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Commercial Banking, Collections and Bankruptcy

The newsletter of the Illinois State Bar Association's Section on Commercial Banking, Collections and Bankruptcy

Newsletter Editor Notes

BY JUDGE MICHAEL CHMIEL

On his President's Page in the March 2020 edition of the Illinois Bar Journal, our fearless leader David B. Sosin authored "All for One and One for Law," about many of the challenges which face our profession today. David explains the work he has done for the ISBA with the American Bar Association and elsewhere, to stem encroachment on the workspace of lawyers. It brings to mind my mantra in various places of involvement: It's what we make of it! Instead of looking to or pointing at others, we each need to do what we can to instill confidence in the community in the rule of law and our

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The Case for Civility: My Perspective

BY ROBERT FIORETTI

As a young Chicago lawyer who enjoyed the practice of law, I was once assigned a case representing a defendant in DuPage County. After several phone calls to the plaintiff's attorney, I realized I would have to go to Wheaton to present a routine motion. I arrived on the day to present the motion and was watching attorneys looking at the call sheet to determine where they were on the call. The individual in front of me with his younger female associate was pointing to the sheet and said, "We are number five on the call." I realized I, too, was number five on the call, and went to shake his hand. In an abrupt, loud, gruff voice, he said "I'M not shaking his hand, you're on the other side."

Our case was called, the motion was presented, the relief was granted, the order signed, and we began to leave the courtroom. The judge stopped us and said, "Gentlemen, come back up here." As we approached the bench, the judge was looking at me, and being a young lawyer, I thought maybe I wrote the order incorrectly. The judge began by saying, "Gentlemen, I noticed that Mr. Fioretti is from Chicago, which is in Cook County. And the rules of DuPage County are different than in Cook County. And as such, Mr. Fioretti should know the rules of this courthouse. So, if Mr. Fioretti violates a rule of the supreme court or of DuPage County or of this courtroom, I want you, opposing counsel, to call me immediately."

At that point, I thought, "This is not going to go well for my client and myself," and I can see that the other attorney having a very big grin on his face, nodding in agreement with chest puffed up. The judge went on, "And I will tell you why you can call me directly if Mr. Fioretti violates a rule of the supreme court, or a rule of DuPage County or a rule of this

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legal system. Each stroke we type—each word we speak—each action we take, helps advance (we hope) our profession in positive ways, and make it the place to go to handle the challenges of the day—the issues folks face in their daily lives. To these ends, we offer articles in this edition on civility and developing issues in the e-world we find ourselves. Should you have questions or comments on any of this, or wish to offer something to publish, please email me at mjchmiel@22ndcircuit.illinoiscourts.gov.■

The Case for Civility: My Perspective

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courtroom. Because I taught Mr. Fioretti everything he knows about civil procedure and civil practice. And after hearing the laughs from the other attorneys and feeling much better about the case the other attorney chased after me as asked, "Why didn't you tell me you knew the judge?" To which I replied, "You wouldn't even shake my hand."

Civility is an attitude that lawyers must treat individuals, witnesses and opponents with dignity and respect. What do we learn from that courtroom experience?

1. Communication is the foundation for civility and setting the tone for respect.
2. Mentoring is key to civility.
3. Control of the courtroom.

Lawyers are expected to be zealous advocates for their clients, yet maintaining a reputation for integrity and civility in the profession. Civility can manifest itself in returning phone calls, shaking a person's hand, or how you treat your opponent or witnesses inside and outside the courtroom.

While that happened many years ago, the focus today has shifted to immediate results and winning at all costs. Telephone calls have given way to emails and texting no matter what time of day.

The second lesson from that situation is mentoring. Would you want to be a young attorney working in the office with this individual? Mentoring of young lawyers has diminished. We have those that have been mentored in civility and those whose exposure has been to unprofessional and discourteous conduct. Abuse and antagonistic behavior reflect poorly upon the individual attorney and demeans our profession. We must remember that behaviors affect outcomes of cases. Mentoring for future trial lawyers is a necessity in our profession. We are expected to fight the good fight, our reputation and the profession are more important than the case. Setting the example is important for this noble profession.

On the third point, control of the courtroom, in that example given, I believe many attorneys and the judge knew the opposing counsel. But it was clear the judge disclosed the fact that he knew me, and he wanted to set the tone for civility in the courtroom. The Code of Judicial Ethics requires that judges be patient, dignified, and courteous to all in their courtroom. Watching many judges, they do not all appreciate being in a position of setting the tone of civility, but they always must.

And accordingly, it is just not appreciated being called upon to bring civility to the attorneys in a court case. During the ISBA conference on Civility and Professionalism 2019: Properly Handling Emerging Issues with Confidence, retired judge, the Honorable Stephen R. Pacey laid out four rules governing the practice for counselors, advisors and advocates. One, follow the golden rule. Two, do the right thing. Three, what would your parents think? And four, we know it when we see it.

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OFFICE
ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

EDITORS
Hon. Michael J. Chmiel

PUBLICATIONS MANAGER
Sara Anderson
sanderson@isba.org

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As I heard those four rules, I was reminded that we are in a service business. The economics of the practice of law have changed a lot in the last 25 years. We are in a noble profession, but a service profession. And our clients really don't want to be our product. In our profession, it takes years to build a reputation of honesty, professionalism and civility, but it takes only minutes to lose them. Together, we must be activists for civility in our profession. We must mentor the young, and the old, in ways that elevate our profession. I am reminded of a quote from a play that I was in in high school. And yes, Shakespeare had many things to say about lawyers in his many years of writing. But one that struck me the most was, "And do as adversaries do in law, strive mightily but eat and drink as friends."■

How Do You Verify the Identity of a Data Requestor?

BY DAVID ADLER

The California Consumer Privacy Act ("CCPA") was enacted in early 2018 and will go into effect in 2020. Among many concerns about the ability of small businesses to comply with obligations imposed by the CCPA is the requirement that a company allow Californians to access the information held about them, or, in some situations, request that the information that they provided to a company be deleted. Your clients may be asking you about the CCPA. By keeping data minimization objectives in mind and not over-thinking compliance obligations, verifying the identity of a data requestor may be straight-forward.

The ability to control how one's data is used is a cornerstone of the CCPA. However, this puts a burden on a business to ensure that only a "verified" consumer accesses the requested data and avoid fraudulent requests. To access or delete information, a consumer must submit a "verifiable consumer request." While the term implies that a business must take steps to "verify" the individual making the request, the CCPA does not specify what steps it considers to be sufficient (or that it considers to be inadequate) to accomplish the verification.

With little to go on, a business might be tempted to act over-cautiously and require more information than is actually necessary to verify identity. With data minimization principles in mind, it is important to recognize privacy risks to avoid. Don't over-reach; avoid obtaining more sensitive or potentially harmful information than is necessary to complete the request. Also, avoid asking for sensitive documents such as a passport.

A good rule of thumb is to try to use the same method that was used to gather the data in first place. For example, your client operates a consumer website featuring information and users are required to provide a username and password to register with the site. Ask the requestor to provide a username and password to verify. If two-factor authentication was used, then challenge that requestor using the same method. Don't ask for a driver's license.

If a client is asking for additional resources on how to implement policies and procedures, it is useful to look to industry-standard references, such as NIST—a good (but technical) explanation Guidelines on verifying identity available at https://doi.org/10.6028/NIST.SP.800-63-3. If this is too technical, a client should work with a consultant who can explain the framework. One valuable upside is that if a business is required to respond to a regulator or litigant, the business can point to use of the industry standard as reasonable basis for compliance efforts.

Are you tasked with advising a client how to craft a CCPA policy or procedure? There is no requirement that companies create a written policy for processing requests. If a company chooses to create an internal policy or procedure for handling data access and deletion requests, the following four topics are relevant:

Data subject verification. Before taking any action, a company should verify that the individual that submitted the request is the individual to whom the data belongs. Verifying identity depends upon the type of data maintained. Remember, if the requestor signed up with a username and password, use this to verify.

Communications. A business must respond to a requestor, even if the request is a denial. To streamline a timely response, a company may choose to create template communications and procedures.

Evaluating the request. The right to be forgotten is not an absolute right. Some companies choose to include a discussion of when the right does, and does not, have to be granted within their internal policy or procedure. If refused: Reply with a reason and provide options: regulator, court?

Completing a Request. Upon verification of the identity of a requestor and a determination that a deletion request should be granted, a business can include instructions for technical steps that should be taken in order to erase an requestor's information.

For clients implementing processes and procedures to respond to individuals who invoke their rights under the CCPA, meeting the requirement to verify the requestor's identity (and reduce the risk of complying with a fraudulent request) can present a risk. However, with data minimization objectives in mind, using verification methods that make sense in the context of the requestor's data, may reduce some of the burden of verifying the identity of a data requestor.■

The CFPB's Debt Collection Rulemaking: Flagging the Privacy Issues

BY ELIZABETH KHALIL

On May 7, 2019, the Consumer Financial Protection Bureau (CFPB) issued a long-awaited Notice of Proposed Rulemaking (NPRM) under the Fair Debt Collection Practices Act (FDCPA). This is the first time regulations would be issued to implement the FDCPA since it was enacted in 1977.

The proposed rule would give further detail on several provisions of the statute, which provides protections for consumer debtors and restricts the practices of defined "debt collectors."

So why should those in privacy law care about this rulemaking?

While, as its name indicates, the FDCPA is focused on debt collection practices, privacy concerns underlie many provisions of the law, as well as of the proposed regulation.

Background

As the CFPB notes in the proposal, "Invasion of individual privacy appears to have been one of the primary harms that Congress sought to eliminate through the FDCPA." In fact, right at the beginning of the FDCPA in the Congressional findings section, the statute asserts, "Abusive debt collection practices contribute to...invasions of individual privacy." To avoid those privacy harms, Congress included in the statute provisions such as restrictions on debt collectors' ability to communicate with people other than the debtor about the debt.

Since the FDCPA was passed in 1977, no regulations have been issued to interpret it, and it has not been updated to address all the ways the world has changed since its enactment, such as changes in communications technology. As a result, questions have arisen over the years as to how to treat situations not explicitly addressed in the law. The CFPB's proposal aims to give some additional clarity on some of those situations, including those involving privacy issues.

The Proposal's Privacy-Related Provisions

Several aspects of the proposal that relate to debt collection communications incorporate privacy considerations. For example:

- Clarifications regarding permissibility of email and text communications. The FDCPA statute has not been updated to reflect all the developments in communications technology that have taken place since it was enacted. Currently, it prohibits a debt collector from communicating with a consumer in certain ways that could reveal the debt to third parties, such as mailing a postcard to the consumer discussing the debt. However, the statute does not specify how communications by email and text message would be covered. The proposed rule would clarify that a debt collector who communicates with a consumer via email or text messages, and follows certain procedures, would not violate the FDCPA by revealing in the email or text message the debt collector's name or other information indicating that the communication relates to the collection of a debt. (The CFPB also considered, but decided not to propose, prohibiting a debt collector from sending an email message to a consumer if the From or Subject line contained information revealing that the email was about a debt. However, as discussed below, the CFPB did propose some restrictions on communications using the consumer's work email.)
- Opt-Out Requirement. The proposed rule would require that a debt collector's emails and text messages include instructions for a consumer to opt out of receiving further emails or text messages.
- Communication by Workplace Email. The proposed rule would prohibit a debt collector from communicating or attempting to communicate with a consumer using an email address that the debt collector knows or should know is provided to the consumer by the consumer's employer, unless the consumer has already emailed the debt collector from that work email address or has provided affirmative consent to the debt collector to use that address. The CFPB notes that debt collectors "should be aware that many employers have a legal right to read, and in fact frequently do read, messages sent or received by employees on their work email accounts. Workplace emails therefore present a particularly high risk of third-party disclosure through an employer reading an email sent by a debt collector to a consumer's work account." The rule's commentary would provide examples of email addresses that a debt collector should know indicate a work email account, as well as domains that "in the absence of contrary information," a debt collector would not be expected to know are associated with the debtor's work email account, such as gmail.com, yahoo.com, hotmail.com, aol.com, or msn.com.
- Voicemail. The CFPB's proposal would provide guidance on ways debt collectors could leave "limited-content messages" for consumers via voicemail without violating the FDCPA. The CFPB intends this provision to resolve conflicting

positions taken by courts on whether leaving messages for consumer debtors violates the FDCPA's prohibitions on communicating with third parties about the consumer's debt.

- Attempts to Communicate Where Prohibited. The FDCPA statute prohibits debt collectors from attempting to communicate with consumers "at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer." The CFPB's proposal states that such an attempt "could pressure the consumer to pay the debt to avoid further intrusions on the consumer's privacy," and the agency therefore "interprets such conduct as unfair or unconscionable" under the FDCPA.
- Truncated Account Numbers. The FDCPA requires debt collectors to provide certain "validation" information to consumer debtors regarding the debt alleged to be owed. The CFPB states that debt collectors may want to truncate account numbers as part of validation information "to prevent disclosure of consumer account information, or to comply with applicable privacy rules, such as the FTC Safeguards Rule." The proposal would explicitly state that debt collectors could do so as long as "the account number remains recognizable."
- Use of Assumed Names by Debt Collection Personnel. Debt collection companies' individual employees sometimes use names other than their real ones (e.g., "Jane Smith" rather than Elizabeth Anne Khalil) when communicating with debtors. The CFPB notes that privacy concerns may be one reason motivating this practice. The proposal would provide that the FDCPA would not be violated by a debt collector's employee's use of an assumed name when communicating or attempting to communicate with a consumer, provided that the employee uses the assumed name "consistently" and that the employer can "readily identify" the employee even if the employee is using the assumed name.

Next Steps

The CFPB accepted comments from the public on any aspect of the proposal until September 18, 2019. Over 14,000 comments were received.

It is unclear what timeframe may be expected from the CFPB for finalizing this proposed rule. Given that this is the first time that any regulations have been proposed to implement the FDCPA, the proposal has attracted significant interest, and the process for finalizing it is likely to be extensive.

The proposal and related information, including a link to public comments submitted on the proposal, can be accessed through the CFPB's website at https://www.consumerfinance.gov/policy-compliance/rulemaking/rules-under-development/debt-collection-practices-regulation-f/.■

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Elizabeth Khalil, elizabeth.khalil@cibc.com,serves as chief privacy counsel for CIBC's US operations.

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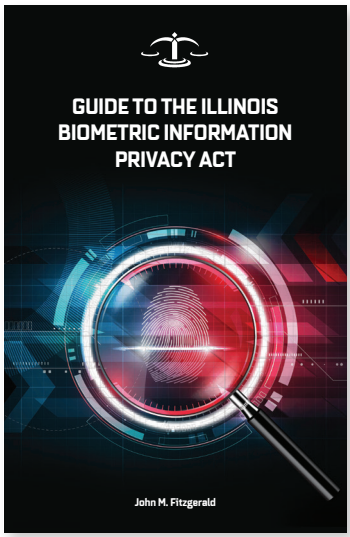

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