher and maybe even a little interesting. I have decided to focus this paper on a specific, significant development affecting attorneys practicing in the area of consumer debt collection. I am referring, of course, to the very recent Ninth Circuit Court of Appeals opinion involving the Federal Fair Debt Collection Practices Act liability from the wording of requests for admission. But, as the title of the talk that goes with this paper is still "Collections Ethics Issues and the Disciplinary Rules," I will also discuss the interplay between conduct actionable under the FDCPA and our existing, recently-*un*changed, Disciplinary Rules of Professional Conduct. That is, this paper will explore areas of potential liability under the FDCPA for attorneys in litigation that also may result in disciplinary action against the attorney.

Texas consumer debt collection law for attorneys on both sides of the docket is governed by, among other things, the Federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. (the "FDCPA"), Texas Finance Code § 392.001 et seq. (the Texas Debt Collection Act), the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA), Tex. Bus & Comm. Code § 17.41 et seq., and, of course, the Texas Lawyers Creed and the Texas Disciplinary Rules of Professional Conduct.[1] A very recent Ninth Circuit Court of Appeals opinion demonstrates the breadth of that statute and the potential for liability on the part of a collection attorney doing fairly routine, volume consumer debt collection work within the context of a collection lawsuit.

II. *MCCOLLOUGH V. JOHNSON, RODENBERG & LAUINGER, LLC – INCREASED FDCPA LIABILITY EXPOSURE FOR ATTORNEYS.*

It has been clear since at least the Supreme Court's decision in *Heintz v. Jenkins*, 115 S.Ct. 1489, 1489 (1995) that the FDCPA's definition of "debt collector" includes lawyers who regularly collect debts through litigation. The FDCPA bars debt collectors from the use of "unfair or unconscionable means to collect or attempt to collect any debt . . .". 15 U.S.C. § 1692f(1). Section 1692e(2) prohibits the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt . . . ".

McCollough v. Johnson, Rodenberg & Lauinger, LLC, No. 09-35767, 2011 WL 746892 (9th Cir., March 4, 2011) addresses a relatively novel and little discussed issue: Whether requests for admission propounded by an attorney in the course of a consumer debt collection lawsuit, which contain false statements, are actionable under the FDCPA. *Id.* at *7-*9. The opinion has very important implications for lawyers representing creditors and debtors in consumer debt cases with respect to discovery practice and may result in increased FDCPA liability exposure for attorneys.[2]

A. *McCollough's* Fact Pattern

First, it is important to review the factual and procedural background of the case in some detail:

> Tim McCollough lives in Montana. He was, at some time in the past, a school custodian. *Id.* He owed about $3000 in credit card debt on an account originally owned by Chemical Bank. *Id.* at *1. Chemical Bank merged with Chase Manhattan Bank, and Mr. McCollough made his last payment on the account in 1999. Chase Bank charged off the account in 2000. *Id.* Mr. McCollough had had difficulty paying his bills after he suffered a brain injury at work. His wife had undergone surgery of some sort as well. *Id.* After the charge-off by Chase in 2000, Collect America, Ltd. ("Collect America") through its subsidiary CACV of Colorado, Ltd., a bad-debt purchaser, purchased the debt in 2001. So,

[1] V.T.C.A., Govt. Code T.2, subt. G App. A, Art. 10, § 9, Rules 1.01 et seq.

[2] Interestingly, one of the Judges on the three judge panel was former United States Supreme Court Justice, Sandra Day O'Connor, sitting by designation. The opinion, however, was written by Judge Sidney R. Thomas.

> CACV buys the debt, and the collection agency, Collect America, attempts collection. *Id.*
>
> In 2005, CACV, the debt purchaser, sued McCollough in state court in Montana for $3816.80 representing principal and interest. *Id.* McCollough filed a pro se answer, and therein stated the "statute of limitations is up." CACV dismissed the case two weeks later, and, importantly, documented service of the state-court complaint and McCollough's response in its electronic files. *Id.*

The matter, however, was not dead, though it probably should have been.

In 2006, the collection agency, Collect America, retained the entity who is now the appellant in the opinion, the law firm of Johnson, Rodenberg & Lauinger, LLC ("JRL"). The firm specializes in debt collection. Collect America retained the firm, of course, to pursue collection of McCollough's debt. Id. Charles Denby was the lawyer from JRL, a North Dakota firm, who handled their Montana lawsuits. In fact, from January 2007, through July 2008, the firm filed 2700 collection suits in Montana, averaging 5 a day, with a high of 40 in one day. *Id.* Eventually, in the federal trial of the later FDCPA lawsuit, a JRL lawyer testified that about 90% of those lawsuits resulted in default judgments. *Id.*

As is the norm, there was a written contract between Collect America and JRL. *Id.* The contract had a disclaimer that stated: "Collect America makes no warranty as to the accuracy or validity of data provided.' In addition, the contract expressly stated that JRL would be "responsible to determine [its] legal and ethical ability to collect these accounts." CACV, working with its parent, Collect America, sent electronic information to JRL about McCollough and the account. *Id.*

The law firm employed screening procedures on these collection accounts, and JRL flagged a statute of limitations problem with the McCollough file. *Id.* A JRL account manager, Grace Lauinger, wrote to CACV on January 4, 2007, mentioning the statute of limitations issue, and asking for any "instrument" which would extend the statute of limitations. *Id.* JRL, the next day, recorded in its electronic file the following: "* * * NO DEMAND HAS GONE OUT ON THIS FILE * * * THIS IS THE COLLECT AMERICA BATCH THAT WE ARE HAVING PROBLEMS W[ITH]." *Id.*

A few weeks later, on January 23 2007, CACV responded. *Id.* at *2. It wrote an email to JRL attorney Lisa Lauinger and titled it: "sol extended." *Id.* SOL is, of course, an acronym for "statute of limitations." In the email, CACV wrote that McCollough had made a $75 partial payment on the account on June 30, 2004. The partial payment, under Montana law, would have, according to the Ninth Circuit, extended the limitations period another five years, through 2009. *Id.* (citing *Colo. Nat'l Bank of Denver v. Story*, 862 P.2d 1120, 1122 (Mont. 1993)). CACV then inquired, "Do you need any info from me on this one?" The problem was that the information regarding partial payment was incorrect. *McCollough*, 2011 WL 746892 at *2.

McCollough had not, in fact, made a partial payment on June 30, 2004. *Id.* Instead, that $75 was a refund of the court costs to CACV that CACV had laid out in preparing to sue McCollough in 2003. *Id.* CACV had not followed through at that time, and the money was somehow reimbursed and the reimbursement recorded in the account pertaining to the McCollough file. *Id.* Lisa Lauinger, the JRL attorney, did not respond to CACV's offer to provide additional information about the supposed partial payment. *Id.* Instead, on April 17, 2007, a few months later, apparently having done little or no additional investigation, Charles Dendy, the North Dakota lawyer for JRL who handled the Montana docket, filed a collection lawsuit against McCollough in Montana state court. *Id.* The suit sought the account balance of $3816.80, plus $5,536.81 in interest, $481.68 in attorney's fees, and court costs of $120.00. *Id.*

Later, in the FDCPA trial, Dendy testified he had reviewed the electronic file before filing suit. The file included, *inter alia*, the following information: (1) that the account had been charged off by Chase in 2000; (2) a June 30, 2004 entry actually indicating that the $75 credit was the return of court costs (not, apparently, a partial payment by McCollough); (3) that CACV had previously sued McCollough; and (4) that McCollough had pled the statute of limitations as a defense in the first lawsuit. *Id.* Dendy also admitted in his later trial testimony in the FDCPA lawsuit that he made no inquiry into whether a partial payment of $75 had occurred on June 30, 2004. Instead, he testified that he had "relied upon the information that was provided by the client." *Id.*

McCollough filed a *pro se* answer to the state court lawsuit on June 13, 2007, again asserting the statute of limitations defense. *Id.* Mr. McCollough also wrote an impassioned plea as part of his answer reciting that he had suffered a head injury. The head injury quite obviously affected his spelling in the answer and he stated he was disabled. *Id.* He wrote that the harassment had made his pain from his brain injury worse and that he had incurred substantial medical bills as a result of having to deal with the harassment of what he claimed was the third lawsuit

by this creditor.[3] He concluded, "WHEN WILL IT STOP DO I HAVE TO SUE THEM SO I CAN LIVE QUIETLY IN PAIN. (sic)" *Id*. A month later, McCollough also telephoned attorney Dendy and left a message indicating he would be seeking summary judgment on the basis of the statute of limitations. *Id*.[4]

Attorney Dendy noted to the file on July 11, 2007 that "[w]e need to get what the client has for docs on hand." *Id*. at *3. The next day, account manager Grace Lauinger emailed Collect America asking for more documents. Collect America wrote back: "[b]ecause of the age of the account, we can't get any more statements (other than what has been sent to you)." Denby continued with the lawsuit. *Id*. And, on August 6, 2007, 3 ½ months into the state court lawsuit, and less than two months after Mr. McCollough had answered, CACV informed Grace Lauinger that, in fact, McCollough had NOT made a partial payment on June 30, 2004, but that that entry actually reflected "unused costs by another office, not payment." *Id*. Lauinger testified that she scanned the email into the electronic file, and that attorney Dendy had access to that file. Dendy later testified that he did not learn of this information until later, and continued to prosecute the suit. *Id*.

B. The Requests for Admission

In October 2007, attorney Dendy served McCollough with twenty-two requests for admission, including:

> 11. Prior to initiation of this suit, Defendant Tim M. McCollough has *never notified plaintiff* or any other party in interest in this action of any *disputes* regarding said Chase Manhattan Bank credit card.
>
> 14. There are no facts upon which Defendant Tim M. McCollough relies as a basis for *defense* in this action.
>
> 17. Every statement or allegation contained in plaintiff's Complaint is true and correct.
>
> 21. Defendant Tim M. McCollough *made a payment* on said Chase Manhattan Bank credit card on or about June 30, 2004 in the amount of $75.00.

Id. (emphasis added). Additionally, the requests DID NOT include an explanation under Montana Rule of Civil Procedure 36(a) that the requests would be admitted if McCollough did not respond within 30 days. *Id*.

Mr. McCollough retained counsel and timely denied all of the requests for admission. *Id*. Attorney Dendy issued a subpoena to Chase in November 2007 for all of the Chase records for the account, and Chase responded a month later that it had no records of the account. *Id*. Then, on December 7, 2007, Dendy sent a letter to CACV marked, "URGENT." It stated:

> An attorney has appeared in this action and has served discovery requests. . . .
>
> The attorney is one who is anti purchased (sic) debt and who attempts to run up costs in an attempt to secure a large cost award against plaintiff. . . .
>
> Please provide me with copies of everything you can get for documentation as soon as possible. We need to request everything available from the original creditor, not just the things that you normally request, etc. Application, statements, cardmember agreement, copies of payments, copies of correspondence. Please have the requests expedited if possible.

Id. CACV responded:

> For this file we are not able to get any more media. The retention rate is seven years from [charge-off], which was 10/2000. I have sent you all the docs we have.

Id. CACV also called JRL, and stated that the last payment McCollough had actually made on the account was prior to the 2000 charge off. *Id*. at *4. That afternoon, CACV told Dendy to dismiss the lawsuit "asap" because of the "SOL problem." *Id*. JRL moved for dismissal with prejudice that afternoon in state court and the state court dismissed the action. *Id*. What happened next?

C. The FDCPA Lawsuit

McCollough and his attorney sued JRL in federal district court alleging violations of the FDCPA, along with state law claims. *Id*. The parties filed cross-motions for summary judgment, and the district court found the following facts to have been established:

[3] The Ninth Circuit opinion only appears to discuss two state court lawsuits against McCollough prior to his filing of the FDCPA suit in federal court.

[4] It would appear that McCollough did not immediately file his summary judgment motion. Rather, as is discussed below, JRL moved to dismiss once an attorney appeared for Mr. McCollough. *Id*. at *4

> (1) On April 17, 2007, JRL filed a time-barred lawsuit against McCollough.
>
> (2) By August 6, 2007, JRL had information from its client demonstrating that the lawsuit was time-barred.
>
> (3) JRL prosecuted the time-barred lawsuit against McCollough until December 7, 2007.

The district court granted McCollough's partial summary judgment motion as to liability on his FDCPA claims. *Id*.

Thereafter, the remaining elements of the FDCPA claim and the remaining state-law claims were tried to a jury in a three-day trial. *Id*. The trial court allowed two lay witnesses to testify about their experiences being sued by JRL. *Id*. Further, a consumer law attorney with Montana Legal Services, Michael Eakin, testified about the rapid growth of debt-collection lawsuits in Montana and about JRL's role in that trend. *Id*. He also testified that a "vast majority" of JRL's suits against debtors resulted in default judgments because "JRL tries its cases without consideration for the *pro se* status of the majority of its debtors. *Id*. Another Montana collection lawyer testified about the importance of pre-suit investigation. *Id*. He testified that it was JRL's "factory" approach of "mass producing default judgments," rather than any mistake, that caused JRL to continue to pursue the time-barred debt and seek unlawful attorney's fees against McCollough. *Id*.

D. Bona Fide Error Defense

I want to pause here to discuss the purported relevance of this testimony. An affirmative defense to liability under the FDCPA is "the bona fide error defense." 15 U.S.C. § 1692k(c). Under that defense, a debt collector may not be held liable in any action brought under the FDCPA if it proves, by a preponderance of the evidence, that the violation was caused by a

> bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

To qualify for this defense, the debt collector must show that (1) it violated the FDCPA unintentionally; (2) the violation resulted from a bona fide error; and (3) it maintained procedures reasonably adapted to avoid the violation. *McCollough*, 2011 WL 746892 at *5; *Reichert v. Nat'l Credit Sys., Inc.*, 531 F.3d 1002, 1005 (9th Cir. 2008). Thus, it appears, at least to this author, and most likely the jury at the trial of the FDCPA lawsuit, that Mr. McCollough had these attorneys testify on his behalf in order to overcome this defense; that is, to show that this was no mistake, and that JRL's entire mass-production-style approach was a systemic failure that inevitably led to this result. And, that no procedures were in place to avoid the violation – indeed quite the opposite was true.

OK, back to the opinion. The jury returned a verdict for McCollough on all remaining claims and awarded him the $1,000 in statutory maximum for violations of the FDCPA; $250,000.00 for emotional distress and $60,000 in punitive damages. *McCollough*, 2011 WL 746892 at *4. The district court entered judgment, denied JRL's post-judgment motions, and JRL appealed to the Ninth Circuit. *Id*. The Ninth Circuit affirmed. Id.

E. The Ninth Circuit's Holdings

The Ninth Circuit first stated that the trial court affirmed the trial court's summary judgment on McCollough's FDCPA claims against JRL. *Id*. The Ninth Circuit noted that the FDCPA prohibits debt collectors from engaging in various abusive and unfair practices. *Id*. (citing *Heintz v. Jenkins*, 115 S.Ct. 1489, 1489 (1995)). The statute was enacted to prevent abusive debt collection practices, to ensure that debt collectors who follow the law are not at a competitive disadvantage with those who do not, and to promote consistent state action to protect consumers. *McCollough*, 2011 WL 746892 at * 4 (citing 15 U.S.C. § 1692a(6); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 130 S.Ct. 1605, 1608-09 (2010)). The statute applies to lawyers who regularly collect debts through litigation. *Heintz*, 115 S.Ct. at 1489.

The Ninth Circuit court also noted that the FDCPA is a strict liability statute, but that it provides and exception to liability for those debt collectors who satisfy a "narrow" bona fide error defense. *McCullough*, 2011 WL 746892 at *5 (citing *Reichert*, 531 F.3d at 1005). The defense is discussed herein, *supra*.

The court concluded that the district court was correct in ruling that JRL's bona fide error defense failed as a matter of law. *McCullough*, 2011 WL 746892 at *5.

The law firm, JRL, argued that it had an adequate system in place, as shown by the fact that it had a mechanism in place to flag the statute of limitations issue. *Id*. But, the court noted that such procedures must be "reasonably adapted" to avoid the specific error at issue. *Id*.; *Reichert*, 531 F.3d at 1006; *Johnson v. Riddle*, 443 F.3d 723, 729 (10th Cir. 2006). The Ninth Circuit pointed out that JRL's error in this case was not its failure to catch time-barred cases--

they had. *McCullough*, 2011 WL 746892 at *5. Rather, the error by JRL that was not accounted for by a "system" was that JRL had relied on the client's representation about the June 30, 2004 payment, and had overlooked or ignored contrary information in its own file. *Id.* Thus, the court noted, JRL presented NO evidence of a procedure designed to avoid the specific problem at issue here that led to the filing and maintenance of a time-barred suit against the debtor. *Id*. (comparing the present case with *Jenkins v. Heintz*, 124 F.3d 824, 834 (7th Cir. 1997) in which debt collectors maintained extensive systems and elaborate procedures to avoid collecting unauthorized charges, and insisting that their clients verify under oath that each of the charges was true and correct).

JRL argued that the representation by its client, CACV, about the June 30, 2004 credit created a fact issue on its bona fide error defense, and that therefore the trial court had erred in granting partial summary judgment for McCollough. *McCollough*, 2011 WL 746892 at *5. The court disagreed, stating that unwarranted reliance on a client is "not a procedure to avoid error." Moreover, it does not protect a debt collector whose reliance on a creditor's representation is unreasonable. *Id*. (citing *Reichert*, 531 F.3d at 1006 and *Clark v. Capital Credit & Collection Serv., Inc.*, 460 F.3d 1162, 1177 (9th Cir. 2006)).

The court went on to reference other federal appellate and district court opinions for the proposition that an example of a reasonable preventive measure would be an agreement with the creditor client that the debts it refers for collection are current. McCollough, 2011 WL 746892 at *5 (citing *Turner v. J.V.D.B & Assocs., Inc.*, 330 F.3d 991, 996 (7th Cir. 2003); and on remand, *Turner v. J.V.D.B. & Assocs., Inc.*, 318 F. Supp.2d 681, 686 (N.D. Ill. 2004)).

Here, by contrast, the court noted, the contract between CACV and JRL expressly DISCLAIMED the accuracy or validity of the data provided. *McCollough*, 2011 WL 746892 at *6. The agreement also instructed JRL that it was responsible to determine its legal and ethical ability to collect the account. *Id*. Further, the electronic file already in JRL's possession confirmed that rather than constituting a payment on the account, the June 30, 2004 credit was the return of unused court costs on the account. *Id*. And, the electronic file made plain that McCollough had asserted a statute of limitations defense in the 2005 lawsuit over the same debt. Finally, McCollough had informed JRL that the debt was time-barred as well in both his answer and a phone message. *Id*. For these reasons, the court concluded, the district court had properly found that JRL's reliance on its client was unreasonable as a matter of law. *Id*.[5] Thus, the court concluded, the district court did not err in granting summary judgment on JRL's bona fide error defense. *McCollough*, 2011 WL 746892 at *6.

The court also concluded that the trial court had not erred in granting summary judgment in favor of McCollough on his affirmative claim that JRL violated the FDCPA by seeking attorney's fees in its state lawsuit. *Id*. FDCPA section 1692f(10) prohibits the use of "unfair or unconscionable means to collect or attempt to collect any debt" including "[t]he collection of any amount (including any interest, fee, charge, or expense . . .) unless such amount is expressly authorized by the agreement creating the debt, or permitted by law." (emphasis added). *McCollough*, 2011 WL 746892 at*6; *see also*, *Reichert*, 531 F.3d at 1005-007 (finding a violation of § 1692f(1) arising out of debt collector's imposition of unlawful charge for attorney's fees).

The court noted that section 1692e(2) prohibits the use of

> any false, deceptive, or misleading representation or means in connection with the collection of any debt, including [t]he false representation of . . . (A) the character, amount or legal status of any debt; or (B) any . . . compensation which may be lawfully received by any debt collector for the collection of a debt.

McCollough, 2011 WL 746892 at *6 (internal quotation marks omitted). Thus, in *Clark*, 460 F.3d at 1174-77, the court found a possible violation of § 1692e(2) arising from a misstatement of an account balance. Likewise, in *Foster v. DBS Collection Agency*, 463 F. Supp.2d 783, 802 (S.D. Ohio 2006) and *Strange v. Wexler*, 796 F. Supp. 1117, 1118 (N.D. Ill. 1992) the courts found that debt collectors violated section 1692e(2) by seeking attorney's fees not permitted by state law.

JRL made two arguments in support of its contention that the trial court erred in granting

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[5] Comparing *Hyman v. Tate*, 362 F.3d 965, 967-68 (7th Cir. 2004), which found reliance on the client reasonable where the debt collector and the client had an understanding that the client would not forward accounts in bankruptcy; error occurred in a tiny percentage of cases; and the debt collector immediately ceased collection efforts upon notice from the debtor of the mistake); *see also*, *Smith v. Transworld Sys., Inc.*, 953 F.2d 1025, 1032 (6th Cir. 1992) (concluding that the FDCPA does not require an independent investigation of the debt referred for collection where, for example, the debt collector's referral form filled out by the client included specific instructions to claim only amounts "legally due and owing").

McCollough summary judgment on his contention that JRL's attorney fee claim violated the FDCPA. *Id.* at *7. First, JRL cited *Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324, 333 (6th Cir. 2006) for the proposition that no FDCPA violation occurs when a creditor files a valid debt collection action in court without already having in its possession adequate proof of its claim. But the court in *McCollough* clarified that the issue in the present case was not that JRL had filed suit without proof of entitlement to attorney's fees. *Id.* at *7. Rather, the issue was that at the *time of summary judgment* in the federal district court, JRL could adduce no summary judgment proof establishing entitlement to collect those fees, and thus summary judgment was proper. *Id.*

Next, JRL argued that summary judgment should not have been granted as to the entitlement to fees because a genuine issue of material fact existed over whether JRL had a contractual right to the fees under the general cardmember agreement that existed between Chase and its account holders. *Id.* Ultimately, though, the cardmember agreement adduced by JRL at the trial was excluded as evidence because it was not a credit card agreement purportedly belonging to McCollough's account. *Id.*[6]

JRL never could get ahold of the cardmember agreement for McCollough's account in particular, and never, therefore, adduced it as summary judgment evidence. *Id.* Interestingly, the court in this case held that despite reference to evidence about "*all* cardmember agreements" JRL adduced NO evidence of an express authorization of its fee request from McCollough as required by section 1692f(1). *Id.* (emphasis in original). Moreover, the court held, "the presentation of generic evidence that all credit cards contain attorney's fees provisions was insufficient to create a genuine issue of material fact for the jury." *Id.*[7] The court concluded that the district court had properly granted summary judgment for McCollough on the claim that the attorney's fee request was not authorized by agreement or otherwise, and thus violated the FDCPA. *Id.*

F. The Requests Violated the FDCPA

One of the most remarkable parts of this opinion is that the court held that the requests for admission listed hereinabove violated the FDCPA as a matter of law. *Id.* At the outset, JRL argued that the FDCPA should not be read to cover discovery procedures like requests for admission at all. *Id.* JRL conceded that the FDCPA covers both the filing of complaints as well as the service of settlement correspondence during the course of litigation. *Id.* (citing *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1031-32 (9th Cir. 2010); and *Heintz*, 115 S.Ct. at 1489).

G. Precedent Supports Conclusion that Discovery Requests May Violate FDCPA

The court stated that precedent supports no such distinction (between complaints and letters on the one hand and discovery on the other), and that the FDCPA "applies to the litigating activities of lawyers." *McCollough*, 2011 WL 746892 at *7 (quoting *Heintz*, 115 S.Ct at 1489). *Heintz* expressly stated that the activities of lawyers who regularly collect debts are covered by the FDCPA. *Heintz*, 115 S.Ct at 1489. Though an earlier version of the statute had exempted lawyers, Congress had since repealed that exemption. *Id.* at 1491. Moreover, current exceptions to the definition of "debt collectors" do not cover attorneys. *McCollough*, 2011 WL 746892 at *7. Further, the court noted that JRL's own requests for admission stated on the bottom of the page, "[t]his is an attempt to collect a debt." *Id.* at *7, n.3.

The Court stated that it had previously held that the FDCPA applies to attorneys engaged in "purely legal activities" and thus covered the filing of an application for writ of garnishment. *Id.* (citing *Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507, 1511-12 (9th Cir. 1994)). Likewise, in *Donohue*, a post-*Heintz* opinion, the Ninth Circuit held that the FDCPA applies to service upon a debtor of a complaint to facilitate debt-collection efforts. *Donohue*, 592 F.3d at 1031-32. The court in *Donohue* reasoned that to limit the litigation activities that may form the basis of FDCPA liability to exclude complaints (or Texas original petitions for the sake of our discussion in this paper) would require a "nonsensical narrowing of the common understanding of the term "litigation." *Donohue*, 592 F.3d at 1032 (rejecting a distinction between "lawyers acting in the capacity of debt collectors and those litigating").

The *McCollough* court went on to conclude that there is no "principled distinction to be drawn between these types of litigation activities and written discovery"). *Id.* at *8. *See also, Sayyed v. Wolpoff & Abramson,* 485 F.3d 226, 228, 230-32 (4th Cir. 2007) (holding that the FDCPA applies to allegedly erroneous statements made by the defendant law firm in interrogatories and a summary judgment motion during the course of a state court collection lawsuit).

Sayyed is the only other case the author could find that discussed discovery requests as potentially

[6] In a footnote, the Ninth Circuit points out that the fees were not available under Montana law. *Id.* at *7, n.2.

[7] Quite often in the author's experience as a trial judge, a credit card company will seek to prove its case through the use of an exemplar or a standard credit card agreement. Attorneys specializing in the defense of such cases will routinely challenge this evidence, often successfully.

actionable under the FDCPA. Nevertheless, *Sayyed* is somewhat different in that the issue there was not the content of the actual discovery questions or requests, but rather had to do with incorrect or missing instructions surrounding the actual discovery questions. In *Sayyed*, the debtor alleged that the interrogatories failed to state that they were a communication from a debt collector, in violation of 15 U.S.C. § 1692e(11). *Id*. at 228. Further, the debtor claimed that the interrogatories violated the section 1692e(10) prohibition against false representations and section 1692f's prohibition against unfair or unconscionable collection attempts via three false statements: (1) that the trial date for the state court lawsuit was June 11, 2004; (2) that the debtor had to state his grounds of refusal to answer the interrogatories under oath; and (3) that the state court could enter a default judgment against the debtor if he did not mail answers to the debt collection attorneys within thirty days after the date of service. *Id*. at 228-29.

In *Sayyed*, the debtor alleged that the attorneys' motion for summary judgment violated the FDCPA in that its false statement of the amount of the debt violated section 1692e(2)(A), and its statement that the debtor was liable for attorney's fees of fifteen percent of the principal balance violated section 1692e(2)(B) as a false representation and section 1692f(1) as the collection of an amount not permitted by law or expressly authorized by the agreement creating the debt. *Id*. at 229.

All of the Circuits that have considered this issue, except for the Eleventh Circuit, have accepted that the FDCPA applies to the litigation activities of attorneys who qualify as debt collectors under the statute. *See*, *e.g.*, *Goldman v. Cohen*, 445 F.3d 152, 155 (2nd Cir.2006) (holding that a complaint initiating a lawsuit in state court seeking recovery of back rent and attorneys' fees was an "initial communication" within the meaning of § 1692g(a)). The *Goldman* court noted that in reaching that conclusion, it was joining at least one sister circuit. *Id*. (citing *Thomas v. Law Firm of Simpson & Cybak*, 392 F.3d 914 (7th Cir.2004) (en banc), *rev'g*, 354 F.3d 696 (7th Cir.2004)). In *Thomas*, the Seventh Circuit held, *en banc*, that a debt collector's initiation of a lawsuit constitutes an "initial communication" for purposes of the FDCPA. *See also*, *Sprouse v. City Credits Co.*, 126 F.Supp.2d 1083, 1089 n. 8 (S.D.Ohio 2000) (holding that "[a] lawsuit initiated to collect debts is certainly included within th[e] definition [of 'communication' in 15 U.S.C. § 1692a(2)]"). *But see*, *Vega v. McKay*, 351 F.3d 1334 (11th Cir.2003) (holding that initiation of a lawsuit does not constitute an "initial communication").

See also, *Todd v. Weltman, Weinberg & Reis Co., L.P.A.*, 434 F.3d 432, 446 (6th Cir.2006) (finding a party's false affidavit actionable under the FDCPA); *Piper v. Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 232-33 (3d Cir.2005) (finding law firm's letters on behalf of municipality to collect water bill to be a "communication" actionable under the FDCPA despite the fact that a lien attached to debtor's property to secure payment). The court in *Piper* also noted in *dicta* that if a communication meets the definition of a debt collector attempting to collect a debt, it does not matter if it came in the context of litigation. *Id*. at 234.

Similarly, in *Romea v. Heiberger & Associates*, 163 F.3d 111, 116 (2d Cir.1998), the court found that the fact that challenged communications came in the context of enforcing a lien to be irrelevant. The debt collection attorney defendant had sent a notice required by a summary proceeding established by New York law to recover possession of real property from a tenant who owed back rent. *Id*. at 113-14. The notice provided in part:

> Please take notice that you are hereby required to pay to 442 3rd Ave. Realty LLC landlord of [442 Third Avenue], the sum of $2,800.00 for rent of the premises[.] ...
>
> You are required to pay within three days from the day of service of this notice, or to give up possession of the premises to the landlord. If you fail to pay or to give up the premises, the landlord will commence summary proceedings against you to recover possession of the premises.

Id. at 114. The defendant in *Romea* argued that because its three-day notice was sent in connection with a possessory *in rem* action under New York law, it did not constitute a "communication to collect a debt" within the meaning of the FDCPA. *Id*. at 116. The Second Circuit rejected this argument *Id*. at 113, 116 (holding that despite the fact that the letter was a prerequisite for a summary proceeding under New York law, it was also undeniably a "communication" under section 1692g(a) and therefore must comply with the FDCPA). *See also*, *Thomas v. Law Firm of Simpson & Cybak*, 392 F.3d 914, 917 (7th Cir.2004) (en banc) (superseded by statute as to its discussion of "formal pleadings" but holding that service of summons & complaint was initial communication); *Johnson v. Riddle*, 305 F.3d 1107, 1117 (10th Cir.2002) (holding that a suit for dishonored check fee was not permitted by law, and thus actionable under FDCPA); and *Addison v. Braud*, 105 F.3d 223, 224 n.

1 (5th Cir.1997) (finding FDCPA liability for filing suit in court with no jurisdiction).

A recent Texas case is also instructive. In *Eads v. Wulpoff & Abramson, LLP*, 538 F. Supp. 2d 981, 986 & n.5 (W.D.Tex 2008), the Fifth Circuit found that plaintiff stated a claim under section 1692f(1) of the FDCPA and the Texas Debt Collection Act (and thus the Texas DTPA) when the defendant law firm sought $225 more than the amount of the underlying arbitration award. In *Eads*, there was no indication that the attorney had authority to collect any of the costs associated with pursuing the arbitration award, including filing fees. *Id*. at 986. Nor had the attorney (for some unexplained reason) invoked the good faith defense or otherwise indicated that the amount of the debt was stated in error. *Id*. at 986. Thus, the claim was legally cognizable under both the federal and state acts. *Id*. at 986-87 & n. 5.

So, while several federal circuits have found that ordinary and routine litigation activities of attorneys may be actionable under the FDCPA, *McCollough* is nevertheless significant in that is the first case this author could find to squarely discuss the actual wording of discovery requests themselves as forming the basis for potential liability under the FDCPA. Moreover, this same conduct would likely also be actionable under the Texas Debt Collection Act. TEX. FIN. CODE Ch. 392 et seq.

H. Policy Basis for Treating Discovery Requests Differently under the FDCPA?

Query: Why, as a policy matter, might the wording of discovery requests be treated differently than the facts discussed in the above-referenced cases? JRL, the defendant in *McCollough*, made some of these policy arguments which were addressed by the Ninth Circuit as well.

JRL asserted that the trial court's ruling that discovery procedures were covered by the FDCPA would hinder an attorney's ability to litigate cases. *McCollough*, 2011 WL 746892 at *8. It argued, as well, that state court rules of civil procedure govern discovery and if the discovery complies with the rules, it ought not be actionable under the FDCPA. *Id*. It seems that this is an important distinction from the *Sayyed* case. In *Sayyed*, the issue involved, at least to some degree, the failure of the collection attorney to include FDCPA language in the discovery requests themselves. *Sayyed*, 485 F.3d 226, 228-29. The *Sayyed* case did not also go on to analyze the wording of the interrogatories themselves unlike the *McCollough* court's analysis of the requests for admission. Thus, whereas in *McCollough*, the rules of civil procedure were more squarely at issue than in *Sayyed*, the *McCollough* court nevertheless found that the FDCPA controlled the attorney's conduct in propounding these specific discovery requests. Indeed, the Ninth Circuit rejected this litigation-immunity argument in *McCollough*, noting that Congress enacted the FDCPA

> expressly because prior laws for redressing abusive, deceptive, and unfair debt collection practices were inadequate to protect consumers.

Id. (quoting 15 U.S.C. § 1692(a), (b), internal quotations omitted).

Further, the Ninth Circuit held, even more succinctly, the statute preempts state law where the two are not consistent. *Id*. at *8. That is, the Ninth Circuit saw the FDCPA as controlling over such things as state civil procedural rules where the two differ. In short, given the requirement that the Court apply clear statutory language as written, the Ninth Circuit concluded that there is no particular policy reason not to apply the FDCPA to the service of false requests for admission. *Id*. (noting that, in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S.Ct. 1605, 1622 (2010), the Supreme Court found it "unremarkable that the FDCPA imposes some constraints on a lawyer's advocacy on behalf of a client").[8]

I. If the Requests are Covered, Do They Actually Violate the FDCPA?

Having concluded that the FDCPA covers the requests for admission, the Ninth Circuit then examined the requests to see if they actually violated the FDCPA. *McCollough*, 2011 WL 746892 at *9. The court pointed out that the FDCPA prohibits a debt collector from using either unfair or unconscionable means to collect any debt. *Id*. (citing 15 U.S.C. § 1692f)). Further, it prohibits the use of any false, deceptive, or misleading means in connection with the collection of any debt. *Id*. (citing 15 U.S.C. § 1692e)). The court also noted that the FDCPA employs an objective, "least sophisticated debtor" standard. *Id*. (citing *Clark*, 460 F.3d at 1171). This ensures that "all consumers, the gullible as well as the shrewd the ignorant, the unthinking, and the credulous" are protected. *McCollough*, 2011 WL 746892 at *9; *Clark*, 460 F.3d at 1171; *Clomon v. Jackson*, 988 F.2d 1314, 1318-19 (2d Cir. 1993). Finally, the court discussed the fact that the FDCPA

[8] In *Jerman*, the Supreme Court wrote, "an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct." *Jerman*, 130 S.Ct at 1622 (quoting *Nix v. Whiteside*, 106 S.C.t 988, 995 (1986) internal quotations omitted)

imposes strict liability on creditors, including liability for "violations that are not knowing or intentional." *McCollough*, 2011 WL 746892 at *9 (quoting *Reichert*, 531 F.3d at 1005).

After discussing the standard under the FCDPA, the Ninth Circuit pointed out that the requests for admission did not include an explanation under the Montana state rules of civil procedure that the requests would be deemed admitted if McCollough did not respond within 30 days. *Id.* Keep in mind that in this case, McCollough did, in fact, respond to the requests. *Id.* at *3.[9] At the time they were served, however, the evidence was that McCollough was *pro se*. *Id.* at *9. The court concluded that the debt collection attorney's service of requests for admission containing false information upon a *pro se* defendant without an explanation that they would be deemed admitted if not timely answered "constitutes 'unfair or unconscionable' or 'false, deceptive, or misleading' means to collect a debt" as a matter of law. *Id.* Because the admissions served on McCollough effectively requested that he admit the whole case against him and concede all defenses (and the fact that he actually had a good defense-limitations- seems to weigh heavily on the court's decision here), without telling him that after thirty days they would be "deemed" against him, the Ninth Circuit concluded that the trial court properly awarded summary judgment against JRL as to liability under the FDCPA. *Id.*

Thus, it may be that Texas consumer debt collection law firms and attorneys are entering a somewhat new world in which liability under federal and state fair debt collection laws may exist where it may not have previously been found. Attorneys need to be wary of not only including statutory wording in letters and litigation filings, but of the falseness of things that are not necessarily even affirmative representations. Now, even asking questions that suggest an answer that is false may form the basis of liability. A request for admission, and for that matter, an interrogatory, that suggests the debtor has no affirmative defenses, or that the debtor has not previously denied liability, may be actionable under the FDCPA, and perhaps under the TDCA and the DTPA as well. And remember, as to the FDCPA and TDCA, absent proof of the elements of a strict bona fide error defense, the collection attorney's state of mind has no bearing on that liability.

III. REPERCUSSIONS OF SIMILAR LITIGATION CONDUCT BY TEXAS DEBT COLLECTION LAWYERS UNDER TEXAS LAW.

So, there is clear indication from several federal circuits that attorneys' routine litigation conduct can subject them to liability under the FDCPA, and under state laws as well. This paper will now discuss the implications for similar litigation conduct by attorneys under the Texas Disciplinary Rules of Professional Conduct. That is, what if the JLR lawyers had done what they did in Texas and the State Bar got wind of it?

In *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S.Ct. 1605 (2010), the United States Supreme Court, perhaps unwittingly, provided an excellent segway for this paper:

> To the extent the FDCPA imposes some constraints on a lawyer's advocacy on behalf of a client, it is hardly unique in our law. "[A]n attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct." *Nix v. Whiteside,* 475 U.S. 157, 168, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986). Lawyers face sanctions, among other things, for suits presented "for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." FED. RULES CIV. PROC. 11(b), (c). Model rules of professional conduct adopted by many States impose outer bounds on an attorney's pursuit of a client's interests. See, *e.g.,* ABA Model Rules of Professional Conduct 3.1 (2009) (requiring nonfrivolous basis in law and fact for claims asserted); 4.1 (truthfulness to third parties). In some circumstances, lawyers may face personal liability for conduct undertaken during representation of a client. See, *e.g., Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N. A.,* 511 U.S. 164, 191, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994) ("Any person or entity, including a lawyer, ... who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under [Securities and Exchange Commission Rule] 10b-5").

Jerman, 130 S.Ct. at 1622 (emphasis added).

[9] And there was no suggestion in the opinion that the responses were untimely filed by McCollough.

A. The Disciplinary Rules as They Pertain to Attorney Conduct Towards Third Parties

The Texas Lawyers Creed and the Texas Disciplinary Rules of Professional Conduct[10] (hereinafter "TDRPC" or "Disciplinary Rules") guide and regulate the conduct of an attorney practicing collection law in several respects. In the introduction to the Disciplinary Rules, the section titled PREAMBLE: A LAWYER'S RESPONSIBILITIES (hereinafter "Preamble"), the rules state that "a lawyer should zealously pursue clients' interests within the bounds of the law."[11] In another section of the Preamble it states that "[a] lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others."[12] Of course, these ideas are central to the FDCPA as well as Texas Finance Code Chapter 392 et seq. (the "Texas Debt Collection Act").

Section III of the Disciplinary Rules is entitled "Advocate." Rule 3.01, titled "Meritorious Claims and Contentions," mandates that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous."[13] Rule 3.02, titled "Minimizing the Burdens and Delays of Litigation," bars an attorney from taking "a position [in litigation] that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter."[14] Rule 3.03, titled "Candor Toward the Tribunal" prohibits an attorney in litigation from "offer[ing] or us[ing] evidence that the lawyer knows to be false."[15] Rule 3.04 is titled "Fairness in Adjudicatory Proceedings." That Rule prohibits the falsification of evidence by either the attorney directly, or by counseling or assisting a witness to testify falsely.[16]

Section IV of the Disciplinary Rules is entitled "Non-Client Relationships." Rule 4.01 requires that an attorney *not* make false statements of material fact or law to third persons,[17] and that the attorney *not* fail to disclose a material fact to third persons when "necessary to avoid . . . a fraudulent act perpetrated by a client."[18] Stated affirmatively, the attorney is required to make truthful statements of material fact to third persons (when the attorney is making representations) and the attorney is required to disclose material facts when necessary to avoid enabling a fraudulent act perpetrated by a client.

Lawyers are also prohibited from using means "that have no substantial purpose other than to embarrass, delay, or burden a third person" and from using "methods of obtaining evidence that violate the legal rights of such a person" by Rule 4.04, titled "Respect for Rights of Third Persons."[19] Likewise, lawyers may not, under the Texas Disciplinary Rules, "present, participate in presenting, or threaten to present . . . criminal or disciplinary charges *solely* to gain an advantage in a civil matter."[20]

Chapter VIII is entitled "Maintaining the Integrity of the Profession." Rule 8.04 bars a lawyer from violating the Disciplinary Rules or knowingly assisting another to do so;[21] from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation;"[22] from stating or implying that the attorney can improperly influence a government agency or official;[23] or from "violat[ing] any other laws of this state relating to the professional conduct of lawyers and to the practice of law."[24]

Despite the foregoing, however, the Preamble to the Disciplinary Rules specifies that:

> [t]hese rules do not undertake to define standards of civil liability of lawyers for professional conduct. Violation of a Rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached. Likewise, these rules are not designed to be standards for procedural decisions. . . . The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the

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[10] *See*, note 1, *supra*.

[11] *Id*. at Preamble, ¶ 3.

[12] *Id*. at Preamble, ¶ 4.

[13] *Id*. at Rule 3.01.

[14] *Id*. at Rule 3.02.

[15] *Id*. at Rule 3.03(a)(5). Comment 5 to Rule 3.03 makes clear that whatever the source of the false evidence, "the lawyer must refuse to offer it, regardless of the client's wishes." Further, Comment 15 to Rule 3.03 allows a lawyer to "refuse to offer evidence that the lawyer reasonably believes is untrustworthy, even if the lawyer does not know that the evidence is false." However, the lawyers duties under Rule 3.03(a)(5) are not triggered by the circumstance described in the previous sentence. *See*, Rule 3.03, Comment 15.

[16] *Id*. at Rule 3.04(b).

[17] *Id*. at Rule 4.01(a).

[18] *Id*. at Rule 4.01(b).

[19] *Id*. at Rule 4.04(a).

[20] *Id*. at Rule 4.04(b)(1).

[21] *Id*. at Rule 8.04(a)(1).

[22] *Id*. at Rule 8.04(a)(3).

[23] *Id*. at Rule 8.04(a)(5).

[24] *Id*. at Rule 8.04(a)(12).

> administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.[25]

So, while the Texas Disciplinary Rules of Professional Conduct echo much of the philosophical basis of the FDCPA as well as Texas Finance Code section 392 et seq. (the Texas Debt Collection Act, which is very much like the FDCPA), the above quoted language makes clear that the Disciplinary Rules do not create a private right of action against the debt collecting attorney.

Of course, that does not mean that the Texas Disciplinary Rules of Professional Conduct do not regulate similar or identical conduct to that proscribed by the FDCPA and the Texas Debt Collection Act. Indeed, they do, and violations thereof, may, of course, result in both statutory liability as well as attorney discipline,[26] including but not limited to disbarment, contempt,[27] disqualification, sanctions, as well as possible perjury charges. The principal difference between liability under the FDCPA and the TDRPC is that the former is a strict liability statute, where the latter rules generally require knowing conduct for disciplinary measures to be applied.[28] However, one exception to this knowing requirement is Rule 8.04(a)(3), which is violated by conduct involving dishonesty, deceit or mere misrepresentation. *See*, *Eureste v. Comm. for Lawyer Discipline*, 76 S.W.3d 184, 198 (Tex. App.–Houston [14th Dist.] 2002, no pet.) (finding sufficient evidence of a violation of Rule 8.04(a)(3) where there was evidence of at least a mere misrepresentation).

B. Texas Cases

So, let us look at reported Texas state and federal cases, and Ethics Commission opinions, involving disciplinary proceedings or sanctions against Texas attorneys arising out of analogous and similar conduct to that of the JLR law firm in the *McCollough* case and other cases discussed, *supra*, in connection with FDCPA liability. In that way, we may observe potential areas of overlap between FDCPA (and TDCA) liability and potential discipline-worthy conduct by attorneys.

i. Candor towards the tribunal

In *In re MFlex Corp.*, 172 B.R. 854, 858 (Bkcy. W.D. Tex. 1994), the court found a "blatant violation" of the obligation of candor to the court when an attorney filed a false attorney fee application or other pleadings. The court noted that the attorney owes both an obligation of candor to the court, and a fiduciary obligation to the bankruptcy estate. This is analogous to the JLR attorneys' conduct in *McCollough*. The attorney made false filings in the course of the litigation which resulted in forfeiture of the attorney's fee. *MFlex* 172 B.R. at 861. What is interesting is that the conduct involved the same type of ordinary-course-of-litigation work performed by both sets of attorneys. The false statements in *MFlex* quite possibly could have given rise to FDCPA liability to the extent they had arisen in the context of an involuntary bankruptcy proceeding as opposed to the Chapter 11 proceeding involved in the *MFlex* case.

ii. Threatening criminal prosecution

Similarly, in *Weiss v. Commission for Lawyer Discipline*, 981 S.W.2d 8, 19 (Tex. App.—San Antonio 1998, pet. denied) the court found that the evidence supported a finding that the attorney knowingly made a false statement of material fact to a tribunal in a disciplinary matter. Further, with regard to conduct towards a third party, as is the concern of this paper, the attorney threatened criminal prosecution against his former client for not paying fees (and then he lied to the disciplinary tribunal about having done that). *Id*. at 18-19.

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[25] *Id*. at Preamble, ¶ 15 (emphasis added).

[26] The Texas Disciplinary Rules of Professional Conduct establish minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action. *Anderson Producing Inc., v. Koch Oil Co.*, 929 S.W.2d 416, 421 (Tex. 1996). All that is necessary to establish violation of the disciplinary rule that prohibits an attorney from violating the Rules of Professional Conduct and from knowingly assisting, inducing, or acting through another to do the same is violation of another rule. *Eureste v. Commission for Lawyer Discipline*, 76 S.W.3d 184, 201 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (holding that a violation of Rule 8.04(a)(1) is shown simply by sufficient evidence supporting the attorney's violation of another disciplinary rule).

[27] *See*, *In re Eastman*, 419 B.R. 711, 729 n.14 (Bkrtcy W.D. Tex. 2009) (noting that a debtor dunned after filing for bankruptcy may ask the bankruptcy judge to h old the other party in contempt of either the automatic stay or the discharge injunction).

[28] It is worth pointing out at this juncture that this paper is concerned with conduct towards third parties by attorneys, and will not discuss liability to a client, such as legal malpractice or fiduciary duty issues. Those issues are beyond the scope of this paper.

In Tex. Comm. On Professional Ethics, Op. 457, v. 51 Tex. B.J. 808 (1988) an issue arose under Rule 4.03. The commission was asked whether an attorney may turn over a hot check given to attorney in payment of his or her fees for services rendered to the District Attorney's office. As you will recall, Rule 4.03 prohibits threats of criminal prosecution when it is done SOLELY for purposes of gaining advantage in civil matter. The Commission found that an attorney is not prevented from reporting a crime committed by a client merely because the attorney is the victim.[29] The Commission also concluded that the attorney can send, in compliance with requirements of the district attorney's office, a letter warning of possible hot check prosecution if the letter was informative only, as opposed to demanding and threatening. *Id*. The letter advised that the check was being turned over to the DA's office for prosecution, advised that the DA's office required notice to the prospective defendant in order that the individual could pay the same if so desired and thereby avoid prosecution, and stated that the letter was not legal advice and encouraged the client to seek legal advice. *Id*.

However, in Tex. Comm. On Professional Ethics, Op. 455, v. 51 Tex. B.J. 1060 (1988), the Commission opined that the plaintiff's attorney in a pending breach of contract suit should not provide legal services to assist client in initiating a criminal proceeding against a defendant where such assistance is not required or necessary and where the district attorney would be able to prosecute a criminal charge adequately. *Id*.

iii. False statements to third parties

In *Resolution Trust Corp. v. Bright*, 6 F.3d 336, 341-42 (5th Cir. 1993), the court discussed potential violations of Disciplinary Rules but concluded none had been established. The case involved allegations that RTC attorneys and their firm had made false statements in draft affidavits and encouraged the making of false statements by a key witness. *Id*. at 341. The attorneys were ultimately found not to have violated the Disciplinary Rules. *Id*. at 342. The Fifth Circuit noted that it may apply the state code of professional conduct in deciding whether to disqualify an attorney from practicing before a federal court even though the Texas Disciplinary Rules do not expressly apply to sanctions proceedings in federal court. *Id*. at 340. The court noted that a federal court, in the exercise of its inherent powers, may disbar an attorney from practicing before it for particular conduct that violates the Disciplinary Rules. *Id*.

Flume v. State Bar of Texas, 974 S.W.2d 55 (Tex. App.–San Antonio1998, no pet.) is an interesting case. As stated above, Rule 4.01 prohibits knowingly making materially false statements to third persons. In *Flume*, the attorney knowingly made false statements to a third person - opposing counsel. *Id*. at 58. Specifically, the attorney served a file-stamped, temporary restraining order (TRO) that contained a purported hearing date. *Id*. . But, the TRO had not actually been signed by the judge. *Id*.. The court in the subsequent disciplinary matter stated that it was unethical to intentionally mislead opposing counsel in that way. *Id*. at 60 & n.6. (citing Barbara Hanson Nellermoe and Fidel Rodriguez, Jr., *Professional Responsibility and the Litigator: A Comprehensive Guide to Texas Disciplinary Rules 3.01 Through 4.04*, 28 St. Mary's L.J. 443, 490 (1997) and TEX. DISCIPLINARY R. OF PROF. CONDUCT 4.01). The court also concluded that the conduct violated Rule 8.04(a)(3) (prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation). This conduct is closely analogous to the conduct engaged in by the JLR law firm in *McCollough.* In both cases, the attorneys, through the use of common filings, made false representations to third parties. It is certainly conceivable that this same conduct in connection with a consumer debt collection matter could give rise to FDCPA liability.

McIntyre v. Commission for Lawyer Discipline, 169 S.W.3d 803, 812-13 (Tex. App.—Dallas 2005, pet. denied) has a lot in common with *McCollough.* The attorney in *McIntyre* signed bankruptcy schedules in an involuntary bankruptcy proceeding under penalty of perjury. *Id*. at 813. The attorney's signature on the schedules indicated his client's consent to the involuntary bankruptcy of the client's debtor. *Id*. These were representations that the client knew of and consented to the bankruptcy, and approved the schedules. *Id*. None of this was true, and such representations violated conduct rule proscribing conduct involving dishonesty, fraud, deceit, or misrepresentation. *Id*. at 814 (citing Rule 8.04(a)(3)).

So, not only was the conduct a representation to the court, but it was a representation to the third-party debtor that the information contained in the schedules was true, and it was a filing in court by attorney. There is no indication in the opinion whether the debtor pursued relief under the FDCPA or the TDCA or otherwise. However, much like the JLR attorneys' conduct in *McCollough*, the attorney's conduct certainly could be actionable under those statutes.

[29] *But see*, Tex. Comm. On Professional Ethics, Op. 495, v. 57 Tex. B.J. 1028 (1994) (concluding that an attorney may not ethically disclose confidential information to a collection agency to enable the agency to collect the fees which might be due to the lawyer from such lawyer's client, unless the client consents after consultation).

C. So, What Would the JLR Attorneys be Facing, Potentially, in Terms of Texas Disciplinary Proceedings if the Matter had Arisen in Texas?

Let us examine the conduct of the JLR attorneys, then, from the McCollough case, as though the matter had arisen in Texas, and we were the State Bar's Disciplinary Committee.

Right off the bat, the pursuit of the lawsuit in the first place, after it had been filed once and dismissed, and after Mr. McCollough raised the statute of limitations more than once, likely violated the provision of the Preamble stating that a lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. The author is unaware whether an attorney is subject to discipline solely for violating the letter and spirit of the Preamble to the Disciplinary Rules. Probably not. The author did not find a reported case citing the Preamble as authority.

Next, it is clear under the Disciplinary Rules that the JLR attorneys may have some disciplinary exposure under Rule 3.01. That Rule requires that the attorney only file claims or contentions that the attorney has a reasonable basis to believe are not frivolous. There is certainly evidence, in light of the repeated assertion of the statute of limitations by Mr. McCollough, that the debt claim pursued by the JLR attorneys did become frivolous at some point, and yet they continued to pursue the matter. Moreover, their service of the requests for admission themselves may be considered frivolous as they contained knowingly false statements.

Next, to the extent the JLR attorneys filed the admissions--had Mr. McCollough not answered them (and they were thereby "deemed")--in support of a motion for summary judgment, they could have been considered frivolous. That same conduct could have constituted a failure of candor towards the tribunal under Rule 3.03. It also could arguably have violated Rule 3.04(b)'s prohibition on falsification of evidence.

Rule 4.01(a) and (b) require that an attorney *not* make false statements of material fact or law to third persons, and that the attorney *not* fail to disclose a material fact to third persons when "necessary to avoid . . . a fraudulent act perpetrated by a client." Certainly, the false requests for admission could be said to constitute false statements of material fact. Moreover, to the extent the collection agency or debt buyer client of the JLR attorneys could be said to be engaging in the prohibited conduct, the JLR attorneys' failure to disclose material facts (that the debt was barred or that the admissions were false) could also be found to have been a violation of Rule 4.01(b).

Clearly, the JLR attorneys violated Rule 8.04(a)(3) by making misrepresentations (intentionally or otherwise) and most likely violated that Rule's prohibition on deceit, dishonesty and fraud as well.

IV. CONCLUSION

The Ninth Circuit's recent opinion in *McCollough* is important because it brings into focus the ease with which a consumer debt collection attorney may violate federal law in conducting day to day activities in his or her practice. Ordinary litigation tools like requests for admission and interrogatories which not only ask for information, but may be said to contain affirmative and false representations, are now almost certainly actionable. In the author's court, it is not at all uncommon to see "deemed" admissions form the basis of a summary judgment motion against a *pro se* defendant. After *McCollough*, it is quite possible that such an approach may be much more carefully scrutinized by the debt collection attorney, and may become more scarce.

As importantly, the facts of the opinion in *McCollough*, and the attorneys' conduct, when viewed through the filter of the Texas Disciplinary Rules of Professional Conduct, demonstrate how seemingly routine collection practice activities may not only expose the attorney to monetary liability, but also to discipline by the State Bar of Texas (or sanctions, disbarment, disqualification, or contempt). Therefore, attorneys must scrupulously adhere to the strictest standards of diligence, honesty and forthrightness towards third parties and the tribunal when undertaking consumer debt collection representation, lest they be forced to answer in damages or even forfeit their licenses to practice law.