Debt Defense System

Part 2 of the Debt Master Series

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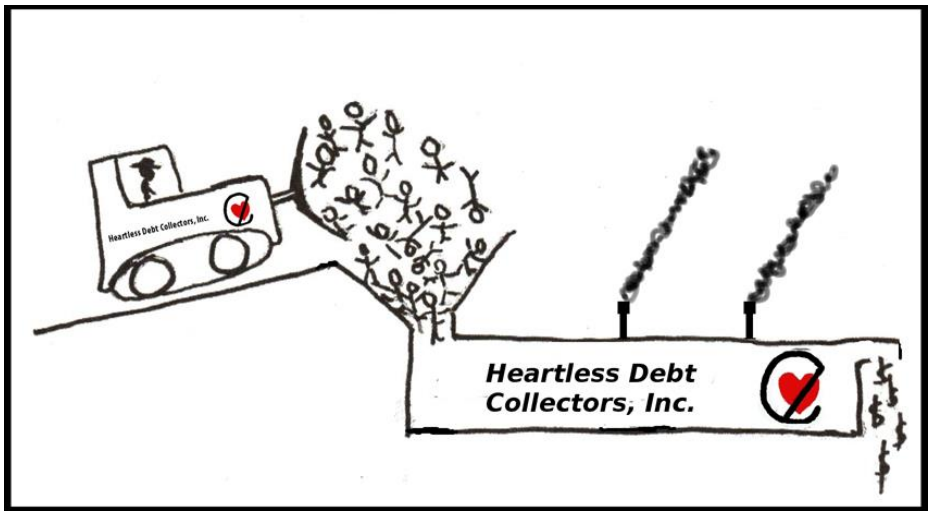
YOUR LEGAL LEG UP

Your Legal Leg Up

Debt Defense System

Understanding the Debt Collection Process And Defending Yourself from Debt Collectors

Second Edition



A new, systematic approach to debt defense that will take you from first hearing that you are being sued through settlement or judgment.

Introduction

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This manual is now exclusively available as part of Your Legal Leg Up's membership program. I hope that you will use it – in combination with the services available through our website and, especially, the teleconferences, to have the best possible chance to beat a debt collector or buyer who has brought suit against you. Our materials also work against original creditors.

And they also work where you, for strategic reasons, bring suit against them.

Won-Lost Record

It's impossible to say how many people, or what percentage of people using our system, have actually won or lost their cases. I have no way of knowing, other than as people report to me. I can say that of the people who have reported, the ratio of winners to losers is somewhere between 25 and 50 to 1. If that's accurate, it's about what one would expect of people who hire lawyers for their defense: victory is almost inevitable, but sometimes things happen. And, very rarely, the debt collectors are truly able to prove their case and deserve to win.

Not all cases go to conclusion in the courts.

In "regular" law cases (non-pro se, non-debt law cases), at least 90 % of cases are determined before trial, either by summary judgment or settlement. You will almost always have an opportunity to settle your case that way, too. But it seems to me that debt collectors do not offer fair settlement terms very often, so more of our cases go all the way than regular cases do. Some of our techniques (especially the discovery parts) are directed towards understanding whether you

really need to settle. Some of members conclude they should settle, and most of these settle on very good terms – all of them, I would venture to say, on better terms than would have been available if they had not used our materials.

What I say is that if the other side has what they need to prove their case and has the stamina and determination to use it despite the fact we take the profit out of it, then they will win. It's just that they almost never have these things. Our job is to make sure that if they DON'T have these things (as they usually do not), the YOU should win. That means, if the system is fair, you should win ninety-five times out of a hundred. If they DO have what they need, you will want to settle if possible.

The system isn't always fair, so our processes are designed to make things hard on the debt collectors so that they will give up and walk away. They won't make money out of suing you if you put up a good defense.

Using Our Materials

The best way to use our materials depends on where you are in the debt process. If you are not yet in litigation, you can use it as a way to prepare for what may be coming down the line. If litigation is coming, you really can't start preparing too soon. And the more you prepare, the less likely it is that they will sue you after all.

If you don't actually see litigation on its way, you should consider switching to our Debt Negotiation and Settlement membership. That might help you to avoid the litigation altogether, and the materials are designed to work with the litigation materials if that becomes necessary. You would be able to switch your membership around to Litigation if that becomes necessary. You can transition from

membership to membership, or if you need more than one program at a time, you should consider the Platinum membership, which gives you all three.

Assuming you are in litigation already, you have two options. You could (1) **read the *Overview of Litigation and Strategic Thinking***, and **locate where you are on the Litigation Flowchart** and go from there to the most pressing issue facing you. **If you have not yet answered the petition**, you should start right at the beginning, as answering without having filed a motion to dismiss can waive (release) some of your rights that you might later want to assert. Don't spend too much time reading, though – answering is easy and should not be time-consuming. It's the other parts that take more time. And motions to dismiss are not that common.

In other words, you could start with this Manual and use it as your primary resource.

A much better choice, however, is to start with the teleconferences and talk to us and get specific, real-time guidance on where to start and what to do. We can't give you legal advice, but we can talk you through questions like whether it makes sense to answer or move to dismiss, for example. If you like to read everything, as many members do, then you can read everything, but you will get help much more efficiently through the teleconferences.

And that way you will also begin to get a more subtle kind of help and encouragement – that of knowing that others are in the same boat and of hearing what tactics and practices they are facing. Because if they're facing them, you probably will eventually, too. The debt law business is run like a factory for the most part, and cases are almost all pretty similar. As I tell people all the time, the

teleconferences are the best part of the membership deal, and the sooner you start using them, the better off you will be.

About this Manual

This book is not loaded with entertaining art or graphics, and it is designed to be read rather than just glanced at. But it is designed to be read by anybody. I would very much appreciate it if you would let me know about any part of it that isn't clear to you. That would be something I would want to fix, as you can be sure that if *you* are having trouble understanding it, there will be lots of others who do, too. I am actually at work on a more graphically interesting version of this Manual, but that has its own challenges and could be a while in coming out.

Foreword

You will notice that essentially nowhere in our materials are any forms you can simply download and use. Why is that? You might be able to get that kind of form from one of the big law-forms company or maybe even from some law firm's website (I don't know that for sure) – why can't you get them from here? After all, if debt collectors use a "factory-like" system, we should be able to give you forms to battle them, right?

Actually, no. Wrong. And I think any place that would give you forms (as some courts actually do, for answering a petition) is really doing you no favors. There are two reasons for that.

The first, most basic reason we don't offer forms is that it might be illegal to do so. I'm not a practicing lawyer any more, and providing you a form that makes certain legal decisions, or strongly leads to certain legal decisions, could well be the equivalent of giving legal advice. The big law publishers might get away with that, but let's be realistic: do you think a small business helping regular people beat rich corporations could get away with the same thing?

I am not confident.

But there's a more important reason anyway. While your case may very well stop short of actual trial, it is quite likely you will at some point stand in front of the judge and make an argument of some sort. When that happens, you need to know just what you're saying and why. And you get that understanding by wrestling with facts and law right from the beginning. You gain confidence by using your judgment and working on the case. Any forms we gave you would just

reduce your chances of honing your abilities and reduce your chances of winning in the long run.

So our goal is to train you to use your judgment and to learn what you need to learn along the way. It may take some more time – I'm sure it does – but it significantly increases your chances of winning, I'm convinced. The debt collectors don't walk away from the case just because you show up and offer to fight. They have to see what you can do, and they must be convinced either that you can win or that your fighting is going to make things very expensive for them so that they lose money. They don't settle out of the goodness of their hearts, you know.

Debt Collection Is a Social Justice Issue

We started our business with the idea that debt collection is a social justice issue. As I have said elsewhere, the debt collection process as we now know it is a process of grinding down poor people into dollars for the rich. I want that fact to motivate you.

Judges don't pay enough attention to the issues of justice that frequently come up in this type of litigation, and they have widely and systematically tolerated rampant abuses. Since that doesn't seem likely to change very soon, our materials are designed to help you work through the court's possible indifference and the debt collector's (likely) arrogance. If you approach these issues with the right attitude, they won't hurt you, but it is key to understand that the pro se litigant usually starts with a "headwind." That is, you'll have to work harder than the lawyer on the other side.

Lawmakers don't pay enough attention to these issues, either. By fighting against the debt collector, you are not just doing something for yourself. You are doing something that is of great value to our country, standing up for justice and fair play for yourself and others. The more people we can get involved in this fight, the fairer it will eventually become. Of course your primary responsibility is to yourself and your case, but there's an argument that you should try to win, at least in part, for the good of everybody.

If you do fight, there is an excellent chance to win, and the more who do fight, the better the chances for any one of them. Thus every debt defendant has a stake in getting others to defend themselves, too.

Commitment

Litigation is a contest – that's something I emphasize constantly. To put it in very blunt terms, the company suing you wants something you have: they want your money. We all know that the debt collectors and their lawyers will draw very few lines in their efforts to ***get*** your money. They are often willing to sue you without true ownership of the debt in question and without any real proof that you owe anything at all. They're willing to sue you on debts that are outdated, have been discharged in bankruptcy or settled, or are the product of fraud or outright identity theft. As far as I can tell, they don't care about any of that.

They want your money, and they're coming after you. Don't expect them to play fair or nice – they aren't going to do that. The question is only, What are you going to do about it?

If you had a lot of money, you could hire a lawyer, but if you're reading these pages you probably don't. That does not mean that you want to lose your

suit. So I repeat – **what are you going to do about it?** You need an answer to that question, and I suggest your answer should be "whatever it takes."

Our materials are good enough to get you through your lawsuit. While we cannot guarantee victory (no one can or should), if you make a good effort, you will have your best chance at winning – as good or better a chance than most lawyers could give you. And that's a very good chance.

You'll know more – much more – than most lawyers, including most debt defense lawyers, by the time you get through our materials. In itself, however, that is not enough. It is *not enough to know what to do in theory*. It is only enough if you actually do the things you need to do to win. There's a lot of money at stake, **so I want a commitment from you to do what it takes to win your suit**. You must make that commitment to yourself.

That means you will have to **budget enough time** *to work through these materials and do what you are supposed to do*, and it means that you will have to **commit to doing some things you haven't done before**. I want that commitment from you because I will be doing what it takes to *help* you get there.

I talk to a lot of pro se debt defendants, and many of them have come to me with only a few days, or not even that much time, left before a response to a motion for summary judgment or some other equally momentous and large task is due. **That is not giving yourself a fair chance to win**. It is acting with the expectation that something or someone else will look out for them, either the judge, the lawyer for the debt collector, or me.

Most likely it will not be any of those. I am the only one actually interested in helping you, and my schedule is exceedingly busy and often cannot be disrupted. You've heard the saying, "*your* failure to prepare does not become *my* emergency." You must give yourself time to do the things you need to do. This is

important to *you* – more important to you than anyone else by far. It must be part of your commitment to winning.

Plan to spend time on your defense.

The Nature of the Business

You must also understand the nature of the debt collection system. If you do not have money, the system is rigged against you. You know it's true, although I'm not *necessarily* saying it is unfair. You can win because the debt collectors take a "factory approach." Their system is designed more to cause the vast majority of people to do nothing than to win a legitimate lawsuit. They don't expect you to fight and are not prepared if you do.

That isn't because they're stupid, by the way. If you could file an hundred cases and win 95% of them without spending anything, would it make sense to spend anything on all of them so you would win 5% more? It wouldn't, and so they don't. It's just a business decision, and it works for them, but you can see why it gives you such a good chance, right?

Still, no one is going to hand anything to you on a platter. *They really do want your money* and will chase you as long as it looks like they may soon or easily win. Delay itself is not a problem for them, but spending time and money on you is. The **one person** you can count on in your debt defense is yourself. I cannot read your pleadings or give you an opinion on something you are about to submit to court. You must learn how to do this yourself because the time will come when yourself is all you have. Our materials and processes are designed to show you how to do that and to develop your information and judgment so that you can do it well.

About the Debt Master Series

The Debt Defense System (this manual and the membership) is complete in itself, but is also designed to be a part (Part 2) of a series of materials we call the ***Debt Master Series***. Part 1 of the series is ***Debt Settlement and Negotiation*** (dealing with debt outside of litigation), and Part 3 is ***Credit Repair – Life after Debt***.

The series is based on my observation and experience that debt problems usually do not arise completely out of the blue. There are probably choices you could have made at some time in the past that would have reduced the chances of your landing in financial hot water. I've been there, know what I'm talking about, and apply the same reasoning to myself. Defending yourself – if that's where you're starting – is an excellent way to reverse the tide and change your luck.

You can do this, and once you do it, then you can start the process of restoring your credit or building something new and good for yourself by using the other manuals in the Debt Master System and of course by using other membership materials.

You have to change, that's all. Remember the old saying that, "if you keep doing the things you've been doing, you will keep getting the things you've been getting"? This book and this series are designed to show you ways you could change and to help with that.

In a sense, fighting a debt lawsuit is easy. All you have to do is follow the steps, with energy and commitment, and you will probably win. You may have to change a few things about yourself along the way, like rearranging your priorities

so you can learn the materials or write a response or go to court, but you will not really have to "change your life" all that much. Except that fighting for yourself in this way may be a new thing for you. When it's done, though, I promise that you will love it.

Changing the things that got you into hot water in the first place is a little tougher because you won't have looming deadlines or the deadly pressure of a lawsuit forcing you to do it. You'll just have your life. Your life depends on what you do with yourself - it's a cliché, but it's also true.

If you are being sued for *one* debt, chances are good that you have other debts that you need to deal with, and you will certainly need or want to do things to deal with your credit report. Like it or not, credit is crucial and inescapable in modern American life, and your credit report makes a huge difference in many ways you may not yet suspect. A bad one costs you a ton of money.

I have looked at the other materials out there and can say, unfortunately, that they often get it wrong. Most of the people who run debt negotiation or credit repair websites or services do not know the law and often give wrong advice. Sometimes this is just a mistake or lack of understanding of the law and its requirements and opportunities. Sometimes it's worse.

There is always a push to give definite answers – that's what people want experts for, after all, in general. But the law is seldom so definite. You will have to use your judgment. That's just the way it is, and pretending otherwise will get you into trouble. But there are things you can do that maximize your chances and give you your best chances. That's what rich people do, and it is what you should do even when there isn't a rock solid answer.

It's what we're here to help you do.

Overview of Litigation

and Strategic Thinking in Debt Litigation

"Strategic thinking" means thinking through your actions with a specific goal in mind and then acting accordingly – let all your actions move you toward that goal. It's obvious what that is in games, but not always quite so obvious in life. When you have debt *problems*, thinking this way is important. But if you are actually in litigation it is even more important. You can waive (let go of and lose) rights if you do not assert them, and anything you say can be used as an "admission" (a legally binding statement) or as evidence against you to hurt your case long after it happens.

One very specific example of the importance of strategic thinking is in dealing with debt collectors. You may have learned that it is the "adult thing" to admit where you have been wrong or to "face up" to debts or other troubles and try your best to work things out. In debt law, both of these things are likely to hurt you. If you admit the debt, for example, you virtually assure that they will sue you if things get bad enough. If you give them money, you will be extending the statute of limitations (time limit for bringing suit) and possibly admitting the debt. Both these things severely compromise your legal position. Lawsuits are different than "real life."

If you say or do inconsistent things you can severely hurt your chances. Therefore, your first action must be to develop a strategy that will guide you through the situation you are facing. You should have a list of favorable outcomes (goals) to achieve in whatever you are doing, at whatever phase of debt trouble you may be.

Your Goals

Let's start with your **most fundamental goal**: to complete this litigation with **no judgment against you**. You want that because a judgment does long-lasting damage to you on your credit report as well as subjecting you to immediate and potentially devastating collection activities in the short term.

Avoiding judgment could be accomplished in a number of ways, from complete victory to a "capitulation settlement" where you give the debt collector everything it wants in exchange for dropping the case. This would be better – if you can do it, and if you can do it without a judgment – than getting a judgment against you. Most people reading this manual, however, cannot afford a capitulation settlement. Therefore, a **secondary goal** must be to complete this litigation at **a price you can afford**.

Far better than that still would be **your ultimate goal**: a **victory**. Complete victory both allows you to avoid paying any money to the debt collector and moves you a long way towards repairing the damage to your credit report that the debt has probably already caused. It is definitely possible, and you can get it through a settlement sometimes as well as through trial.

To get there you must be committed to doing what it takes in terms of effort and learning. You must also make sure that everything you do moves you toward that goal and nothing you do moves you away from it.

The Debt Collector's Goals

It is worth remembering that the debt collector's goals are different than yours and are *not completely opposite*. Whereas your ultimate goal includes

avoiding judgment and repairing your credit, the debt collector has no interest in either a judgment or your credit report. It only wants money. A **debt collector's ultimate goal** is **to get as much money as quickly as possible** from you. That's really its only goal.

The reason that is so important to know is that when it comes to negotiation, you want to know what the other side wants and what it will give up. Of course they know what you want and fear – their whole industry is based on using that against you – but they will negotiate with only their own purpose in mind as a goal. Your offering them a judgment for example, in other words, would do nothing for them other than helping them get money from you, and they would much rather have the cash. They don't care about you or want to hurt you. *This means that wherever you are in the litigation – even if it's over and you have completely lost the suit – you can probably accomplish your goal of not having a judgment against you by offering them enough money* (if you do it soon enough).

And that is true **no matter how hard-fought your case has been or how mad at you they may seem**. You might think that after you give them hell for a year and make them work like crazy to beat you the debt collector might be personally angry at you and want to hurt you. And it could be true as far as that goes. It rarely would be, though. The opposite is, in fact, more likely to be true, because lawyers are fighters, and fighters tend to respect and like other fighters.

However the personal feelings might turn out, though, debt collectors are in business to make money. They will do what it takes to achieve their main goal 99% of the time. Use that fact to give yourself permission to work like a maniac to defend yourself. Do everything you can – give them a hard time every time you can, make them work for every single thing. Even if you do not win, keep your

head and negotiate, confidently knowing that they will act with only one thing truly in mind: your money. As long as you have that and they don't, you have negotiating power.

And here's another thing to keep in mind. All a judgment does is make it a little easier to collect money legally. That is, they can garnish wages or seize bank accounts – if they can find them. Debt collectors don't ever start a case thinking they might lose it, but they always keep a hefty concern that they won't be able to collect. Again, what this means is that even if they get a judgment, they will take a cash settlement.

Provided they don't know where your money and your job are. One of your goals is to keep them from learning these things. Don't forget that.

Settlement

Almost all lawsuits end up settling, even debt lawsuits.

If you have a counterclaim and defend yourself vigorously, the chances are excellent that you will settle your case either with *them* paying *you* money, or for no money. There are lots of good reasons to settle, time and risk being the main ones. Lawyers expect to settle, and you should be aware that that is a likely outcome of your case. If you have tried to hire a lawyer, you have probably been disappointed that one of the first things he or she mentioned was settling.

However always remember: **the terms of the settlement will depend on how the parties view their chances of winning**. In other words, if you make it look like it will take the debt collector a ton of effort to get to trial and that it has a good chance of losing when it finally gets there, it will settle on terms closer to

what you want. If it thinks it will be easy to get to trial and easy to win, it will only settle on terms close to what it wants, especially if it knows where your money is.

The Key to Strategic Thinking in Litigation

Thus the key to strategic thinking in litigation is **to work at all times as if the case will not settle and will go to trial** – to be completely committed to winning at trial – and at all times to make it look like you can and will win at trial. And then to be flexible enough to act in your strategic best interests in settling. In other words, work like mad to win, never give them anything that helps if you can help it, and then step back and act to do what is best for you without taking any of it personally.

Easier said than done! But you can do it.

Once I was in a trial where, following some motions, the judge basically told the parties to negotiate. We'd won the motion, so this worked in our favor, but of course there was still a big question of how much the other side would pay. Midway through the negotiations, however, the other side began to pack up its evidence in preparation for leaving. Our team, on the other hand, continued to look like we planned to go to trial. We took the other side's packing up as a sign of giving up, and that increased the amount we demanded and got in settlement.

Never give away the fact that you want to settle or intend to settle if at all possible. Instead, always act as if you really don't want to settle but might if the number is good enough.

This Manual

The materials in this manual and on our site are designed to help you position yourself to win. The things I really cannot do, however, may be the most important of all. I cannot give you the heart to fight hard even when you're uncomfortable or scared. And I cannot coach you on how to draw back at the last minute and negotiate as if you had never been uncomfortable or scared. Let it be a goal of yours, then, to develop that sort of judgment and coolness under fire. You won't always get everything right – no one ever does, so don't blame yourself for that – just make sure you don't ever give the whole case away, and then keep fighting.

On "Heart"

There are two kinds of "heart" that are important in this litigation: yours, and theirs.

Your Heart

Most people with debt troubles and litigation are "troubled" by it. They are naturally scared and made uncomfortable by the lawsuit, but even more importantly I think, they very often are haunted by feelings of guilt, embarrassment, humiliation, and other things. Debt troubles can make you feel dirty and small – I know. You also probably grew up believing that the "right thing to do" is to "take responsibility" for… everything.

But litigation is a special thing. Think of it as an arena, a football stadium where two teams are squaring off. The rules of litigation, like football, are not the

rules of life. Football teams are there to win, and they must put their personal issues behind them and concentrate on winning the game. "Taking responsibility" in the litigation arena means putting your other feelings aside and working *only* to win.

It doesn't matter to the game of football that one of the players feels guilty or embarrassed about his life at home. Litigation is the same way: **don't let your feelings about your life, or even this debt, affect the way you play the game**. You must do everything within your power to win. Believe me, the debt collector will do that. That may well include trying to make you feel bad personally, to judge from things people have told me (including debt lawyers) and comments on Youtube, for example. If you let that affect you, you will simply be weakening yourself. If the debt collector's opinions of you matter (and they shouldn't), just remember that they are fighters and they respect those who fight and not those who "take responsibility" by giving up. I can vouch for that. **Never give up!**

Their Heart

Debt collectors are, in general, "lazy" and "heartless." I don't mean that personally, although it can be true; I mean they are mostly just button pushers. They have a lot of fruit in the tree, you might say, and their job is simple: shake the tree and pick up what falls down. They spend their time figuring out how to shake the tree better to get more apples to fall down, not on how to get up in the tree to pick a *certain* apple, and they definitely don't care whether the apple *deserves* to be picked. They do not want to climb *far* into the tree to pick an apple even if it looks very, very juicy. They get a lot more fruit by shaking and picking. A lot more.

To put that into plain English, the typical debt collectors (and the large original creditors like Capital One and Discover, among others) have literally thousands of debts to choose from in bringing suit. What they do is file suit "in bulk" – in large numbers – and collect a vast majority of these as default judgments when people don't show up and defend themselves. They make a lot of money by doing this – enough so that whatever you owe, be it five hundred or fifty thousand dollars, is small potatoes to them. Do not worry, therefore, that your debt is "so big they'd never let it go." There is no such thing.

Of course bigger debts may justify some more action, but all their actions will follow their interest in maximizing their income. Don't forget about "collection risk," the risk they face of winning the case but never being able to collect the money because you don't have it. A bigger judgment may look better in some ways, but it means more collection risk, too. If you fight hard, they will eventually lose money on your case however much money is at stake. Try to make sure they do, because that is a first step in making them walk away.

Debt collectors have no significant moral views about you or your case. I believe that in general they despise poor people (you might as well know it if you don't already). This is not really on moral grounds, though. It just makes it easier for them to rip them off and take advantage of them if they think less of poor people (and "poor people" means anybody they're suing). Debt collector lawyers primarily think poor people are weak and defenseless, and they have systems in place to exploit that weakness.

Debt litigation is mostly *impersonal* for the debt collectors, and I usually suggest that you keep it that way. Use the fact that they have systems to do most of their work for them to your advantage. Let them think they are high and mighty as

they sit back and push the buttons on their computers. They're used to a few people falling between the cracks, and your job is to gum up their machine enough so that *you* fall between the cracks and get away.

A central rule in American law is that a plaintiff has to prove its case to the jury. And this rule largely determines the economics of all of these debt cases. Force the plaintiff to prove its case, as it must if you contest the litigation. If you can do that much, then it will most likely not be cost-effective for the company to pursue you. And that's true regardless of the specific laws governing your state.

It is also true that if you fight you should win the case on its legal merits.

Debt Collection May Be a Social Justice Issue, but…

The way debt collection operates is a social justice issue. It rips off and takes advantage of people without much money and grinds them into dollars for the rich. The more people who defend themselves from debt collectors the better it will be for everybody. That said, your job here is to win, not to fight social causes. By all means help others decide to fight their case – it will be better for you if you do – but your main and only important task in the lawsuit you are facing is to win in your case. Think strategically to get that accomplished, and then you can get more interested in the social justice issues of debt later.

Debt Master Series

Timeline of Trouble

Life before Trouble	(this may be mythical)
Distant Rumbles	Something is not right – you know you aren't doing something you should, either to prepare, protect, or conserve.
Closer Rumbles	Rumors of Doom – bills mounting, spouse complaining, *you* complaining, boss warning.
Dark Clouds in Sky	Collection letters and calls, serious conflict with important people
Litigation	Has its own process (See Litigation Timeline)
Clean-up and Move on	Win or Lose, life goes on. The quality of your life depends on handling this well.

Litigation Flowchart

We have products and materials to help with every important stage in this process.

They File Suit

You never hear of it at all.	It can happen, and you have **dodged a bullet**.
You hear about it after judgment entered.	This can happen either because they write you, start garnishing wages, or you read it in your credit report. **Motion to Vacate.**
You hear about it in time	However you hear about it, you must immediately get a copy of your court's (they differ from state to state): **Rules of Civil Procedure**; **Rules of Evidence**; and **Local Rules** (if your court has any – every federal court does, and most states do, too).
- *You notice it without service*	You can **ignore and monitor or respond** (but still **get rules** as above).
- ***You are served***	***You must respond or be defaulted.***
You do not respond	*You are in default.* **Motion to Vacate.**
You respond	**Motion to Dismiss** or **Answer.**
You File Motion to Dismiss	It must be "Partial" or Complete, and someone must "Call the

	Motion for argument and decision. Whichever type of motion you file, you serve **Discovery** at the same time.
- *Partial Motion to Dismiss*	You must file **Answer** as to any parts you have not moved to dismiss or face default as to them.
- *Complete Motion*	No need to Answer until motion ruled on by court, but you should prepare for trial anyway. The fact that you don't answer doesn't mean the suit goes away.
Oral Argument and Decision	Typically someone must set up a hearing with the court and both sides will appear and argue. If all or part of motion is granted, plaintiff is typically given an **opportunity to amend.** If amended, go back to "you were served" stage and decide, again, whether to answer or move to dismiss. Often the court will decide the motion and enter an order on the spot, but often it will not – it could wait months, although this would be very rare in a debt case.
Answer	Along with your Answer, if you have not already done so, you will serve **Discovery**.

	Typically must respond in numbered paragraphs to every paragraph, as every paragraph not denied will **typically be considered "admitted."** Look at Rules of Civil Procedure to see whether you must "verify" (swear to) your answer. In California you must; in Georgia you sometimes must depending on whether they "verified" the complaint; in Missouri you need not. Check your rules to see what your court requires. Your Answer could include **denials**, **affirmative defenses**, and **counterclaims** (as well as a few admissions).
Denials	Typically every paragraph not denied will be considered admitted. *Sometimes you can file what's called a "general denial" which denies everything.*
Affirmative Defenses	Gives a reason why, even if the petition is true as stated, you do not owe the money.
Counterclaim	Regardless of the Petition, a counterclaim states a reason the debt collector owes you money. Not necessarily more than you owe them. Claims are independent.

Court Appearance	You will probably need to show up to at least one hearing early in the case – the one on the date stated on the summons. You may **set your motion to dismiss** for argument at that hearing, do a **Scheduling Plan and Order,** or simply **continue** (put off) matters till a later date.
Discovery	Some jurisdictions have **"mandatory" (required) disclosures**. These jurisdictions might not allow you to file your own discovery until after you receive the mandatory disclosures. You file yours along with your very first response, whether it was motion to dismiss or Answer. The debt collector may or may not file some later. A very few jurisdictions **do not allow discovery** at all.
Your "First" Discovery	If permitted at all, should be filed immediately after service of the lawsuit on you with your first response – or if you decide to respond without being served, with that response. *Their discovery is independent* of yours.
-Time for Answering	Time passes – they never respond before the time is up.

	And even then it will be mostly or all objections. Expect it.
-They Respond	Expect incomplete answers or only objections. They will never, ever give you everything you asked for. You are required in every jurisdiction I am aware of to conduct some **"good faith" negotiations** for the discovery.
-They Do Not Respond	Sometimes debt collectors do not respond to discovery at all. If they do not, you must **do some legal research** to find out whether they waive (give up) all objections not made on time. You will probably need to engage in good faith negotiations before filing a **motion to compel** even in this situation.
- Good Faith Negotiations	Can sometimes go back and forth and will often require more than one letter– do not be in a rush to file a motion to compel. You will almost certainly get your chance. Instead, keep up steady pressure by negotiating.
Motion to Compel	File with the court, serve on debt collector. You will at some point – either immediately or after the debt collector has responded – need to **set the motion** for

	argument. Observe the **time limits given to them for response** by your Rules of Civil Procedure.
Oral Argument on Motion	You will argue the motion and probably end up writing an **Order of the Court** on the spot. Be prepared to do that.
More Discovery	After you get answers to your first discovery, you may want to do more discovery. You can do that unless you have already done as much as the court rules allow in terms of numbers of interrogatories, requests for production, etc. This discovery will follow the same path as your "first discovery" did.
Their Motion to Dismiss	Often the debt collector will move to dismiss your counterclaim or, sometimes, your affirmative defenses. Observe your rules (in the Rules of Civil Procedure) to find out **how much time you have to respond** and respond within that amount of time. Either side may call it for argument and decision.
Amendment of Answer or Counterclaims	Sometimes you will be ordered to amend (if the court grants the debt collector's motion to

	dismiss in part), or you will learn something that makes you want to change an answer or add something (affirmative defense, denial, or counterclaim). You can usually amend, but you must file a **motion for leave (permission) to Amend**.
Their Motion for Summary Judgment	After some time – different debt collectors do this differently – the debt collector may file a **Motion for Summary Judgment**. A motion for summary judgment asks the court to look at the evidence, decide there are no real issues of fact, and rule on all or some part of the case. This is a moment of truth – they will often dismiss the case if you win.
Response to MSJ	You must respond, on time, to the motion for summary judgment. If you fail to do so, or to ask for and receive additional time before the time runs out, the motion will probably be granted.
Their Reply	They are allowed to respond to your response. In rare cases only would you be allowed a "**sur-reply**" to their reply.

***Your* Motion for Summary Judgment**	If you have a counterclaim under the FDCPA, you may want to file a motion for summary judgment yourself. It would even be possible to file one as to your answer (their claim). If they have already filed a motion for summary judgment, yours will be called a "cross-motion for summary judgment."
Motions for Summary Judgment	Traditionally these are also heard by oral argument in state court, but in some courts they are not. Obviously if they are in your jurisdiction someone must "call up" the motion for hearing.
Prepare for Trial	This is a complicated process which must start with you understanding **all the Rules** that apply. Often there are **Local Rules that control when you must give exhibits** to the other side and when and if you file a **pretrial motion.** You must also **prepare psychologically**. You do not wait for the court to rule on other motions before preparing for trial. Sometimes the motions are not ruled on till a few days before trial.
Trial	Will be addressed separately.

Motion for New Trial or Reconsideration	Often a preliminary to appeal, asking the judge to think it over again – you need new arguments, law or facts. Watch the time limits – sometimes these motions do not change the very short time for appeal.
Appeal	Appeal is beyond the scope of this Manual, although we have a few notes on it.
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Appellate Brief	Beyond the Scope of this Manual
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Improving your Life	You will improve your life by learning how to live debt free, by addressing the debts you do have effectively, and by repairing your credit. The Debt Master Program is designed to help with this.

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Some Red Tape

Many of the documents in here or on-site were prepared with my state's law in mind, and different states may have different laws. You will specifically see this in documents related to counterclaims.

Also, I can't give **anybody** legal advice in these pages or in teleconferences or anywhere else, whether you're from my state or not, and I also haven't researched the laws of all the other states in great detail. In general, however, the state laws in this part of the law are very similar to each other, so you will find our forms a good *starting point*. My goal is to help you develop your own judgment and skills so that you do not need to rely on anything anybody else says.

If you don't want to learn how to rely on your own judgment, but are looking for someone to take over the case for you or tell you what to do, you should see if you can hire a lawyer. There's a legitimate trade-off: lawyers are expensive, but they handle the case for you. In this situation, there's really no middle ground – if you're representing yourself, you need to know how to do it all.

CHAPTER 1

You Are Being Sued – What It Means

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If a debt collector is suing you, you must and should fight to defend yourself; we discuss why here. Getting sued means nothing at all about you personally. They're suing you for money, and that's all.

You Receive a Summons

A summons is the sheet or sheets of paper which, when served, actually invoke and establish the court's power over you (jurisdiction). The document is theoretically created by the court in which the case is filed, but lawyers, as "officers of the court," are allowed to, and usually do, fill these things out and actually create them. No matter, when you have received a summons in the proper way you have been served, and the court has power over you.

What is proper service? That depends on your state (and you should find out your state's rules), among other things, although there is eventually a federal constitutional question of whether the service was fair.

If it is physically handed to you by a process server, that will almost always be adequate (although if you were tricked or forced to be where the process server could reach you it might not be adequate). If the summons is stuck between your screen door and your main door, that is almost always *not* adequate, and if you receive the summons by mail, you should look it up to see what your state allows, as some but not many states allow that. If a person physically ***offers*** you the

summons, that will almost always be sufficient unless something really weird makes it obviously unfair. In other words, you don't have to *take* the summons for service to be complete.

Here's an important fact: **if you are adequately served, the court has jurisdiction over you whether you accept the service physically or psychologically. You must respond**. The court's power attaches with service. There are some idiots out there who put videos on Youtube (for example) that would have you believe that if you refuse the summons or return it in some magical way you do not create the "controversy" or "contract" necessary for jurisdiction. This is simply dangerous nonsense.

The "controversy" requirement of the constitution simply requires that the plaintiff actually want something the court can give and does not refer to whether the defendant wants to give it to you or not. The debt collector wanting money from you is **more than adequate**. The "consent" or "contract" talk is just that – foolish talk gleaned from early discussion between the founders of this country about democracy involving the "consent of the governed" or "social contract." If you do not adequately respond to a properly served summons – and this means either with a motion to dismiss or an Answer, or a "collateral attack" on the jurisdiction of the court, you will soon find a judgment against you and someone trying to collect it. Believe me: you must respond or they will get your money if you have any to get.

If you have been served a summons, you will probably need to appear in court on the date and time specified on the summons. If you either choose to, or must, respond to the lawsuit that has been filed against you in writing, you will do that by either filing a motion to dismiss or an Answer to the Petition. We do recommend that you file an Answer or motion to dismiss and don't just plan to attend court.

Court Appearance

Suppose the summons says you need to be in court at 9:00 or 9:30 a.m. on a work-day, ten or so days from the time you get it. Speaking practically, you have to be in court on that date. If you call the debt collector or the court and ask for a continuance, your chances of getting it are very slim, although if you filed a written motion for continuance, served it on the plaintiff, and appeared in court at an appropriate time before the date on your summons you might get one. (This doesn't happen often enough to consider here; if your problem is just the specific date of court and you cannot get cooperation from the debt collector, you will need to do a "motion to continue."

If you cannot be in court on the date appointed, there's a better way. You should go ahead and file your Motion to Dismiss or Answer (discussed below) first, and *then* ask to change the court date. Why do it that way? Because the debt collector is looking for the easy give-up victory, and they think if they can get you to default for any reason they'll have it. Once you file an Answer or Motion to Dismiss, they can't get a default, and they know the court will be much more cooperative with you, too. So they'll probably deal with you. And if they don't, you can talk to the court. If you have a response on record, the court cannot grant the debt collector a default judgment, and you are much more likely to receive cooperation from everybody.

The Courts and Courtrooms

In my area, the court divisions of interest in most of these cases are the Associate Circuit Courts, which are the courts designed to handle lawsuits where the money in dispute is less than $25,000. These are called courts of "limited

jurisdiction," which refers to the maximum amount of money in dispute. Another type of court, with a much more limited jurisdiction is the small claims court. We NEVER suggest that you start or stay in that court because the relaxed rules of evidence allow the debt collectors to prove cases they otherwise could not. The Summons attached to the lawsuit filed on you will tell you where your court is going to be held. There is a building directory, arranged by "division," posted very conveniently beside the elevators in most buildings. Find out where you are going to go ahead of time!

Never try to take a weapon, including any kind of pocket knife or sharp pocket tool, into the courts. Any courts, anywhere! Do not try to take a tape recorder or radio or camera past security without calling in advance for permission, as these are sometimes confiscated. There are guards located on the main floor, and you will go through a metal detector. They will not allow you into the building if you have anything the guards view as threatening, and I suppose you could actually get arrested. The metal detectors are sensitive, so don't wear a belt with a heavy metal belt buckle, or there's a pretty good chance the guards will make you take it off to go through the metal detector. This used to be unusual in society, but I suppose it's pretty common now throughout public buildings.

There have been enough incidents in the recent past for most court guards to be *rather touchy* about security. They will not consider it funny, and may actually arrest you, if you make a joke that could be interpreted as a threat. As a defendant, you are under stress—don't add to the stress by trying to make a joke with security. It's hard to find a group of people with less of a sense of humor while they are at work. And their seriousness is justified.

Let's Talk About Stress

I made a couple of obvious suggestions in the paragraphs above about toning down your humor, for example. Why? Because being sued on a debt is very stressful. Going to a new place (the courtroom) is stressful. Being financially stressed and at-risk is stressful. And people respond to stress in different ways. People sometimes do make jokes out of nervousness which cause security to arrest or hassle them. They sometimes do forget to leave a pocket knife in their car or at home. Getting in trouble for dumb stuff like that could rattle you and hurt your confidence. Also, as I'm sure you know, stress can cause what you think is funny to veer from the norm. Just don't go there.

Your confidence is very important here. You can be scared and probably will be—I always was at least a little bit—but you want to know, deep down, that you have "tended to business." **You want to know that you have handled everything you *could* reasonably handle before you go into court**.

It will never hurt you to do more preparation than you think is necessary, and specifically I strongly suggest that you visit the court and courtroom in advance, preferably scoping out the lawyers for the other side a week or two before your case. Introducing yourself to the court's clerk would also never hurt. Looking up cases involving the other side (that will be heard the same day, so you know how many people the lawyer for the other side is suing, would be a good idea. Anything you can do to familiarize yourself with the process will go a long way towards reducing your stress to manageable levels. Again, this is vitally important.

Be humble but brave anytime you're in the court. Remember that people will be observing you—even the debt collector's lawyers. Be the sort of person people instinctively like if you can. You never know when that will help you, and it will add to your confidence. In the courts, likeable people are dangerous opponents.

Your Case May Be Assigned to a "Division"

The way the associate circuit courts work in my area, cases are assigned to specific "divisions" or judges. This means that the same judge will probably handle your case from beginning to end. In St. Louis County it means that the same judge will handle all the cases filed on behalf of the same debt collector by a given law firm. You can watch the judge deal with cases by the company suing you if you want, although I do not believe the courts treat one debt collector any differently than another.

The Courtrooms Themselves: A Walk-Through

In almost every courtroom in the country, as you walk into your courtroom you will enter the court from a hallway. You will see long benches on your left and right as you enter the courtroom, and there may be fifty or more (way more on debt collection days) people packed into this part of the court. We'll call it the "peanut gallery." This is where you sit if you want to watch. The courtrooms are all pretty much the same in any court I've been in.

Beyond the peanut gallery you will see a low wall and swinging wooden gates and one or two tables with chairs around them. There will be a few lawyers sitting at these tables looking like they own the place, and these generally include the lawyers representing the debt collectors, although I sometimes liked to sit up there when I was defending clients from the debt collectors, too, so you may see a debt defense lawyer or two up there as well. In the courts I've practiced in, up in front and on your right there is a jury box containing fourteen or so seats. Usually there are several lawyers seated in that area as well. Some of these lawyers represent debt collectors, and others represent various other people or businesses.

There may just be tables in the front with a lot of people sitting at them. Trials are probably being held in different courtrooms than the one you'll be

visiting in preparation for the call docket. There is a lot of milling around before the docket call, but as soon as the judge arrives, the bailiff (an armed guard, usually seated at a desk near the front of the court) will silence everybody. You should turn off your pager or mobile phone before you go into any courtroom. It annoys the judge and the bailiff if your phone goes off with sound, and they'll make you go out of the room if you try to speak on the phone. They won't be nice about it, either.

There are a lot of things about courts and court rooms that are a little scary at first if you haven't been there before. First of all, people are serious. Usually they are working, or else they're scared. Then there's the fact that there are signs everywhere telling you to be quiet because "court is in session." But there are no signs, and no person, who really tells you what you **can** do. So let me say:

You can walk into almost **any** civil or criminal courtroom in the country and sit down and watch. That's what you can do. You have a right to do this, and it is a very important right of "open government." The judicial system is part of government, so as the saying goes, "You paid for it." It's yours to watch, and you will sometimes see newspaper reporters or other people who are also there just to watch. I strongly suggest that you make a point of watching the debt collectors in action sometime.

Before the docket call, the clerk and a secretary will come out to prepare the files. You'll probably see lawyers approach them for various reasons. Around 9:00 (or the time set for the call docket), the bailiff will call out, "All rise." The judge will then walk into the courtroom. It is a tradition that people stand up when the judge walks in and sit back down when he or she indicates to do so. Some judges may care whether you rise or not, so you should do it, but most of the judges do not really seem to care about that kind of formality.

When the judge has gotten ready, he or she will start reading from a docket. Some of the judges often give a little speech to guide newcomers to the court and explain the "call docket" process first, but it doesn't take long to get started on the names.

The Call Docket

The call docket is really just your first chance to lose the case. If you're not there to answer, the debt collector will get a default judgment. If you are there, you may be able to set a schedule for the rest of the case. But beyond that, nothing important will happen.

The call docket is a list of cases, often several hundred of them. The judge (or someone else) will read from this list. When the judge starts reading the names, however, you will notice that almost all of the debt cases go as follows:

Judge: "Unifund vs. John Smith."
(Brief silence...)
Lawyer: "Call for default."
Judge: "John Smith, John Smith, John Smith—default."
Judge: "Unifund vs. Susie Homemaker."
Lawyer: "Call for default."
Judge: "Susie Homemaker, Susie Homemaker, Susie Homemaker. Default."

And it goes on in that vein for quite a time. Almost all of the debt cases go by default. Members who have seen it are shocked, and I'm shocked myself, by the machine-like efficiency and the sheer number of dollars that get awarded. Hundreds of thousands, or millions, in an hour or two – all without a fight.

Sometimes people answer when the judge calls their names. Then the lawyer at the table says "second call." This means that after the judge finishes calling all the names, these people will talk to the lawyers for the other side. Can you guess what the result will generally be in most cases? Most cases at this point will end in "give-up settlements," which may or may not actually involve a judgment against the poor sucker giving up. But not if you're prepared.

You Should Fight

If you are being sued on a debt, whether by an original creditor or a debt collector, you should probably fight. You have an excellent chance to win, and if you fight and lose it won't cost you much, if anything, more. In fact, even fighting and losing is likely to reduce the amount the debt collector ultimately tries to get from you.

Chance of Winning

I am not going to devote a lot of attention to your chances of winning here in this Manual because I have dealt with the question in many ways and times before now. See, for example, **Why You Can Beat the Debt Collector**, or **You Can Beat the Debt Collector.** In summary, however, the facts are that debt collectors buy huge amounts of debt at a time and file suit in bulk. They essentially never have the evidence they would need to prove their case against you when they start the suit, and whether they could possibly get it if they wanted is doubtful. They live off the people who do not defend themselves, though.

For every hundred suits they file and manage to get served, they get somewhere between 80 and 95 default judgments. They let a few go, and they take a quick path to judgment against people who do not know how to defend

themselves most of the rest of the time. They just never really face a lot of resistance. If you resist, you will catch them totally off guard. They won't be able, or won't want, to spend the money to get the evidence or to work the case. If you can persuade them that you are going to be able to maintain a tough defense, they will almost always eventually give up. And even when they don't give up, you should be able to win.

Risks of Self-Defense

I guess you could say that competent representation by a lawyer is the "gold standard" in these cases. If you have enough money and want to be sure to win this suit, and if you can find a lawyer experienced in defending these suits, then hiring a good lawyer who is familiar with debt law is the best way to go. They aren't cheap, that's for sure, and they can be hard to find, but there comes a point where you need the gold standard.

If, like most people, on the other hand, you are short on money or need to find a more cost-effective way to do things, you'll do fine here. There are even some advantages of representing yourself as long as you are willing to be tough. And to show the other side that you are tough.

If you give up, you'll give the debt collector almost everything it wants legally and pave the way for disaster for yourself. But the question here is, is there anything bad that could happen to you because you do fight instead of giving up?

The short answer is, **not much, usually**.

The Petition already seeks the maximum the company thinks it could win, probably adding a few bells and whistles it doesn't think it would win if you fight. Look at the Petition and notice what we call the "Wherefore" clause (or clauses, if there is more than one count to the petition). That's the paragraph at the end of each count where they ask the court to give them money. They ask for the entire

value of the account plus interest in every case I've ever seen. And if they think there's a chance of getting them, they also ask for attorney's fees, an amount which in reality is usually already set by the time they file the suit.

That's everything they could get whether you fight or not.

"Wait a minute," you may say. "What's this about attorney's fees? If I fight and make them spend more time, won't the fees go up?" Eventually that may be an issue, but for now the answer is that, actually, whether or not you fight almost never affects the attorney's fees. You see, most attorneys in these cases seek fees as a **set percentage** of the amount sought, and in my state, except in extreme cases I've never seen, that's limited to 15% of the amount. And the court has historically awarded that 15% whether you fight or not.

I have taken the position that this violates both state law and the Fair Debt Collection Practices Act. Some courts have agreed, and it may be that eventually that will be the widespread understanding – although some states have specifically allowed it. But for now, the courts do routinely award whatever the debt collector asks, so if you do not fight, they give them the amount they're asking for, and if you do fight they could conceivably earn the same thing. So it doesn't risk anything to fight.

In most cases you're out the attorney's fees even if you settle (if it's a give-up settlement – they don't give you a break), and they don't go up if you fight. You can find out if that's the way it works in your court, too, by looking at the files of other cases brought by the debt collector suing you (ask the court clerk for help on this, don't be bashful) that have been closed out either by settlement or default. Look at the written judgment, it will specify the amount, if any, of attorney's fees. You'll see that it's a set percentage almost every time.

"Can they garnish my wages?" is a question I often get at this point, with the assumption being that if you give up the debt collector is less likely to do so

even if they have the power. The answer is, they can't garnish without a judgment. ***If you settle or default, you give them that and make it much more likely that you will be garnished***, but if you fight, they can't take your wages unless they actually win the case. In my observation, debt collectors will still negotiate with you (a little) even after they've gone to trial and won a case if they think it will make it easier to collect their money. So what's your risk in fighting? Much less than the risk by not fighting.

Don't make it easier for them. You should make everything as hard as possible for the debt collectors. But hear me: I'm not saying be unreasonable or rude (although you might decide to do that – I'm just saying it isn't necessary for your defense and could even be counterproductive.) Be tough, though, and fight for every inch.

Finally, consider this. If you are being sued for a thousand dollars and you have to spend twenty hours to defend yourself, and you do and succeed, that's like being paid a thousand tax-free dollars. Can you get paid more than fifty tax-free dollars per hour doing anything else? What if it's two, five or ten thousand dollars? Your (implied) hourly rate for defending yourself can be spectacular. It's worth giving it your best, then. And that doesn't even count the value of protecting your credit report or the way you'll feel about yourself after you do it. *That* feeling is worth a million bucks.

Now let's talk briefly about the players.

About The Debt Collectors and Their Lawyers

A lot of people have different, but equally wrong, views about the debt collectors and their lawyers. I believe that the debt collectors have one thing in mind: your money. The lawyers have pretty much the same thing on theirs: your money. You should, too. It isn't personal even though it sometimes looks like it is.

Even though the debt collectors sometimes try to make you think that it is a personal or "moral" thing, at the end of the day, they all go home and forget about you. And they'd rip you off as soon as look at you, and still go home at the end of the day and forget all about you. It isn't personal, and it isn't moral to them. It's about them getting your money if they can. Think large predator chasing small animal to eat. It really is almost as if they regard you as an entirely different species, and completely fair game for hunting. Never forget this even when they're smiling at you.

The Debt Collectors

I use the term "debt collector" throughout this manual in what has turned out to be a somewhat casual way. I consider the junk debt buyers as a whole to be debt collectors – practically speaking, that's exactly what they are. A recent Supreme Court decision has held otherwise, though, and the question has become whether the company's "principal" business is the collection of debts. Most of the big debt collectors fit that definition, but some do not. You won't have a counterclaim, most likely, against non-debt collectors. Anyway, when I say "debt collectors" in this manual, I'm speaking about debt buyers in general.

Employees and owners of the actual debt collection companies are rarely in court. They usually just send their lawyers (typical of all corporations). The company will be the one that ultimately calls the shots, though, since they actually own the debt they're suing you for. They give the lawyers general guidelines to follow, and you will probably never meet, or talk with, the real decision-maker, although practically speaking the lawyer will be able to make a deal with you (within broad limits). In most cases, though, I suspect the lawyers are not the ones who could make the decision to drop the case against you. That probably has to

come from the debt collector (corporate management) itself, and that in turn means that your case will probably not be dropped immediately under any circumstances.

Remember how the debt collectors got your debt—they made a deal with some creditor who claimed you owed them money but who had not been able to get you to pay. The debt collector paid a small fraction of the amount allegedly owed for the right to hound you for it and keep whatever they could get you to cough up.

They knew you were in financial difficulty before they started on you, and they are just playing a numbers game. It is strictly business for them. You should ignore any reference they may make to the ethics of debt payment or avoidance, for example. Such comments are just a way to get your money, which is all they're actually worried about.

When you're a vulture trying to feed off the injured or dead you can't complain about the smell! These guys are vultures trying to make money off your hardship and misery. Don't ever take their moralizing seriously. And don't waste a lot of *your* time or energy moralizing about them, either. Recognize the rules of the game and play by those rules. Anything else gives them an unwarranted advantage.

The Lawyers

The debt collector's lawyers are, for all practical purposes, the debt collectors as far as you are concerned. Sometimes they tell you they must "ask their client" whether a payment you offer is acceptable. This may be theoretically true, but in reality the lawyer will make the immediate decisions in almost every case. In other words, don't let them play the "good cop/bad cop" routine. The company will have given the lawyer an "acceptable" settlement range, and if the lawyer is offering to "check" with her client, it's almost certain that the offer is within that range, although absolute dismissal of the action may not be. Remember

that the lawyer is never, ever taking *your* interest in mind and will never suggest a compromise to his or her client that would benefit you at its expense.

Don't be naïve. **Any offer made to you by the collector's lawyers is exclusively for the benefit of their clients, the debt collectors**. They do not have your interests in mind at all. Nor should or could they, ethically. Their professional obligation is **exclusively** to their clients, and they take it very seriously. You must remember that, too. I emphasize this point because people so often think that people smiling at them are trying to do something for them – or they believe in their hearts that the lawyers "will be nice" or give them a break.

Not so.

The other side of this is that the lawyers are not particularly bad people. They do not want to harm you personally and are not emotionally involved with either you or your case in any way significantly. I do believe that both the debt collectors and their lawyers routinely violate various laws, but this is an impersonal sort of evil. It isn't done to hurt you, and it isn't done to you in any way personally. In fact I think it is the impersonal nature of the system that actually gives you your best chance to come out of this intact. So I normally suggest that **you should not seek to personalize anything for yourself or them**. The question sometimes comes up as to whether you should, if you can, sue the debt collectors. For more on that question, check out Sue the Debt Collector. I suggest caution before going this route.

Original Creditors

Although the "original creditor" is not a "debt collector" in the eyes of the law and is not a party in a suit brought by a debt collector, it is still part of the debt collection process when you are being sued by a debt collector, and the creditor's interests have an impact on the debt collection process. So it makes sense to

discuss them a little bit here. Here we are discussing how original creditors fit into lawsuits brought by debt collectors. In a later chapter we'll deal with lawsuits brought by original creditors themselves, a somewhat different thing.

The original creditor claims (or claimed at one point) to have provided you some benefit and not been paid. After possibly bugging you for quite a while for payment, that creditor "charged off" your debt and sold it to someone else, the debt collector. One of the reasons initial creditors sell the debt to debt collectors is that they do not want their names associated with lawsuits against their customers. That's bad publicity. Another reason is that the process is expensive, annoying, time-consuming and distracting. The original creditor usually makes stuff, sells it, or provides credit for people buying stuff. Their company focus is not on collections. Remember that.

Because these debts tend to be old and because the people who generally get sued for them tend not to have much money, the **debt collection company buys the debt for a small fraction of the "nominal" value of the debt** (at a large "discount" to the amount supposedly owed). That is, if the initial creditor claims you owe $100.00, the debt collector might pay as little as $2.00 for that claim (2%). Sometimes less. I've mentioned this above in connection with the debt collection companies, but now consider it from the perspective of the original creditor: what incentive does the original creditor have to pursue you or help the debt collection company pursue you?

Very, very little.

The original creditor sold the debt in order to wash its hands of the whole thing and get back to the business it wanted to pursue. I believe that **in order to insulate themselves from further activity in the process they sometimes "purge" (destroy) all the files related to you or make the debt collector agree not to try to obtain them in litigation.** Therefore, in many cases, the debt

collection company *could not*, even if it wanted to, obtain the records of your underlying purchase or other activity with the original creditor. And the reality is that they usually do not even *want* to. Even in the best cases, the debt collector must work to get the material, and it takes money and a lot of time.

Anything you do to challenge the validity of the debt puts a burden on the original creditor and strains the relationship between creditor and debt collector. If the debt collector needs documents or testimony from the original creditor in order to pursue its case against you, it may not be able to find those documents or it may risk driving up the cost of future debt purchases. Plus it must pay for them in the current case. The debt collector doesn't want either of these things, and so your pressing for them makes it more likely the debt collector will drop its suit against you.

I have discussed (at the website), the "Assignment Contract." This is the rather lengthy agreement between the original creditor and the debt buyer when the debt buyer buys a bunch of debts. The assignment contract contains a number of interesting terms that define what the creditor is willing to guarantee (not, for example, the accuracy of its records) and determine how a debt collector could get records it wants. We strongly suggest you obtain that document – which the debt collector will never willingly provide or even refer to.

Chapter 2

Summons and Motions to Dismiss

(TOC)

You probably know the way the debt collection business works, but here's a quick review.

How Debt Lawsuits begin

In the first place, somebody generates some sort of debt. Let's say in this case that it was you, and that this is *not* one of the cases of mistaken identity or identity theft, although those things certainly happen often enough.[1] Let's suppose you used the credit card in this case, and when the bills came, you didn't pay. They bugged you for a while, and then there was silence. You had time enough to hope they had forgotten or given up on you, and then a company you may never have even heard of began calling and writing. The company claims to be an *"assignee"* of the credit card company – they bought the debt, i.e., the right to bug you and collect money from you. Eventually, since you don't pay, they file suit.

You Never Hear about the Suit

In our first example, you never hear of the lawsuit. How could that happen? Simple. The company filed the suit and then just never got you served you with the

1 Even if the debt is not and never was yours, you must still deal with it if you are being sued. Once you are served and jurisdiction attaches, the court can and will issue a judgment against you unless you successfully defend yourself. Some people have come to me and are outraged that they should have to defend themselves for a debt that was "clearly" not theirs. If that is you, your remedy is in the Fair Debt Collection Practices Act, which makes attempting to collect a debt wrongfully illegal. **But the court will never figure that out by itself. You must act!**

summons. It happens. Sometimes it happens purely because of internal affairs with the debt collector and its lawyers: they change lawyers, for example, and allow too much time to pass before moving on with the suit. When a plaintiff files suit, it only gets a certain amount of time to serve you before the case is dismissed for lack of prosecution. Sometimes it's that they couldn't find you and serve the suit on you, and the case is dismissed. Where process is not served, the case is dismissed *without prejudice* (meaning they can sue you again if they want to), and nothing else happens.

The dismissal without prejudice itself is neutral, although it often means that the debt collector will actually leave you alone, so it's good in that sense. Because filing suit is a matter of public record, you could eventually find out you got sued by checking court records (and if the debt collector violated the FDCPA by filing suit – if it was past the statute of limitations, for example), the violation occurred and is not "cured" (made right or legal) by their failure to pursue the case. But everything is fine for you in this example: the case has gone away.

You Find out about the Suit after Judgment

In a second scenario, let's say the debt collector gets the summons to a process server who actually does not serve you, but says he did. This happens so often it has a name: "sewer service." When a process server claims to have served you, he must typically file an affidavit swearing that you were served, and in the case of personal, hand delivery service this affidavit often includes a physical description of you. None of this stops some process servers from lying about serving the summons, and because most debt defendants don't challenge the service when and if they ever find out about the case, the process servers usually get away with it. You may have heard that in some places this was happening

thousands, perhaps hundreds of thousands of times in connection with debt litigation.

In this example, the debt collector shows up on the date set for hearing and, of course, you are not there. The debt collector then "calls for default" (asks the judge to award it a judgment), and the judge usually does so automatically. I have seen a judge examine the affidavit of service when the process server had recently been nailed for sewer service, but other than that – they're never going to check.

At some point (usually after long enough so that overturning the judgment is somewhat more difficult, the debt collector then decides to try to collect on the judgment by garnishing you. That really can't be done without your noticing it – after your paycheck has been reduced or your bank account raided. A tremendous amount of damage can be done before you ever know about the judgment, in other words, but you will eventually find out. At this stage you will want to file a motion to vacate the default judgment. In this case, because process was never served, your basis will be constitutional – the court never had jurisdiction over you. There are no time limits in this type of motion to vacate, but states have widely different laws on how it should be done.

You Hear about the Suit in Time

You can "hear about" a lawsuit in one of two ways: either "through the grapevine" one way or another, or by being served. However you happen to hear about the suit against you**, your first action should be to get your state's Rules of Civil Procedure and Evidence**, and to look and find out (on the court's website if it has one) whether the court in which you are being sued has **Local Rules**. If it does, you should get them. You're going to be playing a "game," and you have to

know the rules! If you don't know the rules, then you're playing a "Sucker's Game."

That's obvious if you think about it, but in the stress of the moment, it's a fact that many don't. You should.

Through the Grapevine

People do hear about being sued "through the grapevine" quite often and in lots of ways – mostly it happens because you know there's a debt collection company after you, and you check the court records, but it can also happen that a neighbor notices the process server trying to serve you with the summons and mentions it, or other ways. Sometimes you'll get a note asking you to come to some place to pick up the summons. However it happens, you could find out that you're being sued without being served. What should you do in that situation?

I suggest you do nothing and wait to see if the process server can find and serve you. You have **no obligation to go anywhere to pick up a summons** in any jurisdiction I'm aware of (although if you get a note, you should research the question for *your state **before*** you pick up the summons – a good place to start such research would be by googling your state and "service of summons" and requirements).

You don't *have* to wait, though. You *could* go to court, get a copy of the petition and file an answer or motion to dismiss. As a lawyer I would sometimes do this because I had a counterclaim and was confident that I could force the debt collector to dismiss the case with prejudice and agree to delete all credit references. There was no reason to want to delay accomplishing those things, and little risk of losing the case. There could be other reasons, too. If the issue comes up for you,

you'll have to consider all the factors: defenses you have, convenience of timing, whether you have a counterclaim, etc., and then make the decision you consider best.

Through Being Served the Summons

If you get served, you have to respond or you will be defaulted, which means that the debt collector will get a judgment for everything it asked for in its petition. And such a judgment is not easy to get vacated even if that is sometimes possible. You don't want that, so you must respond with either a Motion to Dismiss or an Answer within the time given. We will discuss those options below.

What if you were served, did not respond in time, and were defaulted. Now you want to respond. How do you do that? By filing a Motion to Vacate. But winning such a motion to vacate is never a "given."

Motions to Vacate Judgment

A "motion to vacate" is the motion by which you ask a court to vacate, or undo, a default judgment previously made. Motions to vacate *only* apply to *true default judgments*. That is, you cannot ask a court to vacate any other kind of judgment – you would have to appeal any other kind of judgment to the court of appeals. This rule sometimes fools even lawyers because sometimes courts will "strike" pleadings and enter "default" judgments because of rule-breaking of some sort. These are not true defaults, however, and the only way to overturn them is through appeals.

And to review a basic fact: defaults occur when there was service but no answer, or no service, but someone told there was service (and there was no answer). Those are very different things.

Time for Filing Motion to Vacate

As we said above, judgments obtained without service lack jurisdiction. You will have to get them vacated, but there is not a time limit. In this section we will speak of motions to vacate where you WERE served, as that is actually more common.

The first thing to bear in mind in deciding on a motion to vacate is **time**. Time is critical. I believe that the rule is everywhere that a motion to vacate must be brought "within a reasonable time, but in no event longer than X amount of time after the judgment was entered." The outside time limit is almost always a year, but you must check your own state's rules to find out for sure. I believe that in most jurisdictions the time is measured from the date the judgment was entered in court, but in some jurisdictions it is measured from the time you received written notice of the judgment.

You must take the "within a reasonable amount of time" seriously. If you wait for a month after you hear about the default before filing your motion to vacate, the court may want to know why, and it may see your hesitation as an "unreasonable" delay. What is "reasonable" is not easy to predict – it's an intrinsically fuzzy term. Undoubtedly the court will be influenced in its considerations of time as it considers the other two factors.

Excuse and Defense in Motions to Vacate

There are a few general approaches for motions to vacate. In every case you are required to have an ***adequate*** **excuse** for not filing and an ***adequate*** **"defense"** to the lawsuit. The million dollar question is, what is "adequate," and every state seems to have somewhat different rules on that. In Missouri, for example, a

judgment is not considered "final" for thirty days. *Before* thirty days have passed, the courts are very forgiving – almost any excuse for not filing an answer that doesn't sound like you were deliberately playing with the court will do, and no specific defense is necessary other than a general statement that you have one.

After thirty days, however, the rules change dramatically. Then, you have to find an *excuse* that can be no more than a little negligent, like a lawyer's employee who unaccountably fails to file something, or a power outage or something. If you can show that your failure to appear was caused by the plaintiff or is their fault, you are almost home free. It often happens with debt collectors, for example, that defendants call them and are told they "don't need to show up at court," and then the debt collector takes a default judgment. The words of the debt collector should be enough excuse for your motion to vacate, although *proving* these words may not be easy, and the courts are not necessarily required to believe you (whether you must simply state, or whether the court must, in some sense believe you, is something else that differs by state, but in any event you should strive to make your excuse believable and to be able to prove it if you can).

Likewise, your defense in Missouri after thirty days must also be much more significant, although there is a question about how much of a defense it must be: does it have to be a *complete* defense as to all liability? (don't owe anything) or can it just be a defense as to amount? Some courts have required a complete defense, but that really seems illogical and probably reflected concern about the excuse more than the defense. Still, you must check your state's rules and act accordingly.

These rules represent the range of rules that you will find in all the states. Every state looks at the excuse question a little differently, and there is considerable difference about the defense question. In order to determine what your state's rule is, you will have to do some legal research and analysis.

Motion to Vacate for Lack of Service of Summons or Other Lack of Jurisdiction – the Big Exception

There is one exception to everything else I have said here so far, at least in most jurisdictions. This is a **motion to vacate for lack of service of process or other lack of jurisdiction** – no one served the lawsuit on you (or it was in a court that has no right over you or this type of case). If you can prove that – and it may not be easy to prove to the high standard that may apply – it is unconstitutional for the court to exercise power over you, and the judgment should be "voidable" (you should be able to get rid of it) at any time and regardless of whether you have or state a defense.

In most motions to vacate you are basically asking the court to give you some sort of break in the name of fairness. In this motion, or in any other motion to vacate based on the court's lack of jurisdiction over you or the issue in dispute, you are basically saying that the *court does not and never did have the power* to enter any order against you at all. As we said above, the different states have widely different things you have to prove in order to upset a judgment.

Form of Motion to Vacate

States have different procedural requirements on motions to vacate. Check your rules of civil procedure. The "form" refers not primarily to how the motion looks, but rather to what it contains. Does it require that you swear to the truth of the facts of your excuse? And if so, can you do it by affidavit (sworn written statement) or do you need to testify in person in court? What must you say in your "defense" section? Must you have a total defense to any liability or can you just attack the amount of judgment? Do you need to attach a "Proposed Answer" to

your motion to Vacate? (usually a good idea). And what about a "Proposed Order" for the court – are you supposed to attach one of those? Different states have different answers to all these questions.

I think every state requires that you **state the facts that constitute your excuse and defense** rather than any sort of conclusion. That is, whether sworn or not, you will say as to your excuse (for example), that you had written your answer to the petition but were attacked by a neighbor's dog on your way to court, the dog bit you so severely that you were in intensive care for a week and then, also, it ate your answer to the petition. (I think that would be sufficient in any jurisdiction!) But you would **not** say that you were "unable to come to court," which is really just a conclusion. You have to say enough for the court to come to its own conclusions.

Then for your defense, you would allege (in a strong case), that you do not owe the debt collector any money and have never had any dealings with it before. You also never had an account with Chase Manhattan, as the petition alleges that you did, and that you have never been behind on any account with any creditor. A somewhat weaker, but more typical defense might be that you have never done business with this debt collector and do not owe the money stated in the petition and never owed it to the original creditor identified in the petition. A weak but possibly sufficient statement of defense might be that "in Paragraph 3 the debt collector itemizes expenses, but that some of these were caused by reported incidences of identity theft" and that the debt collector alleged and received judgment for attorney's fees, but these were not allowed by contract.

How Much (of your) Time Should You Spend on a Motion to Vacate?

You should spend enough time to make sure everything is as good as you can make it. You'd be surprised at how often people contact me saying they have spent "too much time" or "don't want to spend any more time" on the motion to vacate, or mentioning some limit of effort they want to spend on the motion to vacate.

Listen, if you are even considering a motion to vacate it must be because you are aware of a judgment against you for money. That means that the debt collector is looking for your bank accounts or workplace and wants to take as much money from you as fast as it possibly can. **To have any defense at all, you must win the motion to vacate.** In other words, the motion to vacate is for "all the marbles." If you win, you will probably win the suit against you or be able to settle it on much better terms. If you lose it, they will have a judgment against you for everything they wanted.

To put it slightly differently, everything in this case depends on your winning the motion to vacate, thus you must make sure to do your best on it. This means researching it until you are satisfied that you have everything you can find, and it means writing it until you say everything the best way. It means going to court and preparing for the hearing before you go to court. **It means doing your absolute best, because if you fail on this there is no tomorrow as to the case.**

Any limit you would put on your efforts to get the motion to vacate is simply a limit on the value you place on your future – or a reflection of how seriously you take the judgment you're trying to vacate. If the judgment won't hurt you very

much, by all means put a rational limit on your efforts, but what I'm saying is that your efforts should be limited *only* by how much you need to get the judgment vacated. Whatever your chances may be, if the judgment would hurt, make sure you take your best shot.

And remember that judgments can hurt more than in dollars collected by the debt collector – they will damage your credit report and inconvenience you in many ways.

Motions to Dismiss

A Motion to Dismiss is a request that the judge look at the case filed by the other side and kick it out. The motion is not asking the judge to believe anything one side says that the other side denies. It's just a question about whether the law addresses the situation at all, assuming all the facts in the Petition or Counterclaim are true. All the benefits of any doubt go to the party who is **against** the Motion to Dismiss. You can file a motion to dismiss the entire suit against you or just a part of it. Beyond that, you can base your motion on some "procedural" or personal ground, or on an attack that goes to the power of the court to hear this kind of case. And you can do both at the same time. There are some things you need to keep in mind.

Motions to Dismiss – Partial or Complete

There are two types of motions to dismiss: partial or complete. "Partial" means that you are seeking to dismiss some, but not all, the counts of the Petition, and "complete" simply means that you are moving to dismiss every count of the Petition. We will go into the Petition in more detail below, but for now let's just say

that a "count" is a separate claim against you for an amount of money. Counts can simply be different legal theories for why you owe the plaintiff the same money, or they can be for separate things altogether.

Many lawsuits by debt collectors are only brought in one count (for breach of contract, for example), and these petitions will not use the word "count" in them. Each count has its own "wherefore" clause, where they ask for money; if your petition only has one paragraph saying what the debt collector wants, it has only one count. If your motion to dismiss seeks to deny that one count, it is a complete motion to dismiss. If there are two or more counts, on the other hand, and you only ask to dismiss one of them, then it is a partial motion to dismiss.

The rule you must bear in mind is that you must file an Answer as to every count ("claim") that you do not file a motion to dismiss on or you will be defaulted as to that claim. So a complete motion to dismiss (to dismiss the entire lawsuit against you) means you do not need to file an Answer at all (and really should not, either), whereas a motion to dismiss just a part of the lawsuit against you means you must file an Answer as to the part you did not seek to have dismissed. Click here for much more on motions to dismiss, including samples and detailed instructions.

Why Would You Ever File a Partial Motion to Dismiss?

The reason this can be legally important is that different legal claims have different statutes of limitations as well as other rules (mainly, that the debt collector has to prove different things), and it is very possible – and even quite likely – that a debt collector will file suit under a bunch of different legal theories, some of which are beyond the statute of limitations. This *might* violate the Fair Debt Collection Practices Act.

An Example: Debt Collector sues you for a credit card account that a bank terminated for lack of payment four years ago. It alleges claims on an "open account," on a "closed account," for "breach of contract," and for "account stated." It may well be that the statute of limitations for "open account" and "closed account" is only two years, that breach of contract is 10 years, and account stated is 4 years (for example). Getting rid of excess claims early in the game will save you stress. It will also allow you to make things clear for yourself and the court.

It is also true that your formal discovery (and theirs) must be "relevant." What that means, generally, is it must have something to do with the claims in dispute. If you narrow those claims by motion to dismiss, you narrow the discovery that is allowed. And this can be very significant, depending on what the claims are.

Usually, the easiest claim for the debt collector to prove at trial is going to be one for "account stated." You would want to get that and the other claims that you *could* get dismissed, dismissed for lots of reasons. What you do *not* want is for the debt collector to be able to partially prove a bunch of different things and then have the court get confused and award it judgment even though the debt collector never proved *all* that was necessary for any *one* of them. And that can happen – judges are notoriously careless (in my opinion) when it comes to debt cases.

Attack on Personal or "Subject Matter" Jurisdiction

You can base your motion to dismiss on any or all of several different bases. In general, these boil down to an attack in some way on the "form" of the petition (does it allege what it needs to allege to be a valid lawsuit?), on an attack of "personal" jurisdiction (the right of the court to exercise power over you in this

case), or on "subject matter" jurisdiction (the right of the court to hear cases like this at all).

Perhaps the first and most important rule you must keep in mind about these motions is that **attacks on the form of the petition and on "personal jurisdiction" can be waived**. That means, you can lose them, and *the way you would waive them is by answering the petition without having moved to dismiss them*. In other words, if you answer the petition you cannot attack these things later by a motion to dismiss.

Motions as to the form of the petition or service attack the way the petition was written or served in some way. If you think the court didn't get the right to exercise power over you (jurisdiction) because you were not properly served, then answering the petition is considered a "consent" to the court's jurisdiction. Where you have received improper service, you can move to dismiss the case on that basis – or you can ignore the case completely and attack the judgment later, although this is a very risky move. The law lets you make this decision, but it holds you to it on the assumption that you intended whatever you did. It will not allow you to go back later and decide to attack personal jurisdiction unless some new, dramatically different, facts emerge that you couldn't have known about earlier.

Another motion attacking the form of the petition attacks what was included in the petition. In some jurisdictions (i.e., Pennsylvania), the petition must include (either by stating it in the petition or attaching it) the contract upon which you are bringing suit and every item for which you seek recovery. To put that into plain English, if they're suing you for a credit card debt, they must attach the contract and either attach or state in the petition all of the charges they want to make you pay for, charge by charge – including specific items for interest, fees, and every item paid for by the card. Debt collectors simply cannot do this most of the time, and so you can get the case dismissed *if you file a motion to dismiss*. (In

Pennsylvania this is called "Preliminary Objections" that must be filed instead of an answer.

Before you file an answer, therefore, you should look at your state's rules of civil procedure, glance at the "pleading requirements" (which will come very early in the rules on filing civil lawsuits – anything other than "criminal" cases are civil – look at what the rule says they have to say), and if the petition doesn't say *everything* they need to say, you can file a motion to dismiss.

> Remember, do not answer the petition as to any part of it that you move to dismiss.

There are some bases for motions to dismiss that you can file at any time. You can, for example, **always attack the court's subject matter jurisdiction (right to hear this kind of case) by motion**. What would be a possible attack on subject matter jurisdiction? Filing a claim against you in federal court for debt would be subject to a motion to dismiss based on subject matter jurisdiction. Filing a lawsuit against you for a debt discharged in bankruptcy or listed in an ongoing bankruptcy would probably also be a subject matter jurisdiction question as well as raising other issues.

Gray Areas for Motions to Dismiss

There are some defenses that are just gray areas as to whether they are subject matter or other types of jurisdiction. For example, bringing a suit outside the **statute of limitations** is a violation of the FDCPA and is, by itself, grounds for dismissal of the action. Strangely, it is not really considered "jurisdictional,"

meaning that it can be waived. You might wonder whether if you answer a petition without moving to dismiss on statute of limitations grounds you have waived the defense, and the answer might depend on your state's laws. At a minimum, if you think the debt is too old you should allege that as an affirmative defense (discussed below).

It is also a violation of the FDCPA to file suit in the wrong jurisdiction (even if, as sometimes happens, the wrong jurisdiction is more convenient to you). This violation could give rise to a motion to dismiss or an attack, in federal court (where you would seek an order by the federal court requiring the debt collector to dismiss the case). And the filing of suit in the wrong jurisdiction could also be waived. Is it waived by answering even if you later move to amend your answer to include a motion to dismiss? Maybe, maybe not. These are not the sorts of things you want to find out. Therefore, decide whether a motion to dismiss is the right thing to do before you file an Answer and move to dismiss on every available basis if you do file a motion to dismiss.

Should You File a Motion to Dismiss?

Even when you can't get the whole suit dismissed, bringing a motion to dismiss can be a good idea. At a minimum it will slow things down a little bit, and it will probably require the debt collector to spend individual time on your case. These increase the amount of effort and money they must spend on the case and push the time they might collect on it out into the future. It also helps send the message to the debt collector that you intend to fight them every step of the way.

If you lose the motion to dismiss, you will have to answer the petition, that's all (so there is very little risk involved). And the court will give you time – usually ten days – to do so. Likewise, if you win it, they'll get a chance to amend their

petition – if they can. Sometimes they can't – the debt collectors usually know what they need to allege, and if they don't do it, it might be a signal that they are missing some crucial evidence.

Possible Bases for Motions to Dismiss

We have been discussing motions to dismiss in a general way, but how would you know whether or not to file one? How do you find out? You do some research. You have to research two things, mostly. **First, look at the law regarding the claims they're bringing**. These would normally be, as I suggested above, claims for breach of contract, suit on an open or closed account, and/or account stated, but you will have to look at the petition to see what your debt collector has done. **Then you look at the facts alleged**. (At this stage, we're not talking about what they can prove, just what they alleged.)

The Law

Each of the legal theories used by the debt collector will have its own requirements both as to time (statute of limitations) and what must be alleged and proved. If they are alleging a breach of contract, for example, you do a quick google search: "breach of contract" your state and "prima facie case." Or you could try: your state, "breach of contract" and "elements." This is going to bring up a bunch of cases with little blurbs beside them. You want one that says something like, "in Yourstate, a petitioner suing for breach of contract must show elements of a valid contract, its breach, and damages…"

You must do that sort of search on each of the claims alleged. **This gives you what the plaintiff must allege in the petition and later prove at trial. It is**

absolutely vital that you know this from the earliest possible date because it *may* form the basis of a motion to dismiss, and it will *certainly* guide your discovery (discussed below) and the way you prepare for trial. You *must* know what the debt collector has to prove on each of its claims – this is the first key of the case. Remember, too, that each legal claim is independent and must be alleged fully in order to survive a motion to dismiss.

Now that you know the elements of the case against you, are there any ways in which the allegations are shaky in alleging the case? Do they say it right? Is everything in there? Is this an *old* debt? You find out the statute of limitations as to each legal theory because, as I stated above, they can be different.

Are their allegations right? Do they say everything they need to say? **Note that this is a totally different question than what they may eventually be able to prove.** At the motion to dismiss stage you are **only** looking at what they alleged or failed to allege in the petition.

The Facts

Next, look at the actual facts of the situation as you know them. Are the allegations in line with what you know? Is there another fact that is important as a defense – say, a settlement or some kind of agreement, fraud somewhere, or just anything else that might have a bearing on the case? Such facts could possibly form the basis for a motion to dismiss, although most likely they'll form the basis for your discovery and later defense by motion or possibly trial.

One fact that you will definitely want to know involves the status of the debt collector. Does your state require debt collectors to be registered? And if so, is your

debt collector registered? If not, you will want to move to dismiss the Petition as being brought by a person not legally entitled to bring suit against you at all.

Remember: you must look at each claim of the debt collector separately as you analyze for weaknesses of law or facts. This is a habit you need to form right from the beginning.

Possible Bases for Motion to Dismiss

Petition fails to allege every element of the lawsuit necessary for judgment.

Petition is brought in violation of the statute of limitations.

Petition is brought in wrong jurisdiction (wrong city, county or state court, or federal court when it shouldn't be filed in federal court).

Petition was not properly served on you.

Case brought in wrong court (of right jurisdiction, i.e., small claims court when amount exceeds that court's jurisdiction).

Failure to claim ownership of the debt – remember that debt collectors have to establish some right to sue you, and sometimes they forget to do so.

Case is brought against you before verification, but after you had disputed and requested verification (by the same person you asked to verify).

And there are many other possible bases – look at your research.

Motions to Dismiss Overused?

I think motions to dismiss are often overused.

Many defendants seem to regard them as a quick and easy way out. It is not necessary to file a motion to dismiss, and if your motion to dismiss is too forced or lame, you can hurt your position with the court and other side. You will have time to engage in legal battles – you don't have to file a motion to dismiss. If they got the petition right, there's nothing wrong with just filing an Answer and moving on to the discovery portion of the trial preparation. That's the far more important arena, and your chances there are much better. File a motion to dismiss if the opportunity is legitimately there. Otherwise you should probably just answer and move on.

Chapter Three

Answer and Counterclaim

(TOC)

If you don't have a motion to dismiss the entire claim against you, or if you decide to answer the petition, you will need to file an Answer, and you should consider whether there are any counterclaims you could assert. Eventually, unless you succeed in getting the petition permanently dismissed, you will have to file an Answer.

Your Answer to the Petition

Filing an Answer is, for most people in most situations, surprisingly simple.

Here's the first rule that you must remember: **if you do not deny it, most courts will regard it as admitted**. That means just what it says – *things you do not deny in your Answer are admitted and*, unless you amend your answer later (discussed below), *you will not be able to deny them or put on contrary evidence later*. So why wouldn't you deny everything? And what happens if you deny something you know is true?

Rules of Pleading

I believe that every state has rules regarding the truth of allegations made in all pleadings and motions. This rule is usually placed near the front of your rules of civil procedure. In the federal Rules of Civil Procedure, it is Rule 11, and this rule is the model for all the equivalent state rules as far as I know. In general, it means

that you should have an appropriate factual or legal basis for any claims you make. In most states, signing the pleading "certifies" that you have complied with this rule. In California they go further and make you "verify" your Answer (at least), which means swearing to their truth by means of an affidavit.

This rule is not entirely a joke, and there are times when too much carelessness about what you allege or deny in court could get you in trouble, for sure. In general, however, the courts seem extremely forgiving about denials of liability (some courts have a rule that regards every allegation not specifically admitted as being denied – the opposite of the most common rule) provided that the denial does not seem so "formulaic" as to be obviously an incantation which avoids addressing the truth or falsity of the allegation.

What does <u>that</u> mean? There's a lot of stuff out there on the internet, and there are people who swear that lots of things, however foolish or ridiculous they may be, have an almost magical effect. Some people would argue that a statement like the following will keep you out of trouble:

> "Defendant has no basis for knowing or disputing the truth or falsity of this allegation and, accordingly, denies it."

What you must remember is that all your words have, or will be given, meaning. Admitting you have no basis for knowing or disputing something is an actual and often very dangerous admission itself. Why not just say "Deny"? Of course you should not say either of these things about things that are totally, indisputably, and obviously true. If you deny your name or street address, for example, you could be headed for trouble, but how could you ever be satisfied that you owe any debt collector money? Be honest – in most cases you have only their word for it, and even if you had some greater amount of proof than that, can you be

absolutely certain? About their ownership? About the amount claimed? About the legal character of the money claimed?

There are very few things you have to admit, and my policy was always to deny everything unless it absolutely had to be admitted. That's what a court proceeding is about: proving what needs to be proven, and not only did I never get in trouble for denying anything, I've never even heard of anyone who did. If you make a habit of dressing up your denials in language that tries to hide the fact that you are actually denying the request – the court will take you less seriously because it thinks you are lying or "trying to get away with something."

The point of the pleadings is to decide what is in dispute. The Petition says it wants something, and a denial on an Answer is really just saying "prove it." I think you should keep it that simple by answering all but the most obvious allegations with "Deny."

Form of Answer

There is usually a proper form for your answer. I'm not saying there's a court generated, pre-made form, I'm saying that there's a sort of standard *way* or format of answering. And this is stated in your state's rules of civil procedure – you should take a look at it. I am constantly suggesting that you look at the rules of civil procedure for a few reasons. In the first place, when you look at the rule and follow it, you can be sure you are doing the right thing. Not doing literally the right thing will not always hurt you, but following the rules exactly will always build your reputation with the court and other side and make you look more professional. Also, becoming familiar with the rules and comfortable with looking at and analyzing them will do you a lot of good when you come to a more difficult question later. And having a habit of looking for authority will also do you good,

since the only time you know you're on solid ground in the law is when you have some powerful authority telling you what to do. Get used to it – it's the legal way!

That said, as a general rule, you will simply mimic the form of the Petition. It will be in numbered paragraphs with allegations of fact or law in them, and your Answer will probably be in correspondingly numbered paragraphs. So the whole thing will look like this:

Heading (also called "caption"): Debt Collector vs. Joe Consumer

Sample Petition for Breach of Contract

Comes now Petitioner, Heartless Debt Collector, and for its action against Joe Consumer, states as follows:

1. Petitioner Heartless Debt Collector is registered in YourState and is legally entitled to bring this action.
2. Defendant Joe Consumer resides at 1 Lone Eagle Place, Street, State.
3. Credit Corporation extended $15 to Defendant pursuant to a credit card arrangement (blah, blah, blah).
4. Defendant failed and refused to make payments as required and accordingly is in default.
5. Credit Corporation assigned the right to this claim to Heartless Debt Collector.

Wherefore, Heartless seeks $1,500. In principal, plus interest accruing at 35% per year as provided by contract, plus costs and expenses…

(For actual examples of petitions, click here)

Sample Answer

Comes now Joe Consumer and for his Answer states as follows.

1. Deny.
2. Admit.
3. Deny.
4. Deny.
5. Deny.

Wherefore Defendant requests that this court dismiss this claim with prejudice, etc.

(for actual sample answers, click here)

Affirmative Defenses

Affirmative defenses are another thing that is overemphasized by people defending themselves pro se. It sounds so positive, doesn't it? – "affirmative" and everything. But affirmative answers are legally specific things, and they are actually sort of rare. Denying a claim is called, in legalese, a "general defense," and general defenses put the court and other party on notice that you are going to make the plaintiff prove its case. All good.

Affirmative defenses, on the other hand, are things you must plead as if in the petition, and then the burden is on you to prove facts amounting to the defense. So "affirmative" does not mean "positive," but rather it's something you must establish. In most cases, there will not be any affirmative defenses, but when there is one, most typically it involves something the debt collector did not say that would negate your owing anything. The most obvious one would be some previous settlement of the claim (or simply, previous payment). Considering the way debts are sold, this might happen much more often than you think. And there are other affirmative defenses. The key to them, in general, is that, if you take everything

they say as true and it would give them a right to collect (thus not a motion to dismiss), you don't owe them because of "X." The "X" is your affirmative defense.

It would look like this:

AFFIRMATIVE DEFENSES

1. Satisfaction and Accord. Even if all the facts were true as alleged by plaintiff, on November 3, 2017, defendant and Collection Agency A entered into an agreement liquidating the amount owed.
2. Defendant paid the amount agreed by that settlement.
3. Plaintiff in this action is in privity with Collection Agency A, having bought the debt from it.
4. Accordingly, Plaintiff is bound by the settlement reached, and this action must be dismissed.

   [In this situation the affirmative defense would probably be restated to be a counterclaim as well, and probably a motion for summary judgment too.]

Affirmative Defenses are part of your Answer, and they come after you have denied all the paragraphs of the petition. Their legal function is not to deny anything the Petition says, but to add facts that, if true, would mean that even if what the debt collector says is true, you still don't owe any money. You will plead your affirmative defenses according to whatever rules the Petitioner followed in writing the petition.

Notice Pleading vs. Fact Pleading

Different jurisdictions have different requirements for pleading lawsuits. "Notice" pleading *used* to mean that almost anything, however vaguely put, that gave a defendant *some basic idea* of what the lawsuit was about, would be enough.

It would be "notice" that a petitioner wanted something and, generally, why it did. In the old days, that simply meant that if you alleged a basic claim, it wouldn't be dismissed unless there was *no* set of facts, consistent with the pleadings, that would allow the claim. The Supreme Court changed that for the federal courts a few years ago, making it much more difficult to know what you need to plead in federal court, and this will probably create the same confusion in the states that allow notice pleading, too. To be safe, you would really just need to follow the fact pleading rules.

"Fact" pleading is much clearer, and it is what most states require anyway. According to fact pleading rules, a party must allege sufficient facts so that if they (*and nothing else*) are proven true, you have a right to your judgment. In other words, you must plead facts that establish *every* element of the claim against the defendant specifically. If you leave out any part, the case can be dismissed.

You will probably have to plead your affirmative defenses according to the rules of fact pleading, and specifically that means that you must plead facts, that if proven show that despite whatever the petition says, you don't owe money.

Probably the best way to demonstrate the fact pleading requirement for affirmative defenses is to show you one of them.

As we have stated above, one possible affirmative defense would be the statute of limitations. That means the petitioner waited too long to bring suit. To choose an extreme example, suppose a debt collector is suing you for a debt on a credit card account that went bad in 1995. That is, you stopped making payments back in 1995, and a few months after you did that you lost your ability to use the card. Periodically through the years you have heard from various debt collectors still trying to collect on the debt, but you never made a payment. Finally, in 2012, the latest debt collector brought a lawsuit for it against you.

If it alleges the true dates in its Petition, you will have both a motion to dismiss based on the statute of limitations and a counterclaim under the FDCPA; it would probably also be smart to allege as an affirmative defense that the statute of limitations has passed. Let's say in this case, though, that the debt collector did not allege any dates – you can be sure it wouldn't. So your affirmative defense – *made after your denials of all its allegations* – will state that:

1. If you ever owed money to the original creditor it was back in the 1990s, but that,
2. You disputed that and have not paid on any such alleged debt since 1995,
3. Nor used or attempted to use the card since 1995, and that therefore
4. The Statute of Limitations has passed for any debt that might have allegedly existed between you and the original creditor.

Possible Affirmative Defenses

There are lots of possible affirmative defenses, each one with its own set of facts that must be alleged and proven. The following is just a list of them – perhaps it will give you an idea of others. Corporate defendants will typically simple allege ALL of these defenses, in conclusory form. While there is a gray area, I suggest you only allege affirmative defenses where they exist, and according to the rules of fact pleading. You're much more likely to get somewhere good with them, and you avoid the impression that you are "playing lawyer," which judges don't respect.

- **Statute of Limitations** has run – see above.
- **Unclean Hands** – must allege facts that allege the debt collector, or the creditor before it, did something wrong which would make its having the right to collect immoral or unfair. A classic example might be a bank that refused to accept payments on a mortgage because

wrongly it claimed the payments were too small, or a debt collector attempting to collect on gym membership dues where it knew the membership was fraudulently obtained.

- **Fraud** – by anyone in the chain of ownership.
- **FTC Rule** – there is a rule on all consumer contracts which states that any defense that would work against an original creditor will work equally well against anybody seeking to collect the debt.
- **Laches** – (pronounced "latches") this claim involves *unreasonable* delay that affects the ability of the defendant to defend itself. It is independent of the statute of limitations and is, frankly, rarely effective. A possible laches claim might be that the debt collector either waited so long that the original creditor had already destroyed all records of a disputed debt or that you had, in some way, relied upon its failure to pursue action against you so that you would be unfairly damaged if it were allowed to do so now.
- **Settlement** – much more common. You state that you had previously disputed the debt and had come to an agreement and compromise regarding it, and that you paid this amount (or gave up a claim against the debt collector or original creditor).
- **Accord and Satisfaction** – much like settlement, this defense basically states that you put forward an amount of money in full payment for a disputed debt and the petitioner accepted it as payment in full. This doesn't require an explicit "settlement," but it does require proof.

Counterclaims

If you think the debt collection process has been legally unfair, or if you have any other claim against the debt collector, you can file a counterclaim. Remember that **the debt collection process with this debt collector begins with the time they bought the debt and began harassing you (if that's what they did) and also includes the lawsuit itself.** Anything they've done, including filing suit or any part of filing suit, is fair game for a counterclaim.

The statements above are true for all people, but bear in mind that if the person suing you is a "debt collector" under the FDCPA, your possibilities will be much broader and the standards of proof and blame much lower. Original creditors (and now subsequent debt buyers who are not "debt collectors") are allowed to do many things debt collectors are not. For creditors (for example), behavior must be "shocking," while for debt buyers it must simply be "unfair." That's a huge difference, in practice.

Claims against Debt Collectors under the FDCPA

I discuss the FDCPA in much greater detail in materials on the website. See, e.g., articles at Counterclaims, and videos FDCPA, among others. For present purposes, however, remember that it basically requires the debt collectors to be fair and non-deceptive. The following is a *non-exclusive list* of things required by the FDCPA. *That is, the law prohibits unfair or deceptive conduct generally*, and then it lists some possible behaviors that would violate the rules.

Specific FDCPA Rules

The FDCPA prohibits the following conduct by a debt collector when attempting to collect a "consumer" debt (debt incurred for household or personal, rather than income-producing, purposes):

- **Hours for Phone Contact** - contacting consumers by telephone outside the hours of 8 a.m. to 9 p.m. local time, or at times known to the debt collector be inconvenient, is prohibited unless the consumer agrees.

- **Failure to Cease Communication Upon Request** - communicating with consumers in ANY way, other than to tell them that communications will cease and any consequences that may follow, after receiving *written* notice that said consumer wishes no further contact or refuses to pay the debt.

- **Engaging a Person in a Telephone Conversation Repeatedly or Continuously** with the intent to annoy, abuse, or harass any person at the number called.

- **Contacting a Person at Their Place of Employment** - after having been told this is not acceptable and prohibited by the employer.

- **Contacting a Consumer Known to be Represented by an Attorney** after having been told of that representation.

- **Attempting to Collect a Debt,** including **Communicating with Consumer** for that purpose, after the consumer has requested validation and before it has been provided.

- **Misrepresenting or Mischaracterizing the Debt** - using deception to collect the debt by claiming to be an attorney or a law enforcement officer, or claiming that the debt is for something other than it actually was.

- **Publishing Consumers Name or Address** - on a "bad debt" list.

- **Seeking Unjustified Amounts** - demanding amounts not explicitly authorized or permitted under contract or law (i.e., seeking attorney's fees or other collection fees unless your state law or the contract permits), or seeking more for either of these than is permitted.

- **Threatening Arrest or Legal Action not permitted or intended** - the threat to take any action that cannot legally be taken is prohibited. Likewise, the threat to take action that is unintended is also illegal.

- **Using Abusive or Profane Language.** The courts have been known to tolerate some of this if the consumer initiates it.

- **Contacting Third Parties** - revealing or discussing your debt with neighbors, co-workers, family members (other than spouse), friends, employers or any third person is strictly prohibited.

- **Reporting False Information on a Consumer's Credit Report** - or threatening to do so in the process of collection.

Required Conduct by a Collection Agency

The FDCPA also requires debt collectors to do certain things:

- **Identify Themselves and tell the Consumer** - in every communication, that the communication is from a debt collector, and that any information obtained will be used to effect collection of the debt. (This is called "the mini-Miranda warning.")

- **Give the Name and Address of Original Creditor** and **Notify the Consumer of Their Right to Dispute the Debt** This must be done in writing within 5 days of contacting the consumer by telephone or by first written communication.

- **Provide Verification of the Debt** - if a consumer sends a written request for verification within 30 days, then the debt collector must either mail the consumer the requested verification information or cease collection efforts *altogether*. Verification should include at a minimum the amount owed and the name and address of the original creditor. Remember too that collection efforts include much more than merely calling or writing the consumer and also include reporting the debt as unpaid or other actions designed to pressure the consumer to pay the debt.

- **File a Lawsuit only in a Proper Venue** - a debt collector may file a lawsuit only in the place where the consumer lives or signed the contract. Filing in an incorrect jurisdiction is a a grounds for dismissal of the lawsuit (without prejudice) and ***also*** a violation of the FDCPA (grounds for a lawsuit or counterclaim against them).

As I said above if the petition includes a request for any fee not provided for in the contract on which the company is suing you, it is a violation of the Fair Debt Collection Practices Act (FDCPA). The FDCPA is in an Appendix to this book—take a look at it to see some other examples of unfair actions, and I have videos or articles regarding several of the more common violations. See, e.g., Deceptive Notice (of Right of Verification) May Violate the FDCPA, Three Types of

Communications the FDCPA Specifically Prohibits, Four Sneaky Tricks Debt Collectors Use, and Debt Collector Dirty Trick to Get You to Default.

Claims under the Federal *Fair Debt Collection Practices Act* ("FDCPA") are often better than the claims brought by debt collectors. The evidence is easy to obtain because it is in the documents used against you in the lawsuit or the behavior of the collectors beforehand. You do not have to prove the debt collector meant to hurt you. And you can, but don't have to, prove that you were damaged in any way (e.g., you were "emotionally distressed").

The Appendix contains a copy of the FDCPA, and you will find that the law is not that hard to understand and follow. Among other things, you can ask yourself these questions. Is the company suing you seeking to collect money on a "*stale debt*" (too old, or beyond the *statute of limitations*)? Is it seeking attorney fees without showing that it has a right to do so? Is it seeking *compound interest* on the debt without specific authorization from a contract or state law to do that?[2] Is there anything about the lawsuit it filed, or its conduct generally, that could be considered unfair, deceptive or oppressive? If so, the FDCPA may very well give you a right to sue the company.

Other Claims against Debt Collectors or Original Creditors

The FDCPA **mostly applies to debt collectors** (people or companies who regularly pursue debts that allegedly belong to someone else) **rather than original**

2 "Compound interest" is interest on interest. That could arise in any number of ways. Suppose the original creditor had charged you interest on your charge account. This is often added to the amount originally borrowed when it is sold to the debt collector, who then asks for that entire amount "as principle" plus interest from a certain date or "up to the date of trial." But this is seeking interest on interest. In my state, the law is that a plaintiff is not entitled to compound interest unless there's a contract which specifically permits it.

creditors. **There is one main exception** to that rule, however: *it is a violation of the FDCPA for an original creditor to pretend to be a debt collector*.

How would that come up? It usually comes up in the context of something called "flat-rating," which is a really sleazy practice by businesses and debt collection lawyers. What that is, is a practice whereby a law firm basically sells its stationary to a large-scale creditor. The creditor then sends out letters *on that stationary* to all the people that owe it money. Naturally, these people all believe they are being contacted by a debt collection attorney (and are suitably intimidated) rather than the creditor whose letters they may have been ignoring for some time.

The language of the letter falls just short of some sort of legal pronouncement (although in my opinion this all should be considered the illegal practice of law). The FDCPA makes this sort of practice illegal under the FDCPA and applies to the original creditor.

There are other claims that could be brought against debt collectors or original creditors. I mentioned above (in the section on affirmative defenses) the FTC Rule, which makes any defense to a claim that would apply to an original creditor equally applicable to a debt collector. The debt collector suing you supposedly took an "*assignment*" of the debt you allegedly owed someone else.

One of the rules about assignments on contracts for consumer goods is that whoever takes the debt also becomes subject to all claims and defenses you could make against the original creditor. Either the debt collector or original creditor could be liable for defamation or slander if they falsely report a debt, and either could be liable under the Credit Reporting Act, as well, for reporting a debt as not "disputed" if you have disputed it.

If the original creditor did anything wrong to you (defrauded you into purchasing a health club membership or wireless telephone service, for example),

you can do two things. You can defend yourself, saying you don't owe the money (as an affirmative defense). And you can also **sue the debt collector for the *fraud* or *unfair merchandising* that the original creditor did**! (although there are limits to how much you can collect if you win). And likewise, you can interpose any other defenses or claims you would have had against the original creditor against the debt collector (or buyer). Federal law requires this rule.

There are some real advantages to making a claim or defense of fraud or illegal "merchandising" against an assignee. Against the original company you have to worry about an opponent concerned about its reputation. And this company has access to and control over some important evidence (salespeople and sales documents).

Against a debt collector or buyer, though, the tables are turned. The collector purchased the debt for pennies on the dollar from the original creditor. **The original creditor then lost all financial interest in the matter and may very well have destroyed any records relating to you.** The debt collector is not worried about the reputation of the original creditor, and it also must struggle to obtain evidence of the validity of the transaction. The witnesses and documents it needs to protect and defend itself from your claims (as well as to establish its own claims against you) may not be within its control. And probably won't like them.

Meanwhile, you can testify as to your experiences, often without anybody who can contradict you.

This is a path you can follow whether the company against you is a "debt collector" within the meaning of the FDCPA or not, and it has the advantage of being slightly unusual, but suggesting that somebody did YOU wrong, so it gets more respect from the judges.

Miscellaneous Counterclaims

We have been discussing counterclaims arising out of the behavior of the debt collector or the transaction that brought about the debt in the first place. And then there are what you might consider miscellaneous counterclaims which just happen to be claims you might have brought against a debt collector that existed when it sued you first. Examples for this would be a landlord suing a debt collector for overdue rent at the same time the debt collector sues it for old bills, or a person suing for an auto accident with the debt collector where the suits just happen to coincide. These are random things, but counterclaims just put together all the litigation that exists between two people – as a way to save court time.

Why File a Counterclaim

Your motto should be "Attack!"

There are lots of psychological reasons you would want to countersue, since in the law you are definitely pushing or being pushed, and it's much better to be the pusher. One *legal* reason you might want to bring a counterclaim against the debt collector, though, is to keep it (the debt collector) from just disappearing if it looks like you will win. If they do just disappear, they may sell the supposed debt to another company which could then bug you a while and then sue you again. If you want to make the debt go away, you must get it dismissed "with prejudice."

No one can stop the plaintiff from dismissing the suit if it wants to (in my state and most others). But you can make it less advantageous to do it by bringing a counterclaim. They could dismiss their suit against you, but not yours against them, so if they dismissed the suit against you, it simplifies your efforts to make them pay. And it means that their lawyers are fighting a suit with no prospect of making you pay for it. This would be a pure loss of money for the company, and

it's just never going to happen. So the debt collectors will often agree to settle all the claims once and for all. This is what you (usually) want. That way you can wipe out the debt for good.

What You Can Win Under the FDCPA

Unfortunately, the FDCPA does not give you much money if you win. It gives you "up to a thousand dollars" as a general "statutory" penalty, and if you can show that you were "damaged" by the actions in questions (and this might include emotional distress), you can receive compensation for your damages, including pain and suffering. The law also provides for "attorney's fees," but you must hire a lawyer to qualify for those.

State Law Remedies

On the other hand, **most state laws provide penalties for extreme or sufficiently unreasonable collection activities**. Calling at odd hours of the night, for example, or threatening with other than legal actions, certain types of embarrassing behavior, etc., have all been found to be unreasonable in various states, but they have to be pretty extreme. That would open up the possibilities of more significant amounts of money both as damages and as "punitive" damages.

Punitive damages exist to "make an example" of your case and prevent other people from acting in extreme or illegal ways. They are in almost all of the really big awards you hear about, and that's actually why they exist: to make news and warn other potential wrong-doers. In recent times, many courts have limited punitive damages as part of "tort reform." You'll have to find out what your state's law is on this.

Remember: where possible, "Attack!

Jury Trial or Not?

Do you want a jury trial? If you want one, you must file a jury trial request. In some courts you can do that as part of your Answer, but other courts require a separate document. You can find out either by asking the court clerk or by checking the Local Rules. I'd ask the clerk! But if in doubt, there's no harm in putting a request for jury trial on your Answer and Counterclaim and in filing a separate "Request for Jury." Whatever you do, you should file it at the same time you file your Answer unless you know your court does not require that. If you follow whatever the actual rule is on that, you will have a strong right to a jury trial. If you don't follow the rule, you will probably still get it – but you might not.

I usually *did* want a jury trial, while practicing. Things go differently if the case is tried to a judge only rather than to a jury. If it is a judge-tried case, it will be much less formal, will go faster, and is easier for both you (good) and the debt collector (bad – more bad than the good is good). It will also allow the judge to take a more active role during the trial. If the judge happens to be on your side, this would be a great advantage. If the judge happens not to be on your side, then obviously you would be starting with a huge disadvantage.

In my opinion, judges are much better referees than fact finders and, on the whole, are **probably more likely to sympathize with the lawyers and debt collectors on the other side of the case.** They see the debt collectors and their attorneys all the time, and familiarity breeds, in this case… familiarity. Of course this is all just a generalization and might not apply in your case. The other thing is that the reality of these cases is that in a large majority of cases the person being sued really did borrow some money from somebody, and the debt buyers will claim

they have a right to collect. Sometimes judges do "rough justice," which means they basically ignore the law and do what they think is "fair."

What they *should* do is make the debt collector prove its case, which it usually cannot do. Rough justice means letting the debt collector get away with NOT proving its case. I sometimes call this the "Judge Judy Complex," where some judges think they're job is to "dispense justice" without real regard to the rules – like a television judge in a thirty-minute show. These judges are often satisfied by evidence that isn't admissible and may not listen to your arguments at all. To me, that's just wrong, and to you it may mean big trouble if it happens. It's less likely to happen with a jury around.

The main reason I liked juries was that I believe they are made up of people who are generally more aware of daily economic pressures than judges. They tend to be normal people, while judges are often privileged. Also, judges and debt collection lawyers tend to have more or less the same background as each other, and it is probably not the same as yours. Although this is not to say the judges or their staff *like* debt collectors – I don't think they do. But that won't work in your favor.

Juries are perhaps a little more sympathetic to you. They see fewer legal cases and are therefore less jaded by them. They also seldom see the debt collectors or their lawyers, so they may be more likely to identify with you. Also, if any one of them does happen to be prejudiced against you, one of the others may lean in your favor.

On the other hand, juries tend to view the whole thing more like television or other entertainment, and so they expect more of a production and a faster flow of information than judges do. They might make up their minds a little faster, and you definitely need to have a higher standard of preparation. They like it smooth and entertaining, and they don't want to see you pretending to be a lawyer.

If you are representing yourself, you may have some additional fear of a jury, though generally I find juries are sympathetic and nice. **Do not underestimate the jury!** They eventually notice pretty much everything. No one's going to pull the wool over **their** eyes for long, and I do believe this is in your favor if you play straight. I do not have the same confidence in judges because they have only one "set of eyes."

Beware though. If the jury thinks you are talking just to hear yourself talk, or that you are having fantasies of being a lawyer, they're likely to punish you for that. **Stay humble!** Fight, but be polite, and don't "pose."

CHAPTER 4

What the Company Must Prove and Why Your Chance to Win is So Good

(TOC)

In a way, to ask what a debt collection company must prove in a debt case is a trick question. **In the vast majority of cases they are not required to prove anything at all.** You know why by now, right? Most people either don't go to court and are *defaulted*, or else they "show up to give up" ("capitulation settlement"). They give up and consent to a judgment against them without even requiring anything from the debt company at all. *On the other hand, when the defendant chooses to fight and hires a lawyer who doesn't just give up for you, the debt collector usually packs up its bags and hits the road before the case actually goes to trial.*

But in the rare cases where both parties choose to fight, what must the debt company prove? We have discussed the elements of the debt collector's case above in the section on Answers, but, in general, it must prove certain very basic things: (1) that it is the lawful owner of the debt; (2) the amount of the debt; (3) that the defendant incurred the debt and has not already paid it back; and (4) that the debt was "fair" or otherwise authorized.

The debt companies are virtually never prepared to prove any part of their cases at the time they file suit.[3] I don't think there is much reason to believe

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3 This is what I gather from comments of lawyers representing the debt collectors, who say that their clients neither obtain, nor try to obtain, the documents supporting the debts they claim, prior to filing suit, and from cases showing the same thing.

they ever could prove many of their cases. But that is not to say they could **never** prove any case if put to the test.

They are seldom put to that test, however. It wouldn't be cost-effective in most cases for them to pursue the case if the defendant contested it. **In other words, if forced to prove their case, the debt companies usually find it unprofitable to do so whether they can actually do so or not. It costs more in legal fees to do the legwork than they will ultimately collect if they win**. And in terms of ***opportunity cost***, the price is much, much higher, since every hour spent in actual litigation costs them numerous cases that don't get filed and defaulted on, assuming staffing is kept constant.

Proving Ownership of the Debt

Regarding proof that it is the actual owner of the right to sue you, you would think that a debt collector could easily prove this. At a minimum, if you are being sued on a debt you must get this proof for one very simple reason. **If the wrong person sues you and takes your money, you could still get sued by, and be required to pay, the person or company that actually did have a right to sue you.**

This makes perfect sense if you think about it. If you get sued by the wrong person, the legal process gives you the chance to fight it out and discover the real facts. On the other hand, the person actually holding the right to sue may never get notice of the lawsuit at all. Why should the person who has a right to sue you lose that right through the actions of a stranger, when you could easily stop it from happening?

Many people expect the courts to protect them in some way from the injustice of having to pay twice, but you must understand that the courts will not

protect you in that way. Like almost everything else in the legal arena, it's up to you to protect yourself. Don't let wishful thinking make you a sucker. The legal arena is a contest. You have the right to try many things, conventional and otherwise. The courts let you assert or ignore rights as you see fit, but they will hold you to your choice, even if that choice was made in ignorance. And that's fair, right? Because how would they know what you are doing intentionally versus out of ignorance? They'll assume you know what you're doing.

This means **you had better make sure you are dealing with the right person**. In court that means you must require the company to *prove* it is the person with the right to collect the debt. Whether it actually can do that or not is another question, and not so obvious because of something called the rule against hearsay. Someone who knows about when the debt occurred and whether it was sold will either have to testify to the fact itself or else to the documents which prove the fact. (This rule is known as the "Business Records Exception to the Rule against Hearsay.") In either event, it will take time and money, and someone will have to testify on behalf of the corporation. That adds to the debt collector's burden.

There is a very powerful argument to be made, when the person suing you is not the first person who was assigned the debt, that every person or company who theoretically owned the debt before the debt collector which is suing you did, must prove they really did own the debt and have the right to assign it to someone else. If someone steals a car and sells it to another person, the person buying the stolen car does not own the car or have the right to sell it to someone else. The owner still owns it legally. Same with debts: **just because another company really did sell the debt company suing you the right to collect the debt does not prove that this other company legally owned it and had the right to sell it.**

Every company that owned the debt leading to the debt collector suing you must prove valid ownership. That could be extremely difficult for them to do, but

that’s no reason they shouldn’t have to do it. Remember that if you fail to get adequate proof on this you might be required to pay the same debt more than once!

Proving the Amount of Debt

Proving that you borrowed any amount of money, or that you did not pay back everything you owed (a very different question), is much harder for the debt collector than you might expect. How does a company prove how much money you borrowed from someone else unless you admit it? How do they prove that you didn’t pay someone else back all the money before the debt was assigned to the debt collector? Or even afterwards? These are very hard things to prove in court unless you admit them. Make them prove their case. And in many cases you will find that the records of purchases, if they can find them at all, are not correct, or you will find fees and interest that it is a violation of the Fair Debt Collection Practices Act for the company to try to collect.

To avoid all the most difficult parts of proving a contract claim, debt collectors often file their claims as claims for an “account stated.” In account stated, plaintiffs allege that they or a predecessor in interest have submitted statements of account to defendant, that defendant acquiesced (either agreed to, or at least did not disagree) with these statements, and that therefore plaintiff’s claim on an open account (or other credit card claim) is transmogrified into an account stated: you impliedly agreed to pay the specified amount (a separate contract, easier to show) and then didn’t.

To have an account stated, "it must appear that at the time of the statement an indebtedness from one party to the other existed, that a balance was then struck and agreed to be the correct sum owing from the debtor to the creditor, and that the debtor expressly or impliedly promised to pay to the creditor the amount thus

determined to be owing." The key element is agreement on the final balance due. The burden of proof is upon the plaintiff to establish its case. No need, under this theory, to show an original contract or any of the items that were bought – just statements and failure to pay. Much easier, but still almost impossible for a debt collector to show because they cannot testify from personal knowledge as to any of the facts that would establish the claim.

They depend on you to give up – or at least not to fight effectively.

Proving You Incurred the Debt

The debt collector must, as part of its case, prove that **you** are the rightful defendant and incurred the debt. This might not be as easy as it seems for the same reason that proving the amount of money is difficult. The collector is not in possession of all the records and has no personal knowledge of any of the records it has. So if, for example, you deny owing, or remembering that you ever owed, the specific account on which the debt collector is suing you, then the debt collector must try to prove that you did owe that amount. For this it might want checks with the account number on them, copies of credit card applications, and so forth.

Maybe they can get these things, and maybe not, since the debts in these cases tend to be very old and have gone through more than one assignment. Again because of the age of so many of these debts, my clients have often simply lacked any bank records relating to the time the debts were supposedly due. The banks might not have the records, either.

Don't assume the debt collector can get the proof it needs. Make them prove that **you** were the person that really incurred the debt. Because even if you're not that person, and there's a judgment against you, then **you** will have to pay the debt

collector. No one else is going to look out for you here. You must fight for yourself.

On the other hand, if they cannot prove the debt and every part of their case, you will not have to pay it whether you were the person who had the debt or not. Just like that, then, the debt that has perhaps plagued you for years will be gone in the blink of an eye. The law is an adversary system, and what you "should" do is only what they can actually *make* you do. Do not mistake it for something else. And in my opinion, you should play as hard to win as you possibly can.

Proving That the Debt Was Fair

The debt collector has to prove that the debt was legitimate.

This is normally not difficult for them on a credit card debt if they can prove the other elements of the debt, since they will simply ask if you disputed any part of the debts on your statements (if they have the statements). On the other hand, if they don't have the statements, or if you did dispute some of the debts their problem becomes much greater. By the debt being "fair" they don't mean did you get your money's worth or were you happy with the purchase. The question is whether you willingly made the purchase, were defrauded, or other things like that – things that go to the ultimate enforceability of the debt.

The legitimacy of the debt is considerably more difficult to prove in other types of consumer cases than credit card debt. Of course there could be identity theft, and if there was and you reported it, then you're basically home free on credit card debt. But there's no other real type of fraud potential. One type of case I often encountered while practicing was old telephone service cases or gym membership cases. These debts were frequently disputed, and the underlying

contracts are notorious for having been fraudulently obtained. **Any defense you would have had against the original creditor is good here, and even better than it would have been against the original creditor** because the collector has less evidence on hand and is less motivated to challenge the defense. Remember that the debt collector is required to prove the legitimacy of the debt as part of its case.

Whenever you have a legitimate argument as to the fairness of the debt you have a big advantage in a debt collection case.

Redundancy and the Burden of Proof

Just how powerful a case do you have to make in order to win? What amount of proof do you have to have to show the debt collector can't prove its case?

Enough. You have to show… enough.

I'm sure you noticed the extent to which the "elements" of the debt collector's case overlapped or were "redundant." If you can prove that the debt collector didn't (or can't) prove one part of its case, should you win? Yes, you should. **But as a practical matter, consider how much more powerful it is to show that they can't prove *any* (or several parts) of their case**. Judges and juries are people, and that means that the more powerful your case is, and the more parts of its case that the debt collector cannot prove, the more likely you are to win. The legal standard is that you should win if the debt collector fails to prove even a single element of its case. The word here is "overkill." Try to beat them on everything.

"Burden of proof" refers to who has the obligation to prove something is true (or not true). In civil cases, the burden of proving its basic case falls on the plaintiff (debt collector). If you have an "affirmative defense," the burden of proving that is on you. If you have a counterclaim against the debt collector the

burden of proving your basic case is also on you. The level of proof required in a civil case is “by the preponderance,” which is just a fancy way of saying it is at least somewhat more likely than not that a certain thing happened.

Have you ever known someone was lying just by watching him when he said the lie? Of course you have, and so have judges and juries. So if the debt collector asks you at trial if you owe the money, and your answer is no, could that answer provide the evidence that you did owe the money? What if you said you didn’t know?? Yes, in theory your negative answer could be proof that you did owe if the judge or jury decided that you were lying and actually did know that you owed the money. As a practical matter, without any other evidence neither a judge nor jury would be very likely to find that you owed the money on that basis. And to find a specific amount of money due based on that evidence for an old debt might be unreasonable enough to get the case reversed on appeal even if you did lose it.

Thus, if you don’t admit owing the money you will be safe in most debt cases.

Still, you don’t want the jury to think you’re a liar.

But what if there is, literally, no evidence about a certain point? That’s a possibility in cases like this. In that situation, the judge or jury absolutely must rule against the person with the burden of proof. Remember this because there are often gaps in the evidence which make it impossible for the debt collector to prove essential parts of its case. In a nutshell, this is the heart of most debt defendants’ cases: the debt collector lacks proof.

And we make sure they lack proof by challenging all the evidence they want to use AS proof. They almost never have truly admissible evidence, and that’s why I say so often that debt collectors should almost never win their cases. Make sure you fight every inch of the way.

CHAPTER 5
DISCOVERY

(TOC)

In the last chapter we discussed what the debt collector needs to prove its case. You will have to figure out what you need to prove to support your case based on what your counterclaims or affirmative defenses. The next step is to conduct discovery. I believe you should start this process along with whatever you file in response (motion to dismiss or Answer) to the suit in the first place unless you are in a court or state that does not allow this (check your rules of civil procedure). Pennsylvania, for example, will not let the parties engage in any official work on the case while preliminary objections (their equivalent of one kind of motion to dismiss) are pending.

But for most people and jurisdictions, you will be able to go ahead with discovery, and you should.

> This is an early test of your commitment to winning because it's something you need to do which does not have a due date on it that is imposed by rules or the other side – it is your chance to seize the initiative. Grab it!

The other side will *probably* also conduct its own discovery eventually, too, so you may as well get ready for it, but they do not always do it. Whether *they* do discovery or not, you should do so. It is expensive, time-consuming and annoying for the debt collector, and in fact the debt collector may not have the information you are seeking and to which you have a right. Therefore, discovery will be your best chance to make the case go away.

Motions and discovery are independent —just because they ask the court to "dismiss" your counterclaim does not mean that you should not send, or answer, discovery requests aimed at your defenses and counterclaim. The time limits are not changed unless the judge specifically changes them! You should also never wait for the debt collector to start the discovery process before you begin. **Go at your own pace, and make it as fast as you possibly can**! This gives you a chance to find out what you need even though the debt collector will resist and delay, and it also discourages and annoys the other side, increasing its costs and lets them know that you intend to try to win the case.

What Is "Discovery"?

Discovery is the formal process by which both sides ask each other for the information within their knowledge and control that pertains to the case. You find out what the other side can use to prove you owe them money and the things that help you prove your case against them. They do the same. There are two main ways to conduct your discovery: "interrogatories" and "requests for documents." You can also conduct what are called "depositions," which are basically interviews under oath to tell the truth. You can send, and the company suing you will almost always send you "requests for admissions," **which you must answer or face serious consequences**. Each of these tools of discovery is treated by a separate rule in your state's Rules of Civil Procedure.

Interrogatories

Interrogatories are questions parties ask each other which must be answered under oath. Interrogatories are directed toward getting proof that will disprove the company's case or prove yours against them. Interrogatories are not ordinary

questions, and they must be precisely stated in order to get the information you need.

Your Interrogatories

The Sample Forms Book includes two sets of sample discovery that are basically the same in content. This is because there are different rules regarding discovery for different jurisdictions. The main difference is that some jurisdictions allow compound discovery questions, whereas others prohibit them. A "compound" question is one with more than one part. It could look like this:

1. *State all policies you have that are designed to prevent any violations of the FDCPA, and for each state:*
    a. *When it was enacted and put into effect;*
    b. *Where it is maintained and how communicated to employees;*
    c. *Each individual who has ever violated the policy;*
    d. *Every sanction or punishment imposed in accordance with the rule;*
    e. *And identify every document created or maintained related to the rule or its enforcement.*

If you are not allowed to use compound questions, you have to be a little cagier about it:

1. If you have any policy designed to prevent or control violations of the FDCPA, identify every document related or referring to that

policy, including without limitation, all documents stating the policy, imposing any penalty upon any employee [etc.]

Even if you use my sample interrogatories, you will probably need to make changes to them, but it should be pretty clear why you will ask the questions you do. To create interrogatories, you look at the things that the debt collectors say they will prove in their Petition and the things you say in your answer and counterclaim, and you ask questions designed to cast light on these issues. Notice, for example, that proving the "debt collector" status of the plaintiff is more complicated than it used to be, as you must show that the company's "principle business" is collection of debts – you will need to ask interrogatories that help you prove this.

Take your time to get this right, and notice that the questions are rarely "yes" or "no" type questions—rather, they ask for all the company's knowledge about certain issues. If the company cannot prove that you borrowed any money, for example, and you do not admit to it, then this would negate their claim.

Number Limits on Discovery

You want to know what they can prove, and you want to know what they cannot prove. Look carefully at the examples and give it your best shot. ***There is often a numerical limit*** to how many interrogatories you can "propound" (give) to the other side established by "Local Rules." You can ask the judge or a clerk how many are permitted (and you might get an answer or reference to the rules), or you can ask a law librarian at a university law school–they're almost always open to the public. Or you can ask the court (clerk, not judge) for a copy of the "local rules." Don't be shy–this is the way most lawyers find out what the Local Rules provide, too. And you absolutely must know whether there are local rules, and if so, what they are. DO NOT SKIP THIS STEP. For more about Local Rules, how

to find them and how they affect your case, read this article: Local Rules and Discovery Limits.

You must know any limit to the number of questions that can be asked and what the limits apply to. Sometimes they include requests for documents, and sometimes not; and sometimes they include requests for admissions and sometimes not. Be smart – find the rules about number limits and whether or not the questions can be compound, and check to make sure the other side isn't breaking the rules. You would be shocked to find out how often sophisticated legal players break the rules – there's a good chance it will work and give them a big advantage, and little chance they'll get caught – and if they get caught no real penalty. If they break the rules, you can object to everything and not provide anything till they fix it.

Their Interrogatories

They will also probably ask you questions—questions designed to get you to admit that you owe them, or someone, the money you claim they do. My ***Sample Forms Pack*** includes a sample set of discovery from a debt collector. You will likely get similar questions, so this will give you a start on answering the questions you will face. *I strongly recommend that you serve your discovery on them first so that their answers are due to you before yours are due to them*. This will allow you to see how *they* plan to play the game, and you may be amazed at how they do it. Typically they will object to every single thing and give you the vaguest mixture of objections and "retaining rights to amend" and so on that you have ever seen. It's an education by itself.

And another thing – if they're going to play it this way, they will do what they can to disguise it until after you have answered. They'll wait till the deadline for providing answers and then ask for an extension of time, saying that they need the time to contact the people who sold them the debt. I suggest you do the same –

on the last day for answering (or whatever they did), you can say that you're having to look for records from other custodians of records – for example, your bank. This is just a stall, though. They won't be looking for records, and I'm not saying you should go out of your way to get any, either, since any records you get may help them.

This is just the way the game is played. For it to work, though, you must get started on discovery before they do – and you can accomplish this by serving discovery with your answer. Any delay beyond that risks handing over this important advantage.

The fact is that in most cases the debt collector relies totally on you to provide proof of the debt. Do not answer "yes" to something you don't know for sure, but don't play games pretending to be a lawyer, either. If you try to get too tricky and say things like "given the information at my disposal, I cannot answer one way or another and therefore...." because someone with a web site suggests that this sort of phrasing has magic power of some sort, you are just going to get burned. If you stick to the very narrowest version of the truth you know and make sure you do not give them anything more than they are entitled to know, you will be doing a good job.

The reality is that most people in debt have almost no idea, and certainly nothing they could honestly swear to, about how the debt came about or got so big. Most people stop paying attention because it's painful and futile to keep looking at bills you can't pay, right? That doesn't mean you have to swear the bills or correct. It means you CAN'T honestly testify that they are correct – how the heck would you know?

But I have known many people who swear to the accuracy of credit card bills because they feel guilty about not paying it. Don't do that. Never swear to things you don't know are true.

I also include a sample of Answers to Interrogatories I have received in a debt case before in the Sample Pack. Or you may be able to find sample plaintiff interrogatories through the internet. These will give you an idea of the way answers are provided. You will notice that little information is provided, and the response is very technical and precise. One spends great care to answer only the question asked and nothing more. Do you actually know the answer? If you do not know an answer to an interrogatory, then you say you don't know, in order to be truthful. If they ask you if you had a Mastercard Account numbered 1234-567-8901 and you don't remember the account number you had on your Mastercard account, you can't assume they got it right. Unless you can prove or disprove the answer **and swear to it** one way or the other, to be truthful you have to say you don't know.

The Rules require you to answer the questions to the best of your knowledge, but they do not require guesses or opinions. **There is no rule that the benefit of any doubts go in favor of the party suing you**. If you have doubts, you can't swear to your answer unless you say you don't know. So that is the only thing you **can** say truthfully. These cases involve old and obscure debts. Often you will not know where they come from, but that does not mean you should admit the company is right. Say no more than you know.

Requests for Production

You and the company are going to ask each other for copies of the documents you think support your cases. If you have them, you give them. If you don't have them, you don't hire a detective to find them. The rules require

"reasonable efforts" to find the information, not heroic measures. And they require that the documents be in your "custody or control." They're in your custody or control if your lawyer or accountant has them, but not if the bank (presumably) keeps records but you don't have them. I have included sample responses in the Sample Forms Pack as well as on the site, but you can also obtain examples by looking at files where a party brought a motion to compel production. Or you could find some on the internet, too. Notice that the rules require that the answers be updated if new information or documents come into your possession. This is also true of information responsive to interrogatories. You have an automatic duty to update. (And so do they.)

Just remember that if you have said you do not know something it looks fishy to deny it later with certainty. If you say you do not have certain records and you later find them, you better give them to the company if you hope to use them in trial.

Remember also that you will ask the debt collector for information that you think will be helpful to your case as well as the information that might be helpful to their case. In other words, you want to see what they've got to help them, and you want to get whatever help you can get from them on your case.

You can get sample requests the same way you get sample interrogatories: either from me or by google searching for them. The advantage of my samples, of course, is that they are already there for you in one place and are already tailored in general to the kind of case you are litigating.

Requests for Admissions

Requests for Admission are considered a part of discovery, but really what they are is a way to find out which things do not need to be discovered. They are formal requests that ask you to admit, for purposes of this lawsuit, that certain

things are true. If you admit them, or if you fail to answer on time, those things are considered proven, and the company will not have to prove that part of its case. It is certainly best to deny or object to every request for admission on any legitimate basis you can, and I'm not certain it isn't a good idea to deny them regardless of basis, although if you're too obvious about it, it might hurt you in the eyes of the judge.

The company will probably ask you to admit every aspect of its case. Notice what the rules say regarding requests for admissions. **The level of certainty required for an admission is very high, and the rules do not require you to admit to something you aren't sure about**. Likewise, there isn't much of a penalty for denying something even if you know it is true. In reality, my clients have almost never really known for sure whether or not most of the requests for admissions are true. And so they deny all of them. But you will have to decide what to do.

Lawyers almost never admit any "Requests for Admissions." Just about any reason will do, however lame, I've noticed. But whether or not you have any obligation to do so is questionable. The penalty for failing to admit something you know is true is that you are supposed to pay the costs the other side had to spend to prove that thing, which may include legal fees. If they can prove that you knew and how much it cost for them to find out, you might have to pay it, but I've never seen the penalty imposed. If you're too casual about it, though, it could happen, or you could cost yourself in the eyes of the judge, so whatever you do to deny, do it with feeling and try to make the objection stick. Take the questions seriously even if you are going to deny every single one.

Sometimes the debt collectors attach an affidavit to their Requests for Admissions. An affidavit means you swear under oath to the truth of what you are saying. Affidavits for Requests for Admissions are not necessary in most states. **Do**

not sign an affidavit on Answers to Requests for Admissions unless you are in a jurisdiction that requires it (and not many do). Check your Rules of Civil Procedure under Requests for Admissions to see how you are supposed to respond. This is a dirty trick designed to intimidate you into admitting things, and in my opinion it probably itself constitutes a violation of the Fair Debt Collection Practices Act. That's because many people will feel like they should just admit stuff rather than file a police report which could actually get them in trouble. False police reports could get you in trouble, and you have no obligation at all to a creditor to file a police report (valid or not).

You should be aware that **Requests for Admissions are considered admitted unless you answer them within a given time** (thirty days in my state). If you want to answer them after the time for doing so has passed, you must ask permission of the court to do so, and you ***definitely*** should. The courts usually give you that permission, since the goal is to have cases determined according to substantial justice rather than carelessness. But you should nevertheless be diligent. **You don't want to lose your case because of a missed deadline, and courts do not take kindly to pro se peons playing games with them**.

You might be tempted to serve a number of requests for admissions on the debt collector, too, and it can make sense to do. If your local rules do not count requests for admissions as part of your total allowed number of discovery items (some do, some don't) it doesn't cost you anything to do, and you should do it. There's no down-side for doing it. Chances are you won't get anything out of it, either, but there is always the possibility that it tips the other side over the line into giving up – or that they forget to answer them.

If your local rules *do* count requests, you could probably spend your questions in a more effective way. You've seen (above) how easy it is for people to

deny requests for admissions, and how small the punishment is for doing it wrongly. And against pro se parties there is no penalty at all – because attorney's fees to prove facts only apply where a lawyer has been hired. If you can spare the questions, it does make sense to do a few so you can show the court how they handled them if they try to criticize you for the way you do. Obviously the main reasons for requests for admissions against the debt collectors are more long-term strategic than any hope they will actually make any admissions.

Depositions

The Rules provide that either side may conduct "depositions." These are oral question and answer sessions that are written down by a court reporter or "stenographer." Depositions are rarely used in debt litigation because, as a practical matter, they are quite expensive compared to the amount of money being sought by the debt collector. Nevertheless, they are certainly a possible tool for either side, and they offer many advantages. Click here for more on depositions.

If you decide to take a deposition, look it up in the Rules of Civil Procedure for your jurisdiction (your state or federal court). You have to "notice the other side up" (give them adequate warning and the schedule) for it. A copy of a Notice of Deposition is included in my Sample Pack, as is part of a transcript of a deposition conducted in another kind of case.

The main advantage of depositions is their speed and spontaneity. From the company's point of view, they can ask you questions, and you won't have any "form" objections to rely upon. Plus you might get flustered and answer more than you should or admit things you shouldn't.

On the other hand, taking depositions is expensive and requires preparation and time to conduct. If the average case starts to lose money after about five

attorney hours spent on it, then conducting depositions is usually too expensive. They must always be done by a lawyer and will quickly multiply the company's investment of time in the matter. Plus the transcripts cost money—usually a lot of money relative to the amount probably in dispute. So again, the smallness of the case is probably to your advantage.

To give you an idea of the costs, I can say that a member has recently been considering taking depositions. Most of the court reporters ask for deposits of $500. On top of that, you might have to pay for an office in which to conduct the deposition. Debt collectors won't have to put down a deposit or hire an office (most likely). On the other hand, the lawyer doing the deposition will be charging $200 per hour to do it. A four-hour deposition, then, will cost a debt collector upwards of $1,000 dollars. That gets pretty expensive.

If you do want to take a deposition, you will have to prepare. And of course, you have to figure out a way to know whom to question. In that regard, the general lack of information possessed by the company is possibly a disadvantage to you. Look at the *Federal Rules of Civil Procedure*, Rule 30(b)(6). This rule states that if you identify the topic upon which you wish to interrogate a company spokesperson, the company must identify and produce that person for you. My state has a similar rule, and it seems likely that most or all other states do, too. Find that rule for your state regarding identifying the subject matter of depositions you intend to conduct, and consider your options.

Expense: The Double-Edged Sword

Most of the things you will do in a lawsuit will cost you money or effort, or both. Lawyers usually charge their clients $200 per hour or more. So they generally engage in a cost-benefit analysis to decide how much effort to put into a

case. It isn't worth it, on a one-time only basis, to win a case if it costs you more to win than you stand to gain. There are times, however, when it might be worthwhile for them to spend the money even if means taking a loss. Think of the blackmailer who reveals the secret information rather than taking only half of the money initially demanded.

In debt litigation, it is almost certainly not cost-effective for the company to *depose* you. The lawyer will have to spend at least an hour in preparation or travel, and the deposition might take an hour or two. The cases are rarely worth that amount of time, plus it would likely cost $200 to get a court reporter and pay for the *transcript* of *testimony*. They could sue three people who wouldn't fight back for that kind of money. They aren't likely to depose you.

It is questionable whether deposing the other side is cost-effective for you, too. But since part of your strategy may be to make it difficult and expensive for the company to litigate against you, and to increase their risks of non-payment, these costs might very well be worth it. Plus there's really no better way to get an answer than to ask a witness a direct question, and in deposition if the witness refuses to answer, or if you don't get the question just right, you can try again until you do get it right. You'll get better answers and know the other side's case much better for having taken a deposition. But it is expensive, so you will have to consider that fact as you make your decisions.

CHAPTER 6
MOTIONS

(TOC)

"Motions" are the way you bring the court's attention to various issues and ask the judge to rule on something. You can either ask the judge to kick the case out, decide that one side or the other has already won about certain issues (or all of them), or require someone to hand something over or answer questions in discovery.

We have already discussed motions to dismiss in some detail. There are also other kinds of motions you are likely to see. We discuss them here in only a general way, but if you are actually filing or facing either a motion to compel or a motion for summary judgment, you should go here.

Some General Principles for Disputing Motions

Before we get to specific motions, I want to discuss the way motions are disputed and legal research is brought to bear on the dispute.

A Word about Persuasion and "Precedent"

Motions are an attempt to persuade the court to take some action on the "movant's" part. You want to make logical sense, and you want to convince the judge to take your side, so focus on making good sense of the point you're making. The courts are trying to do the right thing, and if you make a sound argument they could very well buy it whether you can point to another court that has ruled the way you want or not.

But obviously everything is better if you can cite case law in your support.

In addition to logical sense, we use "precedent" to persuade judges of our point of view. There are two kinds of precedent: (1) "binding" precedent and (2) "persuasive" precedent. The difference has to do with the authority of the court that rendered the decision. Courts sitting *below* a court which has ruled on an issue are supposed to "follow" that higher court's decision. If, for example, the Eighth U.S. Circuit Court of Appeals has decided that a collector's calling at 8:59 p.m. is unreasonable collection activity because the call will, if taken, necessarily last beyond 9:00, then all the U.S. District Courts in the Eighth Circuit are supposed to follow that same approach unless there is some meaningful distinction to be made in a specific case (e.g., the debtor had told the debt collector that was a good time to call). State courts are *not* bound by federal authority in most cases and don't have to follow it. Nor are courts from other circuits required to follow it.

The other kind of precedent is "persuasive." And that's what the decisions of courts that are not "above" your court *can* be. This is obviously a less powerful kind of precedent, although still valuable since it is no longer "just you" saying something, and it basically just tells the judge that another judge has agreed at some point, in some court, with what you're saying. Federal cases are, perhaps, somewhat more persuasive in cases involving the Fair Debt Collection Practices Act, but state judges often are *not* very interested in what the feds have decided and may be much more interested in what judges from a neighboring state may have done.

Persuasive cases are *much* better than nothing, especially for pro se parties, and you should definitely bring them to your judge's attention. And that is especially true in this kind of law, which is still evolving enough for judges to have different opinions about lots of things (remember, we're talking about what the law means or how it is applied to facts that are not in dispute). The law is also new

enough so that there are lots of things about which there is no controlling authority so that your judge has to make up his or her own mind.

We "cite" cases in a formal way. If you're going to do this, the best way is to go to a law library, ask the reference librarian for your state's latest "reporter," open one of the (many) volumes up, and read a case. You'll see how the cases are identified by reporter, page case begins, and page on which the point you're making is, plus court and date. It might look like this: ***Smith v. Jones, 452 Cal.3d 1122, 124 (Cal.App. 3d Dist. 2009)***. Click here for much more on how to conduct legal research and writing.

Debt Collector Arguments

Debt collectors will often quote a case which they claim means one thing, but that in fact does not mean that thing at all. They do this all the time because they rarely read the cases and don't care. That sounds harsh, but it is true – and for them it makes good economic sense. They think you're going to blow it, and so many pro se parties do that it wastes money to make sure what they're saying is true under the circumstances of your case. They cut and paste from other documents and seldom check. You cannot afford this sort of carelessness.

You should read the cases they "cite" to the court and make sure they stand for what the debt collector says they do. If they do, see if you can make a meaningful distinction (find a difference) between that case and yours. See if you can find a case that says something opposite or significantly different and cite that to the judge. And remember that courts are only required to follow the decisions made in courts over them.

Don't assume that just because the debt collector has filed a motion to dismiss and told the court that it *has* to rule in its favor, you shouldn't argue your

case, even when their argument looks strong—they're paid to make it look strong, and as I have already pointed out they're not above misrepresenting cases or facts to do so, but that doesn't mean the judge will or should agree with the position they take. Often their positions initially look good but fall apart once you think about it carefully. Even if they don't fall apart and do make good sense, make your best argument and fight for it. Much of law is veiled policy-making, and your judge could decide in your favor. This is also why I always suggest you attack every part of the case you can – you don't want to be a victim of policy making.

Don't assume the debt collector has got the cases right, made the right arguments as related to your case, or that the judge is going to buy the debt collector's arguments even if they do look strong. Look up other cases that are similar to yours and check everything the debt collector says. See what other people have said against it and say that to your judge. There are *always* two sides to every argument. Never roll over.

Time, and Types of Motions

Motions must all be filed with an awareness that the other side is permitted a certain amount of time to respond (determined by rule – usually about a week for motions to dismiss or compel, and three weeks to a month for motions for summary judgment), and then the "movant" (side bringing the motion) is permitted some time to respond. Remember the mailbox rule (they get three extra days if you use the mail instead of hand delivery).

The movant must then generally schedule the motion for argument, where both sides appear in court and tell the judge why he or she should rule the way you want the court to rule, and then the judge will often, but not always, rule on the spot. In any event, all of this obviously takes a considerable amount of time. Keep

time in mind! You simply cannot show up at *trial* with a motion and hope to get it heard – you must give the other side its chance to read and respond, and remember that judges are not always familiar with debt law. They hear thousands of these cases, but they are almost never disputed, so *judges need to be educated* to do the right thing. This takes time, and trial is not that time if you can help it. Bring your motions long before trial if you possibly can.

We will discuss how to argue your motion – what to say, what to expect and how to prepare – in the final part of this section.

Motions to Compel

Often a party will not provide any responses to the discovery filed upon them at all. Or they will answer, but not in the way required by the Rules of Civil Procedure. You'll need to know basically all the facts sought in the sample discovery. The debt collectors aren't going to want to give it to you. Not any of it, and they will probably object to every single thing. To force them to play by the rules, you will probably have to file a motion to compel.

Or they won't have the information you are seeking but don't want to admit they don't. To hide the fact, they will object to virtually all of your questions. Be ready for this – it happens 90% of the time in debt law cases. And just about as often in every other kind of law I've been involved in.

Before you file your motion to compel, however, you must find out whether, as most states do, you are required to send a "good faith letter" in an attempt to work out the dispute without requiring the court's involvement. In my opinion, these letters are a waste of time in most cases, but on the other hand they are basically just a rough draft of what you will eventually file as your motion to compel.

Motions for Summary Judgment

Motions for Summary Judgment are like Motions to Dismiss, but with one important difference. Whereas motions to dismiss look only at the petition and the answer (and are sometimes called "motions for judgment on the pleadings"), by the time a Motion for Summary Judgment has been filed, there are usually some facts that have become clear through discovery.

The idea behind a Motion for Summary Judgment is that the parties agree – or at least do not disagree as to certain facts in the case, so the judge can rule on the law as it applies to those facts (as opposed to just the pleadings) without having to believe one side or the other.

In other words, given the undisputed facts, does the law require a certain outcome? Judges are not supposed to believe one side rather than another at this stage because determining the facts is only supposed to happen at trial, but… judges are human, and you want your facts to be believable.

It is possible for a motion for summary judgment just to deal with *part* of the facts of a case (this is called a "partial" motion for summary judgment). In the debt case scenario, the court could find that the debt collector violated the FDCPA without deciding whether or not you owe the company any money. Or vice versa.

If you are facing a motion for summary judgment, **it does not make sense to hide facts from the other side so that you can "surprise" them at trial, in my opinion.** You might get your case kicked out before you even *get* to trial. And in my opinion this reasoning applies to the discovery and argument of all motions. Don't try to sandbag the other side. Try to wear them out with the rightness of your argument. Be relentless and always give them your best. Don't be sneaky – be a royal pain. At least that's my advice, and there are people who think differently. But pro se parties are fighting a constant battle to get and keep the judge's attention

and mindful hearing. If you hold back an argument till trial, you may find the judge won't listen to you at the crucial moment.

Motions for Summary Judgment and Admissions

In the debt case context, practically speaking, Motions for Summary Judgment often occur in connection with requests for admissions which did not get answered. (So answer them!) These are almost the only times these cases will be decided by summary judgment in the debt collector's favor. Otherwise it will usually not even make much sense for the company to file a motion for summary judgment as to its claim against you, although recently (writing this in late 2018), more debt collectors have been trying for summary judgment.

The facts of the debt will almost never be clear enough for a judge to rule on them by motion. This won't *necessarily* stop the debt collectors, however. They'll file them because they don't respect you and because they want to discourage you. Don't let them.

Your Motion for Summary Judgment

It ***might*** make sense for you to file a motion for summary judgment if you want to. If the company has admitted (by its answers to discovery) it does not have information it would need to prove its case, you might get them kicked out of court. That's why they resist discovery so much, and why you should pursue it so relentlessly. Regarding a possible counterclaim under the FDCPA, most of the facts regarding the company's behavior will be clear, and those claims are often determined by motion for summary judgment.

Procedure for Arguing Motions

It is possible that one could argue several different motions at court throughout the course of a case. The motions have different purposes and different issues of law, but they will follow the same general pattern.

Filing the Motion or Response

Start with filing a motion. Let's say *you file* a motion to dismiss. The other side gets to *respond*, and you get to *reply* to the response. The rules of civil procedure will provide you specific time limits as to how much time each party has to file its documents. Without permission, there should not be any further response beyond the Reply. But if you find something out that's important, you should ask for permission to submit an additional brief to tell the court, and you can never be sure the other side won't show up at argument with something they haven't shown you. In fact, they usually will.

That means that you cannot stop preparing to argue the case after you have filed or received your latest response. You have to figure out, and be prepared to deal with, the best arguments that can be made against your position. Just because they don't make their best arguments in their brief (if they don't) doesn't mean they won't in court. Always prepare for the best arguments against your position.

Oral Argument

In most jurisdictions, the work is not finished with the filing of motions and memos. The motion must be "called" and argued. That is, someone has to set the motion for a specific time when the court will hear what both sides have to say and

render a ruling. (Courts often have what they call “Motion Dockets,” which are days or times set aside specifically for arguing motions. In jurisdictions where they expect motions to be argued, the court will ordinarily *not rule* on a motion until it has actually been set and argued, regardless of how clear the law may be.

In federal courts, arguing on motions is rare, but in all the state courts I've ever been in, motions must be argued almost every time before the court will rule.

It isn't always obvious which side will call the motion. Either side *could* do it after the briefs have been filed. On a motion to dismiss, for example, while it is sitting there, you do not normally have to answer the petition and the case just sits. So you won't usually want to “call” your motion to dismiss, but the other side probably will. If they don't, the court might dismiss their case for “failure to prosecute,” although you can’t depend on that. Sometimes the Local Rules will require you to set the argument for any motion or *it* will be dismissed. Again, you must have and know these Local Rules.

The other motions are clearer. You'll go through the Filing, Response, and Reply, but the person bringing the motion will probably need and want to “call up” any of these motions, for practical reasons. Remember that you must give the other side notice of everything you do with the court, and this includes the calling up for hearing. You go into the clerk's office and choose a date you would like to argue the motion—in some jurisdictions they may set the date and time of the argument for you automatically.

After choosing the date, you write a memo to the court “calling up” your motion for hearing on that date and time. And you give a copy of that notice to the other side. Check your local rules to see how much advance notice you have to

give them. It usually isn't much. If they've been cooperative with you, this might be a good time to cooperate back about dates. And if they haven't, maybe not.

So you set the motion for hearing and tell the other side. Then you prepare to argue the motion. For more on argument, oral and otherwise, click here.

Preparation

The trick to arguing motions is to prepare as much as you can. The debt collector knows that, and they're also lazy - so you can expect their memorandum opposing your motion to be pretty basic. Don't worry about that. Prepare the argument from what you know and your own research, and expect them eventually to make the best possible argument against you. And then, if it's a motion where you have sent a letter to try to work things out, every time they say something during your argument that wasn't in their letter, you just make a point of mentioning the fact to the judge.

> "Your honor I feel sandbagged here. I sent them a letter to try to work this out..."

If the other side makes an argument in court that was not in its brief and it seems like a serious point, you can ask for time to research and respond. Or you can try objecting that they waived it by not making it in the brief.

The person *bringing* the motion usually goes first. Don't let the debt collector speak for you—lawyers will often try that, and it could seem comfortable to let the other side lay out the facts, but part of what you're doing here is getting to know the judge and letting him or her know who you are. Plus, you should not ever trust the other side to state any part of the case in a way that will be to your ad-

vantage. You should never trust the debt collector to be fair or impartial – that isn't their job. They are paid to advocate for your enemy. Speak for yourself.

And that brings up another point: performance. Arguing in court is maybe mostly about what you know, but as anybody who has ever been through it before, it's more than what you know. It's what you remember to *say*, and how you say it. You want to make all your points without panicking or sounding shrill or desperate, and the other side is going to be arguing with *you*. In other words, there's a question of keeping your head and performing well in the moment. There's only so much you can do about that. Lawyers practice, and you could do the same, presenting your motion to your spouse and then asking whatever questions come up (and don't be so sure your spouse won't be more interested in and know as much about the situation as a judge). But there is one important thing you can do all by yourself: get enough sleep. I strongly recommend that you get enough sleep before any court appearance.

Make notes to go in with you—notes about what you're going to say, and then make sure you say everything on those notes that needs to be said. Lawyers and judges talk normally (use plain English) when they're arguing about discovery or other motions. Don't dress up your language or try to make it fancy or "legal." Just speak your piece. Speak clearly, and if there's a microphone, speak into it. Don't yell, get abusive, or lose your cool. Stay cool. You're winning just by being there. You never want to get mad or emotional if you can help it.

You're not going to win everything. You may not win much. And let's just say even that it's possible you won't win anything on your motion. Don't get psyched out. You'll still be fine. You're winning by gaining experience in the case

and the law. And you are gaining by requiring the debt collection lawyer to work on the case.

You're even winning by requiring the judge to work on the case and getting "face-time" with them. Most of them don't really like or care about these cases. They aren't above leaning on the debt collection lawyer to get them to let you go if it looks like the case is not financially worth it, but they aren't above leaning on you, either. **Never expect the judge to take care of you** or look out for you in any way. If you seem too willing to talk about not being able to pay if you lose, the other side may not believe you, and the judge will be inclined to think you are not taking the case seriously and will lean against you.

Keep your cool (this is why sleeping is so important) and fight for every single thing. Now that you're there, don't give up on anything until the judge makes a ruling. Then move on to the next issue. One of the great challenges is to keep from letting either disappointment or excitement about one ruling affect you as you argue the others. As much as possible, though, make sure each question is a separate question, not affected by what went before.

You can be reasonable and make *some* compromises that make sense, but remember that **each part of the lawsuit stands on its own**. You don't agree not to get information about the bill of sale for the debt (proof the debt collector bought the debt from someone with a right to sell it) because they're giving you something about their procedures to keep from billing someone who doesn't owe. You have to have enough stuff on *every* aspect of the case. You can't trade one for the other.

Notes

Take notes while you're with the judge. In many jurisdictions, the parties routinely create the order for the judge to sign, and you want to remember what was said. What often happens is the judge issues a ruling and turns to one of the parties (the winner) and says "write the order." I can tell you from experience that this is often impossible without notes, and the other side may try to take advantage of the confusion and write an order that shades or limits the ruling of the court unfairly. The judge may, or may not, pay attention to what he's signing – although he won't sign anything that contradicts what he ordered, of course.

Admissions

Don't admit anything in court. Well, just remember that judges remember what you said, so if you say "I owe the money," the court *could* take that as a case-ending admission and end the case right there. Make sure everything you say to the judge is basically what you're saying everywhere else. **Judges have a tendency to try to look at you and get you to give it up.** *Don't*. They don't know anything about your case, and if they know anything about the debt collection business, they know the debt collectors often sue people who don't owe. Or for more than they owe. Don't give away the shop even if the judge invites you to.

Remember that lawyers are trained to be persuasive. I've heard some pretty persuasive arguments from the other side just before the judge ruled in my favor. So make your best argument and believe in it. Debt collectors will say just about anything sometimes, so don't believe them. Just fight.

Motions for summary judgment are basically just like motions to dismiss at the argument stage. But here you may argue a little more about the facts of the

case. And you may need to make objections. So before briefing (writing your brief) or arguing a motion for summary judgment be sure to read up on the rules of evidence and make your objections to their evidence both in your brief and in oral argument.

CHAPTER 7
Trial and Pretrial

(TOC)

Many excellent books about trials have been written for lawyers, and if your case is actually going to go to trial, you could read one or more of these books. I also ***strongly*** suggest that you go watch a trial in progress. Despite the time I've spent in libraries or working on specific cases, I've never found anything better as a way to prepare myself than watching other trials in person (other than participating in other trials, of course). That's because of how fast things happen in trial – things are constantly coming up that require thinking and adjustment no matter how much you have prepared.

It takes some getting used to, and if you watch a few trials in process you'll get a better sense of how evidence is introduced and objections are made, how testimony is brought out or cross-examined, than anything I could say here or in the associated materials.

That said, however, we'll make the discussion here brief, but you will find much more information in the members-only area of the website, where we have set aside a whole series of videos on various aspects of evidence and trials. We'll talk about some general issues first and then direct our attention to some specific issues of evidence and courtroom behavior.

A Trial Is a Contest

Remember that a trial is not an abstract search for truth. In American law, the feeling has always been that if two sides fight it out as hard and as fairly as

possible, the correct side will win (the "truth will come out"). You must remember, therefore, that a trial is a contest rather than a cooperative venture. There are certain rules. The judge or jury will listen to "evidence" that is put before them, and neither the judge nor the jury should consider evidence that is either not put before them or is taken back. I have referred to the Rules of Evidence in an earlier section, and I would suggest that you read them.

The rules regarding *hearsay* or the *business records exception* to the hearsay rule are especially important. **You need to understand and know your state's rules on these things by heart before trial**. And you should have a case that discusses exactly what they are with you at any hearing.

The main issues in most debt cases are whether the defendant really owed anybody any money, and how large the debt was. Remember that these facts should *only* be shown by real evidence that complies with the rules of evidence, and that means that *the entire trial could very well come down to whether or not you make an objection and keep some evidence out*. You must object if the other side tries to get facts in front of the jury that do not comply with the rules. If you can keep all the evidence of the amount of debt or how it was acquired out of the hearing, then you should win the trial. So be brave and object if you don't think the evidence should be seen. You'll need to tell the judge why you think so, too. You absolutely must be brave enough to do this, although you will soon find that it isn't that hard or scary – in other words, it will take much less courage as you go on.

If you can overcome any fears you may have, then the additional formality of the jury trial will also help you. It will play into your plan to make it tougher on the debt collectors by adding costs and risk to their equation. If the jury gets fired up about the case, they can hurt the debt collector.

If you asked for a jury trial, you should know that, from a lawyer's point of view, litigating against a person who is *"pro se"* (representing himself) is often

difficult for the lawyer. Pro se parties are relatively unpredictable and don't always know or follow the rules. Debt collection lawyers are less disturbed by this than most lawyers, though. They often encounter unprepared people who attempt to defend themselves.

Debt cases essentially always occur in front of a judge only, however. If you ask for a jury trial, you will take the debt collection lawyer out of his comfort zone. Make sure *you* prepare thoroughly. You must strive to be professional at every stage of the proceeding. Don't expect the judge to bail you out of not knowing the rules. In fact, in my experience it is the debt collectors who will want the judge to ease up on the rules (against hearsay). You want the judge to take all the rules seriously and don't want to set up any sort of informal "quid pro quo" where the judge lets you off the hook and then lets something into the record that shouldn't be there.

Pretrial Preparation

Whether or not you have a jury trial, you will need to prepare for trial.

There will probably be a "*pretrial order*" specifically telling you what to do. *Most jurisdictions also have **"Local Rules"** that include rules that provide that exhibits submitted to court but not objected to within a certain amount of time will be automatically admitted*, or other rules that will allow the debt collector to win if you do not take appropriate action. Sometimes exhibits need to be submitted as much as a month ahead of time. **If you do not know or follow these rules you will be trounced. Make it a priority at an early date to find out the rules relating to evidence at trial.** If the rule is that you must submit exhibits a month in advance, for example, and you do not do so, it will fundamentally affect the way the other side negotiates with you in trial discussions – they'll expect an easy win.

Likewise, if they submit things and you don't object, they might automatically come into evidence. In these cases, that means you would lose.

Often the pretrial submissions will include a "trial brief," in which you tell the judge what to expect from the evidence. You will also provide jury instructions and often copies of the documents you intend to introduce into evidence. There is a sample pretrial motion in the Forms Pack, but you can also get one by finding the file of another case that went to trial in your court. It's worth looking at one.

There are some other things you will want to prepare before trial. You want all your evidence lined up and thoroughly organized – most trial lawyers are compulsive about this, and they need to be. It is hard to over-emphasize the speed of things in trial. The pressure is like a game-show – you might know the answers if given time, but things come at you so quickly. Thus you need a plan.

Make sure you have everything in complete order. You will also want to know how the judge will handle your own testimony. You want to know what you will ask the other side and how to prove the things you want the jury to believe. Most of this is common sense, but I think it's worth it to remember that although the jury wants everything covered, they get bored easily if you repeat things or fumble around too much. So you have to know your case well.

You will probably need three copies (plus the original) of every exhibit – one for the other side, one for the judge, and one for the jury (plus one for yourself, of course). Check your Local Rules on this.

Watch someone else's trial. It's hard to believe how fast things happen when you're the one on the spot. Anything that gets into the record that you don't object to is going to stay there. Therefore you should be prepared to make objections, and these can come up fast – it seems obvious to say, but the lawyer on the other side is never going to warn you that he's about to bring up an objectionable question –

you have to hear the question, decide whether the answer it is looking for is appropriate, and make your objection all before the witness answers. If the witness answers before you object, you must object anyway and ask the judge to strike the testimony.

The Actual Trial Schedule

The local rules will probably outline things for you in greater detail. But the way things usually go in jury trials is that there is a last-minute "*pretrial conference*," and usually the judge leans on both sides to settle the case at that time. This is probably where you're going to get your very best settlement offer that isn't based on it looking like you will win. If you don't settle, then they'll call in the potential jurors and get started. The trial will go something like this:

1. Jury selection, where you and the company choose the jury
2. Opening Statements, where you tell the jury what you expect the evidence to be
3. Plaintiff's "Case in Chief" (company puts on evidence supporting its case)
4. Your Motion for Directed Verdict
5. Defendant's "Case in Chief" (you put on evidence against company case, in support of yours)
6. Plaintiff's "Rebuttal" (Company puts on evidence to counter your evidence)
7. Renewed Motion for Directed Verdict
8. Closing Arguments
9. Jury Instructions

10. Jury verdict
11. Final Motions
12. Judge's decision
13. Appeal (if necessary)

1 - Jury Selection

After the last pretrial conference, the first part of a trial is "jury selection." Again, many books have been written on this topic, and it would be impossible for you to spend too much time preparing for it. What you're basically shooting for is a group of people who haven't already made up their minds against you for one reason or another. To the extent possible, you do want people who feel "predisposed" towards you or someone in your position (like you right off). Use your common sense.

You don't want people who are prejudiced against the way you look. You don't want people who think that any time a law suit is filed, the plaintiff (if it's a company) is probably right. You don't want people who will be against you because you're defending yourself without a lawyer or who tend to believe something a lawyer suggests sooner than something you might say. You don't want people who think that people who don't pay their bills are bad, or that not having much money makes you untrustworthy.

Remember throughout the jury selection process that you will **pick the jury by eliminating some of them** either because of some prejudice they express or because you just don't feel good about them (you get a limited number of "peremptory strikes" that you get to use in that case). Remember that the lower numbered jurors are going to be on the jury unless you do get rid of them. In other

words, juror number one is going to be a juror unless something happens to get rid of him. Then juror number two...

Do not grandstand or show off during this, or any, part of the trial. If you show off, the jury will hate you. So be humble. **Remember that almost every juror would much rather be somewhere else than listening to you or anybody else in this trial**. Jury trial is a crucial right in a democracy, but jury duty is a difficult and often boring thing. Respect that. Let them know you respect it. Paradoxically, many people **want** to be on juries: they've come this far, and they want to be picked. So they may lie or "fudge" their answers. Watch them carefully to make sure you believe their answers. If you think they're lying, or if their answers show some attitude you don't like or think would lead to a fair trial (meaning a trial in your favor, you understand), you make your request to strike the juror. Unless the vibe is strong that they're on your side, of course.

The potential jurors are called the "venire." This is pronounce "veneer." Or it's called the "venire panel." You will probably get to ask them some questions regarding their attitudes. This process is called "voir dire" (pronounced "vwa-dire" or "vwa-deer" by most lawyers). As the defendant, you will probably get your chance to talk to the jury after the other side has already done it. But don't count on the company asking any questions at all. They may very well not ask any. They might figure that any prejudices would be in their favor. Or maybe they just don't think it's worth the effort.

As the "little guy" in these cases I liked to make sure the jury would hear my client out and make the other side prove its case. Voir dire is also a chance to talk to the jury more or less like a normal person, too – one of your few chances to do that. There's no substitute for watching other people do all this, but don't forget either that if it looks easy for them it's because they've prepared a great deal.

After the jury has been asked questions by the judge and you and the company lawyer, you and the debt company will have an opportunity to "choose" the jury from the panel. But this is not to say that you will just pick out the ones you like. The jurors are called in by number and seated in a specific order. **You pick by choosing to remove the ones you don't like, starting with the lowest numbered jurors**.

If someone seems prejudiced, you can ask the judge to remove him or her "for cause." (This is called "challenging" the juror.) Because the request to remove is likely to make somebody mad, make sure the jury can't hear you when you make it. Ask after they've been taken out of the courtroom, or outside of their hearing if you can – or at least in a quiet voice up near the judge so the jury can't hear. The judge is well-aware of this need and will generally make it possible to talk to him or her (the judge) outside of the jury's hearing. Speak in a low voice if you are challenging or striking a potential juror.

Remember that your challenging a jury may be embarrassing to the juror, and this could create bad feelings toward you by other jurors. Be nice about it, in other words. You need to make sure the right people are on the jury, but don't be harsh towards anybody – and remember that everybody is judging you on everything you say.

After eliminating as many jurors "for cause" as necessary, you will get a few "peremptory strikes," which means you can remove jurors (who are not disqualified "for cause") just because you don't like them for some reason. Any reason. And you don't have to (and should not) say why. You will use these strikes on the lowest numbered jurors you don't like. So if there are 20 jurors on the panel, and you're going to end up with a jury of 9 people, you will look at juror number 1 and decide whether or not to strike. If you do strike, you've used up one of your strikes. Now look at number 2: strike or not? If you only get 3 strikes, you may

not get to remove all the jurors you want to remove, so remove the worst ones. You must be prepared to make some hard choices – there are always hard choices in jury selection. That's why it's a good idea to take notes during the questioning session.

2 - Opening Statements

After the jury is chosen, the case may very well start immediately. The other side will have a chance to make an "opening statement" to the jury. This is where the lawyer for the debt collector tells the jury what he or she expects to prove. This is not a time to "argue" or call names. The company lawyer will likely say something like, "We have to prove x, y and z. We're going to show you this and that, we'll show you documents that say A and B, and the evidence will establish that [you] borrowed money and didn't pay it back. We'll also show you [why they say they didn't violate the FDCPA]." In a debt case, the whole statement is rarely fifteen minutes. Of course it's much more significant for other kinds of cases.

You, on the other hand, will say something like, "To show I owed them money, they have to show... You're going to see that they cannot show X or Y. On the other hand, I will show you that in collecting this debt they did such and such. That will show that they violated the law which doesn't allow deceptive or false means of collecting debts..."

This part is not supposed to be an argument, so be careful here. It's the old, "under-promise, over-deliver" here. You want the jury to know that you're not agreeing with anything that the company is saying, but you're not going to gain points by calling anyone a liar.

3 - Presenting Evidence: The Company's Case in Chief

Next the company will present its evidence. This might include asking *you* questions as a witness. You need to ask the judge (before trial starts!) how to handle the way you *cross-examine* **yourself** or make objections, but with respect to everybody else, after the company finishes asking the witnesses questions, you get to ask some questions of your own if you wish. You have a right to look at any documents the other side wants to show the jury or use in testifying, and you can object if you don't think they follow the rules of evidence. **If you do not object, the jury will probably be allowed to use the documents as part of their decision-making process, so you have to make the objections.** Don't be shy. This is important.

Cross Examination

You will want to cross-examine if you have a point to make and can do so sharply and clearly. Be brief, to the point, and specific. It's far more powerful to say to the witness for the other side, "you said I owed x dollars, but you weren't there when the alleged debt was incurred, were you? You don't know from personal experience how they keep records? You didn't watch them write down any of these records, did you?" (Making the witness answer each question with a "no") than to wander around asking various questions that you think may cause the jury to dislike the witness. And in cross-examination you're expected and allowed to use "leading questions" (yes or no answers).

Make it snappy. The jury and judge will punish you for any pointless rambling. If you're a reader, I suggest you try some of the books by Michael Connelly – he does a good job of showing you the way juries think and the way

lawyers handle that.

4 - Motion for Directed Verdict

After the debt company has finished putting on its evidence, it will "rest." It's traditional at that time for you to "move for a directed verdict." You will argue that the debt collector has not put on enough evidence to prove its case.

A "Motion for Directed Verdict" asks the judge to require the jury to rule in a certain way because there is no evidence to support any other finding. If you have managed to keep any evidence of the debt out of the trial, you should actually win the case at this point. But in general you should consider whether they have put on anything that proves what the jury instructions require them to prove. If not, if they have failed to prove **any one** part of their case, you should win. And there's no reason not to make the motion. They will do the same thing when their time comes, so don't be flustered. You actually need to do it, often enough, to preserve any right to appeal the case.

Judges are usually reluctant to grant a Motion for Directed Verdict because that takes the fact-finding power away from the jury. Also, if the decision is reversed, they'd have to go through the whole trial again, whereas if the jury renders a verdict they might not. But you should make the motion anyway. It doesn't hurt, and you might win. You are only asking the judge to address the claim of the debt collector against you. There is no evidence yet regarding your claim against it. That comes later (if at all – it's rare).

5 - Putting On Your Case: Evidence!

After the judge rules on your Motion for Directed Verdict, you will have a

chance to put on your own "case in chief." This is the evidence you have that supports your defense (if your Motion for Directed Verdict was denied) **and** counterclaims (regardless of the court's ruling). You put on evidence in the same way the company did, by asking witnesses questions whose answers prove what you want to prove. Use your common sense. Again, you will need to know beforehand how the judge wants to hear **your** testimony.

Remember that **you may have to testify.** People who are representing themselves often try to testify to things *indirectly* by making statements during their questioning of witnesses, but these comments simply do not count. If you say to a witness, "you know I told you…" it isn't evidence. **You must testify to a fact under oath or what you say doesn't count.**

If the debt collector objects to some testimony that you want to enter, you can argue to the judge why it should be permitted. If the objection is "sustained," **do not freak out** or draw any conclusions about the trial. Keep your cool. If the evidence is important, you must make an "**offer of proof**" to the judge, telling the judge (but not the jury) what your testimony would have been. Sometimes the judge will then reconsider the objection and overrule it, letting the testimony in. Then you have to ask the question again and get an answer the jury can hear.

Remember that the objection is to the question you are asking, not the information you are likely to get. And that's important because you can usually think of another way to ask the question. That's not unfair for the company lawyer to do, and you should do it too when you're asking the questions.

Just think of a better way to ask the question.

For example:

"Mr. Smith, didn't you destroy all the documents you say connect me to this debt?"

"Objection! Leading the witness."

[Court sustains objection.]

"Mr. Smith, what became of the documents you say connect me with this debt?" (Not leading.)

"I destroyed them."

"Why did you do that?..."

A "leading" question is one that asks for a "yes or no" answer, and you'll normally be better off with "open-ended" questions (who, what, where or why questions). Be sure to look at the Rules of Evidence as you prepare. Know what the company is going to want to prove, and be aware of their most difficult points.

You have to prove the things that make up your case and your defense. Your claim might be that the company used a "deceptive affidavit" and this was an unfair means of collecting a debt. So you'd present evidence that the company used an affidavit and sent it to you or put it where you would see it (in the lawsuit), that you actually received it, and that it was wrongful in some specific way (deceptive? false?).[4]

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4 The central "deception" of an *affidavit* made by the debt collector's employee is often that the use of the affidavit implies that the person speaking has **direct** knowledge based on personal observation, of the facts surrounding your debt. This might discourage you from defending yourself, but in fact this is essentially never the case. The debt collector's representative knows only about the **debt collector's** records and record-keeping, and knows only about the status of the debt after it arrived at the debt collector. I think this is exactly why the companies use this sort of affidavit. You could testify that you received the affidavit and show it to the jury. You can talk about your education level and what you believed, and you need to be able to prove how you or any normal person would or might reasonably be expected to have been deceived by the affidavit.

To beat a dead horse, this means that **the debt collector's representative has no basis for testifying** as to whether or not you had paid off the entire debt before it arrived at the debt collector. Or whether the original creditor made a deal to reduce the amount owed. Or whether any money was ever owed at all. The debt collector knows nothing about the debt before it got to it, but the affidavits generally give the impression that the person testifying does have some knowledge. This could cause you not to defend a case you would win because you have the wrong impression of the evidence the company had. The case against you could seem overwhelming, when in fact it might be no more than smoke and mirrors.

You do not have to prove you were actually deceived or hurt in any way to show that the affidavit was "deceptive" or misleading. Just that a normal person would be tricked, but obviously if you were fooled, it adds to the story.

You won't normally testify as to the debt during your own case in chief because that will have already been handled during the debt collector's case.

6 - Rebuttal

After you've given your proof, you "rest" your case. The other side then moves for directed verdict and says why. Then they can put on more evidence either to "rebutt" (disprove the case you put on) or to attack your case against them, or to establish affirmative defenses.5 And at the end of that process you can move again for a directed verdict. If the debt collector has introduced new evidence that you can dispute with additional evidence of your own, you move for "sur-rebuttal."

7 - Renewed Motion for Directed Verdict

You make your motion for directed verdict again at the end of all the evidence. In some jurisdictions this is absolutely crucial, so don't forget to do it.

But don't expect the court to do anything about it. At this point they'd almost always rather let the jury decide. Don't let that stop you, though. And if the other

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5 One affirmative defense that debt collectors are likely to have is "accident." To show this they must show they have a policy against whatever you think they did and people who are supposed to enforce that policy. You will want to have submitted discovery to them on these questions so you can cross-examine the witnesses based on what you know.

side moves for a directed verdict you must oppose it on the assumption the judge might grant it – he or she might if you forgot to prove something.

If you did forget to put something into evidence and the other side moves for directed verdict, you can move to "reopen" your case (make this motion before the judge rules on the motion for directed verdict) and try to put the evidence in then.

8 - Jury Instructions

Then you give the jury the jury instructions that were established earlier if they still apply. Sometimes you argue that they don't still, or never did, apply, or misstate the law or do something else wrong. Be sure to object to them in that case. Good objections to jury instructions are about the most powerful objections you can make.

9 - Closing Argument

This is where you tell the jury how they should apply the evidence you gave them and what they should decide is fact. You point to the jury instructions and tell them how you want them to answer the instructions. This is the other part of a trial that people think about when they think about lawyering. Remember again that you must remain humble, and the jury will not like you if they think you're showing off. But it's okay if you're emotional. Think about what would convince **you**. You definitely want them to like you.

10 - Jury Verdict

After that, you wait.

When the jury comes out, they will have yes or no answers to the issues raised by the jury instructions. If necessary, they will decide how much your actual damages were worth, in dollars. But it will be up to the judge to decide how much to award you under the statutory penalty part of the FDCPA if you prove your case.

If, as you look at the jury, one or more of them seems surprised or very worried while the foreman is giving the verdict, and you don't like the results of the jury, you can ask the judge to "poll" the jury. That means ask each one to verify that they wanted the verdict reached. Every now and then you get a dramatic answer, but usually not. It doesn't cost you anything to try, and it sometimes works, so why not do it?

11 - Judgment Notwithstanding the Verdict

If the jury returns a verdict that is in contradiction with itself, or if they rule against you based on evidence you objected to (as far as you can tell), or if the verdict simply seems irrational, you can ask the judge to rule "notwithstanding the verdict." That's basically an argument that no rational jury could have held as it did on the evidence properly before them. This motion is also called a "Motion JNOV" (judgment nonobstante Veredicto). It's basically a repetition of your motion for directed verdict, and sometimes it is necessary to have made a motion for directed verdict in order to file a motion JNOV.

Although still reluctant to grant them, judges are somewhat more willing to rule on a motion notwithstanding the verdict than a motion for directed verdict. They gave the jury its shot (which judges sometimes do because they're confident the jury will rule in a certain way), and then if they disagree with it, the judge may make a different call at that time. You'll make this motion orally, and probably again in writing. And the judge isn't likely to grant it. But you make it anyway just in case.

12 - The Judge Must Render the "Final Judgment"

Next, you either go home and write your motion for judgment notwithstanding the evidence, or just to wait for the judge to issue a "judgment" if you won. The judgment is supposed to close the book on the whole trial process and not leave any issues undecided. The judge always writes the judgment, and the judgment is what you will appeal, if that becomes necessary.[6] **Look very carefully at the rules regarding timing on this! Your time for appeal is going to be limited very strictly**, and the courts of appeal will almost never, ever, give you a break on this if you miss the time deadline. It isn't allowed to – these rules of timing go to the court's powers to hear the case at all.

13 - Notice of Appeal

If you lose at trial, you may want to appeal the decision. That is beyond the scope of this book, but if you have gotten this far, you will have a pretty good idea of what you would need on appeal. To get you started, though, you should look at the *Rules of Civil Procedure* for your jurisdiction. **Look particularly at the deadlines for filing a "*notice of appeal*."** Nothing would get you kicked out faster than to file a notice of appeal too late. After that, you will follow the ***Rules of Appellate Procedure***, which are part of the Rules of Civil Procedure.

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6 I should add a final word about settlement. You can settle a case at any time before, during or after trial. The debt collector may well offer you a settlement after trial, and you can do the same. All my previous statements regarding settlement apply to settlements, no matter when offered or made.

There are special forms you must file with the Notice of Appeal, and these forms will be particular to your court.

Obviously, if the debt collector wants to appeal, it must also follow the same rules. If it files an appeal and there was something about the judgment that you didn't like, then you can and should file a "cross-appeal." The Court of Appeals will not change something that was not appealed. So if you do not file the cross-appeal, you could lose the part you won and not get to challenge the part you lost. Courts of appeal are called courts of error rather than courts of justice—they're usually looking for mistakes that the trial judge made, not injustice in the results, but of course they take sides as well, being only human.

The Rules of Appellate Procedure are usually very strict regarding the form and content of your appeal. You're going to need to see samples of an appellate brief from your jurisdiction before you can proceed with any confidence. Luckily, you can usually get them from the Appellate Courts. If the courts themselves won't give you one, go down and hang out in the Appellate Court and ask one of the lawyers in the peanut gallery for one. If you are tenacious enough, you'll get one, and then you're simply going to model your brief after the one you get.

CHAPTER 8

SPECIFIC ISSUES OF EVIDENCE

(TOC)

In this chapter, we are going to discuss some evidentiary issues in more detail. We discuss them here in a very practical way - ***how to do*** certain things. Specifically, we're going to talk about

1. Direct Examination;
2. Approaching a Witness or the Court and introducing physical evidence;
3. Admitting Physical Evidence (Documents) into evidence;
4. Cross-Examination;
5. Making Objections;
6. The Rule against Hearsay;
7. The Business Records Exception; and
8. Offers of Proof.

Each of these issues is critical, and knowing how to do them should make things go much, much smoother for you if the case actually does go to trial. Most won't go that far, but knowing that you'll be okay if they do will help in negotiating with the debt collectors. As I have said before, this is merely an overview, and if you are going to trial, you need to look more carefully at the materials you find here.

Direct Examination

A pro se defendant rarely needs to prepare direct examination in a debt case. This is for the very practical reason that you will rarely have witnesses, other than yourself, in this type of case. However, it *is* possible that you could have a counterclaim that might call for testimony from other people and the court *might* make you ask yourself questions as part of your own testimony (although this seems unlikely). In any event, it will help you to know what the debt collection lawyer is up to if you understand some of the rules regarding "direct testimony."

First a definition. "Direct" testimony is the testimony of a *cooperative* or "friendly" witness – or at least not one who is hostile to you - in reply to questions asked by a party's representative (or in pro se cases, the party himself or herself). Direct testimony suggests that the witness is probably trying to help the person asking questions and will, if the questioner "leads" him to a desired answer, answer as desired.

Since a friendly witness will allow himself or herself to be directed to a desired answer, in order to give the jury an opportunity to evaluate the witness's believability, the direct witness should *not* be led. And in fact, one of the most common objections is to "leading the witness." You ask a question and the lawyer for the other side stands up and says, "Objection – leading." And that's all there is to that objection – you can do the same thing in the same way. A "leading" question is one that suggests its answer to the witness: "You said the butler did it, didn't you!" "Did you lose a lot of sleep and suffer hair loss and ulcers because of the obnoxious calls from the debt collector?" Usually the way you can tell a question is leading is that the question is long, and the answer is short – often yes

or no. But the basic objection is to a question that suggests its own answer regardless of how it is put.

You state your objection in this way: "Objection – leading." This is not Perry Mason or Judge Judy time – judges rarely want to hear an argument in connection with an objection and will tell you if they do. On the other hand, you will be prepared to say "he is suggesting the answer to the witness."

If you are conducting the questioning, you will normally not want the other side to be able to interrupt you legitimately with an objection, so you will avoid leading questions. How do you do that? By asking open-ended questions. For example, you say "Who did you say did it?" (instead of, "you said the butler did it, didn't you?). Or you say, "what happened to you as a result of the telephone calls of the debt collector?" or "what, if any, physical conditions developed following the phone calling of the debt collector?"

When an objection is made, the judge must rule (sometimes after argument), and this ruling will be either to "sustain" the objection and forbid the question, or to "overrule" the objection and permit the question. If the witness has already answered the question which then gets overruled, the judge can (and should if a party asks) "instruct" the jury to ignore the question. Ironically, you have to ask the judge to do that if you want to keep the answer out of evidence, whereas studies show that juries actually pay more attention to questions they've been instructed to ignore. However, in debt cases the question is often whether or not there is any evidence at all, and you must prevent any evidence from getting in if possible, so you will normally just have to live with the jury thinking about the answer they weren't supposed to hear.

What happens when an objection is sustained, and the witness is not permitted to answer the question? Well, in that case you simply rephrase the question and ask it again.

For example:

"Didn't you say the butler did it?"

(objection, leading, sustained…)

"What did you say then?"

"That the butler did it." (No objection.)

That should suggest a fairly obvious trick – asking the leading question first, then switching if there's an objection. Well, judges and juries are not idiots – at least not that big of idiots – and if they get the sense you are playing unfairly they can punish you in both visible and invisible ways. ***But*** – if you have asked a leading question and the objection is sustained, *nothing in fair play or the rules prevents you from turning right around and asking the same question in a non-leading way*. You should do so.

It happens all the time, and you must not consider a sustained objection regarding the form of the question you asked as in any way preventing you from getting the answer you want. Instead, you just have to ask the question in a different way. Don't let an objection shake you up. They will rarely prevent you from getting the information you need into the record. Remember, they're objecting to the question, not the expected answer. Although they may trying to prevent the answer because they don't like it in substance, the objection must be to the question.

If the objection is to relevance, that IS objecting to the substance of the expected answer, and if the judge sustains the objection you will have to change the focus of the next question. That doesn't necessarily mean abandoning the question entirely, if you can ask questions that show your original question actually was relevant.

Your goal in general with direct examination is to get the witness to tell an interesting, believable story. You want the judge or jury to pay attention and

believe, and you want what they believe to fit into the rest of your story. So if you watch lawyers in trial they will normally start with some background about the witness (why you should believe this person) and what he or she saw and how he or she saw it (why you should believe their story), and then move into what happened in the order the witness observed it. And so a question you will often hear on direct is, "and then what happened, Ms. Smith?"

Leading questions are sometimes unavoidable or so obvious that they are permitted, so don't be fanatical about avoiding them. "And then what happened, Ms. Smith? Did you go downstairs to investigate the source of the noise?" That sort of question is too basic to be objectionable.

Approaching the Witness

Suppose you want to show the witness something. How do you do that? Questioners are not allowed to invade the witness's space just any time. If you have something to show the witness, you must ask the court if you can approach the witness.

You: "Your honor, may I approach the witness?"

Judge: "Go ahead."

After getting the judge's permission, you walk up to the witness and hand him or her an exhibit, saying: "I hand the witness what has previously been marked as Defendant's Exhibit A." You say what you are doing because there is a court reporter writing down all the words that get said, and this is the way you make a record of what you have just handed the witness. *Handing the exhibit to the witness and getting the witness to comment on it is not the same as entering the exhibit into evidence*. To do that, you have to establish the legitimacy of the exhibit and then ask the court to admit it into evidence.

"We'd ask the judge to admit Exhibit A into evidence."

"No objection." [from the other side's lawyer, or they may argue.]

"Granted". (or, "Exhibit A will be received in evidence").

If you want to show something to the judge you follow nearly the same procedures. You say, "Your honor, may I approach the bench," and then hand the judge the exhibit, saying the same thing as if you were handing it to the witness. You will normally hand the judge a copy of anything you hand the witness so he or she can follow along. This is considered good manners when it isn't actually required.

If possible you should highlight the relevant text of any written exhibit you're giving the judge because you want the judge to understand instantly what you are doing.

Getting Things into Evidence

If you have anything you need to get into evidence, you should do some research before the trial to make sure you understand what your jurisdiction requires as a proper "foundation." The foundation is sworn testimony explaining what the document or thing is supposed to be, how it came to be where it was, and how the witness came to know about it.

For example, if it is a written contract with your signature on it that the company wants to introduce into evidence, their lawyer must ask a witness what the document "purports" (seems) to be, where he got it, from whom and under what circumstances, and whose signatures seem to be on the document. Debt collectors are very vulnerable on all these points, including the last one, because if you say it isn't your signature they are rarely able to prove otherwise. If they leave anything out, you should say: "objection – improper foundation." If the document

is a photocopy of something, you say “objection – not the best evidence,” because copies are not allowed when the original can be found.

Cross-Examination

Cross examination is questioning the other side’s witness after direct testimony. Normally this happens immediately after the witness’s direct testimony, and the witness is not allowed down from the witness stand before the cross-examiner gets a crack at him or her.

Cross-examination differs from direct in a few important ways. First of all, the witness is normally considered “hostile” to the party doing cross-examination, and so leading questions are allowed and in fact expected. It is normally foolish to ask a hostile witness an open question, since that witness will be looking for ways to say things that hurt you. Asking an open question will give the witness that chance. With rare exceptions, then, you should ask the witness on cross-examination only yes or no questions.

Witnesses will often lie or stretch the truth on cross-examination. People take sides and will say what they think necessary to win. It’s human nature – expect it and prepare for it. So how do you prepare? By getting together documentary evidence that will contradict whatever the person says if it isn’t the answer you want and expect. And this is why interrogatories can be so important. They will give you the ammunition you need to attack the hostile witness. If the witness is testifying to the great efforts the company makes to keep from violating the FDCPA, for example, you want to have ready the interrogatory answer which says the company does not have any policies in place to prevent it from calling the wrong people. Or that it has never disciplined anyone for violating the FDCPA in

its 30-year history, or that it has been sued twelve times for FDCPA violations and dismissed every case with prejudice in which the violations were alleged. Get it?

Remember, you can't testify to these things without direct knowledge, so if you haven't done your discovery homework, you will be at the witness's mercy – and debt collectors don't have much mercy, right? And they're not above lying if they think they can get away with it. Don't be naïve.

It should be clear from the above that you will not normally ask a witness many questions on cross-examination. There just normally isn't that much ammunition. But a good cross-exam can win the case for you. What they say is that, **on direct examination, you want the jury to remember the answers** and not the questions, but **on cross-exam you want the jury to remember the question** and not the answers. That means that on cross-exam you want to be dramatic with your questions – they need to damage either the witness or the other side's case (or build your case, sometimes). If you cannot do one of those things, then do not cross-examine.

Unless for some reason you feel like you have to because of the way the case is going. Trying a case is an art, and it can depend a lot on the way things feel rather than any of the rules I'm trying to give you. Remember, though, that it is not the way you feel that counts: a trial is a performance for either the judge or, if there is one, the jury. They're the ones whose feelings count. Watch other trials.

Making Objections

As I have already said, you will not normally make an argument in favor of an objection when you make it. Doing so is called making a "talking objection," and some courts really frown on doing that because it lets the jury in on too much of the legal part of the case. Plus can be used to give them information that's unfair

for them to know. Ideally they hear only the appropriate facts of the case. One would expect a pro se defendant to get considerable leeway in making talking objections, but this does not mean it's always a good idea. Rather, you should only make talking objections when there is some actual reason to do so (you sense the story the witness is telling is getting a lot of momentum and could hurt you, for example).

Normally, your objection will simply state the basis of that objection. We have talked about leading questions already. Another objection is "irrelevant," but this is rarely a good objection to make unless you sense the jury is liking the witness more because of what is being said – often they will resent a witness who is wasting their time, and you should let a boring witness keep boring and annoying a jury. This rarely happens in debt cases, though – you will find that debt collectors try to keep things short and sweet – their pay relies on getting lots of judgments as quickly as possible, and they never forget that.

If the debt collector is seeking to ask questions regarding other debts of yours, however, your objection is "irrelevant and prejudicial." If you think the debt collector is planning to ask a question that is subject to this sort of objection, you should strongly consider making an objection "in limine," which means before trial, because sometimes even a hint of that sort of thing can damage your case beyond repair – anything sounding like drugs or political dangerousness, for example, should be kept away from the jury if at all possible.

And just to be clear, that means that if you are Muslim or have said anything in favor of an unpopular political view that the debt collector knows about, you should seek to exclude these things before the jury gets a whiff of them, even if whatever you did was perfectly fine. Consider the general American prejudices and expect your jury or judge to have been infected with them.

And expect the debt collector to try to take advantage of them.

The most important of the objections in debt cases will almost certainly be the objections to hearsay. Again, you simply state the objection: "objection – hearsay." If the other side makes an argument against that objection, listen to it very carefully – all debt collectors are relying on hearsay. You must find it and object to it. And that should win unless they can bring it within an exception to hearsay, and that will likely be the business records exception. I discuss the hearsay objection and exception extensively in this Manual below and at the site, so I urge you again to memorize the rule and exception and understand them thoroughly – your case is probably going to depend on it.

The Rule against Hearsay

Any discussion of the legal difficulties of debt collectors starts with the *rule against hearsay*. Hearsay, according to the Federal Rules of Evidence (Rule 8.01(c)), is "a statement, other than one made by the declarant (person who said what you want the court to believe) while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." In plain language, this means that the judge or jury must be able to look the source of any statement they are asked to believe in the eye and decide whether or not the person is telling the truth. It means you can't ask a judge or jury to believe something someone else said. It means that a person who is testifying has to know what he is saying from actual personal experience or observation.

So what does that mean to you? **It means that no one from the debt collection company can testify to records another company generated** for one thing. At least not the records during the time they were held by the original creditor. **They have to get their proof from the original creditor.** Someone from the original creditor must testify (usually by affidavit, sworn written testimony) to

the original records. And this person must be able to testify about normal business practices at the time you supposedly incurred the debt. It isn't always impossible for them to get, but it adds to the difficulty and expense of the debt collector...

And sometimes it **is** impossible for them to get, especially where the debt has been assigned more than once. 99% of the time, the debt collectors/buyers just fake it – they testify as if they knew what they were talking about. You have to object.

Anybody else who owned the debt (if this debt collector is not the first assignee, as is often the case) would *also* need to give the same testimony that you did not pay, since how could they prove you never paid up if they don't put in good evidence?

The Business Records Exception to the Rule Against Hearsay

There is an exception to the hearsay rule known as the "*business records exception*," which in the Federal Rules of Evidence is located in Rule 803(6), but every state has something that is more or less the same – **you need to know the exact rule for your state**.

The first thing you have to know is that documents, which say specific, substantive things after all, are "hearsay" as to the contents of those statements. In other words, if a billing document says you owe $50, it is making an assertion of fact. Since it was created outside the hearing of the jury in your case, it is, technically, hearsay. Got that? It's the starting point.

In our society, much of which is automated, there often are not human witnesses to many things a company does. Instead, there are records. But these records need to be accurate so the company keeping them can do what it's

supposed to do as well as make sure the person owing money does their part. In other words, there are good business reasons for the records to be accurate, and both parties to the transaction need them to be to know how to conduct their business. These facts are called "indicia of trustworthiness," and they give rise to a major exception to the rule against hearsay called "the Business Records Exception." The federal courts have one, and so does every state. They are not all identical.

This exception allows a debt collector to use records which were created "(1) at or near the time the recorded event occurred (2) by, or from information transmitted by, (3) a person with knowledge, (4) if kept in the course of a regularly conducted business activity, and (5) if it was the regular practice of that business activity to make [such records]... all as (6) **shown by the testimony of the custodian or other qualified witness**..." (Emphasis added.) This is the rule I mentioned which allows the debt collector to prove its records by affidavit, *but remember the only qualified witness is someone with actual, direct knowledge of the records and record keeping, and this cannot be a witness employed by the debt collector*. For a fuller discussion of this rule, go to Understanding the Business Records Exception.

You need to look up the Rules of Evidence for your state to find your state's rule. I suggest you conduct a simple piece of legal research – google [your state's name] and "business records exception" and look at the cases that come up. I mean, read those cases until you find a statement of your state's rule and exactly what must be established to get business records into evidence. It won't hurt to do this more than once, either, just to be sure. Make a copy of the case and highlight the factors that must be shown. That's your starting point.

Sometimes the proof needed to establish the business records exception can be offered by affidavit, even in trial. You need to find out if your debt collector plans to do that.

Most jurisdictions require that a party wanting to use an affidavit to prove that the business records exception applies must provide you **notice in advance of the intention to use a sworn statement that would satisfy the business records exception**. Most or all of the jurisdictions have elaborate requirements for the contents and form of the statements that would get these records into evidence. You'll need to get the "Local Rules" for your court and see what these rules are. As I say elsewhere, you need to get the Local Rules at least a month before trial. The court clerk will be able to tell you how to do this. It isn't hard.

If a party "objects" to hearsay, the court should not allow it in unless there is an exception that permits it. But **you must object** – the court will not enforce the rules of evidence if you do not make an objection.

Obtaining the evidence that would permit a business record into evidence despite the hearsay objection is difficult and expensive for a debt collector, and the alternatives are also not very inviting to them, since they involve either getting you to admit the record or finding someone with actual knowledge of your account when it was with another company.

Offers of Proof

Suppose you are about to answer a question, the other side objects, you argue against the objection, and the judge wrongly sustains the objection and actually prevents you from answering the question. Do you give up on that evidence? Well, obviously not if it is just to the form of the question, right? We've

already said in that situation you would simply restate your question in another way that does not offend a rule.

But suppose the objection is to the substance of the testimony you want to offer – they call it hearsay, but it isn't, for example. (Incidentally, this often happens, because the rule against hearsay is complicated enough to confuse judges sometimes.) What do you do?

You make what is called an "offer of proof," which is where you offer the testimony to the judge so that it is in the record anyway (for the court of appeals to look at). To do this you must follow a set of rules if there is a jury – the rules are much less important if there is no jury, since the judge is going to hear everything anyway. If there is a jury, however, you must ask the judge if you can make an offer of proof – to do this you will first ask to approach the bench and be heard. Then when you are up with the judge, you will ask the judge if you can make an offer of proof out of the hearing of the jury – and it won't hurt if you are a little theatrical here, but be careful.

You want the jury to know you have something you want to show them because if they know you do but are not being allowed to do so they will give you credit for it anyway. On the other hand you don't want to get slapped down by the judge too much. And of course you ultimately want to be able to make the offer of proof. Often, when you make that, the judge will change his or her mind and allow you to give it to the jury, and at a minimum you have set yourself up for an appeal if you make the offer.

And appeals are good because they keep the case alive and give you a chance either to delay or to settle more effectively, or to win outright, of course. Moreover, keeping appeals alive (preserving the record and objections) tends to keep the judges more careful, because they don't like to have their decisions overturned.

CHAPTER 9

Where to Go from Here

(TOC)

Many people who are being sued on one debt also have other debts, and regardless of the way this case turns out, you will want to repair as much damage to your credit report as possible. The best way to do all that is with the other parts of the ***Debt Master Series.*** Use ***Debt Settlement and Negotiation*** to address your debts and make them go away, and ***Credit Repair, Life after Debt*** to address credit reporting issues and begin the credit clean-up process.

Conclusion

In parting, I wish you all the success you deserve for your efforts and courage in defending yourself. I'm sure you will find that your efforts to protect yourself are valuable in many areas of your life.

You can find additional information and help at my web site. I will update it to include more information and products from time to time and look forward to providing information that helps you straighten out your finances and improve the quality of your life.

GLOSSARY

(TOC)

For a more up to date version of this glossary, find the glossary of legal terms on the website and use that. It will be a little more complete than this one.

A

***Affidavit*:** A sworn statement provided by a witness and signed in the presence of a *notary public*.

Allegation: A factual or legal assertion, a fact that a party claims is true, or an assertion that the law provides a certain *remedy*. For example, a Petition is made up of numbered paragraphs containing factual or legal allegations.

***Answer*:** The formal response to a "*complaint*" or "*petition*." The Answer is drafted in numbered paragraphs that correspond to the *allegations* of the petition, so that you are either admitting or denying each paragraph of the petition against you.

***Appeal*:** A request to the *Court of Appeals* for a review of the legal decisions and judgments of the trial court. The Court of Appeals is, as they say, a "court of error," not of "justice," which means that an appeal will focus on specific rulings of the trial court to determine whether the law was followed; whether the outcome in general was fair or compassionate will usually not concern the Court of Appeals.

***Appearance*:** Your formal acknowledgment of the lawsuit against you, and your announcement to the court that you are present for purposes of defending the suit.

***Appellate Procedure*:** The section of the *Rules of Civil Procedure* which apply to appeals.

***Argument*:** Legal reasoning and conclusions, including your theories about what the law prohibits or requires. You make an "argument" when you apply the law as you see it to the facts and tell the judge what the outcome should be, **not** when you merely disagree with something said.

***Assign*:** The process by which one person or company legally transfers its rights to another person.

***Assignee*:** The person or company to whom rights have been legally transferred.

***Assignment*:** The process by which legal rights are assigned from one person to another.

***Attachment of assets*:** The legal process of seizing goods or bank accounts. This is the way the debt collector takes your money out of the bank, and this will typically occur without warning to you or even notice within any specific time, so your first awareness may not be until you start bouncing checks.

B

***Bailiff*:** An armed guard who provides security for an individual courtroom.

***Bulk filer*:** An individual or corporation that files a sufficiently large number of lawsuits in the Associate Circuit Courts (of my state). These people have all of their cases appear before the same judge on the same day, enabling them to process a large number of cases at a minimal cost in dollars or attorney time.

***Business records exception* (to *the rule against hearsay*):** In plain English, this rule provides that if a party can prove that certain records are (1) usually created close to the time the event they record occurred, and (2) are normally kept in a particular way, and (3) that a document they wish to produce in evidence is one of these documents that is normally kept, and (4) in this instance **was** kept in the usual way (5) for business purposes (rather than litigation purposes), then the documents can be used as evidence even though they are *hearsay*.

C

Call docket: A list of cases that will be called out to see if the *defendant* has entered for purposes of defending the suit. If the defendant

is not present, but the *plaintiff* is, then the case will be a *default*. If the defendant is present and the plaintiff is not present, then the case will probably be *dismissed without prejudice* for failure to prosecute (show up).

***Call docket settings*:** Times when a case is assigned to a *call docket*, or (sometimes) a case's numerical location on a call docket.

***Case in chief*:** This is the part of a trial where you present the evidence you want the judge or jury to hear regarding the *claims* you are making against the other side, or your facts opposing the case brought against you. After you present your case in chief, the other side may present a *rebuttal.*

***Case style*:** The name of the case, including the *parties* to the case, the *Cause Number* and the *Division of the Court*. The case style would normally be the first half of the first page of a *pleading.*

***Cause number*:** An identifying number given to a case when it is filed. No other case has the same number, and in the courts of my state, cases before the Associate Circuit Court have the letters "AC" in them.

***Cause of Action**:* This is a legal *claim* against the other party, where the litigant is asking the court to provide him a *remedy* for something the other side did.

***Certificate of service*:** A statement, at the end of a document you are providing the court,that says you have served a copy of that document

upon the other party to the suit. This is required because you are not allowed to communicate with the judge without the other party being there *(ex parte*).

***Charge-off*:** This is an accounting term, not a legal term. When a creditor gets tired of waiting for payment that is not being paid as it comes due, it can charge it off and take a tax loss on the debt. This does **not** mean that the company does not own the debt or will not try to collect it, it is simply an accounting device to recognize that the company has not been paid as expected.

***Charged-off debt*:** A debt that has been charged off. Note that this does not mean that the company has actually disclaimed the debt or given it away or sold it. It is an accounting device that reflects the debt's status for record-keeping purposes.

***Claim*:** Your legal assertion that somebody committed a legal wrong against you for which you are entitled to a *remedy*. In other words, it is what you are suing the other party for.

***Closing argument*:** The argument you present to the jury after the evidence has been presented. You relate the evidence you have provided to the law that governs your claim, and you show the jury why they should rule in your favor.

***Collectability*:** The winning party's ability to collect a *judgment* gained in the lawsuit. Judgments are not in any way guaranteed by the

government, and if the losing party does not have assets you can reach, then the judgment is said to be “uncollectable,” but this is not a term or concept with legal effect, so the holder of a judgment is free to keep trying to collect on the judgment for as long as the judgment lasts. In my state that is ten years, renewable for ten more years. Judgments that were initially uncollectable sometimes later become collectable.

***Complaint*:** Another term for “Petition,” which is the formal *pleading* which a *plaintiff files* to start a lawsuit against a *defendant*.

***Compound interest*:** Interest on interest. That could arise in any number of ways. Suppose the original creditor had charged you interest on your charge account. This is often added to the amount originally borrowed when it is sold to the debt collector, who then asks for the entire amount as principle plus interest from a certain date or “up to the date of trial.” But this is seeking interest on interest. In some states a plaintiff is not entitled to compound interest unless there’s a contract which specifically permits it. Most credit card agreements do, of course, but **note: many debt collectors cannot find your credit card contract (even assuming you’re the right person to sue). Without the contract, they can’t get compound interest in my state, maybe in yours too**.

***Consent judgment*:** In theory, this is a judgment that one party agrees to with another party, typically admitting *liability*. In theory it is a free consent, but in reality it is something frequently entered as the result of fear and intimidation, or confusion. **Since it is a judgment against you, it will have all the bad effects of a judgment after trial on your credit report,**

although sometimes the agreements call for their eradication upon payment. This might provide some protection of the credit report.

***Continuance*:** An order by the court putting something off until a later date. Cases on the *call docket* are typically continued until a specific date about a month away.

***Continuance date*:** The date to which cases on the *call docket* will normally be continued. The continuance date is usually written on a blackboard in the county courts I used to frequent so everyone can see it, but sometimes you must ask the judge or a clerk for the continuance date.

***Continue*:** Put off until another date. As in "we will continue the *motion hearing* from today until next week."

***Cost-benefit analysis*:** This is an accounting term, not a legal one, referring to a process of adding up what something costs and comparing the costs to what you might gain from a certain outcome. Note that, in a lawsuit, risk of losing must be taken into account. So if you have a 50% chance of winning $100, the benefit is considered to be $50. If it would cost $50 or more to win the case, the cost benefit analysis should show that pursuing the case is not profitable. That does not necessarily mean that the company will not pursue it, though, as it might have other costs or benefits to consider, or it might not act in an economically rational way.

***Costs*:** In American law, the loser usually pays the "court costs" of the winner in a lawsuit. It isn't as bad as it might sound, though, since "costs"

typically does not include attorney's fees. Without attorney's fees, costs are usually negligible, since they only include the filing fee, certain copying costs, and certain discovery costs, including deposition transcripts.

***Counterclaim*:** Legal *claims* brought by a *defendant* to a lawsuit against the *plaintiff* who started the suit by suing the defendant.

Court of Appeals: the court that reviews decisions made by the trial court judge. Typically an "appellate panel," the group of judges who will decide your case, is made up of three judges who specialize in appeals. The Court of Appeals is, as they say, a "court of error," not of "justice," which means that an appeal will focus on specific rulings of the trial court which you have "preserved" (by objecting or, when an objection was sustained against you, by making an *offer of proof*). The Court of Appeals' role is to determine whether the law was followed regarding those specific rulings, and the court will generally not consider an issue that was not presented to the trial court judge. Whether the outcome of the case in general was fair or compassionate will usually not concern the Court of Appeals unless it is extreme. The court of appeals rarely "reverses" (overrules) the trial court and will generally respect and follow any determination as to facts made by the trial court.

***Cross-examine*:** The questioning of a *hostile witness*. Typically you will be allowed to ask *leading questions* of a hostile witness ("Isn't it true that...").

D

***Date of Filing**:* The date on which a case is filed. This can matter in jurisdictions that have standards for how long cases last (judges do not like reporting that they are taking a long time resolving their cases) or actual limits regarding dismissal of cases not resolved within specified amounts of time.

***Debt*:** An assertion or claim that you owe somebody money. Importantly, it's a debt for purposes of the law even if you don't think you owe the money.

Debt buyer: a person or company that purchases debts for purposes of collection. Legally defined as a debt collector and treated the same way.

***Debt collector*:** This term is defined by the *Fair Debt Collection Practices Act* (FDCPA), 15 U.S.C. section 1692a. A debt collector is someone who regularly engages in the collection of debts due to another person, or who purchased from another person for the purpose of collection. In other words, a “debt collector” is not the person who originally lent you the money.

***Deceptive affidavit*:** A sworn statement that is either untrue or, while technically true, is somehow misleading. An affidavits by a debt collector's “custodian of records” regarding the accuracy or truth of the records kept by the original creditor would, in my opinion, be “deceptive.”

***Declarant*:** Legalese for “the person testifying.” The important distinction to bear in mind is that when a jury is presented with something to believe, that something must come from the mouth of one who is under oath—not someone who just happened to be talking to someone who would later testify.

Default*:** This term has two meanings of importance to a debt defendant. The first use that this handbook uses most frequently is, “fails to defend.” A person defaults on a lawsuit if he fails to ***answer or otherwise take defensive actions. The second definition is a contractual term—a person “defaults” on a contract if she does not fulfill her obligations, and many (if not most) debt cases involve defaulted credit card accounts.

***Default judgment*:** The judgment entered by the court if you fail to appear and defend yourself from a lawsuit. Typically, the court will give the plaintiff whatever it asked for in the *Petition*, and it should not give the plaintiff any more than that.

***Defendant*:** The person being sued in a lawsuit. If the defendant files a counterclaim, then the defendant becomes also a “counterclaimant” and the plaintiff becomes (also) the “counterdefendant.”

***Depose*:** To take a person’s *deposition* or record his *testimony*.

***Deposition*:** This is a sometimes-lengthy question and answer session conducted by either party’s lawyer, where the lawyer asks very specific questions, and the witness (“deponent”) provides equally specific

answers. There is no room for guesses, nor is the lawyer permitted to argue with, embarrass, or put words in the mouth of the witness. **You** can take a witness' deposition in a case if you are representing yourself.

***Direct examination*:** This is sometimes referred to simply as "direct," and it refers to the questioning of a friendly witness. You are generally not permitted to ask "leading" questions on direct examination, but must ask "open-ended" questions (questions that do no suggest their own answer) such as "Who did..." "When did..." "What happened next..." or the like. You should not make the questions confusing or hide the answer if it is, in fact, obvious—a direct question is simply a non-suggestive way to ask a question.

***Discovery*:** The formal process of asking for information, through *interrogatories* (questions), *requests for documents* or *requests for admissions* of certain facts.

***Dismiss*:** A dismissal means to end the lawsuit. When it is done by the judge, it is kicked out; when it is done by a party, it is dropped or allowed to go away. Dismissal does not mean the case cannot be reinstituted—it only means that this case is over.

***Dismiss with prejudice*:** To drop (if a party) or kick out (if a judge) a case in such a way that it cannot be brought again. The debt is eliminated if the case against you is dismissed with prejudice, but you can be sued again if it is not—i.e., if it is dismissed "without prejudice."

***Dismiss without prejudice*:** The case is dropped (if by a party) or kicked out (if by a judge) in such a way as to allow it to be brought again. The debt is not eliminated and will likely be sold to another person or company who will harass and sue you.

***Division of the Court*:** The number assigned to a courtroom. Generally the same judge will preside over a division over time, but sometimes the judge must be out, and another judge will step in and replace him or her.

***Docket*:** The list of cases before the judge on a given day.

E

Ex Parte (contact): Contact with the judge without the other party being present. It is (normally) not allowed for either party, and judges are normally very sensitive to this. Ex parte contact is, of course, expected in cases where a default has occurred.

***Examine*:** This really just means to ask questions of a *witness*.

***Execute*:** Legalese for “do” or “make,” as in “execute a contract.” See also *execute on the judgment*.

***Execute on the judgment*:** To begin collection proceedings like *garnishment* or *attachment* of bank accounts or other assets.

F

***Fair Debt Collection Practices Act (FDCPA)*:** The federal law that prohibits certain of the worst practices and tactics of the *debt collectors*. It typically does apply to lawyers who do a substantial amount of debt collection for their clients, but it does not apply to companies seeking to collect on debts owed to them, provided they pursue those debts in their own names. A copy of the Fair Debt Collection Practices Act is included in the Supplemental materials of this handbook.

***False affidavit*:** An *affidavit* that includes lies or misstatements, see "deceptive affidavit."

***Federal Rules of Civil Procedure*:** The general rules that control the conduct of civil cases filed in federal court. Not many, if any, debt cases are brought in federal court, but you could bring a claim under the Fair Debt Collection Practices Act in federal court if you desired, and the Federal Rules of Civil Procedure have also served as a model for most state rules, so I refer to them sometimes as examples. They will be like the state rules, but the Federal Rules of Civil Procedure do not directly apply in state courts.

***Federal Rules of Evidence*:** The general rules that control the introduction of evidence in trials of cases filed in federal court. Not many, if any, debt cases are brought in federal court, but you could bring a claim under the *Fair Debt Collection Practices Act* in federal court if you desired. The Federal Rules of Evidence have also frequently served as a model for most state rules, and they are sometimes simply adopted, so I refer to them

sometimes as examples. They will be like the state rules, but the Federal Rules of Evidence do not directly apply in state courts trials.

Fees: The money various courts charge for using them. Typically there is a “filing fee” for every case. Some jurisdictions require a filing fee for counterclaims (e.g., some jurisdictions in Illinois), and some jurisdictions require a filing fee for motions (e.g., some jurisdictions in New York). Whatever the fees may be, if you cannot afford to pay them, you can apply for “in forma pauperis” status, meaning that you don’t have enough money to pay. If the court agrees with you, it will waive the fees.

***File*:** This is a little more than merely giving something to a court, although that is probably the closest definition. You “file” a suit when you give the court a copy of a *Petition*, some additional information, and a *filing fee*. You “file” *pleadings* or other documents with the court when you give them to the clerk and, if the court’s permission is required, obtain that permission.

***Filing fee*:** A fee a *plaintiff* gives the court to start a lawsuit.

***Finder of fact*:** The entity that gets to decide who is telling the truth as to contested facts. In a judge-tried case, this is obviously the judge. In a jury trial, if there is enough evidence to place an issue in legitimate dispute, the jury decides the facts.

***Fraud*:** As a legal term, fraud is more than merely lying, and if you wish to accuse someone of fraud, you should look up the law regarding

fraud in your *State Law Digest*. A typical law library has a digest for the state laws of every state, and these are usually collections of perhaps fifty books each. Look in the index for fraud. As a *legal claim*, “fraud” has technical elements that have to be in the complaint, but it means pretty much what you would expect, as in a deception or trick.

G

***Garnish*:** A separate legal process by which someone with a *judgment* begins to take some of your wages. They file garnishment proceedings upon your employer, and your employer must follow very specific rules regarding how much of your wages they can give the debt collector. In the county in which I live, the Sheriff’s office in the courthouse building has information regarding the laws of how much can be taken from you, and I would guess that most jurisdictions are similar. Or go to the *State Law Digest*. **Notice that in order to garnish your wages, the debt collector must first obtain a judgment**—so any claim by a debt collector that he will “garnish your wages” is deceptive unless there is already a judgment against you. Do not be intimidated. The making of the threat may constitute a violation of the Fair Debt Collection Practices Act. Not all funds are subject to garnishment or attachment, notably certain pension or disability funds. If your source of income is some sort of state or federal aid, it is likely also not subject to attachment or garnishment.

***Garnishing*:** See definition of *garnish*. Garnishing is a separate legal proceeding, so it is not exactly automatic when a *judgment* is rendered against you. Garnishing is a legal proceeding aimed at the people who owe

you money (such as your employer); garnishing is the **interception** of that person's payment to you of money that is owed to you, typically wages. When the money being sought is in the bank, the process is sometimes called "attaching" the account.

***Garnishment*:** The process of *garnishing* your wages.

***Garnishments department*:** The part of the court devoted to helping people with judgments collect on those judgments by instituting claims against your employer or other holder of your assets.

H

***Hearing*:** This is where the judge actually sees you and listens to *arguments* (these are called "oral arguments") you make about a *motion*. In some jurisdictions, a court will not rule on a motion you make without a hearing, but some courts do not require an actual hearing, and in some jurisdictions you rarely see the judge before trial.

***Hearsay*:** An out of court statement offered for the truth of whatever was said. For example, if you testified that "Mr. Smith said the dog was white," this would be hearsay if you wanted the jury to use the statement as proof that the dog was white. You must get someone to show up and testify in court that the dog was white. Or in the debt case context, suppose the company wants to prove that you owed Discover some money—they must either use the *business records exception* or have someone from Discover

testify. It would be hearsay to claim that you owed them money because Discover sold them the debt.

Note that to be hearsay the evidence must be offered to prove the truth of what was said. To go back to Mr. Smith and the dog, you could testify that “Mr. Smith said the dog was white” if you were trying to prove that **you** believed the dog was white, or **why** you believed the dog was white, or that Mr. Smith was lying. Testimony can be permitted for certain reasons but not others, and you must ask the court to **limit the use** of the testimony if you want to keep it from hurting you. To do this, you ask the court for a “***limiting instruction***” to the jury telling them how they can use the testimony, and this can sometimes be very important.

***Hostile witness*:** A witness whose loyalties are with the other side or who is uncooperative. The judge will typically let you *cross-examine* such a witness even if you called him for your side, and you will be permitted to ask *leading questions,* which are normally not allowed in *direct examination.*

I

***Immunity*:** This means you can do something without consequences or punishment. Judges have “absolute” immunity in the course of the lawsuit, and this means you cannot, for all practical purposes, sue the judge for anything he or she does. “Qualified” immunity means that a person is free of consequences for mistakes, but not for deliberately wrongful actions. Whether the debt collectors can assert absolute immunity

for making false statements in their *affidavits* in collection cases is a hotly debated issue. The highest courts to rule on the question have said there was no absolute immunity for witnesses in these circumstances, but as of the date of this printing, there are still a few courts which have disagreed.

In propria persona: Another way of saying "pro se." Self-representation. See "pro se."

Interrogatories: These are formal questions you ask the other party for very specific information. Every state has *Rules of Civil Procedure* that control the use and effect of interrogatories, and most jurisdictions also have *Local Rules* which say how many interrogatories you can ask. Look at the examples provided in the supplemental materials and look at the Rules of Civil Procedure and the Local Rules to determine what you should do.

J

***Judgment*:** The court's final ruling as to all the issues in the case between two litigants. It terminates the suit, it isn't just a step along the way (compare to *"Order"*). After the jury reaches its verdict, the court will consider certain issues and then make its "judgment," which will incorporate or disagree with the jury's verdict, and it is the **judgment** you will seek to enforce or from which you will appeal, although you can also appeal orders.

***Jurisdiction*:** there are two important definitions of this term. First, it refers to **what court and whose law applies to a specific case**. If you live

in the City, some cases against you could be brought in municipal court (typically not debt cases, though), some in the state circuit court for whatever county you live in, and some in the federal district court for your district. In other words, jurisdictions can overlap. If the suit against you is filed in the Circuit Court of the County, the County Circuit's Local Rules will apply in addition to the State Rules of Civil Procedure and Evidence. If you file suit in the Federal District Court, then the Federal Rules of Civil Procedure and Evidence will apply as well as the Federal District's Local Rules.

Jurisdiction also refers to the power of the court to hear the lawsuit against you, and this requires both that you have been *served with process* (or that you waive it—let it go)(giving rise to what is known as "personal jurisdiction") and that the court has power to hear that kind of case (this is known as "subject matter jurisdiction," which cannot be waived). Federal courts typically do not have subject matter jurisdiction over traffic law cases, for example, even if the parties agree that it should.

***Jury instructions*:** Specific instructions which the judge gives to the jury explaining how to apply the law to facts that the jury believes are true. In some states, these instructions are kept in a book called "Approved Instructions," but in other *jurisdictions* there may or not be an official collection of "approved" instructions. You can find instructions used by other people by looking up the files of cases that actually went to jury trial, or you can ask for some research guidance from the law librarian at a university law library. Jury instructions are considered so important that they are frequently appealed and often discussed in great detail by the courts of appeals.

***Jury selection*:** The process of selecting who will be on the jury from the *venire panel*. This process is discussed in detail in the handbook in the trial chapter.

***Jury trial*:** A trial conducted before a jury—a group of citizens selected by the *plaintiff* and *defendant* from a random drawing. The jury is primarily responsible for finding the facts of the case and applying the facts in ways guided by the *jury instructions*. The opposite of a jury trial is a "court-tried" case, or a "judge-tried" case, in which there is no jury, and the judge is the person who finds the facts and applies the laws to them.

L

***Leading question*:** A leading question is one in which the question gives an indication of the answer. A "yes or no" question such as, "Were you confused when you received the collection letter?" is a good example of a leading question.

Legal authority: Cases or statutes (laws written by the legislature) that say what the court should do in a given situation.

Liability*:* This is the fancy legal term for saying you owe somebody some money, but the money is not always established as a particular amount. An auto insurance claim is a liability against the insurer, but the amount is not necessarily clear.

Limited appearance: An appearance in a court for a specific and limited appearance, for example, to challenge whether there was adequate *service of process*.

Limiting instruction: An instruction to the *jury* to ignore something they have heard, or to treat it as *evidence* of one thing but not another.

Litigant: A *party* to a lawsuit.

***Litigation*:** Another way to say lawsuit or legal proceedings.

Local rules: Specific rules which apply only to the court you are in. Local rules, for example, typically control how many *interrogatories* you may ask, and this number varies widely from *jurisdiction* to jurisdiction. Local rules also will tell you what the judge wants from you in *pretrial submissions* or in various actions in front of that court.

M

Make an objection: This is how you tell the judge you believe the other side should not be permitted to provide *evidence* about something it wants to show. The "objection" is your legal reason it should not be allowed. For example, you might say, "Objection. Calls for *hearsay*" if you think a question asked can only be answered by relying on hearsay.

Mistrial: This occurs when something so severely prejudicial is improperly brought to the jury's attention that one cannot rationally expect

them to forget or ignore it. Allegations of drug use or sexual improprieties can often be the basis of mistrials. In debt cases, certain information about the debt or the debt collector's behavior, or the defendant's other debts, can sometimes be the basis for mistrials.

***Motion*:** The way you formally draw the judge's attention to something and ask him or her to do something for you. In some jurisdictions, the court imposes a fee for every motion. If you live in such a jurisdiction, and lack money to pay the fee, you can apply for "in forma pauperis" status, in which the court waives the fees.

Motion docket: Like the *call docket*, only it is a list of all the people who will have their motions heard at a *hearing* on a given day.

***Motion for directed verdict*:** This is a *motion* you make after the other side has put on all of its *evidence* in its *case in chief*. You ask the judge to find, as a matter of law, that the evidence put on by the other side is not enough to allow the jury to rule in its favor.

Motion for Summary Judgment: *A*t almost any point in the process of a lawsuit, you could ask the judge to "find as fact" certain facts that the parties agree to. The judge then figures out whether the facts as agreed give one side or the other the right to the legal *relief* it is seeking, and if they do, then the judge issues a *judgment* as to that *claim*.

***Motion hearings*:** This is the hearing on a motion one of the parties brings. Either side can notice a hearing—not just the one who filed the motion.

***Motion to compel production*:** This is a *motion* one of the parties brings to require the other one to answer *interrogatories* or provide responses to *requests for documents*. These motions are controlled by the *Rules of Civil Procedure*. In most or all *jurisdictions* there is a specific rule telling you what you can get if you win on a motion to compel, and there are usually Local Rules, which say what you must do before you bring one.

Motion to dismiss: A *motion* to kick a case out because there is no law against what the other party did. For purposes of this motion, the facts claimed in the *petition* or *counterclaim* by the party against the motion are considered to be all true.

***Motion to strike**:* You are asking the court to get rid of something—to strike a claim or a factual allegation in the complaint or counterclaim, or to tell the jury to "disregard" (ignore) certain testimony. Such a motion at trial removes the evidence from the record, and it cannot be used to support a finding.

Movant: The party bringing a motion—that is, "moving" (asking) the court to take some specified action.

***Move to strike*:** This is what you say when you want the judge to tell the jury to ignore certain testimony that it heard but which was against the

rules of evidence for it to hear. Sometimes the testimony is so bad that you must move for a mistrial—you say the jury can't possibly be fair after hearing something it should not have heard.

N

***Notary public*:** A person qualified to take sworn statements. Banks usually provide them to their customers for free.

***Notice*:** Legalese for "warning."

***Notice of Appeal*:** A formal document filed to notify the trial court and other party that a litigant is appealing the court's final *judgment* to the *Court of Appeals*.

***Notice of Deposition*:** The notice sent to the opposing party telling them the date, time and place of a *deposition* that will be taken.

***Noticing up*:** When you want to have a *hearing* on something or to require the other party's attendance at something like a *deposition*, you "notice it up." This tells them the date and time the event you are telling them about will be.

O

***Object*:** To make an *objection* by stating it to the court or (at a *deposition*) to the other party.

***Objection*: Why** one party thinks some evidence should not be allowed to be shown to the jury. You tell the judge the legal basis for your objections to evidence when you "*make an objection*." If you do not make an objection, the court will generally allow the evidence to be heard and considered by the jury even if the Rules of Evidence don't allow it. That's because a trial is a contest, not an abstract search for truth or justice.

Offer of proof: Sometimes a party *objects (makes an objection)* to *evidence* you want to give the jury. When this happens, the judge can *overrule* the objection and allow you to give the jury the evidence, or it can *sustain* the objection and prevent you from giving it to the jury. When the judge sustains an objection to evidence you consider important, you make an "offer of proof," where you tell the judge what the evidence would show if he or she allowed you to put it in front of the jury. Sometimes the judge will then reverse the ruling and let you give it to the jury, but sometimes not. If you want to appeal the ruling, you will need to make an offer of proof so that the court of appeals can understand the importance of what you wanted to show.

***Opening statement*:** This is when you tell the jury what you think the evidence will show. You might say, for example, "The evidence will show that I did not borrow any money from the plaintiff in this case..." (The evidence will always show that in these cases because they are cases involving *debt collectors*).

***Opportunity cost*:** This is an economics term rather than a legal one. It refers to what you lose whenever you make a choice. Some

opportunity costs are obviously worthwhile: you lose a day's work when you spend it in trial (opportunity cost is your day's salary or wages), but if you make a claim for $3,000 go away by spending the time in court, chances are it was time well spent. On the other hand, if the company suing you must spend ten hours to gain a $2,000 judgment against you, and during that amount of time it could bring a hundred cases (it could!) against different people and get judgments of $250,000, then the opportunity cost of pursuing you is pretty high and it is not **economically** feasible or reasonable to do so. They might still do it anyway, for reasons other than economic reasons related only to your case.

***Order*:** An intermediate ruling by the judge about something. It may order you to provide records ("order compelling production") or to provide the court or the other side certain information by a certain time (scheduling order), or it may decide that one side has proven certain facts (order granting *summary judgment*). The order will usually discuss the facts, reasons and conclusions of the judge, but the *judgment* will usually merely give the bottom line. An order is not usually considered final until a judgment has been entered, and orders typically cannot be appealed, only judgments. Sometimes a court's ruling will be called a "Final Order and Judgment," and this can be appealed. Sometimes rulings even in the middle of discovery can be so burdensome (or could violate certain important privileges, like the ones against disclosing medical records or attorney-client conversations) that they are allowed to be appealed. These are called **"interlocutory appeals."**

***Original creditor*:** The person or company that actually provided goods or services in exchange for a promise to pay (*debt*). The legal opposite of original creditor in debt collection cases is "*debt collector*."

***Overrule*:** this is a ruling where the judge decides to allow a party to show evidence that the other side objected to. The court "overrules" the *objection*.

P

***Party*:** this is a person who is part of the lawsuit either because he is suing or being sued.

***Peremptory strike*:** What you do (make a peremptory strike) when you don't like a potential juror for reasons other than obvious prejudice. You just don't like the juror, but you don't have to say so or even have a reason. Peremptory strikes are decisions you get to make without telling anyone your reason. And you should not.

***Petition*:** The document that starts a lawsuit. It's supposed to say what the defendant did wrong and what the "*petitioner*" or "*plaintiff*" wants the court to do about it.

***Phished*:** This occurs when a phone service or other utility changes your service provider without telling you.

***Plaintiff*:** The person who starts a lawsuit by suing the other person.

***Pleading*:** The formal documents you submit to the court, as in the *Petition* or *Answer*.

***Pretrial conference*:** Any of a number of conferences with the parties and the judge before trial.

***Pretrial order*:** This could mean any of a number of things. It could be a scheduling order or any order prior to trial, or it could be an order which tells you what rules to follow regarding trial, including when you should give the other side certain documents or notice of evidence you intend to present at trial.

***Pretrial Submissions*:** The things you give the court just before trial, including proposed *jury instructions*, a *trial brief*, and possibly final *motions* or other assorted pleadings.

***Principal sum due*:** In a debt case, this should be the amount of money you theoretically borrowed. In reality, the debt companies often call the debt as it existed when they purchased it the principal sum due, so that it wrongly would include interest and other finance charges.

Privacy: See definition of “sealing.” Much of the information the debt collector will seek from you in discovery is sensitive and private. If you do not get the record “sealed” this information will be available to the public. To do this you will need a “Protective Order.”

***Pro se*:** Literally, by yourself. This means you represent yourself rather than hiring a lawyer to do it, and the rules permit you to do for yourself anything a lawyer could do..

Process: A legal "process" is the use of the formal powers of the judicial system. In plain English, that means that one side is using the court against the other. A *complaint* or *petition* is a classic kind of process, but a *subpoena* is also a form of "process." For purposes of this handbook, process is the petition or *summons* that goes with the petition.

***Process server*:** An adult person who is not part of the lawsuit who is supposed to take the *summons* and deliver it in a certain way to the person being sued. Often the process will initially be the sheriff of the county in which the summons is being served, but sometimes it is an independent, non-governmental person. Sometimes the independent process servers will lie about whether they legitimately served you adequately.

***Proof*:** The evidence you use to show that what you say happened really did happen. The term itself isn't legalese, but remember that evidence must be presented according to the *Rules of Evidence* in order for it to prove anything.

Protective Order: See definition for "privacy." A protective order is an order by the court preventing the other side from revealing private information or seeking information that is too burdensome or difficult to provide. Likewise the debt collector may seek a protective order if your discovery requests are, in its opinion, too probing. In my experience,

requests for protective orders by debt collectors were rarely justified. You oppose this by filing a motion to compel production or opposing the motion for protective order.

R

***Rebuttal*:** After the defendant puts on evidence attacking the *plaintiff* or petitioner's case, the *petitioner* can put on "rebuttal evidence" to show why the defendant's evidence should not be believed.

Recess: The time after the first call of a *call docket* and before the *second call*. It means people are free to move around a little bit and make a little noise, and often the judge will leave the courtroom during the recess.

***Relief*:** What you are seeking when you *file* a lawsuit or a *counterclaim*. It is your *remedy* for what the other side did to you that was illegal.

***Remedy*:** What the law provides you if you win your case.

***Renewed Motion for Directed Verdict*:** This is made after both sides of the case "*rest*" their cases and stop putting on further evidence. It asks the judge to find, as a matter of law, that the other party did not prove what it needed to prove in order to win its case.

***Request for jury trial*:** Your official request that your case be heard by a jury. Different courts have different requirements for this request—make sure you know and follow these rules.

***Requests for Admissions*:** These are requests that you agree certain facts should be taken as proved. They are a lethal trap for the unwary and inexperienced. Requests for Admissions are governed by their own rule of Civil Procedure. Look it up. If you do not respond to Requests for Admissions within the required amount of time, they will be considered admitted, and thus if you are not careful, you will admit that the entire case against you is valid, when it almost certainly is not. The penalty for wrongly denying a request is so slight that it very well may make sense simply to deny every request for admission sight unseen. If you don't want to do that, it only takes a minute to see that the requests are usually things you can deny in perfectly good conscience. And if there is any doubt about admitting them at all, it makes sense to deny them and let the company try to prove its case. You can obviously admit the things that are obviously and indisputably true, but just be careful about how you define that term.

***Requests for Documents*:** An informal way to say *"Requests for production*." See that section for definition.

***Requests for production (of documents or things)*:** Another of the formal *discovery* devices, the way you ask the other side to give you documents or other things that might pertain to the case. A wide range of discovery is allowed, and it makes sense to give a lot of thought to what might help to know. A sample set of requests is included in the

supplemental material, and I suggest you read it carefully to get the spirit of the things.

***Rest*:** Legalese for finish your case and stop.

***Resting the case*:** When you rest your case you announce that you have no more *evidence* to show the jury or the court.

***Rule Against Hearsay*:** This is just what it sounds like—a rule against allowing *hearsay testimony* into *evidence*. Hearsay is not allowed except under specific circumstances. An important part of American justice is the idea that a person should be able to see and confront his accusers, and hearsay is, by its nature, something said by someone who cannot be cross-examined in front of the jury.

***Rules of Civil Procedure*:** The rules that control the way a whole case is conducted, from beginning to end. See *State Rules of Civil Procedure* and *Federal Rules of Civil Procedure*.

***Rules of Evidence*:** The rules that control what evidence is permitted to be used to support or attack a case. If it does not comply with the rules of evidence, **and if an objection is made**, then evidence should be excluded (not permitted). See *State Rules of Evidence* and *Federal Rules of Evidence*.

S

Scheduling conference: Just what you'd expect—a conference with the parties and judge in which a schedule for major events in the lawsuit is planned out. After this conference, the judge generally issues a *scheduling order*.

Scheduling order: An order entered by the judge typically after a *Scheduling conference* which controls the substance and timing of the major events of the lawsuit.

***Sealed*:** When a case involves children or trade or business secrets it is usually "sealed." This is for obvious reasons, right? When a case is sealed, not only is the public prevented from attending the hearings, but the records are kept in a special place away from the public. Sometimes the argument for sealing the record is not nearly so obvious, and often a debt collector will claim that some of the information it provides you in discovery is a "trade secret" that should be sealed. Maybe. And much of the information you will provide them should likewise be sealed to protect your privacy. If it is not sealed, it is completely available to the public, and debt collection companies often seek, and use, social security numbers.

***Second call*:** During the call docket, if both *plaintiff* and *defendant* announce their presence (by saying, "Here!"), then one person, usually the plaintiff, will say "Second call." This tells the judge to go on with other names, and during *recess* the two parties will discuss what should happen next. If the plaintiff is not present at the docket call, the case may be dismissed for failure to prosecute; if the defendant is not present, the case will be *defaulted*.

***Secondary debt*:** An economic term, not a legal one. It refers to debt which has been *assigned* or sold to a *debt collector*.

Secondary debt collectors: In a sense this term is redundant, since debt collectors are, by definition, "secondary"—they were not the original creditors, but purchased the debt at a discount from the *original creditor*. I use the term "secondary debt collectors" when discussing the economy as a way of emphasizing the fact that there is so much of this debt swamping the American economy that an entire market has grown up around it.

***Served*:** This means properly receiving the *summons* or other documents. Except for the *service of summons*, service is normally accomplished by placing a document in the mail, properly addressed to the other party, with proper postage affixed. You must certify that you have served documents in this way with a *certificate of service*.

***Service*:** See *served*.

***Service of process*:** How a case really commences for a *defendant*, and it is sometimes referred to as *service of summons*. It is normally supposed to be accomplished by hand-delivery of a *process server*. The document should be placed into your hand or offered to you or to a member of your residence fifteen years or older, at your residence. See *sufficient service*.

***Settle*:** This refers to two or more parties to a suit agreeing to terms and either dismissing the suit or entering a *consent judgment*. *Dismissal* is obviously a far better option for a *defendant*, and if you're settling a case there's no good reason not to insist on a dismissal. A *judgment* against you of any sort hurts you for a long time.

***Settlement*:** The process of, or document settling a case.

***Settlement conference*:** Often the last conference with the parties and the judge before trial. The judge suggests that the parties *settle* the case and sometimes will lean pretty heavily on one or both sides to get them to settle. If they don't settle, then the judge usually sets the case for a *jury trial* on a certain date or for a week. See *trial docket*.

***Stale debt*:** A debt that is no longer collectible because it is too old (beyond the *statute of limitations*).

State Law Digest: A substantial collection of books containing most legal claims and references to cases in which judges decided what you have to prove in order to establish such a claim. A typical law library has a digest for the state laws of every state, and these are usually collections of perhaps fifty books each.

***State Rules of Civil Procedure*:** The *Rules of Civil Procedure* that the control the way a case is conducted from beginning to end in the state circuit courts. They do not apply to Federal cases or to Municipal cases.

State Rules of Evidence: The *Rules of Evidence* that govern the introduction or use of evidence at trial in the state circuit courts. They do not apply to Federal cases or to Municipal cases.

***Statute of Limitations*:** The length of time in which a person has a right to bring a case in court. After that time passes, one normally cannot bring a suit, and courts have found that it is a violation of the *Fair Debt Collection Practices Act* for debt collectors to attempt to file suit for a debt beyond the time permitted by the statute of limitations. .

Style (of case): This is the name of your lawsuit (e.g., Debt Collector vs. You), and it usually includes at least the name of the court, the case number and the judge or division as well as the parties.

***Subpoena*:** A document which can force people who are not parties to the suit to come into court and testify (to force a party, you must "notice" them of the requirement that they appear). A subpoena's contents are controlled by the jurisdiction's Rules of Civil Procedure and must be precisely complied with in order to be legally effective.

Sufficient Service: As it sounds, this term refers to service that is legally effective according to the rules.

Summons: A document from the court that tells the *defendant* in a lawsuit that he or she is being sued and that a response must be entered in order to avoid a *default judgment*. And it says when and where the response should be filed.

Sustain: What a judge says when he or she agrees with an *objection* and is going to deny the party seeking to introduce evidence the right to do so. You need to make an *offer of proof* to protect your rights.

T

***Testimony*:** What a witness swears to, either in court or by *affidavit.*

***Transcript*:** A written record of *testimony* or other spoken words.

***Trial*:** This is the presentation of *evidence* and *argument* to a *finder of fact*.

***Trial brief*:** A written memorandum which you give the judge just before trial begins. The brief should outline specific important facts you expect to prove and important *arguments* you expect to make. This would be a good time to point out *legal authority* (cases or statutes that say the court should do what you want it to do) for positions you expect to take during the trial. If you think the *debt collector* is going to try to introduce *evidence* which violates the *Rules of Evidence*, you might make your *argument* here first. But note: making the argument in a trial brief is not enough to preserve your rights; you must make all arguments and present (or attempt to present) all evidence at trial or you lose your right to do so. The trial brief is just an opportunity for the judge to take a little more time to think of the issues you want to present before the trial begins.

***Trial docket*:** A list of cases that will be tried on a particular day, week, or two-week period. Normally you will see the judge on the first day of the trial docket (if your case is set for trial), and the court will figure out when the trial will actually occur. In Associate Circuit cases, where trials are usually pretty short, you can get a fairly good idea of when you will need to be ready to start. In the Federal Courts, on the other hand, you might have to be ready to start at any time during a two-week or longer period, which can be much more difficult to manage.

U

***Unfair Merchandising*:** Many states have laws against unfair marketing of goods or services to consumers. In some states it's called the Merchandising Practices Act. This provides a wide range of *remedies* for sales abuses, and with some limitations these rights will apply against whoever possesses the debt. Federal law also has a huge assortment of regulations and laws applying to merchandising or sales of materials coming under the authority of the Federal Trade Commission, among other governmental entities.

V

***Venire panel*:** The group of people from whom the jury will eventually be selected. The handbook addresses the jury selection process extensively.

***Voir Dire*:** The opportunity for parties in a lawsuit to ask the prospective jurors questions to see if they already have opinions about the case or certain issues (“prejudices”).

W

***Wherefore clause*:** The last paragraph of each *cause of action* in which the party seeking *relief* specifies what form of relief is requested (what they want). In theory, this is all one is allowed to seek after a trial, but this rule is applied very liberally—parties are sometimes allowed to “amend” (change) their pleadings even after trial if there has been evidence produced (and not objected to) consistent with the new pleadings. The wherefore clause is much more important as a limitation in default cases, where it generally does prevent the debt collector from getting a judgment larger or different than sought in the words of the petition or lawsuit.

Appendix I

(TOC)

(Published by the FTC)

THE FAIR DEBT COLLECTION PRACTICES ACT
As amended by Public Law 104-208, 110 Stat. 3009 (Sept. 30, 1996)

To amend the Consumer Credit Protection Act to prohibit abusive practices by debt collectors.
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
That the Consumer Credit Protection Act (15 U.S.C. 1601 et seq.) is amended by adding at the end thereof the following new title:
TITLE VIII - DEBT COLLECTION PRACTICES [Fair Debt Collection Practices Act]
Sec.

§ 801. Short Title [15 USC 1601 note]
This title may be cited as the "Fair Debt Collection Practices Act."
§ 802. Congressional findings and declarations of purpose [15 USC 1692]
(a) There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.
(b) Existing laws and procedures for redressing these injuries are inadequate to protect consumers.
(c) Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.
(d) Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.
(e) It is the purpose of this title to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.
§ 803. Definitions [15 USC 1692a]
As used in this title --
(1) The term "Commission" means the Federal Trade Commission.

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.
(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.
(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.
(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.
(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 808(6), such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include --
(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;
(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;
(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;
(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;
(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and
(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.
(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.
(8) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

§ 804. Acquisition of location information [15 USC 1692b]

Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall --
(1) identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer;
(2) not state that such consumer owes any debt;
(3) not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information;
(4) not communicate by post card;
(5) not use any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt; and
(6) after the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not communicate with any person other than that attorney, unless the attorney fails to respond within a reasonable period of time to the communication from the debt collector.

§ 805. Communication in connection with debt collection [15 USC 1692c]

(a) COMMUNICATION WITH THE CONSUMER GENERALLY. Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt --
(1) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antimeridian and before 9 o'clock postmeridian, local time at the consumer's location;
(2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer; or
(3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.
(b) COMMUNICATION WITH THIRD PARTIES. Except as provided in section 804, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than a consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.
(c) CEASING COMMUNICATION. If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except --
(1) to advise the consumer that the debt collector's further efforts are being terminated;
(2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or
(3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy. If such notice from the consumer is made by mail, notification shall be complete upon receipt.
(d) For the purpose of this section, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

§ 806. Harassment or abuse [15 USC 1692d]

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
(1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.
(2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.
(3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 603(f) or 604(3)[1] of this Act.
(4) The advertisement for sale of any debt to coerce payment of the debt.
(5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.
(6) Except as provided in section 804, the placement of telephone calls without meaningful disclosure of the caller's identity.

§ 807. False or misleading representations [15 USC 1692e]

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.
(2) The false representation of --
(A) the character, amount, or legal status of any debt; or
(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.
(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.
(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.
(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to --
(A) lose any claim or defense to payment of the debt; or
(B) become subject to any practice prohibited by this title.
(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.
(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.
(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.
(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.
(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.
(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.
(13) The false representation or implication that documents are legal process.
(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.
(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.
(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 603(f) of this Act.

§ 808. Unfair practices [15 USC 1692f]

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.
(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.
(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.
(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.
(5) Causing charges to be made to any person for communications by concealment of the true propose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.
(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if --
(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;
(B) there is no present intention to take possession of the property; or
(C) the property is exempt by law from such dispossession or disablement.
(7) Communicating with a consumer regarding a debt by post card.
(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

§ 809. Validation of debts [15 USC 1692g]

(a) Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing --
(1) the amount of the debt;
(2) the name of the creditor to whom the debt is owed;
(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.
(b) If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or any copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.
(c) The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

§ 810. Multiple debts [15 USC 1692h]

If any consumer owes multiple debts and makes any single payment to any debt collector with respect to such debts, such debt collector may not apply such payment to any debt which is disputed by the consumer and, where applicable, shall apply such payment in accordance with the consumer's directions.

§ 811. Legal actions by debt collectors [15 USC 1692i]

(a) Any debt collector who brings any legal action on a debt against any consumer shall --
(1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or
(2) in the case of an action not described in paragraph (1), bring such action only in the judicial district or similar legal entity --
(A) in which such consumer signed the contract sued upon; or
(B) in which such consumer resides at the commencement of the action.
(b) Nothing in this title shall be construed to authorize the bringing of legal actions by debt collectors.

§ 812. Furnishing certain deceptive forms [15 USC 1692j]

(a) It is unlawful to design, compile, and furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of or in an attempt to collect a debt such consumer allegedly owes such creditor, when in fact such person is not so participating.
(b) Any person who violates this section shall be liable to the same extent and in the same manner as a debt collector is liable under section 813 for failure to comply with a provision of this title.

§ 813. Civil liability [15 USC 1692k]

(a) Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this title with respect to any person is liable to such person in an amount equal to the sum of --
(1) any actual damage sustained by such person as a result of such failure;
(2) (A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or
(B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and
(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.
(b) In determining the amount of liability in any action under subsection (a), the court shall consider, among other relevant factors --

(1) in any individual action under subsection (a)(2)(A), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or
(2) in any class action under subsection (a)(2)(B), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.
(c) A debt collector may not be held liable in any action brought under this title if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.
(d) An action to enforce any liability created by this title may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.
(e) No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Commission, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

§ 814. Administrative enforcement [15 USC 1692*l*]

(a) Compliance with this title shall be enforced by the Commission, except to the extend that enforcement of the requirements imposed under this title is specifically committed to another agency under subsection (b). For purpose of the exercise by the Commission of its functions and powers under the Federal Trade Commission Act, a violation of this title shall be deemed an unfair or deceptive act or practice in violation of that Act. All of the functions and powers of the Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with this title, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act, including the power to enforce the provisions of this title in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule.
(b) Compliance with any requirements imposed under this title shall be enforced under --
(1) section 8 of the Federal Deposit Insurance Act, in the case of --
(A) national banks, by the Comptroller of the Currency;
(B) member banks of the Federal Reserve System (other than national banks), by the Federal Reserve Board; and
(C) banks the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), by the Board of Directors of the Federal Deposit Insurance Corporation;
(2) section 5(d) of the Home Owners Loan Act of 1933, section 407 of the National Housing Act, and sections 6(i) and 17 of the Federal Home Loan Bank Act, by the Federal Home Loan Bank Board (acting directing or through the Federal Savings and Loan Insurance Corporation), in the case of any institution subject to any of those provisions;
(3) the Federal Credit Union Act, by the Administrator of the National Credit Union Administration with respect to any Federal credit union;
(4) subtitle IV of Title 49, by the Interstate Commerce Commission with respect to any common carrier subject to such subtitle;
(5) the Federal Aviation Act of 1958, by the Secretary of Transportation with respect to any air carrier or any foreign air carrier subject to that Act; and
(6) the Packers and Stockyards Act, 1921 (except as provided in section 406 of that Act), by the Secretary of Agriculture with respect to any activities subject to that Act.
(c) For the purpose of the exercise by any agency referred to in subsection (b) of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this title shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (b), each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this title any other authority conferred on it by law, except as provided in subsection (d).
(d) Neither the Commission nor any other agency referred to in subsection (b) may promulgate trade regulation rules or other regulations with respect to the collection of debts by debt collectors as defined in this title.

§ 815. Reports to Congress by the Commission [15 USC 1692m]

(a) Not later than one year after the effective date of this title and at one-year intervals thereafter, the Commission shall make reports to the Congress concerning the administration of its functions under this title, including such recommendations as the Commission deems necessary or appropriate. In addition, each report of the Commission shall include its assessment of the extent to which compliance with this title is being achieved and a summary of the enforcement actions taken by the Commission under section 814 of this title.

(b) In the exercise of its functions under this title, the Commission may obtain upon request the views of any other Federal agency which exercises enforcement functions under section 814 of this title.

§ 816. Relation to State laws [15 USC 1692n]

This title does not annul, alter, or affect, or exempt any person subject to the provisions of this title from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this title if the protection such law affords any consumer is greater than the protection provided by this title.

§ 817. Exemption for State regulation [15 USC 1692o]

The Commission shall by regulation exempt from the requirements of this title any class of debt collection practices within any State if the Commission determines that under the law of that State that class of debt collection practices is subject to requirements substantially similar to those imposed by this title, and that there is adequate provision for enforcement.

§ 818. Effective date [15 USC 1692 note]

This title takes effect upon the expiration of six months after the date of its enactment, but section 809 shall apply only with respect to debts for which the initial attempt to collect occurs after such effective date.

Approved September 20, 1977

ENDNOTES

1. So in original; however, should read "604(a)(3)."

LEGISLATIVE HISTORY:

Public Law 95-109 [H.R. 5294]

HOUSE REPORT No. 95-131 (Comm. on Banking, Finance, and Urban Affairs).

SENATE REPORT No. 95-382 (Comm. on Banking, Housing, and Urban Affairs).

CONGRESSIONAL RECORD, Vol. 123 (1977):

Apr. 4, considered and passed House.

Aug. 5, considered and passed Senate, amended.

Sept. 8, House agreed to Senate amendment.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 13, No. 39:

Sept. 20, Presidential statement.

AMENDMENTS:

SECTION 621, SUBSECTIONS (b)(3), (b)(4) and (b)(5) were amended to transfer certain administrative enforcement responsibilities, pursuant to Pub. L. 95-473, § 3(b), Oct. 17, 1978. 92 Stat. 166; Pub. L. 95-630, Title V. § 501, November 10, 1978, 92 Stat. 3680; Pub. L. 98-443, § 9(h), Oct. 4, 1984, 98 Stat. 708.

SECTION 803, SUBSECTION (6), defining "debt collector," was amended to repeal the attorney at law exemption at former Section (6)(F) and to redesignate Section 803(6)(G) pursuant to Pub. L. 99-361, July 9, 1986, 100 Stat. 768. For legislative history, *see* H.R. 237, HOUSE REPORT No. 99-405 (Comm. on Banking, Finance and Urban Affairs). CONGRESSIONAL RECORD: Vol. 131 (1985): Dec. 2, considered and passed House. Vol. 132 (1986): June 26, considered and passed Senate.

SECTION 807, SUBSECTION (11), was amended to affect when debt collectors must state (a) that they are attempting to collect a debt and (b) that information obtained will be used for that purpose, pursuant to Pub. L. 104-208 § 2305, 110 Stat. 3009 (Sept. 30, 1996).

APPENDIX II

(TOC)

(Legalese is left in small print, Actual Rules in 12 pt. type)

FEDERAL RULES
OF
EVIDENCE

DECEMBER 31, 2004

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HOUSE OF REPRESENTATIVES

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2nd Session

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FOREWORD

This document contains the Federal Rules of Evidence, as amended to December 31, 2004. The rules were enacted by Public Law 93–595 (approved January 2, 1975) and have been amended by Acts of Congress, and further amended by the United States Supreme Court. This document has been prepared by the Committee in response to the need for an official up-to-date document containing the latest amendments to the rules.

For the convenience of the user, where a rule has been amended a reference to the date the amendment was promulgated and the date the amendment became effective follows the text of the rule.

The Committee on Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Evidence, Judicial Conference of the United States, prepared notes explaining the purpose and intent of the amendments to the rules. The Committee Notes may be found in the Appendix to Title 28, United States Code, following the particular rule to which they relate.

Chairman, Committee on the Judiciary.

DECEMBER 31, 2004.

AUTHORITY FOR PROMULGATION OF RULES

TITLE 28, UNITED STATES CODE

§ 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

(Added Pub. L. 100–702, title IV, § 401(a), Nov. 19, 1988, 102 Stat. 4648, eff. Dec. 1, 1988; amended Pub. L. 101–650, title III, § 315, Dec. 1, 1990, 104 Stat. 5115.)

§ 2073. Rules of procedure and evidence; method of prescribing

(a)(1) The Judicial Conference shall prescribe and publish the procedures for the consideration of proposed rules under this section.

(2) The Judicial Conference may authorize the appointment of committees to assist the Conference by recommending rules to be prescribed under sections 2072 and 2075 of this title. Each such committee shall consist of members of the bench and the professional bar, and trial and appellate judges.

(b) The Judicial Conference shall authorize the appointment of a standing committee on rules of practice, procedure, and evidence under subsection (a) of this section. Such standing committee shall review each recommendation of any other committees so appointed and recommend to the Judicial Conference rules of practice, procedure, and evidence and such changes in rules proposed by a committee appointed under subsection (a)(2) of this section as may be necessary to maintain consistency and otherwise promote the interest of justice.

(c)(1) Each meeting for the transaction of business under this chapter by any committee appointed under this section shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public, and states the reason for so closing the meeting. Minutes of each meeting for the transaction of business under this chapter shall be maintained by the committee and made available to the public, except that any portion of such minutes, relating to a closed meeting and made available to the public, may contain such deletions as may be necessary to avoid frustrating the purposes of closing the meeting.

(2) Any meeting for the transaction of business under this chapter, by a committee appointed under this section, shall be preceded by sufficient notice to enable all interested persons to attend.

(d) In making a recommendation under this section or under section 2072 or 2075, the body making that recommendation shall provide a proposed rule, an explanatory note on the rule, and a written report explaining the body's action, including any minority or other separate views.

(e) Failure to comply with this section does not invalidate a rule prescribed under section 2072 or 2075 of this title.

(Added Pub. L. 100–702, title IV, § 401(a), Nov. 19, 1988, 102 Stat. 4649, eff. Dec. 1, 1988; amended Pub. L. 103–394, title I, § 104(e), Oct. 22, 1994, 108 Stat. 4110.)

§ 2074. Rules of procedure and evidence; submission to Congress; effective date

(a) The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law. The Supreme Court may fix the extent such rule shall apply to proceedings then pending, except that the Supreme Court shall not require the application of such rule to further proceedings then pending to the extent that, in the opinion of the court in which such proceedings are pending, the application of such rule in such proceedings would not be feasible or would work injustice, in which event the former rule applies.

(b) Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.

(Added Pub. L. 100–702, title IV, § 401(a), Nov. 19, 1988, 102 Stat. 4649, eff. Dec. 1, 1988.)

§ 2075. Bankruptcy rules

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11.

Such rules shall not abridge, enlarge, or modify any substantive right.

The Supreme Court shall transmit to Congress not later than May 1 of the year in which a rule prescribed under this section is to become effective a copy of the proposed rule. The rule shall take effect no earlier than December 1 of the year in which it is transmitted to Congress unless otherwise provided by law.

(Added Pub. L. 88–623, § 1, Oct. 3, 1964, 78 Stat. 1001; amended Pub. L. 95–598, title II, § 247, Nov. 6, 1978, 92 Stat. 2672; Pub. L. 103–394, title I, § 104(f), Oct. 22, 1994, 108 Stat. 4110.)

1LEGISLATIVE HISTORY:
HOUSE REPORTS: No. 93–650 (Comm. on the Judiciary) and No. 93–1597 (Comm. of Conference).
SENATE REPORT No. 93–1277 (Comm. on the Judiciary).

CONGRESSIONAL RECORD, Vol. 120 (1974):
Jan. 30, Feb. 6, considered and passed House.
Nov. 21, 22, considered and passed Senate, amended.
Dec. 16, Senate agreed to conference report.
Dec. 17, 18, House agreed to conference report.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 11, No. 1:
Jan. 3, 1975, Presidential statement.

HISTORICAL NOTE

The Supreme Court prescribes Federal Rules of Evidence pursuant to section 2072 of Title 28, United States Code, as enacted by Title IV ''Rules Enabling Act'' of Pub. L. 100–702 (approved November 19, 1988, 102 Stat. 4648), effective December 1, 1988, and section 2075 of Title 28. Pursuant to section 2074 of Title 28, the Supreme Court transmits to Congress (not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective) a copy of the proposed rule. The rule takes effect no earlier than December 1 of the year in which the rule is transmitted unless otherwise provided by law.

Pursuant to sections 3402, 3771, and 3772 of Title 18, United States Code, and sections 2072 and 2075 of Title 28, United States Code, as then in effect, the Supreme Court through the Chief Justice submitted Federal Rules of Evidence to Congress on February 5, 1973 (409 U.S. 1132; Cong. Rec., vol. 119, pt. 3, p. 3247, Exec. Comm. 359, H. Doc. 93–46). To allow additional time for Congress to review the proposed rules, Public Law 93–12 (approved March 30, 1973, 87 Stat. 9) provided that the proposed rules ''shall have no force or effect except to the extent, and with such amendments, as they may be expressly approved by Act of Congress''.

Public Law 93–595 [1] (approved January 2, 1975, 88 Stat. 1926) enacted the Federal Rules of Evidence proposed by the Supreme Court, with amendments made by Congress, to be effective July 1, 1975.

Section 1 of Public Law 94–113 (approved October 16, 1975, 89 Stat. 576) added clause (C) to Rule 801(d)(1), effective October 31, 1975.

Section 1 of Public Law 94–149 (approved December 12, 1975, 89 Stat. 805) enacted technical amendments which affected the Table of Contents and Rules 410, 606(b), 803(23), 804(b)(3), and 1101(e).

Section 2 of Public Law 95–540 (approved October 28, 1978, 92 Stat. 2046) added Rule 412 and inserted item 412 in the Table of Contents. The amendments apply to trials that begin more than thirty days after October 28, 1978.

Section 251 of Public Law 95–598 (approved November 6, 1978, 92 Stat. 2673) amended Rule 1101(a) and (b) by striking out '', referees in bankruptcy,'' and by substituting ''title 11, United States

Code'' for ''the Bankruptcy Act'', effective October 1, 1979, pursuant to section 402(c) of Public Law 95–598.

Section 252 of Public Law 95–598 would have amended Rule 1101(a) by inserting ''the United States Bankruptcy Courts,'' immediately after ''the United States district courts,'', effective April 1, 1984, pursuant to section 402(b) of Public Law 95–598. However, following a series of amendments (extending the April 1, 1984, effective date) by Public Laws 98–249, § 1(a), 98–271, § 1(a), 98–299, § 1(a), 98–325, § 1(a), and 98–353, § 121(a), section 402(b) of Public Law 95–598 was amended by section 113 of Public Law 98–353 to provide that the amendment ''shall not be effective''.

An amendment to Rule 410 was proposed by the Supreme Court by order dated April 30, 1979, transmitted to Congress by the Chief Justice on the same day (441 U.S. 970, 1007; Cong. Rec., vol. 125, pt. 8, p. 9366, Exec. Comm. 1456; H. Doc. 96–112), and was to be effective August 1, 1979. Public Law 96–42 (approved July 31, 1979, 93 Stat. 326) delayed the effective date of the amendment to Rule 410 until December 1, 1980, or until and to the extent approved by Act of

Congress, whichever is earlier. In the absence of further action by Congress, the amendment to Rule 410 became effective December 1, 1980.
Sections 142 and 402 of Public Law 97–164 (approved April 2, 1982, 96 Stat. 45, 57) amended Rule 1101(a), effective October 1, 1982.
Section 406 of Public Law 98–473 (approved October 12, 1984, 98 Stat. 2067) amended Rule 704.
Additional amendments were adopted by the Court by order dated March 2, 1987, transmitted to Congress by the Chief Justice on the same day (480 U.S. 1023; Cong. Rec., vol. 133, pt. 4, p. 4484, Exec. Comm. 713; H. Doc. 100–41), and became effective October 1, 1987. The amendments affected Rules 101, 104(c), (d), 106, 404(a)(1), (b), 405(b), 411, 602 to 604, 606, 607, 608(b), 609(a), 610, 611(c), 612, 613, 615, 701, 703, 705, 706(a), 801(a), (d), 803(5), (18), (19), (21), (24), 804(a), (b)(2), (3), (5), 806, 902(2), (3), 1004(3), 1007, and 1101(a).
Additional amendments were adopted by the Court by order dated April 25, 1988, transmitted to Congress by the Chief Justice on the same day (485 U.S. 1049; Cong. Rec., vol. 134, pt. 7, p. 9154, Exec. Comm. 3517; H. Doc. 100–187), and became effective November 1, 1988. The amendments affected Rules 101, 602, 608(b), 613(b), 615, 902(3), and 1101(a), (e).
Sections 7046 and 7075 of Public Law 100–690 (approved November 18, 1988, 102 Stat. 4400, 4405) amended the Tables of Contents and Rules 412, 615, 804(a)(5), and 1101(a). Section 7075(a) of Public Law 100–690, which directed the amendment of Rule 615 by inserting ''a'' before ''party which is not a natural person.'', could not be executed because ''party which is not a natural person.'' did not appear. However, the word ''a'' was inserted by the intervening amendment adopted by the Court by order dated April 25, 1988, effective November 1, 1988. Section 7075(c)(1) of Public Law 100–690, which directed the amendment of Rule 1101(a) by striking ''Rules'' and inserting ''rules'', could not be executed because of the intervening amendment adopted by the Court by order dated April 25, 1988, effective November 1, 1988.
An additional amendment was adopted by the Court by order dated January 26, 1990, transmitted to Congress by the Chief Justice on the same day (493 U.S. 1175; Cong. Rec., vol. 136, pt. 1, p.

662, Exec. Comm. 2370; H. Doc. 101–142), and became effective December 1, 1990. The amendment affected Rule 609(a).
Additional amendments were adopted by the Court by order dated April 30, 1991, transmitted to Congress by the Chief Justice on the same day (500 U.S. 1001; Cong. Rec., vol. 137, pt. 7, p. 9721, Ex. Comm. 1189; H. Doc. 102–76), and became effective December 1, 1991. The amendments affected Rules 404(b) and 1102.
Additional amendments were adopted by the Court by order dated April 22, 1993, transmitted to Congress by the Chief Justice on the same day (507 U.S. 1187; Cong. Rec., vol. 139, pt. 6, p. 8127, Ex. Comm. 1104; H. Doc. 103–76), and became effective December 1, 1993. The amendments affected Rules 101, 705, and 1101(a), (e).
An additional amendment was adopted by the Court by order dated April 29, 1994, and transmitted to Congress by the Chief Justice on the same day (511 U.S. 1187; Cong. Rec., vol. 140, pt. 7, p. 8903, Ex. Comm. 3085; H. Doc. 103–250). The amendment affected Rule 412 and was to become effective December 1, 1994. Section 40141(a) of Public Law 103–322 (approved September 13, 1994, 108 Stat. 1918) provided that such amendment would take effect on December 1, 1994, but with the general amendment of Rule 412 made by section 40141(b) of Public Law 103–322.
Section 320935(a) of Public Law 103–322 (approved September 13, 1994, 108 Stat. 2135) amended the Federal Rules of Evidence by adding Rules 413 to 415, with provisions in section 320935(b)–(e) of Public

Law 103–322 relating to the effective date and application of such rules. Pursuant to Pub. L. 103–322, § 320935(c), the Judicial Conference transmitted a report to Congress on February 9, 1995, containing recommendations different from the amendments made by Pub. L. 103–322, § 320935(a). Congress did not adopt the recommendations submitted or provide otherwise by law. Accordingly, Rules 413 to 415, as so added, became effective on July 9, 1995.

Additional amendments were adopted by the Court by order dated April 11, 1997, transmitted to Congress by the Chief Justice on the same day (520 U.S. 1323; Cong. Rec., vol. 143, pt. 4, p. 5550, Ex. Comm. 2798; H. Doc. 105–69), and became effective December 1, 1997. The amendments affected Rules 407, 801, 803, 804, and 806 and added Rule 807.

Additional amendments were adopted by the Court by order dated April 24, 1998, transmitted to Congress by the Chief Justice on the same day (523 U.S. 1235; Cong. Rec., vol. 144, pt. 6, p. 8151, Ex. Comm. 8996 to Ex. Comm. 8998; H. Doc. 105–268), and became effective December 1, 1998. The amendments affected Rule 615.

Additional amendments were adopted by the Court by order dated April 17, 2000, transmitted to Congress by the Chief Justice on the same day (529 U.S. 1189; Cong. Rec., vol. 146, pt. 5, p. 6328, Ex. Comm. 7333; H. Doc. 106–225), and became effective December 1, 2000. The amendments affected Rules 103, 404, 701, 702, 703, 803, and 902.

An additional amendment was adopted by the Court by order dated March 27, 2003, transmitted to Congress by the Chief Justice on the same day (538 U.S. 1097; Cong. Rec., vol. 149, p. H2467, Daily Issue, Ex. Comm. 1494; H. Doc. 108–57), and became effective December 1, 2003. The amendment affected Rule 608.

X HISTORICAL NOTE

Committee Notes

Committee Notes prepared by the Committee on Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Evidence, Judicial Conference of the United States, explaining the purpose and intent of the amendments are set out in the Appendix to Title 28, United States Code, following the particular rule to which they relate. In addition, the notes are set out in the House documents listed above.

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FEDERAL RULES OF EVIDENCE

Effective July 1, 1975, as amended to December 31, 2004

ARTICLE I. GENERAL PROVISIONS

Rule 101. Scope

These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Apr. 22, 1993, eff. Dec. 1, 1993.)

Rule 102. Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Rule 103. Rulings on Evidence

(a) Effect of erroneous ruling.—Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection.—In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof.—In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) Record of offer and ruling.—The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of jury.—In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error.—Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.
(As amended Apr. 17, 2000, eff. Dec. 1, 2000.)

Rule 104. Preliminary Questions
(a) Questions of admissibility generally.—Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
(b) Relevancy conditioned on fact.—When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
(c) Hearing of jury.—Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.
(d) Testimony by accused.—The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.
(e) Weight and credibility.—This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.
(As amended Mar. 2, 1987, eff. Oct. 1, 1987.)

Rule 105. Limited Admissibility
When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Rule 106. Remainder of or Related Writings or Recorded Statements
When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.
(As amended Mar. 2, 1987, eff. Oct. 1, 1987.)

ARTICLE II. JUDICIAL NOTICE

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope of rule.—This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts.—A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2)

capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary.—A court may take judicial notice, whether requested or not.

(d) When mandatory.—A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard.—A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice.—Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury.—In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

Rule 301. Presumptions in General in Civil Actions and Proceedings

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Rule 302. Applicability of State Law in Civil Actions and Proceedings

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 401. Definition of "Relevant Evidence"
''Relevant evidence'' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible
All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403 FEDERAL RULES OF EVIDENCE 4
Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time
Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes
(a) Character evidence generally.—Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
(1) Character of accused.—Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;
(2) Character of alleged victim.—Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;
(3) Character of witness.—Evidence of the character of a witness, as provided in rules 607, 608, and 609.
(b) Other crimes, wrongs, or acts.—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person

in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.
(As amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 17, 2000, eff. Dec. 1, 2000.)

Rule 405. Methods of Proving Character
(a) Reputation or opinion.—In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
(b) Specific instances of conduct.—In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.
(As amended Mar. 2, 1987, eff. Oct. 1, 1987.)

Rule 406. Habit; Routine Practice
Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Rule 407. Subsequent Remedial Measures
When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.
(As amended Apr. 11, 1997, eff. Dec. 1, 1997.)

Rule 408. Compromise and Offers to Compromise
Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration

in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Rule 409. Payment of Medical and Similar Expenses

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
(1) a plea of guilty which was later withdrawn;
(2) a plea of nolo contendere;
(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or
(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.
(As amended Dec. 12, 1975; Apr. 30, 1979, eff. Dec. 1, 1980.)

Rule 411. Liability Insurance

Evidence that a person was or was not insured against liability

is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.
(As amended Mar. 2, 1987, eff. Oct. 1, 1987.)

Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition

(a) Evidence Generally Inadmissible.—The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions.

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) Procedure To Determine Admissibility.

(1) A party intending to offer evidence under subdivision (b) must—

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.
(As added Oct. 28, 1978, eff. Nov. 28, 1978; amended Nov. 18, 1988; Apr. 29, 1994, eff. Dec. 1, 1994; Sept. 13, 1994, eff. Dec. 1, 1994.)

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases
(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.
(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.
(d) For purposes of this rule and Rule 415, ''offense of sexual assault'' means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—
(1) any conduct proscribed by chapter 109A of title 18, United States Code;
(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;
(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;
(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or
(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4).
(Added Sept. 13, 1994, eff. July 9, 1995.)

Rule 414. Evidence of Similar Crimes in Child Molestation Cases
(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.
(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose

the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.
(d) For purposes of this rule and Rule 415, ''child'' means a person below the age of fourteen, and ''offense of child molestation'' means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—
(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;
(2) any conduct proscribed by chapter 110 of title 18, United States Code;
(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;
(4) contact between the genitals or anus of the defendant and any part of the body of a child;
(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or
(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(5).
(Added Sept. 13, 1994, eff. July 9, 1995.)

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation
(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.
(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.
(Added Sept. 13, 1994, eff. July 9, 1995.)

ARTICLE V. PRIVILEGES
Rule 501. General Rule
Except as otherwise required by the Constitution of the United

States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Rule 601. General Rule of Competency
Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

Rule 602. Lack of Personal Knowledge
A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.
(As amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988.)

Rule 603. Oath or Affirmation
Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.
(As amended Mar. 2, 1987, eff. Oct. 1, 1987.)

Rule 604. Interpreters
An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.
(As amended Mar. 2, 1987, eff. Oct. 1, 1987.)

Rule 605. Competency of Judge as Witness
The judge presiding at the trial may not testify in that trial as

a witness. No objection need be made in order to preserve the point.

Rule 606. Competency of Juror as Witness

(a) At the trial.—A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment.—Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear

upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.
(As amended Dec. 12, 1975; Mar. 2, 1987, eff. Oct. 1, 1987.)

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.
(As amended Mar. 2, 1987, eff. Oct. 1, 1987.)

Rule 608. Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character.—The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct.—Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness

or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.
(As amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Mar. 27, 2003, eff. Dec. 1, 2003.)

Rule 609. Impeachment by Evidence of Conviction of Crime
(a) General rule.—For the purpose of attacking the credibility of a witness,
(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.
(b) Time limit.—Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later

date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.
(c) Effect of pardon, annulment, or certificate of rehabilitation.—Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications.—Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.
(e) Pendency of appeal.—The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.
(As amended Mar. 2, 1987, eff. Oct. 1, 1987; Jan. 26, 1990, eff. Dec. 1, 1990.)

Rule 610. Religious Beliefs or Opinions
Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.
(As amended Mar. 2, 1987, eff. Oct. 1, 1987.)

Rule 611. Mode and Order of Interrogation and Presentation
(a) Control by court.—The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
(b) Scope of cross-examination.—Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.
(c) Leading questions.—Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987.)

Rule 612. Writing Used To Refresh Memory
Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either—
(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.
(As amended Mar. 2, 1987, eff. Oct. 1, 1987.)

Rule 613. Prior Statements of Witnesses

(a) Examining witness concerning prior statement.—In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.
(b) Extrinsic evidence of prior inconsistent statement of witness.—Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).
(As amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988.)

Rule 614. Calling and Interrogation of Witnesses by Court

(a) Calling by court.—The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.
(b) Interrogation by court.—The court may interrogate witnesses, whether called by itself or by a party.
(c) Objections.—Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

Rule 615. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Nov. 18, 1988; Apr. 24, 1998, eff. Dec. 1, 1998.)

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 17, 2000, eff. Dec. 1, 2000.)

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

(As amended Apr. 17, 2000, eff. Dec. 1, 2000.)

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference

unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.
(As amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 17, 2000, eff. Dec. 1, 2000.)

Rule 704. Opinion on Ultimate Issue
(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.
(As amended Oct. 12, 1984.)

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion
The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on crossexamination.
(As amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993.)

Rule 706. Court Appointed Experts
(a) Appointment.—The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.
(b) Compensation.—Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow.

The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.
(c) Disclosure of appointment.—In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.
(d) Parties' experts of own selection.—Nothing in this rule limits the parties in calling expert witnesses of their own selection.
(As amended Mar. 2, 1987, eff. Oct. 1, 1987.)

Rule 801. Definitions
The following definitions apply under this article:
(a) Statement.—A ''statement'' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
(b) Declarant.—A ''declarant'' is a person who makes a statement.
(c) Hearsay.—''Hearsay'' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
(d) Statements which are not hearsay.—A statement is not hearsay if—
(1) Prior statement by witness.—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or
(2) Admission by party-opponent.—The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator

of a party during the course and in furtherance of
the conspiracy. The contents of the statement shall be considered
but are not alone sufficient to establish the declarant's
authority under subdivision (C), the agency or employment relationship
and scope thereof under subdivision (D), or the existence
of the conspiracy and the participation therein of the
declarant and the party against whom the statement is offered
under subdivision (E).
(As amended Oct. 16, 1975, eff. Oct. 31, 1975; Mar. 2, 1987, eff. Oct.
1, 1987; Apr. 11, 1997, eff. Dec. 1, 1997.)

Rule 802. Hearsay Rule
Hearsay is not admissible except as provided by these rules or
by other rules prescribed by the Supreme Court pursuant to statutory
authority or by Act of Congress.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial
The following are not excluded by the hearsay rule, even though
the declarant is available as a witness:
(1) Present sense impression.—A statement describing or explaining
an event or condition made while the declarant was
perceiving the event or condition, or immediately thereafter.

(2) Excited utterance.—A statement relating to a startling
event or condition made while the declarant was under the
stress of excitement caused by the event or condition.
(3) Then existing mental, emotional, or physical condition.—
A statement of the declarant's then existing state of mind,
emotion, sensation, or physical condition (such as intent,
plan, motive, design, mental feeling, pain, and bodily health),
but not including a statement of memory or belief to prove
the fact remembered or believed unless it relates to the execution,
revocation, identification, or terms of declarant's will.
(4) Statements for purposes of medical diagnosis or treatment.—
Statements made for purposes of medical diagnosis or
treatment and describing medical history, or past or present
symptoms, pain, or sensations, or the inception or general
character of the cause or external source thereof insofar as
reasonably pertinent to diagnosis or treatment.
(5) Recorded recollection.—A memorandum or record concerning
a matter about which a witness once had knowledge
but now has insufficient recollection to enable the witness to
testify fully and accurately, shown to have been made or
adopted by the witness when the matter was fresh in the witness'
memory and to reflect that knowledge correctly. If admitted,
the memorandum or record may be read into evidence

but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity.—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term ''business'' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6).—Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports.—Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers

and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics.—Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry.—To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any

form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations.—Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates.—Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records.—Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property.—The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property.—A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents.—Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications.—Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises.—To the extent called to the attention of an expert witness upon cross-examination or relied upon by

the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history.—Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) Reputation concerning boundaries or general history.—Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to character.—Reputation of a person's character among associates or in the community.

(22) Judgment of previous conviction.—Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family, or general history, or boundaries.—Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) [Other exceptions.] [Transferred to Rule 807]

(As amended Dec. 12, 1975; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 17, 2000, eff. Dec. 1, 2000.)

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of unavailability.—''Unavailability as a witness'' includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court

to do so; or
(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.
A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.
(b) Hearsay exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
(1) Former testimony.—Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
(2) Statement under belief of impending death.—In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.
(3) Statement against interest.—A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.
(4) Statement of personal or family history.—(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning

the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.
(5) [Other exceptions.] [Transferred to Rule 807]
(6) Forfeiture by wrongdoing.—A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.
Rule 805 FEDERAL RULES OF EVIDENCE 20
(As amended Dec. 12, 1975; Mar. 2, 1987, eff. Oct. 1, 1987; Nov. 18, 1988; Apr. 11, 1997, eff. Dec. 1, 1997.)

Rule 805. Hearsay Within Hearsay
Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Rule 806. Attacking and Supporting Credibility of Declarant
When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.
(As amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 11, 1997, eff. Dec. 1, 1997.)

Rule 807. Residual Exception
A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known

to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant. (Added Apr. 11, 1997, eff. Dec. 1, 1997.)

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Rule 901. Requirement of Authentication or Identification

(a) General provision.—The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations.—By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge.—Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting.—Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness.—Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like.—Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification.—Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations.—Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports.—Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation.—Evidence that

a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system.—Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule.—Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

Rule 902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal.—A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal.—A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and

having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents.—A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the

authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records.—A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) Official publications.—Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals.—Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like.—Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents.—Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial paper and related documents.—Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions under Acts of Congress.—Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.

(11) Certified domestic records of regularly conducted activity.—The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act

of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record—

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) Certified foreign records of regularly conducted activity.—In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record—

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Apr. 17, 2000, eff. Dec. 1, 2000.)

Rule 903. Subscribing Witness' Testimony Unnecessary

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001. Definitions

For purposes of this article the following definitions are applicable:

(1) Writings and recordings.—''Writings'' and ''recordings'' consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating,

photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.
(2) Photographs.—''Photographs'' include still photographs, X-ray films, video tapes, and motion pictures.
(3) Original.—An ''original'' of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An ''original'' of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an ''original''.
(4) Duplicate.—A ''duplicate'' is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

Rule 1002. Requirement of Original
To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

Rule 1003. Admissibility of Duplicates
A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Rule 1004. Admissibility of Other Evidence of Contents
The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—
(1) Originals lost or destroyed.—All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
(2) Original not obtainable.—No original can be obtained by any available judicial process or procedure; or
(3) Original in possession of opponent.—At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or
(4) Collateral matters.—The writing, recording, or photograph is not closely related to a controlling issue.
(As amended Mar. 2, 1987, eff. Oct. 1, 1987.)

Rule 1005. Public Records
The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be

1 Pub. L. 102–572, title IX, § 902(b)(1), Oct. 29, 1992, 106 Stat. 4516, provided that reference in any
other Federal law or any document to the ''United States Claims Court'' shall be deemed to refer to the ''United States Court of Federal Claims''.
obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Rule 1006. Summaries
The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Rule 1007. Testimony or Written Admission of Party
Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.
(As amended Mar. 2, 1987, eff. Oct. 1, 1987.)

Rule 1008. Functions of Court and Jury
When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

ARTICLE XI. MISCELLANEOUS RULES

Rule 1101. Applicability of Rules

(a) Courts and judges.—These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court, 1 and to United States bankruptcy judges and United States magistrate judges, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms ''judge'' and ''court'' in these rules include United States bankruptcy judges and United States magistrate judges.
(b) Proceedings generally.—These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.
(c) Rule of privilege.—The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.
(d) Rules inapplicable.—The rules (other than with respect to privileges) do not apply in the following situations:

2 Repealed and reenacted as 46 U.S.C. 11104(b)–(d) by Pub. L. 98–89, §§ 1, 2(a), 4(b), Aug. 26, 1983, 97 Stat. 500.
(1) Preliminary questions of fact.—The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.
(2) Grand jury.—Proceedings before grand juries.
(3) Miscellaneous proceedings.—Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.
(e) Rules applicable in part.—In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of misdemeanors and other petty offenses before United States magistrate judges; review of agency actions when the facts are subject to trial de novo under section 706(2)(F) of title 5, United States Code; review of orders of the Secretary of Agriculture under section 2 of the Act entitled ''An Act to authorize association of producers of agricultural products'' approved February 18, 1922 (7 U.S.C. 292), and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499f, 499g(c)); naturalization and revocation of naturalization under sections 310–318 of the Immigration and Nationality Act (8 U.S.C. 1421–1429); prize proceedings in admiralty under sections 7651–7681

of title 10, United States Code; review of orders of the Secretary of the Interior under section 2 of the Act entitled ''An Act authorizing associations of producers of aquatic products'' approved June 25, 1934 (15 U.S.C. 522); review of orders of petroleum control boards under section 5 of the Act entitled ''An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes'', approved February 22, 1935 (15 U.S.C. 715d); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581–1624), or under the Anti-Smuggling Act (19 U.S.C. 1701–1711); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301–392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U.S.C. 256–258); habeas corpus under sections 2241–2254 of title 28, United States Code; motions to vacate, set aside or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679); 2 actions against the United States under the Act entitled ''An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes'', approved March 3, 1925 (46 U.S.C. 781–790), as implemented by section 7730 of title 10, United States Code.

(As amended Dec. 12, 1975; Nov. 6, 1978, eff. Oct. 1, 1979; Apr. 2, 1982, eff. Oct. 1, 1982; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Nov. 18, 1988; Apr. 22, 1993, eff. Dec. 1, 1993.)

Rule 1102. Amendments

Amendments to the Federal Rules of Evidence may be made as provided in section 2072 of title 28 of the United States Code.

(As amended Apr. 30, 1991, eff. Dec. 1, 1991.)

Rule 1103. Title

These rules may be known and cited as the Federal Rules of Evidence.

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