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CHAPTER 6
Manuel H. Newburger
BARRON, NEWBURGER & SINSLEY, PLLC
1212 Guadalupe, Suite 102
Austin, Texas 78701-1837
(512) 476-9103
Fax: 279-0310

BIOGRAPHICAL INFORMATION

Manuel H. (Manny) Newburger is the President of Barron, Newburger & Sinsley, PLLC, and practices in the firm’s Austin office. He is also the President of Fair Debt Consultants, LLC, and an Adjunct Professor at the University of Texas School of Law, where he teaches consumer protection law. He has been recognized by Law & Politics and Texas Monthly magazines as a Texas Super Lawyer, and he is a Fellow of the American College of Consumer Financial Services Lawyers.

Mr. Newburger received a B.A. in history from Trinity University in 1980 and his J.D. in 1983 from the University of the Texas School of Law. He is licensed to practice law in both Texas and Colorado and is also admitted to practice before the United States Supreme Court, the United States Courts of Appeals for the Second, Fifth, Seventh, and Ninth Circuits, all United States District Courts in Texas, and the United States District Courts for the Eastern and Western Districts of Wisconsin, the Northern and Southern Districts of Indiana, The District of Colorado, the Northern District of Illinois, and the Western District of Tennessee. He is certified as a specialist in Consumer and Commercial Law by the Texas Board of Legal Specialization, and his practice is almost exclusively in the areas of consumer and commercial law.

Mr. Newburger is a past Chair of the Consumer Law Section of the State Bar of Texas, and the Texas State Bar’s Advisory and Exam Commissions on board certification in consumer law. He is a member of the Commercial Law League of America, and he served for four years as Chairman of the Fair Debt Collection Practices Act Committee of that organization and subsequently as the Chair Emeritus of that committee. He testified as the League’s representative before a United States Congressional Subcommittee regarding the Fair Debt Collection Practices Act at the last oversight hearing held on the Act.


Mr. Newburger was a recipient of the State Bar of Texas’ 1999 Frank J. Scurlock Award for voluntary legal services to the poor and the 2006 J. Chrys Dougherty Award from Volunteer Legal Services of Central Texas. He has also received the Commercial Law League of America’s President’s Cup and the Don Kramer Award from the National Association of Retail Collection Attorneys.
# TABLE OF CONTENTS

A. THE FEE AGREEMENT .....................................................................................................................1

B. FDCPA BASICS.......................................................................................................................................1

C. DISCIPLINARY RULE CONSIDERATIONS........................................................................................2

D. SAMPLE “SAFE HARBOR” DISCLAIMERS THAT HAVE BEEN APPROVED BY COURTS.....11
ETHICS ISSUES

A. The Fee Agreement

Texas Disciplinary Rule 1.04. Fees
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(d) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (e) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined. If there is to be a differentiation in the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, the percentage for each shall be stated. The agreement shall state the litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement describing the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Tex. Gov’t Code 82.065. Contingent Fee Contract for Legal Services

(a) A contingent fee contract for legal services must be in writing and signed by the attorney and client.

(b) A contingent fee contract for legal services is voidable by the client if it is procured as a result of conduct violating the laws of this state or the Disciplinary Rules of the State Bar of Texas regarding barratry by attorneys or other persons.

B. FDCPA Basics

1. Lawyers are debt collectors:

2. Meaningful Involvement:

*Clomon v. Jackson*, 988 F.2d 1314 (2d Cir. 1993).

In short, the fact that Jackson played virtually no day-to-day role in the debt collection process supports the conclusion that the collection letters were not "from" Jackson in any meaningful sense of that word. Consequently, the facts of this case establish a violation of subsection (3) of § 1692e.

. . . the use of an attorney's signature on a collection letter implies that the letter is "from" the attorney who signed it; it implies, in other words, that the attorney directly controlled or supervised the process through which the letter was sent. We have also found here that the use of an attorney's signature implies--at least in the absence of language to the contrary--that the attorney signing the letter formed an opinion about how to manage the case of the debtor to whom the letter was sent.

In a mass mailing, these implications are frequently false: the attorney whose signature is used might play no role either in sending the letters or in determining who should receive them. For this reason, there will be few, if any, cases in which a mass-produced collection letter bearing the facsimile of an attorney's signature will comply with the restrictions imposed by § 1692e.

*Avila v. Rubin*, 84 F.3d 222 (7th Cir. 1996).

Clomon establishes that an attorney sending dunning letters must be directly and personally involved in the mailing of the letters in order to comply with the strictures of FDCPA. This may include reviewing the file of individual debtors to determine if and when a letter should be sent or approving the sending of letters based on the recommendations of others.

*Nielsen v. Dickerson*, 307 F.3d 623 (7th Cir. 2002)


At this time, no attorney with this firm has personally reviewed the particular circumstances of your account. However, if you fail to contact this office, our client may consider additional remedies to recover the balance due.

C. Disciplinary Rule Considerations

3.03 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:
(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;

(3) in an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision;

(4) fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(5) offer or use evidence that the lawyer knows to be false.

(b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.

(c) The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible.

Comment:

1. The advocate’s task is to present the client’s case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate’s duty of candor to the tribunal.

Factual Representations by Lawyer

2. An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client’s behalf, and not assertions by the lawyer. Compare Rule 3.01. However, an assertion purporting to be on the lawyer’s own knowledge, as in an affidavit by the lawyer or a representation of fact in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.02(c) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. See the Comments to Rules 1.02(c) and 8.04(a).

Misleading Legal Argument

3. Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but should
recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(4), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Ex Parte Proceedings

4. Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of unprivileged material facts known to the lawyer if the lawyer reasonably believes the tribunal will not reach a just decision unless informed of those facts.

Anticipated False Evidence

5. On occasion a lawyer may be asked to place into evidence testimony or other material that the lawyer knows to be false. Initially in such situations, a lawyer should urge the client or other person involved to not offer false or fabricated evidence. However, whether such evidence is provided by the client or by another person, the lawyer must refuse to offer it, regardless of the client’s wishes. As to a lawyer’s right to refuse to offer testimony or other evidence that the lawyer believes is false, see paragraph 15 of this Comment.

6. If the request to place false testimony or other material into evidence came from the lawyer’s client, the lawyer also would be justified in seeking to withdraw from the case. See Rules 1.15(a)(1) and (b)(2), (4). If withdrawal is allowed by the tribunal, the lawyer may be authorized under Rule 1.05(c)(7) to reveal the reasons for that withdrawal to any other lawyer subsequently retained by the client in the matter; but normally that Rule would not allow the lawyer to reveal that information to another person or to the tribunal. If the lawyer either chooses not to withdraw or is not allowed to do so by the tribunal, the lawyer should again urge the client not to offer false testimony or other evidence and advise the client of the steps the lawyer will take if such false evidence is offered. Even though the lawyer does not receive satisfactory assurances that the client or other witness will testify truthfully as to a particular matter, the lawyer may use that person as a witness as to other matters that the lawyer believes will not result in perjured testimony.

Past False Evidence

7. It is possible, however, that a lawyer will place testimony or other material into evidence and only later learn of its falsity. When such testimony or other evidence is offered by the client, problems arise between the lawyer’s duty to keep the client’s revelations confidential and the lawyer’s duty of candor to the tribunal. Under this Rule, upon ascertaining that material testimony or other evidence is false, the lawyer must first seek to persuade the client to correct the false testimony or to withdraw the false evidence. If the persuasion is ineffective, the lawyer must take
additional remedial measures.

8. When a lawyer learns that the lawyer’s services have been improperly utilized in a civil case to place false testimony or other material into evidence, the rule generally recognized is that the lawyer must disclose the existence of the deception to the court or to the other party, if necessary rectify the deception. See paragraph (b) and Rule 1.05(h). See also Rule 1.05(g). Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal by the lawyer but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer would be aiding in the deception of the tribunal or jury, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.02(c).

Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer’s advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a Criminal Defendant

9. Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that in such cases, as in others, the lawyer should seek to persuade the client to refrain from suborning or offering perjurious testimony or other false evidence, there has been dispute concerning the lawyer’s duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

10. The proper resolution of the lawyer’s dilemma in criminal cases is complicated by two considerations. The first is the substantial penalties that a criminal accused will face upon conviction, and the lawyer’s resulting reluctance to impair any defenses the accused wishes to offer on his own behalf having any possible basis in fact. The second is the right of a defendant to take the stand should he so desire, even over the objections of the lawyer. Consequently, in any criminal case where the accused either insists on testifying when the lawyer knows that the testimony is perjurious or else surprises the lawyer with such testimony at trial, the lawyer’s effort to rectify the situation can increase the likelihood of the client’s being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

11. Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This solution, however, makes the advocate a knowing instrument of perjury.

12. The other resolution of the dilemma, and the one this Rule adopts, is that the lawyer must take a reasonable remedial measure which may include revealing the client’s perjury. A criminal accused
has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence.

False Evidence Not Introduced by the Lawyer

13. A lawyer may have introduced the testimony of a client or other witness who testified truthfully under direct examination, but who offered false testimony or other evidence during examination by another party. Although the lawyer should urge that the false evidence be corrected or withdrawn, the full range of obligation imposed by paragraphs (a)(5) and (b) of this Rule do not apply to such situations. A subsequent use of that false testimony or other evidence by the lawyer in support of the client’s case, however, would violate paragraph (a)(5).

Duration of Obligation

14. The time limit on the obligation to rectify the presentation of false testimony or other evidence varies from case to case but continues as long as there is a reasonable possibility of taking corrective legal actions before a tribunal.

Refusing to Offer Proof Believed to be False

15. A lawyer may refuse to offer evidence that the lawyer reasonably believes is untrustworthy, even if the lawyer does not know that the evidence is false. That discretion should be exercised cautiously, however, in order not to impair the legitimate interests of the client. Where a client wishes to have such suspect evidence introduced, generally the lawyer should do so and allow the finder of fact to assess its probative value. A lawyer’s obligations under paragraphs (a)(2), (a)(5) and (b) of this Rule are not triggered by the introduction of testimony or other evidence that is believed by the lawyer to be false, but not known to be so.

What the Courts Say:

Todd v. Weltman, Weinberg & Reis Co., L.P.A., 434 F.3d 432 (6th Cir. 2006):

From a practical perspective, treating Defendant as a complaining witness without immunity simply makes sense. The Court reserves absolute immunity for individuals when they functionally serve as "integral parts of the judicial process," such as judges, advocates, and witnesses in their ordinary judicial roles. Briscoe, 460 U.S. at 335. The purpose of this immunity is to preserve the integrity of our judicial system, not to assist a self-interested party who allegedly lies in an affidavit to initiate a garnishment proceeding. Beck v. Codilis & Stawiarski, P.A., 2000 U.S. Dist. LEXIS 22440 (N.D. Fla. Dec. 26, 2000):

That the affidavits were submitted by attorneys does not change this result. Submission of
false affidavits by attorneys is particularly troublesome, but probably no more so than the submission of false testimony by law enforcement officers as involved in Briscoe. Any appropriate remedy based on the affiants' status as attorneys is a matter for consideration by the Florida Bar; that status does not, however, render inapplicable the doctrine of absolute witness immunity.

* * *

IT IS ORDERED:
1. Defendants' motion for summary judgment (document 46) is GRANTED.
2. Plaintiffs' motion for partial summary judgment (document 44) is DENIED.
3. The clerk shall enter judgment stating, "All claims are dismissed with prejudice."
The clerk shall close the file.
4. The clerk, shall send a copy of this order to the Florida Bar for such consideration as the Florida Bar may deem appropriate.

_In re Porcheddu_, 338 B.R. 729 (Bankr. S.D. Tex. 2006):

“Nevertheless, the Court must repeat its earlier findings. This conduct was not undertaken by [the firm] to obtain more than [he firm] thought that its clients were entitled. Instead, the conduct was undertaken to achieve what [the firm] honestly believed to be a just result. [the firm] did submit what it thought was reasonable. It just did not give the adversarial system a reasonable opportunity to function.

* * *

**Of course, no false testimony is ever inconsequential.**


S&D had become a paper-pushing factory; the pressure of turnaround time from receipt of a file to stay relief application, as this court interprets the testimony, was the driving force at the firm. That type of pressure must impact on other firms providing services to large mortgage holding companies and their servicing agents, and perhaps prompts their taking unauthorized shortcuts. Notwithstanding such pressure, the S&D Certification Practice, simply put, is and always has been unacceptable.


In the instant case, Baker presented false schedules to the court, without adequately counseling his clients as to what the schedules represented, and without conducting any investigation into their veracity. It appears that the schedules contain figures invented by Baker or his subordinates, and filed for the improper purpose of evasion of Debtor's obligations to pay creditors. These services violated counsel's duty to instruct and supervise the Debtors, and violated Baker's ethical duty of candor to the tribunal.

The Court has held two hearings concerning whether the Debtors and Counsel intentionally filed vague, misleading, and outright false documents. The Court deferred adjudication at the first hearing because Counsel vigorously argued that the IRS claim was baseless. But, Debtors and Counsel then declined to offer any evidence in support of their objection and consented to an order establishing the IRS claim essentially as set out in the statutory Notice of Deficiency.

The Court therefore held a final hearing on November 1, 2005, after notice to the Debtors and to Counsel to allow Counsel to explain his, and his client's, conduct. In addition to considering sanctions under FRBP 9011, the Court gave notice that it would address whether to vacate the confirmation order as having been obtained by a fraud on the Court.

At that hearing, Counsel and Debtors declined to submit evidence. And even more important, although the Court asked twice, Counsel declined to recognize a duty of candor to the Court and recognized only a duty to represent his client aggressively.

* * *

The Court is now aware of the false statements. It is simply inconceivable that the Court, after becoming aware of the false representations, would be required to issue an order at some point in the future that discharges the Debtors (or purports to discharge them) from debts about which they lied to the Court. To prevent that abuse of process, the Court concludes that it must issue an order under § 105(a) to vacate the plan confirmation order.

Counsel contends that litigation and bankruptcy are adversary processes, that Counsel is duty bound to take whatever position most benefits his client in litigation, and that Counsel is entitled to a default judgment or order binding adverse parties, even if the judgment or order is based on false information, unless the adverse party files a timely answer or response.


After 43 years at the bar, the saddest thing about this case is the conduct of the lawyers - all the lawyers. A careful reading of the briefs in this case reveals only a single recognition that counsel did anything amiss in their misrepresentations to the Bankruptcy Court. There's blame aplenty, of course, each one blaming everyone else - including the hapless bankrupt homeowner. Only once, at the very end of the Buchalter brief, looking back at the wreck of America's economy, does its counsel admit "In 2002, Buchalter could have - and perhaps….should have - identified Ameriquest in the proofs of claim." Buchalter Mem. at 20 [Doc. No. 16].

How is it that our profession, the legal profession - which could have and should have strongly counseled against the self interested excesses that set up the collapse - instead has
eagerly aided and abetted those very excesses? How could we (all of us who profess to be lawyers) have fallen so low?

5.01 Responsibilities of a Partner or Supervisory Lawyer

A lawyer shall be subject to discipline because of another lawyers violation of these rules of professional conduct if:

(a) The lawyer is a partner or supervising lawyer and orders, encourages, or knowingly permits the conduct involved; or

(b) The lawyer is a partner in the law firm in which the other lawyer practices, is the general counsel of a government agency's legal department in which the other lawyer is employed, or has direct supervisory authority over the other lawyer, and with knowledge of the other lawyers violation of these rules knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of the other lawyers violation.

5.03 Responsibilities Regarding Nonlawyer Assistants

With respect to a non-lawyer employed or retained by or associated with a lawyer:

(a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the persons conduct is compatible with the professional obligations of the lawyer; and

(b) a lawyer shall be subject to discipline for the conduct of such a person that would be a violation of these rules if engaged in by a lawyer if:

(1) the lawyer orders, encourages, or permits the conduct involved; or

(2) the lawyer:

(i) is a partner in the law firm in which the person is employed, retained by, or associated with; or is the general counsel of a government agency's legal department in which the person is employed, retained by or associated with; or has direct supervisory authority over such person; and

(ii) with knowledge of such misconduct by the nonlawyer knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of that persons misconduct.

Comment:

1. Lawyers generally employ assistants in their practice, including secretaries, investigators, law
student interns, and paraprofessionals. Such assistants act for the lawyer in rendition of the lawyers professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising non-lawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

2. Each lawyer in a position of authority in a law firm or in a government agency should make reasonable efforts to ensure that the organization has in effect measures giving reasonable assurance that the conduct of nonlawyers employed or retained by or associated with the firm or legal department is compatible with the professional obligations of the lawyer. This ethical obligation includes lawyers having supervisory authority or intermediate managerial responsibilities in the law department of any enterprise or government agency.

Rule 3.01. Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous.

Rule 4.01. Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.

4.03 Dealing With Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyers role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Comment:

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyers representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel. With regard to the special responsibilities of a prosecutor, see Rule 3.09.

4.04 Respect for Rights of Third Persons
(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer shall not present, participate in presenting, or threaten to present:

   (1) criminal or disciplinary charges solely to gain an advantage in a civil matter; or
   (2) civil, criminal or disciplinary charges against a complainant, a witness, or a potential witness in a bar disciplinary proceeding solely to prevent participation by the complainant, witness or potential witness therein.

D. Sample “Safe Harbor” Disclaimers That Have Been Approved By Courts

The law does not require me to wait until the end of the thirty-day period before suing you to collect this debt. If, however, you request proof of the debt or the name and address of the original creditor within the thirty-day period that begins with your receipt of this letter, the law requires me to suspend my efforts (through litigation or otherwise) to collect the debt until I mail the requested information to you. Source: Bartlett v. Heibl, 128 F.3d 497 (7th Cir. 1997).

This advice pertains to your dealings with me as a debt collector. It does not affect your dealings with the court, and in particular it does not change the time at which you must answer the complaint. The summons is a command from the court, not from me, and you must follow its instructions even if you dispute the validity or amount of the debt. The advice in this letter also does not affect my relations with the court. As a lawyer, I may file papers in the suit according to the court's rules and the judge's instructions. Source: Thomas v. Law Firm of Simpson & Cybak, 392 F.3d 914 (7th Cir., en banc, 2004); Goldman v. Cohen, 445 F.3d 152 (2d Cir. 2006).

As of the date of this letter, you owe $ [the exact amount due]. Because of interest, late charges, and other charges that may vary from day to day, the amount due on the day you pay may be greater. Hence, if you pay the amount shown above, an adjustment may be necessary after we receive your check, in which event we will inform you before depositing the check for collection. For further information, write the undersigned or call 1-800-[phone number]. Source: Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, and Clark, LLC, 214 F.3d 872 (7th Cir. 2000).

Riddle & Associates, P.C. v. Kelly, 414 F.3d 832 (7th Cir. 2005)