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Litigators Behaving Badly: Ethics and Trial Tactics

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ETHICAL PITFALLS IN PREPARING AND PRESENTING WITNESSES AT TRIAL

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ETHICAL PITFALLS IN PREPARING AND PRESENTING WITNESSES AT TRIAL

Trial lawyers hate to lose. They have often invested months, or even years, marshalling all the evidence, briefing the various motions, and pushing the case to an eventual trial. By that point, their client relationships, as well as their own professional reputations, may depend on achieving a successful outcome at trial. They will look for every edge or advantage at trial. But the desire to win must never prevail over the importance of ethical conduct. At trial, they tell their client's story through witnesses. Thus, every lawyer should be mindful of the ethical pitfalls involved in preparing and presenting witnesses at trial.

Preparing Witnesses

Witness preparation—which is also known as "horse-shedding" or "wood-shedding" a witness—has long been recognized as an essential part of trial advocacy.[1] To be effective, witness testimony must be coherent, credible, and concise. Most witnesses, however, are not equipped to provide such testimony without a lot of preparation. For starters, witnesses are often asked to testify about events that occurred months and years prior to their testimony. This is difficult without review of contemporaneous documents and comparison to the recollections of others. Even then, the question-and-answer format of witness examination—where the witness must engage in a conversation in front of the jury and/or judge—is unfamiliar and uncomfortable to most witnesses. And cross-examination can be confusing, frustrating, and downright intimidating.

Preparing witnesses to testify is not only a good practice, but may be an ethical obligation. Although the Model Rules of Professional Conduct do not specifically require lawyers to prepare witnesses, the rules do impose duties of competent and diligent representation.[2] Model Rule 1.01, for example, requires a lawyer to engage in "preparation reasonably necessary for the representation."[3] Some courts, moreover, have interpreted this rule to impose "an ethical duty to prepare a witness" to testify.[4] Other authorities and commentators have reached the same conclusion.[5] Even if failure to prepare a witness does not rise to the level of an ethical violation, it may constitute malpractice.[6]

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[1] In the early 1800s, James Fenimore Cooper coined the phrase "horse-shedding the witness," referring to the use of carriage sheds behind the courthouse for last-minute witness preparation. *See* JAMES W. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK at 99 (4th ed. 2005).

[2] Nearly all states, including Kansas and Missouri, have adopted the Model Rules of Professional Conduct, either in whole or in large part. California is the only state that has not adopted the Model Rules.

[3] MODEL RULES OF PROF'L CONDUCT r. 1.01 (AM. BAR ASS'N 1983). Similarly, Model Rule 1.3 requires a lawyer to "act with reasonable diligence" in representing a client.

[4] *In re Stratosphere Corp. Sec. Litig.*, 182 F.R.D. 614, 621 (D. Nev. 1998); *Christy v. Penn. Turnpike Comm'n*, 160 F.R.D. 51, 53 (E.D. Pa. 1995).

[5] *See, e.g.*, D.C. Bar Op. No. 79 (1979) ("A lawyer who did not prepare his or her witness for testimony, having had an opportunity to do so, would not be doing his or her professional job properly."); John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 288 (1989) ("A lawyer who does not prepare all witnesses is derelict in his professional duties").

[6] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 116 cmt. b (AM. LAW INST. 2000).

Despite the importance of this issue, it can be difficult to discern the line between proper witness preparation and improper witness coaching. The Model Rules contain several broad ethical prohibitions, stating that a lawyer shall not:

- "counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal [e.g., perjury] or fraudulent";[7]
- "counsel or assist a witness to testify falsely";[8]
- "offer evidence that the lawyer knows to be false";[9] or
- "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[10]

These seemingly clear prohibitions, however, contain some hidden ambiguities. Model Rule 3.3, for example, requires that the lawyer "knows" that he or she is offering false testimony, but such knowledge can be "inferred from the circumstances."[11] And it is unclear how much information is sufficient to satisfy this inferred knowledge standard. Similarly, the warning in Model Rule 8.4 provides little guidance as to what constitutes "dishonesty, fraud, deceit or misrepresentation." As one commentator noted, "everyone knows that it is wrong to ask a witness to lie. What is not known is how far a lawyer can properly push a witness short of that."[12]

Fortunately, the Restatement (Third) of the Law Governing Lawyers provides guidance on permissible ways to prepare witnesses. Specifically, it states that a lawyer may:

- discuss the role of the witness and effective courtroom demeanor;
- discuss the witness's recollection and probable testimony;
- reveal to the witness other testimony or evidence that will be presented and ask the witness to reconsider the witness's recollection or recounting of events in that light;
- discuss the applicability of law to the events at issue;

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[7] MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 1983).

[8] MODEL RULES OF PROF'L CONDUCT r. 3.4(b) (AM. BAR ASS'N 1983). Comment 5 to Model Rule 3.4 states that "[f]air competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly coaching witnesses, obstructive tactics in discovery procedure, and the like." However, the comment offers no guidance on exactly what constitutes "improperly coaching witnesses."

[9] MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(3) (AM. BAR ASS'N 1983).

[10] MODEL RULES OF PROF'L CONDUCT r. 8.4(c) (AM. BAR ASS'N 1983).

[11] MODEL RULES OF PROF'L CONDUCT r. 3.3 cmt. 8 (AM. BAR ASS'N 1983) ("A lawyer's knowledge that evidence is false . . . can be inferred from the circumstances.").

[12] Charles Silver, *Preliminary Thoughts on the Economics of Witness Preparation*, 30 TEX. TECH. L. REV. 1383, 1383 (1999).

- review the factual context into which the witness's observations or opinions will fit;
- review documents or other physical evidence that may be introduced;
- discuss probable lines of cross-examination that the witness should be prepared to meet; and
- rehearse testimony and even suggest choice of words that might be employed to make the witness's meaning clear.[13]

Yet even lawyers following this guidance may easily stumble across the line into unethical conduct. For instance, if a lawyer lectures on the applicable law before knowing the witness's version of the facts, the lawyer runs the risk of suggesting what the testimony should be. This occurs in the infamous scene from "Anatomy of a Murder," in which the criminal defense lawyer lectures his client on the defenses to a murder charge in their first meeting.[14] The client then immediately adapts his story to buttress one of the defenses.[15]

Similar concerns arise when a lawyer suggests that a witness use specific words in his or her testimony. Obviously, a lawyer may offer a choice of words to improve the clarity and accuracy of the witness's testimony.[16] In one case, for example, the criminal defense lawyer suggested his client say that he "cut" rather than "stabbed" the victim.[17] The court noted that "defense counsel was trying to properly do his job as counsel. Suborning perjury is different from education of the witness about the power of words, whether 'cut,' 'stab,' or 'accidentally strike in self defense.'"[18] However, a lawyer may not suggest particular words that are calculated to convey a false or misleading impression.[19] In a recent Fifth Circuit case, the court affirmed sanctions against lawyers who—through their expert—had improperly influenced witness testimony with terms of art like "retaliation" and "high crime area," which the two witnesses had never used before, including in a prior trial.[20] As the court explained, "[a]n attorney enjoys extensive leeway in preparing a witness to testify truthfully, but the attorney crosses a line when she influences the

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[13] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 116 cmt. b (AM. LAW INST. 2000)

[14] ANATOMY OF MURDER (Columbia Pictures 1958). The movie was based on a 1958 play of the same name written by Judge John D. Voelker and published under the pseudonym "Robert Travers."

[15] In addition to the ethical reasons, there are practical reasons to delay a lecture on the law until after the witness has told his or her entire story to the lawyer. After hearing a lecture, the witness might intentionally or unintentionally omit details which could be important to developing other legal theories in the case. Or the witness might conceal facts that could be damaging if first raised in cross-examination, and not disclosed and properly dealt with in direct examination.

[16] *See* D.C. Bar Op. No. 79 ("[T]he fact that the particular words in which testimony . . . is cast originated with a lawyer rather than the witness . . . has no significance so long as the substance of that testimony is not, so far as the lawyer knows or ought to know, false or misleading.").

[17] *Haworth v. Wyoming*, 840 P.2d 912, 920 (Wyo. 1992).

[18] *Id.* at 920 n.3.

[19] *See id.*; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 116 cmt. b (AM. LAW INST. 2000).

[20] *Ibarra v. Baker*, 338 F. App'x 457, 466-68 (5th Cir. 2009).

witness to alter testimony in a false or misleading way."[21] Because of this risk, "[a]ttorneys should exercise the utmost caution . . . in recommending changes in word choice to a witness."[22]

Another sensitive area involves preparing the witness using other testimony and evidence obtained in the case. It could cause the witness to fabricate facts consistent with that evidence.[23] But this does not prohibit a lawyer from attempting to persuade the witness to provide testimony for which a factual basis exists, even if that testimony is inconsistent with the witness's initial recollection of the facts. For example, the Fifth Circuit held that the plaintiff's attorneys did not run afoul of ethical rules when they presented a witness with a draft affidavit that contained "new facts" provided by other witnesses.[24] The court explained:

> It is one thing to ask a witness to swear to facts which are knowingly false. It is another thing, in an arms-length interview with a witness, for an attorney to attempt to persuade her, *even aggressively*, that her initial version of a certain fact situation is not complete or accurate.[25]

Indeed, attempting to persuade a witness to provide testimony inconsistent with his or her initial recollection is, in some instances, not only permitted but required. Under Model Rule 3.3(a)(3), a lawyer shall "not offer evidence that the lawyer knows to be false." Thus, if a witness states an intention to provide testimony that the lawyer knows to be false, the lawyer must either convince the witness to testify correctly or, failing that, refuse to offer the witness's testimony on that matter.[26]

An even thornier issue arises if the witness intends to give testimony that the lawyer believes—but does not know—to be false. The prohibition in Model Rule 3.3(a)(3) against offering false evidence only applies if the lawyer knows that the evidence is false. The rule permits a lawyer to refuse to offer evidence that he or she "reasonably believes is false."[27] In forming this belief, however, the lawyer "should resolve doubts about the veracity of testimony or other evidence in favor of the client."[28] And though the lawyer may refuse to offer suspect evidence, "[t]hat discretion should be exercised cautiously . . . in order not to impair the legitimate interests of the client."[29] At the same time, the lawyer should probably advise that offering such evidence

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[21] *Id.* at 466. This case also demonstrates that the use of an expert witness or trial consultant does not absolve a lawyer from his or her ethical responsibilities. In fact, Model Rule 5.3 states that "a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if . . . the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved." MODEL RULES OF PROF'L CONDUCT r. 5.3(c)(1) (AM. BAR ASS'N 1983).

[22] Joseph D. Piorkowski, Jr., *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of "Coaching"*, 1 GEO. J. LEGAL ETHICS 389, 402 (1987).

[23] An old, but frequently cited New York opinion notes that a lawyer's duty is "to extract the facts from the witness, not pour them into him." *In re Eldridge*, 82 N.Y. 161, 171 (1880).

[24] *Resolution Trust Corp. v. Bright*, 6 F.3d 336, 341 (5th Cir. 1993).

[25] *Id.* (emphasis added).

[26] MODEL RULES OF PROF'L CONDUCT r. 3.3 cmt. 6 (AM. BAR ASS'N 1983).

[27] MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(3) (AM. BAR ASS'N 1983).

[28] MODEL RULES OF PROF'L CONDUCT r. 3.3 cmt. 8 (AM. BAR ASS'N 1983).

[29] MODEL RULES OF PROF'L CONDUCT r. 3.3 cmt. 15 (AM. BAR ASS'N 1983).

may impair the witness's credibility and the lawyer's effectiveness as an advocate.[30] If the client nonetheless wishes "to have suspect evidence introduced, generally the lawyer should allow the finder of fact to assess its probative value."[31]

In sum, lawyers have significant leeway in preparing a witness to testify. Lawyers may use various techniques, including discussing applicable law with the witness, challenging the witness with other testimony and evidence, and rehearsing the witness's testimony and suggesting specific words to make the witness's meaning clear. In employing each of these techniques, however, lawyers must exercise caution to ensure that they do not influence the witness to testify in a false or misleading way. So long as the witness is comfortable that his or her testimony is accurate—and the lawyer can be sure of this—then the witness preparation process is probably within ethical bounds.[32]

Presenting Witnesses

Presenting witnesses raises many of the same ethical challenges as preparing witnesses. Indeed, most of the ethical rules related to witness preparation are really rules about presentation of witness testimony. Model Rule 3.3(a)(3), for instance, prohibits a lawyer from offering testimony that he or she knows is false.[33] As explained above, if the lawyer learns during witness preparation that a witness intends to provide testimony that the lawyer knows to be false, the lawyer should attempt to convince the witness not to offer such testimony.[34] If the lawyer believes that the witness has been persuaded to testify correctly, the lawyer may then examine that witness in the usual manner. If, however, the lawyer does not receive satisfactory assurances that the witness will testify truthfully as to the matter in question, the lawyer must not elicit the witness's testimony on that matter.[35] This does not mean that the lawyer cannot call that witness at all. To the contrary, "the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false."[36]

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[30] *See* MODEL RULES OF PROF'L CONDUCT r. 3.3 cmt. 9 (AM. BAR ASS'N 1983) ("Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate.").

[31] MODEL RULES OF PROF'L CONDUCT r. 3.3 cmt. 15 (AM. BAR ASS'N 1983).

[32] Another common ethical dilemma involves whether it is appropriate to compensate a fact witness. Comment 3 to Model Rule 3.4 states that "it is not improper to pay a witness's expenses," but notes that many jurisdictions prohibit the payment of any fees or other compensation to a fact witness. MODEL RULES OF PROF'L CONDUCT r. 3.4 cmt. 3 (AM. BAR ASS'N 1983). The American Bar Association, however, has stated in a formal opinion that a fact witness may be paid "reasonable" compensation, which is measured by any "direct loss of income" or "the reasonable value of the witness's time based on all relevant circumstances." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 96-402 (1996). Further, "the witness may also be compensated for time spent in reviewing and researching records that are germane to his or her testimony, provided, of course, that such compensation is not barred by local law." *Id.*

[33] Model Rule 3.3 does not define "false" testimony. The Restatement (Third) of the Law Governing Lawyers, however, provides the following broad definition: "False testimony includes testimony that the lawyer knows to be false and testimony from a witness who the lawyers knows is only guessing or reciting what the witness has been instructed to say." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §120 cmt. d (AM. LAW INST. 2000).

[34] *See* MODEL RULES OF PROF'L CONDUCT r. 3.3 cmt. 6 (AM. BAR ASS'N 1983).

[35] *See id.*

[36] *Id.*

Of course, not everything can be anticipated. A lawyer might offer testimony or other evidence that he or she does not know is false at the time, but later learns of its falsity. If the evidence is material, the lawyer must take "reasonable remedial measures."[37] As an initial matter, the lawyer should confer with the client, advise the client of the lawyer's duty of candor to the court, and seek the client's consent to correct or withdraw the false testimony or evidence.[38] In many circumstances, especially where the client was unaware of the testimony's falsity, this can be done in a manner that does not cause significant harm to the client. After all, everyone makes mistakes, and judges and juries usually understand that. However, if the client refuses to authorize the lawyer to correct or withdraw the false evidence, the lawyer "must take further remedial action," including: (1) withdrawal from the representation; or (2) if withdrawal would not be permitted or would not undo the effect of the false evidence, the lawyer must make such disclosure to the court as is "reasonably necessary to remedy the situation," even if doing so requires the lawyer to reveal confidential information.[39]

It is important to note that a lawyer has "no responsibility to correct false testimony or other evidence offered by an opposing party or witness."[40] Rather, the lawyer's responsibility extends only to "false testimony elicited by the lawyer, as well as such testimony elicited by another lawyer questioning the lawyer's own client, another witness favorable to the lawyer's client, or a witness whom the lawyer has substantially prepared to testify."[41] Thus, if an opposing party or witness offers false evidence, the lawyer may remain silent and has no duty to correct the evidence. However, the lawyer "may not attempt to reinforce the false evidence," such as by arguing to the judge or jury that the false testimony or evidence should be accepted as true.[42]

These prohibitions regarding false evidence do not mean a lawyer must disclose facts adverse to his or her client's position. Normally, the lawyer must present only one side of the matter pending before the court, and the other side should be presented by the opposing party.[43] But in an ex parte proceeding, such as an application for a temporary restraining order, there is "no balance of presentation by opposing advocates."[44] In such a proceeding, therefore, the lawyer must disclose "material facts known to the lawyer and that the lawyer reasonably believes are

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[37] *See* MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(3) (AM. BAR ASS'N 1983).

[38] *See* MODEL RULES OF PROF'L CONDUCT r. 3.3 cmt. 10 (AM. BAR ASS'N 1983).

[39] *See id.* What if the lawyer learns about false evidence or testimony after a hearing or trial has concluded? The lawyer's duties under Model Rule 3.3 continue until the "conclusion of the proceeding," which is defined as when a final judgment has been affirmed on appeal or the time for appellate review has passed. MODEL RULES OF PROF'L CONDUCT r. 3.3(c) & cmt. 13 (AM. BAR ASS'N 1983). Thus, if the order or judgment could still be appealed, the lawyer has a continuing obligation to take remedial actions with respect to the false evidence.

[40] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 cmt. d (AM. LAW INST. 2000).

[41] *Id.*

[42] *Id.*

[43] MODEL RULES OF PROF'L CONDUCT r. 3.3 cmt. 14 (AM. BAR ASS'N 1983).

[44] *Id.*

necessary to an informed decision."[45] This obligation may even require disclosure of certain confidential information, but not privileged information.[46]

Even if the witness testifies truthfully, a lawyer may face other ethical issues in a direct examination. For example, the inappropriate use of leading questions may cross ethical lines. If the judge has explained when leading questions may or may not be used, or has just sustained an objection to such a question, then a lawyer who nonetheless asks an impermissible leading question—especially a blatantly leading question (e.g., "Isn't it true that . . . ?")—may violate Model Rule 3.4(c),[47] which states that a lawyer shall not "knowingly disobey an obligation under the rules of a tribunal."[48] Similarly, a lawyer may violate this rule by referring to substantively inadmissible evidence, such as evidence that has been ruled to be inadmissible through a pretrial motion in limine.[49] Even in the absence of any prior ruling, this conduct may violate Model Rule 3.4(e), which forbids a lawyer from alluding to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence.[50] "If any reasonable attorney would realize that the controlling rules preclude the introduction of the evidence, its attempted introduction would be a disciplinary offense."[51]

What about cross-examination? Surely, a lawyer may adopt a "no-holds-barred" approach to take down an adverse witness, right? Not necessarily. The threshold question, of course, is whether the lawyer should cross-examine the witness at all. If the witness has testified truthfully in direct examination, a lawyer may not conduct a cross-examination to impeach that witness, according to some commentators.[52] Their rationale hinges on Model Rule 3.1, which prohibits a lawyer from asserting or controverting an issue, unless there is a factual basis for doing so. Of course, if the witness has not testified truthfully or has omitted key facts, a lawyer certainly can (and probably should) conduct cross-examination. In the heat of cross-examining such a witness, however, the lawyer must be careful to avoid making improper comments and insulting remarks.[53]

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[45] *Id.*; *see also Comm. on Prof'l Ethics & Conduct v. Postma*, 430 N.W.2d 387, 391 (Iowa 1988) (suspending a lawyer for presenting ex parte application for an order transferring funds without disclosing ongoing controversy over entitlement to such funds).

[46] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 112 cmt. b (AM. LAW INST. 2000).

[47] *See* WILLIAM H. FORTUNE ET AL., MODERN LITIG. & PROF'L RESPONSIBILITY HANDBOOK: THE LIMITS OF ZEALOUS ADVOCACY § 11.7, at 403-05 (2d ed. 2001) (arguing that the use of leading questions is another form of witness coaching and explaining when the use of such questions might constitute an ethical violation).

[48] MODEL RULES OF PROF'L CONDUCT r. 3.4(c) (AM. BAR ASS'N 1983).

[49] *See* FORTUNE, *supra* note 47, § 11.10, at 412.

[50] *See id.*

[51] *Id.* § 11.10, at 413.

[52] *Id.* § 12.3, at 436 (citing CHARLES WOLFRAM, MODERN LEGAL ETHICS 651 (1986)). "Whether it is ethically permissible to suggest that a truthful witness is lying during cross-examination has been famously characterized as one of the 'three hardest questions'" in terms of the ethical dilemmas facing lawyers. Eleanor W. Myers & Edward D. Ohlbaum, *Discrediting the Truthful Witness: Demonstrating the Reality of Adversary Advocacy*, 69 FORDHAM L. REV. 1055, 1055 (2000).

[53] *See, e.g., United States v. Lowrimore*, 923 F.2d 590, 593 (8th Cir. 1991) ("You know Mr. Lowrimore, I've seen you testify, this is the third time now, and the main thing that struck me—I've never seen any remorse that your wife is dead."); *Hawk v. Superior Court*, 116 Cal. Rptr. 713, 724 (Cal. Ct. App. 1974) (affirming contempt ruling against a lawyer who, after having been admonished not to interject personal comments, told a witness who was having trouble with directions not to take up flying).

Model Rule 3.4(e) forbids personal opinions about the credibility of witnesses. Model Rule 4.4(a), moreover, requires a lawyer to refrain from acts "that have no substantial purpose other than to embarrass . . . a third person," including a witness.[54] As one commentator notes, "good ethics are good tactics. Seldom does a lawyer win an exchange with a witness that is punctuated by personal insults."[55]

Conclusion

Lawyers face many ethical pitfalls in preparing and presenting witnesses at trial. At times, lawyers may be torn between their ethical obligations and their duty of zealous advocacy, as well as a strong desire and immense pressure to win the trial. But that desire and pressure must never prevail over the importance of ethical conduct in dealing with witnesses.

[54] MODEL RULES OF PROF'L CONDUCT r. 4.4(a) (AM. BAR ASS'N 1983).

[55] FORTUNE, *supra* note 47, § 12.4.1, at 438.

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Kansas City, Missouri

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The Section 1111(b)(2) Election

Judge Robert E. Nugent III
U.S. Bankruptcy Court, District of Kansas

The Problem

Metcalf Hotel, L.L.C. owns the Mar-a-Pondo Hotel which overlooks a small body of water in Overland Park. Metcalf files a chapter 11 reorganization case. Metcalf's principal secured creditor, Lodgebank, holds a $10.0 million non-recourse note that is secured by a first mortgage on the hotel, a security interest in its equipment, and an assignment of rents and accounts receivable. Post-petition, Lodgebank assigns its claim to HedgeLender Fund for $5.0 million. Metcalf files a plan stating the value of Hedge's collateral (the hotel and other assets) is $4.0 million and proposing to cram Hedge down under § 1129(b)(2) by bifurcating its secured claim, treating the balance of the claim as unsecured. Obviously, there is little hope of a dividend for the unsecured creditors. Hedge thinks its collateral is worth *much* more and files a motion under § 506 and Rule 3012 seeking an order that the hotel's value is $11.0 million. Hedge also asks for more time to make an § 1111(b) election, at least until the valuation hearing is completed.

After hearing from two appraisers, the court values the Mar-a-Pondo at $6.0 million for purposes of plan confirmation and allows Hedge's secured claim in that amount. Hedge files its § 1111(b) election and Metcalf amends the plan to incorporate the court's valuation and propose fully-secured treatment. But, shortly before the confirmation hearing on Metcalf's plan, Hedge files a competing plan of reorganization in which it proposes to bifurcate its claim into a secured portion (based upon the court's valuation) and a general unsecured claim (for the deficiency).

Questions for Discussion

1. What are some situations in which a creditor should consider exercising the election?
    a. Difficult-to-value collateral or down market.
    b. Rising market.
    c. Debtor cannot pay in full, forcing forfeiture or foreclosure.
2. When might it be better to preserve your §1111(b)(1)(A) recourse status?
    a. Sale in prospect; you can still credit bid, §363(k) up to the amount of your "allowed claim," i.e. all of it.
3. Downsides to election?
    a. If you were a non-recourse creditor before, the loss of recourse unsecured deficiency claim—no dividend and no ability to block voting in the unsecured class.
    b. Lower interest rates may allow debtor to string out secured claim payout.
4. Debtor responses to election?
    a. Interest in collateral is inconsequential?
    b. Propose lengthy payout at lower interest rates?
5. Can you un-elect?
    a. If you're non-recourse, the nature of your claim has changed.
    b. Surest way out of the election is the failure of the plan to be confirmed. "Only if the plan is not confirmed may the class of secured creditors thereafter change its prior election." Adv. Comm. Notes, Fed. R. Bank. P. 3014 (1983).
    c. What about filing your own plan?
6. How do we treat the elected claim in the plan?

Analysis

I. What is the "1111(b)(2) election?"

A. Section 1111(b)(2) is better understood in context with subsection (b)(1). Section 1111(b)(1)(A)(i) converts prepetition nonrecourse claims into recourse claims. It provides that secured claims will be allowed or disallowed under § 502 as a claim with recourse against the debtor, whether or not recourse exists outside of bankruptcy law, unless the creditor class "elects" subparagraph (b)(2) treatment [a nonrecourse claim]:

> A claim secured by a lien on property of the estate shall be allowed or disallowed under section 502 of this title the same as if the holder of such claim had recourse against the debtor on account of such claim, whether or not such holder has such recourse, unless – (i) the class of which such claim is a part elects, by at least two-thirds in amount and more than half in number of allowed claims of such class, application of paragraph (2) of this subsection;[1]

See also In re 680 Fifth Ave. Associates, 29 F.3d 95, 97 (2nd Cir. 1994):

> As stated by the bankruptcy court, '[i]n Chapter 11, § 1111(b) determines the treatment of undersecured claims secured by liens on property of the estate.' . . . Section 1111(b) allows an undersecured creditor either to elect to have its entire claim treated as secured, or to have the claim bifurcated into secured and unsecured portions, notwithstanding the fact that under 11 U.S.C. § 502(b)(1), the nonrecourse nature of the loan would otherwise bar a deficiency claim for the unsecured portion of the loan.

[1] 11 U.S.C. § 1111(b)(1)(A)(i).

Note that, in most cases, each secured creditor is classified into a single class of its own.

B. By making the "election" under § 1111 (b)(1)(A)(i) a secured creditor elects to decline recourse treatment of its claim, rendering it fully secured to the extent it is allowed per §1111(b)(2). *See In re 680 Fifth Ave. Associates*, 29 F.3d 95, 97 (2nd Cir. 1994) (impetus behind enactment of § 1111(b) was to protect the rights of nonrecourse lienholders in chapter 11 reorganizations by providing that a claim secured by a lien on property of the estate is treated as giving the lienholder recourse against the debtor, whether or not recourse exists under non-bankruptcy law or the creditor's loan documents.).

C. There are two circumstances in which a secured creditor may not elect: when its security has little or no value or when its security is to be sold under §363 or under the plan. Subsection (b)(1)(B) describes these circumstances:

> (i) the interest on account of such claims of the holders of such claims in such property is of inconsequential value; or
> (ii) the holder of a claim of such class has recourse against the debtor on account of such claim and such property is sold under section 363 of this title, or is to be sold under the plan.[2]

1. The inconsequential value limitation arises in cases where senior secured creditors are undersecured and there is no collateral value to support a junior lienholder's claim. *See In re 500 Fifth Ave. Assocs.*, 148 B.R. 1010 (Bankr. S.D. N.Y. 1993) (creditor whose subordinate lien was

[2] 11 U.S.C. § 1111(b)(1)(B).

completely unsecured could not elect to have its claim treated as wholly secured under § 1111(b)), *aff'd* 1993 WL 316183 (S.D.N.Y. May 21, 1993). *See also In re Tuma*, 916 F.2d 488 (9th Cir. 1990) (issue of whether controlling stock in newly reorganized corporation pledged to undersecured creditor was of "inconsequential value" and precluded creditor's § 1111(b) election).

2. The "sale" limitation on a recourse creditor's electing under § 1111(b) exists because the secured creditor may already protect its interest by credit bidding its debt at the sale and recovering the collateral, thus receiving the benefit of its bargain without the special treatment of § 1111(b). Note that this exception specifically applies only to recourse creditors. In a case where the undersecured creditor did not have a lien on all of debtor's assets but the § 363 sale was of debtor's assets in bulk, implications for credit bidding were discussed. *See In re R.L. Adkins Corp.*, 784 F.3d 978 (5th Cir. 2015) (undersecured mechanic's lien claimant against debtor's mineral interests was not entitled to § 1111(b)(2) election where plan proponent recognized mechanic's lien and proposed a § 363 sale of debtor's mineral interests in its plan with creditor's right to credit bid at the sale; concurring opinion held that mechanic's lien claimant waived its § 1111(b) election by failing to pursue it at the confirmation hearing, and noting court

should settle objections to creditor's § 1111(b) election prior to the confirmation hearing.).

II. What is the effect of making the § 1111(b)(2) election?

A. When a creditor makes a § 1111(b) election, it opts to have its allowed claim treated as a fully secured and waives its unsecured claim for any deficiency, notwithstanding § 506(a)'s bifurcation of its claim into secured and unsecured portions, changing how the debtor must treat the fully secured claim. *See* §§ 1111(b)(2) and 1129(b)(2); *see also* paragraph II.C below. Note that any secured creditor may elect whether it was recourse or nonrecourse prepetition, subject to the limitations of § 1111(b)(1)(B). By electing, the secured creditor waives its recourse status and its collateral is deemed to have the same value as the claim.

1. In our fact pattern, Hedge's fully secured claim would be allowed at $10.0 million. If Hedge hadn't made the § 1111(b)(2) election, its allowed secured claim would be $6.0 million and its general unsecured claim would be $4.0 million.

B. The election is binding with respect to the plan. Fed. R. Bankr. P. 3014. Only if confirmation of that particular plan is denied or if the plan is materially modified after the election is the election no longer binding. *See* Advisory Committee Notes to Rule 3014; 9 COLLIER ON BANKRUPTCY ¶ 3014.01[4] (16th ed.).

1. In our pattern, Metcalf's amendment of its plan Hedge elected wasn't a material modification; the modification was required to reflect the court's determination of the value of the collateral and the election was based upon the court-determined valuation on Hedge's § 506 motion.

C. Section 1129(b)(2) – Comparative treatment of a bifurcated claim with an elected-to claim in a plan.

1. Suppose Hedge had stood pat on the claim it acquired. Its $10.0 million claim, secured by $6.0 million of collateral, would be treated as two claims, a $6.0 million secured claim and a $4.0 million unsecured claim. The secured portion would be entitled to treatment that allowed Hedge to retain its lien and to receive "deferred cash payments" totaling the allowed amount of the [fully-secured] claim and having "a value, as of the effective date" of the value of the collateral.[3] Thus, Hedge would receive the equivalent of a note for $6,000,000 at a market rate of interest that is secured by the hotel assets and whatever pro rata dividend the debtor can pay in connection with Hedge's $4,000,000 unsecured claim.

2. But Hedge elected up. That means it is entitled to retain its lien and to receive "deferred cash payments" totaling the allowed amount of the [fully-secured] claim and that have "a value, as of the effective date" of the value of the collateral. Because Hedge is now fully secured, its stream of

[3] 11 U.S.C. § 1129(b)(2)(A)(i). Or the debtor could propose to sell the Mar-a-Pondo and pay Hedge the proceeds or surrender the hotel, § 1129(b)(2)(A)(ii), or otherwise provide Hedge with the indubitable equivalent of its claim, §1129(b)(2)(B)(iii).

payments must total $10,000,000 while having a present value of $6,000,000. *See First Fed. Bank of Cal. v. Weinstein (In re Weinstein),* 227 B.R. 284, 294 (9th Cir. BAP 1998). Another way to look at this is that the creditor will receive a note for $10,000,000 note at confirmation that is only worth $6,000,000 because of a below-market interest rate (or maybe even no interest) depending on the duration of the payment schedule.

a) The shorter the term, the higher the effective interest rate. A note could also provide for a prepayment or cash-out that includes an amount sufficient to pay the total amount of the allowed claim—the §1111(b) "premium." This must be so; if the creditor received a $6.0 million note with payments totaling $10.0 million, without the "premium" provision, the debtor could cash out for $6.0 million the day after confirmation and leave the creditor shy $4.0 million, but without an unsecured claim for its deficiency. *See In re Brice Road Developments, L.L.P.*, 392 B.R. 274, 284-287 (6th Cir. B.A.P. 2008); *In re Weinstein*, 227 B.R. 284, 294 (9th Cir. B.A.P. 1998).

3. The interest portion of the payments apply to reduce the allowed secured claim. *See* James A. Pusateri, et al., Section 1111(b) of the Bankruptcy Code: How Much Does the Debtor Have to Pay and When Should the Creditor Elect? 58 Am. Bankr. L.J. 129, 136–41 (1984).

4. Payment by partial surrender is not available. *See In re Griffiths,* 27 B.R. 873, 876 (Bankr. D. Kan. 1983) (Partial surrender of collateral plus

payment of remaining collateral's value not the indubitable equivalent of lender's §1111(b)(2) claim, rather payment of the balance of the claim itself is).

III. Procedures for the § 1111(b)(2) election.

A. Timing: Rule 3014 provides that a secured creditor may make an election at any time before the conclusion of the hearing on the disclosure statement. Fed. R. Bankr. P. 3014. In a small business case, if the disclosure statement is conditionally approved, a § 1111(b) election must be made no later than the deadline for objecting to the disclosure statement or such other date the court may fix. *See* Rule 3014.

1. The court may extend the time to make a § 1111(b) election for cause -- to prevent the secured creditor from having to make an election prior to the court's valuation of its secured claim under § 506(a) and Rule 3012. *See* Fed. R. Bankr. P. 9006(b) (but court cannot reduce the time for an election, Rule 9006(c)(2)); Alan N. Resnick & Henry J. Sommers, eds., 7 COLLIER ON BANKRUPTCY ¶ 1111.03[4] and 9 COLLIER ON BANKRUPTCY ¶ 3014.01[3], n. 14 (16th ed.). In the above scenario, Hedge filed its motion to extend the time to elect until after the court's ruling on its § 506 motion. Thus, there was cause for the extension.

B. Writing: Unless the creditor elects at the disclosure statement hearing, the election must be in writing and signed by the creditor or creditor's counsel. *See* Fed. R. Bankr. P. 3014.

C. CM/ECF does not have a dedicated docket event for § 1111(b) elections, so the creditor should file the election as a "Notice." But the writing should itself be designated as an election under § 1111(b) in the title. *See* Fed. R. Bankr. P. 9004(b). The election should indicate the name of the creditor, the amount of the claim, the collateral, and identify the plan.

IV. Can a secured creditor "un-elect" or withdraw its election?

A. As noted above, absent denial of confirmation or a material modification of the plan to which the secured creditor elected, the election cannot be undone. *See In re Bloomingdale Partners*, 155 B.R. 961 (Bankr. N.D. Ill. 1993) (undersecured mortgage holder could not withdraw its election); Adv. Comm. Notes, Fed. R. Bankr. P. 3014 (1983), stating "Only if the plan is not confirmed may the class of secured creditors thereafter change its prior election." *See also, In re Keller*, 47 B.R. 725 (Bankr. N.D. Iowa 1985) (secured creditor cannot withdraw its election unless debtor materially modifies its plan ["tantamount to filing a different plan"] after the § 1111(b) election is made); *In re Century Glove, Inc.,* 74 B.R. 958, 961 (Bankr. D. Del. 1987) (upon debtors' modification or alteration of the plans, secured creditor must be given an opportunity to change its prior election; electing creditor must know the proposed treatment under the plan before it can intelligently determine its rights); *Matter of IPC Atlanta Ltd. Partnership*, 142 B.R. 547 (Bankr. N.D. Ga. 1992) (modifying a plan to clarify second lienholder's treatment and to clarify allocation of postpetition payments paid to electing creditor under prior order did not

amount to material modifications that would permit electing creditor to withdraw its election; in any event, electing creditor's notice of withdrawal of its election was untimely where it was filed several weeks after the plan modifications and after conclusion of confirmation hearing). *But see In re Scarsdale Realty Partners, L.P.,* 232 B.R. 300 (Bankr. S.D.N.Y. 1999) (Creditor's motion to withdraw election was granted where debtor's initial disclosure statement failed to disclose information material to creditor's election – that creditor's deficiency claim may enable it to dominate the unsecured class because one of the creditors in the unsecured class was an affiliate of the debtor and its right to vote on the plan could be challenged). It should be noted that in *Scarsdale Realty Partners,* the electing creditor's motion to withdraw its election was filed prior to conclusion of the hearing on the adequacy of the disclosure statement. Other cases also allow withdrawal of the election on the basis of material misstatements in the disclosure statement that prejudice the electing creditor. *See In re Stanley*, 185 B.R. 417 (Bankr. D. Conn. 1995).

B. Conditional elections. Two courts have addressed a creditor's attempted conditional election; neither creditor was successful. In *In re Western Real Estate Fund, Inc.*, 83 B.R. 52, 55 (Bankr. W.D. Okla. 1988), the electing creditor "declined to have its claim treated as fully secured in the event the court determined that the debtor could not eliminate the unsecured portion of its claim through a proposed future sale." That court denied confirmation of

debtor's plan containing the electing creditor's condition, directing debtor to modify plan providing creditors treatment if there were no election. It stated that the creditor's "purported" election "became an election not to be granted [§ 1111(b)(2)] treatment" when the court denied confirmation and directed debtor to modify it. *See also In re Paradise Springs Assocs.,* 165 B.R. 913 (Bankr. D. Ariz. 1993) (conditional or "under protest" elections are clearly not contemplated by Rule 3014; creditor sought its § 1111(b) election to be effective only in the event that the bankruptcy court determined debtor's plan that separately classified creditor's unsecured deficiency claim was confirmable).

C. Multiple Plans. Treatise authority suggests that a secured creditor may make different elections where there are multiple proposed plans. *See* Hon. Susan V. Kelley, GINSBERG & MARTIN ON BANKRUPTCY, § 13.14 (5th ed. Supp. 2016) (noting that the § 1111(b) election is made with respect to a specific plan and is binding only as to that plan); Alan N. Resnick & Henry J. Sommer eds., 9 COLLIER ON BANKRUPTCY ¶ 3014.01[5] n. 24 (16th ed.) (secured creditor may wish to make an election for fewer than all plans). Section 1129(c) provides that a court may confirm only one plan. In the above case scenario, Hedge's competing plan treats its claim as a recourse claim under § 1111(b)(1)(A)(i), after having elected a non-recourse claim to debtor's plan. Query whether this should be permitted?

V. Some §1111(b)(2) Election Strategic Considerations

A. When is the election a better deal?

1. Consider how far undersecured your creditor is. Remember that the unsecured claim, even in a low-dividend case, has tactical value in the confirmation process.

2. Does it matter that Hedge succeeded to the claim? *In re 680 Fifth Ave. Associates,* 29 F.3d 95, 98 (2nd Cir. 1994) holds that a creditor not in contractual privity with the debtor is entitled to elect; § 1111(b) applies to all lien claims against property of the estate. Hedge could elect under § 1111(b) even though it lacked contractual privity with the debtor.

3. Deciding to elect involves a good understanding of the markets. For instance, during recessionary times, lodging expenditures may suffer and hotels may lose value. But if the claim-holder suspects that the market value will recover, electing to preserve upside may be in order. Likewise, in a rising collateral market, creditors will want to guarantee their receiving cash in the future rather than allowing the debtor to cash out at a reduced value and reap the benefits of appreciation. This may be so when the secured creditor believes the § 506(a) judicial valuation undervalues the collateral.

4. Can the debtor afford to pay the now increased secured claim? If it can't pay the claim in full over time, that may force forfeiture or foreclosure. Does your client necessarily want the collateral back?

B. When might the creditor be better off to preserve its § 1111(b) recourse status and not elect?

1. Is a sale in prospect? Creditor can still credit bid at sale, § 363(k) up to the amount of creditor's "allowed claim," *i.e.* all of it.

2. If you were a non-recourse creditor before bankruptcy, § 1111(b)(1)(A)(i) automatically converts claim to recourse; if creditor elects nonrecourse it loses: (a) an unsecured deficiency claim and potential dividend; and (b) the ability to block voting in the unsecured class. There is some split in authority whether an undersecured creditor's deficiency claims may be classified with other general unsecured claims. *See Matter of Greystone III Joint Venture,* 995 F.2d 1274 (5th Cir. 1991) (separate classification unwarranted; proper classification ensures creditors with claims of similar priority are treated similarly); *In re Barakat*, 99 F.3d 1520 (9th Cir. 1996). *But see Matter of Woodbrook Associates*, 19 F. 3d 312 (7th Cir. 1994) (discussing limits on debtor's discretion to classify claims that are necessary to prevent gerrymandering and ensuring affirmative vote of at least one impaired class; undersecured creditor's unsecured deficiency claim must be separately classified from other general unsecured claims).

3. Risk of a lengthy payout – particularly if interest rates are low, debtor may be able to string out payment of secured creditor's claim.

4. Unencumbered assets for unsecured creditors – the plan may provide a substantial distribution to the general unsecured creditor class (*i.e.* deficiency claims of undersecured creditors). This is admittedly the exceptional case.

VI. Conclusion

The § 1111(b) election is a powerful weapon in reorganizations, but like all potent weapons, must be used with care for the consequences, both beneficial and adverse, to your client. Both debtors and creditors need to be wary of the potential pitfalls (and benefits) of the election, while keeping in mind its usefulness as negotiating template.

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Dicta

By Hon. Robert E. Nugent III

Bring Back the Bankruptcy Trial[1]

Hon. Robert E. Nugent III
U.S. Bankruptcy Court (D. Kan.); Wichita

Hon. Robert Nugent III has been a bankruptcy judge for the District of Kansas since 2000. He is also a past NCBJ president.

Whatever happened to bankruptcy trials? Why does everything seem to settle? And, why does it matter? Lawyers tell me that litigating is just too expensive and time-consuming, or that they prefer not to try cases. It matters because parties (who are usually actual human beings), and especially individual consumers, forfeit their chance to tell the judge their side of the story. Meanwhile, lawyers and judges give up trial experience, all because it is too complicated and expensive to go to trial.

It is not that our institutions do not recognize the problem. New Rule 26(b)(1) of the Federal Rules of Civil Procedure, which imposes "proportionality" limitations on federal court discovery, is just another in a long series of efforts to rein in the cost of discovery.[2] This rule articulates what should have been obvious to all of us a long time ago: Don't discover more than you need to in order to make or defend your case. Use discovery as what it was meant to be used as — a sharp tool to tease out the truth, not a blunt instrument. However, "right-sizing" should not be limited to discovery because it applies to every aspect of bankruptcy litigation. Maybe more matters would make it to trial, meaning more parties — both large and small — would be heard, more bankruptcy lawyers would get valuable trial experience, and (most important to me) judges might have a little more fun.

Complicated litigation practice is a barrier to accessing justice, particularly for ordinary people. How can we do better? By simplifying practices and procedures in every phase of an adversary proceeding or contested matter, lawyers and judges can go a long way toward reopening the courtroom doors to ordinary folks. Here are one judge's suggestions.

Pre-Filing Preparation

Right-size your matter by honestly assessing what your client's case requires you to prove. Can you prove it, and what will that take? Rule 2004 of the Federal Rules of Bankruptcy Procedure lets you examine "any entity" about pretty much anything having to do with the debtor, the case or the plan.[3] What district court litigator wouldn't love that? With all of the information-gathering devices that the Bankruptcy Code and Rules provide, you can find out a lot about your adversary party before you file your motion or complaint. Plead only what you can prove, not the kitchen sink.[4] Once that's done, check Rule 7004 and, if it is appropriate, use its nationwide first-class mail-service option to invoke the court's jurisdiction over your target.[5]

Right-Sized Discovery

Until last year, you could discover any information "relevant" to your claim or defense so long as it was "reasonably calculated" to lead to admissible evidence. The rule-makers hoped to reduce or eliminate expensive and tiresome arguments about relevance and reasonableness with the "proportional" discovery rule.

Civil Rule 26(b)(1) now limits the scope to "relevant" information that is not necessarily admissible, but must now be "proportional to the needs of the case" and considered in light of a number of factors.[6] Judges will now consider how "important" the issues are, the amount in controversy, the relative access that each party has to the information, the respective resources of the parties, how important the information is to resolving the matter and whether the burden of producing the information outweighs its likely benefit.[7]

1 "Make Bankruptcy Trials Great Again" was taken.
2 *See* Fed. R. Civ. P. 26.
3 Fed. R. Bankr. P. 2004. *See* Jeffrey E. Gross and Yonah Jaffe, "Maximizing the Evidentiary Value of Rule 2004 Examinations," XXXVI *ABI Journal* 1, 30-31, 65, January 2017, *available at* abi.org/abi-journal.
4 The same goes for defendants' assertion of affirmative defenses. A litigant is not obliged to assert waiver and estoppel defenses in every case.
5 Bankruptcy Rule 7004 applies to both adversary proceedings and contested matters. *See* Fed. R. Bankr. P. 9014(b).
6 Bankruptcy Rule 7026 makes Fed. R. Civ. P. 26(b)(1) applicable in adversary proceedings and Fed. R. Bankr. P. 9014(c) makes it applicable in contested matters.
7 Fed. R. Civ. P. 26(b)(1).

This may level the playing field in most typical bankruptcy matters. After all, every case is "important" to the players, but most routine adversary proceedings do not present cutting-edge issues. So, if the trustee can as easily obtain a debtor's bank records from the bank as from the debtor, a court might order him/her to do just that, particularly in a lower-dollar case. Burying or being buried with discovery is less likely under this new standard.

Efficient discovery in a smaller case might include a brief round of interrogatories or, even better, requests for admission (RFAs). Depending on the answering party's responses, the need for requests for production and depositions may be eliminated. Hiding in plain sight in Civil Rule 36, RFAs are the silver bullet of party discovery.[8]

You can ask the opposing party to admit facts, the application of the law to the facts, or opinions about either. In addition, you can ask them to admit the authenticity of various documents. If they do (or if they default), those matters are "conclusively established."[9] If they do not specifically deny the matter, the party must "state in detail" why they cannot admit or deny.[10] If they specifically deny a matter, you can ask them through contemporaneous interrogatories to state the reason for their denial of any RFAs. The responses can be used at trial either to establish facts, legal applications, or genuineness, or to impeach a party's testimony.

Civil Rule 26(b)(2) lets judges limit discovery that is outside of the "proportional" scope of the case.[11] The planning process requires you to meet with adversaries to confer about and propose a discovery plan. If you do not, Civil Rule 37(f) allows judges to sanction parties who fail to participate in good faith. Lawyers sometimes treat the Civil Rule 26(f) process as make-work, but the planning meeting and Rule 26(f) conference provide two opportunities to eliminate problems that run up litigation costs. Both of these are good opportunities to narrow the issues in your case.

Consider assembling one set of relevant documents to make everyone's life easier both now and at trial when exhibits must be exchanged. Discuss informally the exchanging of information — something bankruptcy lawyers do all the time — as opposed to requiring formal discovery procedures to be followed. Talk about privilege and proprietary information issues, first among the lawyers, then, if necessary, with the judge. Bankruptcy lawyers are problem-solvers; there's no reason why they cannot solve discovery problems, too.

Discovery Disputes

Sometimes you just cannot agree, and that is where we (as judges) come in. Both the rules and local court cultures provide lots of formal and informal means of solving discovery problems. If your best efforts fall short, most bankruptcy courts have regularly scheduled calendars that provide you with easy access to a judge. District court litigators would kill for that. I like to get on top of discovery disputes early by encouraging counsel to contact the clerk's office for an informal phone conference with me before they incur the expense of formal motions to compel. If we cannot resolve it that way, the formal process is still there as a backstop. Even then, I endeavor to expedite and hear such discovery disputes promptly. Bankruptcy is uniquely suited to this aspect of litigation because the prevailing culture among lawyers and judges favors discussion over contention. Many lawyers think judges "hate" discovery disputes, and without a doubt, some of my colleagues do. But let's face it: That is part of the job. If the parties cannot work out a discovery issue, we are — and should be — there to resolve it by formal or informal means. So do not be afraid to call us.

Rethinking the Final Pre-Trial Order

The pre-trial process is a prodigious trial preventer. Eager beavers that we are, most bankruptcy judges have devised thoughtful, thorough and *long* pre-trial order forms that are expensive and time-consuming to complete. In most cases, I do not need a 20-page order to try a typical complaint for turnover or dischargeability proceeding. The final pre-trial order is a powerful pleading because anything previously pled merges into it.[12] But it is also the program for the "trial show." That program tells your audience (me) what is still in controversy, why it matters, who will testify about it and how the law applies. It signals housekeeping issues like privilege and proprietary information, *Daubert* problems, late amendments, witness availability and evidentiary issues. Not every case requires a full-blown final pre-trial order.[13]

In simple cases, an alternative is the "hearing order," which lists what issues will be considered and sets out a rudimentary scheduling for discovery, motions *in limine*, witness and exhibit exchange, and trial. I issue hearing orders when a case or matter is passed from a calendar directly to an evidentiary hearing, and bypass waiting for the parties' Civil Rule 26(f) discovery plan or a pre-trial scheduling conference. This is often more efficient and useful than a formal pretrial order, plus it saves the cost of preparing one.[14]

Other Trial Nonstarters

Another trial preventer is the use of stipulations of fact and submission "on the briefs." This sounds efficient but sometimes isn't. Stipulations can be difficult to reach, and when agreement eludes the parties, they sometimes stipulate that they do not agree! This is not helpful. Remember that your set of stipulations is basically a trial in a box. The stipulations represent the parties' agreed-upon material statement of facts and each party's efforts to bear its burden of proof, because they are the only records the court will have. If you cannot agree to definitive stipulations of fact after a couple of attempts, consider simply going to trial. Frankly, most cases with one or two witnesses can be tried in less time than it would take counsel to prepare the stipulations and briefs.

Then there are dispositive motions. While summary-judgment motions are admittedly useful for narrowing issues and previewing your story to the court, they are costly to prepare and take time to decide. Remember that the court does

8 RFAs apply in adversary proceedings and contested matters. *See* Fed. R. Bankr. P. 7036 and 9014(c).

9 *See* Fed. R. Civ. P. 36(a)(3) and (b).

10 Fed. R. Civ. P. 36(a)(4). Lack of knowledge or information is not necessarily a sufficient excuse for failing to admit or deny a matter. *Id.*

11 Note that imposing limits on non-proportional discovery is required and does not require a motion from the litigants. *See* Fed. R. Civ. P. 26(b)(2)(C).

12 See Fed. R. Civ. P. 16(d) and (e); Fed. R. Bankr. P. 7016.

13 This does not necessarily reflect the opinion of the courts, Federal Rules Committee or your judge. Remember, this is Dicta.

14 Imitation is the sincerest form of flattery. My form came from ABI President-Elect Hon. **Eugene R. Wedoff** (ret.), with his permission, of course. A form of the hearing order that I use can be found at www.ksb.uscourts.gov/index.php/chambers/chief-judge-nugent/3351-court-s-hearing-order.

not weigh evidence or credibility on summary judgment: Either there are material factual controversies, or there are not. Summary judgment suits some cases better than others. Rarely do they suit fraud cases. Unless yours is the rare case where the fraudster has 'fessed up, just go to trial.

Similarly, Rule 12(b)(6) motions to dismiss for failure to state a claim upon which relief may be granted should focus on whether all of the elements of the claim are sufficiently pled and whether that claim is plausible.[15] Sometimes the movant, the opposing party or both attach documents outside the pleadings to establish facts, which may cause me to convert the motion to one for summary judgment and require me to give the other party an opportunity to present its own material.[16] Like summary judgment motions, motions to dismiss may eliminate some claims or defenses, but they are costly and time-consuming. If you are unsuccessful, there will be a trial anyway. It might be easier simply to proceed to trial.

Getting Trial Ready

Begin getting yourself and your client ready for trial by sketching out an order of proof. There is no need to file it, but doing it will focus you on what needs to be presented to make your burden of proof. Be sure you know that burden of proof, who has it, and when or if it shifts. Think about the order in which you will call witnesses, and get them lined up, subpoenaed or otherwise committed to show up on the appointed day. Remind your client when the trial is, too. Check out the courtroom and test any technology that you plan to use. Court staff are happy to assist. Please do not make us watch you learn it on the fly during the trial. Think about a joint exhibit list to avoid each side presenting voluminous and even duplicative exhibits, and consider submitting them in e-format (disks or thumb drives).

Speaking of exhibits, how will you get them admitted? Do you need a foundation witness? Are they hearsay? Is there an exception? Whatever you do, paginate your exhibits and tab them by number or letter as local rules may require for easy access by all.

Consider saving time by presenting direct testimony by declaration or reading in parts of a deposition.[17] Written designations of deposition testimony are also efficient.[18] If presenting by declaration, the witness should be present for cross-examination. If you plan to present direct testimony live, work with your witness beforehand so that the direct examination tells a coherent and compelling tale that touches on the elements of proof that the witness is there to address. Testifying does not come naturally to lay witnesses, and it is scary, so a little practice is often fruitful.

Think about impeaching the other side's witnesses. Did you serve requests for admission — matters that the opposing party admitted are "conclusively established" for trial purposes? If you deposed another party's witness, review how to use that deposition in impeaching the witness's testimony on cross-examination. This is an easy and effective way to point out inconsistencies in a witness's prior testimony. Consider a brief and pointed cross-examination that highlights important inconsistencies with what was presented on direct, not a torturous slog back to contest every point the witness made on direct. In addition, be prepared for rebuttal.

Right after you sketch out your order of proof, prepare a brisk and organized opening statement. Likewise, prepare a similar closing statement to focus on what you believe you proved at trial. Your opening tells me what you are going to prove at trial; your closing tells me how and why you proved it.

The Pitch

Preparing for trial is hard work, but standing before the court with your client and telling the judge his/her story is one of the sublime pleasures of being a lawyer (indeed, the one I really miss). It is why we are here. The more you do it, the more comfortable you will get and the more justice your clients will receive. Win or lose, a judge will have listened to them. Bankruptcy trials give you valuable courtroom experience, so try more cases! abi

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15 Fed. R. Civ. P. 12(b) and Fed. R. Bankr. P. 7012(b).
16 Fed. R. Civ. P. 12(d).
17 Remember, a party's deposition can be used for any purpose. Fed. R. Civ. P. 32(a)(3).
18 Fed. R. Civ. P. 32(a)(6). Each party should highlight or mark their designated testimony in different colors. File a pleading with the court identifying the witness, and the page and line numbers of the testimony that you are offering and designating.

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37th Annual Midwestern Bankruptcy Institute

Presented by: Elizabeth M. Lally
Attorney

37th Annual Midwestern Bankruptcy Institute
October 27, 2017

SOCIAL MEDIA AS A "DOCUMENT"

- Federal Rule of Civil Procedure 34(a) regarding the production of documents was first enacted in 1937.


Santa Ana Register
BILLIONS LOST AS STOCKS CRASH
Pantages In Jail Awaits Sentence To State Prison
SENATE "FARM BLOC" STARTS BATTLE FOR HIGHER TARIFFS

SOCIAL MEDIA AS A "DOCUMENT"

- Franklin D. Roosevelt was sworn in for his second term as President of the United States

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- The Volkswagen Group was founded in Germany

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- Amelia Earhart disappeared while trying to become the first woman to fly around the world

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- Walt Disney's "Snow White and the Seven Dwarfs" premiered in theaters

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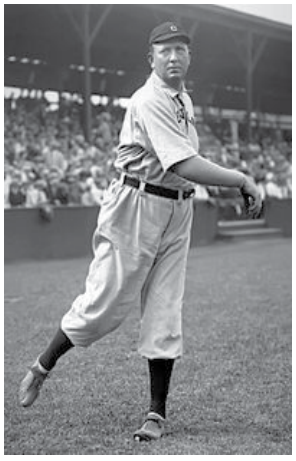
SOCIAL MEDIA AS A "DOCUMENT"

- Cy Young was inducted into the Baseball Hall of Fame, 26 years after he retired from major league baseball



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SOCIAL MEDIA AS A "DOCUMENT"

- In 2006, the U.S. Federal Rules of Civil Procedures were amended to codify the requirement to provide electronic information and records, collectively electronically stored information ("ESI"), as part of routine discovery.
- ESI includes everything from word documents to spreadsheets to e-mail, text messages and social networking site information.

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SOCIAL MEDIA AS A "DOCUMENT"

- ESI isn't just e-mail anymore.
- With extensive and almost instantaneous mobile access to the Internet, uploads and downloads, status updates, texts, and "tweets," social media has to be considered part of almost every legal investigation into discoverable evidence.
- Over 100,000 tweets are sent and over 684,478 pieces of content shared on Facebook every minute of every day.

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OBTAINING SOCIAL MEDIA COMMUNICATIONS & THE ETHICAL IMPLICATIONS OF "SELF HELP"

- Social media evidence can be obtained either within or outside of the formal discovery process.

- Before formal discovery commences, a simple Internet search (Google / Bing) or search of social media sites can be done to determine if the party or witness in question has a social media presence.

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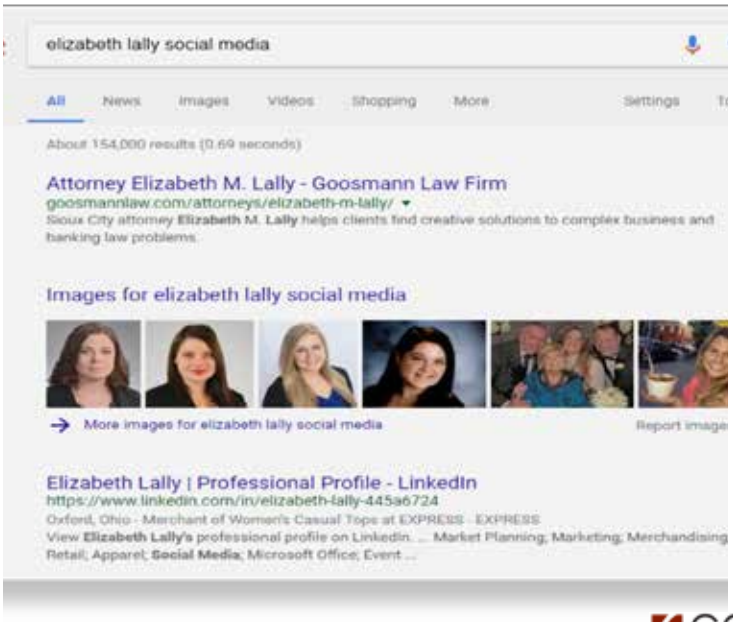
EVIDENCE : JUST A CLICK AWAY



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FRAUD FOR THOUGHT

- FRCP 60(d)(3) allows for a judgment to be set aside where there has been fraud on the court.
  - "There is no statute of limitations for fraud on the court." *In re Roussos*, 541 B.R. 721, 729 (Bankr. C.D. Cal. 2015) (21-year-old judgment set aside based on fraudulent activity).
- Social media posts demonstrating fraud on the court can provide potent evidence when seeking to set aside prior bankruptcy orders.

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YOU CAN'T MAKE THIS STUFF UP

50cent Follow

50cent Man this lunch money,I gotta go to work I'm still up, no Sleep at all. NEW MUSIC this week,Off The KANAN tape. #FRIGO #SMSAUDIO

Load more comments

ciaminmullan7 @david_linton

300mil_barras 50 u hard

ehehedvdjeb @darking_07

schottiente @y_pro broke

oiml9 @roibernat96

180,679 likes

OCTOBER 14, 2015

Log in to like or comment.

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YOU CAN'T MAKE THIS STUFF UP

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YOU CAN'T MAKE THIS STUFF UP

- Gregory Scott Sipe, 54, pled guilty to destruction, alteration, or falsification of records.
- According to the February 8, 2012 criminal indictment, Sipe filed a Chapter 7 bankruptcy listing several guitars with a net value of $10,000.
- North Carolina bankruptcy trustee John Bircher III, ran an online search on a Chesapeake, Va., businessman and found a newspaper article about his collection of 250 guitars.
- It was later learned that the guitars in his collection numbered over 300. Also, Sipe did not list his amplifiers and sound equipment in the filed schedules.
- The guitars were sold by the Chapter 7 trustee and brought approximately $897,820 in gross proceeds.

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YOU CAN'T MAKE THIS STUFF UP

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"Self-Help" Ethics

- "Self-help" searches are easy and cost-effective ways of uncovering information.
- There is nothing *per se* unethical about conducting a self-help search.

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"Self-Help" Ethics

- A lawyer may not practice deception online to gain access to non-public content posted by a party.
- Normal discovery procedures should be used to seek discovery of posted "private" content.

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"Self-Help" Ethics

- Pursuant to Rule 4.2 of the Model Rules of Professional Conduct, a lawyer may not become the "friend" of, or "follow" a represented party in order to gain access to their private content.
- Rule 4.2 provides that a lawyer may not communicate with a person represented by counsel without first obtaining the consent of the person's attorney to so do.

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"Self-Help" Ethics

- Even if the person is not a represented party, under Rules 4.1 and 8.4 a lawyer should not obtain any such information under false pretenses.
- A lawyer may not knowingly make "false statement[s] of material fact or law to a third person" or "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

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"Self-Help" Ethics

- A lawyer may not cause or induce another person under his direction or control—such as an associate, paralegal, or assistant—to "friend" or otherwise communicate with the party or witness without disclosing the third person's relationship to the lawyer.

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Subpoenas To Social Media Sites

- Gathering information from social media sites is not as easy as serving a subpoena on the host site.
- Under the Stored Communications Act, **social networking sites are prohibited (either voluntarily or pursuant to subpoena or court order) from producing private information created by or about their users or subscribers** (with certain express exceptions). 18 U.S.C. §§ 2702(a)(1), 2702(a)(2) (2015).

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Subpoenas To Social Media Sites

- A social networking host is allowed to release a user's records with "the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service." 18 U.S.C. § 2702(b)(3).
- **A party may request that a social networking site release its information to him or herself, or to some other enumerated party** (*e.g.*, the opponent's counsel).

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Subpoenas To Social Media Sites

- Facebook's terms and conditions state that "federal law prohibits Facebook from disclosing user content (such as messages, timeline posts, photos, etc.) in response to a civil subpoena."

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Subpoenas To Social Media Sites

- Facebook instructs parties to obtain substantive, content-based information through the formal discovery process and encourages the responding party to produce and authenticate the contents of their accounts" by using its "Download Your Information" tool.

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Compelling Production of Social Media

- If the user (party) refuses to execute a consent form, **the requesting party may move to compel execution and seek a court order requiring the user to so do**.

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Discovery Aimed at Social Media Information

- Interrogatories can be useful to determine if a party opponent maintains any social media profiles and, if so, what screen names (*e.g.*, Twitter "handles") and passwords are associated with such accounts.

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Discovery Aimed at Social Media Information

- Requests for the production or inspection of documents can be used to require the responding party to grant access to or otherwise print out the requested "screen shots," pictures, postings, or messages.

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Discovery Aimed at Social Media Information

- During depositions, the requesting party can ask the witness questions concerning his social media activity.
- Some courts may require this before ordering the production of such information. See Mark A. Berman, "Social Media Discovery and ESI in Motion Practice," New York L J (Jan. 8, 2013).

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ADVISING CLIENTS REGARDING THEIR SOCIAL MEDIA PRESENCE

- Advise your client to be:
  - aware of the nature of future postings, but
  - not to delete / modify their pages in order to help their case lest the other side cry "spoliation."

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OBJECTIONS TO DISCOVERY REQUESTS FOR SOCIAL MEDIA CONTENT

- **Possession, Custody, and Control**
  - Pursuant to Fed. R. Civ. P. 34(a)(1), a party must only produce those documents that are in the party's possession, custody, or control.

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OBJECTIONS TO DISCOVERY REQUESTS FOR SOCIAL MEDIA CONTENT

- **Possession, Custody, and Control**
  - Because social media content is hosted and maintained by a third-party company (Facebook, Twitter, LinkedIn), objections may be interposed regarding the extent of a user's duty to produce responsive information based on the user's lack of possession, custody or control.

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OBJECTIONS TO DISCOVERY REQUESTS FOR SOCIAL MEDIA CONTENT

- **Possession, Custody, and Control**
  - Actual possession or legal ownership of the documents is not determinative.
  - The concept of "control," as used in Fed. R. Civ. Pro. 34 exists where a party has actual possession, custody or control, **or the legal right to obtain the documents on demand**.

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OBJECTIONS TO DISCOVERY REQUESTS FOR SOCIAL MEDIA CONTENT

- **Possession, Custody and Control**
  - "Control is defined as the legal right to obtain documents upon demand." *See Alex v. KHG Of San Antonio, L.L.C., 2014 WL 12489735, at *5 (W.D. Tex. Aug. 6, 2014) (*citing *United States v. Int'l Union of Petroleum & Indus. Workers*, 870 F.2d 1450, 1452 (9th Cir. 1989) (Espousing the idea that social media posts can be requested from the host under FRCP 34(a)).

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OBJECTIONS TO DISCOVERY REQUESTS FOR SOCIAL MEDIA CONTENT

- **Possession, Custody, and Control**
  - Facebook makes clear that users "own" the contents of their own pages and allows users to obtain all of their content by using its "Download Your Information" tool.
  - There is no legitimate argument that a social media user from whom discovery is sought does not have the possession, custody or control of his user information.

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OBJECTIONS TO DISCOVERY REQUESTS FOR SOCIAL MEDIA CONTENT

- **General Privacy Objections**
  - "[G]enerally, [social networking site] content is neither privileged nor protected by any right of privacy." *Michael Brown, Sr. v. City of Ferguson*, 2017 WL 386544, at *1 (E.D. Mo. Jan. 27, 2017) (*citing Mailhoit v. Home Depot USA, Inc.*, 285 F.R.D. 566, 570 (C.D. Cal. Sept. 7, 2012).
    - Court allowed discovery of private messages sent via Facebook messenger, because "[i]t is reasonable to expect severe emotional or mental injury to manifest itself in some [social media] content, and an examination of that content might reveal whether onset occurred, when, and the degree of distress." *Id.* at *2.

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OBJECTIONS TO DISCOVERY REQUESTS FOR SOCIAL MEDIA CONTENT

- **General Privacy Objections**
  - Users of social media "lack a legitimate expectation of privacy in … materials intended for publication or public posting." *Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001).
  - This is because a user's 'friends' are free to use such information however they want—including sharing it with the Government. *See Palmieri v. United States*, 72 F. Supp.3d 191, 210 (D.D.C. 2014).

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OBJECTIONS TO DISCOVERY REQUESTS FOR SOCIAL MEDIA CONTENT

- **General Privacy Objections**
  - Content is not protected from discovery merely because a user marks such content as "private." *E.E.O.C. v. Simply Storage Mgmt., LLC,* 270 F.R.D. 430, 434 (S.D. Ind. 2010).
  - A party cannot attempt to shield something from discovery merely by changing their user settings to "private" (thereby restricting public access to) all or certain content.

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Privileged Communications vs. Privacy Settings In the Work Place

Courts draw a distinction between communications employees send via an employer-provided e-mail account and communications employees send via a personal e-mail account while at work.

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Privileged Communications vs. Privacy Settings In the Work Place

- An e-mail between spouses that the government seized as part of a criminal investigation was not protected by the marital privilege because it resided on the server of the defendant's employer. *United States v. Hamilton*, 778 F.Supp.2d 651, 655 (E.D. Va. 2011).

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Privileged Communications vs. Privacy Settings In the Work Place

Waiving the marital privilege where a husband sent personal e-mails to his wife from his work computer even though his employer monitored company e-mail for regulatory purposes and had a policy limiting e-mail use to official business. *See also, In re Reserve Fund Sec. & Derivative Litig.*, 275 F.R.D. 154, 164 (S.D.N.Y. 2011).

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Privileged Communications vs. Privacy Settings In the Work Place

- Courts routinely focus on four factors in balancing the expectation of privacy in the workplace:
  1) Whether the company policy expressly bans personal e-mails during work hours;
  2) Whether the company monitors and enforces violations of the policy;
  3) Whether the company has access to all communications sent from the workplace on company-issued hardware; and
  4) Whether the company communicates its policies effectively to employees.

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GENERAL RULES REGARDING THE ADMISSIBILITY OF SOCIAL MEDIA OR OTHER ESI

- **Parties are not entitled to blanket protective orders for social media or other ESI content**
- There are five distinct but interrelated evidentiary issues that govern whether ESI will be admitted into evidence
    - Relevance (Fed. R. Evid. 401)
    - Authenticity (Fed. R. Evid. 901 and 902)
    - Hearsay (Fed. R. Evid. 801, 803, 804, 807)
    - Original Writing, a.k.a. Best Evidence Rule (Fed. R. Evid. 1001 – 1008)
    - Unfair Prejudice (Fed. R. Evid. 403)

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GENERAL RULES REGARDING THE ADMISSIBILITY OF SOCIAL MEDIA OR OTHER ESI

- **Relevance (Fed. R. Evid. 401)**
    - A piece of evidence is relevant if it tends to make the existence of any fact more or less probable than it would be without the evidence
    - Social media information typically raises no unique problems of relevance over those that would be experienced when trying to use more traditional / paper documents

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GENERAL RULES REGARDING THE ADMISSIBILITY OF SOCIAL MEDIA OR OTHER ESI

- **Authenticity (Fed. R. Evid. 901 and 902)**
  - The authentication requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."
  - The proponent need not prove authenticity, only make a *prima facie* showing.

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GENERAL RULES REGARDING THE ADMISSIBILITY OF SOCIAL MEDIA OR OTHER ESI

- **Authenticity (Fed. R. Evid. 901 and 902)**
  - The authenticity and accuracy of ESI is almost always something to be concerned about from the very beginning.
  - "The integrity of data may also be compromised in the course of discovery by improper search and retrieval techniques, data conversion, or mishandling." *Manual for Complex Litigation* §11.446 (4th ed. 2000).

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GENERAL RULES REGARDING THE ADMISSIBILITY OF SOCIAL MEDIA OR OTHER ESI

- **Authenticity (Fed. R. Evid. 901 and 902)**
  - **Testimony of a witness**
    - A witness could authenticate her e-mail address or social media account and testify that she recognizes a copy of an e-mail that she wrote or received, or a posting or text that she authored.

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GENERAL RULES REGARDING THE ADMISSIBILITY OF SOCIAL MEDIA OR OTHER ESI

- **Authenticity (Fed. R. Evid. 901 and 902)**
  - **Testimony of a witness**
    - "Screen shots" of Web sites largely can be authenticated through the testimony of the witness who created the screen shot that the image accurately reflects the content of the Website and the image of the page on the computer at which the screen shot was made.

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GENERAL RULES REGARDING THE ADMISSIBILITY OF SOCIAL MEDIA OR OTHER ESI

- **Authenticity (Fed. R. Evid. 901 and 902)**
- **Distinctive Characteristics**
  - Fed. R. Evid. 901(b)(4) allows for authentication by "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances" i.e. circumstantial evidence.

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GENERAL RULES REGARDING THE ADMISSIBILITY OF SOCIAL MEDIA OR OTHER ESI

- **Authenticity (Fed. R. Evid. 901 and 902)**
  - **Distinctive Characteristics**
    - Metadata, while not foolproof, is a distinctive characteristic, and can be used to make a *prima facie* showing of authenticity.
      - For example, the presence of a party's name and email address within a document may help establish the authenticity of an e-mail.

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GENERAL RULES REGARDING THE ADMISSIBILITY OF SOCIAL MEDIA OR OTHER ESI

- **Authenticity (Fed. R. Evid. 901 and 902)**
  - **Distinctive Characteristics**
    - Social media content can be authenticated by taking into account the distinctive characteristics of a user's social networking page.

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GENERAL RULES REGARDING THE ADMISSIBILITY OF SOCIAL MEDIA OR OTHER ESI

- **Authenticity (Fed. R. Evid. 901 and 902)**
  - **Distinctive Characteristics**
    - Individual characteristics, such as pictures, user commentary, and information about the user's hobbies and interests—all of which are verifiable by circumstantial evidence—often provide the court with reasonable assurances under Rule 901(b)(4) that the purported author is indeed the one responsible for the content on the page in question.

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GENERAL RULES REGARDING THE ADMISSIBILITY OF SOCIAL MEDIA OR OTHER ESI

- **Authenticity (Fed. R. Evid. 901 and 902)**
  - **Self-Authenticating Documents**
    - In the case of ESI, information that bears a company logo may also be self-authenticated under Rule 902(7) for "[i]nscriptions, signs, tags or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin."
    - **A company identifier on an e-mail handle or website screenshot may be sufficient to authenticate it**. *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 551-52 (D. Md. 2007)

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GENERAL RULES REGARDING THE ADMISSIBILITY OF SOCIAL MEDIA OR OTHER ESI

- **Admissions, Stipulations and Pretrial Disclosures**: Three ways to authenticate E-discovery prior to trial.
  1. A party may use requests for admission to authenticate ESI in the discovery process.
     - Fed. R. Civ. P. 36 (a)(1)(B).
  2. At a pre-trial conference, a party may propose stipulations about the authenticity of ESI about which the court may take "appropriate action."
     - Fed. R. Civ. P. 16(c)(2)(C).
  3. Once a party makes its pre-trial disclosures under Fed. R. Civ. P. 26(a)(3) identifying each exhibit, the opposing party has fourteen days to serve and file objections to the admissibility of any exhibit.
- Most evidentiary objections not timely made are waived.

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GENERAL RULES REGARDING THE ADMISSIBILITY OF SOCIAL MEDIA OR OTHER ESI

- **Other Ways to Authenticate Electronic Records**
  - A party may seek **judicial notice of foundational facts** needed to authenticate an electronic document, such as "well known characteristics of computers, how the internet works, scientific principles underlying calculations performed within computer programs, and many similar facts that could facilitate authenticating electronic evidence." *Lorraine*, 241 F.R.D. at 553. Fed. R. Evid. 201(b).

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GENERAL RULES REGARDING THE ADMISSIBILITY OF SOCIAL MEDIA OR OTHER ESI

- **Other Ways to Authenticate Electronic Records**
  - **Records produced by the opposing party in discovery are presumptively authentic, thereby shifting the burden of authentication to the producing party challenging their reliability**. *Lorraine,* at 542, citing *Indianapolis Minority Contractors Ass'n, Inc. v. Wiley,* 1998 WL 1988826, *6 (S.D. Ind. May 13, 1998).

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GENERAL RULES REGARDING THE ADMISSIBILITY OF SOCIAL MEDIA OR OTHER ESI

- **Exclusions from Hearsay under Rule 801(d)**
  - Rule 801(d)(2), an "**admission by a party opponent**" is the hearsay exclusion most frequently invoked to overcome hearsay challenges in the context of social media / ESI.

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GENERAL RULES REGARDING THE ADMISSIBILITY OF SOCIAL MEDIA OR OTHER ESI

- **Exclusions from Hearsay under Rule 801(d)**
  - Statements contained in social media posts, texts or other electronically stored evidence have been repeatedly found to qualify as admissions by a party opponent if offered against that party.

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GENERAL RULES REGARDING THE ADMISSIBILITY OF SOCIAL MEDIA OR OTHER ESI

- Email authored by defendant was not hearsay because it was an admission under Rule 801(d)(2)(A), *United States v. Siddiqui,* 235 F.3d 1318, 1323 (11th Cir. 2000).
- Email sent by defendant was admissible as non-hearsay because it constituted an admission by the defendant, 801(d)(2)(A), *Safavian*, 435 F.Supp.2d at 43-44;
- Exhibits showing defendant's Web site as it appeared on a certain day were admissible against defendant as admissions, *Telewizja Polska USA, Inc. v. Echostar Satellite Corp.*, 2004 WL 2367740 (N.D. Ill. Oct. 15, 2004).

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GENERAL RULES REGARDING THE ADMISSIBILITY OF SOCIAL MEDIA OR OTHER ESI

- **Exclusions from Hearsay under Rule 801(d)**

- To be admissible under Rule 801(d)(2), however, the party's statements must be offered *against* that party.
- A party cannot use this provision to offer his or her own statement into evidence. *Lorraine,* 241 F.R.D. at 568.

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Questions?

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- Complex litigation with an emphasis on commercial banking, finance, insolvency and restructuring
  - Advises clients on the preservation, collection and production of ESI
- Experience:
  - Litigation counsel for secured and unsecured creditors
  - Former defense counsel of Class I railways

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Thank You!

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West's Kansas Statutes Annotated
Rules of the Supreme Court of Kansas
Rules Relating to Discipline of Attorneys
Rule 226. Kansas Rules of Professional Conduct
Advocate

KRPC 3.1

KRPC 3.1. Meritorious Claims and Contentions

Currentness

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

Credits

[Comment amended effective July 1, 2007.]

Sup. Ct. Rules, Rule 226, Rules of Prof. Conduct, KRPC 3.1, KS R RULE 226 RPC KRPC 3.1
Current with amendments received through August 1, 2017.

End of Document

West's Kansas Statutes Annotated
Rules of the Supreme Court of Kansas
Rules Relating to Discipline of Attorneys
Rule 226. Kansas Rules of Professional Conduct
Advocate

KRPC 3.2

KRPC 3.2. Expediting Litigation

Currentness

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Comment

[1] Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

Credits

[Comment amended July 1, 2007.]

Sup. Ct. Rules, Rule 226, Rules of Prof. Conduct, KRPC 3.2, KS R RULE 226 RPC KRPC 3.2
Current with amendments received through August 1, 2017.

End of Document

West's Kansas Statutes Annotated
Rules of the Supreme Court of Kansas
Rules Relating to Discipline of Attorneys
Rule 226. Kansas Rules of Professional Conduct
Advocate

KRPC 3.3

KRPC 3.3. Candor Toward the Tribunal

Currentness

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal 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

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Credits

[Amended effective July 1, 2007.]

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(n) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3)

requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] 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 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement 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 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] 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 must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), 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.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(e). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done--making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). 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.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] 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 material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

[Comment amended effective July 1, 2007.]

Sup. Ct. Rules, Rule 226, Rules of Prof. Conduct, KRPC 3.3, KS R RULE 226 RPC KRPC 3.3
Current with amendments received through August 1, 2017.

End of Document

Vernon's Annotated Missouri Rules
Supreme Court Rules
Rules of Civil Procedure
Part I. Rules Governing Civil Procedure in the Circuit Courts
Rule 68. **Masters** and Receivers

Supreme Court Rule 68.01

68.01. **Masters** in Circuit Courts

Currentness

(a) Appointment and Compensation. Each circuit court in which any action is pending may appoint a **master** therein. The compensation to be allowed a **master** shall be charged upon such of the parties, or paid out of any fund or subject matter of the action which is in the custody or control of the court, as the court may direct.

(b) Reference. A reference to a **master** shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

(c) Qualifications of Master. No person shall be appointed a **master** who is of kin to either party or is interested in the outcome of the action.

(d) Oath of Master. Before proceeding to hear any testimony in the action, a **master** shall take and subscribe an oath, before some officer duly authorized to administer an oath, faithfully to hear and examine the matters at issue and to make a just, impartial and true report.

(e) Powers. The order of reference to the **master** may specify or limit the **master's** powers and may direct the **master** to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the **master's** report. Subject to the specifications and limitations stated in the order, the **master** has and shall exercise the power to regulate all proceedings in every hearing before the **master** and to do all acts and take all measures necessary or proper for the efficient performance of the duties under the order. The **master** may require the production of evidence upon all matters embraced in the reference. The **master** may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may examine them and may call the parties to the action and examine them upon oath. When a party so requests, the **master** shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 73.01(a) for a court sitting without a jury.

(f) Proceedings.

(1) *Meetings.* When a reference is made, the clerk shall forthwith furnish the **master** with a copy of the order of reference. Upon receipt thereof, unless the order of reference otherwise provides, the **master** shall forthwith set a time and place for the first meeting of the parties, or their attorneys, to be held within thirty days after the date of the order of reference and shall notify the parties, or their attorneys. It is the duty of the **master** to proceed with all reasonable diligence. Any party, on notice to the parties and **master**, may apply to the court for an order requiring the **master** to speed the proceedings and to make a report. If a party fails to appear at the time and place appointed, the **master** may proceed or, in the **master's** discretion, adjourn the proceedings to a future day, giving notice thereof to the absent party.

(2) *Witnesses.* The parties may procure the attendance of witnesses before the **master** by the issuance and service of subpoenas issued by the clerk of the appointing court. The failure of any person to comply with the requirements of any subpoena issued as herein provided shall be reported promptly to the court issuing the subpoena. Witnesses shall receive the same fees as would be allowed them as witnesses in a civil case in circuit court. Sheriff and all other officers shall be entitled to the same fees for services performed in references to a **master**, as would be allowed them in their respective courts for similar services. All costs incurred in a reference shall be taxed in the pending case in circuit court.

(3) *Statement of Accounts.* When matters of accounting are in issue before the **master**, the **master** may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the **master** may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as the **master** directs.

(4) *Depositions.* Depositions of witnesses or parties taken in the action may be read in evidence before the **master** as in cases of trials before the court.

(g) Report.

(1) *Contents and Filing.* The **master** shall prepare a report upon the matters submitted by the order of reference and if required to make findings of fact and conclusions of law shall set them forth in the report. The **master** shall file the report with the clerk of the court together with a transcript of the proceedings including the evidence and exhibits, if any. The clerk shall forthwith mail to all parties notice of the filing and a copy of the **master's** report.

(2) *Objections.* Any party within thirty days after being served with notice of the filing of the **master's** report may file written objections thereto and serve them upon the other parties.

(3) *Action on Report and Use in Jury Trials.* If no objections are filed, the court may adopt the report. If objections are filed, or the court proposes action other than adoption of the report, the court, after hearing, may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions. If issues are to be tried by a jury, the **master's** findings on the issues submitted to the **master** may be reported to the jury as having been

determined and only fact issues other than those determined by the **master** shall be submitted to or determined by the jury.

(4) *Stipulation as to Findings.* If the parties stipulate that a **master's** findings of fact shall be final and binding upon them, only questions of law arising upon the **master's** report shall thereafter be considered.

(5) *Draft Report.* Before filing the report a **master** may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

(h) Masters for Depositions. The court, upon motion, may appoint a **master** to preside at the taking of a deposition. The **master** shall be a member of The Missouri Bar.

The **master**, in addition to the authority conferred on officers to take depositions, shall have the authority to determine all objections to evidence and to exclude evidence that is not within the scope of **discovery** as defined in Rule 56.01(b).

Upon request of a party, the **master** shall report a ruling or rulings on evidence to the court either during or after the completion of the taking of a deposition. Within 30 days after being served with a copy of the **master's** report, any party may file written objections thereto and serve them on the other parties. If objections are filed, the court shall issue an order sustaining or overruling the objections.

Credits

(Adopted Feb. 1, 1972, eff. Sept. 1, 1972. Amended June 1, 1993, eff. Jan. 1, 1994; Sept. 28, 1993, eff. Jan. 1, 1994; June 26, 2007, eff. Jan. 1, 2008; Dec. 18, 2007, eff. July 1, 2008.)

Editors' Notes

RESEARCH REFERENCES

ALR Library
33 ALR 745, Conclusiveness of or Weight Attached to Findings of Fact of **Master** in Chancery.

Treatises and Practice Aids
3 MO Practice Series Form 8.9, Interlocutory Judgment Requiring Mutual Accounting by Trustees and Appointment of **Master** to Conduct Accounting.
9 MO Practice Series Rule 68.03, **Masters** in Appellate Courts--Author's Comment.
9 MO Practice Series Rule 68.01 Form 1, Motion for Reference to a **Master**.
9 MO Practice Series Rule 68.01 Form 7, Order Appointing **Master** and Fixing Compensation.
9 MO Practice Series Rule 68.01 Form 8, **Master's** Motion for Payment of Expenses.
9 MO Practice Series Rule 68.01(D) Form 1, Oath of **Master**.
9 MO Practice Series Rule 68.01(F)(1) Form 1, **Master's** Notice of First Meeting.
9 MO Practice Series Rule 68.01(F)(1) Form 3, Order to **Master** to Speed Proceedings.
9 MO Practice Series Rule 68.01(F)(1) Form 4, **Master's** Notice of Adjournment of Proceedings.
9 MO Practice Series Rule 68.01(G)(1) Form 1, **Master's** Report--Contents.
9 MO Practice Series Rule 68.01(G)(1) Form 2, Notice of Filing of **Master's** Report.

KeyCite Yellow Flag - Negative Treatment
Distinguished by In re Minbatiwalla, Bankr.S.D.N.Y., March 1, 2010

409 B.R. 125
United States Bankruptcy Court,
S.D. Texas,
Houston Division.

In re Donald G. DEPUGH, Debtor.

No. 08–37521–H4–13.
|
June 12, 2009.

Synopsis

Background: Chapter 13 debtor objected to proof of claim filed by alleged assignee of credit card debt, on ground that he was not indebted to assignee.

Holdings: The Bankruptcy Court, Jeff Bohm, J., held that:

[1] while proofs of claim that were not executed and filed in accordance with Bankruptcy Rule were not automatically disallowed, debtor had no evidentiary burden to overcome in making claims objection;

[2] debtor's objection provided valid basis for disallowance of claims as being "unenforceable against the debtor under applicable law";

[3] amended proof of claim that creditor filed without leave of court after Chapter 13 debtor had objected to its bare-bones initial proof of claim had to be stricken, as filed in violation of notice and order issued by bankruptcy court;

[4] claims had to be disallowed, given that only evidence offered by alleged assignee, after amended proof of claim was stricken, was bald allegation that debtor's credit card debts, identified by last four numbers on accounts, had ultimately been assigned to it; and

[5] conduct on part of alleged assignee of credit card debts and its lead counsel warranted award of sanctions in amount of debtor's reasonable attorney fees.

So ordered.

West Headnotes (21)

[1] **Courts**
Decisions of United States Courts as **Authority** in Other United States Courts

Decisions of district court are binding on bankruptcy courts of that district under the federal hierarchical judicial structure.

7 Cases that cite this headnote

[2] **Bankruptcy**
Presumptions and Burden of Proof

Bankruptcy
Effect of Proof of Claim

If unsecured creditor files proof of claim that fully complies with Bankruptcy Rule, claim is deemed prima facie valid, and if debtor objects to claim, he or she must adduce evidence sufficient to rebut the presumption of validity and to establish that claim should be disallowed. 11 U.S.C.A. § 502(b); Fed.Rules Bankr.Proc.Rule 3001(f), 11 U.S.C.A.

3 Cases that cite this headnote

[3] **Bankruptcy**
Presumptions and Burden of Proof

Bankruptcy
Weight and Sufficiency

If unsecured creditor files proof of claim that fails to comply with Bankruptcy Rule, then debtor has no evidentiary burden to overcome when lodging a claim objection, at which point burden shifts back to creditor to prove the underlying validity of its claim by preponderance of evidence in order to have its claim allowed. 11 U.S.C.A. § 502(b); Fed.Rules Bankr.Proc.Rule 3001(f), 11 U.S.C.A.

1 Cases that cite this headnote

[4] **Bankruptcy**

Sufficiency of Filing

Bankruptcy Rule governing the content of proofs of claim was promulgated for a reason, so that debtors and other parties in interest could see and read documents upon which claims were based in order to make initial assessment of their validity; the Supreme Court, in promulgating the Rule, did not contemplate that creditors could ignore the Rule's requirements unless and until debtor complained and then cry "no harm, no foul" by producing documents that should have been produced to begin with. Fed.Rules Bankr.Proc.Rule 3001, 11 U.S.C.A.

2 Cases that cite this headnote

[5] **Bankruptcy**

Presumptions and Burden of Proof

Bankruptcy

Weight and Sufficiency

Bankruptcy

Effect of Proof of Claim

Proofs of claim that were not executed and filed in accordance with Bankruptcy Rule, while not prima facie valid, were not automatically disallowed; however, debtor had no evidentiary burden to overcome in making claim objection, and if debtor lodged a claim objection that constituted a valid ground for disallowance, burden shifted back to creditor to prove underlying validity of its claims by a preponderance of evidence. 11 U.S.C.A. § 502(b); Fed.Rules Bankr.Proc.Rule 3001(f), 11 U.S.C.A.

2 Cases that cite this headnote

[6] **Bankruptcy**

Objections Generally;Time, Form, and Sufficiency;Pleading

Chapter 13 debtor's objection to proofs of claim filed by alleged assignee of credit card debts, that he did not have any liability to alleged assignee, was not mere objection to sufficiency of documentation attached to assignee's proofs of claim, and even if it were, it provided valid basis for disallowance of claims as being "unenforceable against the debtor under applicable law." 11 U.S.C.A. § 502(b)(1).

Cases that cite this headnote

[7] **Bankruptcy**

Amendment or Withdrawal

Amended proof of claim that creditor filed without leave of court after Chapter 13 debtor had objected to its bare-bones initial proof of claim had to be stricken, as filed in violation of notice and order issued by bankruptcy court that was designed to prevent claims gamesmanship by requiring creditors to seek leave of court in order to amend proof of claim after objection had been filed thereto; accordingly, where creditor declined to present any other evidence at hearing on debtor's claims objection, court would look only to original proofs of claim to determine whether claim, and another claim which was never amended, were valid and enforceable under Texas law. 11 U.S.C.A. § 502(b).

1 Cases that cite this headnote

[8] **Bankruptcy**

Weight and Sufficiency

Proofs of claim that were executed and filed by alleged assignee of credit card debts not in accordance with Bankruptcy Rule had to be disallowed, on objection by Chapter 13 debtor that he had no liability to assignee, where only evidence offered by alleged assignee at hearing on claims objection, after amended proof of claim was stricken as filed in violation of order of bankruptcy court, was bald allegation that debtor's credit card debts, identified by last four numbers on accounts, had ultimately been assigned to creditor, with no evidence to establish that there was enforceable agreement between debtor and original credit card issuer, that accounts in question were actually in debtor's name, or that alleged assignee was the current holder of accounts. 11 U.S.C.A. § 502(b)(1).

Cases that cite this headnote

[9] **Bankruptcy**
Equitable Powers and Principles
Bankruptcy
Effect of State Law, in General

While question of whether claims were allowable in bankruptcy was one of federal law and bankruptcy court's exercise of its equitable powers, underlying validity of creditor's claims, for credit card debts that were allegedly assigned to it prepetition, depended on Texas contract law. 11 U.S.C.A. § 502.

Cases that cite this headnote

[10] **Contracts**
Presumptions and Burden of Proof

For a contract to be enforceable under Texas law, party must produce evidence of contract under which other party is allegedly liable.

Cases that cite this headnote

[11] **Assignments**
Presumptions and Burden of Proof

Texas law **requires** alleged assignee of contract to come forward with evidence of assignment in order to enforce contract against other party.

Cases that cite this headnote

[12] **Bankruptcy**
Weight and Sufficiency

While alleged assignee of credit card debts might have avoided having to establish validity of its claims at hearing on Chapter 13 debtor's claims objection had it attached to its initial proofs of claim all of the documentation that it appended to amended proof of claim which it subsequently filed in violation of court order, this documentation, even if considered by bankruptcy court, was insufficient to establish validity of claims once alleged assignee lost benefit of presumption of validity accorded to properly filed claims by Bankruptcy Rule; this documentation, all of which was hearsay, showed only a bulk transfer of credit card accounts to assignee, not that debtors' accounts were among the accounts assigned, and alleged assignee never produced any evidence of valid credit card agreement between debtor and original account holder, the essence of its claim. 11 U.S.C.A. § 502(b); Fed.Rules Bankr.Proc.Rule 3001(f), 11 U.S.C.A.

Cases that cite this headnote

[13] **Bankruptcy**
Frivolity or Bad Faith;Sanctions

Bankruptcy court's power to impose sanctions upon party or its attorney derives from Bankruptcy Rule 9011 and court's role as guardian of integrity of bankruptcy process. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

Cases that cite this headnote

[14] **Bankruptcy**
Frivolity or Bad Faith;Sanctions

Bankruptcy court, in exercise of its power to enter "necessary or appropriate" orders, has **authority** to issue sanctions against parties and their attorneys to effectuate provisions of the Bankruptcy Code. 11 U.S.C.A. § 105(a).

Cases that cite this headnote

[15] **Bankruptcy**
Frivolity or Bad Faith;Sanctions

Bankruptcy courts are "courts of the United States," which, pursuant to federal statute providing for sanctions against those who vexatiously multiply proceedings, may **require** attorneys to pay excess costs attributable to their misconduct. 28 U.S.C.A. § 1927.

Cases that cite this headnote

[16] **Bankruptcy**

Power and **Authority**

Bankruptcy court has inherent power to police conduct of litigants and attorneys who appear before it.

Cases that cite this headnote

[17] **Bankruptcy**
Frivolity or Bad Faith;Sanctions

Bankruptcy court may sanction attorney for violating local rules, even if violation was not committed willfully.

1 Cases that cite this headnote

[18] **Bankruptcy**
Frivolity or Bad Faith;Sanctions

Attorney's misconduct may be imputed to his law firm, for purpose of imposing sanctions.

1 Cases that cite this headnote

[19] **Bankruptcy**
Frivolity or Bad Faith;Sanctions

Counsel of record for party may be sanctioned for actions or inactions of substitute counsel that counsel sends to represent client at hearing.

Cases that cite this headnote

[20] **Bankruptcy**
Frivolity or Bad Faith;Sanctions

Conduct on part of alleged assignee of credit card debts and its lead counsel, in not bothering to attach supporting documentation to its original proofs of claim, in neglecting to review recently published opinions of bankruptcy and district courts for that district that were precisely on point with respect to claims allowance process and creditor's obligations therein, in neglecting to review bankruptcy court's notice and order or to seek prior court approval before filing amended proof of claim, in filing response to debtor's claims objections which not only confused facts, but ignored applicable law, and in sending substitute attorney to hearing on debtor's claims objections that had virtually no knowledge of case, warranted award of sanctions against alleged assignee and lead counsel in amount of debtor's reasonable attorney fees.

2 Cases that cite this headnote

[21] **Bankruptcy**
Frivolity or Bad Faith;Sanctions

Bankruptcy
Hourly Rate

Hourly rate of $350.00 claimed by Chapter 13 debtor's attorney was reasonable, and would be used in calculating attorney fee award against alleged assignee of credit card debt and its lead counsel for their improper claims gamesmanship, given that attorney had practiced law for over 25 years and was board certified in consumer bankruptcy law.

Cases that cite this headnote

Attorneys and Law Firms

***128** John Ernest Smith, John E. Smith & Associates, Houston, TX, for Debtor.

MEMORANDUM OPINION REGARDING DEBTOR'S OBJECTION TO ROUNDUP FUNDING, LLC'S PROOF OF CLAIM NUMBERS 5 AND 6

[Docket Nos. 23 & 24.]

JEFF BOHM, Bankruptcy Judge.

I. INTRODUCTION

In October of 2008, this Court issued a memorandum opinion in *In re Gilbreath* criticizing the lax practices and gamesmanship that pervade the bankruptcy system with respect to the filing and amending of deficient proofs of claim. 395 B.R. 356 (Bankr.S.D.Tex.2008). Following its ruling in *Gilbreath,* in order to prevent future violations

of Bankruptcy Rule 3001 and to foster judicial efficiency and economy, on December 11, 2008, this Court issued a written notice and order in all Chapter 13 cases **requiring** creditors to seek leave of court or written consent of the debtor before amending a deficient proof of claim after the debtor has lodged a valid claim objection (the Notice and Order). *See* Notice and Order that Federal Rule 15, as Made Applicable by Bankruptcy Rule ***129** 7015, Shall Apply Whenever an Objection to a Proof of Claim Is Lodged, *available at* http://www.txs.uscourts.gov/bankruptcy/judges/jb/notice.htm.

Despite this Court's prior published opinion in *Gilbreath,* the Notice and Order (and its continuing efforts to have creditors comply with Bankruptcy Rule 3001), [1] Roundup Funding, LLC (Roundup)—either due to a flagrant disregard of this Court's prior rulings or a complete lack of diligence—filed two proofs of claim in the present case in January of 2009 with no documents attached to them. Additionally, despite the Notice and Order, Roundup, without leave of Court or the Debtor's written consent, amended one of its deficient proofs of claim in this case on April 22, 2009, seventy-seven days after the Debtor objected to Roundup's original proofs of claim.

Additionally, Roundup's counsel of record, Kelly Gill (Gill), did not appear at the hearing on the Debtor's objections to Roundup's proofs of claim, but rather sent another attorney in his place, Robert MacNaughton (MacNaughton), who had virtually no knowledge of Roundup's claims or the applicable opinions issued by this Court and the United States District Court for the Southern District of Texas. MacNaughton was therefore in violation of Local Rule for the Southern District of Texas 11.2 because he appeared in Court without being "fully informed"; and, further, Gill, as the attorney-in-charge, was in violation of this same rule because of his duty to attend all proceedings "or send a fully informed attorney."

Where a debtor is forced to incur attorneys' fees objecting to deficient proofs of claim and attending hearings for which the creditor's counsel is woefully unprepared, it is not only the debtor that bears these costs but also every other unsecured creditor, as every penny used to pay a debtor's attorney's priority claim for fees necessarily reduces the amount available to pay other creditors. Additionally, the practice of filing skeletal proofs of claim and **requiring** the debtor to object before producing documents that should have been produced to begin with could, in the aggregate, cost Chapter 13 debtors substantial sums that could be put to better use proposing and maintaining payments on a feasible plan of reorganization. "[T]he fact is that debtors in chapter 13 frequently live so close to the line that every penny counts: Every penny that they keep, and every penny that they put toward their plan." *See In re Fauntleroy,* 311 B.R. 730, 739 (Bankr.E.D.N.C.2004); *see also In re T–H New Orleans Ltd. Partnership,* 116 F.3d 790, 802 (5th Cir.1997) (noting that the dual aims of bankruptcy are payment of claims and a debtor's ability to obtain a fresh start). In the case at bar, the Debtor has been forced to needlessly incur attorney's fees due to Roundup's failure to comply with the fundamental **requirements** set forth in Bankruptcy Rule 3001. Accordingly, this Court not only sustains the Debtor's objection to Roundup's proofs of claim, but also imposes sanctions on Roundup and Gill, its counsel of record, by **requiring** them to pay the attorney's fees incurred by the Debtor.

Set forth below are this Court's written findings of fact and conclusions of law. To the extent a finding of fact is construed to be a conclusion of law, it is adopted as such. To the extent a conclusion of law is construed to be a finding of fact, it is ***130** adopted as such. This Court reserves the right to make additional findings of fact and conclusions of law as it deems necessary or appropriate, or as may be requested by any of the parties. Additionally, to the extent that a finding of fact or conclusion of law set forth in this written Memorandum Opinion conflicts with a finding of fact or conclusion of law made orally at the claim objection hearing held on April 27, 2009, the former **controls**. For the reasons set forth below, the Debtor's objections to Roundup's proofs of claim should be sustained, Roundup's claims should be disallowed, and sanctions should be imposed against Roundup and Gill, its counsel of record, for their violations of the local rules and this Court's Notice and Order.

II. FINDINGS OF FACT

1. On November 25, 2008, Donald G. DePugh (the Debtor) filed a voluntary Chapter 13 petition, initiating the above-referenced Chapter 13 case. [Docket No. 1.]

2. The last day for a non-government creditor to file a proof of claim in this Chapter 13 case was April 23, 2009. *See* [Docket No. 16.]

Roundup's Original Proofs of Claim

3. On January 26, 2009, Roundup filed Proof of Claim 5, a true and correct copy of which is attached to this Opinion as Exhibit A. Proof of Claim 5 consists of the official proof of claim form along with one attachment. On the form, Roundup lists the amount of the claim as $19,073.04, lists the basis for the claim as "Unsecured Account," and provides the last four digits of an account number —XX59G5—by which the Debtor may be identified.[2] Roundup also notes on the proof of claim form that the Debtor may have scheduled the claim as being held by "Wells Fargo." Roundup attached a single document to Proof of Claim 5 that contains the same information provided on the form with respect to the claim, but which also represents that the claim was assigned to Roundup by "NCO Portfolio Management, Inc." and that the original creditor on this account was "WELLS FARGO."

4. On January 27, 2009, Roundup filed Proof of Claim 6, a true and correct copy of which is attached to this Opinion as Exhibit B. Proof of Claim 6 consists of the official proof of claim form along with one attachment. On the form, Roundup lists the amount of the claim as $32,283.66, lists the basis for the claim as "Credit Card," and provides the last four digits of an account number—8548—by which the Debtor may be identified.[3] Roundup also notes on the proof of claim form that the Debtor may have scheduled the claim as being held by "FIA Card Services NA aka Bank of America." Roundup attached a single document to Proof of Claim 6 that contains the same information provided on the form with respect to the claim, but which also represents that the claim was assigned to Roundup by "FIA Card Services NA aka Bank of America."

***131** 5. On February 4, 2009, the Debtor filed objections to Proof of Claim 5 and 6 (the Objections). [Docket Nos. 23 & 24.] The Debtor objects to both of Roundup's proofs of claim on the following grounds: (1) Roundup failed to attach documentation to prove the existence of its purported claims; (2) Roundup failed to comply with Federal Rule of Bankruptcy Procedure 3001 (Bankruptcy Rule 3001); and (3) the Debtor denies that he has any liability to Roundup. In support of this third contention, the Debtor has attached an affidavit to the Objections, in which he swears that he does not owe any money to Roundup and that he has no proof of the debt, the transfer, or the proper amount owed. The Debtor requests that Claims 5 and 6 be disallowed.

[1] 6. On February 20,2009, Roundup filed a Response to the Objections (the Response). [Docket No. 26.] The Response alleges that Roundup purchased the accounts ending in 8548 and 59G5 as part of a "bulk purchase" from "FIA" and "NCO," respectively. Additionally, throughout the Response, Roundup confuses Proofs of Claim 5 and 6.[4] The Response cites to a number of published (and unpublished) opinions from courts in other circuits and one published opinion issued by the Bankruptcy Court for the Northern District of Texas in support of Roundup's contention that its skeletal proofs of claim should not be disallowed, but rather are only deprived of prima facie validity. Roundup also asserts that an objection to a proof of claim based solely on a creditor's failure to comply with Bankruptcy Rule 3001 (which **requires** creditors to attach supporting documentation to their proofs of claim) is not a valid objection under 11 U.S.C. § 502(b). The Response does not mention this Court's published opinion in *Gilbreath,* or the published opinion issued by the Honorable Gray H. Miller, United States District Judge for the Southern District of Texas, in *eCast Settlement Corp. v. Tran (In re Tran),* 369 B.R. 312 (S.D.Tex.2007), which affirmed a ruling by Bankruptcy Judge Karen K. Brown, and which is binding on this Court.[5]

***132** 7. Roundup attached the following documents to the Response:

a. A "Term Agreement" between NCO Portfolio Management, Inc. and Roundup dated December 22, 2008, which "[p]ursuant to the Bankruptcy Receivable Purchase Agreement dated as of August 6th, 2008" (which has not been provided), purports to transfer to Roundup "all right, title and interest in the Accounts or receivables arising therefrom described below."

b. An "Assignment of Accounts" between NCO Portfolio Management, Inc. and Roundup dated December 22,2008, which purports to transfer to Roundup "all right, title and interest in and to (i) Seller's Receivables 6,060 accounts, ... which are described on computer files furnished by Seller to

Buyer in connection herewith (each, an "Account"); (ii) all judgments obtained in connection with any such Account; and (iii) all proceeds of Accounts after the close of business on December 22, 2008." This document also provides that the transfer "is subject to the terms of the Bankruptcy Receivable Forward Flow Purchase Agreement of Chapter 7 and Chapter 13 Receivables dated August 6th, 2008" (which is not provided).

c. A number of what appears to be redacted printouts from some unidentified computer spreadsheet pertaining to account numbers ending in 59G5 and 7777, some of which contain the personal information of the Debtor (though not in connection with the account numbers listed above).

d. An invoice dated December 23, 2008 confirming the terms under which FIA Card Services, N.A. would sell 1,137 accounts to Roundup pursuant to the terms of an "Agreement" (which, once again, has not been provided).

e. A redacted computer printout listing account number ending in 8548, and other printouts listing the Debtor's personal information (again, not alongside the account number listed above).

f. An affidavit signed by Steven G. Kane (Kane), the operations manager for B–Line, LLC, a purported business affiliate that maintains records and provides bankruptcy services to Roundup, in which Kane swears that Roundup is the current holder of an account number ending in 8548 originally held by Bank of America, then assigned to FIA Card Services, N.A., then assigned to Roundup. In this affidavit, Kane also swears that Roundup is the current holder of an account number ending in 7777 originally held by Wells Fargo, then assigned to NCO Portfolio Management, Inc.—at which point the account number changed to a number ending in 59G5—then assigned to Roundup.

8. Roundup has not amended either of its proofs of claim to include the documents attached to the Response and did not move to offer them into evidence at the hearing on the Objections held on April 27, 2009.

***133 Roundup's Amended Proof of Claim 6**

9. On April 22, 2009, Roundup—without leave of Court or consent of the Debtor—amended Proof of Claim 6 to include documentation in support of the claim. The amount of the claim listed on Amended Proof of Claim 6 is $34,991.94. A true and correct copy of Amended Proof of Claim 6 is attached to this Opinion as Exhibit C.

10. Roundup attached the following documents to its Amended Proof of Claim 6: (1) A one-page summary of the interest that has accrued with respect to two accounts—one ending in 5261, and another ending in 8548—since the date the Debtor's bankruptcy petition was filed. This document also represents that the "Charge–Off Balance" on those two accounts as of October 28, 2006 was $27,332.69 and that this amount, when added to the interest that has accrued since the petition date—i.e. $7,659.25—equals a total claim for $34,991.94; and (2) a number of invoices from 2006 showing various purchases made by the Debtor charged to an account number ending in 5261 held by "MBNA America" or "Bank of America/ MBNA." Roundup has not attached any documentation to suggest that Roundup is the current owner and holder of the account ending in 8548, which, according to both the Debtor's Schedule F and the invoices attached to Roundup's Amended Proof of Claim 6, is held by either Plaza Associates or Bank of America (or its affiliate, FIA Card Services).

11. Roundup has not amended Proof of Claim 5.

The Claim Objection Hearing

12. On April 27, 2009, this Court held a hearing on the Objections. Counsel of record for Roundup—Gill—did not appear, but rather sent MacNaughton to appear on behalf of Roundup in his place. At the hearing, MacNaughton conceded that he had not reviewed this Court's opinion in *Gilbreath* or the District Court's opinion in *Tran,* that he was unaware of the Notice and Order **requiring** Roundup to seek leave of Court or the Debtor's consent before amending its contested claims, and that he did not know why supporting documents had not been attached to Proof of Claim 5 and 6 or where such documents might be found. In fact, MacNaughton had virtually no knowledge of the Debtor's case or the nature of Roundup's claim. Additionally, MacNaughton did not offer any evidence to support Roundup's claims at the hearing; he neither adduced testimony nor sought to introduce exhibits. As a result, this Court issued an oral ruling at the conclusion of the hearing sustaining

the Debtor's Objections, disallowing Claims 5 and 6, and awarding sanctions in the form of attorneys' fees against Roundup and Gill, its counsel of record, for failing to review applicable case law and to come prepared for the hearing in accordance with the Local Rules for the Southern District of Texas. [6]

13. On May 27, 2009, this Court issued a written Order Disallowing Proofs of Claim # 5 and # 6 Filed by Roundup Funding LLC, memorializing its ruling from the April 27, 2009 hearing. [Docket No. 63.] In accordance with this Court's oral ruling, the order provides that Roundup and Gill shall pay counsel for the Debtor—John E. Smith (Smith)—for the value of the services rendered by Smith on behalf of the Debtor in objecting to Roundup's ***134** claims. Specifically, this Court ordered Roundup and Gill to pay $1,050.00 to compensate Smith (representing the three hours that Smith spent objecting to Roundup's claims, multiplied by his hourly rate of $350.00).

III. CONCLUSIONS OF LAW

A. Jurisdiction and Venue

The Court has **jurisdiction** over these matters pursuant to 28 U.S.C. §§ 1334(b) and 157(a). This claim objection proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), and (O). Additionally, this proceeding is a core proceeding under the general "catch-all" language of 28 U.S.C. § 157(b)(2). *See In re Southmark Corp.,* 163 F.3d 925, 930 (5th Cir.1999) ("[A] proceeding is core under section 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case."); *In re Ginther Trusts,* No. 06–3556, 2006 WL 3805670, at *19 (Bankr.S.D.Tex. Dec.22, 2006) (holding that a matter may constitute a core proceeding under 28 U.S.C. § 157(b)(2) "even though the laundry list of core proceedings under § 157(b)(2) does not specifically name this particular circumstance"). Venue is proper pursuant to 28 U.S.C. § 1408(1).

B. Standard for Ruling on Claim Objections

Allowance of claims is governed by 11 U.S.C. § 502. Section 502(a) provides that a proof of claim filed under § 501 is deemed allowed unless a party-in-interest objects. Section 502(b) provides that once an objection is made, the Court shall determine the amount of the claim as of the petition date and "shall allow such claim in such amount" unless the claim falls under one of the nine statutory grounds for disallowance listed in § 502(b)(1)-(9).

The statutory grounds for disallowance most applicable to the dispute at bar are § 502(b)(1) and (9). Under § 502(b)(1), a claim must be disallowed if "such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." Additionally, under § 502(b)(9), a claim must be disallowed if "proof of such claim is not timely filed" with narrow exceptions carved out for tardy claims filed pursuant to 11 U.S.C. § 726(a)(1)-(3), or in accordance with the Bankruptcy Rules.

The form and content **requirements** for proofs of claim are set forth in Federal Rule of Bankruptcy Procedure 3001 (Bankruptcy Rule 3001). Bankruptcy Rule 3001(a) mandates that "[a] proof of claim shall conform substantially to the appropriate Official Form"—that is, Official Form 10 (Form 10). Additionally, Bankruptcy Rule 9009 states that the Official Forms "shall be observed." Fed. R. Bankr.P. 9009. Paragraph 7 of Form 10 **requires** the creditor to "[a]ttach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements or running accounts, contracts, judgments, mortgages, and security agreements" or a summary of such documents. Paragraph 7 of Form 10 also **requires** that "[i]f the documents are not available, please explain." Bankruptcy Rule 3001(c) **requires** that, when a claim is based on a writing, "the original or a duplicate shall be filed with the proof of claim"; or, if the writing has been lost or destroyed, "a statement of the circumstances of the loss or destruction shall be filed with the claim." A proof of claim that comports with the **requirements** set forth in Bankruptcy Rule 3001, "shall constitute prima facie evidence of the validity and amount of the claim." Fed. R. Bankr.P. 3001(f).

***135** [2] [3] In *Gilbreath,* this Court described the burden-shifting process that § 502 and Bankruptcy Rule 3001 create during a proof of claim dispute. *In re Gilbreath,* 395 B.R. at 361–65. If, for example, an unsecured creditor files a proof of claim that fully complies with Bankruptcy Rule 3001, that claim is deemed prima facie valid and, if the debtor objects to that claim,

he or she must adduce evidence sufficient to rebut the presumption of validity and establish that the claim should be disallowed pursuant to § 502(b). If, however, an unsecured creditor files a proof of claim that fails to comply with Bankruptcy Rule 3001, the Debtor has no evidentiary burden to overcome when lodging a claim objection pursuant to § 502(b),[7] at which point the burden shifts back to the creditor to prove the underlying validity of its claim by a preponderance of the evidence in order to have its claim allowed. *See* 11 U.S.C. § 502; *In re O'Connor*, 153 F.3d 258, 260–61 (5th Cir.1998); *In re Fid. Holding Co., Ltd.*, 837 F.2d 696, 698 (5th Cir.1988); *see also Placid Oil Co. v. IRS (In re Placid Oil Co.)*, 988 F.2d 554, 557 (5th Cir.1993) *abrogated by Raleigh v. Ill. Dept. of Revenue*, 530 U.S. 15, 20, 22 n. 2, 120 S.Ct. 1951, 147 L.Ed.2d 13 (2000) (determining that the bankruptcy process does not alter the applicable burden of proof with respect to state tax liability, but leaving open the question of the applicable burden of proof with respect to proof of claim disputes). This Court rendered its decision in *Gilbreath*—at least in part—to help curb the growing trend of creditors filing seriously deficient proofs of claim in the name of frugality, only amending those claims to include the proper documentation after the debtor lodges an objection and the Court sets the matter for a hearing.

[4] This Court believes that the Supreme Court created Bankruptcy Rule 3001 for a reason[8]—so that debtors and other parties in interest can see and read the documents upon which claims are based in order to make an *initial* assessment of their validity. This Court does not believe that the Supreme Court contemplated that creditors could ignore ***136** Bankruptcy Rule 3001's **requirements** unless and until a debtor complains and then cry "no harm, no foul" by producing documents that should have been produced to begin with. This latter scenario subverts the fundamental process by which the American legal system is based—that a claimant must come forward with at least some evidence that its claims are valid before collecting their due. *Raleigh v. Ill. Dep't. of Revenue*, 530 U.S. 15, 21, 120 S.Ct. 1951, 147 L.Ed.2d 13 (2000) (recognizing that "the burden of proof is an essential element of the claim itself," and that "one who asserts a claim [has] the burden of proof that normally comes with it"). Though efficiency and the speedy resolution of the claims objection process is important to keep bankruptcy cases running smoothly, such efficiency should not come at the expense of accuracy, fairness, and fundamental evidentiary **requirements**. Every penny that goes to pay a creditor's allowed claim necessarily diminishes the pool of funds available to pay other creditors while, at the same time, reducing the probability that the Chapter 13 debtor will be able to propose, and make payments on, a feasible plan of reorganization. Creditors are provided ample leeway to have their claims presumed valid—and to shift the evidentiary burden to the debtor—if they simply comply with Bankruptcy Rule 3001 the *first* time they file a proof of claim. As this Court stated in *Gilbreath*,

> Even if the Court were inclined to consider the potential costs of complying with the Bankruptcy Rules, its decision would be the same. Bankruptcy Rule 3001(c) provides that if the documents supporting the creditor's claim cannot be produced, "a statement of the circumstances of the loss or destruction shall be filed with the claim." Fed. R. Bankr.P. 3001(c). Further, paragraph 7 of Form 10 allows a creditor to attach a summary of documents supporting the claim and **requires** some explanation if the documents are unavailable. These rules and instructions appear to be designed specifically to accommodate creditors who claim to be unable to locate the documents on which their claims are based. Given these provisions, it is difficult to understand how providing a summary of documents supporting a claim, or at least providing an explanation for why the proof of claim has nothing attached to it, unduly burdens creditors. The only explanation could be that certain creditors wish to continue their routine of executing and filing proofs of claim without objection and without any evidence—essentially, without having to do any work.

In order to ensure compliance with Bankruptcy Rule 3001 and to give effect to the burden-shifting framework contemplated by § 502, this Court—in accordance with Bankruptcy Rule 9014 and this Court's equitable power under 11 U.S.C. § 105(a)[9]—issued a Notice and Order that ***137** Bankruptcy Rule 7015 shall apply in all Chapter 13 cases after a claim objection is filed. Bankruptcy Rule 7015 incorporates Federal Rule of Civil Procedure 15, which **requires** claimants to obtain "the opposing party's written consent or the court's leave" to amend a claim after being served with a response—in this case, a written objection. Fed.R.Civ.P. 15(a)(2). As this Court pointed out in *Gilbreath*, "most bankruptcy courts have recognized that '[t]he trend of the cases appear to apply Rule 7015 to contested matters' " (here, the Debtor's Objection initiated a contested matter). *In re Gilbreath*,

395 B.R. at 366 (quoting *In re MK Lombard Group I, Ltd.*, 301 B.R. 812, 816 (Bankr.E.D.Pa.2003); and citing *In re Stavriotis*, 977 F.2d 1202, 1204 (7th Cir.1992) (noting that Bankruptcy Rule 9014 permits extension of Rule 7015 to contested matters); *In re Best Refrigerated Express, Inc.*, 192 B.R. 503, 506 (Bankr.D.Neb.1996) (applying Rule 7015 through Rule 9014 to allow amendment to a filed proof of claim to relate back); *Enjet, Inc. v. Maritime Challenge Corp. (In re Enjet, Inc.)*, 220 B.R. 312, 314 (E.D.La.1998) (noting that "numerous courts have applied Rule 7015 and Rule 15(c) explicitly or by analogy in non-adversary [bankruptcy] proceedings"); *In re Brown*, 159 B.R. 710, 714 (Bankr.D.N.J.1993) (noting that Rule 15's "standards for allowing amendments to pleadings in adversary proceedings ... also apply to amendments to a proof of claim"); *In re Blue Diamond Coal Co.*, 147 B.R. 720, 725 (Bankr.E.D.Tenn.1992) (extending Rule 9014 to apply Rule 7015 to contested matters); *In re Enron Corp.*, 298 B.R. 513, 521–22 (Bankr.S.D.N.Y.2003) (invoking Rule 9014 to apply Rule 7015); 10 Collier on Bankruptcy 7015.02 n. 1 (Matthew Bender 15th ed. Rev.)).

Having described the applicable legal standard for ruling on claim objections and amendments to contested proofs of claim, the Court will now apply those standards to the dispute at bar.

C. Debtor's Objections to Roundup's Proofs of Claim

[5] As discussed above, even if Roundup's proofs of claim are not prima facie valid, they are not automatically disallowed. *See In re Armstrong*, 320 B.R. 97, 106 (Bankr.N.D.Tex.2005). However, the Debtor has no evidentiary burden to overcome in making a claim objection. *In re Tran*, 369 B.R. at 318. Thus, if the Debtor has lodged a claim objection that constitutes a valid ground for disallowance pursuant to § 502(b), the burden shifts back to Roundup to prove the underlying validity of its claims by a preponderance of the evidence. *See In re O'Connor*, 153 F.3d at 260–61; *In re Fid. Holding Co., Ltd.*, 837 F.2d at 698.

[6] Roundup argues that the Debtor's Objections are invalid because they are merely technical complaints that Roundup did not comply with Bankruptcy Rule 3001, and that the Debtor needed to object based on one of the nine grounds enumerated in § 502(b). As in *Gilbreath*, this Court need not decide whether § 502(b) provides an exclusive list of valid claim objections because the Debtor has, in fact, raised a valid objection pursuant to § 502(b)(1). *See In re Gilbreath*, 395 B.R. at 364 n. 3. Specifically, the Debtor has alleged that he does not have any liability to Roundup and has attached an affidavit supporting this allegation. [Finding of Fact No. 5.] This objection falls squarely within the ambit of § 502(b)(1), which provides that a claim must be disallowed if "such claim is unenforceable against the ***138** debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." Additionally, as this Court stated in *Gilbreath*, even if the Debtor had merely complained that Roundup has not produced sufficient documentation to support its claims, such an objection "necessarily asserts that the claim is 'unenforceable against the debtor ... under ... applicable law' under § 502(b)(1)." *Id.* ("This Court knows of no **jurisdiction** where a claim arising out of a credit card agreement is enforceable without proof of the underlying agreement. Neither is this Court aware of any **jurisdiction** where a purchaser of contract rights may establish the enforceability of those rights without proof of purchase.").

[7] Additionally, this Court's Notice and Order became applicable in December of 2008 and the Debtor's Objection was filed on February 4, 2009, such that Roundup was **required** to obtain leave of this Court or the Debtor's consent before amending Proof of Claim 6 on April 22, 2009. [Finding of Fact No. 9.] Because Roundup did neither, it was barred from amending Proof of Claim 6 and, therefore, Amended Proof of Claim 6 will be stricken. It is also noteworthy that even though Roundup attached a slew of documentation to its Response to the Debtor's Objection, it chose to offer none of these documents at the evidentiary hearing on April 27, 2009. While, at the outset, Roundup's claims might have enjoyed prima facie validity had these documents been attached to its original proofs of claim, the Objection initiated a full blown evidentiary dispute which **required** Roundup to introduce evidence or adduce testimony to establish the underlying validity of its claims by a preponderance of the evidence. *See In re O'Connor*, 153 F.3d at 260–61; *In re Fid. Holding Co., Ltd.*, 837 F.2d at 698. Because Roundup's Amended Proof of Claim 6 is stricken, and because Roundup chose not to offer any evidence at the hearing, this Court will look only to Roundup's original Proof of Claim 6 (and Proof of Claim 5, which was never amended) to determine whether they are valid and enforceable under Texas law.

1. Validity of Roundup's Original Proofs of Claim 5 and 6

[8] Here, Roundup's original proofs of claim fail to satisfy the **requirements** set forth in Bankruptcy Rule 3001 and the instructions in Form 10. Proof of Claim 5 and 6—which both purportedly arise out of credit card agreements—consist of nothing more than the official form with a single, desultory document attached to it that essentially re-alleges the scant information that Roundup provided on the form. Proof of Claim 5 and 6 merely inform the Debtor, the Court, and indeed, any interested party, that a numbered account exists based on some unknown credit card agreement, allegedly executed between the Debtor and some third party, which was eventually assigned to either FIA Card Services NA aka Bank of America or NCO Portfolio Management, Inc., and which is now held by Roundup. Roundup now seeks to avail itself of the presumption that its claims are valid based on this paltry smattering of information. This Court will not allow it to do so.

As stated above, Bankruptcy Rule 3001(a) **requires** that Roundup's proofs of claim substantially conform to the instructions in Form 10. Form 10 instructs Roundup to "[a]ttach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements or running accounts, contracts, judgments, mortgages, and security agreements" or a summary of such documents. Roundup failed to do so. ***139** Additionally, if such documents are unavailable, Form 10 instructs Roundup to "please explain." Roundup failed to do so. Bankruptcy Rule 3001(c) **requires** that, for claims based on a writing—such as credit card agreements—"the original or a duplicate shall be filed with the proof of claim"; or, if the writing has been lost or destroyed, "a statement of the circumstances of the loss or destruction shall be filed with the claim." Roundup has failed to file any documents along with Proof of Claim 5 or 6 and has not provided any statement explaining that such documents were lost or destroyed. There is no doubt that Roundup's claims do not enjoy prima facie validity under Bankruptcy Rule 3001(f), as they fail to comply with nearly every **requirement** of Bankruptcy Rule 3001. Thus, in accordance with the burden-shifting framework described in *Gilbreath* and above, the Debtor had no evidentiary burden to overcome when making the Objections and needed only to raise a valid objection pursuant to § 506(b) to shift the burden back to Roundup to prove—by a preponderance of the evidence—that its claims are valid.

[9] [10] [11] While the question of whether Roundup's claim is allowable in bankruptcy "is a matter of federal law and the bankruptcy court's exercise of equitable powers," the underlying validity of Roundup's claim is based on Texas contract law. *See First City Beaumont v. Durkay (In re Ford),* 967 F.2d 1047, 1050 (5th Cir.1992). For a contract to be enforceable under Texas law, a creditor must produce evidence of the contract under which a debtor is allegedly liable. *See Preston State Bank v. Jordan,* 692 S.W.2d 740, 744 (Tex.App.-Fort Worth 1985, no writ). Texas law also **requires** an alleged assignee of a contract to come forward with evidence of the assignment. *See Skipper v. Chase Manhattan Bank USA, N.A.,* No. 09–05–196 CV, 2006 WL 668581, at *1 (Tex.App.-Beaumont, 2006, no. pet.hist.) (citing cases). Therefore, Roundup has the burden of proving the validity of its underlying claim, which, under Texas law, **requires** (1) proof of an enforceable credit card agreement between the Debtor and the original creditor, and (2) proof of any subsequent assignment of rights under that agreement to Roundup.

Roundup's original proofs of claim are woefully insufficient to establish the enforceability of Roundup's claims under Texas law. Proofs of Claim 5 and 6 are simply bald allegations that certain credit card accounts were ultimately assigned to Roundup without any evidence to establish (a) that there was an enforceable agreement between the Debtor and the original credit-card issuer; (b) the accounts in question are actually in the Debtor's name; or (c) Roundup is the current holder of the accounts. [Findings of Fact No. 3 & 4.] Roundup cannot establish the validity of its claims by a preponderance of the evidence without offering any evidence. Therefore, Claims 5 and 6 should be disallowed.

2. Validity of Roundup's Amended Proof of Claim 6

[12] Even if the Notice and Order had not been issued, and even if this Court did not elect to apply Bankruptcy Rule 7015—and therefore Rule 15(a)(2)—pursuant to its **authority** under Bankruptcy Rule 9014 and § 105(a), Roundup's Amended Proof of Claim 6 would still be insufficient to establish the underlying validity of Claim 6 under Texas law.

First, because Roundup has the burden to establish the enforceability of Claim 6 pursuant to Texas law by a

preponderance of the evidence, it was **required** to do more than simply affix documents—all of which are hearsay, as no foundation has been laid under the business records exception to ***140** the hearsay rule under Fed.R.Evid. 803(6)—to its pleadings or its amended proof of claim. Indeed, the very purpose of the April 27,2009 hearing was to give Roundup the opportunity to come forward with evidence of its claims sufficient to establish their validity in the face of the Debtor's Objections. However, Roundup chose not to offer any evidence at the hearing and, indeed, could not even articulate that documents existed to establish that Roundup owned the debt or that enforceable credit card agreements existed to support the accounts upon which Roundup bases its claims. [Finding of Fact No. 12.] Because there is no evidence that Roundup owns Claim 6 or that Claim 6 is enforceable, Claim 6 must be disallowed.

Second, even if Roundup had admitted the documents attached to Amended Proof of Claim 6 into evidence at the April 27, 2009 hearing, these documents do not establish that Roundup owns the accounts in question or that the accounts are based on enforceable credit card agreements executed by the Debtor. Although Roundup attached documents to its *Response*—and *not* to Amended Proof of Claim 6—suggesting that a bundle of accounts originally held by Bank of America (or Wells Fargo) were subsequently assigned to FLA Card Services, N.A. (or NCO Portfolio Management, Inc.) and were eventually assigned to Roundup, there is no documentation suggesting that this particular Debtor's accounts were among those transferred. [Finding of Fact No. 7.] That Roundup attached one-page, untitled, and unidentified computer printouts listing the last four digits of the applicable account number does not somehow bridge that gap. Most importantly, however, Roundup never produced any evidence of a valid credit card agreement between the Debtor and the original account holder—the essence of its claim.

Therefore, even if Roundup was permitted to amend Proof of Claim 6 despite this Court's Notice and Order and despite this Court's election to apply Bankruptcy Rule 7015 to proof of claim disputes, Roundup has offered no evidence to prove the underlying validity of Claim 6 under Texas law. And, even in the event that Roundup had properly offered the attachments to Amended Proof of Claim 6 and the Response at the hearing, these documents would still be insufficient to prove the existence of a valid and enforceable contract between the Debtor and the original account holder and that Roundup is the current owner and holder of the accounts in question. Roundup might have avoided having to establish the validity of its claims by a preponderance of the evidence if it had attached all of these documents to its initial proofs of claim, but it chose not to do so. *See In re Gilbreath,* 395 B.R. at 368 ("The point is this: had eCast correctly filed its original proofs of claim, it could have availed itself of prima facie validity, shifted the evidentiary burden to the Debtors, and avoided the strictures and equitable balancing of the post-objection amendment process.")

D. Sanctions Against Roundup and Gill, its Counsel of Record

[13] [14] [15] A bankruptcy court's power to impose sanctions upon a party or its attorney derives from Federal Rule of Bankruptcy Procedure 9011 and its role as guardian of the integrity of the bankruptcy process. *See, e.g., Campbell v. Countrywide Home Loans, Inc.,* 545 F.3d 348, 356 n. 1 (5th Cir.2008) (noting that Bankruptcy Rule 9011 and 11 U.S.C. § 105 provide "mechanisms to impose sanctions on parties who may attempt to abuse the procedural mechanisms within the bankruptcy court"). Under 11 U.S.C. § 105, a bankruptcy court has the power to issue sanctions ***141** against parties and their attorneys to effectuate the provisions of the Bankruptcy Code. *See In re Volpert,* 110 F.3d 494, 500–01 (7th Cir.1997); *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine),* 77 F.3d 278, 283–84 (9th Cir.1996); *In re Courtesy Inns, Ltd., Inc.,* 40 F.3d 1084, 1089 (10th Cir.1994). Additionally, this Court may impose sanctions pursuant to 28 U.S.C. § 1927 by **requiring** attorneys to pay excess costs attributable to their misconduct. *See, e.g., Bishop v. W. Fid. Mktg., Inc. (In re W. Fid. Mktg., Inc.),* No. 4:01–MC–0020–A, 2001 WL 34664165, at *22 (N.D.Tex. June 26,2001) (determining that bankruptcy courts are "courts of the United States" that may award sanctions pursuant to 28 U.S.C. § 1927).

[16] [17] This Court also has the inherent power to police the conduct of litigants and attorneys who appear before it. *Chambers v. NASCO, Inc.,* 501 U.S. 32, 43–46, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991); *see also Flaksa v. Little River Marine Const. Co.,* 389 F.2d 885, 888 (5th Cir.1968) ("The inherent power of a court to manage its affairs necessarily includes the **authority** to impose reasonable and appropriate sanctions upon errant **lawyers** practicing before it."). This Court has previously

noted that "a federal court's inherent power to sanction bad faith conduct serves the dual purpose of covering the gaps where there are no applicable rules and also covering situations where 'neither the statute nor the Rules are up to the task.' " *In re Cochener,* 360 B.R. 542, 570 (Bankr.S.D.Tex.2007), *aff'd in part, rev'd in part,* 382 B.R. 311 (S.D.Tex.2007), rev'd, 297 Fed.Appx. 382 (5th Cir.2008) (quoting *Chambers v. NASCO,* 501 U.S. 32, 50, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)) ("The bankruptcy court acted well within its **authority** to enforce the integrity of the process by policing the accuracy of debtors' schedules and representations to the court."). The imposition of sanctions to **control** attorney misconduct "transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself, thus serving the dual purpose of 'vindicat[ing] judicial **authority** without resort to the more drastic sanctions available for contempt of court and mak[ing] the prevailing party whole for expenses caused by his opponent's obstinacy.' " *Chambers,* 501 U.S. at 46, 111 S.Ct. 2123 (citations omitted). Accordingly, a court may sanction an attorney for violating the local rules, even if the violation was not committed wilfully. *See Barbosa v. County of El Paso,* No. 97–51098, 1998 WL 648596, at *2 n. 1 (5th Cir.1998) (unpublished) ("Only a violation of a **requirement** of form must be willful before the court may sanction the party; a court may sanction any other violation of its local rules even if nonwillful."); *Miranda v. S. Pac. Transp. Co.,* 710 F.2d 516, 520–21 (9th Cir.1983).

[18] **[19]** An attorney's misconduct may also be imputed to his law firm. *See, e.g., In re Parsley,* 384 B.R. 138, 182 (Bankr.S.D.Tex.2008) (holding that it maybe appropriate to impose responsibility for an attorney's misconduct on his law firm). Additionally, the Supreme Court has recognized that counsel of record for a party may be sanctioned for the actions or inactions of the substitute counsel it sends to represent its client at hearings. *See Pavelic & LeFlore v. Marvel Entm't. Group,* 493 U.S. 120, 125, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989). The Eleventh Circuit, when faced with a similar situation to the one at bar—i.e. where counsel of record sent substitute counsel to represent the client at a hearing—held as follows:

> Levin asserts that he turned over responsibility for representing Simmons to his associate, Horkitz, and that Horkitz was responsible for the discovery abuse ***142** for which he is now being sanctioned. This argument is unavailing. As counsel of record, Levin owed a duty to his client fully to represent his interests, and he owed a duty to the court to comply with the court's orders. Although Levin may have delegated some of these duties to his associate, such a delegation—while it may provide a ground for sanctioning Horkitz—did not relieve Levin of his own duties. We find that the record fully supports the district court's determination that Simmons was an "advising" attorney and therefore hold that the district court did not abuse its discretion when it held Levin liable for sanctions....

Stuart I. Levin & Assocs., P.A. v. Rogers, 156 F.3d 1135, 1141 (11th Cir.1998).

[20] As discussed above, this Court may sanction a party or its attorney for violating the Local Rules of the United States District Court for the Southern District of Texas (the Local Rules)—which also apply to the Bankruptcy Courts in this District, *see* Bankruptcy Local Rule 1001(b)—even if such violation is not willful. Additionally, Appendix A of the Local Rules states that "the minimum standard of practice shall be the Texas Disciplinary Rules of Professional Conduct" (the Texas Disciplinary Rules) and that "[v]iolation of the Texas Disciplinary Rules of Professional Conduct shall be grounds for disciplinary action, but the court is not limited by that code." This Court believes that Roundup's conduct and the conduct of Gill, its counsel of record, with respect to this dispute violate provisions of the Local Rules and the Texas Disciplinary Rules and, therefore, warrant the imposition of sanctions in the form of paying the Debtor's attorney's fees. [10]

Local Rule 11.2 provides that "[t]he attorney-in-charge ... shall attend all court proceedings or send a *fully informed* attorney with **authority** to bind the client." (emphasis added). Additionally, Texas Disciplinary Rule 1.01 **requires** that an attorney provide competent and diligent representation to his or her clients. Texas Disciplinary Rule 1.01(a) provides that "[a] **lawyer** shall not accept or continue employment in a legal matter which the **lawyer** knows or should know is beyond

the **lawyer's** competence." Comment 1 to this rule provides that "[c]ompetence is defined in Terminology as possession of the legal knowledge, skill, and training reasonably necessary for the representation. Competent representation contemplates appropriate application by the **lawyer** of that legal knowledge, skill and training, *reasonable thoroughness in the study and analysis of* ***143** *the law and facts, and reasonable attentiveness to the responsibilities owed to the client.*" (emphasis added). Finally, Texas Disciplinary Rule 3.03 **requires** that attorneys exhibit candor when appearing or making written submissions to the court. Texas Disciplinary Rule 3.03(a)(4) provides that a **lawyer** shall not knowingly "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." The comments to this rule provide that "[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.*" (emphasis added).

This Court can think of no legal **authority** more pertinent to the dispute at bar than the published opinion it issued in *Gilbreath* and the opinion of District Judge Miller in *Tran*—two recent and highly pertinent opinions from this District on proof of claim objections and Bankruptcy Rule 3001. It is highly troubling that neither of these two opinions were discussed in Roundup's Response. Even more troubling—and particularly relevant to the "knowingly" **requirement** in Texas Disciplinary Rule 3.03—is that nearly every other published opinion that discusses Bankruptcy Rule 3001 from nearly every circuit throughout the country is cited and discussed in Roundup's Response to the Objection. It is unfathomable to this Court that counsel for Roundup's legal research turned up opinions from the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits, including a highly recent unpublished opinion from the Bankruptcy Court for the Eastern District of Pennsylvania, but not the opinions from this Court or the District Court for the Southern District of Texas. As this Court stated on the record at the April 27,2009 hearing, these undisclosed cases (which, incidentally, are **adverse** to Roundup's position) are "conspicuous by their absence." These omissions, when coupled with MacNaughton's paltry knowledge about Roundup's claims, the documents supporting them, and the chain of title with respect to the accounts purportedly held by Roundup, [Finding of Fact No. 12], violate the Local Rules and the Texas Disciplinary Rules, and are therefore grounds for sanctions against Roundup and its counsel of record. Gill, as the attorney-in-charge for Roundup, violated Local Rules by failing to send a "fully informed" attorney to the April 27, 2009 hearing. *See* Local Rule 11.2. The Debtor has expended considerable sums for his counsel to prepare and prosecute the Objections. These costs were incurred as a **direct** result of Roundup's failure to comply with Bankruptcy Rule 3001, its failure to review applicable case law from this District, and the failure of its attorney of record, Gill, to send a fully informed attorney to the April 27, 2009 hearing.

[21] This Court concludes that Roundup and Gill should bear the Debtor's costs incurred in preparing and filing the Objections and appearing at the April 27, 2009 hearing. This Court further concludes that Smith's fee is reasonable compensation for the services he rendered in objecting to Roundup's proofs of claim and that Smith's $350.00 hourly rate is reasonable, given that Smith has practiced law for over twenty-five years and is board certified in consumer bankruptcy law.

*144 IV. CONCLUSION

For the reasons set forth above and for the reasons stated on the record at the April 27,2009 hearing, this Court concludes that the Debtor's Objections should be sustained and that Claim 5 and Claim 6 should be disallowed. Roundup failed to comply with Bankruptcy Rule 3001 when filing Proofs of Claim 5 and 6, and the Debtor's Objections placed the burden on Roundup to introduce evidence to support its claims at the hearing. Because Roundup failed to introduce any exhibits or adduce any testimony, this Court must disallow Claim 5 and 6 pursuant to § 502(b). *See In re Foreclosure Cases,* 2007 WL 3232430, at *3 n. 3 (N.D.Ohio.2007) ("Unlike the focus of financial institutions, the federal courts must act as gatekeepers, assuring that only those who meet [certain **requirements**] are allowed to pass through."), In effect, Roundup wants this Court to disregard the rules of evidence and allow its claims. This, the Court will not do.

Additionally, Roundup's conduct—or the conduct of MacNaughton, which may properly be imputed to Gill, as Roundup's counsel of record—warrants the imposition of sanctions in the form of attorneys' fees. It is not one particular incident, but many compounded instances of misconduct that have led this Court to conclude that sanctions are appropriate. Roundup did not bother to attach the exhibits attached to its Response to its original proofs of claim; it neglected to review this Court's or the District Court's recently published opinions that were precisely on point with respect to the issues being addressed herein; it neglected to review this Court's Notice and Order before amending Proof of Claim 6; and it filed a Response to the Debtor's Objections that not only confuses the facts, but also ignores the applicable law in this District. Roundup's lack of competence and diligence is compounded by the fact that Gill, in violation of Local Rule 11.2, sent an attorney with virtually no knowledge of the Debtor's case or Roundup's file to the hearing on the Objections. This Court is very concerned with the conduct of Roundup and its counsel of record in this case and hopes that both exercise more care and diligence in the future in cases before this Court. The purpose of the sanctions issued against Roundup and Gill, its counsel of record, is to compensate the Debtor for the time his counsel spent preparing and filing written objections to two proofs of claim that clearly fail to comply with Bankruptcy Rule 3001 and for having to appear at the April 27,2009 hearing for which counsel for Roundup was grossly unprepared.

An order consistent with this Memorandum Opinion was entered on the docket on May 27, 2009. [Docket No. 63.]

***145 EXHIBIT No. A**

EXHIBIT No. A

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF TEXAS AT HOUSTON

PROOF OF CLAIM

***146**

ACCOUNT INFORMATION

Debtor(s) Name:	DEPUGH, DON
Debtor(s) SSN:	XXX-XX-9751
Account Number:	XX59G5
Creditor Name:	Roundup Funding, LLC
Related Account Number:	XXXXXXXXXXXX7777
Assignor:	NCO Portfolio Management, Inc.
Original Creditor:	WELLS FARGO
Open Date:	03/18/2004
Charge Off Date:	07/31/2006
Balance as of Filing:	$19,073.04
Basis for Claim:	Unsecured Account

CASE INFORMATION

Case Number:	08-37521
Bankruptcy Filing Date:	11/25/2008
Current Chapter:	13
Court District:	SOUTHERN DISTRICT OF TEXAS
Court City:	HOUSTON
Trustee:	DAVID G PEAKE
Counsel for Debtor(s):	JOHN ERNEST SMITH
Counsel Address:	2190 NORTH LOOP W STE 101 HOUSTON, TX 77018-8007

Pursuant to Instruction 7, above is a redacted version of the information contained in the computer files documenting the account.

This information substantially conforms to 11 U.S.C. § 501, Federal Bankruptcy Rule 3001 and the instructions to Form B10. See, e.g., In re Hines, 343 B.R. 32, 35 (Bankr. N.D. NY 2006); In re Lassanske, 2005 WL 3656243 (Bankr. E.D. Pa. 2006); In re Burnett, 329 B.R. 820 (Bankr. S.D. Ohio 2005); In re Hollabaugh, 337 B.R. 911 (Bankr. E.D. Wis. 2006); In re Pavlovic, 323 B.R. 659 (Bankr. S.D. Ind. 2004); In re Heath, 331 B.R. 429 (9th Circuit BAP 2005); In re Maynard, 341 B.R. 813 (Bankr. S.D. Fla. 2006); In re Worsh, 315 B.R. 732 (Bankr. N.D. Ga. 2004); In re Shaffner, 320 B.R. 670, 675 (Bankr. W.D. Mich. 2005); In re Dove-Nation, 318 B.R. 147 (10th Cir. BAP 2004); In re Gluzig, 321 B.R. 717, 719 (Bankr. N.D. Ill 2005); In re Ahland, 372 B.R. 341 (10th Cir. BAP 2007); In re Sivera, 2007 WL 4486662 (Bankr. N.D. W.Va. 2007).