September 18, 2019

Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, D.C. 20552


Dear Sir/Madam:

On behalf of the American Bar Association (ABA), which is the largest voluntary association of attorneys and legal professionals in the world, I write to express our views regarding Section 1006.18(g) of the above-referenced proposed rule (the Proposed Rule) that would create a “safe harbor for meaningful attorney involvement in debt collection litigation submissions.”

Although the ABA appreciates the CFPB’s efforts to explain the steps it believes attorneys and law firms should take to comply with the so-called “meaningful attorney involvement” concept and thus avoid incurring liability under Section 807(3) and (10) of the Fair Debt Collection Practices Act (FDCPA), the ABA is concerned that the Bureau’s safe harbor proposal would improperly codify this flawed concept. Doing so would undermine the courts’ primary and inherent authority to regulate and oversee attorneys engaged in litigation. It would also undermine the attorney-client privilege, the work product doctrine, the attorney’s ethical obligations not to disclose confidential client information, and the confidential attorney-client relationship in general. Therefore, the ABA urges the CFPB to withdraw the safe harbor proposal, reject the meaningful attorney involvement concept, and recognize the long-standing authority of courts to oversee and address the conduct of all attorneys engaged in litigation before them.

The Bureau’s Proposed Safe Harbor for Meaningful Attorney Involvement in Debt Collection Submissions

In the Proposed Rule, the Bureau contends that Section 807 of the FDCPA “contains certain provisions designed to protect consumers from false, deceptive, or misleading representations made by, or means employed by, attorneys in debt collection litigation,” including Section 807(3) that “prohibits the false representation or implication that any individual is an attorney or that any communication is from an attorney.” The Bureau also claims that debt collection communications

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1 Section 807(3) and (10) of the FDCPA, which prohibit a “debt collector” from engaging in certain false or deceptive acts in connection with the collection of any debt, has been codified at 15 U.S.C. § 1692e(3) and (10).
2 Proposed Rule, 18(g) Safe Harbor for Meaningful Attorney Involvement in Debt Collection Litigation Submissions, 84 Fed. Reg. at 23323.
that are sent under an attorney’s name—including pleadings, written motions, or other papers submitted to the court in debt collection litigation—could violate Section 807(3) and (10) of the FDCPA if the attorney was not “meaningfully involved in the preparation of the communication.”

In an apparent effort to provide greater clarity to consumers, attorneys, and law firms engaged in debt collection litigation concerning the “meaningful attorney involvement” concept, the Bureau has proposed new “safe harbor” language in Section 1006.18(g), that states:

(g) Safe harbor for meaningful attorney involvement in debt collection litigation submissions. A debt collector that is a law firm or who is an attorney complies with § 1006.18 when submitting a pleading, written motion, or other paper submitted to the court during debt collection litigation if an attorney personally:

1. Drafts or reviews the pleading, written motion, or other paper; and
2. Reviews information supporting such pleading, written motion, or other paper and determines, to the best of the attorney’s knowledge, information, and belief, that, as applicable:
   i. The claims, defenses, and other legal contentions are warranted by existing law;
   ii. The factual contentions have evidentiary support; and
   iii. The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or lack of information.

The Bureau contends that the safe harbor factors in proposed Section 1006.18(g) are similar to the nationally recognized standards for attorneys making submissions in civil litigation outlined in Federal Rule of Civil Procedure 11(b) through (4), except in the following two respects:

First, that the claims, defenses, or other legal contentions are a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law; and second, that the factual contentions are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

The Bureau has requested comments on “whether the safe harbor proposed for meaningful attorney involvement in debt collection litigation submissions provides sufficient clarity for consumers, attorneys, and law firms.”

The ABA’s Concerns Regarding the CFPB’s Proposed Safe Harbor

The ABA recognizes and appreciates the CFPB’s efforts to clarify the meaning of “meaningful attorney involvement” with respect to debt collection litigation submissions and to attempt to

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3 See id.
4 Proposed Rule, Section 1006.18(g), 84 Fed. Reg. at 23402-23403.
5 See Proposed Rule at 23324, footnote 351.
6 Id. at 23324.
provide attorneys and law firms with a safe harbor protecting them from potential liability when they meet the requirements outlined above. However, the ABA believes that the safe harbor proposal in the Proposed Rule falls short of that goal and therefore opposes it for several important reasons:

1. The Safe Harbor Proposal Would Improperly Codify the Flawed “Meaningful Attorney Involvement” Concept, which is Not Referenced in the FDCPA or Any Other Statute

The ABA respectfully disagrees with the entire premise of the “meaningful attorney involvement” concept, as neither that term nor the general concept appears anywhere in the FDCPA, the Dodd-Frank Act, or any other federal statute. Instead, the concept was developed in a series of federal court cases interpreting Section 807(3) of the FDCPA, which prohibits debt collectors from making a “false representation or implication that any individual is an attorney or that any communication is from an attorney,” and Section 807(10), which generally prohibits the “use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.” See, e.g., Clomon v. Jackson, 988 F.2d 1314 (2nd Cir. 1993) and Avila v. Rubin, 84 F.3d 222 (7th Cir. 1996).

Section 807(3) of the FDCPA is a straightforward rule that simply prohibits a collection agency or any other type of debt collector from falsely stating or implying that an individual is an attorney or that the debt collector’s letters or other communications to a debtor are from an attorney when that is not the case. Because a letter or other communication from an attorney can seem more forceful or intimidating to a debtor than a communication from an ordinary collection agency, this prohibition is sensible and uncontroversial. But on its face, the rule is limited in scope and merely raises the question of whether the collection letter or communication was sent by an attorney—or not.³

Unfortunately, the courts in the Clomon, Avila, and several other similar cases went well beyond the plain language of the statute and interpreted the term “from” to mean much more than whether the person sending the demand letter or other communication to the debtor was in fact an attorney. Instead, the courts interpreted the term “from” to mean that the attorney not only sent the communication, but that the attorney also “directly controlled or supervised the process through which the letter was sent” and formed a professional judgment that the debtor is delinquent and is a candidate for legal action or an opinion about how to manage the debtor’s case. See Avila at 229, Clomon at 1321, and Nielsen v. Dickerson, 307 F.3d 623, 625 (7th Cir. 2002). These requirements were later expanded by other federal courts to cover not just pre-suit demand letters, but also state

³ When the FDCPA was enacted in 1977, it contained an express exemption for “any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client.” Heintz v. Jenkins, 514 U.S. 291, 294 (1995), citing FDCPA, Pub. L. No. 95-109, § 803(6)(F), 91 Stat. 874, 875 (1977). Attorneys remained exempt from the statute until the exemption was removed by Congress in 1986. See Heinz at 294-295, citing Pub. L. No. 99-361, 100 Stat. 768 (1986). Therefore, as originally enacted in 1977, Section 807(3) was merely intended to prohibit non-attorney debt collectors from falsely claiming that they or their representatives were attorneys or that correspondence on attorney letterhead was in fact from an attorney, not to require attorneys (who were not yet covered by the Act) to engage in any special due diligence before sending a letter or other communication to a debtor.

Through these and other similar rulings, various federal courts have expanded the original meaning of Section 807(3) and developed the concept of “meaningful attorney involvement,” thereby subjecting creditor attorneys to substantial new CFPB regulatory burdens and potential liability that go well beyond the actual wording of that statutory provision.

In the absence of clear statutory authority to the contrary, it is the proper role of the state courts that license and oversee attorneys and federal courts presiding over federal litigation—not federal agencies or private litigants—to regulate and establish professional standards for attorneys engaged in litigation.8 Therefore, because neither the FDCPA nor any other federal statute refers to meaningful attorney involvement or grants the CFPB authority to adopt rules implementing such a requirement, it would be inappropriate for the Bureau to issue new rules codifying or granting a safe harbor from this flawed concept.

2. The Meaningful Attorney Involvement Concept and the Safe Harbor Proposal in the Proposed Rule Would Undermine the Courts’ Primary and Inherent Authority to Regulate and Oversee Attorneys Engaged in Litigation

The ABA is concerned that by effectively codifying the meaningful attorney involvement concept, the safe harbor proposal in Section 1006.18(g) of the Proposed Rule would seriously undermine the state and federal courts’ ability to regulate and oversee the litigation process and sanction attorneys that engage in litigation misconduct in a consistent manner.

For many decades, attorneys engaged in the practice of law have been regulated and disciplined for violations of applicable rules of professional conduct primarily by the highest court of the state in which the attorney is licensed or authorized to practice through attorney disciplinary agencies overseen by those courts. During that time, the state supreme courts have promulgated and enforced extensive and effective regulations governing all aspects of the practice of law, including admission requirements, strict attorney rules of professional conduct and disciplinary rules, and litigation procedural rules. An unbroken line of U.S. Supreme Court decisions recognizes the unique nature of the legal profession and the inherent power of the states to regulate the practice of law.9 The Supreme Court has also noted that the states’ interest in regulating the legal profession “is especially great since lawyers are essential to the primary governmental function of

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8 See American Bar Ass’n v. FTC, 430 F.3d 457, 471-472 (D.C. Cir. 2005) (FTC exceeded its authority by applying its Gramm-Leach-Bliley Act privacy regulations to attorneys when Congress had not made an intention to regulate the practice of law “unmistakably clear” in the language of the Act); see also American Bar Ass’n v. FTC, 671 F.Supp.2d 64, 87-88 (D.D.C. 2009), vacated as moot after Congress amended statute to exempt most attorneys and other professionals, 636 F.3d 641 (D.C. Cir. 2011) (FTC’s attempt to apply its Red Flags Rule to attorneys engaged in the practice of law exceeded its authority and was plainly erroneous as “the Court will not infer that Congress transgressed into a traditional area of state regulation predicated on nothing more than silence and conjecture.”)

9 See, e.g., Leis v. Flynt, 439 U.S. 438, 442 (1979) (licensing and regulation of attorneys has been left exclusively to the states since the nation’s founding); Hoover v. Ronwin, 466 U.S. 558 (1984) (precluding Sherman Act suit against development and grading of bar examinations); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (state prohibition against lawyer advertising does not violate the Sherman Act).
administering justice, and have historically been ‘officers of the court.’” As a result, the Supreme Court often has refused to permit the application of certain federal laws and regulations to attorneys engaged in the practice of law.

Although state supreme courts are primarily responsible for regulating the practice of law in general, both state and federal courts have the authority to address attorney misconduct that occurs during the course of litigation before them by sanctioning attorneys and the parties. The courts have the power to impose a wide range of sanctions under the applicable rules, including fines, reimbursement of the aggrieved party’s attorney fees caused by the violation, striking the offending pleading or other paper, reprimands or censures, or referring the matter to disciplinary authorities.

Consistent with this principle of judicial regulation and oversight of the legal profession, the FDCPA originally contained a complete exemption for attorneys engaged in the practice of law who collect debts on behalf of their clients. Congress later amended the FDCPA in 1986 to remove the broad attorney exemption, based in part on the belief of the bill’s sponsor, Rep. Frank Annunzio (D-IL), that the revised statute would only subject attorneys’ non-litigation and other non-legal collection activities to the Act’s regulations and that attorneys’ litigation activities would continue to be overseen by the courts. Although the Supreme Court later narrowly held in Heintz v. Jenkins that the amended Act “applies to attorneys who ‘regularly’ engage in consumer-debt-collection activity, even when that activity consists of litigation,” the Court did not address “meaningful attorney involvement” nor did it state or infer that Section 807(3) or any other part of

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10 Bates, 433 U.S. at 362.
11 See, e.g., Fed. R. Civ. P. 11(c)(4), Notes of Advisory Committee on Rules—1993 Amendment, Subdivisions (b) and (c), available at https://www.law.cornell.edu/rules/frcp/rule_11.
12 See footnote 7, supra.
13 As Rep. Annunzio explained when Congress enacted the 1986 amendment to the FDCPA:

The Fair Debt Collection Practices Act regulates debt collection, not the practice of law. Congress repealed the attorney exemption to the act, not because of attorneys’ conduct in the courtroom, but because of their conduct in the backroom. Only collection activities, not legal activities, are covered by the act. . . . Actions which can only be taken by those possessing a license to practice law are outside the scope of the act. The filing of a complaint is not covered by the act…. Repeal of the attorney exemption does not infringe upon the practice of law by attorneys. [132 Cong. Rec. H10031 (daily ed. October 14, 1986) (statement of Rep. Annunzio).]

Similarly, the FTC staff noted in its Commentary on the 1986 amendment that “attorneys or law firms that engage in traditional debt collection activities (sending dunning letters, making collection calls to consumers) are covered by the FDCPA, but those whose practice is limited to legal activities are not covered.” See Federal Trade Commission—Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097, 50100 (December 13, 1988).
the FDCPA should be interpreted to impose any additional due diligence standards on creditor attorneys beyond the well-established state and federal court rules governing all licensed attorneys.

Applicable state rules of professional conduct subject attorneys to stringent ethical duties of competency, diligence, and confidentiality and require them to assert only meritorious claims, display candor to the court and fairness to opposing parties and counsel. Federal Rule of Civil Procedure 11(b) also requires attorneys presenting pleadings, motions, and other papers to the court to certify as officers of the court that the contentions contained in those materials are meritorious and have legal and evidentiary support. These and other state and federal court rules impose legal and ethical obligations on litigation attorneys that extend well beyond the meaningful attorney involvement concept or the safe harbor provisions that the Proposed Rule would codify, and they are specifically designed to ensure that clients receive effective representation of counsel, protect the confidential attorney-client relationship, promote justice, and ensure that all litigants are treated fairly.

Unfortunately, by codifying the meaningful attorney involvement concept, creating a safe harbor, and applying these special due diligence standards only to creditor attorneys—but not other types of attorneys—engaged in litigation, the Proposed Rule would conflict with well-established state and federal court rules governing attorneys in several ways.

For example, the safe harbor proposal in Section 1006.18(g) of the Proposed Rule provides that an attorney has been meaningfully involved in the preparation of debt collection litigation submissions if the attorney drafts or reviews the item, personally reviews information supporting it, and determines that the claims, defenses, and legal and factual contentions are well-supported by law or evidence, which are factors similar to those outlined in Federal Rule of Civil Procedure 11(b)(2) through (4). However, as the CFPB readily admits in the Proposed Rule, the safe harbor standard omits two aspects of Federal Rule 11(b), including: “First, that the claims, defenses, or other legal contentions are a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law; and second, that the factual contentions are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.”

The safe harbor also differs from Federal Rule 11 because the former places the burden on the creditor attorney to prove he or she fully complied with the requirements to avoid liability, while the latter requires the opposing party filing a motion for sanctions to allege and prove that the

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15 See, e.g., ABA Model Rules of Professional Conduct 1.1, 1.3, 1.6, 3.1, 3.3, and 3.4, available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/. Rules identical or substantially similar to the ABA Model Rules have been adopted as legal binding ethical rules in all fifty states and the District of Columbia and are binding on all attorneys licensed in each particular state. See Charts Comparing Individual Professional Conduct Rules as Adopted or Proposed by States to ABA Model Rules, available at https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/.


creditor attorney failed to meet the requirements before sanctions can be imposed. In addition, the safe harbor proposal differs from Federal Rule 11 because although Rule 11 grants the attorney accused of filing an improper pleading, motion, or other paper 21 days to withdraw or correct the item before a sanctions motion can be filed or presented to the court, the safe harbor contains no such grace period for the creditor attorney to withdraw or correct the court filing.

By omitting two key elements of Federal Rule 11(b), requiring the creditor attorney to prove that the due diligence requirements were fully met to avoid liability, and denying the attorney a 21-day grace period in which to withdraw or correct the filing in question, the proposed safe harbor rule for creditor attorneys engaged in litigation clearly conflicts with the Federal Rule’s general standard of conduct for all other types of litigation attorneys when filing documents with the court. This “double standard” for creditor attorneys vs. all other types of litigation attorneys is grossly unfair and undermines the courts’ authority—and duty—to regulate conduct before them and sanction all litigation attorneys in a consistent, evenhanded manner.

3. The Meaningful Attorney Involvement Concept and the Safe Harbor Proposal in the Proposed Rule Would Also Undermine the Attorney-Client Privilege, the Work Product Doctrine, the Attorney’s Ethical Obligations Not to Disclose Confidential Client Information, and the Confidential Attorney-Client Relationship in General

The ABA is also concerned that by codifying the meaningful attorney involvement concept, the safe harbor proposal in Section 1006.18(g) of the Proposed Rule would seriously undermine the confidential attorney-client relationship in general, as well as the attorney-client privilege, the work product doctrine, and the attorney’s ethical obligations not to disclose confidential client information relating to the legal representation. As a result, the safe harbor would deny or weaken the client’s right to effective counsel.

Under the Proposed Rule, a creditor attorney claiming the safe harbor would have to prove that the attorney drafted or reviewed the pleading, written motion, or other paper; personally reviewed information supporting the submission; and determined, to the best of the attorney’s knowledge, that the claims, defenses, and legal and factual contentions were well-supported by law or evidence. But to prove that these requirements were met, the attorney would have to reveal all of the documents and legal authorities that the attorney reviewed for the client, the legal opinions and conclusions reached by the attorney, and the confidential communications between the attorney and the client regarding the merits and soundness of the case.

The attorney would be unable to disclose this extensive information without revealing client confidences or violating the attorney-client privilege. To establish the safe harbor, the attorney would also be forced to reveal a great deal of attorney work product by disclosing what the attorney reviewed and why the attorney reached certain legal opinions and conclusions for the client. The attorney is generally prohibited from revealing client confidences or disclosing work

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19 See, e.g., Rodick v. City of Schenectady, 1 F.3d 1341, 1350 (2nd Cir. 1993) and Anaqua, Inc. v. Schroeder, 2014 WL 1795310 (D. Mass. May 5, 2014) (Second Circuit and other courts have held that burden of proof as to whether signer has violated Rule 11 is on the Rule 11 movant and district court should resolve all doubts in favor of the signer).
product or other privileged matters without consulting with and obtaining the consent of the client. But because the safe harbor would benefit only the attorney and not the client, requiring the attorney to make such revelations about the client creates a conflict of interest between the attorney and client.

The attorney-client privilege is a bedrock legal principle of our free society, and as the U.S. Supreme Court has noted, it is “the oldest of the privileges for confidential communications known to the common law.”20 It enables both individual and organizational clients to communicate with their attorneys in confidence, which is essential to preserving all clients’ fundamental rights to effective counsel.21 Importantly, the privilege encourages clients to seek out and obtain guidance to conform their conduct to the law, facilitates self-investigation into past conduct to identify shortcomings and remedy problems, and enables attorneys to fulfill their ethical duties to their clients, all of which benefit society at large. The work product doctrine underpins our adversarial justice system and allows attorneys to prepare for litigation without fear that their work product and mental impressions will be revealed to adversaries, to the detriment of their clients.

The ABA strongly supports attorneys’ obligations of confidentiality under applicable rules of professional conduct, as well as the preservation of the attorney-client privilege and the work product doctrine. The ABA also opposes governmental policies, practices and procedures that will have the effect of eroding these protections.22 By requiring creditor attorneys to reveal confidential information regarding the documents and legal authorities they reviewed, the legal opinions and conclusions they reached, and the communications they had with their clients before filing suit, the safe harbor proposal would undermine the attorney-client privilege, the work product doctrine, the attorney’s ethical duty to preserve client confidentiality, and the overall confidential attorney-client relationship. Each of these fundamental legal principles is absolutely critical to encourage the open and frank communications needed for effective legal representation, compliance with law, and the administration of justice.

Conclusion

For all these reasons, the ABA respectfully requests that the CFPB withdraw the safe harbor proposal contained in Section 1006.18(g) of the Proposed Rule; interpret Section 807(3) of the FDCPA as plainly written and intended by Congress and thus reject the meaningful attorney involvement concept; and recognize the courts’ primary and inherent authority to regulate,

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21 The primary purpose of the privilege is to “encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” Upjohn Co. at 389. See also Fisher v. United States, 425 U.S. 391, 403 (1975). This strong rationale for the privilege has been recognized by the Supreme Court for well over a century and “is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.” Upjohn Co. at 389, citing Hunt v. Blackburn, 128 U.S. 464, 470 (1888).
oversee, and sanction all attorneys engaged in litigation, regardless of the attorney’s legal specialty or the types of cases the attorney files with the court.

Thank you for considering the views of the ABA on these important issues. If you have any questions regarding the ABA’s position on the Proposed Rule, please contact ABA Associate Governmental Affairs Director Larson Frisby at (202) 662-1098 or larson.frisby@americanbar.org.

Sincerely,

Judy Perry Martinez
President, American Bar Association