

Finding a Life Line: How to Handle a Client's Debt Collector During Protracted Personal Injury litigation

As a bankruptcy attorney, I am often referred clients who have extensive medical and credit card debt from the attorney's that are pursuing a personal injury claim on their behalf. While it would be ideal for the injury claim to be resolved prior to filing bankruptcy, often times the debt collectors harass a client to the point that a bankruptcy case is filed out of the client's need to end the harassment, much to the chagrin of their PI attorney. *(If this happens, it doesn't have to be the end of your case, I will be writing on this topic in coming additions, so in the interim contact a bankruptcy attorney before you decide to withdraw)*

Terms to Understand:

Original Creditor- allegedly owed a debt (i.e credit card company, medical provider, etc.)

Debt Collector: third party who purchased the debt or is collecting on behalf of the original

So what can *you* do for your client to stop the collection harassment while you are trying to settle or litigate the case?

1. Send a Cease and Desist Letter

As soon as you are made aware of the collection attempts, and assuming that your representation includes negotiating the alleged debt, send a cease and desist letter citing FDCPA 1692b(6) and 1692c(a)(2) and requesting that all future communications be directed to your office. Keep in mind, if the original creditor is calling, FDCPA may not apply and the original creditor is permitted to call despite your notice, however, most will err on the side of caution and cease its collection efforts upon receipt of an attorney representation letter. Further, if the contact is being made by a law firm or general counsel, ethics rules prevent an attorney from having direct communications with a person known to be represented by counsel (Nevada Rules of Professional Conduct 4.2.) even if FDCPA does not apply.

Once a debt collector is notified that the debtor is represented by counsel, they cannot call or send communications directly to the debtor. *Caveat-* If the collector contacts the retained attorney and the attorney does not respond, then direct communications may resume, so be sure and respond in writing as soon as practicable if this occurs.

In the event that future contact occurs after the cease and desist, your client will likely have an FDCPA claim against the debt collector and may be entitled to statutory or actual damages as a result. This claim is independent from the underlying debt, so pursuit of such a claim would not affect the status of unpaid medical bills subject to the PI litigation. More importantly, a demand for violation of FDCPA will usually result in all collection efforts promptly ceasing, which ultimately is what you and your client want.

2. Educate Your Client

Inform your client that if a debt collector contacts them, they should write down the date and time of the call, the phone number the call came from and a summary of the conversation. Should there be a violation, a contemporaneous record of the contact will be very important. Have them state “I have an attorney, Her name is ____, she can be reached at ____” Most often the collector will hang up as soon as the client makes this statement, if possible, the client should also tell the debt collector not to call them again and to only communicate with counsel. IMPORTANT! Tell your client they should never provide any personal information such as social security number, date of birth, address, etc., to anyone that calls them directly. Often debt collectors will claim that they need to “verify” that they are speaking with the correct person, the client’s response should always be “give me your name, phone number, company name, address and facsimile number and I will have my attorney respond to your request.” There are scammers out there that obtain delinquent debt lists with the intent of stealing identity or perpetrating some other type of fraud, so it is imperative that such information not be given over the telephone to an unsolicited caller. This rule of thumb also makes it more difficult for debt buyers to merge accounts among similarly named individuals, despite variations in personally identifying information.

3. Empower Your Client “Do you owe the debt collector, or does the debt collector owe you?”

Violations of the Fair Debt Collection Practices Act provide statutory damages for each proven violation. Calls from a pre-recorded message or an “auto-dialer” to a cell phone are violations of TCPA, which also provides for statutory damages. If either occurs, refer your client to a consumer rights attorney immediately. (*Example of pre-recorded message to a cell phone that violates TCPA and may also violate FDCPA: “This message is for ‘client’, if you are not ‘client’ please hang up, pause... ‘client’ this is an attempt to collect a debt, contact ABC collections at...”* *Example of Auto-Dialer: Client answers the phone and there is a delay while call is transferred to an actual person, or hold music until a live person is available*) Make sure to advise your client to keep all detailed phone records, as well as a copy of any voicemail messages as such proof will be needed should litigation become necessary.

Any person recording a conversation in Nevada must inform and get the consent from the person being recorded (NRS 200.620). Often, a debt collector may not mention that the call is being recorded, or fail to provide the disclaimer until end of the call. Failing to notify at the very beginning of the call creates a potential cause of action under FDCPA and NRS 649.250 against a debt collector. There are many other provisions under FDCPA and Nevada Revised Statutes that protect consumers, the above is simply a highlight of the easiest to remember and most prevalent violations.

Lastly, have your client go to: <http://www.consumer.ftc.gov/articles/0149-debt-collection> so they can read an unbiased, layman's explanation of what debt collectors can and cannot do. You can also obtain client handouts for free go to: <https://bulkorder.ftc.gov/ShowCat.aspx?s=cre-18> and give them to your client at their initial consultation. Once your client has a better understanding of debt collection and knows that violations could lead to money damages for them, they will be less fearful of the calls, and will be more inclined to wait out resolution of their case.

4. Negotiate... But Get it In Writing

If you are nearing settlement or trial, contact the debt collector and start negotiating. Often, they will have limited delegated authority to settle, and if you have limited funds, they will need to get their client's permission to settle for a lesser amount. The sooner you start negotiating the better off you will be.

Many debt collectors will refuse to provide a written offer of settlement, so draft a confirming letter as to your conversation with the debt collector and send it via mail and fax. Give them a timeframe to respond and dispute your recitation of the discussion and do not send payment until the timeframe has expired. If they fail to respond or dispute, it will be persuasive evidence as to the terms agreed upon and again there are provisions under FDCPA that may be triggered if the collector deviates.

Lastly, make sure you address credit reporting since the debt is in active collection. Some debt collectors will claim that they cannot delete reporting, but that simply is not true. If there are claims against the collector and a "settlement" is reached, then the entire collection account can be deleted. To get a deletion, the collector will likely want more of a payoff, so it really comes down to the client's needs and any bad action by the debt collector.

If the above tips seem daunting, or your office just does not have the capacity to handle these types of client issues, then have a referral list for consumer rights attorneys and/or bankruptcy attorneys that would be willing to assist your client with debt defense, debt collection violations and as a last resort, bankruptcy. As I will explain in a future article, bankruptcy is not the end of your PI case no matter which side you are on, so reach out to the bankruptcy bar, ask questions and find an attorney who can be a "life line" when these issues come up.