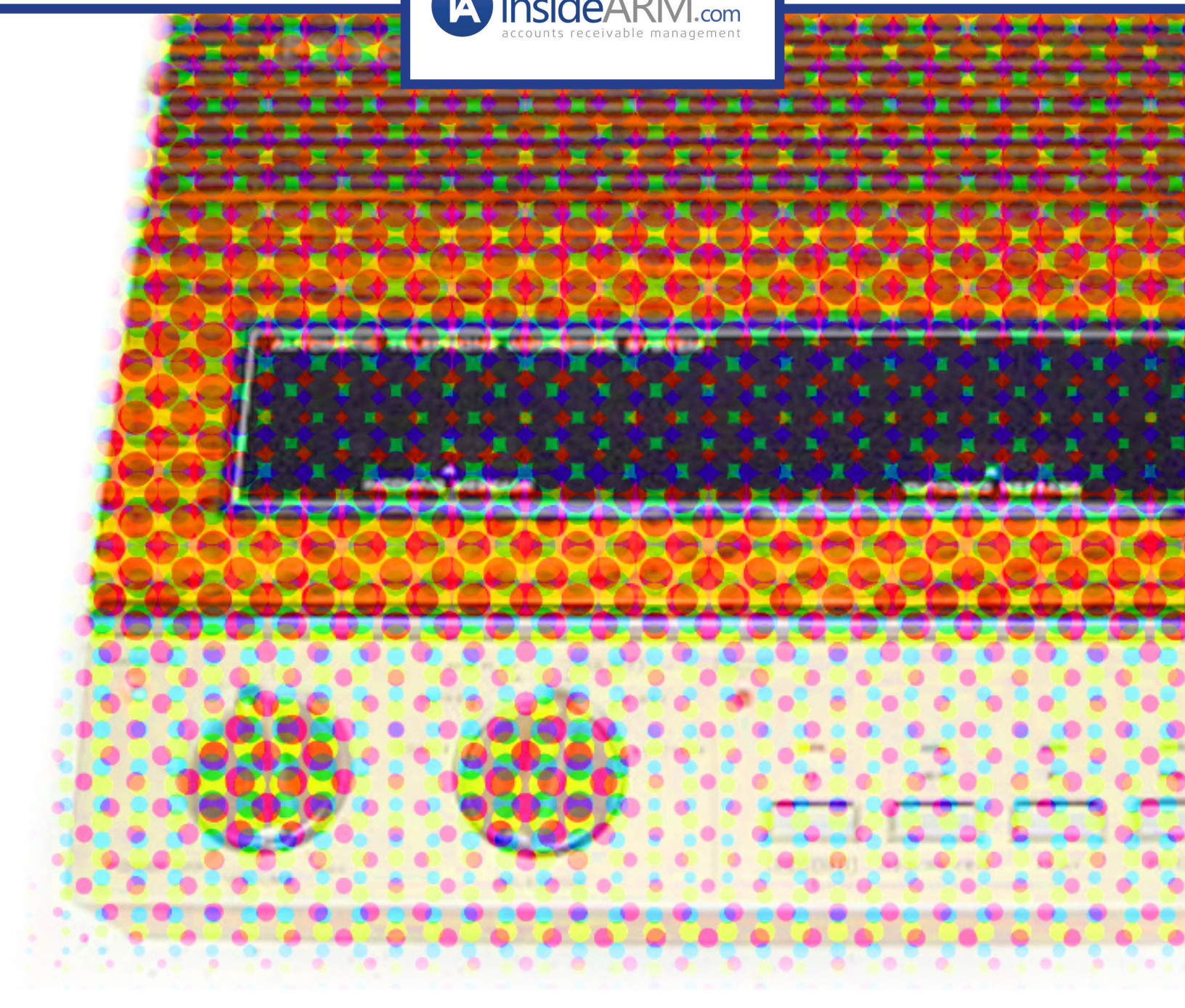
To the Point:
Telephony and Voicemail

Answers from Ask the Attorney

insideARM.com
accounts receivable management



insideARM.com
Phone: 240.499.3834
E-mail: editor@insideARM.com | Website: www.insideARM.com

Legal Disclaimer

This information contained in this transcript is not intended to be legal advice and may not be used as legal advice. Legal advice must be tailored to the specific circumstances of each case. Every effort has been made to assure this information is up-to-date. It is not intended to be a full and exhaustive explanation of the law in any area, however, nor should it be used to replace the advice of your own legal counsel.

Table of Contents

Telephony & Voicemail

1) What is the impact of the recent Meyer v. PRA appeal as it relates to the dialing of cell numbers?

The decision came out on 12 October 2012 [download here]. The claim in the Meyer case was that there were calls being made to a cell phone using an auto dialer. And as part of the decision, there was a motion for provisional class certification and a preliminary injunction. The U.S. District Court out in California granted that. That decision was appealed. And the Ninth Circuit affirmed that decision.

In doing so, the Ninth Circuit also addressed the Telephone Consumer Protection Act (TCPA). First and foremost, what do you need to show express consent? And as the Ninth Circuit stated in the opinion, the cell phone number has to be provided to the creditor at the time the underlying transaction was initiated. So, if it's a credit card application, you want to make sure the cell phone number was provided on the credit application. And if it's put on that application, and the creditor sends it over to the debt collector, it's presumed then that the debt collector is standing in the shoes of the creditor and it is permissible to call. The issue that you can run into, of course, is when the number wasn't provided initially with that credit application or the initiating document. You want to make sure that the information you're getting from your client, from the creditor, is complete. You need to know where and when they got that number.

> ***An interesting wrinkle…***
>
> Does the Meyer v. PRA case extend to manual dialing as well?
>
> *Don Maurice, Maurice & Needleman*: I have two clients right now who have been sued out in California claiming that calls being made, it's agreed that they were made with a manually dialed to a cell phone number, that those violated the TCPA. Now, I can tell you I'm quite confident these two clients are going to ask us, one, to send out a Rule 11 letter and seek sanctions, and then file a motion to dismiss.
>
> So, I don't think that it's going to apply to manually dialed calls. And there's nothing in the TCPA that would make me think that. My interpretation of the Meyer case is that it's going to apply to auto dialer calls, not to the manually dialed calls.

The Meyer case is not over. It was just an appeal regarding the class certification and the injunction issues. There are still motions to dismiss or motions for summary judgment that could be filed. It's not even clear if this decision is going to be appealed to the Supreme Court. Most importantly, though: It's not dead by any means. So, there's always risk involved with the TCPA. Agencies must tread carefully while making that business decision.

2) In February 2012, the Federal Communication Commission (FCC) set due-dates for telemarketers to have a measurement of abandoned call rates less than 3 percent of the total volume of calls. Additionally, there was also a requirement for an opt-out for telemarketing calls. Are these truly specific to telemarketers or should first-party collections' departments also have measurements/opt-outs in place?

The FCC Report and Order in February 2012 makes it clear that debt collection calls are not telemarketing calls. You're not trying to sell anything. If you're looking at making calls to sell a product or service, then certainly you need to comply with the telemarketer rules. If you're looking to collect debt, then you do not need to comply with those telemarketer rules.

As a best practice, all agencies should take a look at what their call-abandon rates are and whether they fall within the FCC requirements.

An interesting difference to the February 2012 FCC rule is: prior express consent can now be oral as well as written, whereas before, it could only be written.

Having said that: As an industry, we need to look into the future and try and predict what are the consumer attorneys going to use as grounds for lawsuits going forward? This issue could potentially be the next area of litigation. As a best practice, all agencies should take a look at what their call-abandon rates are and whether they fall within the FCC requirements.

3) Are there any new changes for auto dialers and cell phones?

The 2012 FCC rule was a dramatic change. It clarified that debt collection calls are informational calls and not telemarketing calls. Therefore, we have to comply only with the informational restrictions. Another significant change: prior expressed consent can be oral or written/electronic, which applies to also telemarketers. It also made clear that prior consent is not required to call the residential landline. While that's not a change, it's certainly nice to hear. We were still seeing lawsuits under TCPA for calls made to landlines, when we always thought that it wasn't applicable as restricting the use of ATDS for landline calls.

We've seen, also, the possibility that text messages are going to fall within this.

However: there was a case out of the Southern District of California involving text messages sent by Taco Bell Corporation. The question was whether the device used by the defendant to send out these text messages was an auto dialer and then also whether there was an appropriate ability to opt-out. And the courts in that particular case did grant a motion to dismiss on the issue of whether or not this is an auto dialer, but allowed the plaintiff the opportunity to amend.

This is to say, yes: the issue of text messages is going to continue to be a hot topic for the industry. Many collection agencies absolutely want to use texting, since so many consumers rely heavily on cell phones and text communication. However, will an agency be able to fit all of the disclosures necessary in a text message? There are still concerns.

A look back: The 2008 FCC Ruling

John Rossman, Moss & Barnett: To underscore the point about what a change the 2012 FCC ruling was regarding prior expressed consent, go back to the 2008 ruling by the FCC, the declaratory ruling, the one that kind of got the whole TCPA lawsuits ball rolling. This is what started the huge numbers of TCPA lawsuits.

In that 2008 decision, the FCC wrote, "We emphasize that prior expressed consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed." So, we've gone from the situation where prior expressed consent could only happen at the time the original transaction took place with the creditor to something much broader. So, really, I think the 2012 changes have been revolutionary.

4) Can a message for a consumer be left with a live third party?

Section 1692e(11) of the FDCPA requires that the mini-Miranda be given in every communication. And the mini-Miranda, of course, must explicitly state that this is a communication from a debt collector attempting to collect a debt. Any information obtained will be used for this purpose. And in subsequent communications, this is a communication from a debt collector.

This is a classic Catch-22 of the FDCPA for collectors. If you're speaking to someone who is not the consumer, not the obligor, not the debtor, how can you leave a message and expect to not violate e(11), which requires that you give this disclosure?

This is a classic Catch-22 of the FDCPA for collectors. If you're speaking to someone who is not the consumer, not the obligor, not the debtor, how can you leave a message and expect to not violate e(11), which requires that you give this disclosure? If you leave a message, you have to give them the mini-Miranda stating you're a debt collector. And if you state that you're a debt collector to a third party, then you've made an inappropriate disclosure.

In a case from the state of Minnesota, *Zortman v J.C. Christensen* [download here], the court held that the specific message that was left was not a communication. There simply wasn't enough information there. It may be possible to craft a message in such a way that you can comply with 1692e(11).

All that said: this is an area that's fraught with peril.

5) When should the mini-Miranda be used? Should it be used on a dialer call? And if it's used on the dialer call, how is that not third-party disclosure?

The mini-Miranda, as discussed above, needs to be used in every communication.

To get around third-party disclosure, an agency can use what's sometimes referred to as a "Foti workaround."

> This call is for Amy Smith. If you are not Amy Smith, please stop listening to this message. There will now be a five-second pause.
>
> By continuing to listen to this message, you are confirming that you are Amy Smith. Hi, Amy, this is John calling from ABC Collection Agency. This is a communication from a debt collector attempting to collect a debt. Any information obtained will be used for this purpose.

The Zortman Wrinkle

John Rossman, Moss & Barnett: In the Zortman case, the message that was left, as I understand it, did not specifically reference the debtor/consumer. It said, "Hi, this call is from ABC Collection Agency. Please give us a call back at phone number." But it never said who the consumer was. It never said who was being called. And without that vital piece of information, the argument was, "Well, how could this possibly be a communication?" The only person who is going to know to call back ABC Collection Agency is the person who received the letter.

Don Maurice, Maurice & Needleman: What I found interesting about that is the court saying, "Look, I didn't disclose anything to a third party, because I didn't say who owned the debt." Boy, that was brilliant. I don't know where else they would say that that would defeat a third-party disclosure claim. But we will certainly try it here in New York, New Jersey and Pennsylvania.

6) Can you leave a message on an attorney's voicemail?

In today's legal environment, it may not be possible for a debt collector to leave a message with anybody and feel comfortable.

This is a gray area. In some parts of the country, the courts will not consider communications between a debt collector and an attorney to be required to comply with the requirements of the FDCPA. They don't consider those contacts or that dialogue between collector and attorney to be a communication under the statute.

I think a debt collector will be reducing their risk as much as they can if they treat communications with lawyers the very same way they treat communications with consumers, which is to provide the disclosures anyway, even if you're not required to.

There are other parts of the country, however, that do consider the dialogue and the contact between a debt collector and an attorney to be communications under the statute, for which those communications must comply in all respects with the FDCPA. And that bears directly upon the issue of leaving messages.

I think a debt collector will be reducing their risk as much as they can if they treat communications with lawyers the very same way they treat communications with consumers, which is to provide the disclosures anyway, even if you're not required to.

A post-script about an attorney's administrative staff: The question's a little bit more vague when you're dealing with an office staff member or a paralegal, which can often happen. And in those cases, you may have to be a bit more careful about what you're doing and what kind of messages you're leaving.

What About Emails?

Jacques A. Machol, Machol & Johannes, LLC: Well, what we do is instead of leaving voicemails for the attorneys, we use emails, and we find that we get a better response from the attorneys by emails, indicating whether they are or are not representing the consumer or getting back to us to discuss the obligation.

Anita Tolani, Weinberg, Jacobs & Tolani, LLP: Are you putting the mini-Miranda on that email?

Jacques A. Machol: Absolutely. Every one.

Don Maurice, Maurice & Needleman: A tight reading, a close reading, of the FDCPA would mean to me that an attorney is not a consumer. The consumer is the person who owes or allegedly owes a debt, and that's what you find in the definitions in 1692(a). And in the other special definition of a consumer in 1692c(d), we have a consumer being the spouse, parent, guardian, executor or administrator. And in 1692c(b), as John Bedard and Anita just pointed out, a third party is not an attorney.

So when I think of disclosures that are required to be made, I only think of those disclosures as being required to be made to consumers. So the G disclosure would have to be given to the consumer, and I don't believe the attorney to be the consumer.

Now, the theory goes that the attorney is acting on behalf of the consumer and is entitled to those same types of disclosures. Not every circuit has weighed in on this. I don't think that a strict reading of the FDCPA would equate the attorney as receiving the same level of disclosures as the consumer gets, but that is not to say that you won't be sued on it.