# The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association

*Editor-in-Chief, Suzy Tate, Suzy Tate, P.A.*

**Spring 2014**


## PRESIDENT'S MESSAGE

*by Stephenie Biernacki Anthony, Esquire, Anthony & Partners, LLC*

**Maintaining Respect for the Judiciary and the Integrity of Our Legal System**

From the time that I was a law clerk for the Honorable Alexander L. Paskay, I have appreciated the opportunity to participate in courtroom deliberations. One of my favorite aspects of private practice at this point in my career is the opportunity to appear before the bankruptcy court to present factual allegations and testimony, argue the law and apply it to my facts, and urge a result consistent with my clients' interests and objectives. Sometimes you win, sometimes you lose, but you always have a sense of confidence in the process, and in the integrity of our legal system. This is in large measure a credit to our judiciary, which is sworn to consider the facts and the law impartially, without considering biases or other irrelevant items. Our clients may pursue claims and defenses for business, financial, and other reasons that shape their conduct; however, the Court is above all of that, and not only our legal system, but our financial system and society as a whole depend upon that objective judiciary.

When a Bankruptcy Judge is sworn in, he/she swears (or affirms) that he/she "will administer justice without respect to persons, and do equal right to the poor and the rich, and that [he/she] **will faith fully and impartially discharge and perform all duties incumbent upon [him/her] as a United States Bankruptcy Judge under the Constitution and laws of the United States**; and that [he/she] will support and defend the Constitution of the United States against all enemies, foreign and domestic; that [he/she] will bear true faith and allegiance to the same; that [he/she] take[s] this obligation freely, without any mental reservation or purpose of evasion; and that [he/she] will well and faithfully discharge the duties of the office on which [he/she] [is] about to enter. So help me God." This oath is not taken lightly.

To facilitate the integrity of our legal system, lawyers are uniformly required under Bar rules of the various states to do what they can to maintain appropriate respect of the judiciary. The general principles that control a Florida lawyer's conduct are set forth inter alia in the oath that a lawyer takes when being sworn in to The Florida Bar, as follows:

> I will support the Constitution of the United States and the Constitution of the State of Florida; **I will maintain the respect due to courts of justice and judicial officers**; I will not counsel or maintain any suit or proceedings which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land; I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law; I will maintain the confidence and preserve inviolate the secrets of my clients, and will accept no compensation in connection with their business except from them or with their knowledge and approval; to opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications; I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged; I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay anyone's cause for lucre or malice. So help me God.

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**The *Cramdown* can be accessed via the Internet at www.flmb.uscourts.gov and www.TBBBA.com**

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# Proof of Claim Could Cost You Your Privilege

## *Bankruptcy Court Holds Attorney's Signature on Proof of Claim Form Renders Attorney a Fact Witness to Allegations in Proof of Claim, Waiving Attorney-Client and Work-Product Privileges.*

*by Steven R. Wirth & Jason L. Margolin*

A properly filed proof of claim serves as *prima facie* evidence as to a claim's validity. But when this written statement is signed by a creditor's attorney, the court may find that the attorney has become a fact witness and that there has been a waiver of critical privileges. This was the recent holding of *In re Rodriguez*, Bankr. No. 10-70606, Adv. No. 11-07012, 2013 WL 2450925, at *6 (Bankr. S.D. Tex. June 5, 2013) (granting in part and denying in part a motion to compel, thereby authorizing the deposition of the creditor's attorney on the facts alleged within the proof of claim). Although this is an unpublished opinion, it should serve as a cautionary tale for clients and practitioners in the future.

**Significance of Ruling**

In this opinion, the bankruptcy court held that by signing a proof of claim form, the creditors' attorney made himself a fact witness, thereby waiving work-product and attorney-client privileges as to the facts alleged in the proof of claim.[1] As a result, the creditors' attorney was ordered to appear for deposition and answer numerous questions that would normally be subject to sustainable privilege objections. In light of this holding, attorneys representing creditors, whether acting as in-house or outside counsel, should encourage their clients to have their corporate representatives sign proof of claim forms going forward to ensure that the privilege is protected.

**A Proof of Claim**

A proof of claim is a written statement setting forth a creditor's claim.[2] The written statement must substantially conform to the appropriate Official Form.[3] Official Form 10 is the current Official Form for such proofs of claim. A properly filed proof of claim serves as *prima facie* evidence as to the claim's validity and amount, and thus, as to the facts alleged therein.[4] Official Form 10 was revised in 2011 to, among other changes, include a declaration under penalty of perjury that the information is "true and correct to the best of my knowledge, information and reasonable belief."[5]

**Factual and Procedural Background of the Case**

This unpublished opinion arises from a ruling upon a motion to compel in an adversary proceeding related to the involuntary bankruptcy of Gabriel G. Rodriguez (the "Debtor"), filed on September 1, 2012 by nine creditors (the "Petitioning Creditors").[6] The Petitioning Creditors filed the involuntary bankruptcy petition against the Debtor alleging claims for bad faith trespass and converted royalties and interest.[7]

The Petitioning Creditors had previously sued the Debtor over possession of a substantial amount of land.[8] The Debtor's adoptive father inherited nine tracks of land from an aunt.[9] When the Debtor's father died intestate, the land remained in possession of the Debtor and his mother.[10] At that time, the Petitioning Creditors sued claiming to be lawful owners of the land.[11] After a long dispute, the Petitioning Creditors prevailed because the aunt's will was interpreted to have an executory limitation that automatically divested the devise of the property from the Debtor's father if he were to die without lawful issue of his body (which was interpreted to exclude the Debtor as an child by adoption).[12] During the time the Debtor was in possession of the land, the Debtor leased a portion of the property to an oil and gas company.[13] During that lease, a spill occurred causing substantial damage to the land.[14] As a result of this damage, the Petitioning Creditors filed claims against the Debtor and the oil and gas company. *Id.* In the bankruptcy case, the Petitioning Creditors, through their attorney, Harlin C. Womble, Jr. ("Womble"), filed proofs of claim for these alleged state law torts.[15]

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1 *See id.*
2 *See* Fed. R. Bankr. P. 3001(a).
3 *Id.*
4 *See* Fed. R. Bankr. P. 3001(f); *In re Rodriguez*, 2013 WL 2450925, at * 3.
5 *See* Official Form 10; 2011 Committee Note to Official Form 10.
6 *See* Case No. 10-70606 (Bankr. S.D. Tex.), ECF No. 1.
7 *See* Case No. 11-07012 (Bankr. S.D. Tex.), ECF No. 79.
8 *See Rodriguez v. Garza*, No. 04-06-00139-CV, 2007 WL 2116411, at *1 (Tex. App. July 25, 2007).
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.* at 2-4.
13 *See* Case No. 11-07012 (Bankr. S.D. Tex.), ECF No. 79.
14 *Id.*

## Proof of Claim

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In the course of the bankruptcy, the Chapter 7 Trustee commenced adversary proceedings against the Petitioning Creditors (to object to their proofs of claim) and against the oil and gas company, which were consolidated into one action.[16] The oil and gas company served discovery, including a notice for deposition of Womble, the attorney for the Petitioning Creditors. The Petitioning Creditors moved to quash the deposition;[17] however, the court denied the motion to quash without prejudice to the assertion of any applicable privileges.[18] During the deposition, privilege objections were raised to substantially all of the questions and the oil and gas company moved to compel answers.[19] The court held a hearing on February 25, 2013, and with respect to certain questions, requested further briefing.[20] The parties submitted briefs addressing, among other issues, (i) the effect, if any, the *prima facie* evidentiary value of filing a proof of claim has on the assertion that any privilege was waived, and (ii) whether the analysis of privilege claims was affected by the December 2011 amendments to Rule 3001 and Official Form 10.[21] The oil and gas company successfully argued that the *prima facie* evidentiary effect of the proof of claims did support the argument that the privileges were waived, and that this analysis was not dependent on the 2011 amendments.[22]

**Holding**

United States Bankruptcy Judge Marvin Isgur issued his opinion on June 5, 2013, granting in part and denying in part the motion to compel. Essentially, the court held that by signing the clients' proofs of claim, their attorney asserted personal knowledge of the facts alleged in the proof of claim, thereby becoming a fact witness to the facts alleged therein, just as if the attorney had filed an affidavit supporting the merits of a case.[23] The court also ruled that Texas' offensive use doctrine supported the waiver of the attorney-client privilege.[24] In addition to ruling that the attorney-client privilege was waived, the court also held that because the attorney signed the proofs of claim, the work-product privilege was waived as to the facts alleged in the proofs of claim; however, the legal basis of the proofs of claim were still protected.[25]

Judge Isgur grouped the disputed questions[26] into seven general categories:

| Category | Ruling |
|---|---|
| Category A – Questions Regarding Privileged Communications | Privilege Waived, motion granted |
| Category B – Questions Regarding Womble's Activities Prior to Filing the Proofs of Claim | Privilege Waived, motion granted |
| Category C – Questions Regarding the Factual Basis for the Proof of Claim | Privilege Waived, motion granted |
| Category D – Questions Regarding Documents Used Offensively | Privilege Inapplicable, motion granted |
| Category E – Questions Disregarded | Uncertain, motion to compel denied |
| Category F – Questions Regarding Womble's Knowledge of Certain Facts or Events | Privilege Waived, motion granted |
| Category G – Questions Regarding the Fee Arrangements and Other Nonprivileged Aspects of the Attorney-Client Relationship | Privilege Inapplicable, motion granted |

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15 *See* In re Rodriguez, 2013 WL 2450925 at *1.
16 *Id.*
17 *See* Case No. 11-07012 (Bankr. S.D. Tex.), ECF 31
18 *See* Case No. 11-07012 (Bankr. S.D. Tex.), ECF 41.
19 *See* Case No. 11-07012 (Bankr. S.D. Tex.), ECF 110.
20 *See* Case No. 11-07012 (Bankr. S.D. Tex.), ECF 152.
21 *See* Case No. 11-07012 (Bankr. S.D. Tex.), ECF 168.
22 *See id.*; In re Rodriguez, 2013 WL 2450925 at *3-4.
23 *See In re Rodriguez*, 2013 WL 2450925 at *3-4 (citing *Comp. Network Corp. v. Spohler*, 95 F.R.D. 500 (D.D.C. 1982) (holding that attorney became a factual witness to matters contained within his affidavit by submitting that affidavit in support of an opposition to a motion to compel expedited discovery because the affidavit touched on the merits of the litigation)).
24 *Id.* at *5.
25 *Id.* at *6.
26 The individual questions at issue were attached as an appendix to the opinion.

## Proof of Claim

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Pursuant to the Federal Rules of Evidence, the court applied state privilege law (here, Texas law) because state law governed the proceedings (the Trustee's causes of action against the oil and gas company for state law breach of contract and indemnity).[27] Nevertheless, the court applied the uniform standard embodied in Fed. R. Civ. P. 26, which codifies the work-product doctrine, as it was made applicable through Rule 7026 of the Federal Rules of Bankruptcy Procedure.[28]

When considering both the attorney-client privilege and the work-product doctrine, the court ruled that the Petitioning Creditors waived both privileges when they consented to their attorney filing proofs of claim in the bankruptcy case. The waiver of the privileges extended to all facts contained in the proofs of claim, and allowed the opposing party to question the Petitioning Creditors' attorney on numerous questions that the court acknowledged would normally be subject to sustainable privilege objections.[29]

The court did not indicate that this ruling was dependent upon the changes to the proof of claim form (Official Form 10) made in 2011; and in fact the movant argued that it was not because Rule 9011(b) already states that the attorney's signature on any document certifies that "to the best of the person's knowledge, information, and belief, formed after inquiry reasonable under the circumstances," that there is evidentiary support for the position.[30] Instead, the court noted that a proof of claim serves as *prima facie* evidence as to the claim's validity, which makes it analogous to signing an affidavit rather than signing a complaint.[31] While the court did not address the change to Official Form 10 in its opinion, it seems likely that other courts could find additional support for the waiver of privilege based upon the additional certification included on the signature block to the revised proof of claim form.

**Potential Counter Arguments Not Raised**

The client, not the attorney, holds the privilege, and therefore, the privilege cannot be waived by the attorney's conduct unless the client consents.[32] In *Rodriguez*, there was no dispute that the Petitioning Creditors consented to having Womble sign the proofs of claim, and the court held that this consent constituted the waiver by the Petitioning Creditors – the clients.[33] Thus, courts should not interpret *Rodriguez* to impose a waiver absent some finding that the client consented to the attorney signing the proof of claim.

In *Rodriguez*, a deposition of the lead creditor demonstrated a lack of personal knowledge as to the amounts and facts in the proofs of claim. This further supported the movant's waiver argument because there was no alternative source of the information sought through the deposition of the attorney. If the Petitioning Creditors had been able to demonstrate that another source of the information was available, at least some of the work-product privilege may have been sustained pursuant to Fed. R. Civ. P. 26(b)(3), made applicable by Fed. R. Bankr. P. 7026 (restricting production unless a party "is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means.").

**Best Practice Suggests a Change for Practitioners**

Previously, it had been common practice for attorneys to sign proof of claim forms on behalf of the creditors they represent, just as attorneys routinely sign pleadings and motions. In light of *Rodriguez*, attorneys, whether in-house or outside counsel, should exercise caution before signing any proof of claim form. While several counter-arguments to the waiver of privilege exist, it is better to avoid having to raise them. Although *Rodriguez* remains an unpublished decision from a Texas bankruptcy court, other courts may choose to follow *Rodriguez*, and the consequences of a waiver of the attorney-client privilege could be severe. For example, a waiver may allow for disclosure of facts that compromise the allowance or amount of the proof of claim, create exposure to the creditor's counsel, and may exponentially increase litigation costs if disputes over the scope of the waiver follow. A debtor's counsel will also likely use the threat of conducting discovery and a deposition for strategic advantage for obtaining a more favorable resolution of a disputed claim.

The reasoning of *Rodriguez* is also consistent with Florida privilege law.[34] A proof of claim serves as *prima facie* evidence as to the validity and amount of the claim – a "sword." If the only basis for the facts that support the claim are in the mind of the creditor's attorney, then Florida law is unlikely to provide an applicable privilege – a "shield" – once the proof of claim is filed. Moreover, because the work-product doctrine is governed by federal law, it should be consistently applied in any bankruptcy court. Thus, the best practice is for the individual creditor or the corporate creditor's representative to sign the proof of claim form. By having the person who would serve as the creditor's fact witness sign the proof of claim form, creditors can avoid this potential misstep and protect their rights.

27 *Id.* at *2.
28 *Id.*
29 *In re Rodriguez*, 2013 WL 2450925 at *3-4.
30 *See* Fed. R. Bank. P. 9011(b)(3).
31 *In re Rodriguez*, 2013 WL 2450925 at *3.
32 *See In re Rodriguez*, 2013 WL 2450925 at *3 (citing Tex. R. Evid. 503(b)).
33 *Id.* at *3 n. 8.
34 *See, e.g., GAB Bus. Servs., Inc. v. Syndicate* 627, 809 F.2d 755, 762 (11th Cir. 1987) ("In the ordinary case, inquiry of the type sought by GAB might be foreclosed by the attorney-client privilege. The privilege, however, 'was intended as a shield, not a sword.'").

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# What You Missed at the Florida Residential Mortgage Modification Mediation Summit

*by: Stefan Beuge, Phelan Hallinan, PLC*

On February 27, 2014 the Florida Residential Mortgage Modification Mediation Summit commenced in Orlando. Bankruptcy judges, trustees, practitioners from all over Florida, as well as representatives from the major lenders came together to compare and contrast the existing loss mitigation programs from the various districts and divisions with the intent to better the process statewide. The overall consensus is to strive for uniformity throughout the state.

**ADEQUATE PROTECTION PAYMENTS**

All Divisions of the Middle District require the debtor to provide for 31% of the debtor's gross monthly income less Homeowner's Association (HOA) fees, whereas the Southern District currently does not exclude the HOA fees as part of the loss mitigation mediation adequate protection payment. While it appears that the Southern District may soon conform its adequate protection calculation to the Middle District's, disbursement of adequate protection payments remains a hot topic. The Court is soliciting feedback from working groups to determine if payments should be disbursed prior to confirmation and if the lender should be able to elect a preferred disbursement schedule.

**MEDIATOR FEES**

While the Orlando and Jacksonville Divisions currently require the debtor to pay the mediator fee in the amount of $350, the Tampa Division and the Southern District of Florida require the debtor and lender to split the mediator fee. Notably, the mediator fee in the Southern District is $600, whereas Tampa's mediator fees align with the Jacksonville and Orlando Divisions. Summit attendees appeared agreeable to split the mediator fee equally. However, the Court is seeking input from working groups to confirm if lenders and debtors are in agreement to splitting the payment of the mediator, and whether a consensus as to the appropriate amount can be reached. Requiring payment of the mediator fee directly to the mediator and the payment of most or all of the fee prior to the mediator setting the initial mediation session were also suggested and unopposed.

**MEDIATOR SELECTION**

It was suggested to allow both parties to cooperate and select the mediator. While the default provisions of the Middle and Northern District's loss mitigation programs require the parties to collaborate on mediator selection, the Southern District's current program allows the debtor to select the mediator. In consideration for statewide uniformity, the Southern District's loss mitigation mediation working group is already in the early process of adopting changes to the order of referral, requiring the parties to agree or disagree upon a mediator within 7 days of the order, and direct the debtor to file a Notice of Selected Mediator. If the lender and debtor cannot agree on the mediator, the debtor would have to file the Certificate of Contested Matter Regarding Selection of Mediator and request for the clerk to appoint a mediator.

**COMMUNICATION**

Talks of uniformity throughout the state have brought up the means of communication between counsel, the debtors and the lender. The Southern District's use of the portal appears to be the favored method of communication. As a result, debtors may soon be required to use a secure portal for the submission of documents. The Court will not endorse one portal over another, but voiced the requirement that the portal must permit access to more than one attorney for the lender. The common consensus is that the debtor will pay the portal cost (currently a $25) and be required to upload documents to the portal prior to filing the motion requesting mediation. Portal security remains to be a concern for all parties.

**TIMELINE**

Chief Judge Karen Jennemann has indicated that if a motion for loss mitigation is filed within 90 days of the bankruptcy petition, the Court will enter an order directing the parties to mediation and permit the creditor to seek reconsideration, if appropriate. If the motion is filed outside that 90 day period, the Court will set a hearing on the motion to allow the debtor to explain the reason for the delay. If the motion is filed within the 90 day window, the mediation order will require completion of the mediation within 150 days of the petition.

**AFTER MEDIATION**

If the debtor is eligible for a loan modification, and accepts the terms offered by the lender, the parties may seek approval of any permanent modification by negative notice. According to Judge Jennemann, the Judges are leaning toward confirming plans subject to completion of the mediation process. The parties will also be obligated to record any permanent modification in the local public records; however it has not been determined who will be responsible for recording the documents.

## President's Message
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In football, sometimes a player or coach will criticize a referee. However, as lawyers, we know that our system cannot function if ad hominem attacks are allowed to confuse the facts, the law, or the application of the law to the facts. The Court is precluded from attacking lawyers and clients, and lawyers are similarly precluded from this sort of conduct as well. Another source of this mandate for lawyers is Rule 4-8.2 of the Rules of Professional Conduct, regulating The Florida Bar, which provides as follows:

(a) Impugning Qualifications and Integrity of Judges or Other Officers. A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, mediator, arbitrator, adjudicatory officer, public legal officer, juror or member of the venire, or candidate for election or appointment to judicial or legal office.

Accordingly, there is a legal basis and an ethical mandate that governs the conduct that we all generally know about as lawyers. Significantly however, there is no such limitation upon the public at large, or the press. Recognizing the entitlements of the First Amendment, it is still frustrating for me personally and professionally to read or watch news that periodically bashes a judge or tribunal unfairly.

I recently read an editorial in The Tampa Bay Times attacking a Bankruptcy Judge based in Wilmington, Delaware for a ruling on a record that clearly applies a set of findings of fact to a corpus of law to produce a specific result. The editorial did not question the facts, account for the law, or even fully appreciate the scope of the holding. Instead, it simply contained an ad hominem attack against the tribunal in a way that would be verboten for any lawyer. Bracketing the emotional appeals and other nonsense in the editorial, the thing that offended me as a bankruptcy lawyer and a member of the Bar is that it took a cheap shot at a judge in a way that no lawyer or judge would find to be appropriate. Society is developing in the right direction in terms of appreciating legal ethics, and our system of law. However, every judge and every lawyer has a duty to point out fallacious statements that improperly attack the judiciary. By writing this article, I feel like I have done my part in those regards. I recognize that our law firm has a role in the litigation about which the editorial was written, but I make that disclosure while at the same time noting that this article is not directed to any clients or lawyers involved in the specific dispute, but to the broader issue of respect for the judiciary. That being said, I have the utmost respect for the fine lawyers involved in the same.

**Judge Paskay Plaque Ceremony & Reception**

Court unveils plaque honoring Judge Alexander Pasky in ceremony with Judge Paskay's family on February 21, 2014

Tampa Bay Bankruptcy Bar Association 2013-2014 Membership Applications were sent via e-mail in the TBBBA News. Please renew your membership to continue receipt of *The Cramdown* and other membership benefits.

The Judicial Conference of the United States met on March 11, 2014, and approved changes to the Bankruptcy Court Miscellaneous Fee Schedule effective June 1, 2014. A summary of those changes follow:

The fee for filing a complaint increases to $350.00.
The following administrative fees are increased to the totals noted:
- For the filing of a petition under Chapter 7, 12, or 13, $75.00.
- For the filing of a petition under Chapter 9, 11, or 15, $550.00.
- When a motion to divide a joint case under Chapter 7, 12, or 13 is filed, $75.00.
- When a motion to divide a joint case under Chapter 11 is filed, $550.00.

As a consequence the increases effective June 1, 2014, the full fee for filing a:
Chapter 7 will be $335.00
Chapter 9 will be $1,717.00
Chapter 11 will be $1,717.00
Chapter 12 will be $275.00
Chapter 13 will be $310.00
Chapter 15 will be $1,717.00

## January TBBBA Luncheon

# YOU ARE COMMANDED to Comply with to Rule 45

*by: Philip Nodhturft, III,*
*Law Clerk to the Honorable Caryl E. Delano*

In the hit HBO series *The Newsroom*, lead actor Jeff Daniels plays Will McAvoy, the sharp, no-nonsense anchor and managing editor of "News Night," the nightly news broadcast for a major (fictitious) cable news network. In one particularly heated interview, McAvoy's guest reminds McAvoy that he came on the show voluntarily. McAvoy's response: "I don't have subpoena power. Everyone comes on this program voluntarily."

Although viewed as a well-timed retort in the show, McAvoy's comment also seems to lament the fact that the press does not have the power of subpoena. To be sure, the power of subpoena is a great one: the power to compel attendance and speech. And as Voltaire famously proclaimed, "with great power comes great responsibility."

In the arena of federal litigation, the subpoena power is granted to attorneys, as officers of the court, in Rule 45 of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 45(a)(3). Yet, for its basic purpose, Rule 45 has never been easily construed. In years past, there has been much confusion over various provisions of the rule, and a significant amount of litigation has ensued related to whether a subpoena has been properly issued, served, and complied with. Accordingly, Voltaire's great responsibility accompanying the subpoena power frequently falls to the courts to determine whether those wielding the power have done so properly and in accordance with the strictures of the rule.

As with most issues that are litigated nationwide before many different judges, differing interpretations of the rule were inevitable. Splits of authority have arisen, and confusion—and even more litigation—have followed. For example, courts have disagreed over whether former Rule 45(c)(3)(A)(ii) expanded a court's subpoena power beyond the 100-mile distance set forth in Rule 45(b)(2)(B). *Compare In re Vioxx Products Liability Litigation*, 438 F. Supp. 2d 664, 667 (E.D. La. 2006) (finding that "Rule 45(c)(3)(A)(ii) supports the inverse inference that Rule 45(b)(2) empowers the Court with the authority to subpoena…an officer of a party to attend a trial beyond the 100 mile limit") with *Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213 (E.D. La. 2008) (holding that Rule 45(b)(2) established firm geographic limitations within which a subpoena could be served, and that Rule 45(c)(3)(A)(ii) does not expand the scope or territorial reach of that power).

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States ("Committee"), which is the body charged with amending the Federal Rules of Civil Procedure, expressly cited the *Vioxx* and *Big Lots* cases in its official note regarding the 2013 amendments to Rule 45 as an example of why certain of the amendments were necessary. As those cases illustrate, the existence of conflicting judicial decisions can result in expensive pre-trial motions that delay the ultimate resolution of the case. As a result, the subpoena power, instead of facilitating the discovery process and assisting with the orderly presentation of a trial, often engenders further litigation, which, of course, translates to lengthier delays and larger bills for clients.

In an effort to clarify and simplify Rule 45, the Committee decided that several amendments were in order. The amendments became effective December 1, 2013, and hopefully will eliminate some of the uncertainty that existed in the former version of the rule and thereby dispense with extraneous litigation and conflicting judicial decisions. Although the Committee's official note discussing the 2013 amendments is lengthy, the major substantive revisions can be distilled into 5 main points.[1]

**1. Subpoenas are issued from the court where the action is pending and can be served nationwide.**
Prior to the 2013 amendments, Rule 45(a)(2)(A)-(C) implicated a number of different courts from which the subpoena had to be issued. The amended rule simply provides that the subpoena must issue from the court where the action is pending (i.e., the "issuing court"). Rule 45(a)(2). And in a related amendment, service of subpoenas can now be effectuated nationwide. *See* Rule 45(b)(2) ("A subpoena may be served at any place within the United States.").

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1 Credit must be given to the Jenner & Block law firm, and its attorneys Christopher Tompkins and Ethan Kent, who authored the article "Changes to Federal Rule of Civil Procedure 45 Effective December 1, 2013 Promise to Simplify Federal Subpoena Practice." The instant summary of the 5 major amendments to Rule 45 tracks that article, which is available at: http://jenner.com/system/assets/publications/12431/original/Changes_to_Federal_Rule_of_Civil_Procedure_45_Effective_December_1_2013.pdf?1384530386

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**2. Geographic limits intended to protect subpoena recipients are now based exclusively on the location where compliance can be required.**
Although a subpoena can now be served nationwide, there are still geographical considerations which limit the place of compliance. Rule 45(c)(1)(A) now states that a subpoena may command a person to attend a trial, hearing, or deposition only within 100 miles of where the person resides, is employed, or regularly transacts business in person. Alternatively, under Rule 45(c)(1)(B), a subpoena may command a person to attend a trial, hearing, or deposition anywhere within the state where the person resides, is employed, or regularly transacts business in person, but only if: (i) that person is a party or a party's officer; or (ii) the person is commanded to attend a trial and would not incur substantial expense.

Because Rule 45(c)(1)(B)(ii) references only a "trial" but omits any reference to attendance at a "hearing" or "deposition," it is unclear whether a non-party witness may ever be compelled by subpoena to travel more than 100 miles for a hearing or deposition, regardless of the potential expense associated with such travel.

The primary effect of amended Rule 45(c)(1)(B) is to overrule the majority line of cases, as represented by Vioxx, in which a party or a party's officer was compelled to travel more than 100 miles or out of state to testify at trial. However, depositions of parties and their officers and directors (as opposed to appearances at trial) are still governed by Rule 30, with sanctions for failure to appear as provided in Rule 37. The Committee note clarifies that the Rule 45 amendments do not change the existing law under Rules 30 or 37.

**3. The primary forum for resolving subpoena disputes is the court for the district where compliance is required. However, a new provision expressly permits transfers to the court in the district where the case is pending.**
Three provisions of Rule 45 address subpoena-related motions. The first is Rule 45(d)(2)(B)(i), which concerns a motion to compel filed by the subpoenaing party in response to a written objection by the subpoenaed party. The second is Rule 45(d)(3)(A), which allows the subpoenaed party to file a motion to quash the subpoena. The third is Rule 45(e)(2)(B), which applies when a party has inadvertently produced privileged documents to the opposing party. The rule offers the party in receipt of the purportedly privileged documents the opportunity to challenge the producing party's claim of privilege. In all three scenarios, the subpoena-related motion must be filed in the court for the district where compliance with the subpoena is required.

However, under Rule 45(f), which was added anew as part of the 2013 amendments, the court where compliance is required may transfer the subpoena-related motion to the issuing court (i.e., the court where the action is pending). But, such transfer can occur only if (i) the person subject to the subpoena consents; or (ii) the transferring court finds that "exceptional circumstances" exist. The Committee note states that the burden of showing that such exceptional circumstances exist rests with the proponent of the transfer.

**4. The amended rule highlights the notice and copy requirement to other parties.**
Rule 45(a)(4) now highlights in a separate provision the requirement that the subpoenaing party both give notice of the subpoena and serve an actual copy of the subpoena on each party before the subpoena is served on its intended recipient. This notice and copy requirement applies only where the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial.

While the notice requirement existed in the former version of the rule, it was buried in the last sentence of former Rule 45(b)(1). The amendment was designed to make this requirement more prominent and also to clarify that not only is notice of the subpoena required but also a copy of the subpoena itself.

**5. The contempt provision was amended to clarify that contempt sanctions may be applied to a person who disobeys a subpoena-related order.**
Former Rule 45(e) stated only that the issuing court may hold a person who was served with a subpoena in contempt for failure to obey. The failure to obey was sometimes understood as being limited to failure to obey the commands of the subpoena itself. The amended contempt provision, now found in Rule 45(g), clarifies that contempt sanctions can be imposed for failure to obey the subpoena itself, as well as any subpoena-related orders. And either the court where compliance is required or, in the event of a transfer, the issuing court can make such contempt findings.

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# Proposed New Local Rules
*(April Fools' Day Edition)*

The following are proposed new local rules. The proposals are posted below for public comment commencing on April 1, 2014. The public comment period ends on April 18, 2014.

**Rule 5005-3 Filing Papers – Size of Papers**
The amendment revises section (a) to provide requirements for legal memorandum:

- 20-page minimum
- Statutes and caselaw should never be cited.
- Gossip and innuendos will no longer be considered hearsay.
- Drawings and brainstorm maps are encouraged (remember: the more color, the better)

**Rule 5073-1 Photographs; Broadcasting or Televising; Use of Computers and Communication Devices**
The amendment revises the Administrative Order Possession and Use of Personal Electronic Devices in Federal Courthouse in the Middle District of Florida dated 9/26/2013 (#6:13-MC-94-ORL-22) and adds a new section. Due to severe electromagnetic interference with courthouse electronics, cellular devices predating 1996 are the only electronic devices allowed in federal courthouses in the Middle District of Florida. Typically, any cell phone larger than a bread box or comes in a bag will be acceptable.

**Rule 5072-1 Courtroom Decorum**
The amendment revises a tradition dated to 17th century England—the black robe. Tradition states that in 1694 the nation's justices attended the funeral of Queen Mary, and naturally wore black robes to show mourning. The mourning period lasted for many years and the black robe tradition eventually spread around the world. The amendment seeks to abandon the mourning look and instead welcome a color that represents compassion, nurturing and love—salmon. Psychologists say that shades of pink represent intuition and insightfulness, and can calm and reassure our emotional energy, and alleviate our feelings of anger. In color psychology, pink is also a sign of hope. Here's hoping you win your next case!

**Rule 5072-2 Courtroom Decorum**
The amendment requires all attorneys to curtsey or bow before the judge, opposing counsel, and the audience before proceeding with oral arguments.

**Rule 9019-2 Alternative Dispute Resolution (ADR); Mediation**
To ensure a successful mediation, the following should be utilized to defuse argument and disagreement:

a. Before responding to opposing counsel, thank the person for their interest, concern, comments or input to the situation.
b. Start your argument with the phrase, "Let me see if I understand you correctly." Then restate the person's argument verbatim.
c. Agree with at least one point of your opponent's argument, even if you believe their argument is nonsense. By conceding with one point, you show your opponent that you are not defensive about the situation and want to resolve the problem.
d. If all else fails and a solution does not appear within the first hour, all parties should embrace in a hug.

## You are Commanded

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**New Form Subpoenas for Use by Bankruptcy Practitioners**

So what do all of these amendments have to do with the practice of bankruptcy law? Because Rule 9016 of the Federal Rules of Bankruptcy Procedure incorporates Rule 45 in full, the form subpoenas used in bankruptcy cases and adversary proceedings have been updated to reflect the amendments to Rule 45. Previously, bankruptcy practitioners used three subpoenas: Form 254 (Subpoena for Rule 2004 Examination); Form 255 (Subpoena in an Adversary Proceeding); and Form 256 (Subpoena in a Case under the Bankruptcy Code). Those three prior forms were withdrawn from use on December 1, 2013. In their place are four new forms:

• Form 254 - Subpoena for Rule 2004 Examination
• Form 255 - Subpoena to Appear and Testify at a Hearing or Trial in a Bankruptcy Case (or Adversary Proceeding)
• Form 256 – Subpoena to Testify at a Deposition in a Bankruptcy Case (or Adversary Proceeding)
• Form 257 – Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Bankruptcy Case (or Adversary Proceeding)

These new form subpoenas, along with all of the other official forms, can be accessed at: http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx

**Conclusion**

Bankruptcy practitioners would be wise to carefully study the 2013 amendments to Rule 45 and the corresponding Committee note and also to compare the amended rule with the previous version of the rule so as to fully appreciate the scope and effect of the amendments. As we all become more familiar with the amendments and begin to use the new subpoena forms, hopefully some of the thorny issues that existed previously will disappear. And if you are able to comply with the requirements of the rule, when faced with a recalcitrant witness who questions why he must comply with your subpoena, you—unlike Will McAvoy—can respond, "Because I said so!"

# National Women's Football League: An Interview with Constance d'Angelis

**1. When did you play for the National Women's Football League? How long did you play football prior to joining the League?**

I played for the Toledo Troopers, one of the first teams in the National Women's Football League in 1971, 1972 and part of 1973, until I was injured. I sustained a spiral fracture of the fibula in my right leg.


**2. Why did you decide to join the League? Did you have to try-out? What did try-outs look like?**

I had never played football in my life. I was a fan, watched football and greatly appreciated Don Shula and the Miami Dolphins. I have been an athlete all my life but as a girl I didn't have much opportunity. I swam competitively, did gymnastics, which we called acrobatics, and played basketball. I was educated at parochial schools in Toledo Ohio and graduated from St. Ursula Academy– an all-girls high school. My favorite subject was gym class. They called me a 'Tomboy'.

I was a student at the University of Toledo in Life Sciences (Biology), pre-med curriculum. When I heard that there was a football team starting; I tried out. There were at least 40, maybe 50 women at the tryouts. 25 of us made the team. We practiced almost every day for over two hours. It was grueling but I got in great shape. I loved the sled.

**3. What team did you play for? How many teams were there in the League?**

When the Toledo Troopers first started, there were six teams in the League, all around the Great Lakes area. We traveled in a bus. I remember one time when we were leaving the bus someone called us a "Motley Crew". We weren't big on fashion…we had a game to play. We were a team.

**4. What position did you play?**

Although I played halfback, I was second string. As a middle linebacker I started every game. I loved it. Being quick and agile is an asset. Today, I laugh and say I was a terrific linebacker because I have such a low center of gravity.

**5. What is your favorite memory of your time spent with the League? What did you learn about yourself during your time with the League?**

I was a full-time student in sciences at the University, a single mom, on welfare and going to school on a Pell grant. I was determined. Football practice was a relief from the stress, studying and feeling of responsibility. I greatly enjoyed the competitiveness in a team-oriented atmosphere. There is nothing like a team that works together to accomplish a goal. In our case, we won. Being the best we could be and helping teammates to do the same was the main objective. The camaraderie and teamwork are the things I remember most and where my heart is centered.

My number was 34 and I was a good linebacker. I remember a time in New York when I intercepted a pass and ran 37 yards for a touchdown. My teammates picked me up and carried me to the center of the field. The crowd was cheering. I'll never forget it. We won the game.

**6. I understand the first female professional football team, the Toledo Troopers, contributed to the women's movement in the 1970s. During your time with the League, were there a lot of supporters of the predominantly male sport performed by females? Who were the supporters?**

At the time, there were no girls' sports sanctioned in college. Title IX passed in 1972. It wasn't effective until 1978. At the time I was playing football, I had no idea about any of this. I just wanted to play football-real football, with full gear and able to "knock heads".
As I look back on this experience, I realize that I lived at a time where massive changes in mind-set and legal status were emerging. I was just trying to survive.

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## Interview with Constance d'Angelis

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When I graduated from college the Affirmative Action program was in effect. I had graduated with a Bachelor of Science, cum laude and was offered a job with Owens Corning Fiberglas in the technical division. This company had never hired a woman, except for secretarial and support jobs. This was 1975. The world was changing.

Owens Corning Fiberglas held a 1976 Fiberglas Fitness Festival at the Cooper Ranch in Texas. 20 athlete employees were invited to compete. I was the only woman. We were divvied up into relay teams. We competed in swimming, obstacle course events and running. Running through a four foot diameter pipe was a hoot. I'm 5'3" and a middle linebacker. I won that relay. My teammates were more competitive than cooperative. But, after winning or placing in my assigned "legs" of the relay and gaining points for our team, there was a shift in attitude. What I remember most is that Don Shula was the keynote speaker at the awards banquet. He called me up on stage. There's nothing like being recognized by your hero.

**7. Have you heard of Perfect Season—a motion picture currently filming about Toledo's first female professional football team, the Toledo Troopers? What do you think about the production of this movie?**

The Toledo Troopers are now known as the winningest football team in history. A well-known director, Brett Leonard is making a movie. The movie is titled, PERFECT SEASON. That's because the Toledo troopers never lost a game from 1971 to 1978.
http://perfectseasonthemovie.com

I haven't read the script. The co-author is Guy Stout, who is the son of our coach, Bill Stout. My sense is that the movie could be focused on the coach, and his commitment to creating a winning team out of a motley crew. The star of our team, Linda Jefferson, one of only four women to be inducted into the American Football Association Hall of Fame was amazing. I expect we'll see her in the spotlight. She joined the Toledo Troopers in 1972. Undoubtedly, the societal focus of the movie will be on Title IX, which required colleges and universities to provide equal opportunities for Athletic scholarships. This year, 2014, a friend's daughter received an athletic scholarship in track at Georgia Tech. Wow!

Labor Day 2013, there was a kick off for the movie and a reunion for the Toledo Troopers. This was the first time I had gone back to Toledo after being transferred to Tampa Florida by Owens Corning Fiberglas. I met up with old teammates and connected with my best childhood friend. I was saddened to learn that our coach, Bill Stout, and assistant coach, Jim Wright had died.
Because the movie kick-off event was held at the Maumee River Yacht Club in Toledo, and I belong to the Davis Island Yacht Club in Tampa, I exchanged Club Burgees with one of their former Commodores. There is an article and photos in the DIYC Log October 2013.

All of the team members had their pictures taken with the director, Brett Leonard and the photos are on Facebook. https://www.facebook.com/photo.php?fbid=162110370655119&set=a.162109700655186.1073741834.138293233036833&type=1&theater

(photo number 31 of 42 photos taken with Director at the Perfect Season Kickoff at Maumee River Yacht Club in Toledo over Labor Day weekend 2013)

There's a Toledo Troopers team picture on the PERFECT SEASON website:

http://perfectseasonthemovie.com/history.
In the team photo, I'm number 34.

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# People on the Go

Jennis & Bowen, P.L. is pleased to announce the newest associate attorney to their firm Eric D. Jacobs. Mr. Jacobs is a graduate from Stetson University College of Law and interned for the late Honorable Alexander Paskay, Chief Judge Emeritus. Mr. Jacobs has significant experience both corporate and individual debtors in the chapter 11 bankruptcy process. In his leisure time, Eric enjoys spending time with his wife, Allison and his son, Grayson.

Iurillo Law Group, P.A. Announces New Partners and Name Change

Camille J. Iurillo is pleased to announce that Sabrina C. Beavens (l) and Gina M. Pellegrino (r) have been promoted to Partner and that the name of the firm has been changed to Iurillo Law Group, P.A

*The Cramdown*
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