

**CALIFORNIA CREDITORS  
BAR ASSOCIATION**

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March 8, 2021

COMMENTS ON PROPOSED RULEMAKING UNDER THE CALIFORNIA CONSUMER  
FINANCIAL PROTECTION LAW

***Submitted electronically to: [regulations@dfpi.ca.gov](mailto:regulations@dfpi.ca.gov)***

Commissioner Manuel P. Alvarez  
State of California  
Department of Financial Protection and Innovation  
Legal Division  
Attn: Sandra Sandoval, Legal Assistant  
300 S. Spring Street, Suite 15513  
Los Angeles, CA 90013

**Re: Response to Invitation for Comments on Proposed Rulemaking Under the  
California Consumer Financial Protection Law (PRO 01-21).**

Commissioner Alvarez:

We thank you for providing stakeholders the valuable opportunity to provide input into this rulemaking. We welcome this occasion to submit our comments and look forward to establishing an excellent working relationship with the DFPI in the years to come.

The California Creditors Bar Association (CCBA) is a bar association of attorneys that practice creditors rights. Members of the CCBA are regularly involved in the lawful collection of past-due consumer debts and must therefore interpret and comply with the often-unsettled requirements of applicable collection law, principally the Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977) and the California Rosenthal Fair Debt Collection Practices Act, California Civil Code Section 1788, *et seq.*

Most of our members are hired by clients when voluntary attempts to collect an obligation owed by a consumer fail. We are retained by these clients to use the court process to recover money from consumers who most often are able to pay but for some reason are unwilling to voluntarily pay. Our clients represent businesses small and large, who employ hundreds and thousands of Americans who depend on collecting the amounts owed to keep those employees employed. Our law firms also employ hundreds and thousands of hard-working Americans.

Unlike most if not all the other industry participants who may submit comments, the attorneys that work for our law firm members have gone to law school, have achieved a law degree, have passed at least one bar examination, and have agreed to comply with certain ethical standards and civil rules of procedure imposed by the California court system. The attorneys in our

member law firms also have their conduct supervised and regulated by the California State Bar. Additionally, we also have a very sacred responsibility to maintain the confidentiality of attorney-client privilege communications and represent our clients within the constraints of the law. Our members' attorneys must also comply with California Business and Professions Code section 6077.5, which makes it an ethical obligation to comply with the California Rosenthal Fair Debt Collection Practices Act, California Civil Code section 1788, *et seq.*, in addition to other obligations for collection attorneys.

## Discussion

As attorneys, we work diligently to ethically represent their clients while at the same time striving to treat consumers professionally and respectfully. We look forward to working with you, Commissioner Alvarez, and your team to ensure that the DFPI promulgates debt collection regulations that protect consumers but also ensure that attorneys can meet the ethical responsibilities they have to their clients and the court system.

The CCBA strives to be not only a leader in the industry but to also work with the DFPI to ensure that its members may abide by their ethical obligations through the court system and the California State Bar, which also ensures consumer protection. We look forward to presenting you with CCBA's comments regarding two issues that you identified in your Invitation to Comment, clarifying the scope of the California Consumer Financial Protection law ("CCFPL") and timelines related to consumer complaints.

### **A. Clarifying the Scope of the CCFPL.**

The DFPI invited comment regarding definitions and exemptions:

#### 1. Definitions

a. Financial Code section 90005 establishes definitions that apply to the CCFPL. Are additional definitions needed? For the terms already defined, are any of the definitions unclear, and if so, why? Does any definition result in ambiguity regarding whether an individual or entity, or product or service, falls within the scope of the CCFPL?

#### 2. Exemptions

a. Financial Code section 90002 describes certain entities that are exempt from the CCFPL. Should the DFPI issue regulations to clarify the scope of these exemptions?

For the reasons set forth below, the DFPI is requested to clarify, through issuance of appropriate regulation, that attorneys and their employees are exempt from the CCFPL pursuant to Financial Code section 90002(a) which states:

(a) This division shall not apply to a licensee, or an employee of a licensee, of any state agency other than the Department of Financial Protection and Innovation to the extent that licensee or

employee is acting under the authority of the other state agency's license.

The members of the CCBA have a strong interest in ensuring that the California Consumer Financial Protection Law (CCFPL) is interpreted and applied in a way that allows collection attorneys to execute their ethical duty in accordance with the State Bar Act to advance their clients' legitimate interests—within the bounds of existing law.

Section 90002 of the California Financial Code, found in Division 24 of the Financial Code, the CCFPL, states, in relevant part:

(a) This division shall not apply to a licensee, or an employee of a licensee, of any state agency other than the Department of Financial Protection and Innovation to the extent that licensee or employee is acting under the authority of the other state agency's license.

This provision states that a party that is already licensed by any state agency does not have to be licensed by the DFPI if the party is acting under the authority of another state agency's license. Attorneys are licensed by the State Bar and operate under the authority of the State Bar. California's official website, [www.ca.gov](http://www.ca.gov), contains a list of California's agencies, which includes the California State Bar.

Additionally, California Government Code Section 6252 states, in relevant portion:

- (f) (1) "State agency" means every state office, officer, department, division, bureau, board, and commission or other state body or agency, except those agencies provided for in Article IV (except Section 20 thereof) or Article VI of the California Constitution.
- (2) Notwithstanding paragraph (1) or any other law, "state agency" shall also mean the State Bar of California, as described in Section 6001 of the Business and Professions Code.

Moreover, collection attorneys are specifically regulated by California Business and Professions Code Section 6077.5:

An attorney and his or her employees who are employed primarily to assist in the collection of a consumer debt owed to another, as defined by Section 1788.2 of the Civil Code, shall comply with all of the following:

- (a) The obligations imposed on debt collectors pursuant to Article 2 (commencing with Section 1788.10) of Title 1.6C of Part 4 of Division 3 of the Civil Code.
- (b) Any employee of an attorney who is not a licensee of the State Bar of California, when communicating with a consumer debtor or with any person other than the debtor concerning a consumer debt, shall identify himself or

herself, by whom he or she is employed, and his or her title or job capacity.

- (c) Without the prior consent of the debtor given directly to the attorney or his or her employee or the express permission of a court of competent jurisdiction, an attorney or his or her employee shall not communicate with a debtor in connection with the collection of any debt at any unusual time or place, or time or place known, or which should be known, to be inconvenient to the debtor. In the absence of knowledge of circumstances to the contrary, an attorney or his or her employee shall assume that the convenient time for communicating with the debtor is after 8 a.m. and before 9 p.m., local time at the consumer's location.
- (d) If a debtor notifies an attorney or his or her employee in writing that the debtor refuses to pay a debt or that the debtor wishes the attorney or his or her employee to cease further communications with the debtor, the attorney or his or her employee shall not communicate further with the debtor with respect to such debt, except as follows:
  - (1) To advise the debtor that the attorney or his or her employee's further efforts are being terminated.
  - (2) To notify the debtor that the attorney or his or her employee or creditor may invoke specific remedies which are ordinarily invoked by such attorney or creditor.
  - (3) Where applicable, to notify the debtor that the attorney or creditor intends to invoke his or her specific remedy.
  - (4) Where a suit has been filed or is about to be filed and the debtor is not represented by counsel or has appeared in the action on the debt in propria persona.

For the purpose of this section, "debtor" includes the debtor's spouse, parent, or guardian, if the debtor is a minor, executor, or administrator.

- (e) An attorney or his or her employee shall not take or threaten to take any nonjudicial action to effect disposition or disablement of property if (1) there is no present right to possession of the property claimed as collateral through an enforceable security interest; (2) there is no present intention to take possession of the property; or (3) the property is exempt by law from that disposition or disablement.

- (f) An attorney or his or her employee shall not cause charges to be made to any person for communications, by concealment of the true purposes of the communication. The charges include, but are not limited to, collect telephone calls and telegram fees.
- (g) Within five days after the initial communication with a debtor in connection with the collection of any unsecured debt, an attorney or his or her employee shall, unless the following information is contained in the initial communication or the debtor has paid the debt, send the debtor a written notice containing the following:
  - (1) The amount of the debt.
  - (2) The name of the creditor to whom the debt is owed.
  - (3) A statement that unless the debtor, within 30 days receipt of the notice, disputes the validity of the debt or any portion thereof, the debt will be assumed to be valid by the attorney or his or her employee.
  - (4) A statement that if the debtor notifies the debt collector in writing within the 30-day period that the debt, or any portion thereof, is disputed, the attorney or his or her employee will obtain a writing, if any exists, evidencing the debt or a copy of the judgment against the debtor and a copy of such writing or judgment will be mailed to the debtor by the attorney or his or her employee.
  - (5) A statement that, upon the debtor's written request within the 30-day period, the attorney or his or her employee will provide the debtor the name and address of the original creditor, if different from the current creditor.

If the debtor notifies the attorney or his or her employee in writing within the 30-day period described in this section that the debt or any portion thereof is disputed, or that the debtor requests the name and address of the original creditor, the attorney and his or her employee shall cease collection of the debt or any disputed portion thereof, except for filing suit thereon, until the attorney obtains a writing, if any exists, evidencing the debt or a copy of a judgment or the name and address of the original creditor, and a copy of such writing or judgment or the name and address of the original creditor is mailed to the debtor by the attorney or his or her employee.

- (h) If any debtor owes multiple debts and makes any single payment to any attorney or his or her employee with

respect to the debts, the attorney may not apply such payment to any debt which is disputed by the debtor and, where applicable, shall apply such payment in accordance with the debtor's directions.

- (i) A willful breach of this section constitutes cause for the imposition of discipline of the attorney in accordance with Section 6077.

Moreover, creditors rights attorneys are not only subject to the above obligations, but the State Bar Act makes clear that these obligations are binding on attorneys and attorneys are subject to enforcement and discipline for violating these obligations:

Effect of rules; discipline for breach

The rules of professional conduct adopted by the board, when approved by the Supreme Court, **are binding upon all licensees of the State Bar.**

**For a willful breach of any of these rules, the board has power to discipline licensees** of the State Bar by reproof, public or private, or to recommend to the Supreme Court the suspension from practice for a period not exceeding three years of licensees of the State Bar.

Bus. & Prof. Code § 6077 (emphasis added).

Power to Discipline and Reinstate

After a hearing for any of the causes set forth in the laws of the State of California warranting disbarment, suspension, or other discipline, the State Bar Court has the power to recommend to the Supreme Court the disbarment or suspension from practice of licensees or to discipline them by reproof, public or private, without such recommendation. ...

Bus. & Prof. Code § 6078.

Not only are creditors rights attorneys subject to discipline by the State Bar, but they are also subject to sanctions issued by a court when they violate the law or ethical obligations. Courts have routinely recognized that disciplinary proceedings and court sanctions have the primary purpose of protecting the public:

The primary purposes of disciplinary proceedings conducted by the State Bar and of sanctions imposed are the **protection of the public**, the courts and the legal profession, the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession.

*In re Silverton* (2005) 36 Cal. 4<sup>th</sup> 81, 91-92 (emphasis added) (citation omitted).

And courts have recognized that only the final orders of the California Supreme Court are “intended to have the effect of working disbarment, suspension or discipline of any” California attorney licensed by the California State Bar. *Werner v. State Bar of Cal.* (1939) 13 Cal. 2d 666, 673.

The California State Bar is an agency of California; that it regulates and licenses attorneys, and specifically creditors rights attorneys; and it disciplines and suspends attorneys who violate their obligations under the law, including those obligations set forth under the California State Bar Act. It is also clear that attorneys are regulated from the point at which they are retained by their clients and an account is placed with the law firm (and even before under some circumstances) through the point at which the matter is resolved and the account is closed with the law firm. This makes clear that Financial Code section 90002(a) mandates that the CCFPL and its licensing provisions do not apply to attorneys and their employees.

This position is further supported by a resolution adopted by the Conference of Chief Justices in connection with their opposition of federal agency regulation of lawyers’ litigation activities. Although the resolution addresses federal agency regulation, the logic applies to state agency regulation as well. The Resolution states:

**Resolution 1. In Support of Preserving the Courts’ Authority  
to Regulate and Oversee Lawyers Engaged in Litigation and  
Opposing Federal Agency Regulation of Lawyers’ Litigation  
Activities**

WHEREAS, the Conference of Chief Justices, in fulfilling its leadership role for state judicial systems, has traditionally taken positions to defend against proposed policies that threaten principles of federalism or that seek to preempt proper state court authority; and

WHEREAS, the Conference has long committed itself to protect and strengthen independent state judicial authority and proceedings as a central part of the federal system of American government; and

WHEREAS, the Conference has also taken positions to defend against proposed policies that threaten to undermine separation of powers; and

WHEREAS, for centuries, lawyers engaged in the practice of law have been regulated and disciplined primarily by the highest court of the state in which a lawyer is licensed or admitted to practice, along with lawyer disciplinary agencies overseen by those courts, and other state and federal courts of competent jurisdiction; and

WHEREAS, the state courts have developed extensive and effective regulations governing all aspects of the practice of law, including admission requirements, rules of professional conduct, disciplinary rules, and procedural rules for litigation, while federal courts have adopted local

rules governing the conduct of lawyers appearing before them; and

WHEREAS, as a result of these judicial rules and regulations, state and federal courts have extensive authority and tools to address lawyer misconduct that occurs during the course of litigation before them, including monetary sanctions, striking offending pleadings or other papers, or referring a matter to disciplinary authorities, which could lead to a reprimand, censure, license suspension, disbarment, or other available sanctions; and

WHEREAS, consistent with the longstanding principle of judicial regulation and oversight of lawyers and the legal profession, many federal agencies have included broad practice-of-law exclusions in major rules, including the Federal Trade Commission's "Mortgage Assistance Relief Services" rule issued in November 2010 and the Department of Housing and Urban Development's "Secure and Fair Enforcement for Mortgage Licensing Act" rule issued in June 2011; and

WHEREAS, also consistent with this principle, Congress has incorporated broad practice-of-law exclusions into certain federal statutes, including Section 1027(e) of the "Consumer Financial Protection Act of 2010" that excludes most lawyers engaged in the practice of law from Consumer Financial Protection Bureau (CFPB) regulatory and enforcement authority, and language in the Fair Debt Collection Practices Act of 1977 (FDCPA) that completely exempted all lawyers engaged in the practice of law before the exemption was removed by Congress in 1986 based in part on its belief that the revised Act would only apply to lawyers' non-litigation activities; and

WHEREAS, the Conference of Chief Justices adopted Resolution 1 on January 26, 2011, which affirmed that primary regulation and oversight of lawyers and the legal profession should continue to be vested in the state courts, not federal agencies or Congress; expressed support for Congress and federal agencies' decisions to include broad practice of law exclusions in certain key federal statutes and agency rules; and opposed federal legislation or rules intended to establish or expand federal regulatory jurisdiction over lawyers engaged in the practice of law; and

WHEREAS, in recent years, certain federal agencies have undermined the courts' proper role by imposing special litigation rules and standards on certain types of lawyers that go beyond and often conflict with well-established



court rules applicable to all litigation lawyers, including the special due diligence standards and procedural rules that the CFPB has sought to impose solely on creditor lawyers; and

WHEREAS, the President of the American Bar Association submitted detailed comments to the CFPB on September 18, 2019 urging it to withdraw that portion of its proposed Debt Collection Practices Rule that would effectively codify the flawed “meaningful attorney involvement” concept that imposes special due diligence standards and procedural rules solely on creditor litigation lawyers, and also urging the CFPB to recognize the courts’ authority to regulate, oversee, and sanction all lawyers engaged in litigation, regardless of the lawyer’s legal specialty or the type of case filed with the court; and

WHEREAS, these recent actions by federal agencies have undermined the courts’ primary and inherent authority to regulate and oversee lawyers engaged in the practice of law by creating multiple conflicting sets of litigation rules and standards for lawyers, resulting in unfair lawsuits against lawyers pursuing valid legal claims for clients in court, increased lawyer malpractice insurance rates, difficulty in obtaining legal representation, reduced access to justice, and interference with core aspects of the confidential attorney-client relationship including the attorney-client privilege;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices supports legislation that would clarify that (1) lawyers engaged in litigation should be regulated and disciplined exclusively by state supreme courts, their lawyer disciplinary agencies, and other state and federal courts of competent jurisdiction; (2) federal agencies shall have no regulatory authority over litigation activities of lawyers or law firms; and (3) no party in a legal action shall have a federal private right of action against the opposing lawyer for the lawyer’s litigation activities.

In keeping with the points raised by the Conference of Chief Justices, and the express language of Financial Code section 90002(a), CCBA requests that you clarify that lawyers and their employees are not subject to regulation by the DFPI or the CCFPL licensing provisions.

B. Responses to Consumer Complaints.

3. Complaint Handling:

- a. What procedures should DFPI establish to ensure that businesses provide timely responses to consumer

complaints? And should those procedures vary depending where the consumer submits the complaint (directly to the business or to DFPI)?

b. What timelines should DFPI establish? Should the timeliness vary based upon the type of businesses or product?

...

e. Should DFPI provide clarification of any provisions concerning complaints?

Our comments on these issues focus on one of the questions on this topic:

With respect to the timeliness of complaint and inquiry responses, what timelines should the DFPI establish for businesses? Should the timelines vary based upon the type of business or product to which the complaint or inquiry relates?

We respectfully request that the DFPI provide businesses with an ample amount of time to conduct a detailed investigation into all the concerns contained in a consumer's complaint. We recommend that the DFPI adopt the same timeline that the Consumer Financial Protection Bureau (CFPB) gives businesses to provide a response, which is 15 calendar days from the date of the consumer's complaint. Our member firms have found the 15-day time period to be sufficient in almost all cases. We do not recommend that the timeline vary depending upon the type of business.

We also request that the rule contain a provision that would allow businesses to request an extension of time to provide a response, if needed, similar to what the CFPB sets forth. The California Legislature recognizes the need to do this in other statutory schemes, like the California Consumer Privacy Act (*see* Civil Code § 1798.130(a)(2)). The ability to extend the 15-day time frame for a response will help ensure that all consumer complaint issues are thoroughly addressed, and the responses are complete, even in those circumstances where it may take longer than 15 days to complete the investigation (for example, when the business must gather important information from a third party and that important information impacts the results of the investigation).

We also recommend that the DFPI build an online portal for consumers to submit complaints and through which businesses can access the complaint, upload a response, and request an extension of time to respond. CCBA would recommend that the system contain the functionality to send reminders via email of important dates (e.g., date complaint submitted, response deadline date, upcoming deadline date), which should provide more timely actions, which will address the consumer concerns raised.

We believe that consumers would be best served by the three recommendations we present: mirroring the complaint response timelines established by the CFPB, allowing for an extension to ensure that all relevant information is considered during the investigation, and providing technological innovations that would permit reminders.

Thank you again for inviting and considering stakeholder input prior to drafting and presenting proposed regulations for public comment. We look forward to providing future input to DFPI regarding rulemaking. If you have any questions, please contact me by telephone at 408-677-5822 or by email at [dsherrill@hunthenriques.com](mailto:dsherrill@hunthenriques.com).

Sincerely,



Donald Sherrill  
President  
California Creditors Bar Association

Thank you again for inviting and considering stakeholder input prior to drafting and presenting proposed regulations for public comment. We look forward to providing future input to DFPI regarding rulemaking. If you have any questions, please contact me by telephone at 408-677-5822 or by email at [dsherrill@hunthenriques.com](mailto:dsherrill@hunthenriques.com).

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