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# Case Law Update
# Thursday 11/19

CONSUMER CASE SUMMARIES

CASE SUMMARIES PREPARED BY CATHERINE ANNE UMBERGER

(CURRENT THROUGH 9/21/2026)

## OPINIONS OF THE HONORABLE JUDGE JASON D. WOODARD

***In re: Kevin O'Conner Freeman,* Case No: 20-12124-JDW- AP No: 24-01002-JDW 5/29/2026**

This opinion arose from a Chapter 7 adversary proceeding on the Complaint for Turnover of Property of the Estate between the Chapter 7 Trustee and Debtor's estranged spouse, who was not a debtor. The Trustee was represented by an attorney at trial and the defendant, Leslee L. Freeman appeared pro se.

The issue at hand involved community property, specifically a home in California that happens to be the Defendants' homestead since 2006 that the Trustee wanted to sell for the benefit of the estate. The debtor and the defendant are still legally married but have been separated for over fourteen years. The defendant has lived in and maintained the property since its purchase. The Debtor, Kevin O'Conner Freeman, has lived in Mississippi since 2018.

The stipulated facts showed that the house in California was purchased by the Debtor and the defendant on May 25, 2006, as "Husband and Wife as Joint Tenants." There is one deed of trust in the original principal amount of $375,000. The fair market value of the house was determined to be at least $620,000 leaving the nonexempt equity around at least $373,000. The home is the only non-exempt asset of meaningful value. The Debtor and the Defendant are not divorced, but they have been separated since August 1, 2012. There is a pending divorce action in California. The monthly mortgage payments are $1,480.54 and there was an arrearage of $5,203.64.

The Court looked at Debtor's intent and found that the Debtor did not intend to return to reside in the California house. The defendant lives in the home with their children, while the debtor has lived in Mississippi since January 2, 2018. The Debtor lives with his girlfriend and her two children. The Court also looked at the equity in the property including the secured tax claims, outstanding mortgage, and the home's value. There is a partially secured tax lien of $7,140.38 on the property for unpaid taxes for 2011,2012, and 2013, where the Debtor is listed as the taxpayer. Based on expert witness testimony, the fair market value was determined to be $745,000 with an outstanding mortgage of $246,693.16 leaving approximately $500,000 of equity.

The Trustee would bear the burden of proving the elements for Section 542 turnover by a preponderance of the evidence by proving (1) the property is in the possession, custody, or control of a non-custodial third party; (2) the property constitutes property of the estate: (3) the property is a type that the trustee could use, sell, or lease pursuant to §363; and (4) the property is not of inconsequential value or benefit to the estate. The only element that the Court is looking at for the trial stage was whether the Property was of inconsequential value or benefit to the estate.

The Court considered the unique facts and circumstances of this case to determine whether the property is of greater than inconsequential value. The community property aspect of this asset means that it may only be sold to pay particular claims after administrative expenses are taken out: (A) all community claims-including community claims assertable against the non-debtor spouse, (B) community claims assertable against the debtor, (C) any remaining non community claims against the debtor using non community property, and (D) all remaining community claims from all remaining property of the estate. The Court has established that the home is community property and now turns to the concept of "community claims."

A "community claim" is a "Claim that arose before the commencement of the case concerning the debtor for which property of the kind specified in section 541(a)(2) of this title [i.e. community property] is liable, whether or not there is any such property at the time of the commencement of the case." There are only three claims in the bankruptcy case and California state law is used to determine whether they would be considered community claims. In California, "the community estate is liable for a debt incurred by either spouse before or during marriage." "During marriage" does not include time after the date of separation and before the legal separation/dissolution. In this case, the date of separation is August 1, 2012.

Claim One: Capital One Bank ($357.35)- Not a community claim since card was opened after date of separation.
Claim Two: Foremost Insurance Company ($83,382.41)- Not a community claim since debt incurred after date of separation.
Claim Three: California Franchise Tax Board ($7,140.38)- Partial community claim- All of the 2011 Taxes in amount of $3,026.21 and 2012 Taxes incurred before August 1, 2012, which would be secured.

The only claim that qualifies as a community claim is the secured claim of the California Franchise Tax Board, which the trustee should not seek to pay. If the claim were of an unsecured nature, the value to the estate would be inconsequential when looking at the administrative costs that would be needed. Further, the Chapter 7 trustee is looking to maximize distribution to the unsecured creditors. When liquidation will result in little to no payment to unsecured creditors, the asset should be abandoned. The secured creditors are protected by their liens.

Takeaway: Turnover is not warranted and the Trustee has not met the burden needed under §542. The costs of pursuing the liquidation would be greater than what the payout to creditors would be. Additionally, only secured creditors would benefit from the liquidation.

Additional Thoughts:

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***In re: Brian L. Hazlett, Sr., Case No: 26-10377-JDW- 09/14/2026***
This opinion is on Debtor's Pro Se Objection to the Proof of Claim of the Internal Revenue Service and Notice that the IRS Tax Obligation Has Been Satisfied and the Response of the Internal Revenue Service. The court looked at whether the Debtor's self-generated "Bill of Exchange" constitutes legal tender or another legally recognized form of payment. The debtor argues that his tender of the Bill of Exchange satisfied all existing tax obligations and, in fact, created a credit to be used against future tax obligations. The IRS contends that the Bill of Exchange is a meaningless piece of paper.

On June 11, 2025, the debtor mailed a self-generated document labeled "Bill of Exchange" to the United States Department of the Treasury directing the Treasury to pay $200,000 to itself. The debtor created the document on his computer and printed it out after receiving IRS billing statements reflecting his outstanding and estimated future tax liabilities. The debtor contends that he is now current in his taxes and has a $192,000 credit against future taxes. The Chapter 13 Plan is unconfirmed. The Internal Revenue filed a proof of claim in the amount of $30,655, later amended to $24, 992.94.

The Debtor filed an Objection to the Claim evidencing that his "Bill of Exchange" satisfied his outstanding tax debt. The Debtor's "Bill of Exchange" is not legal tender because it does not fall within the definition of forms of money recognized as legal tender. The debtor also maintained that the "Bill of Exchange" constitutes a valid "draft" under Mississippi law and operated as payment of his federal tax obligation. The "Bill of Exchange" is not a valid negotiable instrument in any form. The document does not identify an existing source of funds from which the purported drawee is obligated to make payment. Objection Overruled.

Takeaway: The self-generated Bill of Exchange does not constitute legal tender or any other legally recognized form of payment and, therefore, did not serve as payment of debtor's tax obligations.

Additional Thoughts:
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***In re Gregory Bigham and Cynthia Delores Bigham, Case No: 26-010150-JDW- AP No: 26-01015 and 26-01016- 9/8/2026***

This opinion is on a Motion for Summary Judgment filed by Community Bank against the Debtors in two adversary cases and the Court issued a Memorandum Opinion and Order. In both adversary cases, the debtors are seeking to "strip" the subordinate liens of Community Bank on two separate properties. In order to strip a subordinate lien, there must be no value or equity in the property that could be used to pay any portion of the subordinate loan.

Summary Judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The debtors filed a Chapter 13 case, and they own two parcels of real property in Hernando, 840 Green Acres Drive (Green Acres) and 5645 Joan Street (Joan Street). Green Acres serves as Debtor's homestead. Community Bank holds recorded deeds of trusts on both properties that include cross-collateralization provisions. Community has an outstanding loan of $106,255.70 on Green Acres and another outstanding loan of $56,803.44 on Joan, both of which are cross-collateralized.

In the filed schedules, Joann was listed with a value of $248,500, with the caveat of a pre-existing flood control easement by the US Army Corps of Engineers. Debtors would acquiesce that the value is closer to the Tax Assessor amount of $111,452, but the schedules were not amended to reflect that amount. Green Acres was listed with a value of $221,350. Community Bank accepted the value of $248,500 for Joann and countered that the value of Green Acres is $425,000 based on an appraisal done earlier this year.

If the Court accepts the $425,000 and $248,500 valuations, Community Bank would be fully secured, but if the Court accepts the $221,350 and the $111,452 valuations, Community Banks would be wholly unsecured. Green Acres has the potential to strip down and/or strip off the Community Bank lien. The Court found that the cross-collateralization clause of Community Bank allows Joan to be subject to strip down and or strip off since Green Acres is also tied to the loan.

The court looks to the issue as to which value should be used on Joan and determine the scheduled value would prevail so Community Bank's lien on Joann is fully secured

and the Motion for Summary Judgment is granted. The cross collateralized Green Acres loan would be undersecured, leaving the possibility of a potential strip down.

They then turn to the Green Acres property and determine that there is a material issue of genuine fact due to the difference between the scheduled value and the appraised value. The Court does agree that tax assessments are not great evidence and are rarely determinative at an evidentiary hearing, but an owner of the property may always testify about the value of the property. At this juncture, the court is not weighing the evidence but just assessing that there is evidence. The value of the property is material because it will determine whether any of the liens are wholly unsecured.

Takeaway: There is a material issue of genuine fact in the Green Acres Adversary that is scheduled for trial, so the Motion for Summary Judgment is denied. In the Joan Adversary, there is value to support the subordinate lien, so the Motion for Summary Judgment is granted, and the Community Bank lien will not be stripped.

Additional Thoughts:

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OPINIONS OF THE HONORABLE JUDGE SELENE D. MADDOX

***In re: Jodie Felton,* Case No: 18-11791-SDM- AP No: 25-01001-SDM 12/23/2025**
This opinion arose from an adversary proceeding on a Motion for Damages, Sanctions, and Attorney Fees filed by Jodie Felton against USDA-Rural Housing Service for failure to timely release its mortgage lien after the entry of the Court's Agreed Order declaring the debt satisfied, and after the entry of the Discharge Order.
Plaintiff/Debtor argues violation of Court orders and the discharge injunction, civil contempt and requesting damages. USDA conceded its failure to release the lien in a timely manner but stands on sovereign immunity as a limitation as to what damages are available as a remedy.

The undisputed relevant facts are that the Debtor owns her primary residence (923 Parkview Street Cleveland, MS 38732) and USDA held a deed of trust on the property that was fully satisfied through the bankruptcy discharge. USDA was directed to release the lien on October 6, 2023, and the bankruptcy case was discharged on November 14, 2023.

As of March 21, 2024, the release was unfiled. Debtor's counsel reached out to USDA's counsel via email to request an update on compliance. Approximately two months later, Debtor received an email from USDA showing an unpaid balance of $4,364.85 remaining. Debtor confirmed, through counsel, that there was no balance owed to USDA by verifying with the Chapter 13 Trustee. Debtor's counsel then sent the Agreed Order and another request to release the lien to USDA. USDA then referred the Debtor's account to the US Department of Treasury for collection and Debtor received notice that her Social Security benefits would be garnished. USDA's counsel confirmed that there would not be a garnishment and no funds were garnished As of December 4, 2024, the lien was still on record and a Motion to Reopen case was filed. Once the case was reopened, an Adversary Complaint was filed asserting civil contempt, violation of the FDCPA, and violation of Mississippi Code §89-5-21. The Debtor sought $1,000 in statutory damages under FDCPA, $200 in statutory damages and $131,472 in "mortgage money" under Mississippi Code §89-5-21, actual damages, attorney fees and costs, sanctions for USDA's conduct, daily sanctions until the deed of trust is released, and pre- and post- judgment interest.

The lien was released in March 2025, and a copy of the executed release was recorded in Bolivar County land records on April 14, 2025. Debtor submitted a fee itemization of $8,019.50 for 31.1 hour billed at the hourly rate of $265 from the date range of March 2024 through October 2025 and USDA contends that of that amount only $4,825.78 of it is compensable.

The Court looked at the scope of sovereign immunity and its application under §106 to determine recovery. The Court then used its authority under §105(a) to enforce its orders through civil contempt. Section 106 does not create substantive rights against the United States and does not override the substantive limitations found in other federal statutes. The Court then looks to see if sovereign immunity has been waived and whether the substantive law invoked actually provides a viable cause of action. The debtor contends that USDA violated both the Agreed Order declaring her mortgage debt satisfied and the Discharge Order by failing to release its lien and by treating the discharged debt as still owed. Civil contempt requires clear and convincing evidence that (1) a court order was in effect; (2) the order required certain conduct by the contemnor; and (3) the contemnor failed to comply. Specifically, for discharge violations, contempt turns on whether the creditor had an objectively reasonable basis to believe its conduct was lawful. It was admitted by USDA that compliance did not happen for approximately 18 months, so civil contempt was met. The discharge injunction of §524(a)(2) was also violated by USDA carrying an erroneous balance and also referring the account to the Treasury and the impending garnishment threat. The USDA was found in contempt of both the Agreed Order and the discharge injunction.

Civil Sanctions are meant to coerce compliance or compensation the injured party, not punish past conduct.
We now turn to what fees are allowed by going through each of the Debtor's categories for relief.

1. Attorney's Fees and Costs Reasonably Incurred to Secure Compliance (√)- 26.7 hours ($250.32 per hour and $254.81 per hour) for the attorney and 3 hours ($65 per hour) for paralegal work- $6,794.68 and $195. Along with mailing costs of $50.28, office copy costs of $49.50 and filing fee of $350. Total of $7439.46.
2. Prospective Coercive Civil Contempt Sanctions and Punitive Sanctions (X)- Contempt was purged on 4/14/2025 when it recorded the lien release so prospective coercive civil contempt sanctions are moot and punitive sanctions are prohibited against governmental units.

As to the Debtor's remaining claims under FDCPA and Mississippi Code §89-5-21, the Court agrees with USDA that §106(b) does not create a substantive right to recover damages and the Debtor is not allowed to recover damages under either statute.

1. Debtor's claim for damages under FDCPA is barred by sovereign immunity since the FDCPA does not contain an express waiver of sovereign immunity.

2. Debtor's claim for recovery under Mississippi Code §89-5-21 is also barred by sovereign immunity due to the absence of an express congressional waiver and it historically being a punitive as opposed to a compensatory damage.

Takeaway: Although, USDA was held in civil contempt for violating the Court's orders and the discharge injunction, sovereign immunity did limit the recovery to reasonable attorney's fees and costs incurred to secure the USDA's compliance with the Agreed Order and the Discharge Order.

Additional Thoughts:
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***In re: John Kirk Shumpert,* Case No: 24-11641-SDM; Stephen H. Landy, Case No: 24-11399-SDM; and Doneice Cunningham Johnson, Case No: 24-14079-SDM**

This opinion stems from three identical Motions to Examine Fees of Attorney and Other Relief filed by the US Trustee seeking to review flat-fee retainers paid to the same law firm for representation of the above Debtors. The fees range from $10,450 and $12,500 for the Chapter 7 Cases, and the UST contends that the fees are excessive and requests disgorgement of the excessive portions of the fees. Further, the UST asserts failure to disclose the full amount of compensation received and requests disgorgement of the undisclosed amounts. Debtor's counsel responds that the fees are reasonable given the nature of the cases, which involved substantial business-related debt, extensive preparation, and continued post-petition administration.

After Debtor's counsel submitted an itemization of time on each case, a final hearing was held and taken under advisement. The initial filed disclosures of compensation of attorney for debtor reflected the following prepetition payment amounts: $12,073 (Landy), $10,016 (Shumpert), and $12,077 (Johnson). The services provided by the law firm included financial analysis, preparation and filing of required documents, and the representation at the meeting of creditors and did not cover court filing fee, postage fees, fees and charges related to credit and educational counseling, credit and asset reports. The services provided also did not include reaffirmation agreements, adversary proceedings, and responses to inquiries by the UST regarding dismissal or denial of discharge.

Each debtor reported large amounts of liabilities and business-related financial circumstances ranging from $955,889.63 to over $2.1 million. Each case involved at least one continuance of the meetings of creditors and resulted in discharge.
The Debtors' attorney asserted that these cases required significant work not reflected on the docket, including extensive client communications, asset investigations, and repeated creditor meetings. Further citing the bankruptcy practice has evolved since BAPCPA and that the flat fees accounted for risk, overhead, and unforeseen work. Attached to the briefs were "Attorney-Client Retainer Agreements" reflecting the following amounts that were paid pre-petition: $12,500 (Landy), $10,450 (Shumpert), and $12,500 (Johnson). These agreements provided that the services covered were prepetition consultations, preparation and filing of the petition, creditor communications, the filing fee, and representation at a single meeting of creditors and excluded reaffirmation agreements, adversary proceedings, and responses to UST inquiries. It also permitted additional fees in the event of case complexity and allocated certain costs such as credit counseling and related expenses to the debtor.

The disclosures filed in the cases and the retainer agreements provided by the law firm differed in the scope of the services provided and the fee amounts. The retainer included the filing fee, whereas the filed disclosure did not.
The Chapter 7 Trustee testified at the initial hearing that typical fees in the district range from $800 to $2,000 per case and these cases were referred to the UST due to the higher amounts requested. One of the Debtors, Landy, also testified at the hearing as to spending substantial time with counsel and staff prepetition and his preference for the flat fee arrangement as well as his satisfaction with the representation. Itemization of time was requested by the UST and later provided by Debtor's counsel. The itemizations included work done from initial consultations through post-petition administration and litigation of the UST's fee motions and included work done by the various members of the firm. The itemized invoices were actually higher than the flat fees that were charged to each respective debtor: ($43,576.75 in Johnson, $58,905.50 in Landy, and $50,024.55 in Shumpert).

At the final hearing, the UST argued that the flat fees were unusually high and had issues with the itemizations. Debtor's counsel advised that the itemizations were done to comply with the Court's directive and were not standard in a flat-fee situation. The time spent defending the reasonableness of the fees was not considered by the Court. The Court looked at (1) whether Debtors' counsel complied with the disclosure requirements of §329(a) and Rule 2016(b), and (2) whether the fees charged exceed the reasonable value of the services rendered under §329(b) and Rule 2017(a).

(1) Disclosure of Compensation under §329(a) and Rule 2016(b)- The Court allowed disgorgement of the undisclosed amounts from the retainer agreements. ($270)
(2) Reasonableness of Fees under §329(b) and Rule 2017(a)- The Court found that the amounts were reasonable when viewed in light of the particular facts of these cases and the Court excluded the time spent on the defense of the fee motions.

Takeaway: The Debtor's counsel was required to disgorge the portion of retainer fees that was undisclosed. The Court did not require full disgorgement due to the discrepancies being minimal, absence of bad faith evidence, and the value of the services provided.

Additional Thoughts:
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OPINIONS OF THE HONORABLE JUDGE KATHARINE M. SAMPSON

***In re: Ikechukwu H. Okorie, Case No. 19-50379-KMS***
***9/18/2025***

This opinion is on Debtor's Motions for Leave to File Barton Motions and File Bond Under Seal. Ath the time of the Chapter 11 filing, Debtor owned 6 properties, 4 of which were encumbered. One property was foreclosed with Debtor's acknowledgment and then the case was converted to a Chapter 7. Another creditor obtained relief on another property, and the remaining properties were set to be liquidated by the Chapter 7 trustee. No objections to the sale motions were filed. Debtor filed an Objection to the sale of one of the properties, without the assistance of counsel, after the Order was filed, but it was overruled and the sale was approved. A Chapter 7 discharge was received on October 5, 2021. Two years later, the Debtor filed motions to void the sales by alleging misconduct by the Trustee, but the motions were denied after a thorough investigation due to lack of standing and res judicata. The Debtor then filed Motions to Set Aside the sale orders in four different state courts.

Debtor is now seeking leave to sue the Trustee and various third parties and asserts that the claims arise out of state law. The proposed complaints reveal a laundry list of claims. The Court entered an order enjoining the Debtor from filing anything without prior approval of the Court, a year prior to this. The Debtor also had requirements that had to be met on the motions for leave: 1) Two pages maximum; 2) Attach the proposed filing; 3) Explain why the proposed filing is not frivolous; 4) Explain why the proposed filing is not an attack on any previous order entered by the Court in this case or any related adversaries; and 5) Shall certify, by affidavit or under penalty of perjury, that the proposed filing raises a new issue that has not already been rejected by the Court or is not currently pending before the Court.

The Motions were denied because the Court has already held that the Trustee properly performed the estate duties and there was no evidence of fraud or other misconduct. Further, Debtor does not have standing to attack the administration of the bankruptcy estate. The Court viewed the motions as a continuation of Debtor's harassment of the Trustee, creditors, and their counsel.

Takeaway: The Court denied the Motions due to lack of factual or legals basis and bad faith filings.

***9/30/2025- Adv. Proc- 25-06008-KMS, 25-06013-KMS, and 25-06027-KMS***

This opinion involves Debtor and three separate adversary proceedings against PriorityOne Bank. All three adversaries were filed by the Debtor in either state or district court, and alleged wrongful actions by PriorityOne, related to the loan and foreclosure of 908 W. Pine Street in Hattiesburg. In a prior adversary filed in bankruptcy court, Debtor alleged violations of the automatic stay and improper foreclosure of the same property. The prior adversary ended in dismissal with prejudice. PriorityOne filed Motions to dismiss in two adversaries for four reasons: (1) The Complaints are time barred due to the foreclosure occurring 5 years ago, which would be two years too late: and (2) PriorityOne's deficiency claim has been allowed due to the objection to claim being overruled.; (3) Debtor is precluded from relitigating an alleged violation of the automatic stay or finality of the foreclosure, and (4) Debtor is claim splitting by attempting to bring lawsuits in different courts.

The Court went into the res judicate standard which bars the litigation of claims that either have been litigated or should have been raised in an earlier suit. The four elements of res judicata: (1) the parties are identical or in privity (√); (2) the judgment in the prior action was rendered by a court of competent jurisdiction (√): (3) the prior action was concluded by a final judgment on the merits (√); and (4) the same claim or cause of action was involved in both actions (?).

The Fifth Circuit applies a transactional test to determine whether the same claim or cause of action was involved. Did the Debtor base the two actions on the same nucleus of operative or key facts? The court found that yes, res judicata applies due to a common set of facts and the same allegations and theories of recovery. Then the court lists the prior rulings: Adv. 23-06019- Adversary Dismissed with Prejudice., 19-50379-KMS- Violation of Automatic Stay Denied and Motion to Annul Stay Granted, 19-50379- Objection to Proof of Claim Overruled, 19-50379- Order Denying Various Pending Motions, Adv. 25-06013- District Court Referral to Bankruptcy Court. It was determined that the same nucleus of operative facts were in play in these three adversaries. The Court went further in saying that the action is time barred. The Court also denied PriorityOne's Motion to Reinstate Adversary Proceeding since the intent was to reopen in order to file a Motion to Dismiss.

Takeaway: The Court ultimately dismissed all three adversary proceedings due to res judicata.

***10/31/2025***

This opinion is on a Motion for Contempt filed by the Chapter 7 Trustee and the Debtor's response. There is a history of frivolous and vexatious litigation filed by Okorie against the Trustee and the Court found no evidence of Trustee misconduct and that the estate was properly administered. The Court granted sanctions against the Debtor in the amount of $78,533.27 along with a pre-filing injunction in an attempt to stop repetitive complaints and other filings. The Order was affirmed after appeal to the District Court and Fifth Circuit. The Debtor has neglected to pay the sanctions award and has persisted in filing frivolous and unfounded actions.

The case was originally filed as a Chapter 11 case and was converted two years later to a Chapter 7 Case. The case was discharged on October 5, 2021. His counsel withdrew from the case that following February due to the Debtor filing pro se motions. As a pro se Debtor, he has unsuccessfully challenged matters in 10 different courts. The sanctions award was payable within thirty days of the order and has not been paid going on over a year.

The Court looked at the elements for civil contempt which is (1) that a court order was in effect; (2) that the order required certain conduct by the respondent; and (3) that the respondent failed to- comply with the court's order by clear and convincing evidence. The Trustee has met the burden for establishing contempt. Further, the Debtor is ordered to pay the Trustee $100 daily from the date of the order (10/31/2025) until the sanctions amount is paid in full. The Trustee also requested attorney's fees and costs related to the contempt motion and was awarded reasonable costs, expenses, and attorney's fees.

Takeaway: The Motion for Contempt is Granted. Debtor has to pay $78,533.27 in sanctions with a $100 daily penalty for failure to comply. Additional sanctions for reasonable attorney's fees, expenses, and costs incurred were also awarded.

***3/30/26 Adv. Proc. 19-06032***

This opinion is on Trustmark Bank's Motion for Summary Judgment and Debtor's Response. The case was originally a Chapter 11 case and later converted to a Chapter 7 case. The Chapter 7 case has been discharged. During the Chapter 11 case, Trustmark filed a proof of claim in the amount of $561,815.82 that includes a commercial guaranty executed by Debtor. Trustmark filed an adversary seeking determination of nondischargeability for willful and malicious injury caused by Debtor's sale of medical equipment securing Trustmark's loan. Trustmark claims that the practice and equipment was sold to a third party with no payment to Trustmark. Trustmark asserts a nondischargeable debt of $211,928.08 plus interest and attorney's fees of

$15,956.55. An abeyance request was filed in order to let the Chapter 7 proceed and determine amount of distribution. Debtor then appeared pro se. Trustmark contends that there are no genuine issues of material fact and that it is entitled to a nondischargeable judgment as a matter of law in the amount of $120,228.73 plus fees and costs. The Debtor counters that nondischargeability cannot be established and that the collateral transfer is a simple contractual dispute. The Court then looked to see if summary judgment would be appropriate and it is “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” It is undisputed that Trustmark had a purchase money security interest in an x-ray machine and related equipment along with the stipulation that “Grantor shall not sell, offer to sell, or otherwise transfer or dispose of the collateral.” Further, “all proceeds from any disposition of the Collateral shall be held in trust for Lender and shall not be commingled with any other funds; provided however, this requirement shall not constitute consent by Lender to any sale or other disposition. Upon receipt, Grantor shall immediately deliver any such proceeds to Lender." The debtor sold the practice along with the equipment to a third party and did not pay Trustmark. The sale of the practice and property generated approximately $120,000 in net proceeds.

The Court then delves into whether the debt should be excepted from discharge due to willful and malicious injury by the debtor to another person or their property. The three elements were established : (1) injury by the debtor; (2) to another (or property of another; and (3) such injury was willful and malicious. The Court relied on the Debtor being 100% owner and managing member of the medical practice, the pmsi of Trustmark, the sale prohibition, and the sale of the property including Trustmark’s PMSI collateral when making its determination. Also, Trustmark was not informed of the sale and did not receive any proceeds from the sale. The Court moves on to the willful and malicious aspect. The Debtor’s sale of Trustmark’s collateral without consent or remittance of payment was substantially certain to result in injury to Trustmark. This met the objection substantial certainty of harm essential for exception to discharge so the Court did not need to determine if subjective motive to cause harm existed.
The damages should be measured as the value of the collateral at the time of the sale, which will be determined later by evidentiary hearing. Trustmark is also entitled to recover its nondischargeable attorneys’ fees for the adversary proceeding.

Takeaway: Trustmark is entitled to a judgment of nondischargeability as a matter of law.

Additional Thoughts:
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***In re: James Allen Knowles, Jr., Case No. 24-51513-KMS 12/22/2025***
This opinion is derived from Motions to Vacate or Reconsider the Order Denying Motion to Reopen Chapter 13 Case. The pro se debtor alleges that the actions of Cadence Bank violated the automatic stay in a later case filed by Debtor (25-51384) while Debtor was under a 180 day refiling ban.

Debtor filed this case, which was his second case filing within a year. Cadence Bank filed a motion to dismiss asserting fraudulent conduct by Debtor and alleging a bad faith case filing.

The Court later entered an order denying Cadence Bank's motion, but the order had a stipulation that if this case was dismissed, the automatic stay would be lifted as to Cadence Bank along with a 180-day ban on refiling. The case was dismissed for failure to make plan payments. Debtor filed a third bankruptcy case, but Cadence Bank foreclosed on its property, and the Court dismissed the third case sua sponte due to the violation of the 180-day ban on refiling.

Debtor filed the Motion to Reopen this second case, and a telephonic hearing was held. Debtor's motion was replete with AI generated nonsense for lack of a better description. In a later pleading, the Debtor requests nunc pro tunc reinstatement of the automatic stay.

Debtor argued that Cadence Bank violated the automatic stay when it foreclosed on its collateral. The majority of courts have recognized that reopening a dismissed case does not retroactively impose the automatic stay. The Motion to reopen was denied. Debtor's motion to vacate is evaluated by the court as a motion to alter or amend the judgment. Amendment would be appropriate (1) where there has been an intervening change in the controlling law; (2) where the movant presents newly discovered evidence that was previously unavailable; or (3) to correct a manifest error of law or fact. Debtor did not present anything where amended would be appropriate. The motions to vacate were denied.

Takeaway: A motion for reconsideration is not a proper vehicle for rehashing evidence or legal theories. Debtor had not established any grounds to warrant reconsideration.

Additional Thoughts:
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***In re: William Joeseph Bayes, Case No. 24-51260-KMS 2/12/2026, AP No: 24-06029-KMS***

This opinion is on a Motion for Summary Judgment. The Plaintiffs object to discharge of a debt based on the pre-existing Final Judgment on Complaint of Damages in Chancery Court. The Chancery Court found that the Debtor acquired money and property by undue influence. The Judgment further entitles the Plaintiffs to summary judgment based on collateral estoppel.

The Debtor was appointed conservator and guardian of the plaintiff who is now deceased. The decedent's sister and intended beneficiary later asserted that the Debtor was failing in his obligations as conservator and breaching his fiduciary duties. Ultimately Debtor was replaced as conservator and the new conservator filed a complaint for damages in Chancery Court. After the Chancery Court trial and prior to the Judgement, Debtor filed a Chapter 7 bankruptcy and listed the conservator and the decedents estate as a nonpriority unsecured creditor. The Chancery Court Judgment was entered and ordered the Debtor to pay damages to the Plaintiffs. An adversary proceeding was filed seeking to have this judgment declared non dischargeable. The Motion for Summary judgment asserts the factual findings of undue influence would equate to willful and malicious conduct, false representation, and fraud or defalcation while acting as a fiduciary rendering their claim non dischargeable. The Debtor did not file a response. The Motion for Summary Judgment was denied without prejudice so that the Plaintiffs could seek relief from the automatic stay. A motion for relief was filed, the stay was annulled, and the Chancery Court Judgment was given full force and effect.

Summary Judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." A fact is material if its resolution in favor of one party might affect the outcome of the lawsuit under governing law. An issue is genuine if the evidence is sufficient for a reasonable [factfinder] to return a verdict for the non-moving party.

Although the Debtor did not respond, the Court still considered the motion for summary judgment. Plaintiffs are that there are no genuine issues of material fact since the issues were decided in Chancery Court and that the bankruptcy court would be bound by the Chancery Court Judgment. Collateral estoppel precludes re-litigation of a specific issue that was (1) actually litigated in the former action. Issue preclusion would apply in bankruptcy court only if, inter alia, the first court has made specific, subordinate, factual findings on the identical dischargeability issue in question and the facts supporting the court's finding are discernible from that court's record.

The court then turned to whether the three elements were established to render a pre-petition debt nondischargeable: (1) Injury by the debtor (√); (2) to another (or property of another) (√); and (3) such injury was willful and malicious (√). The Court looked at whether there was a willful and malicious injury. The subjective motive to cause harm was met because the Chancery Court Judgment established that the Debtor's motive to harm Plaintiffs was for personal financial gain and "essentially a fraud upon the Court". ($150,000 transferred over the course of 10 months). In a related criminal matter, the Debtor pled guilty to the crime of Exploitation of a Vulnerable Person, which required a willful state of mind. The objective substantial certainty of harm was also met due to the confidential relationship, suspicious circumstances, and a presumption of undue influence under Mississippi law. The Chancery court found that he did not act in good faith. Plaintiffs would be harmed by the debtor actively transferring money for his own use. The debt is nondischargeable and the related attorney's fees are also nondischargeable.

Takeaway: The Motion for Summary is granted, and the Chancery Court Judgment renders the debt nondischargeable. The Court determined that the requisite elements of the dischargeability claim were decided by the Chancery Court. Further, both subjective motive and substantial certainty of injury were present.

Additional Thoughts:

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***In re: Kaneisha L. Magee, Case No: 19-52426-KMS 3/31/2026***

This opinion is related to Debtor's Motion to Declare Lien Satisfied as to Exeter Finance. The Debtor is seeking the release of Exeter's lien on a 2017 Nissan Maxima since the claim has been satisfied under the terms of the confirmed plan. Exeter's counter argument is that the lien cannot be released due to the Debtor not being eligible for discharge and the full amount of the debt not being paid under state law. The Debtor filed a Chapter 7 case in 2016 and was discharged. Debtor then entered a retail installment contract with Exeter for the purchase of a 2017 Nissan Maxima for $24,184.67 at 24% interest. Debtor then filed a nondischargeable Chapter 13 bankruptcy in 2019. Exeter filed a proof of claim in the amount of $25,188.80 for the vehicle and Debtor's confirmed plan proposed to pay the amount of the claim at 6.75% interest. Exeter did not object to confirmation nor the treatment of the claim. The Trustee filed a Notice of Completion of Plan Payments and Debtor filed the Motion to declare Exeter's lien satisfied.

The issue before the Court is whether Exeter accepted the plan and if so, whether payment of the full amount of Exeter's claim at the *Till* rate requires release of the lien. The Court found that Exeter accepted the plan by not filing an objection to confirmation and by accepting all plan payments without objection. The plan was considered final as to the non-objecting creditor. Further, Exeter's debt was paid in full under the confirmed plan. The lien is now extinguished and the Debtor is entitled to release of the lien.

Takeaway: The lien is released. Exeter did not object to the plan, the plan was confirmed and the debtor paid Exeter's claim in full per the confirmed plan.

Additional Thoughts:

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OPINIONS OF THE HONORABLE JUDGE JAMIE A. WILSON

***In re: Kevin Dale Camp, Case No: 25-01352-JAW 6/11/2026***

This opinion arose from a Joint Motion to Approve Compromise and Settlement Pursuant to Rule 9019 filed by the Chapter 7 Trustee and Divorce Counsel with an Objection filed by the Debtor.

The Debtor retained Roberts, Bridges & Boydston PLLC (RB&B) in 2021 to represent him in divorce proceedings. An Agreed Judgment of Divorce was rendered, and Debtor was to be paid $157,500 in two equal installments as part of the property settlement agreement. The initial $78,750 was payable within thirty days and the remaining $78,750 was due within one year. The first installment was received in April 2023. Before the second installment became due, Debtor and RB&B had a dispute as to the amount of attorney's fees and costs charged for the legal services. Prior to the second installment coming due, RB&B filed a Notice of Attorney's Lien in the Divorce Proceedings and later sued the Debtor in County Court to collect the past due balance of its attorneys' fees. Due to this dispute, the Debtor's ex-wife deposited the amount of $78,750 into the County Court registry. The County Court ultimately entered an order granting RB&B $105,133.75 plus interest. RB&B later file a motion for additional attorney's fees and expenses for the Collection Action and it is pending due to the bankruptcy filing.

The bankruptcy Trustee gave notice to creditors of an asset case and a request for proof of claims to be filed. Unsecured claims totaled $983,305.70, which would not

result in a full distribution to unsecured creditors per the Trustee's testimony. RB&B filed a claim totaling $208,056.04 with a secured portion being $78,750. The trustee filed an Objection to the secured portion of the Claim and a Motion for Turnover of the $78,750 being held in the County Court Register.

The Trustee and RB&B filed a Joint Settlement Motion authorizing the County Court to release the held funds to the Trustee. In turn, the Trustee will disburse $58,750 to RB&B in full satisfaction of the secured portion of its claim and retain $20,000 for the benefit of the estate. RB&B would then file an amended unsecured proof of claim of $149,306.04. The Debtor objected to this settlement proposal based on the alleged secured status of the claim. Debtor would show that the RB&B's entire claim is unsecured because RB&B never held or retained possession of the funds. The Trustee and RB&B then challenged the Debtor's standing. At the Hearing, The Trustee testified that the settlement is fair, reasonable and in the best interest of the bankruptcy estate and creditors due to not having to fully litigate the matter.

The Court first looked at the Debtor's standing to object to the proposed settlement offer and found that an exception to the solvent estate rule due to the existence of the nondischargeable IRS unsecured priority tax claim ($38,674.89).
The Court then turned to whether the proposed joint settlement is "fair, equitable and in the best interest of the estate." A three-factor test is used: (1) the probability of success in litigating the adversary claim;(2) the complexity and likely duration of litigation; and (3) all other factors bearing on the wisdom of the compromise. The third prong includes (a) the best interests of the creditors and (b) the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud of collusion.

1. Probability of Success in Litigating Claim- Whether RB&B has a perfected pre-petition lien is at dispute and would have to be litigated. The Court found that this weighed in favor of approving the settlement.
2. Complexity & Expense of Litigation- This involves complex legal questions and would require substantial legal fees and negatively impact unsecured creditors. The Court found that this weighed in favor of approving the settlement.
3. Other Relevant Factors Bearing on the Wisdom of the Settlement- The Debtor does not want the settlement to occur in the hope that he can use the funds to pay his nondischargeable priority tax debt. The Court found that the balance of relevant factors weighed in favor of the proposed settlement.

Takeaway: The Court found the settlement to be "fair and equitable" when all factors were considered and approved the Joint Settlement.

Additional Thoughts:

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***In re: Joyce M. Hewitt, Case No: 24-02654-JAW***
***Opinion: 5/19/2026***

This opinion concerned an Order to Show Cause issued to the Debtor and her counsel of record along with a Voluntary Motion to Dismiss Chapter 7 Case and Objection by the Chapter 7 Trustee. At the hearing, the Debtor terminated her Attorney's representation and proceeded in a pro se manner and the Trustee was represented by an attorney. During the case, a 2004 Examination was conducted by the US Trustee, and schedules were later amended to include additional assets: two unencumbered real properties and six additional deposits of money accounts, two term life insurance policies, and 100% ownership interest in a company. Also, Debtor amended income and expense schedules to include VA disability income and three dependents. In addition, Debtor added fifteen unsecured creditors.

The UST filed an Adversary Proceeding to deny discharge under 11 U.S.C. § 727(a)(2)(B) and § 727(a)(4)(A) for concealing estate property and making a materially false oath by failing to disclose estate assets on her original schedules. The day after, the Debtor initiated divorce proceedings in Chancery Court without obtaining relief from the automatic stay. Meanwhile, the Chapter 7 trustee deemed the bankruptcy case to be an asset case and asked creditors to file their proof of claims. The day after the Notice to Creditors to File Proofs of Claim, a Motion to Convert the Case to a Chapter 13 was filed and the Trustee filed an Objection. A settlement was reached where the case was converted to a Chapter 13 case, with the caveat that if the Chapter 13 case proved to be unsuccessful, the case would revert back to a Chapter 7 proceeding. The adversary proceeding regarding dischargeability was also settled. After the fact, the Debtor filed a Motion for Relief as to the divorce proceedings with the limitation that the Bankruptcy Court would have exclusive jurisdiction as to the enforcement of any settlement agreement that would affect property of the bankruptcy estate. The Chapter 13 also filed a response that the property could not be transferred to the non-filing spouse.
A settlement was announced at the scheduled hearing, but the agreed order was not submitted within fourteen days of the hearing and that brings us to the first Order to Show Cause. At the Show Cause hearing, Debtor's counsel requested an additional two weeks to obtain Debtor's signature and that request was granted. Another deadline

passed and the Stay Motion was withdrawn instead. The divorce proceeding continued without leave of the bankruptcy court.

The Chapter 13 Plan was eventually confirmed at monthly payments of $1,555 for 60 months. The Debtor became delinquent in the payments, requested and was granted a suspension, plan modified to complete, and the Debtor once again became delinquent triggering the Chapter 13 Trustee to file the Motion to Convert Case to Chapter 7 in accordance with the prior Agreed Order. The case was back in a Chapter 7 posture. The Chapter 7 Trustee began the process of selling the nonexempt property and filed an application to employ an Auctioneer and a Real Estate Law Firm to help expedite the process. A day later, the Chancery Court enters a final Judgment of Divorce that transferred the Properties to the nonfiling spouse. The Debtor then filed a pro se Voluntary Motion to Dismiss Case, while still being represented by an attorney, citing the transfer of the nonexempt properties to the nonfiling spouse in the divorce proceedings. The divorce proceedings that happened to be conducted in violation of the automatic stay. The Trustee hired an attorney to set aside the Property Settlement Agreement and void the deed transfers in Chancery Court, which was done very quickly by the Chancellor. The Debtor also cited that she no longer had disposable income to fund the plan due to newly acquired alimony payments.

The Court issued a Show Cause Order in respect to the pro se Motion to Dismiss filed by the Debtor, while still being actively represented by counsel. Rule 9011 of the Federal Rules of Bankruptcy Procedure requires every pleading, motion, and other paper to be signed by an attorney of record. The Motion that was subject to the Show Cause hearing was unsigned. At the Show Cause hearing, the Debtor informed the court that she would like to terminate her attorney/client relationship and proceed in a pro se manner.

The Court then has to determine if the “for cause” provision applies in this voluntary dismissal action by balancing the best interests of the debtor and creditors of the estate.

1. Good Faith- In this particular case, the Debtor was seeking dismissal to prevent the sale of the unencumbered, nonexempt properties and to prevent creditors from receiving proceeds. Also, the Agreed Orders show the intent for Debtor to remain in a bankruptcy case, whether a 7 or a 13. The hidden assets showcase an intent to transfer the properties to the nonfiling spouse. The divorce proceedings were commenced without permission from the bankruptcy court and Debtor failed to sign orders that would have lifted the stay. The Stay Motion that was filed and later withdrawn showing an awareness of the need for permission.
2. Prejudice to Creditors- The Debtor has not proposed a plan for paying the creditors’ outside of the bankruptcy. Although it would appear that Debtor could

pay creditors, the failure to do so while in the Chapter 13 case, demonstrates otherwise. The dismissal of the case would pose a greater risk to creditors and would not protect the integrity of the bankruptcy system against abuse.

Takeaway: The Court dismissed the Show Cause Order and the Motion to Dismiss was stricken. Debtor did not provide a legitimate basis to dismiss the case, and dismissal would not be in the best interest of creditors. Debtor is stuck within the confines of the bankruptcy proceedings and the impending liquidation of assets.

***Opinion: 6/10/2026***

This opinion arose from an Emergency Motion to Temporarily Stay Liquidation and Maintain Status Quo Pending Hearing along with a Motion to Reconvert Case to Chapter 13 filed by the Debtor and Objections filed by the Chapter 7 Trustee. The Debtor appeared pro se and the Chapter 7 Trustee was represented by an attorney. The Chapter 7 case was filed, and the Trustee later filed a notice of assets and a request for proof of claims to be filed. The Debtor filed a Motion to Convert the case to a Chapter 13 and the Chapter 7 Trustee objected. An agreement was reached where the Chapter 7 case was converted to a Chapter 13 case, but the case would convert back to a Chapter 7 case if the Chapter 13 case proved unsuccessful. A Chapter 13 Plan was filed proposing to pay a monthly payment of $400 for 60 months and the Chapter 13 Trustee objected. The Plan was Confirmed at monthly payments of $1,555 for 60 months. A suspension was granted and the monthly plan payments increased to $1,700 for the remainder of the plan term. After nonpayment, the Chapter 13 Trustee filed a Motion to Convert the Case to a Chapter 7 in accordance with the prior agreement. Once the case was converted to a Chapter 7, the Trustee hired an auctioneer and a law firm to handle the sales process. The Debtor filed a Motion to Voluntarily Dismiss her Case, which was denied. The Debtor then filed a Motion to Reconvert the Case to a Chapter 13 case due to a substantial change in financial circumstances and requested a stay in the attempts to sell the properties.

If the case were reconverted, the Debtor would be bound by the prior Confirmed Plan, which would result in an increase of payments to complete within the plan term. With the Debtor’s new circumstances, the plan would not be feasible.

Takeaway: The Court denied the Motion to Reconvert on the basis of bad faith. Since the Motion to Reconvert was denied, the Stay Motion was rendered moot.

Additional Thoughts:

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***In re: Jessica H. Vega, Case No: 25-03092-JAW- 05/15/2026***

This opinion is from a consolidated hearing on a Motion to Extend Time to File a Reaffirmation Agreement and a Motion for Relief from Discharge Order filed by FirstBank. The Debtor filed a Chapter 13 case and later converted the case to a Chapter 7 case. FirstBank filed a proof of claim before the case was converted. The Chapter 7 trustee deemed the case to be a no asset case.

FirstBank filed a Motion to Abandon Collateral and Lift Stay alleging a default on the loan. Prior to the hearing, FirstBank submitted an Order withdrawing the Motion. Shortly after, the deadline for filing a reaffirmation agreement expired with no reaffirmation agreement or extension request filed. The Discharge was automatically granted. FirstBank then filed the Request for Extension and the Motion to Set Aside Discharge Order for the purpose of filing the Reaffirmation Agreement. The Reaffirmation Agreement was filed the next day. The Reaffirmation was signed by the Debtor after the case was discharged. At the hearing, FirstBank wanted to be able to enter into the Reaffirmation Agreement and the Debtor did confirm that they wished to keep the home. The Court did explain that since the Debtor is current on the loan payments, the Court's decision would not put them at risk of losing their home. FirstBank stated by not Reaffirming the debt it would result in an "incurable event of default" per a nationwide policy.

Courts have previously held that any reaffirmation agreement signed after entry of a discharge order is unenforceable.  FirstBank asked the Court to adopt a two-factor test considering (1) "the relative prejudice to the parties" and (2) "the degree of the debtor's culpability in allowing the [discharge] order to be entered." By using the test, FirstBank argues that the Debtor will lose her Home due to the "incurable default" provision and the "compressed timeline" between the Motion for Relief being withdrawn and the Discharge Order being entered. The Fifth Circuit has not adopted this test and if it were to be adopted, the facts of this case do not justify setting aside the discharge order. The Court found that there was insufficient evidence that the Debtor was at risk of losing their home. The "incurable default" provision is not evidenced in the Promissory Note, Security Agreement and Truth-In- Lending Disclosures. The debtor can also voluntarily pay the debt even though it is discharged. Further, the discharge order was entered in the normal timeframe, and an extension of deadlines was not filed by either the creditor or the debtor prior to the deadline's expiration.

The Reaffirmation Agreement was not "made" until after the Discharge Order was entered and there was no extraordinary reason or circumstance given to warrant vacating the Discharge Order.

Takeaway: The Court did not vacate the discharge order, and the Reaffirmation Agreement would not take effect.

Additional Thoughts:

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THE SUPREME COURT OF MISSISSIPPI

***Quinton Strong v. Acara Solutions, Inc. No. 2024-CT-00455-SCT- On Writ of Certiorari***

Debtor was injured on the job by another employee, but it happened that the other party was an employee of a different company. Debtor's Chapter 13 case was dismissed without discharge and then the Debtor sued the other party and her actual employer in state court in a personal injury claim. The employer, Acara, moved for summary judgment due to judicial estoppel since the personal injury claim was not disclosed in his prior bankruptcy case. Debtor argued that the second element wasn't met since his case was dismissed without a discharge.

The trial court granted summary judgment, the Court of Appeals reversed, and the Supreme Court affirmed the Court of Appeals decision. The Debtor was injured prior to filing his Chapter 13 case and had one attorney handling his bankruptcy and another attorney handling his workers compensation case. The bankruptcy schedules did list his pending workers compensation claim. The personal-injury portion was not disclosed prior to the case being dismissed without discharge. The Court of Appeals found the issue of "revocation- of acceptance- upon dismissal- argument" one of first impression and looked to the Fifth Circuit for guidance. Due to no discharge in the bankruptcy case, the court's acceptance of the plan was negated, and the parties were no longer bound by its terms.

The MS Supreme Court found that the Court of Appeals did not err by reviewing the trial court's judgment de novo instead of reviewing for abuse of discretion. The Court of

Appeals focused on the applicability of the rule announced by the Fifth Circuit that dismissal of a bankruptcy case without discharge revoked acceptance and that the trial court erred as a matter of law. Since a question of law was at hand, de novo was the correct standard of review.

The MS Supreme Court also found that the trial court committed an error of law by not applying Fifth Circuit precedent in its analysis of the second element of judicial estoppel. The elements of judicial estoppel (1) the party is judicially estopped only if its position is clearly inconsistent with the previous one; (2) the court must have accepted the previous position: and (3) the non-disclosure must not have been inadvertent. They found that the dismissal of the bankruptcy case without discharge returns the involved parties to their precommencement positions.

Takeaway: The MS Supreme Court announced that debtors are no longer judicially estopped from asserting claims that were not disclosed in their schedules if the case was dismissed before discharge.

The Dissent (just for fun):

In a dissenting opinion, the minority suggested that the application of judicial estoppel is a matter of state law and the majority view opens to the door to attempted concealment of claims and deception.

Additional Thoughts:

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MBC | Mississippi Bankruptcy Conference, Inc.

# Tech for Lawyers
# Thursday 11/19

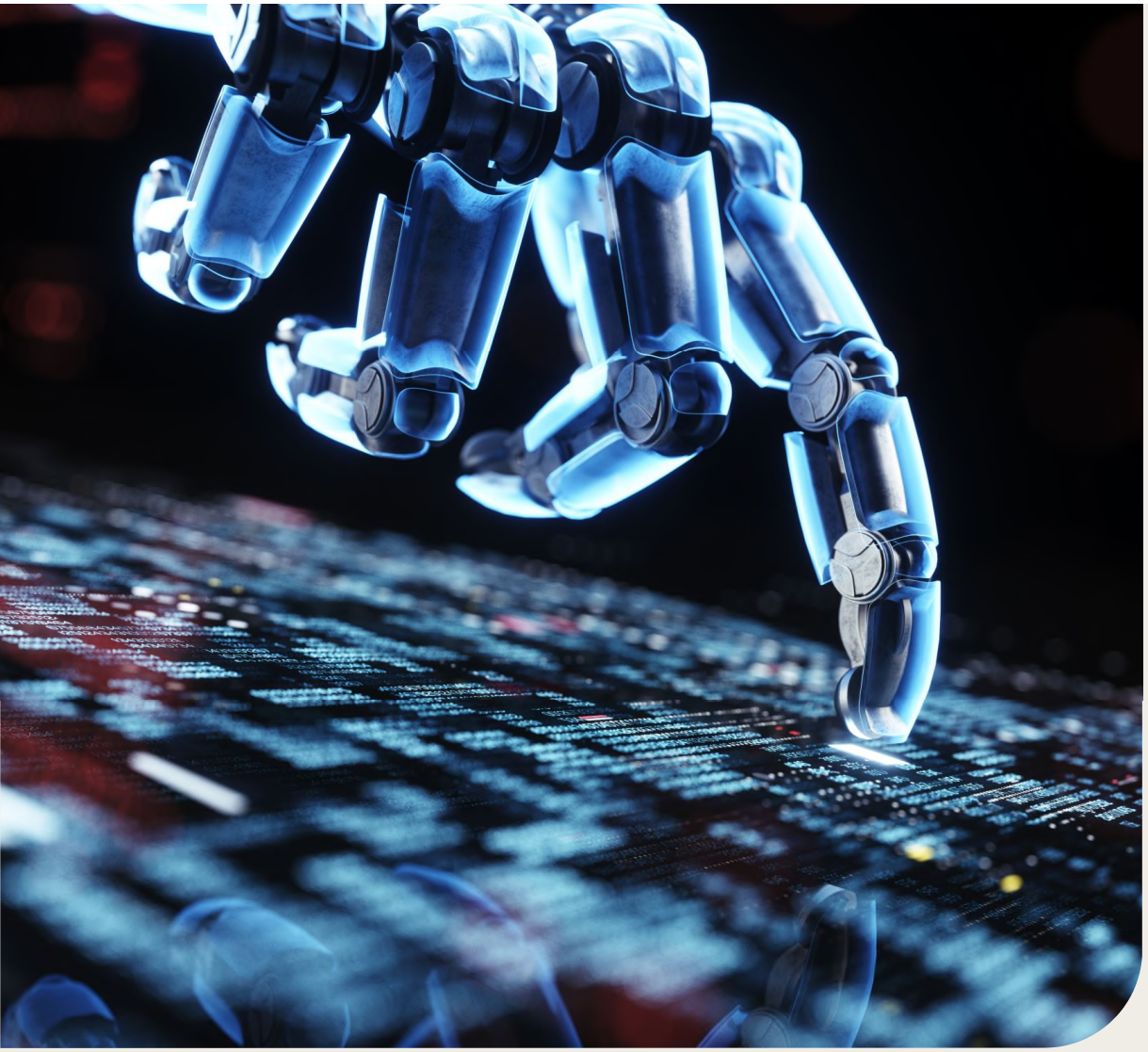
# Legal Technology Dos and Don'ts

Bill Ramsey, Womble, Bond






- Evolution of Technology in the Practice of Law
- Emergence of AI
- AI Use and Trends for Lawyers
- Privacy and Cybersecurity
- Trial Tech and E-discovery
- Fun and Useful Gadgets



# EVOLUTION OF TECHNOLOGY IN THE PRACTICE OF LAW

# Old School Tools in Law



**Typewriters in Law**

Typewriters were essential for drafting legal documents and formal correspondence in traditional law firms. Created content with in person or recorded dictation.

GONE NOW!



**Physical Filing Systems**

Physical filing systems organized case files and important legal documents before digital storage.  Used a lot of physical space. All trials used paper exhibits.

ALMOST GONE NOW!



**Landline Communication**

Landline phones were the primary mode for client communication and coordination in law offices.  No email communications, maybe voicemail

GONE NOW!

# A new model for law firms



### Everything is computerized

Centralize matters, files, calendars, billing and knowledge so teams can work securely from anywhere.

**CONNECTED**

One source of truth



### AI-ASSISTED RESEARCH & DRAFTING

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**AUGMENTED**

Faster first pass



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**PROTECTED**

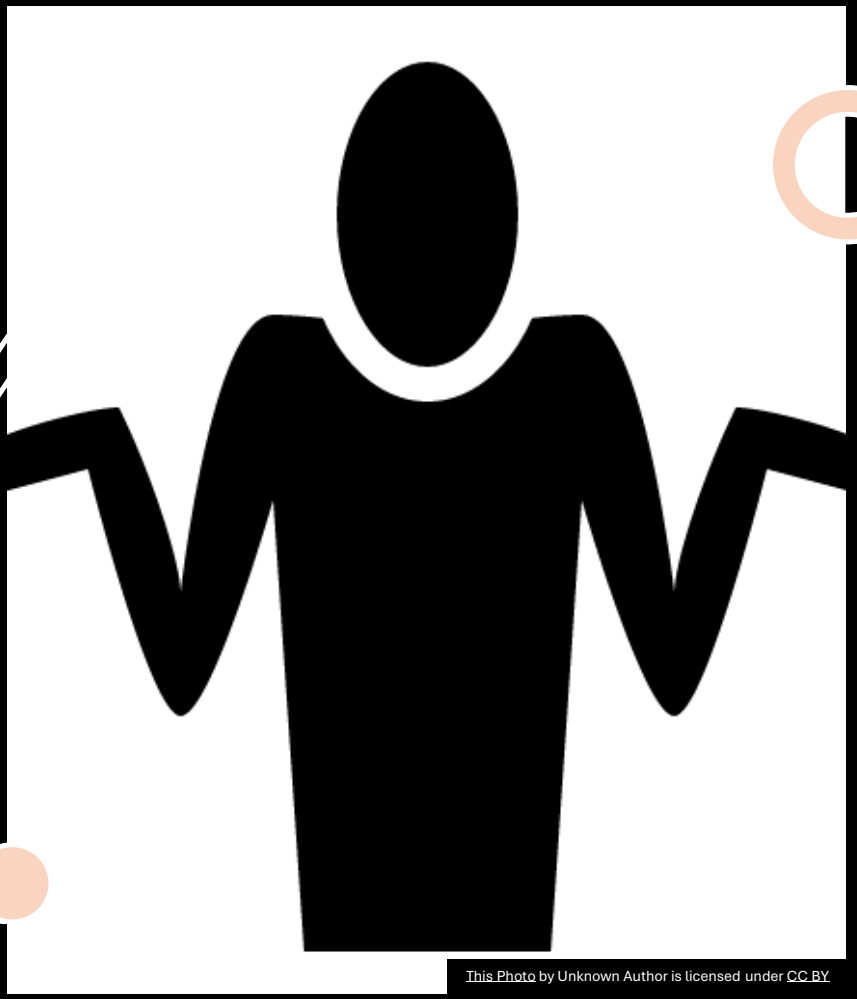
Digital by default

**The modern office is a connected system: cloud infrastructure, AI assistance and security work together.**

Source: American Bar Association legal technology trends, 2025

# How did we get here?

Let’s take a look at history



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# Legal Technology Through the Years

1980's: WordPerfect era

1990: Microsoft Office

1990: LexisNexis 100,000 searches

1992: AOL for Windows




1995: O.J. Simpson Trial



1996: Trial Director & Sanction

1996: TimeSlips

# Legal Technology Through the Years

**2000:**
**Y2K Scare**




**2003:**
**Zubulake v.**
**UBS Warburg**

**2005:**
**E-Discovery**
**FRCP**
**Changes**

**2007:**
**Apple iPhone**

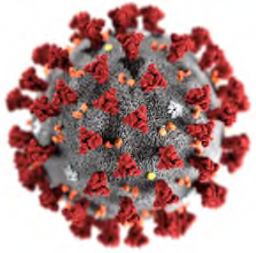


**2010:**
**iPad**

**2012:**
**ABA**
**Technical**
**Competence**

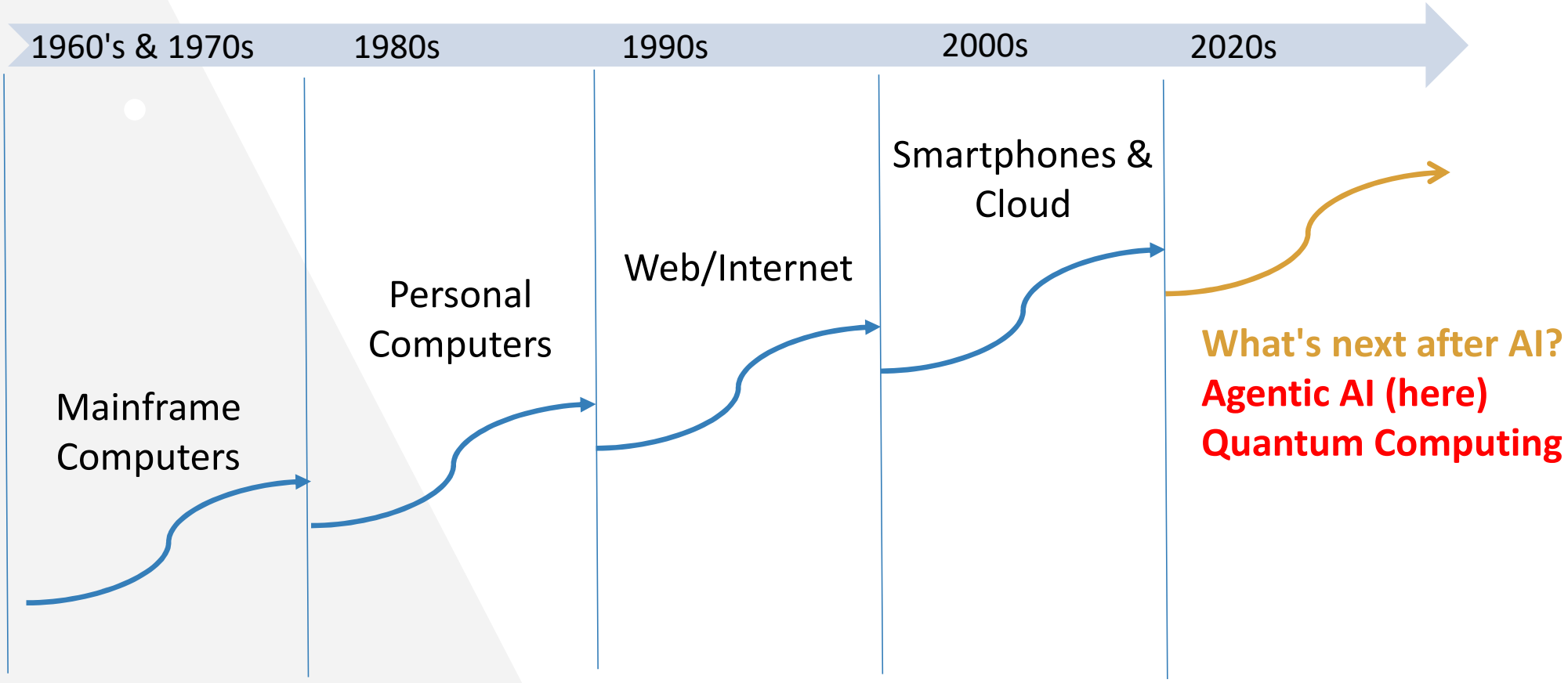
2016:
Panama
Papers
Scandal

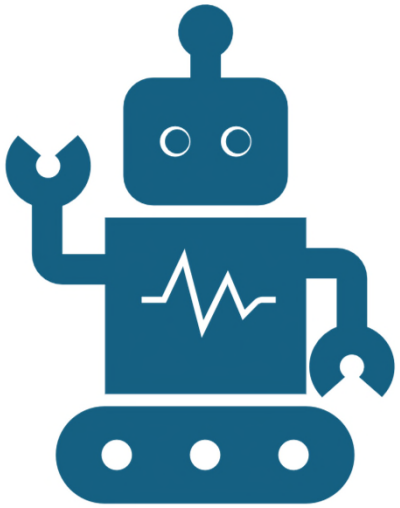
2020:
Covid-19
Pandemic



Artificial
Intelligence
Tools

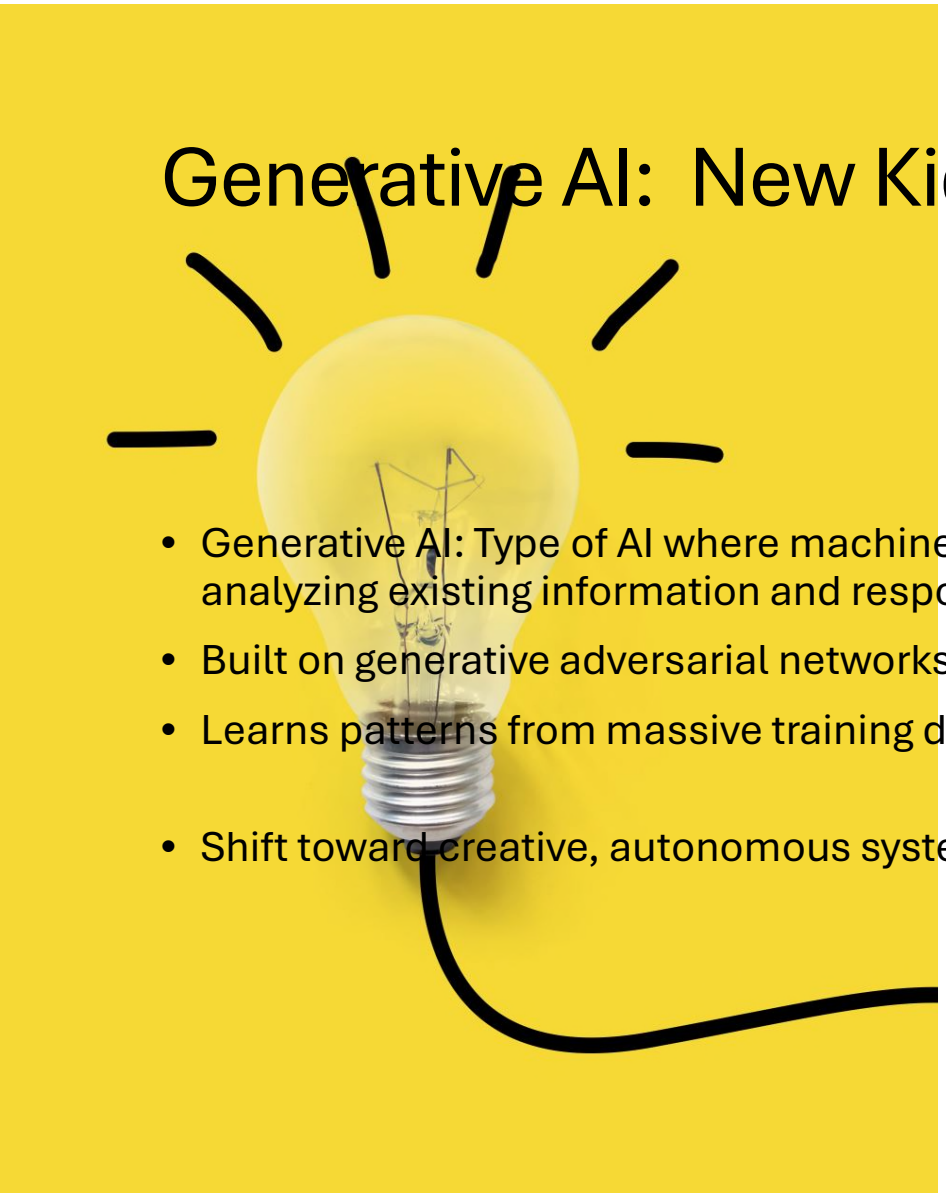
# Tech Life Cycles 1970-Current





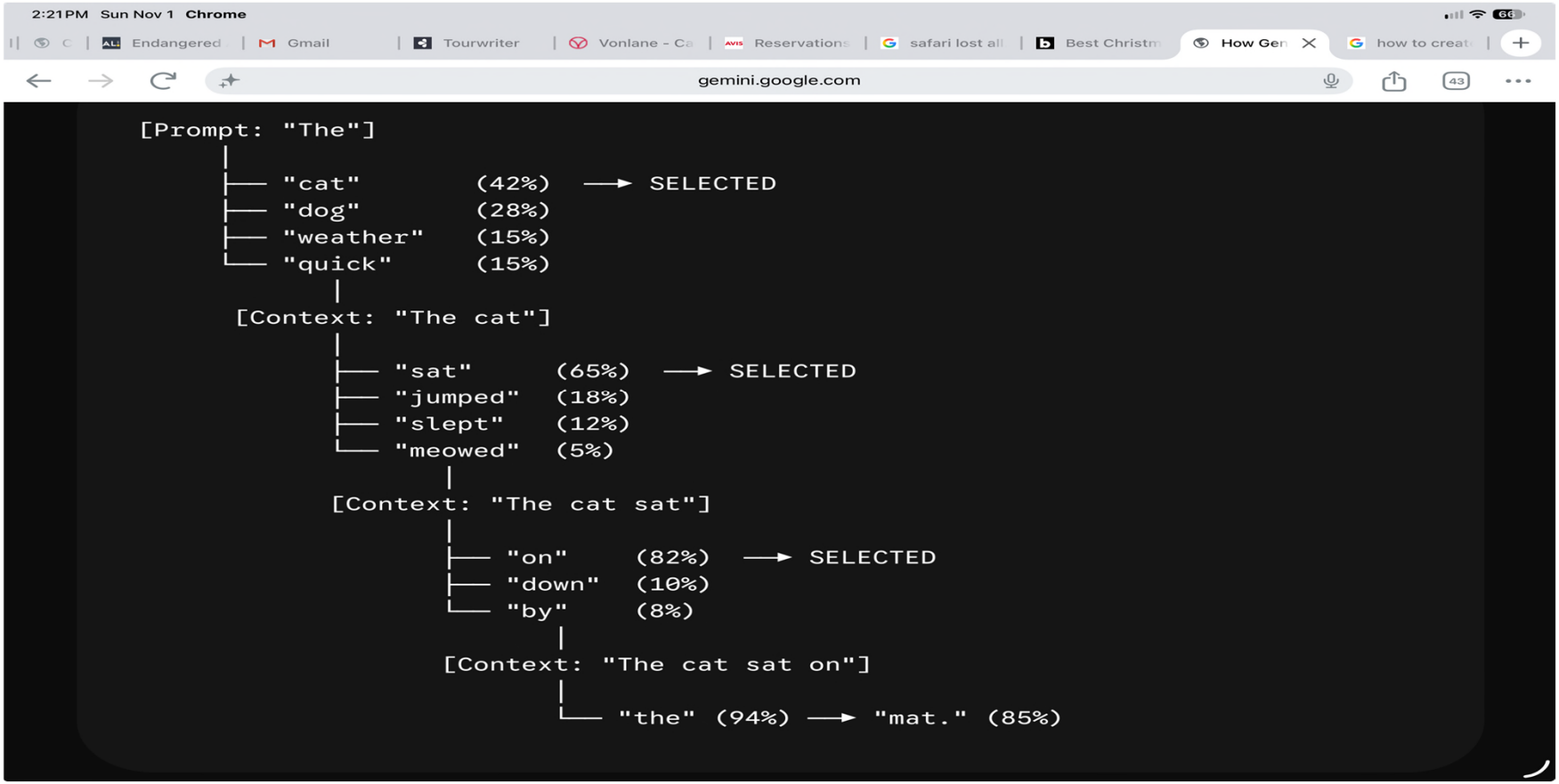
# AI – The New Disrupter

# Generative AI:  New Kid on the Block



- Generative AI: Type of AI where machine creates new, original? content rather than just analyzing existing information and responding to user inputs.
- Built on generative adversarial networks (GAN) to create new content
- Learns patterns from massive training data
- Shift toward creative, autonomous systems

# HOW LLMs WORK



# AI USE AND TRENDS FOR LAWYERS



# There Are Many Use Cases
# Here are a Few

| | | | |
|---|---|---|---|
| Automated Document/E-mail Creation | Contract Drafting and Review | Legal Research | Case Prediction |
| Due Diligence and Compliance | Discovery | Litigation Strategy | Trial Presentation |

But First!!!

ABA Formal Opinion 512

Mississippi Ethics Op. No. 267

# ABA FORMAL OPINION 512

| Competence | Confidentiality issues | Communication |
| --- | --- | --- |
| • Understand capabilities and limitations | • Rule 1.6<br>• Understand the tool you are using | • Disclosure of use of Gen AI<br>• Tell your client you are using AI<br>• Warn client about AI usage |

# ABA FORMAL OPINION 512

## Candor

- Rules 3.1, 3.3 and 8.4(c)
- Hallucinations
- Some courts require disclosure

## Supervisory Responsibility

- Rules 5.1 and 5.3
- Establish policies and know how your folks are using

## Fees

- Should inform your client? yes
- How do you charge for using?

# Legal Research Applications

- Westlaw Edge and Co-Counsel
- Lexis+
- Vincent AI
- Harvey AI



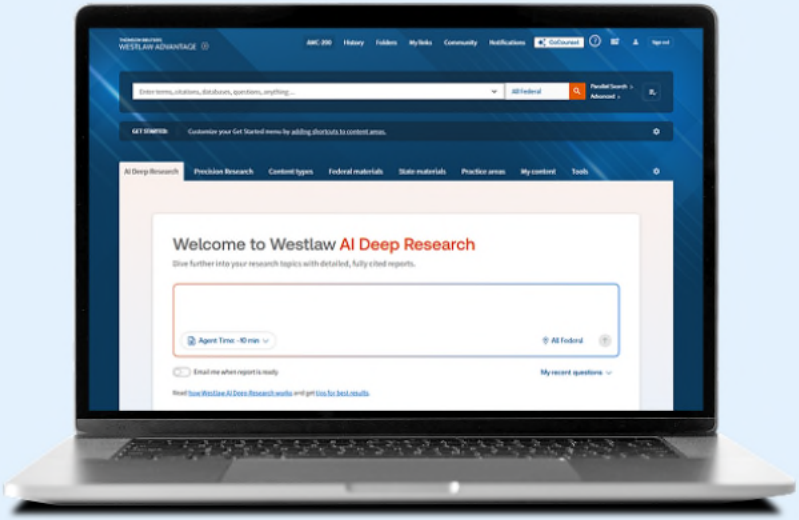
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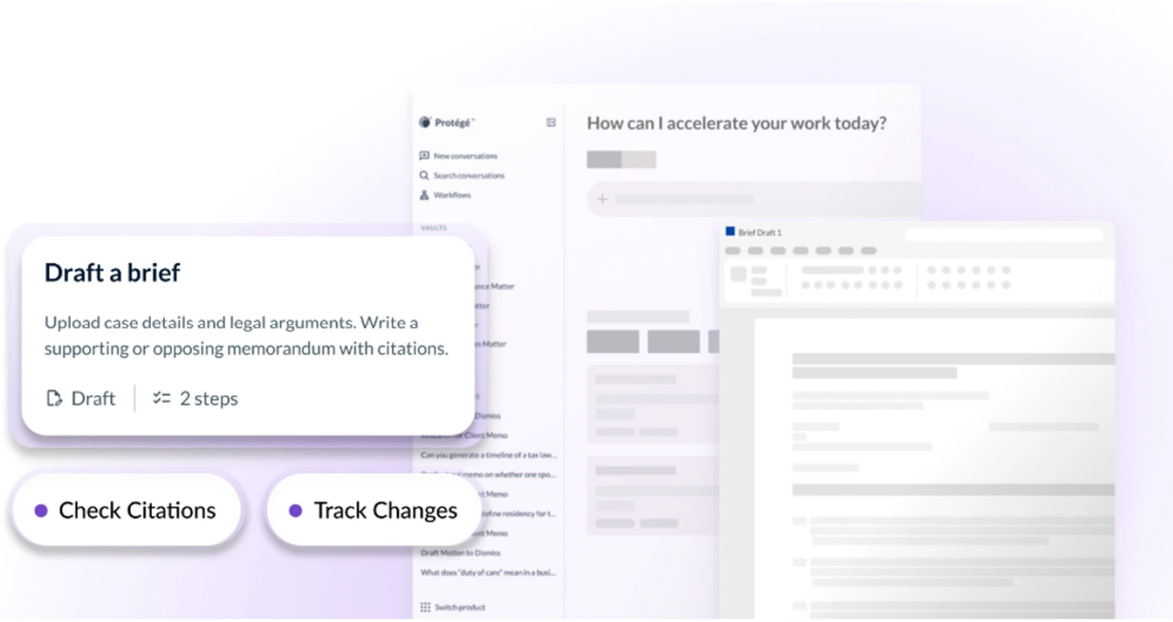

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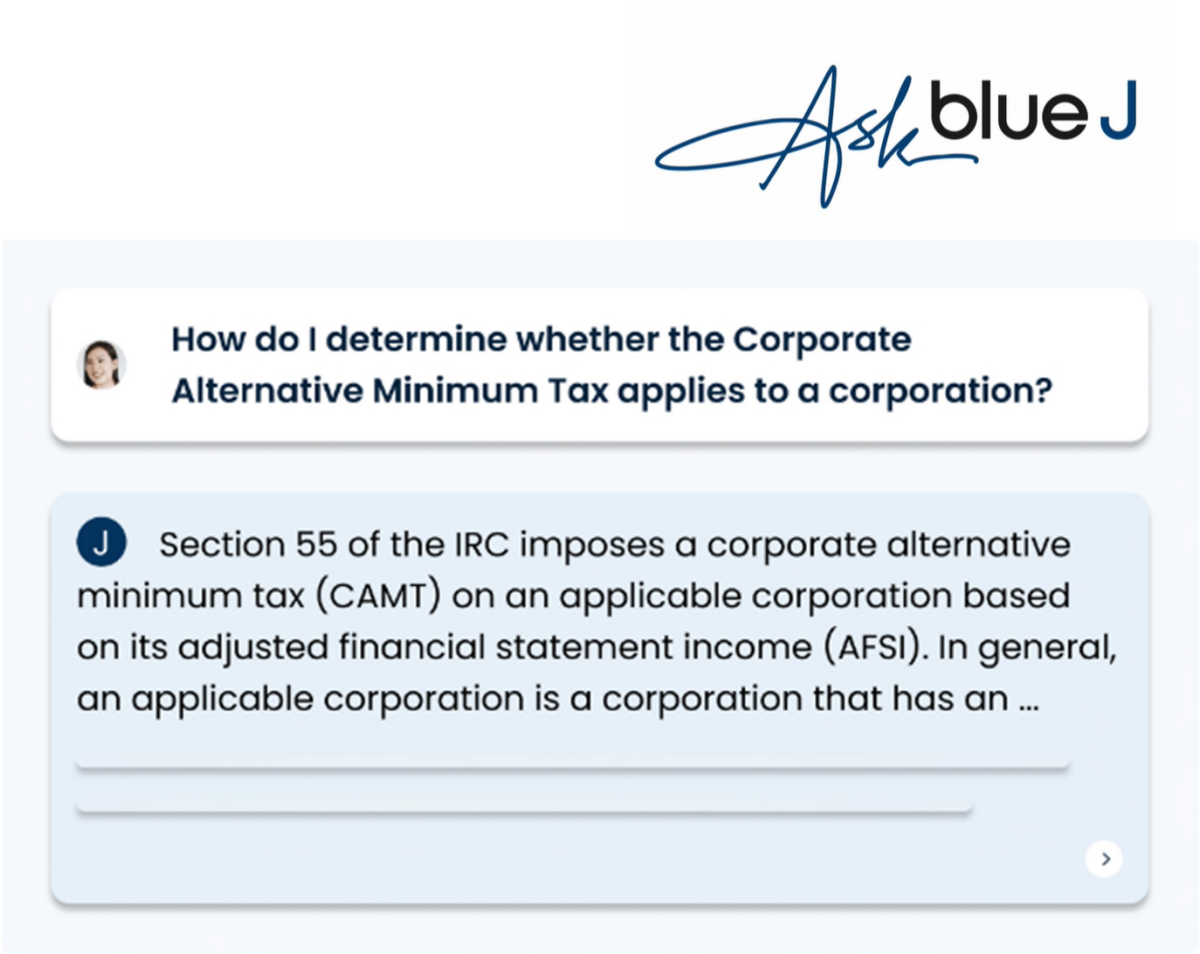
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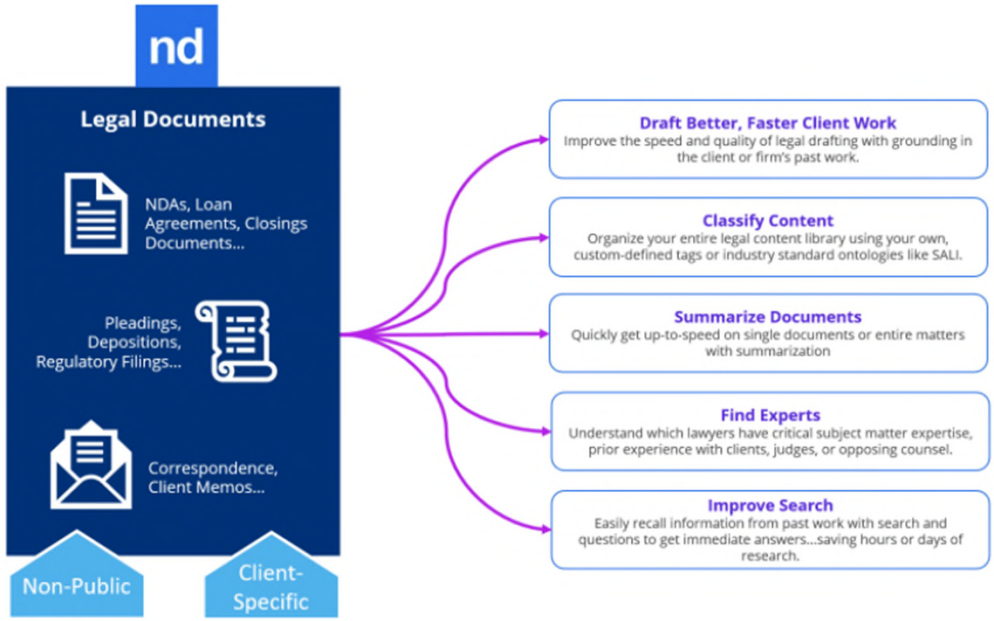
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- Data updated daily
- Results supported by relevant sources
- Bluej.com/ask



# Net Documents ndMAX

- Generative AI capability embedded in NetDocs
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- Generate new content based on internal precedents
- Compare third-party contracts against firm's clause & best practices
- Instantly summarize documents
- Natural language query of documents
- Netdocuments.com/ndmax



# Top Generative AI Chatbot Engines

- ChatGPT
- Gemini
- Claude AI  (Anthropic)
- Copilot
- Perplexity
- Grok (xAi)

# Most Popular AI Legal Tools

- Harvey AI
- Copilot
- CoCounsel (Thompson)
- Lexis AI (with Protégé)
- Claude CoWork (Anthropic)
- Gemini (Google) Notebook LM
- Spellbook

# Bankruptcy-Specific AI tools

- Counsel Pro AI
- Best Case
- Next Chapter
- Callidus
- Relaw.ai
- Clio Duo
- Claude/ChatGPT

# Problems with Generative AI

Hallucinations: Generative AI can confidently produce plausible but false information, similar to how a dream might feel real.

Lack of Common Sense: Models don't possess true intelligence or common sense; they rely on statistical probabilities from their training data.

Nuanced Understanding: They struggle with subtle human language elements like humor, sarcasm, and irony.

Inability to Distinguish Fact from Fiction: Generative AI cannot easily verify the accuracy of information or distinguish between truth and falsehood.

But these problems are being continuously dealt with

# AI Dos and Don’ts

| Do | Don’t |
| --- | --- |
| Avoid AI “Slop” | Just Copy and Paste |

# AI Dos and Don’ts

| Do | Don’t |
| --- | --- |
| Use “Enterprise” Version | Use AI Version That Trains On & Keeps Data |

# AI Dos and Don’ts

| Do | Don’t |
| --- | --- |
| Remove Private, Sensitive Data From Prompts | Just Be Lazy and include Personal and Privileged Info |

# AI Dos and Don’ts

| Do | Don’t |
| --- | --- |
| “Play Around” With AI – Experiment | Be Afraid Of Using AI |

# AI Dos and Don’ts

| Do | Don’t |
| --- | --- |
| Correct | Accept |
| And | The First |
| Redirect | Response |
| All the time | You Get |

# AI Dos and Don’ts

| Do | Don’t |
| --- | --- |
| Try Using Voice Mode And Dictate | Use The Keyboard All the Time (Especially on Your phone) |

# AI Use Tips for Lawyers

- Do not use consumer model
- Warn clients about use
- Try Dictating Prompts
- Double-Check Translations
- Try using on Phone
- Take an AI certification course

# AGENTIC AI

Agentic AI is an advanced form of artificial intelligence that focuses on autonomous systems capable of reasoning, planning, and executing complex, multi-step tasks with minimal to no human intervention.

The term "agentic" refers to the system's agency—its ability to act independently and proactively to achieve a specific, pre-determined goal.

# HOW AGENTIC AI WORKS



**Goal Decomposition** – Breaks a complex legal task into manageable sub-tasks automatically



**Autonomous Reasoning** – Evaluates information, identifies gaps, and decides next steps without prompting



**Tool Integration** – Accesses legal databases, document management systems, and research platforms



**Iterative Refinement** – Reviews its own output, cross-checks citations, and improves results before delivery

# AGENTIC AI FOR LAWYERS

Agentic AI refers to AI systems that can autonomously plan, reason, and execute multi-step tasks to achieve a goal — without continuous human guidance.

Unlike traditional AI tools that respond to a single prompt, agentic systems can break complex problems into sub-tasks, use external tools, and adapt their approach based on intermediate results.

For lawyers, this means AI that can independently research case law, draft documents, review contracts, and flag risks — acting more like a junior associate than a search engine.

# Agentic AI Dangers

- Loss of Control
- Runaway Decisions
- Major Security Risk
- No Transparency
- Failure
- Capable of Generating New Agents

# Bankruptcy.ai Agentic tool

## Stage 1 — Intake

62% READY

*Debtor · Maricopa County, AZ · Chapter 7*

- Contact and household details captured (household of 3)
- Credit-counseling certificate on file
- Prior filings check clear — no case in 8 years
- Spouse income figures for the 6-month lookback
- Vehicle payoff statement
- Wage garnishment reported — starts in 19 days

## Stage 2 — Document collection

84% READY

*Debtor · Pierce County, WA · Chapter 13*

- 6 months of pay stubs received and labeled
- 2 years of tax returns matched to the file
- Mortgage statement and arrears figure logged
- Two bank statements missing (Feb, Mar)
- Business profit-and-loss for side income
- Transfer of a titled vehicle 11 months ago — needs review

## Stage 3 — Analysis & schedules

93% READY

*Debtor · Pima County, AZ · Chapter 7*

- Means test run against state median for household of 2
- Exemptions applied to homestead, vehicle, and retirement
- Creditor matrix built from credit report and mail
- Household goods valuation confirmation from client
- Homestead equity within $4,100 of the cap — attorney review requested

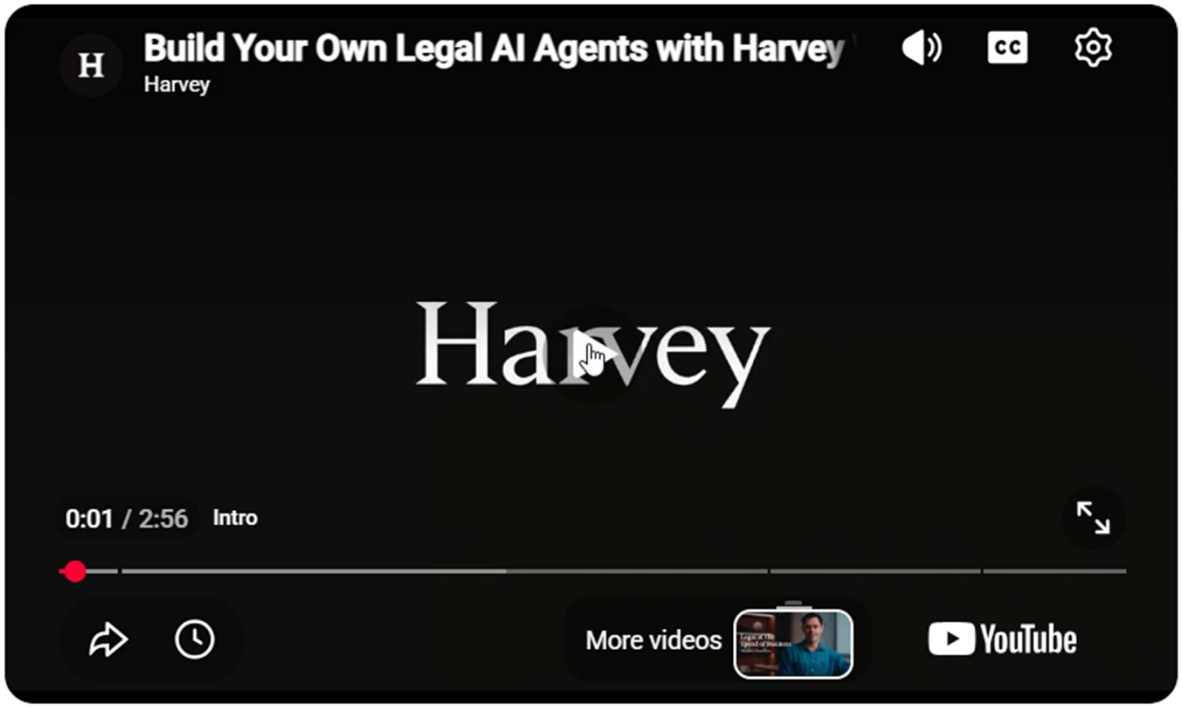
## Stage 4 — Petition & trustee delivery

100% READY

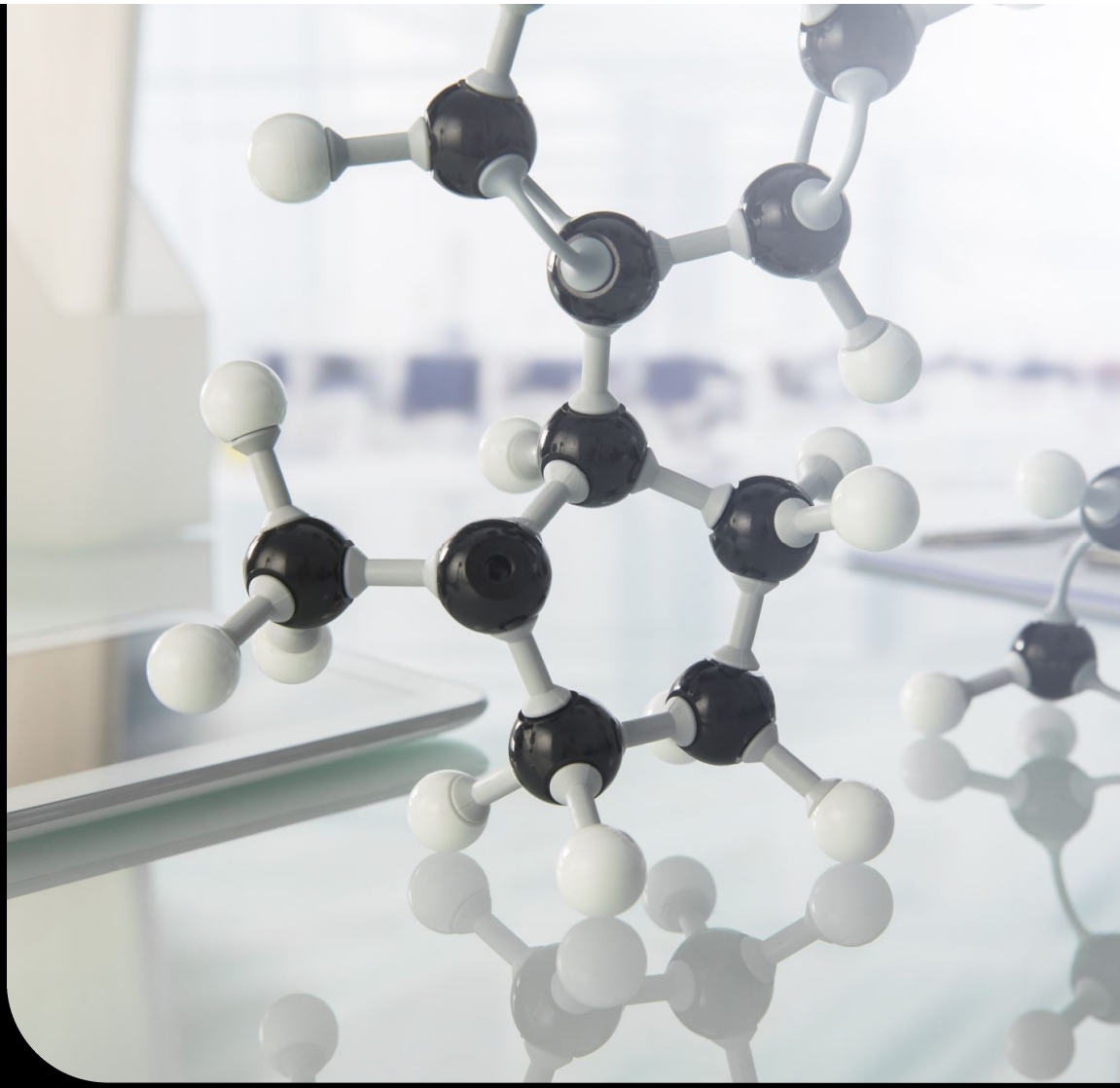
*Debtor · King County, WA · Chapter 13*

- Schedules exported to petition software without manual re-entry
- Signature pages executed and filed to the case folder
- Trustee packet assembled and delivered
- 341 meeting date calendared with client reminders

# Example of how agents are built



# Specialized agentic al



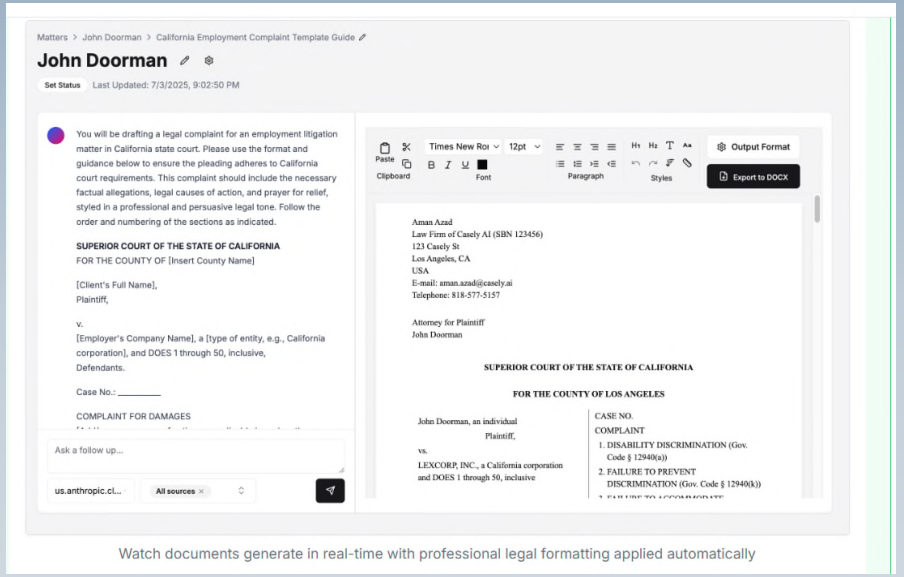
## One Example of Agentic AI for a specialized pratice

# Casely

AI TOOL DESIGNED SOLELY FOR DUI CASES

# Features of Casely

- Jurisdiction-specific template variations
- Court-approved formatting and structure
- Pre-written compliant clauses and language
- Regular updates for law changes
- Dui-specific document types
- Professional pleading paper formatting
- Automated citation and reference formatting
- Can create custom templates
- No Data Training Concerns: Documents stay private and secure



Watch documents generate in real-time with professional legal formatting applied automatically

Casely

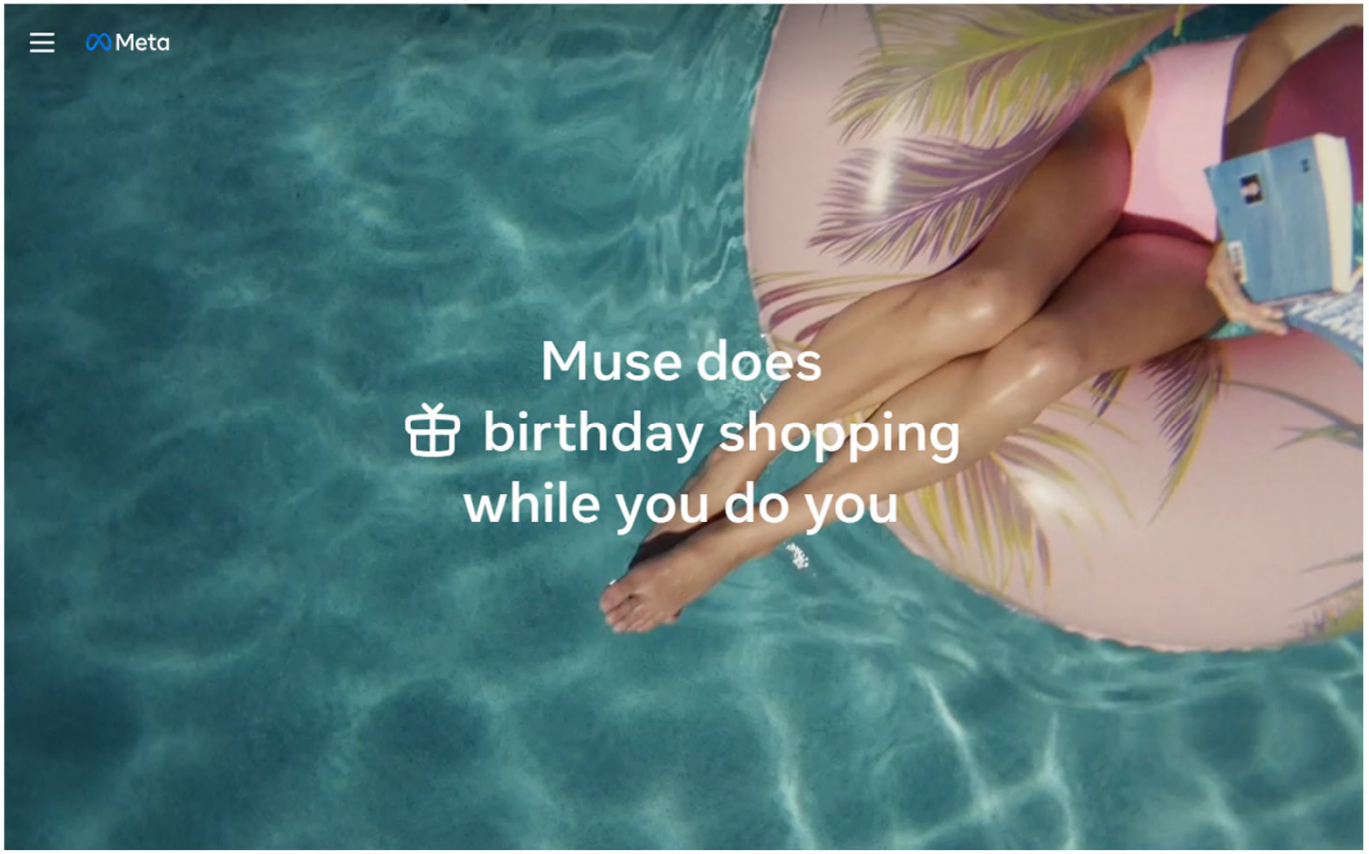
# PERSONAL AI AGENTS

- Muse
- Dots
- Instinct
- Claude Duet
- Gemini Spark
- Grok Bot

# What are Personal AI Agents?

- Assistants that act for you across email, calendar, your browser and files, and keep working in the background. And some have access to credit card accounts and bank accounts
- **For lawyers:** an agent that can read your inbox can see client confidences. Use enterprise plans, give it as few permissions as possible, and check anything before it sends.

# Muse Personal AI Agent



# Trial Tech and E-Discovery

# Trial Presentation Dos and Don’ts

| Do | Don’t |
| --- | --- |
| Get evidence organized well in advance | Wait Until The Last Minute |

# Trial Presentation Dos and Don’ts

| Do | Don’t |
| --- | --- |
| Practice Using the Tech Ahead of Time | Assume It will “Just Work” |

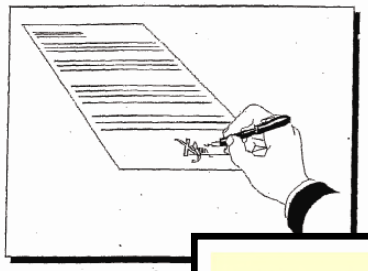
# Trial Presentation Dos and Don’ts

| Do | Don’t |
| --- | --- |
| Place all Videos, Pictures, Etc. On your local computer | Try To use Material from the Cloud |

# Trial Presentation Dos and Don’ts

| Do | Don’t |
| --- | --- |
| Use “call outs” When displaying Documents | Just show The Whole Document on The Screen |

# Fee Agreement



This agreement made on the date of DEC

between the Melbourne MillsLaw Office, refer

Marcia LeuAnne Hughes , re

WITNESSETH: That client empl

client's injuries, actual or potential, resulting f

known as fen-phen, Redux, and Pondimin. Attorney accepts the employment. It is anticipated that attorney will file a class action law suit on behalf of client and others similarly situated against the manufacturers of those drugs. Attorney's fees shall be set by the court, but shall not be more than 30% of client's net recovery. Expenses, if any, will be paid up front by Attorney and repaid off the top before calculation of fee. Client will pay for

M000460

This agreement made on the date of DEC '97,

between the Melbourne MillsLaw Office, referred to as Attorney, and

Marcia LeuAnne Hughes, referred to as Client,

similarly situated against the manufacturers of those drugs. Attorney's fees shall be set by the court, but shall not be more than 30% of client's net recovery. Expenses, if any, will be

# ELECTRONIC PRESENTATION ADVANTAGES



- Expedites trial proceedings
- Appeals to different learning styles
- Flow of information controlled

# AI-POWERED COURTROOM PRESENTATIONS



- **Call up exhibits** instantly or by voice
- **Auto-annotate** documents
- **Flag contradictions** in witness testimony in real time
- **Generate 3D visuals** and animations on the fly

# IMMERSIVE VISUALS AND 3D RECREATIONS



**3D laser scanning**



**Drone footage**



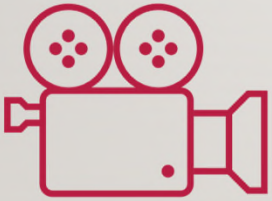
**3D-printed scale models**



**Animated timelines**

Used to explain complex forensic, medical and corporate data to jurors

# HYBRID AND REMOTE PROCEEDINGS



- **Platforms:** Zoom, Webex and local tools such as LA Court Connect
- **Hybrid depositions**
- **Virtual witness testimony**
- **Remote mock-trial research**
- All now routine practice

# DEEPFAKES IN EVIDENCE



- **Fakes are already in court:** a California judge dismissed Mendones v. Cushman & Wakefield (2025) over AI-generated witness videos
- **Verify before you offer:** get original files, metadata and chain of custody
- **Expect the deepfake defense:** opponents may call real evidence fake, so corroborate it
- **No AI-specific rule yet:** proposed FRE 707 and 901(c) remain under study
- **Ethics:** never offer evidence you know or reasonably believe is false (Rules 3.3, 3.4)

# Elmo TT-12G Visual Presenter

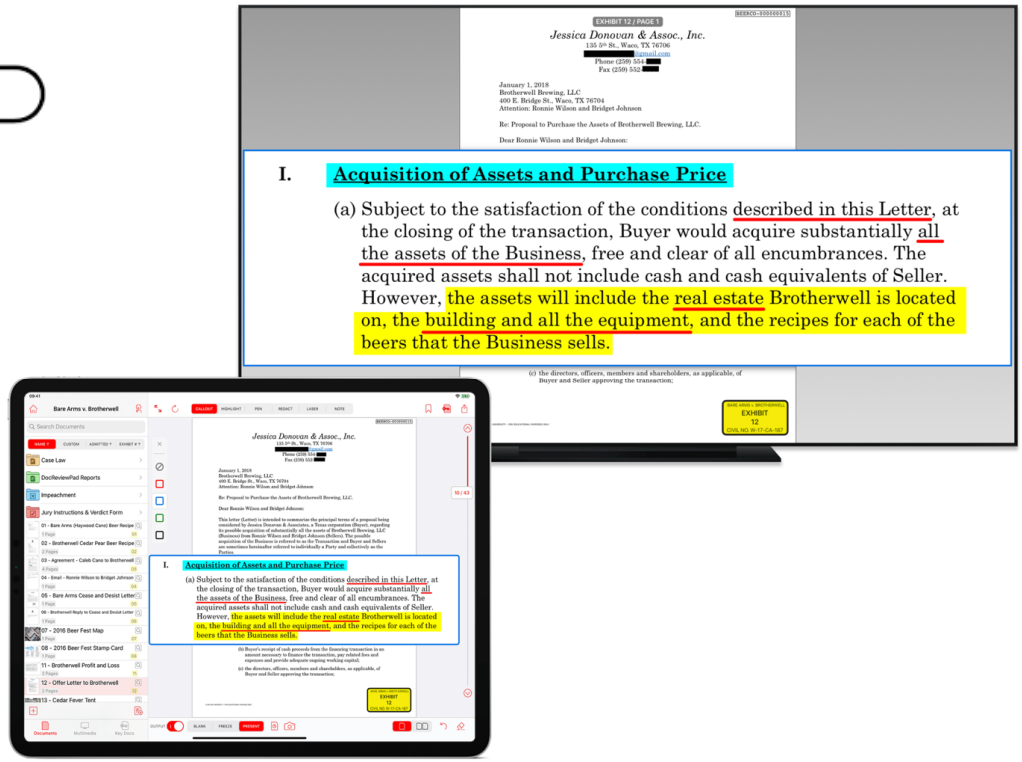
- Ultra compact
- 192K zoom in 4K
- 6 lbs
- Digital document camera
- HDMI input/output
- Connect to laptop
- Use for court / mediations
- $1,065
- www.elmousa.com



# Trial Presentation Software

TRIALPAD

- www.litsoftware.com
- Available from App Store
- iPad or Mac
- Several apps come with bundle (transcripts, doc review, timeline, exhibits
- 7-Day Free Trial



# TRIAL PRESENTATION PLATFORMS

| OnCue | TrialDirector | Sanction |
| --- | --- | --- |

**What these platforms do best**

| Transcript syncing | Video-clip editing | Exhibit control |
| --- | --- | --- |
| Deposition video synced to the transcript | Clips cut and queued for playback quickly | Zoom, highlight and call out exhibits live |

# LINEAR PRESENTATION TOOLS

- PowerPoint (Windows)
- Keynote (Apple)
- Prezi (Cloud)



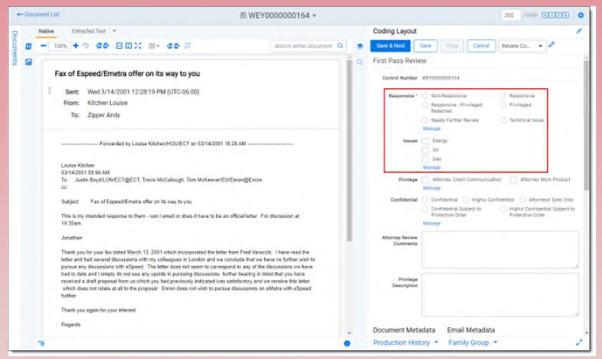
# E-Discovery

# LATEST TRENDS IN EDISCOVERY TECHNOLOGY

- **Generative AI review** scores documents from a plain-language description of the issues
- **AI included in platform pricing** at Relativity and Everlaw
- **AI agents** that plan and run multi-step review tasks
- **Review platforms connected** to CoCounsel, Harvey and Microsoft Copilot
- **Chat and mobile data** now part of most matters
- **Courts defining standards** for validating AI-assisted review

# AI-POWERED REVIEW PLATFORMS

- **RelativityOne:** aiR for Review and aiR for Privilege now standard
- **Everlaw:** free AI Assistant; links to CoCounsel, Harvey and Copilot
- **DISCO:** Auto Review and agentic Advanced Research
- **Reveal:** reviewed evidence flows into CoCounsel Legal




Relativity

# FROM KEYWORD SEARCH TO AI AGENTS

| Keyword search | TAR 1.0 | TAR 2.0 | Generative AI | AI agents |
|---|---|---|---|---|
| Exact terms and Boolean logic; still the first cull in about 40% of matters | Attorneys code a seed set; a model predicts relevance | Model retrains as reviewers code; today's default | Lawyers describe the issues in plain language; an AI model scores each document | Plan, run and check multi-step review tasks, then hand off for attorney sign-off |

Source: Agentic eDiscovery, "What is agentic eDiscovery? A 2026 taxonomy" (Apr 2026).

# ARTIFICIAL INTELLIGENCE IS CHANGING EDISCOVERY

- **Data now goes well beyond email**
  - 43% of practitioners see chat app data in most cases; 38% see phone data
  - Disappearing messages must be preserved once litigation is likely
- **AI does more than review**
  - Drafts privilege calls, summaries, timelines and deposition outlines
- **Defensibility is the open question**
  - Expect rulings on validating, sampling and disclosing AI review
- **Lawyers stay accountable**
  - Verify AI output before it shapes a production



# E-Discovery Dos and Don’ts

| Do | Don’t |
| --- | --- |
| Send a Legal Hold As Soon As Litigation Is Likely | Wait Until The Data Is Already Gone |

# E-Discovery Dos and Don’ts

| Do | Don’t |
| --- | --- |
| Spot-Check AI Review Results | Rely on Search Terms Alone |

# E-Discovery Dos and Don’ts

| Do | Don’t |
| --- | --- |
| Collect Texts, Slack and Teams Chats | Assume Email Is the Only Evidence |

# E-Discovery Dos and Don’ts

| Do | Don’t |
| --- | --- |
| Get a 502(d) Clawback Order Early | Produce Without A Privilege Review |

# Privacy and Cybersecurity

# Cyber Threats

Data Growth

System Vulnerabilities

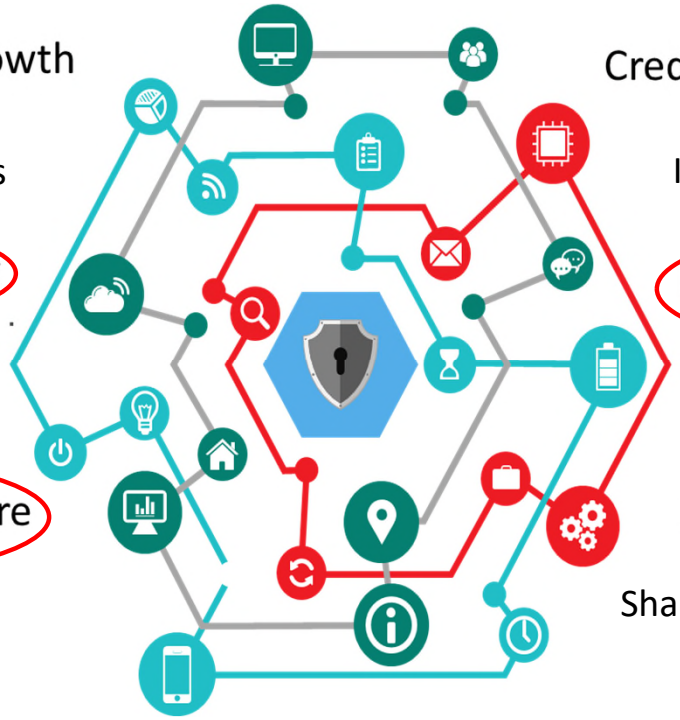
Email/Spearphishing

Malicious Insiders

Advanced Threats

Ransomware/Malware

Third Party Exposure



Credential Theft/Password Re-use

Identity Management

Intellectual Property Theft

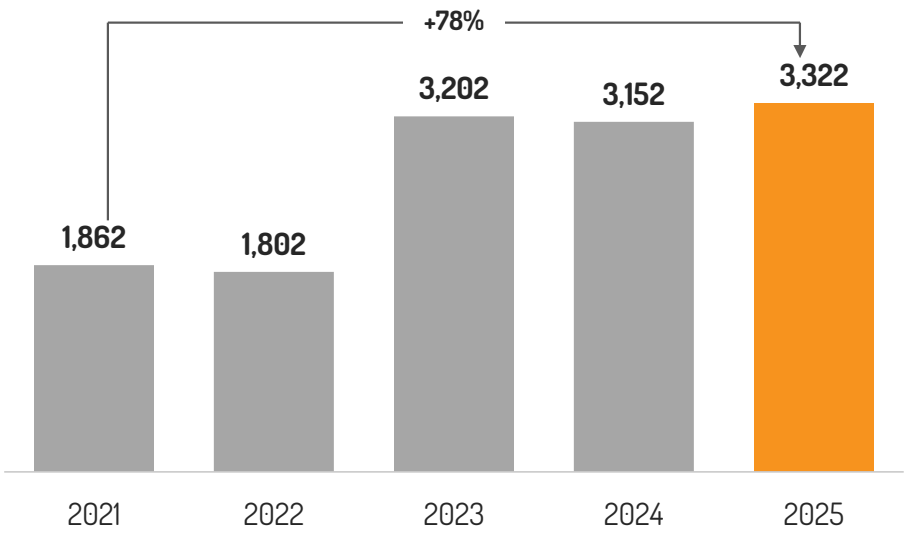
Insecure API/Interfaces

Denial of Service

Shared Technology Vulnerabilities

# Data Loss Trends

U.S. data compromises per year




- **3,322** U.S. data compromises in 2025, a record high[1]
- **48%** of breaches involved a third party, up from 30% a year earlier[2]
- **Ransomware** appeared in 48% of breaches[2]
- **Professional services**, which includes law firms, was the third most-breached industry with 478 compromises[1]

1. Identity Theft Resource Center, 2025 Annual Data Breach Report (Jan 2026). 2. Verizon, 2026 Data Breach Investigations Report.

# Cybersecurity Do's and Don'ts for Lawyers

## DO

- ✓ **Turn on multi-factor authentication** for email, cloud and practice software
- ✓ **Encrypt** laptops, phones and client files sent outside the firm
- ✓ **Confirm wire instructions by phone** using a number you already have
- ✓ **Install updates promptly** on every device and app
- ✓ **Vet vendors' security** before sharing client data
- ✓ **Keep an incident response plan** and know when to notify clients

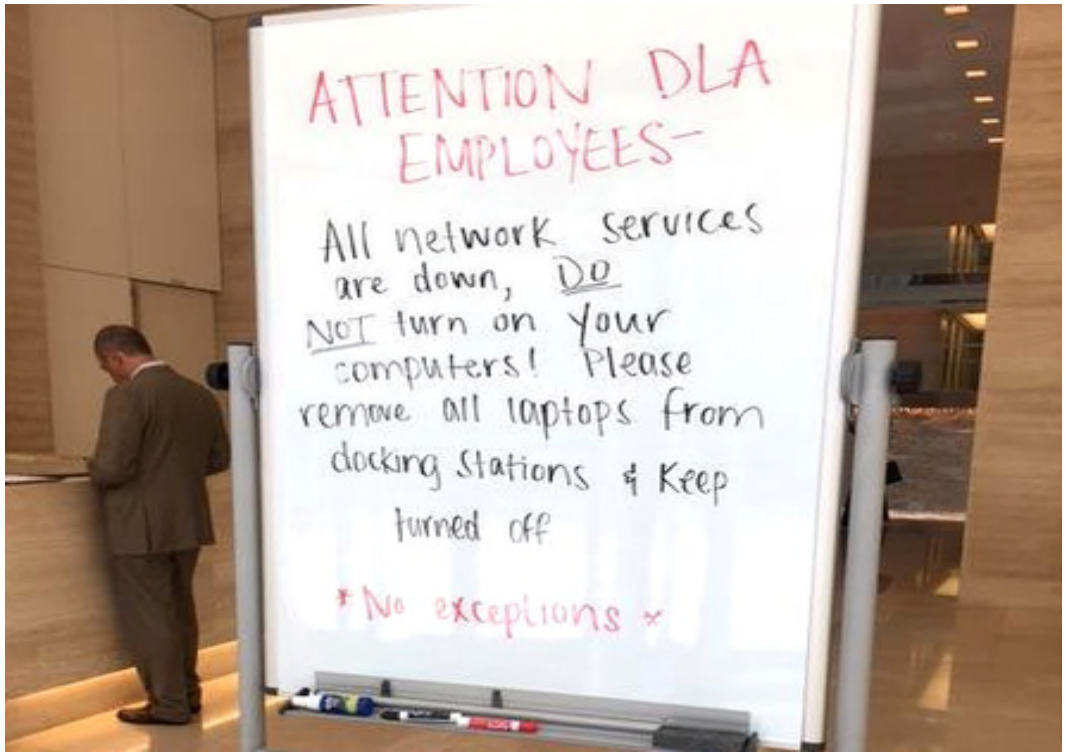
## DON'T

- ✗ **Reuse passwords** across accounts; use a password manager
- ✗ **Use public Wi-Fi** for client work without a VPN
- ✗ **Open unexpected links or attachments,** even from known senders
- ✗ **Put client data in personal email** or unapproved AI tools
- ✗ **Leave devices unlocked** or unattended in public

ABA Model Rule 1.6(c) requires reasonable efforts to protect client information; ABA Formal Opinions 477R (2017) and 483 (2018) cover securing communications and breach notice.

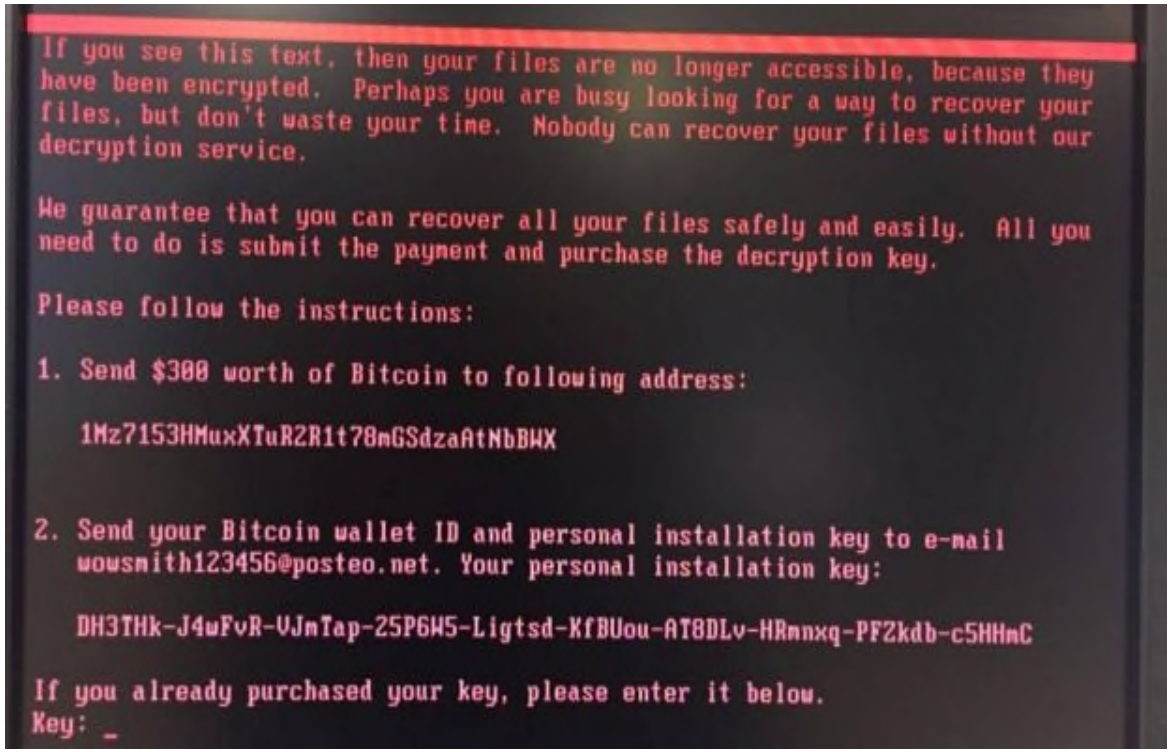
# Ransomware Attacks Against Attorneys

**DLA Piper (June, 2017):**



# Ransomware Attacks Against Attorneys

**DLA Piper (June, 2017):**



# Ransomware Attacks Against Attorneys

**DLA Piper (June 27, 2017):**

- Firm infected by Petya malware.

- Entire 3,600 lawyers + support staff in 40 countries on digital lockdown.

- Lockdown wasn't fully remediated for weeks.
  - 1 day without phones
  - 6 days without email
  - 2 weeks without complete access to older email and documents

- Total direct and indirect costs to firm estimated to be millions of dollars.

# TECH GADGETS AND TOYS



# PHONES PHONES PHONES



# iPhone 18 Pro

- A20 Pro chip, 2nm
- 48MP main camera with variable aperture
- Smaller Dynamic Island
- Up to 36 hours of video playback
- 50% charge in 15 minutes
- Up to 2TB, from $1,199
- Not a lot that is new
- Apple Intelligence imporving



# Samsung S26

- Larger 6.3" 120Hz display
- Snapdragon 8 Elite Gen 5 chip
- 50MP main camera, 3x zoom
- Bigger 4,300mAh battery
- 256GB base, from $899
- Galaxy AI live translation
- Not much improved over S25



# iPhone Duo

- Apple's first foldable iPhone
- 5.4" outside, 7.6" unfolded
- Thinnest iPhone ever
- Same A20 Pro chip as 18 Pro
- Touch ID replaces Face ID
- No telephoto camera
- $1,999 to $3,199
- Now competing with Samsung and others





# PERSONAL COMPUTERs

# Computers that run AI locally

- ASUS ProArt P14 and P16
- Dell XPS 16
- HP’s OmniBook Ultra and OmniBook X 14.
- Lenovo Yoga Pro 9n
- Microsoft Surface Laptop Ultra
- **All use NVIDIA RTX Spark and are expensive**



# Apple computers than can run AI locally (Most new ones can)

- **M6 Mac mini  ($899)**
- **Macbook Pro M5**
- **M6 is here**
- **Very fast, amazing computers**



# Apple MacBook Neo 13-Inch (2025, M4)

- Low starting price ($699)
- Good starter computer
- Should spend some money and add storage
- 16 hours battery life
- Uses iPhone class processor
- Dell, Asus, and others released competitors



# Competing Dell

- Low starting price ($699)
- Good starter computer
- Should spend some money and add storage
- 16 hours battery life
- Uses iPhone class processor
- Dell, Asus, and others released competitors



# NOTE-TAKING OPTIONS



# Remarkable Paper Pure

- Latest from Remarkable
- Syncs with apps over wi-fi
- Handwriting recognition
- Notes are searchable
- From $399
- Similar stuff from Boox, Kindle Scribe, iPad mini



# Rocketbook

- Write, erase, reuse
- 8.5 X 11
- Works with Rocketbook app
- Connect to various apps
- Take picture an load into app
- Handwriting recognition
- Notebooks are about $40
- App is free



# Nuwa Pen




- Actual ink pen
- Equipped with 3 cameras
- Capture what you write
- On real paper
- Saves it app
- Searchable
- Interact with the app's built-in large language

# Plaud Note + Plaud NotePin

- Records meetings
- Transcribes and summarizes
- Records all meetings and summarizes
- Powered by ChatGPT
- $159
- Plaud.ai





# And there are many more

- Limitless Pendant
- Bee-AI wearable
- Pocket
- Comulytic
- Otter.ai
- Zoom, Teams, Meet



# Bee AI-wearable (now owned by Amazon)



- Listens to conversations
- All day
- Summarizes
- Makes transcripts
- Provides “insights”
- Behavior coaching
- Integrates with
  - Calender
  - Email
- Amazon added Plaud-like device

# Meeting Recorder Rules

- Always ask permission
- Check your state’s law: some require consent of all parties
- Be careful about using with privileged information
- Know where recordings and transcripts are stored
- Assume recordings can be discoverable
- Review AI summaries before relying on them

# OTHER STUFF



Ray Ban/Meta
Smart Glasses
Gen 3

- Looks like Wayfarer
- 3K Ultra video (optional)
- Up to 8 hours of battery life, 48 additional hours with fully charged case.
- Prescription-ready
- 12 MP ultra-wide camera for HD photos and video
- Open-ear speakers and custom 5-mic array
- 32GB flash storage
- $379



## Meta’s Ray-Ban Display Glasses

- Glasses with a display
- Wristband to control the glasses with hand gestures
- Glasses include a small display in its right lens
- $800
- Lots of competitors:
  - Xreal One Pro
  - Halliday AI Glasses
  - RayNeo Air XR Glasses

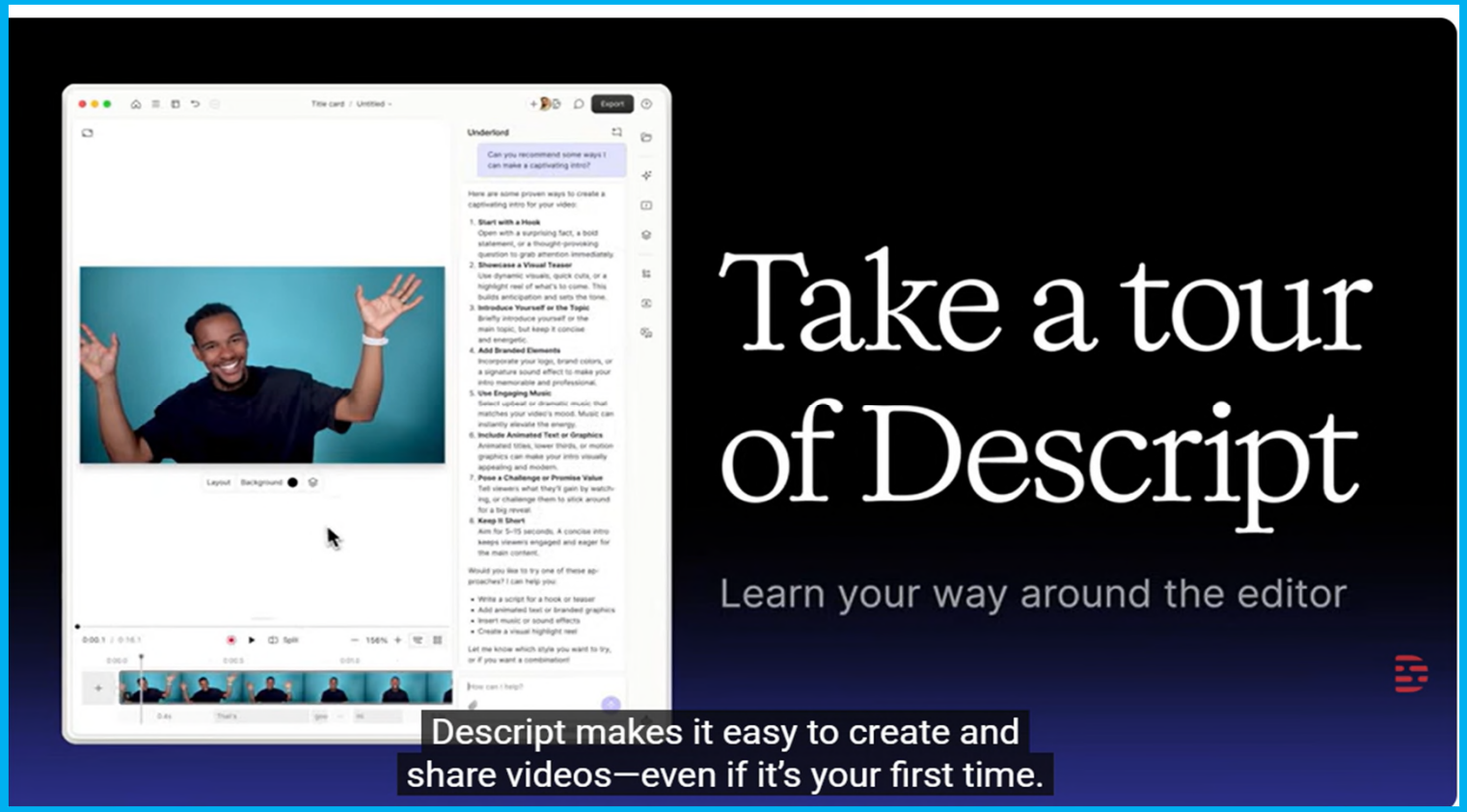


# ANKER LAPTOP POWER BANK




- 165 Watts
- Can power laptop
- Built in USB cables
- Built-in display
- $120
- Awesome

# Descript
descript.com




Use Riverside for interviews and podcasts (Riverside.com)

# You can also make videos using an AI Avitar






THE END

# THANK YOU FOR PUTTING UP WITH ME!

MBC | Mississippi Bankruptcy Conference, Inc.

# Divorce and Family Law in Bankruptcy Thursday 11/19


THE INTERSECTION OF DIVORCE & BANKRUPTCY
FROM MATRIMONY TO ACRIMONY

# WHAT ARE COURTS TO DO WHEN DIVORCE AND BANKRUPTCY COLLIDE?



# MATTERS NOT STAYED BY FILING BANKRUPTCY

- Proceedings to establish paternity
- Proceedings to establish or modify a DSO
- Proceedings regarding child custody or visitation
- Divorce proceedings
- Proceedings regarding domestic violence
- Certain methods used to collect DSOs
- Criminal contempt proceedings

# COLLECTION OF DSOS

- Withholding income for payment of DSO
  - Code requires wage withholding order, not just DSO. *In re DeSouza*, 493 B.R. 669 (B.A.P. 1st Cir. 2013)
  - Must garnish wages, not bank account. *In re Ojiegbei*, 512 B.R. 513, 524 (Bankruptcy. D. Md. 2014)
  - Post-petition garnishment can violate terms of confirmed plan. *Fla. Dept. of Revenue v. Gonzalez (In re Gonzalez)*, 832 F. 3d 1251, 1258 (11th Cir. 2016); *In re Gellington*, 363 B.R. 497, 501-02 (Bankr. N.D. Tex. 2007)

# COLLECTION OF DSOS

- Withholding, suspending or restricting certain licenses
- Reporting overdue support to a credit bureau
- Enforcing a medical obligation
- Intercepting a tax refund
  - This can violate the terms of a confirmed plan. *Fla. Dept. of Revenue v. Gonzalez (In re Gonzalez)*, 832 F. 3d 1251 (11th Cir. 2016).

# COMMENCEMENT OR CONTINUATION OF CRIMINAL CONTEMPT PROCEEDING

- Generally bankruptcy courts should not interfere with state court criminal proceedings unless the charges are an attempt to collect a debt.
- Criminal contempt is punitive and imposed to uphold the dignity of the court
- Civil contempt coerces compliance with a court order or compensates the complainant

# DIVISION OF MARITAL PROPERTY IS STAYED

- Federal courts have exclusive jurisdiction over property of the bankruptcy estate
- Includes all property titled in the debtor's name at the time of the bankruptcy filing.

# DISCHARGEABILITY OF DEBTS FROM A DOMESTIC PROCEEDING

- In Chapter 7, 11, and 12, debts arising from a domestic proceeding are non-dischargeable
- In a Chapter 13, the debtor can discharge any debt that is not a DSO if the debtor makes all plan payments and does not receive a hardship discharge.
- No time limit for bringing dischargeability action for debts arising from a domestic proceeding.
- Bankruptcy court has concurrent jurisdiction with state court to determine dischargeability

# DSO OR PROPERTY SETTLEMENT?

- Matter of federal bankruptcy law
- Court not bound by designation of a debt in a settlement agreement or divorce decree
- Courts look at intent of parties at time of divorce
- If agreement is ambiguous, Courts can look at extrinsic evidence to determine intent

# FACTORS CONSIDERED BY COURTS TO DECIDE DSO V. PROPERTY SETTLEMENT WHERE THERE IS TRIVIAL OR NO ALIMONY

- Disparity in earning power of parties
- Parties' business opportunities
- Future need of spouse who receives payments
- Relative physical condition of the parties
- Recipient's educational background
- Benefits innocent spouse would have received had marriage continued

# FACTORS CONSIDERED BY COURT WHERE AGREEMENT IS AMBIGUOUS AND THERE IS ALIMONY

- Whether the obligation fell within the property settlement or support obligation provisions of the divorce decree
- Whether the obligation ceases on debtor's death
- Whether the ex-spouse could assign the obligation
- Whether the obligation could be modified based on a change of circumstances
- Whether the payments were made over time as opposed to in one lump sum

# EFFECT OF NON-PAYMENT OF DSO

- Court cannot confirm a plan if post-petition DSO not current
- Debtor subject to conversion or dismissal if post-petition DSO not current
- Chapter 12 and 13 debtors cannot receive discharge if post-petition DSO not current

# DIVORCE DURING REORGANIZATION

- Should debtors remain in chapter 13?
- If so, how will plan be funded?
- Should case be severed and new counsel employed by each debtor?
- If severed, which debts will be paid in each case?
- Remember, any transfer of assets per property settlement agreement requires bankruptcy court approval

# BANKRUPTCY-PROOF YOUR DIVORCE

- Eliminate debt by selling joint assets
- Assign debt to the spouse who is contractually liable
- Avoid future equalizing payments
- Secure any future performance with a lien

## ➢ SCENARIO #1

- Karen and Josh are in a contentious divorce.
- Josh ordered to pay mortgage, medical insurance and half of medical expenses for children, school and daycare expenses, insurance on cars, yard maintenance, Karen's college tuition, and $2,500 in attorney fees.
- Josh did not pay and was held in contempt by chancellor.
- Forensic accounting determined Josh was hiding or disposing of assets.
- Josh filed chapter 7 and then filed a suggestion of bankruptcy in chancery court.
- Chancery court issued show cause, entered order freezing $50,000 from a stock sale and directed Josh to file a motion for relief from stay in bankruptcy court to allow chancery court to proceed with divorce.
- The rest of the story…

## SCENARIO #2

Sally and Joe decided not to hire an attorney to assist them with their divorce, but to do it themselves. They went to the Chancery Clerk's office and obtained the Irreconcilable Differences divorce packet, paid the filing fees and filed their paperwork, including their UCCR 8.05 financial declarations. On the hearing date, they appeared to present the paperwork to the Judge to obtain his signature on the Judgment of Divorce, both having taken off work to do so. Everything appeared to be in order.

Then, one of the following happens:

A. The Judge was about to sign the Judgment, when he noticed something under "installment payments" on Joe's 8.05: "Bankruptcy payment."

B. The Judge asked the parties if they knew they were entitled to have an attorney review their paperwork. Both nodded, and Joe said, "I can't afford one – maybe once I get my bankruptcy stuff settled."

## SCENARIO #3

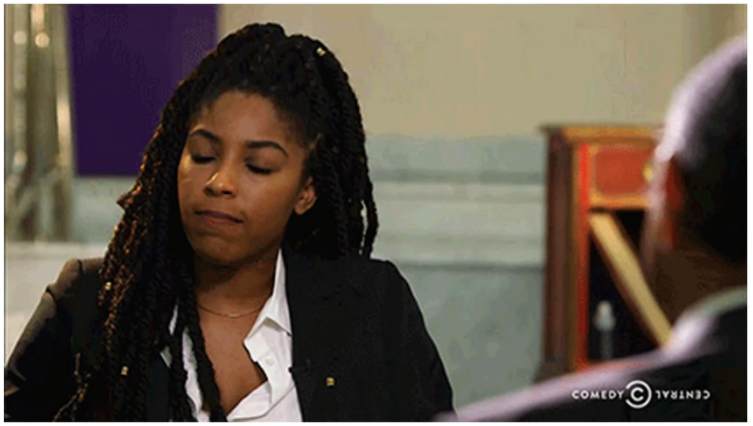
- After two years in litigation, Mitch and Cassie's divorce is finally set for trial.
- Trial begins and after a few other witnesses, Cassie is called as an adverse witness by Mitch.
- After a series of introductory questions, Mitch's attorney asks Cassie why she thinks Mitch is not a good father, to which she replies, "Other than the fact that he left us high and dry? Well, let me see, it could be because he hasn't paid half of the child support he was supposed to in the last year and a half. Or the house payment. I tried to keep up without it, but I finally just gave up and filed bankruptcy."

The Fallout…

## SCENARIO #3

# THE JUDGE:






## SCENARIO #3

# THE LAWYERS:

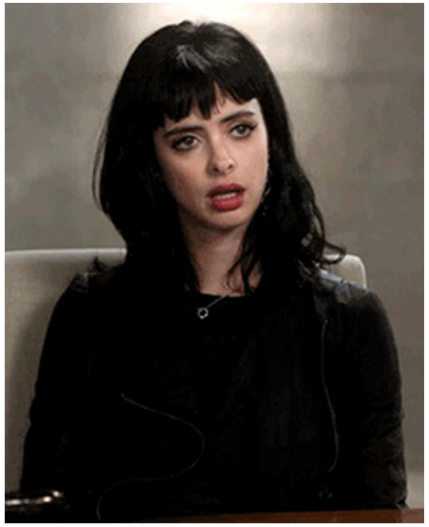






## SCENARIO #3

# THE LAW CLERK:








## SCENARIO #4

- Cynthia and Lipton were married in 1992 and had two children
- They divorced in 2011
- Property Settlement Agreement:
  - Cynthia has custody of children
  - Lipton pays child support of $600/month
  - Cynthia gets title to house and pays first mortgage
  - Lipton pays second mortgage – only he is personally liable on debt
  - Parties waived alimony
- At time of divorce, Lipton made $61,895 as a lineman and Cynthia made $9,454 as a school bus attendant
- Is the second mortgage a DSO or property settlement?

## SCENARIO #5

- Tom and Stephanie were married for 36 years
- They were divorced in 2010
- Property Settlement Agreement provided:
  - Stephanie remains in the home
  - Tom pays indebtedness on home and quit claims it to Stephanie
  - Tom pays alimony of $1200 per month until Stephanie reaches age 65

## SCENARIO #5

D. **Bankruptcy and Hold Harmless Agreement:**

With respect to the parties' responsibility for the payment of those certain debts and liabilities and their obligations to hold each other harmless for payment thereof, as any such liabilities and obligations are described herein, the parties understand and agree that any such obligations are in the form of spousal support and are non-dischargeable debts under the Bankruptcy Code and are spousal support and in the event that either shall hereafter file for bankruptcy under any chapter of the code, they shall reaffirm any debt they have agreed to pay by the terms and conditions of this document, this obligation being part of the financial support settlement between the parties.

- Is the provision regarding the house a support obligation or property settlement?

## SCENARIO #6

- James and Tiffany were married for less than three years
- Both parties were employed at the time of the divorce
- There were no children
- The final judgment of divorce provides:

Based on the above distribution and the Court's consideration of Tiffany's financial condition resulting therefrom, there is no significant disparity in the parties' respective estates. The Court has used equitable distribution to eliminate the need for permanent periodic payments and declines an award of periodic and/or lump sum alimony to Tiffany. However, pursuant to the equitable distribution above, Tiffany is awarded a monetary judgment against James in the total sum of $150,000 to be made in a lump sum payment or in monthly payments of $2,000 per month until paid in full.

- Support or property settlement?

## SCENARIO #7

- Angelina sued Brad in state court to recover unpaid child support
- Brad failed to appear at the hearing and was held in contempt
- Shortly thereafter, Brad filed bankruptcy
- After the bankruptcy filing, the state court judge signed the child support order and executed a writ of arrest for the contempt
- Brad was arrested and held in custody for 10 days before he was released after he negotiated with and paid Angelina $80,000.
- Did Angelina violate the automatic stay?

## SCENARIO #7



# THE INTERSECTION OF BANKRUPTCY AND MISSISSIPPI FAMILY LAW[1]

In Mississippi, issues of family law are handled exclusively by the chancery courts. However, the bankruptcy of a party to a chancery court action may disrupt family law proceedings. And "the intersection between bankruptcy law and divorce law is an especially dangerous place to be." *In re Campbell*, 649 B.R. 831, 842 (Bankr. S.D. Miss. 2023).

The Bankruptcy Code governs bankruptcy proceedings. 11 U.S.C. § 101 *et seq*. It was enacted in 1978 and went through its most thorough revision in 2005 with the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). The Code is supplemented by the Federal Rules of Bankruptcy Procedure and local bankruptcy rules adopted by the bankruptcy courts in each federal district. The bankruptcy courts of the Northern and Southern Districts of Mississippi have adopted a single set of uniform local rules which can be found on the websites of both districts. Chapters 1, 3, and 5 of the Code contain general provisions, definitions, and procedures that apply to all bankruptcy cases. Chapter 7 provides for liquidation and is available only within the restrictions established by BAPCPA. Chapters 9, 11, 12, and 13 provide for reorganization where a debtor may keep assets in exchange for making a stream of payments to creditors. Under the U.S. Constitution's supremacy clause, federal bankruptcy law supersedes state law to the extent state law is inconsistent with bankruptcy law. U.S. Const. art. IV, cl. 2.

### A. Family Law Matters Not Stayed by Filing Bankruptcy

In general, the filing of a bankruptcy petition operates as a stay of any action against the debtor to collect a debt. *See* 11 U.S.C. § 362(a). Certain actions, however, are excepted from the

[1] Prepared by Katharine M. Samson, Chief Judge, United States Bankruptcy Court for the Southern District of Mississippi, with input from Jeffrey K. Tyree, Esquire, and Joe M. Davis, Esquire.

automatic stay. Regarding family law, actions "for the establishment or modification of an order for domestic support obligations; . . . concerning child custody or visitation; [or] . . . for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate" are not stayed. 11 U.S.C. § 362(b)(2)(A)(ii)-(iv); *see also* Deborah H. Bell, *Bell on Miss. Family Law* § 21.03[1] (2d ed. 2011) ("[T]he stay does not apply to actions for divorce, paternity, custody, visitation, or protective orders. It does not apply to actions to establish or modify domestic support obligations (DSO), which include alimony, maintenance, and child support, including child support collected by the Department of Human Services."). The Supreme Court has held that "the domestic relations exception [to federal jurisdiction] . . . divests the federal courts of power to issue divorce, alimony, and child custody decrees." *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992). This exception is based "on narrower statutory, rather than broader constitutional, grounds." *Id.* at 696; *Vulcan Materials Co. v. City of Tehuacana*, 238 F.3d 382, 386 n.2 (5th Cir. 2001) (describing exception as "narrow"). The bankruptcy court is not the appropriate forum to re-examine divorce decrees and support orders. *Smith v. Smith (In re Smith)*, 114 B.R. 457, 465 (Bankr. S.D. Miss. 1990); *Mosley v. Bowie Cnty. Tex*, 275 F. App'x 327, 329 (5th Cir. 2008) (*Rooker-Feldman* doctrine bars federal review of a support order unless that judgment is void).

In addition, the following actions are not stayed:

1. Actions establishing paternity or involving claims of domestic violence. 11 U.S.C. § 362(b)(2)(A).
2. Collecting a domestic support obligation from property that is not property of the bankruptcy estate. 11 U.S.C. § 362(b)(2)(B).

3. Withholding the debtor's income for payment of a domestic support obligation under a judicial or administrative order or statute. 11 U.S.C. § 362(b)(2)(C); *In re Gellington*, 363 B.R. 497, 501-02 (Bankr. N.D. Tex. 2007) (post-petition garnishment of wages not violation of stay but can violate confirmation order); *Fla. Dep't of Revenue v. Gonzalez (In re Gonzalez)*, 832 F.3d 1251, 1258 (11th Cir. 2016) (Code allows withholding of income post-petition but not after confirmation if withholding is in violation of plan); *In re DeSouza*, 493 B.R. 669, 673 (B.A.P. 1st Cir. 2013) (Code requires wage withholding order, not merely court order requiring payment of support.); *In re Ojiegbe*, 512 B.R. 513, 524 (Bankr. D. Md. 2014) (Code does not allow garnishment of debtor's bank account).
4. Withholding, suspending, or restricting a debtor's driver's license, professional or occupational license, or recreational license. 11 U.S.C. § 362(b)(2)(D); 42 U.S.C. § 666(a)(16).
5. Reporting of overdue child support owed by a parent to any consumer reporting agency. 11 U.S.C. § 362(b)(2)(E); 42 U.S.C. § 666(a)(7).
6. Intercepting a debtor's federal or state income tax refund by or on behalf of a state or local child support enforcement agency to collect past-due spousal or child support in accordance with federal and state child support enforcement statutes. 11 U.S.C. § 362(b)(2)(F).
7. Enforcing a debtor's medical obligation in accordance with federal and state child support enforcement statutes. 11 U.S.C. § 362(b)(2)(G).
8. Commencement or continuation of a criminal contempt proceeding against a debtor based on the debtor's failure to pay a pre-bankruptcy spousal or child support debt if

the purpose and effect of the criminal contempt proceeding is to punish the debtor's failure to pay spousal or child support and not to coerce or require the debtor's payment of spousal or child support. 11 U.S.C. § 362(b)(1); *see generally Stewart v. Hampton Co. Nat'l Sur., LLC (In re Stewart)*, 544 B.R. 859, 866 (Bankr. N.D. Miss. 2015) (court should not interfere in state court criminal proceedings unless charges are an attempt by creditor to extract payment or exact revenge); *see also Russell v. Caffey (In re Caffey)*, 384 F. App'x 882, 886-87 (11th Cir. 2010) (even if ex-wife had no affirmative duty to vacate outstanding contempt order, she violated stay by negotiating support payment in exchange for debtor's release from prison).

**B. Family Law Matters Stayed by Filing Bankruptcy**

Perhaps the most important family law matter that is subject to the automatic stay is the division of marital property. Federal courts "in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." 28 U.S.C. § 1334(e)(1) (citation modified). This exclusivity of jurisdiction over property of the debtor is not affected by a previously pending divorce action in Mississippi chancery court.

> When bankruptcy is filed after a divorce petition is filed but before the judgment of divorce, all assets titled in the name of the debtor spouse become a part of the bankruptcy estate. The state court action is stayed with respect to a property division. In Mississippi, a spouse has no property interest in marital assets titled in the other's name until a judgment of divorce and equitable distribution. Under these circumstances, the nondebtor spouse becomes an unsecured creditor in the bankruptcy with regard to assets titled in the debtor's name.

Bell, *supra*, at § 21.06[2] (footnote omitted); *Id.* at § 21.03[3] ("A state court may not classify and divide marital property without permission of the bankruptcy court.").

The Mississippi Supreme Court has held that while a husband's primary asset (a partnership) was in bankruptcy, the value of that asset could not be determined, and therefore the chancellor's "decision to grant [the wife] a property settlement and/or lump sum alimony was premature." *Heigle v. Heigle*, 654 So. 2d 895, 898 (Miss. 1995). The Mississippi Supreme Court further held that other than the question of the divorce itself, which was undisputed, "all the remaining issues should have remained in the trial court pending the conclusion of the bankruptcy proceedings." *Id.*; *see also Dunaway v. Dunaway*, 749 So. 2d 1112, 1120-21 (Miss. Ct. App. 1999) (automatic stay of bankruptcy proceeding enjoins actions affecting bankruptcy assets).

**C. Relief from Stay**

"On request of a party in interest and after notice and a hearing," a bankruptcy court may grant relief from the automatic stay "for cause." 11 U.S.C. § 362(d)(1). "Such 'cause' includes allowing an action to proceed to completion in another tribunal." *In re Armstrong & Guy Law Office, LLC*, No. 07-02459, 2007 WL 4571152, at *1 (Bankr. S.D. Miss. Dec. 21, 2007) (citing *In re Curtis*, 40 B.R. 795, 799 (Bankr. D. Utah 1984)); *see also* H.R. Rep. No. 95-595, at 341 (1977) ("[I]t will often be more appropriate to permit proceedings to continue in their place of origin, when no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from any duties that may be handled elsewhere."). "Regarding family obligations, the Fifth Circuit has emphasized that '[i]n general, bankruptcy courts owe state courts deference in domestic matters.'" *McCloskey v. McCloskey (In re McCloskey)*, No. 06-3012, 2015 WL 1062102, at *15 (Bankr. S.D. Tex. Mar. 5, 2015) (quoting *Barnes v. Barnes (In re Barnes)*, 279 F. App'x 318, 319 (5th Cir. 2008)). Relief from the automatic stay should be "liberally granted in situations involving alimony, maintenance, or support in order

to avoid entangling the federal court in family law matters best left to state court." *Carver v. Carver*, 954 F.2d 1573, 1578 (11th Cir. 1992).

**D. Dischargeability of Debt Arising from Domestic Proceeding**

The Bankruptcy Code recognizes two kinds of post-marital obligations: debts that are within the definition of "domestic support obligation" and debts that are not.

A debt for a domestic support obligation ("DSO") cannot be discharged, period. 11 U.S.C. § 523(a)(5). The Code defines a DSO as:

> a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—
>
> (A) owed to or recoverable by—
>
> (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
> (ii) a governmental unit;
>
> (B) *in the nature of alimony, maintenance, or support* (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
>
> (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—
>
> (i) a separation agreement, divorce decree, or property settlement agreement;
> (ii) an order of a court of record; or
> (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
>
> (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

11 U.S.C. § 101(14A) (emphasis added).

A marital debt that is not a DSO can be discharged, but only in chapter 13 and only if the debtor makes all payments under the plan, as opposed to receiving a "hardship discharge." 11 U.S.C. § 1328(a), (b). Non-DSO debts are those that fall outside the definition of a DSO but were incurred "in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit." 11 U.S.C. § 523(a)(15). This category may include obligations to pay marital debts. *See James v. Younes (In re Younes)*, 545 B.R. 591, 596 (Bankr. N.D. Iowa 2016) (debtor could discharge direct obligation to third-party creditor but not obligation in divorce decree to hold former spouse harmless and indemnify her on debt); *Walls v. Hicks (In re Hicks)*, 530 B.R. 912, 917 (Bankr. M.D. Fla. 2015) (although debts to third party for mortgage on former residence could be discharged, debtor's obligation to former spouse under divorce decree to pay mortgage was not discharged); *Stanley v. Stanley (In re Stanley)*, No. 11-00357, 2013 WL 1336103, at *4-5 (Bankr. N.D. Ala. Mar. 29, 2013). It also includes property settlements. *See Humphries v. Rogers (In re Humphries)*, 516 B.R. 856, 865 (Bankr. N.D. Miss 2014).

Bankruptcy courts are not bound by the chancery court's designation of a particular debt as in the nature of support or as a property settlement. *See Joseph v. J. Huey O'Toole, P.C. (In re Joseph)*, 16 F.3d 86, 88 (5th Cir. 1994) ("Thus, we must place substance over form to determine the true nature and purpose of the award, regardless of the label used."). "Whether a particular obligation constitutes alimony, maintenance, or support within the meaning of [§ 523(a)(5)] is a matter of federal bankruptcy law, not state law." *Biggs v. Biggs (In re Biggs)*, 907 F.2d 503, 504 (5th Cir. 1990).

When presented with a separation or divorce agreement, bankruptcy courts look at the intent of the parties at the time the agreement was executed to determine whether a payment is in

the nature of support or is a property settlement. *Milligan v. Evert (In re Evert)*, 342 F.3d 358, 368 (5th Cir. 2003). "A written agreement between the parties is persuasive evidence of their intent." *Id.* If an agreement clearly characterizes a debt as support or property settlement, that characterization controls. *Steele v. Wyly (In re Wyly)*, 525 B.R. 644, 655 (Bankr. N.D. Tex. 2015) (quoting *In re Evert*, 342 F. 3d at 368); *Littleton v. Littleton (In re Littleton)*, 189 F. App'x 294, 296 (5th Cir. 2006).

If the agreement is ambiguous, the bankruptcy court looks at extrinsic evidence to determine the intentions of the parties. *In re Evert*, 342 F.3d at 368. "If an agreement fails to provide explicitly for spousal support, a court may presume that a so-called 'property settlement' is intended for support when the circumstances of the case indicate that the recipient spouse needs support." *Id.* Bankruptcy courts look to state law when considering extrinsic evidence. *See, e.g., Nunnally v. Nunnally (In re Nunnally)*, 506 F.2d 1024, 1026-27 (5th Cir. 1975) (discussing Texas law factors); *see also* Henry J. Sommer & Margaret Dee McGarity, *Collier Family Law and the Bankruptcy Code* ¶ 6.03[2] (Matthew Bender) ("[A]lthough state law is not dispositive, a court making a dischargeability determination can and should look to state law for guidance in making its decision.").

A bankruptcy court cannot confirm a plan if the debtor is not current on all post-petition DSOs. 11 U.S.C. §§ 1129(a)(14), 1225(a)(7), 1325(a)(8). A debtor in arrears on post-petition DSOs is also subject to conversion or dismissal. 11 U.S.C. §§ 1112(b)(4)(P), 1208(c)(10), 1307(c)(11); *see In re Guzman*, No. 13-06960, 2018 WL 3032862, at *7 (Bankr. D. Puerto Rico June 15, 2018) (chapter 11 debtor dismissed post-confirmation for failure to maintain post-petition DSO). In addition, a chapter 12 or 13 debtor will not receive a discharge of any debts unless the debtor is current on all post-petition DSOs. 11 U.S.C. §§ 1228(a), 1328(a); *In re Turner*, No. 09-

14476, 2014 WL 2203882, at *2 (Bankr. S.D. Miss. May 27, 2014) (debtor not current on post-petition DSO payments unable to receive discharge). These requirements include obligations to pay debts of an ex-spouse that are in the nature of support. *See In re Bright*, No. 11-10214, 2012 WL 346643, at *3-4 (Bankr. D. Kan. Feb. 1, 2012) (court could not confirm plan that did not provide for payment of ex-spouse's mortgage, which was support obligation).

There is no time limit to bring a non-dischargeability action under §§ 523(a)(5) and (15). Fed. R. Bankr. P. 4007; *In re Walls*, 496 B.R. 818, 826 (Bankr. N.D. Miss. 2013); *In re Bingham*, 163 B.R. 769, 771-72 (Bankr. N.D. Tex. 1994). And the bankruptcy court has concurrent jurisdiction with the state court to determine whether a domestic obligation is non-dischargeable. *In re Walls*, 496 B.R. at 826; *In re Bingham*, 163 B.R. at 772.

**E. What to Consider when Divorce Occurs During a Reorganization**

It is not unusual for the financial difficulties that resulted in a bankruptcy filing to be followed by the filing of a divorce between joint debtors or the debtor and a non-filing spouse. If a case is confirmed, debtor's counsel should determine if new counsel is needed due to the potential conflict because of the divorce. At a minimum, if counsel intends to remain in the case, an executed waiver from both debtors should be completed for counsel to proceed.

Other considerations for debtors and counsel are:

- Should debtors remain in chapter 13?
- If so, can the plan still be completed?
- How will the plan be funded?
- Are both debtors in agreement as to how the plan will be funded and how creditors will be paid?
- If not, should the chapter 13 case be severed and should new bankruptcy counsel be employed by each debtor?

- If severed, which marital debts will be paid in each case and which debtor is liable for those debt obligations? (This would include amended schedules for the debts to be paid in the original case.)

- The chapter 13 Trustee will need clarification and an order modifying any confirmed plan (in the original case for all debts to be paid).

- The severed case will proceed as a new filing with a proposed plan, schedules and related documents addressing the debts to be paid in that case.

- Any transfer of assets pursuant to a contemplated chancery court property settlement requires bankruptcy court approval, after notice and hearing.

**F. What to Consider when Divorce Occurs Prior to a Bankruptcy Filing**

Remember that all debts incurred as part of a divorce are nondischargeable in a chapter 7 bankruptcy. Only support obligations are nondischargeable in a chapter 13 bankruptcy. So, obligations related to property settlements and hold harmless agreements related to property settlements can be discharged in a chapter 13. Recognizing these potential issues, lawyers representing clients in divorce should consider ways to "bankruptcy proof" the divorce decree. These include:

- Eliminating debt by selling joint assets. For example, sell the residence, payoff the mortgage, and divide any equity.

- Assigning debt to the contractually liable spouse. The chancery court cannot modify the rights of a third-party creditor. So, avoid assigning the legal obligations of one spouse to the other because the contractually liable spouse may ultimately be responsible to pay the debt if the other spouse files bankruptcy.

- Avoiding uneven division of assets where one spouse pays an equalizing payment in the future. The equalizing payment could be subject to discharge in a chapter 13.

- Securing future performance under a divorce decree with a lien. *See Farrey v. Sanderfoot*, 500 U.S. 291 (1991) (debtor could not avoid judicial lien on homestead created by divorce decree); *Potts v. Potts (In re Potts)*, 18-11882-SDM, 2020 WL 476592 (Bankr. S.D. Miss. Jan. 29, 2020) (same).

**G. Select Mississippi Cases**

*Fava v. Freeman*, 3:26-cv-157-JDM, 2026 WL 3006913 (N.D. Miss. Oct. 6, 2026) (community property can only pay debts of community).

*Freeman v. Freeman (In re Freeman)*, 664 B.R. 334 (Bankr. N.D. Miss. 2024) (Woodard, J.) (bankruptcy court has jurisdiction over community property even if it is in another state).

*Burkhalter v. Burkhalter (In re Burkhalter)*, 635 B.R. 284 (Bankr. N.D. Miss. 2022) (Woodard, J.) (lump sum alimony, employment severance owed by debtor to ex-spouse, cell phone charges and health insurance premiums were all obligations owed under divorce decree and therefore nondischargeable in Chapter 7).

*In re Hunsucker*, 631 B.R. 610 (Bankr. N.D. Miss. 2021) (Woodard, J.) (sets out factors for bankruptcy court to consider when determining whether debt is support or property settlement).

*Parker v. Miller (In re Miller)*, 589 B.R. 550 (Bankr. S.D. Miss. 2018) (Olack, J.) (holding issue of dischargeability in abeyance until resolution of state-court action in which former wife of debtor's boyfriend sought damages against debtor for fraud, embezzlement, intentional infliction of emotional distress, and alienation of affection).

*Dumitrache v. New (In re New)*, 589 B.R. 288 (Bankr. N.D. Miss. 2018) (Woodard, J.) (fees incurred by former spouse in action seeking Order of Protection against harm and abuse were support and non-dischargeable under 523(a)(5)).

*In re Ulrich*, No. 15-51408-KMS, ECF No. 82 (Bankr. S.D. Miss. Aug. 24, 2016) (bankruptcy court not appropriate forum to re-examine parties divorce arrangements).

*Robinson v. Robinson (In re Robinson)*, No. 15-06029-KMS, ECF No. 41 (Bankr. S.D. Miss. Aug. 15, 2016) (requirement to repay mortgage on marital home is support obligation under unambiguous language of settlement agreement).

*In re Dezell*, No. 15-10596-NPO, ECF No. 83 (Bankr. N.D. Miss. June 15, 2015) (requirement to pay auto insurance of former spouse is support obligation under unambiguous language of court order).

*Anderson v. Anderson (In re Anderson)*, No. 13-05041-KMS, ECF No. 34 (Bankr. S.D. Miss. Sept. 17, 2014) (denying summary judgment where court could not determine amount of non-dischargeable medical expenses from documents submitted by non-debtor spouse).

*Shankle v. Shankle (In re Shankle)*, 476 B.R. 908 (Bankr. N.D. Miss. 2012) (Houston, J.) (dissipating marital assets and violating chancery court order warrants finding of willful and malicious injury under 523(a)(6)).

*Rustin v. Rustin (In re Rustin)*, No. 09-05100-NPO, 2011 WL 5443067 (Bank. S.D. Miss. Nov. 9, 2011) (lump-sum alimony is non-dischargeable support obligation).

*In re White*, No. 07-03870-NPO, 2008 WL 682422 (Bankr. S.D. Miss. Mar. 7, 2008) (debtor with only post-petition DSO not required to list recipient in schedules but is required to list debt on Schedule J and in plan).

*Morin v. Rogers (In re Rogers),* Adv. No. 00-0039-EE (Bankr. S.D. Miss. Dec. 6, 2000) (debt to ex-husband for attorney fees related to defense of child abuse allegation non-dischargeable as child support obligation), *aff'd* 189 F. App'x 299 (5th Cir. 2006).

*McCaskill v. McCaskill (In re McCaskill)*, Adv. No. 94-00112-EE (Bankr. S.D. Miss. Nov. 3, 1994) (lump-sum and periodic alimony awarded by chancellor both in nature of support and non-dischargeable) (Memorandum Opinion available only on Bankr. S.D. Miss. website).

**H. Select Resources**

Deborah H. Bell, *Bell on Miss. Family Law* (2d ed. 2011).

Henry J. Sommer & Margaret Dee McGarity, *Collier Family Law and the Bankruptcy Code* (Matthew Bender).

William Houston Brown, *Bankruptcy and Domestic Relations Manual* (2017).

MBC | Mississippi Bankruptcy Conference, Inc.

# Intergenerational Panel Thursday 11/19

CHAPTER 13 PLAN CASE NO. 0502330

DEBTOR(S): HARRIET SMITH SS# xxx-xx- NET MONTHLY EARNINGS 1,790.02

SS# NET MONTHLY EARNINGS

FULL ADDRESS: 68 Old Hwy 35 S, Forest MS 39074 # OF DEPENDENTS 0 RENT -0-

2005 MAY -4 AM 10:39

PLAN PAYMENTS: Debtor(s) propose to pay a total of $ 278.00 per month into the plan.

Direct primary Wage Order to: Tyson, PO Box 410, Forest MS 39074

Wage Order Amount: $ ~~64.50~~ 264.50 per (Circle One:) MONTH / WEEK / SEMI-MONTHLY / BI-WEEKLY

If split, direct spouse's Wage Order to:

Wage Order Amount: $ per (Circle One:) MONTH / WEEK / SEMI-MONTHLY / BI-WEEKLY

PRIORITY CREDITORS: IRS: $ -0- @ /month STATE TAX COMM: $ -0- @ $ /month

OTHER: $ @ $ /month

MORTGAGES:

Mtg. pmts to United Bilt Homes beginning 10-05 @ $ 517.22 ( ) PLAN (X) DIRECT

Mtg. pmts to beginning @ $ ( ) PLAN ( ) DIRECT

Mtg. pmts to beginning @ $ ( ) PLAN ( ) DIRECT

Mtg. arrearage to from thru 9/05 $ @ $ /month* (*Including interest at %)

Mtg. arrearage to from thru $ @ $ /month* (*Including interest at %)

Mtg. arrearage to from thru $ @ $ /month* (*Including interest at %)

SECURED CLAIMS: Shall be paid the sum set out as value or the creditor's proof of claim amount if lesser than value of collateral. That portion of the creditor's claim that exceeds the value shall be paid as an unsecured claim.

| CREDITOR'S NAME & COLLATERAL | AMT OWED | VALUE | INT. RATE | TOTAL TO BE PAID | MONTHLY PAYMENT |
|---|---|---|---|---|---|
| Mitsubishi Motors, '02 Mit. Lancer | ~~$ 6,454.84~~ $ 11,778.06 | $ 6,937.50 | 8 % | ~~$ 7,281.72~~ $ 7826.26 | ~~$ 262.27~~ $ 217.40 |
| | $ | $ | % | $ | $ |
| | $ | $ | % | $ | $ |
| | $ | $ | % | $ | $ |

SPECIAL CLAIMANTS: Child support, co-signed debts, collateral for surrender or abandonment, or previously repossessed, insurance to be paid through plan, etc.

| | CLAIM | INT. RATE? | PROPOSAL |
|---|---|---|---|
| cosigned Chrysler Ser, '03 Dodge Neon | ~~$ 9280.00~~ $ 9054.93 | % | abandons interest to comaker |
| | $ | % | |
| | $ | % | |

UNSECURED DEBTS: The holders of the allowed unsecured claims totaling approximately $ ~~12,510.01~~ 19,447.51 are to be paid in deferred payments: ( ) 100%, (XX) None-0%, or a minimum of ( ) percent, not to exceed 100%.

ADMINISTRATIVE FEES: Filing fees and administrative fees shall be paid pursuant to Court Order and/or Local Rules.

TOTAL ATTORNEY FEE: $ 1,700.00 Amount Received: $ -0- Amount to be Paid Through Plan $ 1,700.00

REMARKS:

Name/Address/Telephone # of vehicle insurance company or agent:

Telephone No.

Attorney for Debtor (Name/Address/Telephone #):

EDWIN F. TULLOS
PO BOX 505
RALEIGH MS 39153
Telephone No. (601) 782-9411

The Debtor(s) request that the Court approve this plan for 36 months or until paid, not to exceed 60 months.

DATE: 4-30-05

Debtor's Signature /s/ Harriet Smith
HARRIET SMITH

Spouse's Signature

Attorney's Signature /s/ Edwin F. Tullos

**CHAPTER 13 PLAN**
**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF MISSISSIPPI**

Debtor: Janice Marie Boyd SSN: XXX-XX-_____ CASE NO. 13-02886
Joint Debtor: P.O.Box 676 SSN: XXX-XX-_____ Median Income: ☐ Above ☑ Below
Address: 20450 Old HWY 80 West, Lot 89
Edwards, MS 39066

**THIS PLAN DOES NOT ALLOW CLAIMS. Creditors must file a proof of claim to be paid under any plan that may be confirmed. The treatment of ALL secured and priority debts must be provided for in this plan.**

**PAYMENT AND LENGTH OF PLAN**
The plan period shall be for a period of 60 months, not to be less than 36 months for below median income debtor(s), or less than 60 months for above median income debtor(s).

(A) Debtor shall pay $ ~~122.00~~ 240.50 (☑ monthly, ☐ semi-monthly, ☐ weekly, or ☐ bi-weekly) to the chapter 13 trustee. Unless otherwise ordered by the Court, an Order directing payment shall be issued to Debtor's employer at the following address:
Direct Pay, Debtor is retired/disabled

(B) Joint Debtor shall pay $_____ (☐ monthly, ☐ semi-monthly, ☐ weekly, or ☐ bi-weekly) to the chapter 13 trustee. Unless otherwise ordered by the Court, an Order directing payment shall be issued to Debtor's employer at the following address:

**PRIORITY CREDITORS.**
Filed claims which are not disallowed are to be paid in full or as ordered by the Court as follows:
Internal Revenue Service: $_____ at $_____/month
Mississippi Dept. of Revenue: $_____ at $_____/month
Other/_____: $_____ at $_____/month

**DOMESTIC SUPPORT OBLIGATION.** DUE TO: _____

POST PETITION OBLIGATION: In the amount of $_____ per month beginning _____.
To be paid ☐ direct, ☐ through payroll deduction, or ☐ through the plan.

PRE-PETITION ARREARAGE: In the total amount of $_____ through _____ which shall be paid in the amount of $_____ per month beginning _____.
To be paid ☐ Direct, ☐ through payroll deduction, or ☐ through the plan.

**HOME MORTGAGES.** All claims secured by real property which are to be paid through the plan shall be scheduled below. Absent an objection by a party in interest, the plan will be amended consistent with the proof of claim filed herein, subject to the start date for the continuing monthly mortgage payment proposed herein.

Mtg pmts to _____ Beginning _____ @ $_____ ☐Plan ☐Direct
Mtg pmts to _____ Beginning _____ @ $_____ ☐Plan ☐Direct
Mtg pmts to _____ Beginning _____ @ $_____ ☐Plan ☐Direct

Mtg arrears to _____ Through _____ $_____ @ $_____/mo
Mtg arrears to _____ Through _____ $_____ @ $_____/mo
Mtg arrears to _____ Through _____ $_____ @ $_____/mo

**MORTGAGE CLAIMS TO BE PAID IN FULL OVER PLAN TERM:**

Creditor:_____ Approx. amt. due: _____ Int. Rate: _____
Property Address: _____ Are related taxes and/or insurance escrowed ☐Yes ☐No

Creditor:_____ Approx. amt. due: _____ Int. Rate: _____
Property Address: _____ Are related taxes and/or insurance escrowed ☐Yes ☐No

**NON-MORTGAGE SECURED CLAIMS.** Creditors that have filed claims that are not disallowed are to retain lien(s) pursuant to 11 U.S.C. § 1325(a)(5)(B)(i)(I) until the payment of the debt determined as under non-bankruptcy law or discharge. Such creditors shall be paid as secured claimants the sum set out below or pursuant to other order of the Court. The portion of the claim not paid as secured shall be treated as a general unsecured claim.

| CREDITOR'S NAME | COLLATERAL | 910* CLM | APPROX. AMT. OWED | VALUE | INT. RATE | PAY VALUE OR AMT. OWED |
|---|---|---|---|---|---|---|
| Title Cash of MS | 1998 Ford Contour | | $708.00 | $1,662.50 | 7% | AMT. OWED |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |

* The column for "910 CLM" applies to both motor vehicles and "any other thing of value" as used in the "hanging paragraph" of 11 U.S.C. § 1325

**SPECIAL CLAIMANTS** including, but not limited to, co-signed debts, abandonment of collateral, direct payments by Debtor, etc. For all abandoned collateral Debtor will pay $0.00 on the secured portion of the debt. Where the proposal is for payment, creditor must file a proof of claim to receive proposed payment.

| CREDITOR'S NAME | COLLATERAL | APPROX. AMT. OWED | PROPOSED TREATMENT |
|---|---|---|---|
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

**STUDENT LOANS** which are not subject to discharge pursuant to 11 U.S.C. §§ 523(a)(8) and 1328(c) are as follows (such debts shall not be included in the general unsecured total):

| CREDITOR'S NAME | APPROX. AMT. OWED | CONTRACTUAL MO. PMT. | PROPOSED TREATMENT |
|---|---|---|---|
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

**SPECIAL PROVISIONS** which may apply to any or all payments to be paid through the plan, including, but not limited to, adequate protection payments:

_____
_____
_____

**GENERAL UNSECURED CLAIMS** total approximately $ ~~3,337.62~~ 9,635.29. Such claims must be ***timely filed*** and not disallowed to receive payment as follows:_____ IN FULL (100%), 100 %(percent) MINIMUM, or a total distribution of $_____, with the Trustee to determine the percentage distribution. ***Those general unsecured claims not timely filed shall be paid nothing, absent order of the Court.***

Total attorney fee charged: $ 2,500.00
Attorney fee previously paid: $ 0.00
Attorney fee to be paid in plan: $ 2,500.00

The payment of administrative costs and aforementioned attorney fees are to be paid pursuant to Court order and/or local rules.

Automobile Insurance Co/Agent

Attorney for Debtor (Name/Address/Phone/Email)
Michael G. Pond
1675 Lakeland Drive, Suite 201
Jackson, MS 39216

Telephone/Fax:

Telephone No. (601)948-4878
Facsimile No. (866) 666-0341
Email address mailforward@pondlawoffice.com

DATED: DEBTOR'S SIGNATURE s/ Janice Marie Boyd

JOINT DEBTOR'S SIGNATURE

ATTORNEY'S SIGNATURE s/Michael G. Pond

**Fill in this information to identify your case:**

Debtor 1 _____
Full Name (First, Middle, Last)

Debtor 2 _____
(Spouse, if filing) Full Name (First, Middle, Last)

United States Bankruptcy Court for the: Northern District of Mississippi

Case number (If known) _____

☐ Check if this is an amended plan, and list below the sections of the plan that have been changed.

_____
_____

# Chapter 13 Plan and Motions for Valuation and Lien Avoidance 12/17

## Part 1: Notices

**To Debtors:** **This form sets out options that may be appropriate in some cases, but the presence of an option on the form does not indicate that the option is appropriate in your circumstances or that it is permissible in your judicial district. Plans that do not comply with local rules and judicial rulings may not be confirmable. The treatment of ALL secured and priority debts must be provided for in this plan.**

*In the following notice to creditors, you must check each box that applies.*

**To Creditors:** **Your rights may be affected by this plan. Your claim may be reduced, modified, or eliminated.**

You should read this plan carefully and discuss it with your attorney if you have one in this bankruptcy case. If you do not have an attorney, you may wish to consult one.

**If you oppose the plan's treatment of your claim or any provision of this plan, you or your attorney must file an objection to confirmation on or before the objection deadline announced in Part 9 of the Notice of Chapter 13 Bankruptcy Case (Official Form 309I). The Bankruptcy Court may confirm this plan without further notice if no objection to confirmation is filed. See Bankruptcy Rule 3015.**

The plan does not allow claims. Creditors must file a proof of claim to be paid under any plan that may be confirmed.

The following matters may be of particular importance. ***Debtors must check one box on each line to state whether or not the plan includes each of the following items. If an item is checked as "Not Included" or if both boxes are checked, the provision will be ineffective if set out later in the plan.***

| | | | |
|---|---|---|---|
| **1.1** | **A limit on the amount of a secured claim, set out in Section 3.2, which may result in a partial payment or no payment at all to the secured creditor** | ☐ **Included** | ☐ **Not included** |
| **1.2** | **Avoidance of a judicial lien or nonpossessory, nonpurchase-money security interest, set out in Section 3.4** | ☐ **Included** | ☐ **Not included** |
| **1.3** | **Nonstandard provisions, set out in Part 8** | ☑ **Included** | ☐ **Not included** |

## Part 2: Plan Payments and Length of Plan

**2.1 Length of Plan.**

The plan period shall be for a period of _____ months, not to be less than 36 months or less than 60 months for above median income debtor(s). If fewer than 60 months of payments are specified, additional monthly payments will be made to the extent necessary to make the payments to creditors specified in this plan.

**2.2 Debtor(s) will make regular payments to the trustee as follows:**

Debtor shall pay $ _____ (☐monthly, ☐semi-monthly, ☐weekly, or ☐bi-weekly) to the chapter 13 trustee. Unless otherwise ordered by the court, an Order directing payment shall be issued to the debtor's employer at the following address:

Joint Debtor shall pay $ _____ (☐monthly, ☐semi-monthly, ☐weekly, or ☐bi-weekly ) to the chapter 13 trustee. Unless otherwise ordered by the court, an Order directing payment shall be issued to the joint debtor's employer at the following address:

**2.3 Income tax returns/refunds.**

*Check all that apply .*

☑ Debtor(s) will retain any exempt income tax refunds received during the plan term.

☐ Debtor(s) will supply the trustee with a copy of each income tax return filed during the plan term within 14 days of filing the return and will turn over to the trustee all non-exempt income tax refunds received during the plan term.

☐ Debtor(s) will treat income tax refunds as follows:

**2.4 Additional payments.**

*Check one.*

☑ **None.** ***If "None" is checked, the rest of § 2.4 need not be completed or reproduced.***

☐ Debtor(s) will make additional payment(s) to the trustee from other sources, as specified below. Describe the source, estimated amount, and date of each anticipated payment.

## Part 3: Treatment of Secured Claims

**3.1 Mortgages. (Except mortgages to be crammed down under 11 U.S.C. § 1322(c)(2) and identified in § 3.2 herein.)**

*Check all that apply.*

☐ **None.** ***If "None" is checked, the rest of § 3.1 need not be completed or reproduced.***

**3.1(a)** ☐ **Principal Residence Mortgages:** All long term secured debt which is to be maintained and cured under the plan pursuant to 11 U.S.C. § 1322(b)(5) shall be scheduled below. Absent an objection by a party in interest, the plan will be amended consistent with the proof of claim filed by the mortgage creditor, subject to the start date for the continuing monthly mortgage payment proposed herein.

1st Mtg pmts to _____

Beginning _____ @ $ _____ ☐ Plan ☐ Direct. Includes escrow ☐ Yes ☐ No

1st Mtg arrears to _____ Through _____ $ _____

3.1(b) ☐ **Non-Principal Residence Mortgages:** All long term secured debt which is to be maintained and cured under the plan pursuant to 11 U.S.C. § 1322(b)(5) shall be scheduled below. Absent an objection by a party in interest, the plan will be amended consistent with the proof of claim filed by the mortgage creditor, subject to the start date for the continuing monthly mortgage payment proposed herein.

Property 1 address: _____

Mtg pmts to _____

Beginning _____ @ $ _____ ☐ Plan ☐ Direct. Includes escrow ☐ Yes ☐ No

Property 1: Mtg arrears to _____ Through _____ $ _____

3.1(c) ☐ **Mortgage claims to be paid in full over the plan term:** Absent an objection by a party in interest, the plan will be amended consistent with the proof of claim filed by the mortgage creditor.

Creditor: _____ Approx. amt. due: _____ Int. Rate*: _____

Property Address: _____

Principal Balance to be paid with interest at the rate above: _____
(as stated in Part 2 of the Mortgage Proof of Claim Attachment)

Portion of claim to be paid without interest: $ _____
(Equal to Total Debt less Principal Balance)

Special claim for taxes/insurance: $ _____ /month, beginning _____
(as stated in Part 4 of the Mortgage Proof of Claim Attachment)

*Unless otherwise ordered by the court, the interest rate shall be the current Till rate in this District.

*Insert additional claims as needed.*

**3.2 Motion for valuation of security, payment of fully secured claims, and modification of undersecured claims.** *Check one.*

☐ **None.** ***If "None" is checked, the rest of § 3.2 need not be completed or reproduced.***

***The remainder of this paragraph will be effective only if the applicable box in Part 1 of this plan is checked.***

☐ Pursuant to Bankruptcy Rule 3012, for purposes of 11 U.S.C. § 506(a) and § 1325(a)(5) and for purposes of determination of the amounts to be distributed to holders of secured claims, debtor(s) hereby move(s) the court to value the collateral described below at the lesser of any value set forth below or any value set forth in the proof of claim. Any objection to valuation shall be filed on or before the objection deadline announced in Part 9 of the Notice of Chapter 13 Bankruptcy Case (Official Form 309I).

The portion of any allowed claim that exceeds the amount of the secured claim will be treated as an unsecured claim under Part 5 of this plan. If the amount of a creditor's secured claim is listed below as having no value, the creditor's allowed claim will be treated in its entirety as an unsecured claim under Part 5 of this plan. Unless otherwise ordered by the court, the amount of the creditor's total claim listed on the proof of claim controls over any contrary amounts listed in this paragraph.

| Name of creditor | Estimated amount of creditor's total claim # | Collateral | Value of collateral | Amount of secured claim | Interest rate* |
|---|---|---|---|---|---|
| | | | | | |

*Insert additional claims as needed.*

#For mobile homes and real estate identified in § 3.2: Special Claim for taxes/insurance:

| Name of creditor | Collateral | Amount per month | Beginning |
|---|---|---|---|
| | | | |

*Unless otherwise ordered by the court, the interest rate shall be the current *Till* rate in this District.

For vehicles identified in § 3.2: The current mileage is _____

**3.3 Secured claims excluded from 11 U.S.C. § 506.**

*Check one.*

☐ **None.** ***If "None" is checked, the rest of § 3.3 need not be completed or reproduced.***

☐ The claims listed below were either:

(1) incurred within 910 days before the petition date and secured by a purchase money security interest in a motor vehicle acquired for the personal use of the debtor(s), or

(2) incurred within 1 year of the petition date and secured by a purchase money security interest in any other thing of value.

These claims will be paid in full under the plan with interest at the rate stated below. Unless otherwise ordered by the court, the claim amount stated on a proof of claim filed before the filing deadline under Bankruptcy Rule 3002(c) controls over any contrary amount listed below. In the absence of a contrary timely filed proof of claim, the amounts stated below are controlling.

| Name of creditor | Collateral | Amount of claim | Interest rate* |
|---|---|---|---|
| | | | |

*Unless otherwise ordered by the court, the interest rate shall be the current *Till* rate in this District.

*Insert additional claims as needed.*

**3.4 Motion to avoid lien pursuant to 11 U.S.C. § 522.**

*Check one.*

☐ **None.** ***If "None" is checked, the rest of § 3.4 need not be completed or reproduced.***

***The remainder of this paragraph will be effective only if the applicable box in Part 1 of this plan is checked.***

☐ The judicial liens or nonpossessory, nonpurchase money security interests securing the claims listed below impair exemptions to which the debtor(s) would have been entitled under 11 U.S.C. § 522(b). Unless otherwise ordered by the court, a judicial lien or security interest securing a claim listed below will be avoided to the extent that it impairs such exemptions upon entry of the order confirming the plan unless the creditor files an objection on or before the objection deadline announced in Part 9 of the Notice of Chapter 13 Bankruptcy Case (Official Form 309I). Debtor(s) hereby move(s) the court to find the amount of the judicial lien or security interest that is avoided will be treated as an unsecured claim in Part 5 to the extent allowed. The amount, if any, of the judicial lien or security interest that is not avoided will be paid in full as a secured claim under the plan. See 11 U.S.C. § 522(f) and Bankruptcy Rule 4003(d). If more than one lien is to be avoided, provide the information separately for each lien.

| Name of creditor | Property subject to lien | Lien amount to be avoided | Secured amount remaining | Type of lien | Lien identification (county, court, judgment date, date of lien recording, county, court, book and page number) |
|---|---|---|---|---|---|
| | | | | | |

*Insert additional claims as needed.*

**3.5 Surrender of collateral.**

*Check one.*

☐ **None.** ***If "None" is checked, the rest of § 3.5 need not be completed or reproduced.***

☐ The debtor(s) elect to surrender to each creditor listed below the collateral that secures the creditor's claim. The debtor(s) request that upon confirmation of this plan the stay under 11 U.S.C. § 362(a) be terminated as to the collateral only and that the stay under § 1301 be terminated in all respects. Any allowed unsecured claim resulting from the disposition of the collateral will be treated in Part 5 below.

| Name of creditor | Collateral |
|---|---|
| | |

*Insert additional claims as needed.*

## Part 4: Treatment of Fees and Priority Claims

**4.1 General**

Trustee's fees and all allowed priority claims, including domestic support obligations other than those treated in § 4.5, will be paid in full without postpetition interest.

**4.2 Trustee's fees**

Trustee's fees are governed by statute and may change during the course of the case.

**4.3 Attorney's fees**

☑ No look fee: $ 4,600.00.

Total attorney fee charged: $ 4,600.00.

Attorney fee previously paid: $ .00.

Attorney fee to be paid in plan per confirmation order: $ 3,.00.

☐ Hourly fee: $ _____. (Subject to approval of Fee Application.)

**4.4 Priority claims other than attorney's fees and those treated in § 4.5.**

*Check one.*

☐ **None.** ***If "None" is checked, the rest of § 4.4 need not be completed or reproduced.***

☐ Internal Revenue Service $ _____.

☐ Mississippi Dept. of Revenue $ _____.

☐ Other _____

$ _____.

**4.5 Domestic support obligations.**

☐ **None.** ***If "None" is checked, the rest of § 4.5 need not be completed or reproduced.***

DUE TO:

POST PETITION OBLIGATION: In the amount of $ _____ per month beginning _____

To be paid ☐ direct, ☐ through payroll deduction, or ☐ through the plan.

PRE-PETITION ARREARAGE: In the total amount of $ _____ through _____ which shall be paid in full over the plan term, unless stated otherwise: _____

To be paid ☐ direct, ☑ through payroll deduction, or ☐ through the plan.

*Insert additional claims as needed.*

## Part 5: Treatment of Nonpriority Unsecured Claims

**5.1 Nonpriority unsecured claims not separately classified.**

Allowed nonpriority unsecured claims that are not separately classified will be paid, pro rata. If more than one option is checked, the option providing the largest payment will be effective. *Check all that apply.*

☐ The sum of $ _____.

☐ _____ % of the total amount of these claims, an estimated payment of $ _____.

☐ The funds remaining after disbursements have been made to all other creditors provided for in this plan.

If the estate of the debtor(s) were liquidated under chapter 7, nonpriority unsecured claims would be paid approximately $ 0.00.

Regardless of the options checked above, payments on allowed nonpriority unsecured claims will be made in at least this amount.

**5.2 Other separately classified nonpriority unsecured claims (special claimants).** *Check one.*

☐ **None.** ***If "None" is checked, the rest of § 5.2 need not be completed or reproduced.***

☐ The nonpriority unsecured allowed claims listed below are separately classified and will be treated as follows

| Name of creditor | Basis for separate classification and treatment | Approximate amount owed | Proposed treatment |
|---|---|---|---|
| | | | |

## Part 6: Executory Contracts and Unexpired Leases

**6.1 The executory contracts and unexpired leases listed below are assumed and will be treated as specified. All other executory contracts and unexpired leases are rejected.** *Check one.*

☐ **None.** ***If "None" is checked, the rest of § 6.1 need not be completed or reproduced.***

☐ **Assumed items.** Current installment payments will be disbursed either by the trustee or directly by the debtor(s), as specified below, subject to any contrary court order or rule. Arrearage payments will be disbursed by the trustee. The final column includes only payments disbursed by the trustee rather than by the debtor(s).

| Name of creditor | Description of leased property or executory contract | Current installment payment | Amount of arrearage to be paid | Treatment of arrearage |
|---|---|---|---|---|
| | | $ _____ Disbursed by: ☐ Trustee ☐ Debtor(s) | $ _____ | |

*Insert additional claims as needed.*

## Part 7: Vesting of Property of the Estate

**7.1 Property of the estate will vest in the debtor(s) upon entry of discharge.**

## Part 8: Nonstandard Plan Provisions

**8.1 Check "None" or List Nonstandard Plan Provisions**

☐ **None.** ***If "None" is checked, the rest of Part 8 need not be completed or reproduced.***

*Under Bankruptcy Rule 3015(c), nonstandard provisions must be set forth below. A nonstandard provision is a provision not otherwise included in the Official Form or deviating from it. Nonstandard provisions set out elsewhere in this plan are ineffective.*

***The following plan provisions will be effective only if there is a check in the box "Included" in § 1.3.***

In the event a secured creditor with a security interest in the Debtor's principal residence (the "Mortgage Creditor") files a Notice of PostPetition Fees, Expenses, and Charges pursuant to Rule 3002.1(c) of the Federal Rules of Bankruptcy Procedure (the "PPFEC"), the Debtor hereby acknowledges and consents to the payment of each PPFEC in full by the Trustee pursuant to 11 U.S.C. § 1326(b)(1). Nothing contained in this provision shall serve as a waiver of the Debtor's right to object to the PPFEC within one (1) year pursuant to Rule 3002.1(e) of the Federal Rules of Bankruptcy Procedure. The Trustee is hereby authorized to adjust the Debtor's plan payment as may be necessary to comply with the terms of this provision.

## Part 9: Signature(s):

**9.1 Signatures of Debtor(s) and Debtor(s)' Attorney**

*The Debtor(s) and attorney for the Debtor(s), if any, must sign below. If the Debtor(s) do not have an attorney, the Debtor(s) must provide their complete address and telephone number.*

✘ _____
Signature of Debtor 1

Executed on _____
MM / DD / YYYY

_____
Address Line 1

_____
Address Line 2

_____
City, State, and Zip Code

_____
Telephone Number

✘ _____
Signature of Debtor 2

Executed on _____
MM / DD / YYYY

_____
Address Line 1

_____
Address Line 2

_____
City, State, and Zip Code

_____
Telephone Number

✘ /s/William L. Fava
Signature of Attorney for Debtor(s)

Date _____
MM / DD / YYYY

Fava Firm
Address Line 1

P.O. Box 783
Address Line 2

Southaven, MS 38671
City, State, and Zip Code

(662)536-1116 101348
Telephone Number MS Bar Number

wfava@favafirm.com
Email Address

**UNITED STATES BANKRUPTCY COURT**
**NORTHERN AND SOUTHERN DISTRICTS OF MISSISSIPPI**

**STANDING ORDER DESIGNATING PRESUMPTIVE**
**11 U.S.C. § 1325(a)(5)(B) INTEREST RATE**

The United States Supreme Court has held that the "prime-plus method" is the proper method to determine the interest rate to be applied to a secured creditor's claim paid under the "cram down" option of 11 U.S.C. § 1325(a)(5)(B). *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S.Ct. 1951, 158 L.Ed.2d 787 (2004). The prime-plus method (now commonly known as the "*Till* rate") begins with the national prime rate, which is then adjusted upward depending on certain risk factors. *Id.* Both the Supreme Court and the Court of Appeals for the Fifth Circuit have observed that the risk enhancement is typically 1% to 3%. *Wells Fargo Bank, N.A. v. Texas Grand Prairie Hotel Realty, L.L.C. (In re Texas Grand Prairie Hotel Realty, L.L.C.)*, 710 F.3d 324, 332 (5th Cir. 2013) (citing *Till,* 541 U.S. at 480). As the prime rate of interest is currently 5.5% per annum, an adjustment to the locally recognized *Till* rate is warranted.

Accordingly, for all chapter 13 cases filed on or after October 1, 2022, the presumptive *Till* rate shall be 7.0%. The presumptive rate will be periodically reviewed and adjusted depending on fluctuations in the prime interest rate.

This Order amends and supersedes all previous standing orders and memoranda setting a presumptive *Till* rate in chapter 13 cases.

**SO ORDERED** this 1st day of August, 2022.

Katharine M. Samson
KATHARINE M. SAMSON
UNITED STATES BANKRUPTCY JUDGE

JASON D. WOODARD
UNITED STATES BANKRUPTCY JUDGE

SELENE D. MADDOX
UNITED STATES BANKRUPTCY JUDGE

JAMIE A. WILSON
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
NORTHERN AND SOUTHERN DISTRICTS OF MISSISSIPPI

## STANDING ORDER DESIGNATING PRESUMPTIVE 11 U.S.C. § 1325(a)(5)(B) INTEREST RATE

The United States Supreme Court has held that the "prime-plus method" is the proper method to determine the interest rate to be applied to a secured creditor's claim paid under the "cram down" option of 11 U.S.C. § 1325(a)(5)(B). *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S.Ct. 1951, 158 L.Ed.2d 787 (2004). The prime-plus method (commonly known as the "*Till* rate") begins with the national prime rate, which is then adjusted upward depending on certain risk factors. *Id.* Both the Supreme Court and the Court of Appeals for the Fifth Circuit have observed that the risk enhancement is typically 1% to 3%. *Wells Fargo Bank, N.A. v. Texas Grand Prairie Hotel Realty, L.L.C. (In re Texas Grand Prairie Hotel Realty, L.L.C.)*, 710 F.3d 324, 332 (5th Cir. 2013) (citing *Till*, 541 U.S. at 480). As the prime rate of interest is currently 8.5% per annum, an adjustment to the local *Till* rate is warranted.

Accordingly, for all chapter 13 cases filed on or after January 1, 2024, the presumptive *Till* rate shall be 10.0%. The presumptive rate will be periodically reviewed and adjusted depending on fluctuations in the prime interest rate.

This Order amends and supersedes all previous standing orders and memoranda setting a presumptive *Till* rate in chapter 13 cases.

**SO ORDERED** this 8th day of November, 2023.

Entered 11/28/23 at ____A.M. ____P.M.
United States Bankruptcy Court
Northern District of Mississippi
Shallanda J. Clay

KATHARINE M. SAMSON
UNITED STATES BANKRUPTCY JUDGE

JASON D. WOODARD
UNITED STATES BANKRUPTCY JUDGE

SELENE D. MADDOX
UNITED STATES BANKRUPTCY JUDGE

JAMIE A. WILSON
UNITED STATES BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT**
**NORTHERN AND SOUTHERN DISTRICTS OF MISSISSIPPI**

**STANDING ORDER DESIGNATING PRESUMPTIVE**
**11 U.S.C. § 1325(a)(5)(B) INTEREST RATE**

The United States Supreme Court has held that the "prime-plus method" is the proper method to determine the interest rate to be applied to a secured creditor's claim paid under the "cram down" option of 11 U.S.C. § 1325(a)(5)(B). *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S.Ct. 1951, 158 L.Ed.2d 787 (2004). The prime-plus method (commonly known as the "*Till* rate") begins with the national prime rate, which is then adjusted upward depending on certain risk factors. *Id.* Both the Supreme Court and the Court of Appeals for the Fifth Circuit have observed that the risk enhancement is typically 1% to 3%. *Wells Fargo Bank, N.A. v. Texas Grand Prairie Hotel Realty, L.L.C. (In re Texas Grand Prairie Hotel Realty, L.L.C.)*, 710 F.3d 324, 332 (5th Cir. 2013) (citing *Till*, 541 U.S. at 480). As the prime rate of interest is currently 7.0% per annum, an adjustment to the local *Till* rate is warranted.

Accordingly, for all chapter 13 cases filed on or after January 1, 2026, the presumptive *Till* rate shall be 8.5%. The presumptive rate will be periodically reviewed and adjusted depending on fluctuations in the prime interest rate.

This Order amends and supersedes all previous standing orders and memoranda setting a presumptive *Till* rate in chapter 13 cases.

**SO ORDERED** this 19th day of November, 2025.

Katharine M. Samson
KATHARINE M. SAMSON
UNITED STATES BANKRUPTCY JUDGE

JASON D. WOODARD
UNITED STATES BANKRUPTCY JUDGE

SELENE D. MADDOX
UNITED STATES BANKRUPTCY JUDGE

JAMIE A. WILSON
UNITED STATES BANKRUPTCY JUDGE

Bank Prime Loan Rate Changes: Historical Dates of Changes and Rates




Governors of the Federal Reserve System (US) via FRED®
icate U.S. recessions.

fre

MBC | Mississippi Bankruptcy Conference, Inc.

# Case Law Update
# Friday 11/20

# 2026 Commercial Case Law Update

National, Fifth Circuit and Mississippi decisions, 2026

**Kristina Johnson | Jones Walker LLP**

**Chris Maddux | Butler Snow LLP**

Mississippi Bankruptcy Conference 2026

# Questions that come across our desks

*Cases chosen not for the size of the debtor, but for the questions they answer*

**1**

**When is silence consent to a release?**

*Container Store*

**2**

**Which debts count — and which debtors are out — for Subchapter V?**

*Alecto · Jerry's Place*

**3**

**What may the bankruptcy court decide?**

*EP Energy · El Dorado*

**4**

**When is a judgment, or a fee award, truly final?**

*Coney Island · CHFS*

I

# Four national decisions

Releases, eligibility, priority and finality

# 1 Container Store: when is silence consent?

*Epstein v. Container Store Group, Inc. (In re Container Store Group, Inc.), 676 B.R. 356 (S.D. Tex. 2026); appeal pending, 5th Cir. No. 26-20166*

## FACTS

A prepackaged plan bound creditors to third-party releases unless they opted out, with an injunction and a gatekeeping clause. The U.S. Trustee objected.

## ANALYSIS

After Purdue, consent is a federal-law question. An opt-out can show consent, case by case, but not for deemed-rejecting classes that get nothing.

## HOLDING

Releases and injunction largely affirmed; zero-recovery classes must opt in; gatekeeping narrowed under Highland and remanded. Appeal pending.

## PRACTICE TAKEAWAY

Notice is not consent. Analyze voting, nonvoting and deemed-rejecting classes separately, and consider opt-ins where a class recovers nothing.




Source: 676 B.R. 356; Jones Day client alert (June 2026)

# 2 Alecto: which debts count for Subchapter V

*Reed Action Judgment Creditors v. Alecto Healthcare Servs., LLC (In re Alecto Healthcare Servs. LLC), 184 F.4th 163 (3d Cir. 2026)*

### FACTS

Creditors said a $3.7M settlement debt pushed Alecto over the Subchapter V debt cap, and challenged a $25,000 insider settlement of avoidance claims.

### ANALYSIS

The debt was payable only after written demand, and none was made before filing, so it was contingent and unliquidated on the petition date.

### HOLDING

Eligibility affirmed; the debt didn't count toward the cap. The insider settlement was within the range of reasonableness under Rule 9019.

### PRACTICE TAKEAWAY

Test each debt's legal nature on the petition date. Back insider deals with a documented investigation. Verify the cap for your filing date.

**$3.4M**
scheduled noncontingent, liquidated debt

**$3.7M**
LHP settlement claim — excluded as contingent and unliquidated

**$7.5M**
debt cap in effect at the time; check the cap for your filing date

Source: Third Circuit slip opinion, ca3.uscourts.gov/opinarch/251853p.pdf; Duane Morris alert (Aug. 2026)

# 3 EP Energy: who decides administrative priority

*Storey Minerals, Ltd. v. EP Energy E&P Co., L.P., 169 F.4th 609 (5th Cir. 2026)*

### FACTS

Mineral owners said a 40-day COVID-era production halt ended 16 Texas leases, made operations a trespass, and earned them § 503(b) priority.

### ANALYSIS

A § 503 request is core, so the bankruptcy court could decide the Texas-law questions itself. The claim was ripe; abstention was waived on appeal.

### HOLDING

Affirmed: the leases did not terminate, there was no trespass, and the administrative expense claim was disallowed.

### PRACTICE TAKEAWAY

Jurisdiction to decide priority isn't entitlement to it. Prove actual, necessary benefit to the estate, and appeal abstention rulings or lose them.




Source: 169 F.4th 609; Fifth Circuit opinion No. 24-20477; Jones Day alert (Aug. 2026)

# 4 Coney Island: "void" still has a clock

*Coney Island Auto Parts, Inc. v. Burton, 607 U.S. 155 (Jan. 20, 2026)*

### FACTS

A trustee won a default judgment against Coney Island. Years later, after a marshal seized its funds, it moved to vacate the judgment as void for bad service.

### ANALYSIS

Rule 60(c)(1) requires every Rule 60(b) motion to be made within a reasonable time. Nothing exempts void-judgment motions under Rule 60(b)(4).

### HOLDING

The motion was untimely. Void-judgment challenges must be brought within a reasonable time (Alito, J., for the Court).

### PRACTICE TAKEAWAY

"Void" is not a license to wait. Raise service and jurisdiction objections promptly; the Court decided timing, not whether service was valid.

## Rule 60(c)(1)

*"A motion under Rule 60(b) must be made within a reasonable time."*

**Alito, J., for the Court**

Sotomayor, J., concurring in the judgment

Source: supreme.justia.com/cases/federal/us/607/24-808; Faegre Drinker alert (Jan. 2026)

II

# Four Mississippi opinions

Judges Maddox and Wilson, and a district court review of a 14-year case

# 5 Jerry's Place: single asset real estate

*In re Jerry's Place Cleveland, LLC, No. 25-14357-SDM, 2026 Bankr. LEXIS 1269 (Bankr. N.D. Miss. May 19, 2026) (Maddox, J.)*

## FACTS

The debtor owns contiguous lots in Cleveland: a building leased to Delta Ag and a Lamar billboard site ($2,000/yr). The UST objected to its Sub V election.

## ANALYSIS

Under Scotia Pacific's three-part test, the lots are one project, the income is property-derived, and leasing and marketing are incidental.

## HOLDING

The debtor is single asset real estate, excluded by § 1182(1)(A). Its Subchapter V designation was stricken.

## PRACTICE TAKEAWAY

Look at actual operations and where revenue comes from before electing Sub V. Pair with Alecto: debts that count vs. debtors that are out.

**§ 101(51B) — all three met**

1. **Single property or project**
   Contiguous lots, common use
2. **Substantially all income**
   Rent and billboard pay are property-derived
3. **No substantial other business**
   Leasing and marketing are incidental

Source: Memorandum Opinion and Order, Dkt. 73 (May 19, 2026), via govinfo.gov

# 6 MedEx: estate cash and affiliate expansion

*In re MedEx, LLC, No. 24-11781-SDM, 2026 Bankr. LEXIS 1361 (Bankr. N.D. Miss. May 29, 2026) (Maddox, J.)*

## FACTS

A Sub V management company sought to spend about $227,000 held by its counsel, nearly all its cash, on three affiliated clinics, two not in bankruptcy.

## ANALYSIS

It was unclear the funds were estate property, and the benefit to MedEx was indirect, based on internal projections, with no notes or repayment terms.

## HOLDING

Denied without prejudice under § 363(b). A renewed motion needs evidence, written agreements and estate-level protections.

## PRACTICE TAKEAWAY

A plausible business rationale isn't enough when estate cash flows to affiliates. Duties run to the estate, not the enterprise.

*"The defect is not intent; it is proof, structure, and protection."*

1. **Prove it's estate property**
   Source, ownership and control
2. **Document the estate's return**
   Agreements, notes, repayment terms
3. **Fit it into the case**
   Phased relief, reporting, plan path

Source: Memorandum Opinion and Order Denying Without Prejudice, Dkt. 199 (May 29, 2026)

# 7 El Dorado: limits of Rule 2004 — and of AI

*In re El Dorado Gas & Oil, Inc., No. 23-51715-JAW, 2026 Bankr. LEXIS 2721 (Bankr. S.D. Miss. July 23, 2026) (Wilson, J.)*

### FACTS

Thomas Swarek, pro se owner and guarantor of a $50M loan, sought 21+ categories of lender documents under Rule 2004 for his guaranty litigation elsewhere.

### ANALYSIS

The pending-proceeding rule applied; the requests had no link to estate administration, showed no good cause, and were harassing in nature, related to claims or defenses precluded by prior rulings and/or overbroad.

### HOLDING

Motion denied as a violation of the pending-proceeding rule. Footnote 4 cautioned parties against using AI without verification and warned of possible sanctions.

### PRACTICE TAKEAWAY

Rule 2004 is not a back door to discovery in other forums. Verify anything AI helps draft before filing.

**Footnote 4**

*The Court "cautions Swarek and other parties against using AI without verification."*

Warns of possible sanctions for unverified AI-generated pleadings; Rule 11 duties apply to pro se filers too.

Source: Memorandum Opinion and Order, Dkt. 1931 (July 23, 2026), mssb.uscourts.gov

# 8 CHFS: trustee fees after 14 years

*Edwards Fam. P'ship v. Jones Walker LLP, [Westlaw cite] (S.D. Miss. Sept. 4, 2026) (Reeves, J.), aff'g No. 12-01703-JAW (Bankr. S.D. Miss.)*

### FACTS

After a 14-year Chapter 11 case, creditors challenged the final fee awards to the trustee and her counsel and sought disgorgement of all fees after March 2015.

### ANALYSIS

An alleged conflict of interest alone does not establish a breach of fiduciary duty; objectors must prove breach, causation and injury. Both sides shared in the decision to engage in litigation rather than settle.

### HOLDING

Affirmed on all five issues, including the bankruptcy court's entry-by-entry § 330(a) fee review and its evidentiary rulings.

### PRACTICE TAKEAWAY

A trustee's retention of its own law firm as counsel is not automatically disqualifying. Raise disinterestedness concerns and allegations of conflicts of interest early. Fee disputes are decided entry by entry, not by blanket objection.

**14 years**
from the 2012 petition to the final fee rulings

**10th**
appeal from the bankruptcy court to the district court

**5 of 5**
issues on appeal resolved in favor of affirmance

Source: District court Order, Doc. 9 (Sept. 4, 2026), entered at Bankr. Dkt. 3559; bankruptcy opinion (June 6, 2025)

III

# Six more decisions to know

Supreme Court and Fifth Circuit, 2026

# 9 Keathley: judicial estoppel gets a closer look

*Keathley v. Buddy Ayers Constr., Inc., 608 U.S. 647 (June 11, 2026), on remand, 2026 U.S. App. LEXIS 21002 (July 16, 2026)*

### FACTS

Keathley, in Chapter 13, didn't disclose a post-petition truck-accident claim. His N.D. Miss. suit was dismissed on judicial estoppel, and the Fifth Circuit affirmed.

### ANALYSIS

The Fifth Circuit's test called an omission inadvertent only if the debtor lacked knowledge of the claim or a motive to conceal it, ignoring evidence of good faith.

### HOLDING

Vacated and remanded, 9–0: courts must weigh the totality of the circumstances before barring a debtor's undisclosed claim.

### PRACTICE TAKEAWAY

Judicial estoppel defenses get harder in the Fifth Circuit. Debtors should still amend schedules promptly; how and when an omission is fixed will matter.

**9–0**
unanimous; Justice Jackson for the Court

**N.D. Miss.**
where the personal-injury suit was filed

**Totality**
of the circumstances replaces the Fifth Circuit's two-part test

Source: Supreme Court slip opinion No. 25-6; Gibson Dunn client alert (June 2026)

10

# T.M.: Rooker-Feldman reaches non-final judgments

*T.M. v. University of Maryland Medical System Corp., 608 U.S. 668 (June 18, 2026)*

### FACTS

T.M. challenged a Maryland consent order in federal court while her state appeal was still pending. The lower courts dismissed under Rooker-Feldman.

### ANALYSIS

Tying the doctrine to finality would make it turn on timing and invite confusion; the question is whether the federal suit seeks review of a state judgment.

### HOLDING

Affirmed, 5–4: Rooker-Feldman bars federal district court review of state-court judgments even before they are final.

### PRACTICE TAKEAWAY

Lost in state court? Appeal in state court. A parallel federal suit attacking the judgment won't work, even mid-appeal.

**5–4**

Justice Sotomayor for the Court; Justice Barrett dissenting

**Non-final**

state judgments still trigger Rooker-Feldman

**Exxon Mobil**

(2005) limits relaxed, per the dissent

Source: SCOTUSblog (June 18, 2026); Faegre Drinker client alert (June 2026)

# 11 VCR I: no trustee commission on surplus to equity

*Henderson v. U.S. Trustee (In re VCR I, L.L.C.), No. 25-60204, 2026 U.S. App. LEXIS 9066 (5th Cir. Mar. 27, 2026) (unpublished)*

### FACTS

After the estate's Gluckstadt property sold for about $6.8M, the trustee sought a commission on about $8.2M disbursed, including $2.64M of surplus paid to equity.

### ANALYSIS

§ 326(a) excludes payments to the debtor. The equity holder stood in the debtor's shoes to receive the surplus, so that payment didn't count.

### HOLDING

Affirmed (unpublished, 2–1): no trustee commission on the $2.64M distribution to the equity holder.

### PRACTICE TAKEAWAY

In surplus cases, calculate trustee compensation on payments to creditors only. It's nonprecedential, but a clear signal from a Mississippi case.

**$2.64M**
surplus paid to the equity holder; no commission

**~$270K**
commission sought on about $8.2M disbursed

**2–1**
unpublished; Judge Haynes dissenting

Source: Fifth Circuit opinion No. 25-60204 (Mar. 27, 2026), ca5.uscourts.gov

# 12 IFG Port Holdings: consent must be knowing

*IFG Port Holdings, LLC v. Lake Charles Harbor & Terminal District, No. 24-30552, 2026 U.S. App. LEXIS 27543 (5th Cir. Sept. 8, 2026)*

### FACTS

After a 20-day bench trial and a $125M judgment, the losing party learned the magistrate judge had a decades-long friendship with the winner's lead counsel.

### ANALYSIS

Consent to a non-Article III judge must be knowing, which takes actual knowledge of a conflict. Parties have no duty to investigate a judge's private life.

### HOLDING

Affirmed, 2–1: the referral was vacated, and the $125M judgment fell with it. The dissent warned of risk to bankruptcy court rulings.

### PRACTICE TAKEAWAY

Consent to a bankruptcy judge rests on the same footing; disclose relationships early and fully. *Fallout from the Jackson Walker firm in Houston with Judge David R. Jones's resignation.

**$125M**
judgment vacated with the referral

**20 days**
of bench trial lost

**2–1**
Judge Graves for the court; Judge Oldham dissenting

Source: ABI Daily Wire, "Fifth Circuit Announces Rule for Broad Disclosure of Bankruptcy Judges' Relationships"

# 13 Highland: recusal rulings wait for a final order

*In re Highland Capital Mgmt., L.P. (Dugaboy Inv. Tr. v. Highland Capital Mgmt., L.P.), No. 26-10012 (5th Cir. Nov. 13, 2026) (unpublished)*

**FACTS**

Dugaboy, a Dondero-related trust, filed its fifth motion to recuse Chief Judge Jernigan about a month after appealing a Rule 9019 settlement approval. It appealed the denial.

**ANALYSIS**

A recusal ruling is nonfinal and reviewable only when merged into a final order. Dugaboy knew that, yet didn't raise recusal with later final orders.

**HOLDING**

Affirmed (unpublished, per curiam): the district court lacked jurisdiction, and Dugaboy did not act in a timely manner.

**PRACTICE TAKEAWAY**

Recusal objections ride with a final order. Raise them with the next final order you appeal, or risk losing review.

**5th**
motion to recuse the same bankruptcy judge

**Nonfinal**
a recusal ruling is reviewable only with a final order

**Per curiam**
unpublished; Judges Richman, Haynes and Graves

Source: Fifth Circuit opinion No. 26-10012 (Nov. 13, 2026)

14

# With Purpose: stay damages for a nondebtor

*Ayers v. Neugebauer (In re With Purpose, Inc.), 182 F.4th 457 (5th Cir. 2026)*

## FACTS

After GloriFi's Chapter 7 filing, investors kept pressing arbitration against co-founder Neugebauer, seeking discovery on a fiduciary claim the estate owned.

## ANALYSIS

Pursuing an estate claim is exercising control over estate property (§ 362(a)(3)). A creditor can enforce the stay and is an "individual injured" under § 362(k).

## HOLDING

Affirmed: the nondebtor recovers actual damages, including attorney's fees. Under § 362(k), fees are mandatory and reviewed for clear error.

## PRACTICE TAKEAWAY

Third-party litigation can still violate the stay if it touches estate claims. Check who owns a claim before you pursue it.

1. **Creditor can enforce the stay**
   Under Labuzan, even as a nondebtor
2. **"Individual injured"**
   Litigation costs are a real injury
3. **Fees are mandatory**
   § 362(k): "shall recover"

Source: Fifth Circuit opinion No. 25-10572 (July 16, 2026), ca5.uscourts.gov

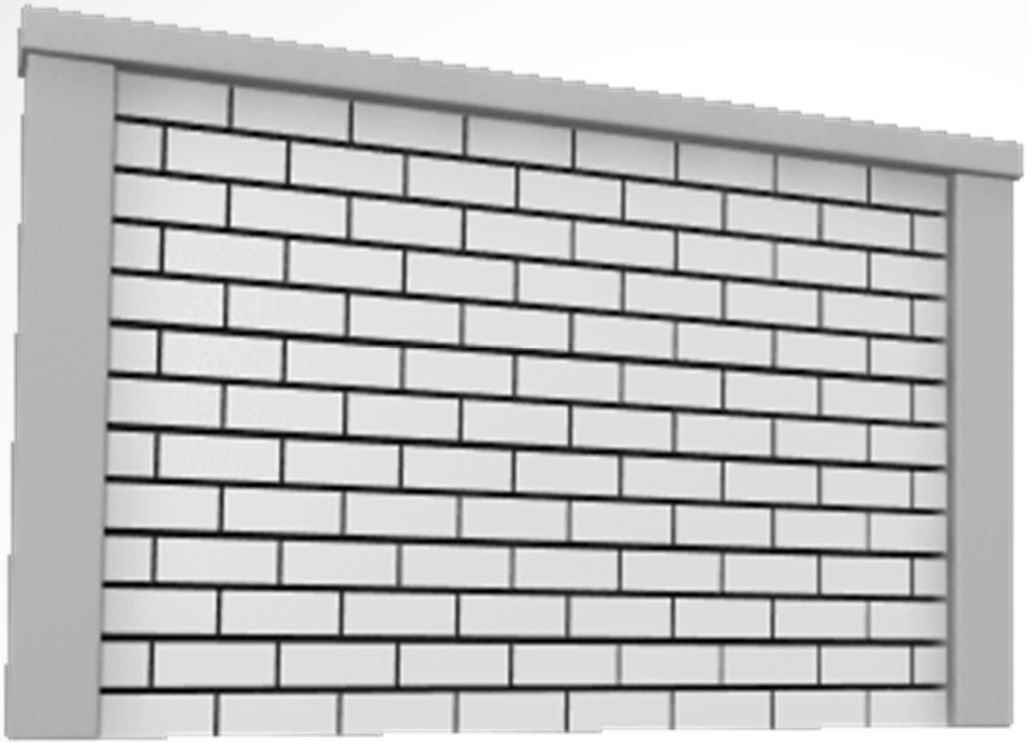
MBC | Mississippi Bankruptcy Conference, Inc.

# Evidence: It's Not for Sissies! (But You Can Do It!)
# Friday 11/20

# Evidence in Bankruptcy Court: IT'S NOT FOR SISSIES!



- By: Chief Judge Cynthia A. Norton, W.D.MO.



# Part I:

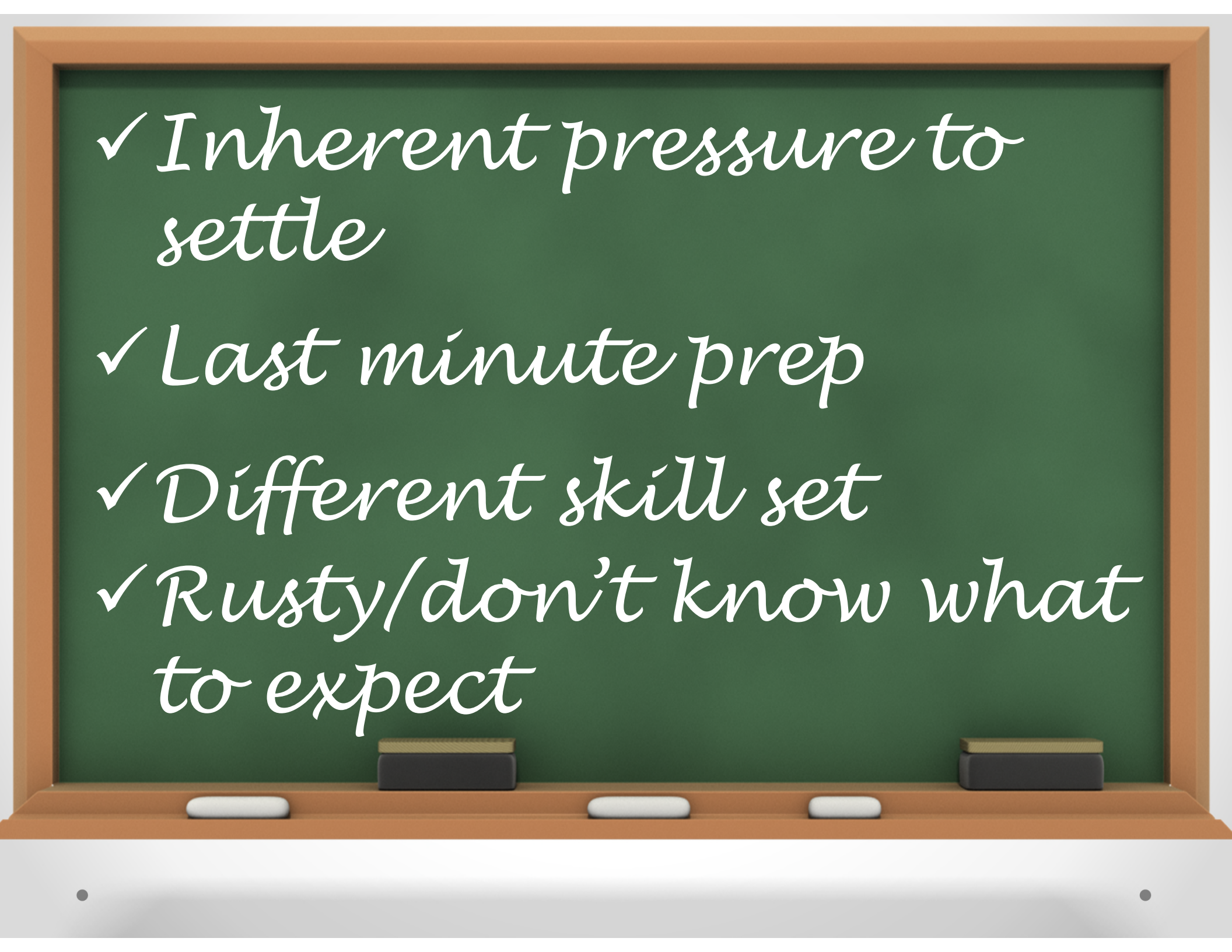
## Conquering Your Fear

# Why do we fear evidence?



# Why do we fear evidence?



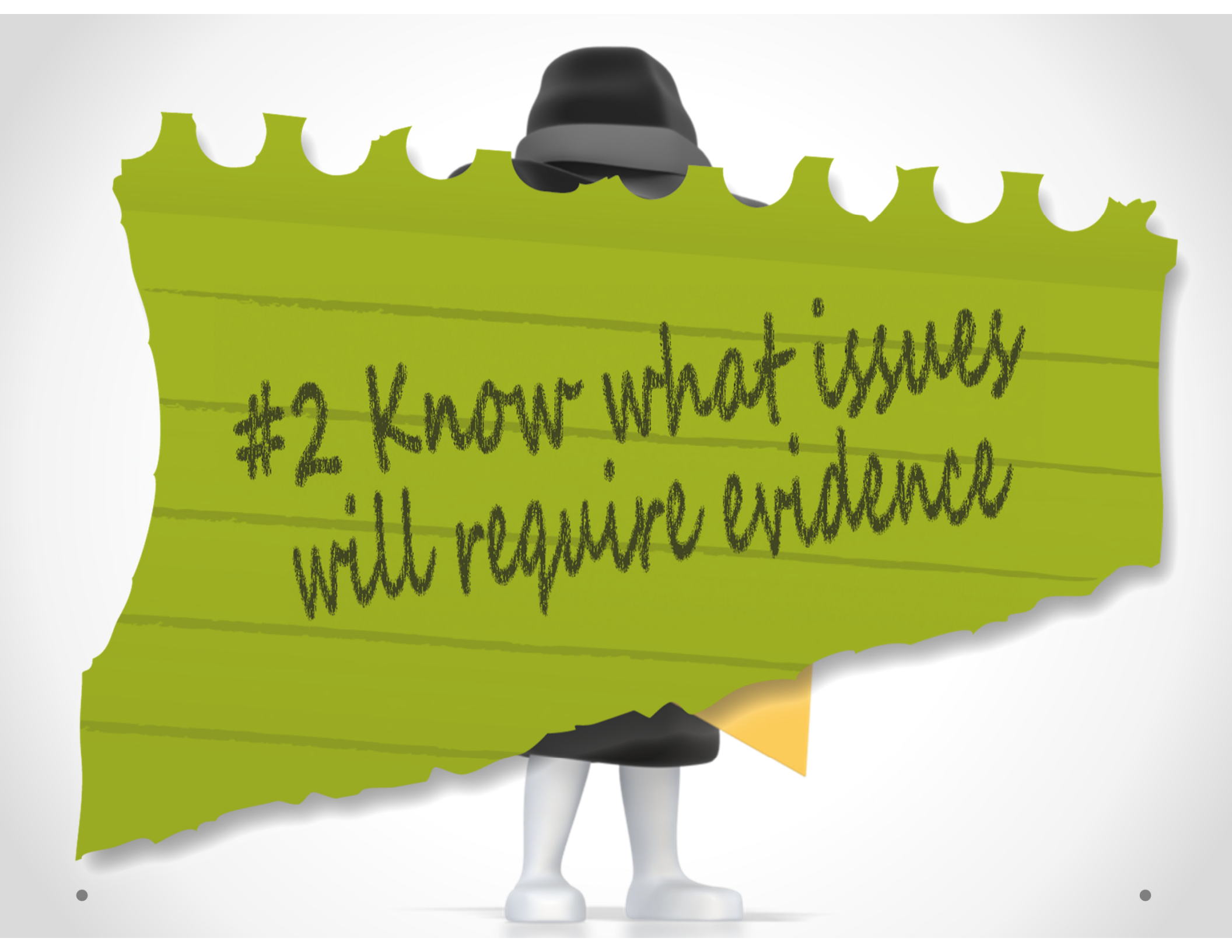

✓ Inherent pressure to settle
✓ Last minute prep
✓ Different skill set
✓ Rusty/don't know what to expect

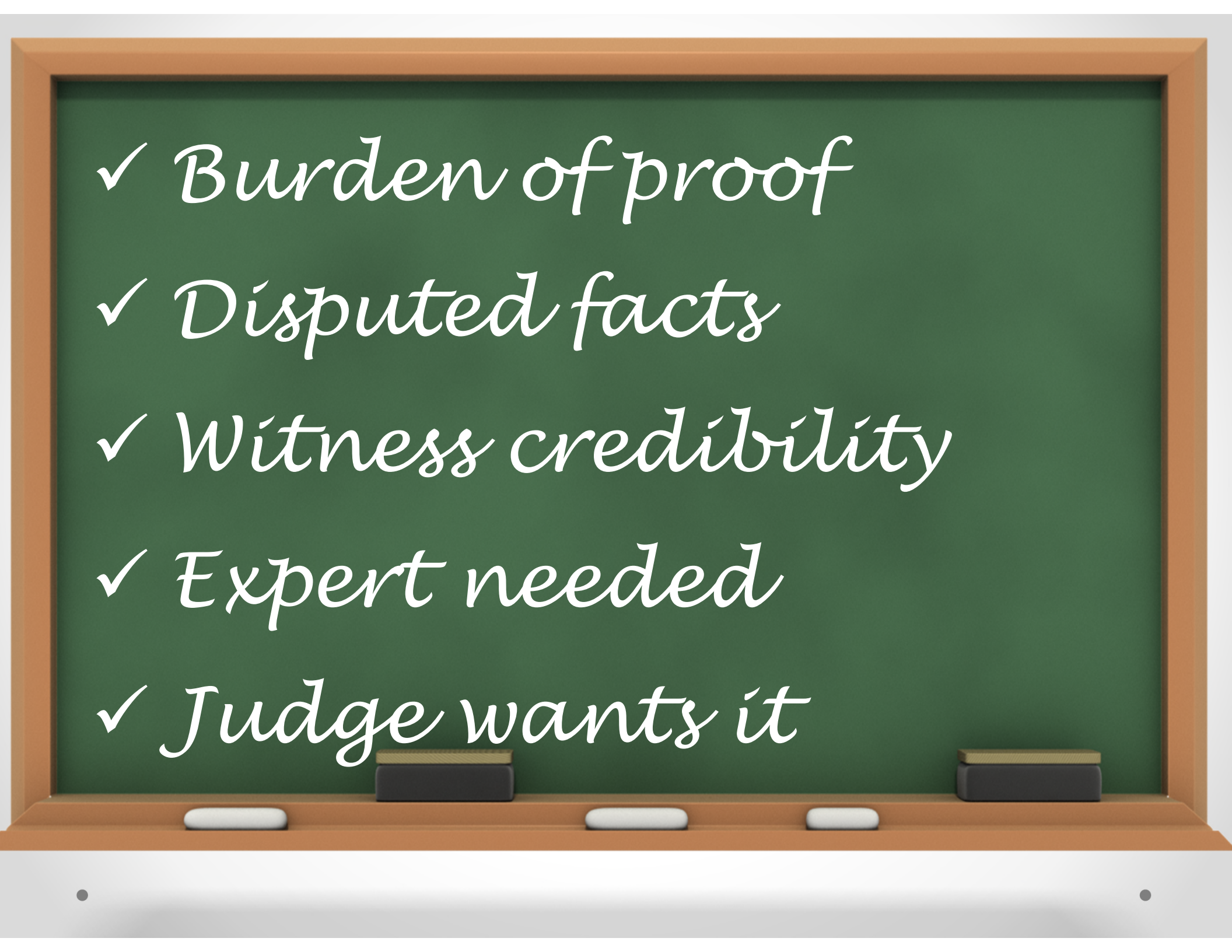



TOP SECRET


#1 Start with a
well-drafted pleading

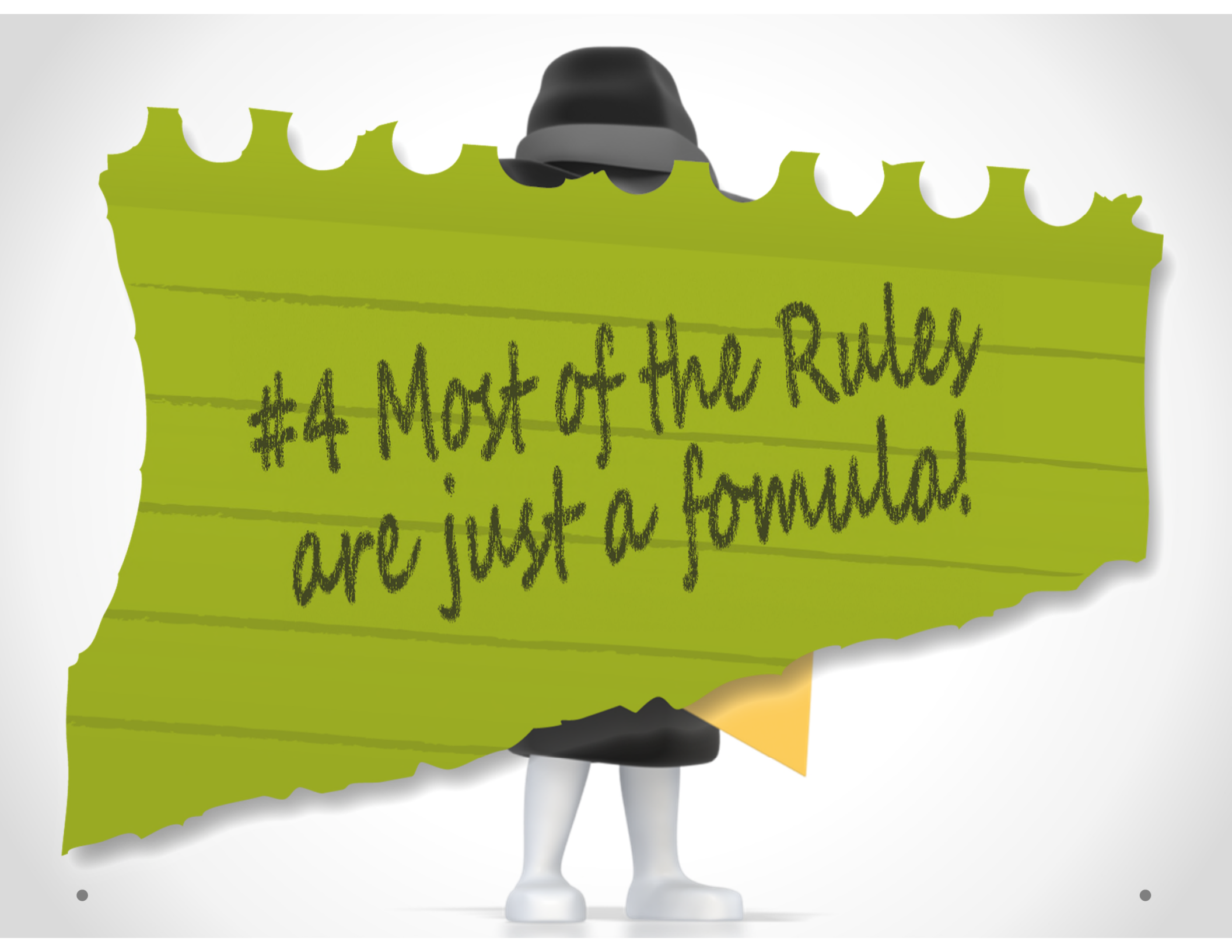

Three-legged stool supporting your relief:
1. Predicates
2. Facts
3. Law


#2 Know what issues
will require evidence

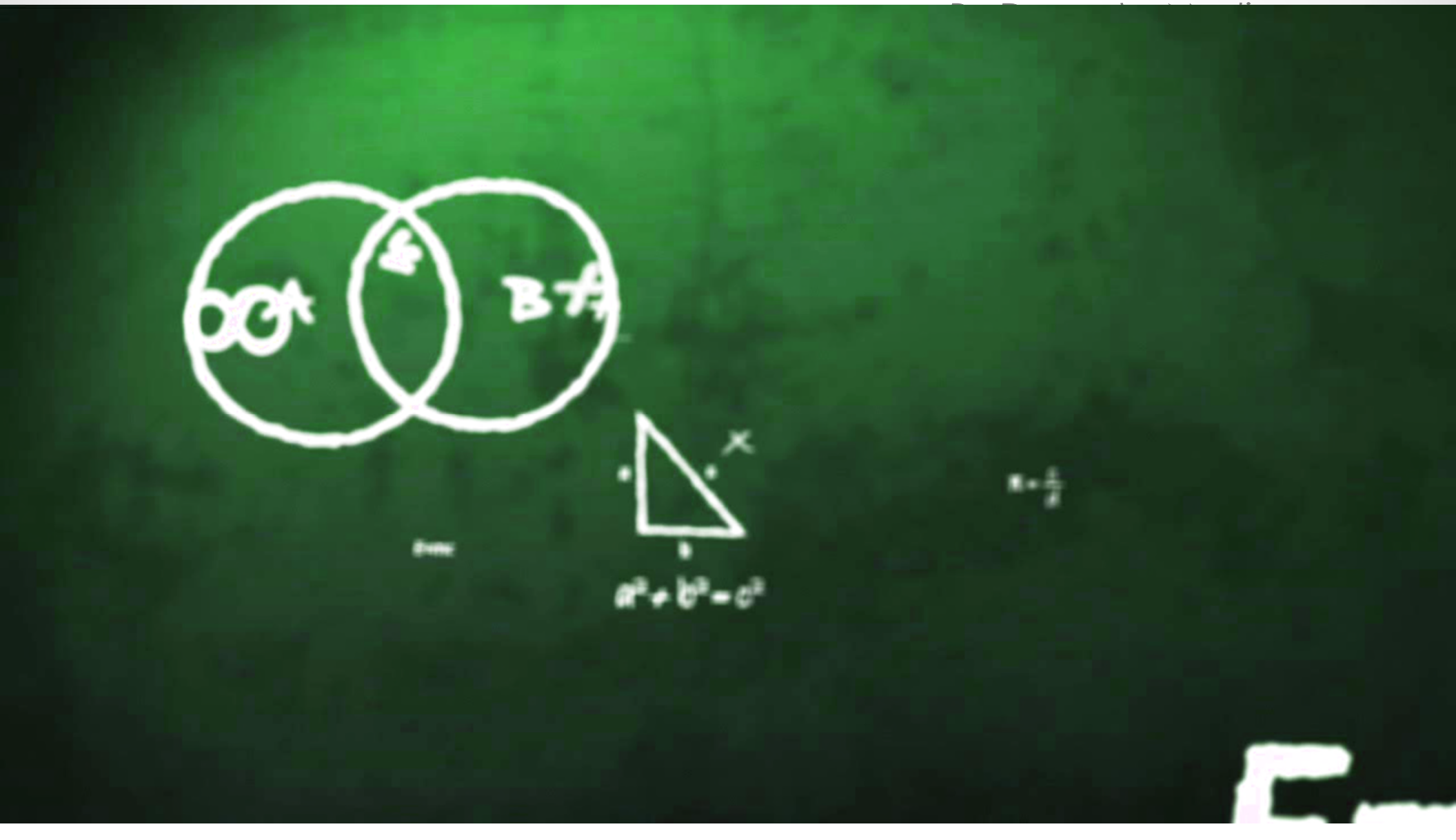

✓ Burden of proof
✓ Disputed facts
✓ Witness credibility
✓ Expert needed
✓ Judge wants it


#3 You don't need
to know all 68 FRE!


✓ Judicial Notice
✓ Relevance
✓ Witness Rules
✓ Hearsay
✓ Authentication
✓ The Judge's Favorites


#4 Most of the Rules
are just a formula!

# Not This Kind of Formula!



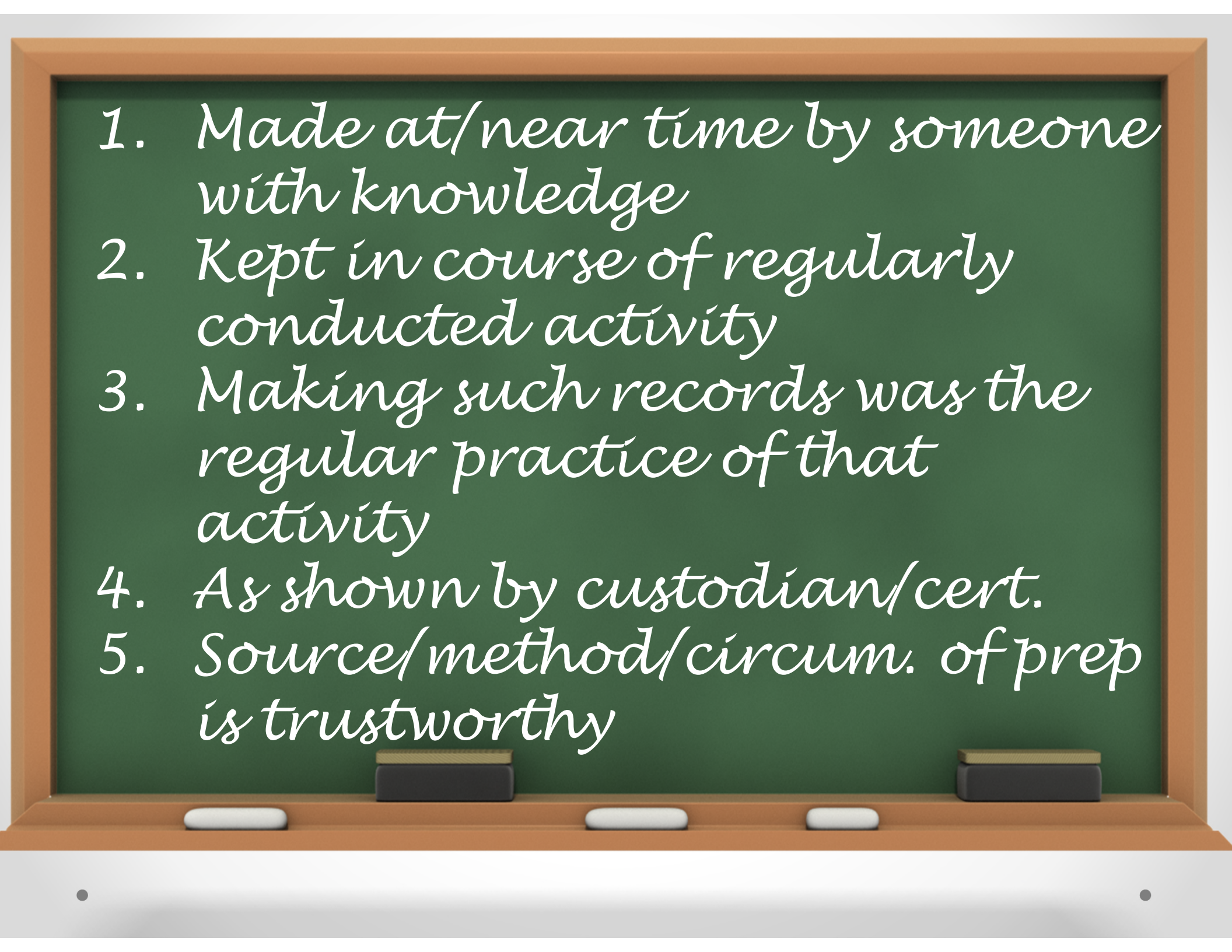
# Foundation Formula



- **Relevance**
- **Competent witness**
- **Authentic**
- **Not subject to exclusion**

# FRE 803(6) Business Records




1. Made at/near time by someone with knowledge
2. Kept in course of regularly conducted activity
3. Making such records was the regular practice of that activity
4. As shown by custodian/cert.
5. Source/method/circum. of prep is trustworthy


WHERE?
WHO?
WHAT?
WHY?
HOW?
WHEN?

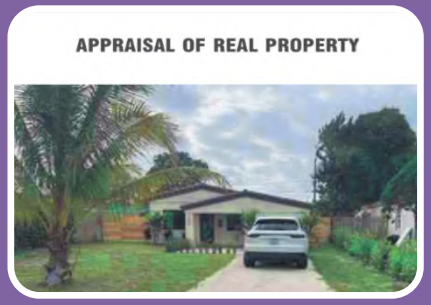
In the absence of a stip with opposing counsel,
are any of the following admissible?



**Exhibits offered by a lawyer without a witness?**

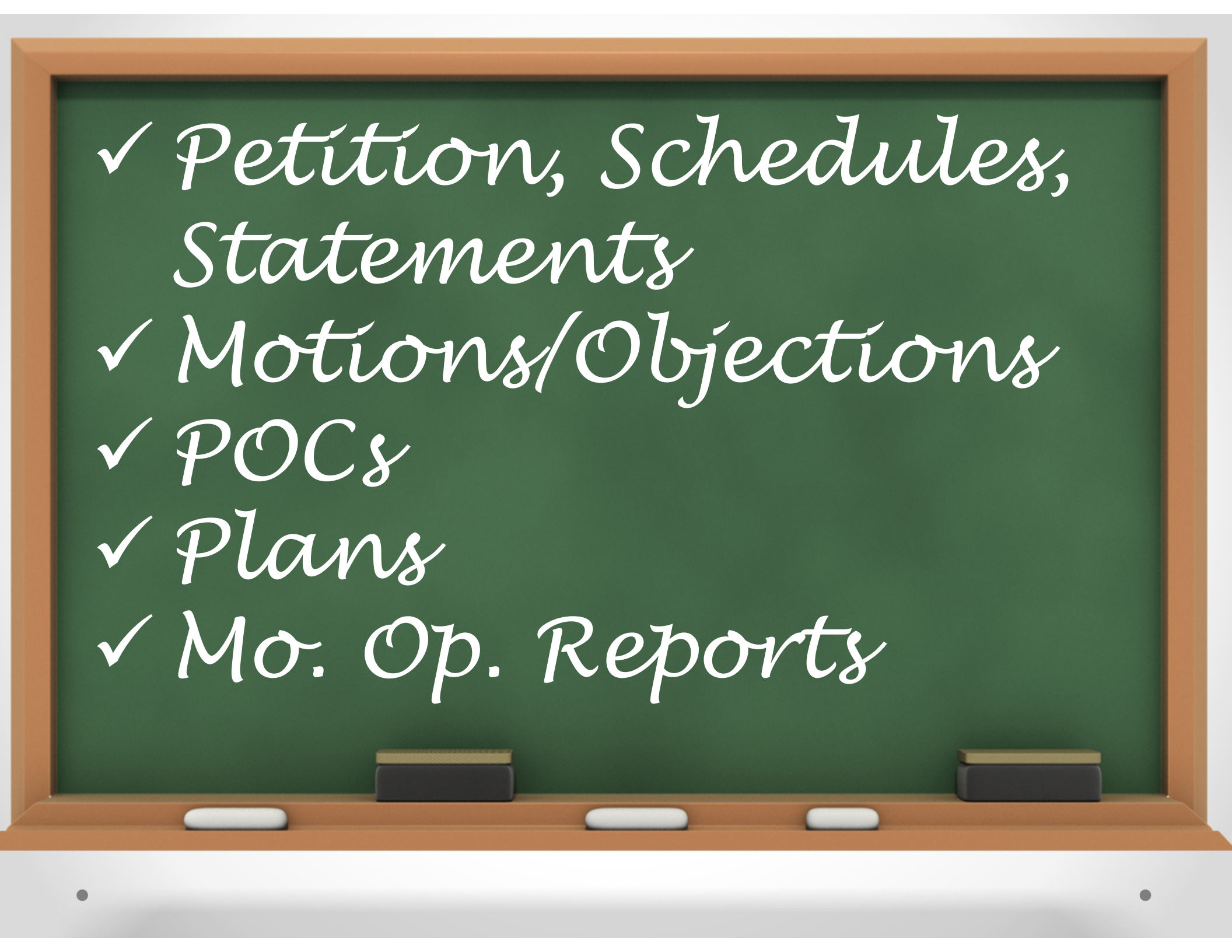


**The Appraisal as a business record of the Bank?**




**The Appraisal itself?**

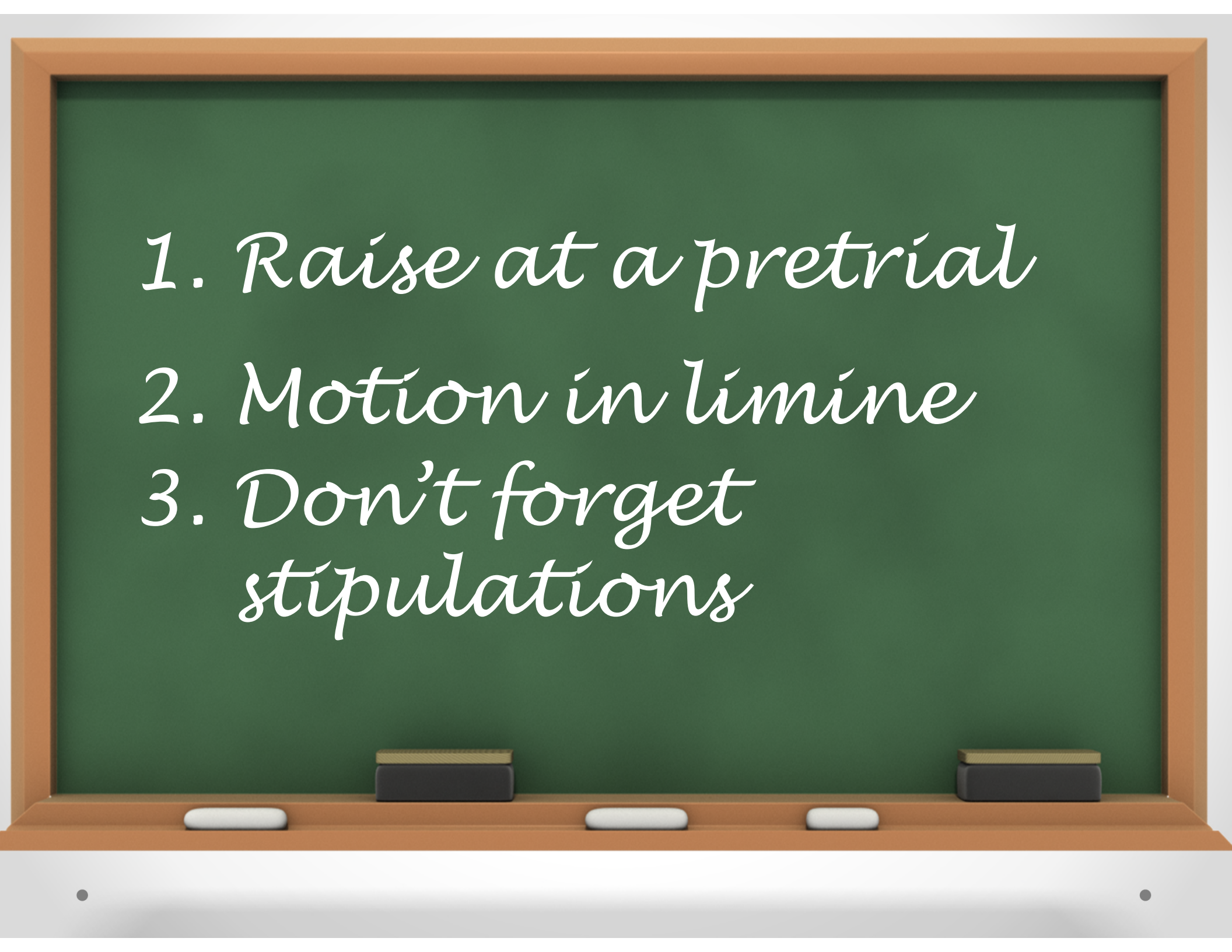

#5 Mine the record
for opposing party admissions!


✓ Petition, Schedules, Statements
✓ Motions/Objections
✓ POCs
✓ Plans
✓ Mo. Op. Reports


#6 Don't forget
Rule 26(a)


1. Rule 26 applies in Adv. Proc./contested matters
2. Mandatory disclosures
3. Scope of discovery
4. Sanctions for failure


#7 Help us!
Seek our guidance

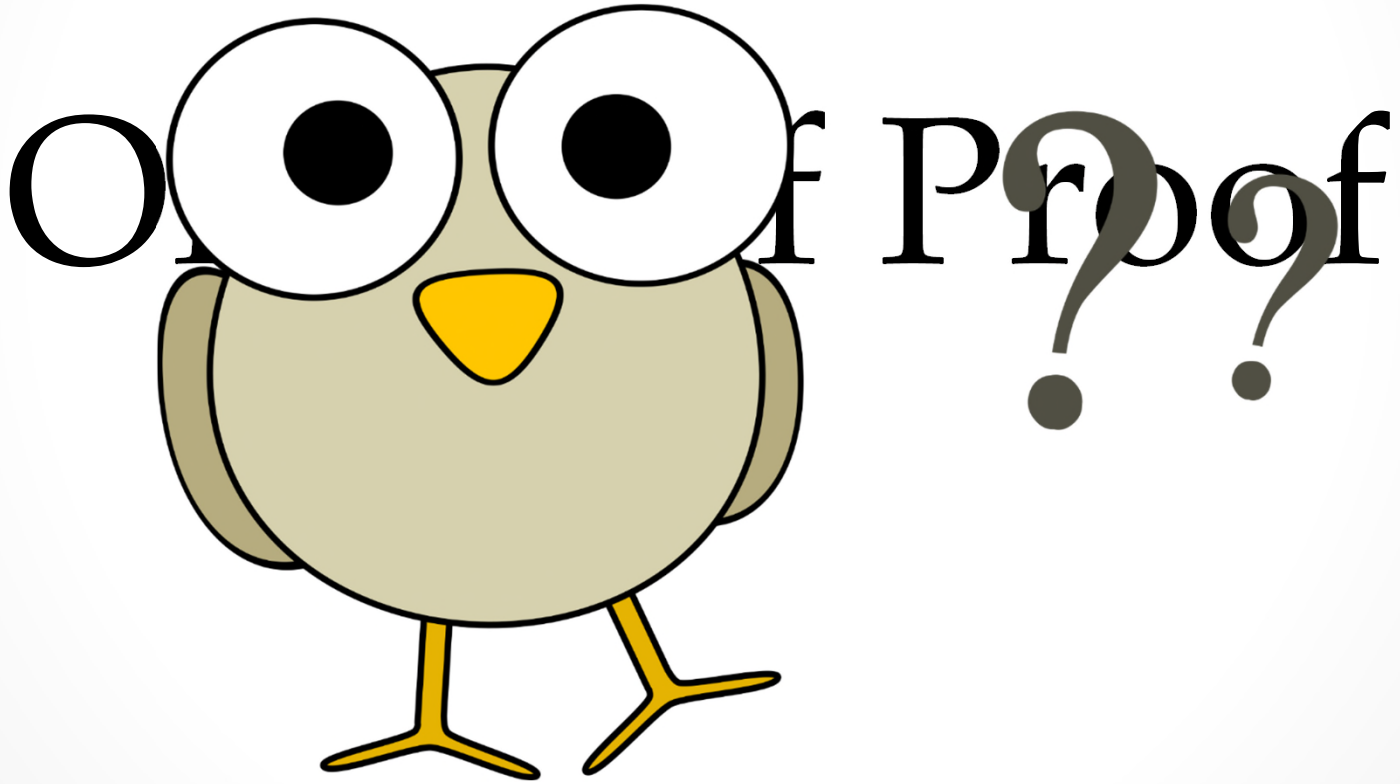

1. Raise at a pretrial
2. Motion in limine
3. Don't forget stipulations

# Part II

• • •

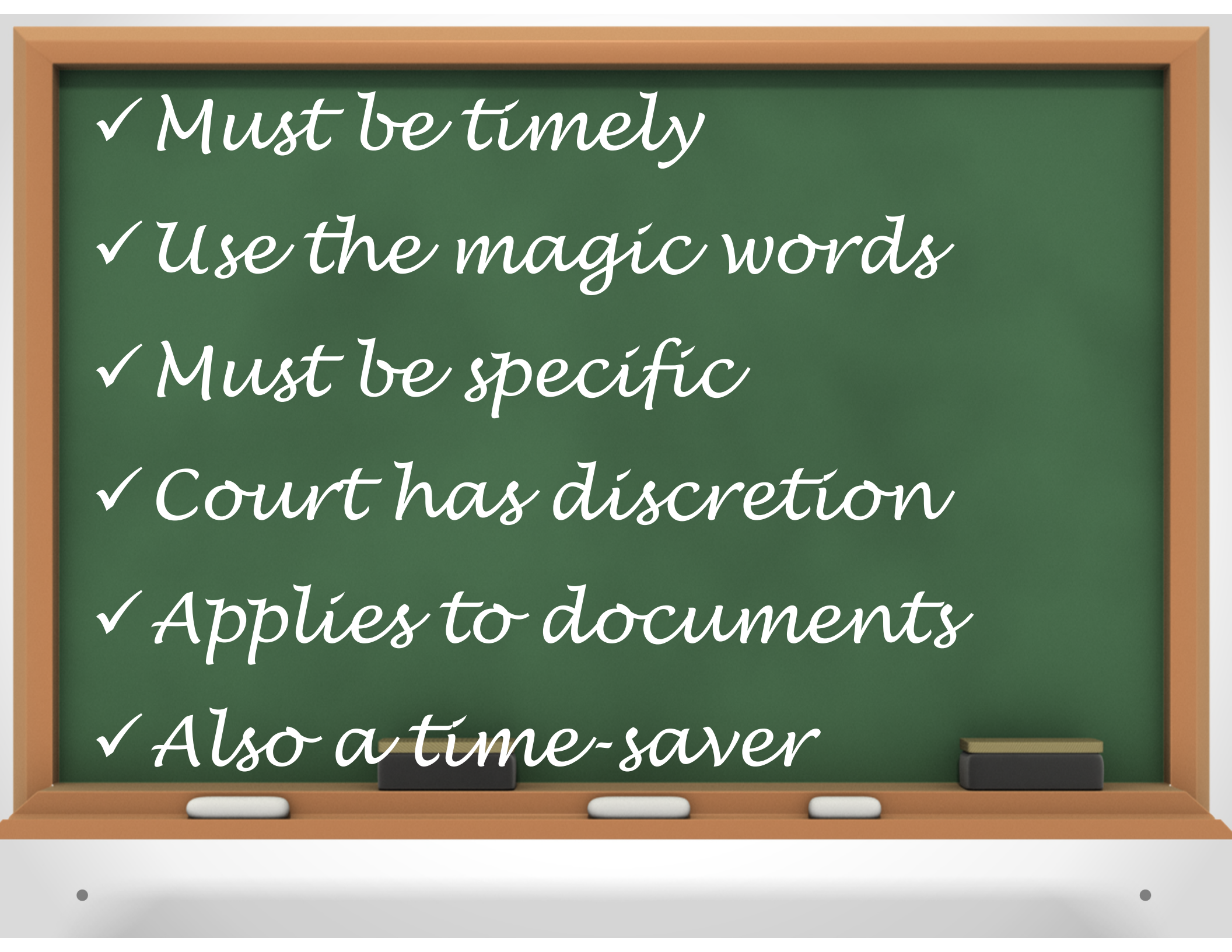
## Select Evidentiary Issues

# What are Proffers?



# FRE 103: Preserving Error




✓ Must be timely
✓ Use the magic words
✓ Must be specific
✓ Court has discretion
✓ Applies to documents
✓ Also a time-saver

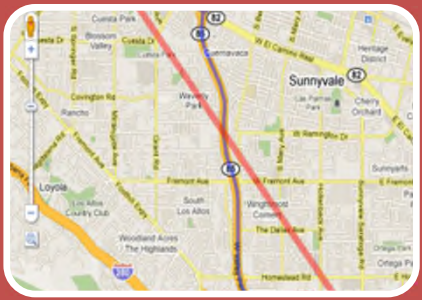
# Remember to practice!



# FRE 201: Judicial Notice



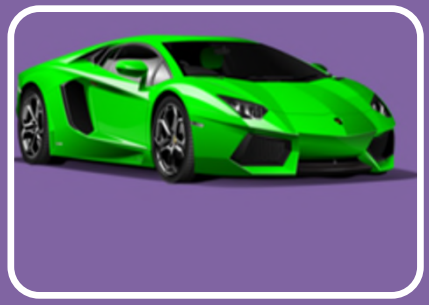
# Can I take judicial notice of:




**Distance between courthouses/locations?**

| | |
|---|---|
| 5 | Receipt for Voluntary Petition (Chapter 11)( 1 429.25 dollars. (re: Doc #1) (Fulks) (Entered: 04 |
| 4 (1 pg) | Application to Pay Filing Fee in Installments Fil (Entered: 04/18/2019) |
| 3 (1 pg) | Individual Chapter 11 Case: List of creditors wh Richard Bluebaum III , Anissa Faye Whittle-Mo |
| 2 (1 pg) | No 'Declaration Re: Electronic Filing' is require (Fulks, Robyn) (Entered: 04/18/2019) |
| 1 (10 pgs) | Chapter 11 Voluntary Petition for Individual. (Fi Disclosure Statement due by 8/16/2019. (Fulk |

**Court file?**



**Value of property in the schedules?**

# FRE 613: Impeachment with Prior Inconsistent Statement

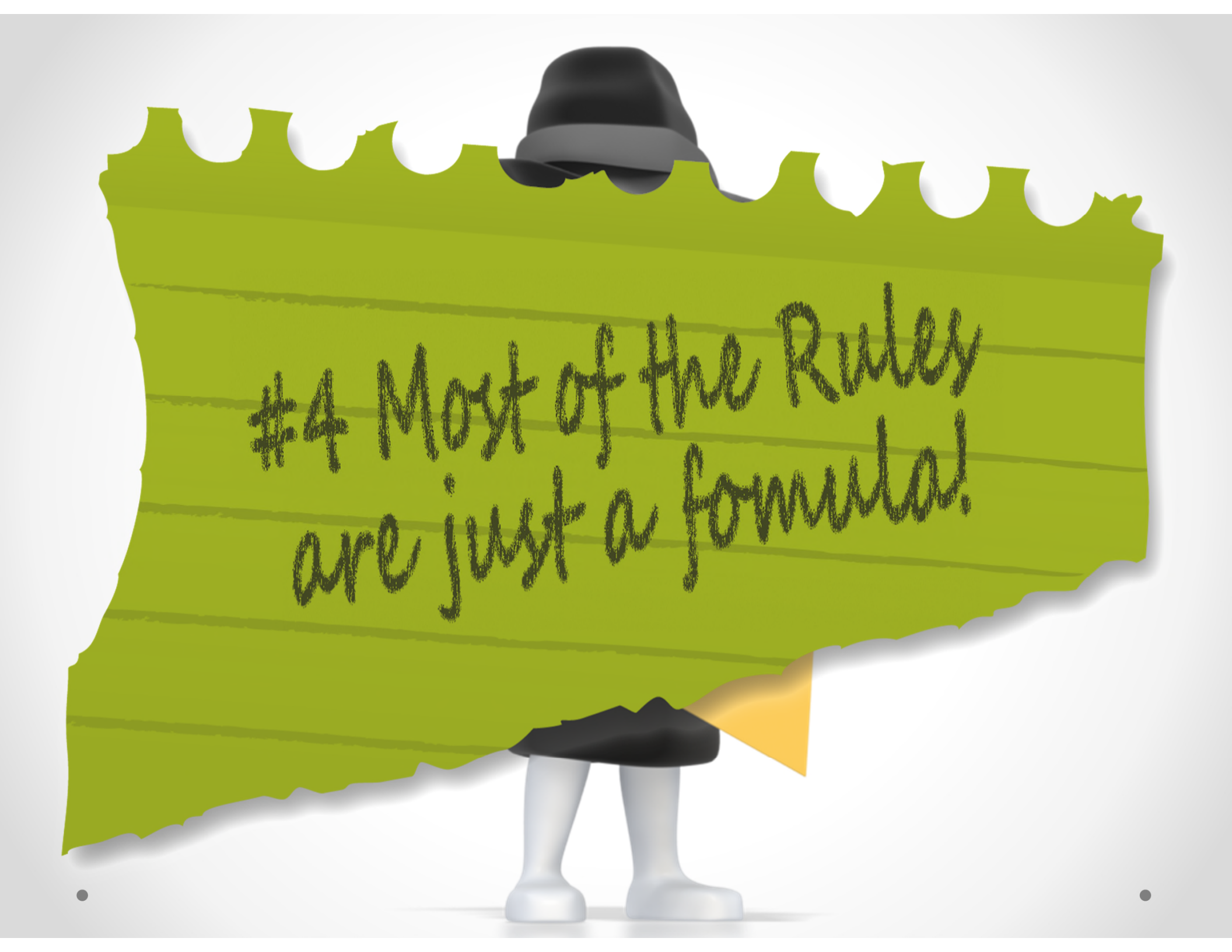






# Which are proper impeachment questions?

1. **Well, that's not what you said at your deposition, was it?**
2. **Didn't you tell me the light was red at your depo? Were you lying then or are you lying now?**
3. **Why are you saying the light was green when you previously said it was red?**
4. **Judge, I have a deposition transcript where she said the light was red!**
5. **Your Honor, I'd like to offer into evidence this transcript where she said the light was red**


#4 Most of the Rules
are just a formula!

# Impeachment Formula



- Confirm
- Credit
- Confront



# Film Credits

## *Actors*

| | |
|---|---|
| **HON. CYNTHIA A. NORTON** | Debtor Wendy |
| **JEFFREY MERRITT**, Law Clerk to Judge Norton | Trustee Lawyer |
| **JOE PESCI** | Cameo Appearance as Wendy's Lawyer |

## *Production*

| | |
|---|---|
| JEFFREY MERRITT, Law Clerk to Judge Norton | Camera |
| JEFFREY MERRITT, Law Clerk to Judge Norton | Video Editing |
| JEFFREY MERRITT, Law Clerk to Judge Norton | Sound Editing |
| JEFFREY MERRITT, Law Clerk to Judge Norton | Closed Captioning |
| ERICA GARRETT, Law Clerk to Judge Norton | Costume Design |
| MIRANDA SWIFT, Intern to Judge Norton | Production Assistant |

## *Location*

Filmed on location, Charles Evan Whittaker U.S. Courthouse
Kansas City, Missouri

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# See You in Court!



MBC | Mississippi Bankruptcy Conference, Inc.

# Ethics: Artificial Intelligence
# Friday 11/20

# A Collection of Evidence & Advocacy Materials
# U.S. Bankruptcy Judge Cynthia A. Norton, W.D. MO
# Presented to the Missouri Bar Annual Bankruptcy Institute
# March 2022[1]

## Part I: Selected Evidence Cases

### (1) Attorney-Client Privilege Waived Under Missouri Law

*State ex rel. Garrabrant v. The Honorable Calvin Holden*, 633 S.W.3d 356 (Mo. en banc 2021) (wife's disclosure of recorded conversation with attorney's staff to a third-party, her husband, waived the attorney-client privilege)

**Attorney-client privilege did not shield attorney's file from discovery because the attorney both advised the insurer on its bad faith refusal to pay liability and assisted in the defense of the insured.**

*State of Missouri ex rel., Kilroy was Here, LLC v. Moriarty*, 2021 WL 3869539 (Mo. Ct. App. 2021) (in bad faith suit arising from insurer's failure to settle within policy limits, the court held the attorney-client privilege did not preclude the insured's discovery of the attorney's entire file because the attorney both advised the insurer on its exposure on the bad faith claim, and also became involve in the defense of the insured; while the insured's and the insurer's interests overlapped in that they would both benefit from a successful defense, their interests diverged because a verdict in excess of policy limits would have exposed the insurer to liability for bad faith refusal to settle; therefore, to the extent the attorney acted as the insured's attorney, the insured was entitled to the attorney's file).

### (2) Trustee Failed to Meet Burden of Proof on Tool of Trade Exemption

*In re Allen*, 2021 WL 2311453 (10th Cir. B.A.P. June 7, 2021) (bankruptcy court order sustaining chapter 7 trustee's objection to debtors' tool of trade exemption under applicable New Mexico law reversed; trustee's only evidence was cross-examination about the debtors' failure to list the trailer in the amended Schedule A/B as a tool of the trade; that evidence was insufficient to meet the burden of proof. To determine whether the asset was a tool of the debtors' trade, the trustee should have presented evidence on the amount of income or support the business provided the debtors, how debtors carried on the business, the time and effort spent on the business, the assets of the business, and so on).

### (3) Bankruptcy Court's Order Confirming Chapter 12 Plan Reversed For Failure to Receive Evidence on Disputed Value of Bank's Collateral

*In re Schiller*, 629 B.R. 54 (8th Cir. B.A.P 2021) (bankruptcy court erred in failing to hold an evidentiary hearing on the value of the Bank's collateral; the value was a disputed fact; bankruptcy courts cannot make findings regarding disputed facts without holding an evidentiary hearing, rejecting the bankruptcy court's reasoning that because the difference between the Bank's valuation and the Debtor's valuation was minor ($3,431.31), no evidentiary hearing was necessary).

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[1] Prepared by Kristi Sutton, Law Clerk to the Hon. Cynthia A. Norton and originally presented to the Mississippi Bankruptcy Bar in November 2019; updated for presentation to the National Association of Bankruptcy Trustees in July 2021 by Cynthia A. Norton and revised for presentation to the Missouri Bar in March 2022.

**(4) Bankruptcy Court Not Required to Conduct an Evidentiary Hearing on Creditor's Bad Faith Objection to Debtors' Chapter 13 Plan, Particularly When Creditor Did Not Clearly Request An Evidentiary Hearing**

*In re Wojciechowski*, 568 B.R. 682 (8th Cir. B.A.P. 2017) (bankruptcy court was not required to hold an evidentiary hearing on creditor's bad faith objection to confirmation of the debtors' chapter 13 plan; first, it was not even clear the creditor requested an evidentiary hearing; the creditor's attorney asked only "to be heard on [her objections] and to "have a chance to keep the record open." In any event, nothing in the Code or case law requires a hearing every time the issue of a good faith is raised in a chapter 13 proceeding; the bankruptcy court is in the best position to determine whether an evidentiary hearing on good faith is necessary. *See also* Fed. R. Bankr. P. 3015(f) (if no objection to a chapter 13 plan is timely filed, the court may determine whether the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues).

**(5) On a motion to dismiss an adversary proceeding under Rules 8(a)(2) and 12(b)(6), movant met burden of establishing that the adversary complaint was legally insufficient.**

*Western Robidoux, Inc. v. Boehringer Ingelheim Animal Health USA, Inc.* (*In re Western Robidoux, Inc.*), 2022 WL 256805 (Bankr. W.D. Mo. Jan. 27, 2022) (holding that the plaintiff chapter 7 trustee sufficiently alleged lack of reasonable equivalent value and insolvency on her constructively-fraudulent transfer claims, and stated facially plausible claims for contractual indemnification and money had and received; therefore, the defendant failed to meet its burden and its motion to dismiss the adversary proceeding was denied).

**(6) Rule 9014 (Bankruptcy Case from Fifth Circuit)**

*In re Anderson*, 330 B.R. 180 (Bankr. S.D. Tex. 2005) (the debtors objected to the movant's proof of claim and argued that the claim was not secured as contended by the movant. The movant failed to attach any documents to its proof of claim and failed to appear at an initial hearing to offer evidence of the secured nature of its claim. At a second hearing on the movant's amended motion to vacate the order on the debtors' objection to the proof of claim, the movant again did not introduce evidence and the court denied the motion to vacate. Pursuant to Bankruptcy Rule 3001(f), when a proof of claim is filed in accordance with the bankruptcy rules, it constitutes *prima facie* evidence of the amount of the claim and its validity. However, if relevant documents are missing, the creditor cannot solely rely on a proof of claim. In such a case, the creditor must either amend its claim with supporting documents or introduce evidence at a hearing. The court found that because the dispute was not so much about the secured status of the lien but was whether the creditor supplied documentation supporting its proof of claim, the matter was a contested matter pursuant to Rules 3007 and 9014. The court ultimately found that because Rule 9014 expresses that if a motion cannot be decided without resolving a disputed material issue of fact, an evidentiary hearing must be held and because the movant failed to introduce or provide evidence as to its proof of claim, the movant failed in its burden to establish any supposed lien on the debtors' property.).

**(7) Judicial Notice**

Rule 201 of the Federal Rules of Evidence governs judicial notice of adjudicative facts. When a fact is not subject to reasonable dispute, this rule permits the court to judicially notice facts that are generally known to the court's territorial jurisdiction or facts that can be readily and accurately determined from sources whose accuracy cannot be reasonably challenged. Fed. R. Evid. 201(b). The court may take judicial notice *sua sponte* or must take judicial notice when a party requests such notice and provides the court with the necessary information. Fed. R. Evid. 201(c). Taking judicial notice may be done at

any point of the proceeding (Fed. R. Evid. 201(d)) and upon a timely request, a party is entitled to argue the propriety of taking judicial notice. Fed. R. Evid. 201(e).

***Case law evidencing when the court can clearly take judicial notice to when it cannot:***

**When the court clearly can take judicial notice:**

- **Verified Schedules for Purposes of Establishing Debtor Had Other Creditors:** *In re Hollander*, 25 B.R. 905 (Bankr. W.D Mo 1982) (Barker, J.) (in trustee's action to avoid certain transfers of farmland as fraudulent, the court rejected the defendants/transferees' argument that they lacked fraudulent intent because they offered to pay "all the debtor/transferor's creditors." The evidence showed that the defendants only offered to satisfy the debts of creditors with liens against the transferred farmland; court took judicial notice of the fact that the debtor's bankruptcy estate included other substantial creditors).

- **Verified Schedules for Purposes of Establishing that a Creditor Existed When Debtor Made the Transfer Avoidable Under Missouri Fraudulent Transfer Law:** *Matter of Gervich*, 570 F.2d 247 (8th Cir. 1978) (in a fraudulent transfer action under the Bankruptcy Act, the bankruptcy court could properly take judicial notice of the bankrupt's verified schedule of creditors to establish that the bankruptcy was indebted at the time he entered into the fraudulent agreement).

- **Decision of the BAP in a Related Case**: *Sears v. Sears*, 863 F.3d 980 (8th Cir. 2017) (in an adversary proceeding to deny the debtor a discharge, the bankruptcy court did not err in taking judicial notice of the fact that there was a decision of the BAP in a related case).

- **Post-Appeal Developments in the Underlying Bankruptcy Case:** *In re Alexander*, 239 B.R. 911 (8th Cir. B.A.P 1999) (rejecting the debtor/appellant's argument that the appellate court can only consider facts that were before the trial court; appellate courts routinely take judicial notice of post-appeal developments which trigger the mootness doctrine).

- **Records of Related Proceedings Before the Same Court:** *Enterprise Bank v. Magna Bank of Missouri*, 894 F. Supp. 1337 (E.D. Mo. 1995) (in dispute involving the validity of a prejudgment attachment, the court would take judicial notice of pleadings from two prior cases before the court and the judgment debtor's bankruptcy case for the purpose of establishing the facts leading to the current action and judicial acts taken and the subject matter of the bankruptcy litigation).

- **The Code, Rules, and the Court's Local Rules, Including CM/ECF Procedures Plus Applicable Case Law:** *In re Phillips*, 317 B.R. 518 (8th Cir. B.A.P. 2004) (the bankruptcy court sanctioned the debtor's lawyer for filing a petition without the debtor's signature and the lawyer appealed; on appeal, he argued that he could sign the debtor's name on the petition and that the appellate court could not take judicial notice of the CM/ECF procedures and local rules requiring the debtor's signature; the BAP rejected that argument, noting that federal courts may take judicial notice of the U.S. Constitution, federal statutes, and federal case law; since the rules and procedures of the bankruptcy court are created by statute, the appellate court could properly consider them and they need not be admitted into evidence to be considered by a court).

- **Distance Between Courthouses/Locations of Parties:** *In re Red Door Prop. Mgmt. LLC*, No. 11-02704-KMS, 2011 WL 5592910 (Bankr. S.D. Miss. Nov. 16, 2011) (when ruling on a Motion to Transfer, a court may take judicial notice of distances between courthouses and the locations of the parties.).

- **That an Accountant Was an Expert**: *In re Rodriguez*, 204 B.R. 510, 514 (Bankr. S.D. Tex. 1995), *subsequently aff'd*, 95 F.3d 54 (5th Cir. 1996) (in a case involving numerous involuntary chapter 7 bankruptcy petitions, the court overruled an objection that the trustee's accountant could not testify as an expert. The court reasoned, that while there was no resume or curriculum vitae evidencing that the accountant was an expert in the pending case, the court had, in previous bankruptcy cases, found the accountant to be an expert. The court could thus take judicial notice of that fact and permit the accountant to testify as an expert.).

**When the court clearly cannot take judicial notice:**

- **On Appeal, the Transcript of State Court Proceeding & Excerpts of Missouri Court of Appeals Decision When Not Part of the Trial Court Record:** *In re Scott*, 627 B.R. 134 (8th Cir. B.A.P. 2021) (although FRE 201 allows a court to take judicial notice at any stage of the proceedings, the BAP refused to grant the debtors/appellants' motion to take judicial notice of certain state court proceedings when the debtors had failed to convince the trial court to take judicial notice and the transcripts were not part of the trial court record).

- **On Appeal, the District Court's Order:** *In re Moss,* 266 B.R. 697 (8th Cir. B.A.P 2001) (in the debtor's appeal from the bankruptcy court order sustaining the trustee's objection to the debtor's exemptions where the debtor, a Missouri resident, attempted to claim Arizona exemption, the trustee as appellee asked the court to take judicial notice of a district court order that had affirmed a finding that Missouri venue was proper for the bankruptcy filing; the BAP denied the trustee's motion because "such a request is inappropriate and unnecessary; it is inappropriate because the decision of a court does not fall within the ambit of those kinds of "facts" which are the proper subject of judicial notice; it is unnecessary because the order was already contained in the record on appeal; also denying the debtor's motion to judicial notice of an excerpt of the bankruptcy court's opinion since the opinion was not a "fact" and therefore was not subject to judicial notice).

- **Schedules, for the Purpose of Establishing Whether the Debtor Was Insolvent at the Time of an Allegedly Constructively Fraudulent Transfer:** *Matter of Annis*, 78 B.R. 962 (Bankr. W.D. MO. 1987) (Stewart, J.) (court could take judicial notice that the debtors made certain contentions in the schedules, but that is far from saying that the contentions themselves may be judicial noticed as proof of the truth of whether the debtors were solvent or not).

- **The Entire Case Files in Four Related Bankruptcy Cases**: *In re Peterson*, 270 B.R. 719 (8th Cir. B.A.P. 2001) (debtors objected to the secured creditor's claim, on the grounds the creditor had violated the Truth-in-Lending Act; the court overruled the objection and the debtors appealed; on appeal, they argued that the bankruptcy court had erred in refusing to take judicial notice of the files in four unrelated bankruptcy cases; the BAP disagreed; the record showed that the debtors asked the bankruptcy court to take judicial notice of the entire contents of the bankruptcy case files instead of directing the court's attention to specific documents in those files that contained adjudicative facts relevant to the issues; the burden was on the debtors to present pertinent evidence; the bankruptcy court was not required to wade through the bankruptcy case filed in search of same).

- **The Entire Court File, as a Substitute for Proof of Deposition Excerpts in a Summary Judgment Motion**: *In re Kirtley*, 533 B.R. 154 (Bankr. S.D. Miss. 2015) (in this adversary proceeding, the plaintiffs sought to deny the debtors' chapter 7 discharge pursuant to 11 U.S.C. § 727. The plaintiffs held three separate promissory notes, secured by the debtors' real property. At the time of the adversary proceeding however, senior lienholders foreclosed on the real property

and extinguished the liens of the plaintiffs; making the plaintiffs unsecured creditors. In discussing the procedure of the case, the court noted, in their post-trial briefs, the plaintiffs correctly stated that the bankruptcy court took judicial notice of the court file. The court disagreed however, with the plaintiffs' contention that this included judicial notice of exhibits of selected pages from depositions of the defendants (debtors) attached to a motion for summary judgment. The court reasoned that the plaintiffs misconstrued the scope of judicial notice in the Fifth Circuit and that the court is limited to taking judicial notice of only adjudicative facts not subject to reasonable dispute. ***Here, the court clarified that it did take judicial notice of the facts in the court file that are not subject to reasonable dispute such as the date the petition was filed, the bankruptcy schedules, the statement of financial affairs, the dates pleadings were filed, the dates orders were entered, and the content of the pleadings presently before the court.*** Judicial notice could not be taken of the court file however "as a substitute for the admission of proof by a party, namely, pages from depositions" attached to a summary judgment motion. In further support of this conclusion, the court noted that, at trial, the plaintiffs' attorney specifically stated his intent not to submit into evidence pages from depositions. Hence, the court concluded that while it took judicial notice of the court file, it did not take judicial notice of the exhibits attached to the motion for summary judgment, which was not pending before the court).

- **Evidence Admitted in a Different Adversary Proceeding:** *In re SI Restructuring Inc.*, 480 F. App'x 327 (5th Cir. 2012) (the debtor's former officers and directors (the Wooleys) sought permission to pursue claims against former outside directors on behalf of the bankruptcy estate. The court ultimately denied the request. At the hearing on the motion, the Wooleys requested that the court take judicial notice of evidence previously submitted in a different adversary proceeding. The court declined to take judicial notice and reasoned that judicial notice is not a tool to avoid introducing material that may be subject to legitimate evidentiary objections. In response, the Wooleys appealed and designated the documents as part of the record, notwithstanding that they were never properly admitted in the pending proceeding. The appellees filed motions to strike and the bankruptcy court granted the motions. The appellate court affirmed and reasoned that the disputed evidence was not properly admitted in the proceeding pending before the bankruptcy court and that judicial notice would be improper given that the contents of the evidence were in dispute. The court opined, that while it may be appropriate for the court to take judicial notice of documents filed in another court to establish the litigation and filings associated with a case, the court may not take judicial notice of the factual findings of another court).

- **Business Records For Which No Foundation Was Laid and Book Authored by the Defendant Discovered by the Judge Based on Independent Research:** *American Prairie Const. Co. v. Hoich*, 560 F.3d 780 (8th Cir. 2009) (in an action to enforce a settlement agreement, the judge abused his discretion in taking judicial notice of minutes from a business meeting and a book the defendant had authored which the court found on its own research; the court had ordered another defendant to turn over its business records to the court for examination; the defendant had no advance knowledge of the specific business records being sent to the judge or which records the judge would take judicial notice of or that the judge intended to take judicial notice of the defendant's friendship with the person to establish that person was purportedly an agent with authority to bind the defendant; caution much be taken to avoid admitting evidence through the use of judicial notice in contravention of the relevancy, foundation and hearsay rules; no foundation was laid for the minutes or the book; on fact questions, the court should not use the doctrine of judicial notice to go outside the record unless the facts are matters of common knowledge or are capable of certain verification; because the effect of judicial notice is to deprive a party of the opportunity to use rebuttal evidence, cross-examination ad argument to attack contrary evidence, caution must be used in determining that a fact is beyond controversy under FRE 201(b)).

**Gray area**:

- **May Take Judicial Notice of the Fact That Major Religions Are Supported by Congregants:** *In re Rivera*, 214 B.R. 101 (Bankr. S.D.N.Y. 1997) (the trustee sought to recover transfers the debtors made to their church pursuant to 11 U.S.C. § 548(a)(2). The church sought dismissal pursuant to Fed. R. Bankr. P. 7012 (for failure to state a claim) or, in the alternate, argued that allowing recovery of the transfers violated the debtors' First Amendment Rights. The debtors transferred ten percent of their income to the church pursuant to their practice of tithing. The church did not disagree that, under any other circumstance, the transfers would be recoverable, however, it argued that because the debtors sought to support their faith and their church, the funds were not recoverable. The court ultimately disagreed that the tithes were exempt from the fraudulent transfer provisions of the bankruptcy code and in its analysis, reasoned that it may take judicial notice "of the fact that all major religions in this country, including Judaism, Islam and many denominations of Christianity, are supported by their congregants either monetarily or in some other fashion.").

**(8) Business Records Exception to Hearsay**

Pursuant to the Federal Rules of Evidence, Rule 803 governs the exceptions to the rule against hearsay. Hearsay is an out of court statement offered for the truth of the matter asserted. Fed. R. Evid. 801(c). Rule 803(6) applies to business records and permits admission, regardless of whether a declarant is available as a witness if

(A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

***Case law evidencing when you can clearly admit business records and when you cannot:***

**When you clearly can admit**:

*United States v. Kassimu*, 188 F. App'x 264 (5th Cir. 2006) (admission of postal records under the business records exception was proper when a postal inspector, deemed by the court to be an "other qualified witness," testified to the authenticity of the records. The Rules of Evidence do not require that a witness laying foundation for the admissibility of the business records "be the one who entered the data into the computer or be able to attest personally to its accuracy.").

**When you clearly cannot admit**:

*United States v. Williams*, 661 F.2d 528 (5th Cir. 1981) (admission of a verified statement of a trailer's value made by an operator of a trailer maintenance facility, was hearsay without an exception when the

statement was made three years after the incident in question, was not made "in the course of a regularly conducted business activity," and was not "the regular practice of that business activity to make the memorandum." The appellant was charged with transporting a stolen trailer and the government witness, an operator of the trailer maintenance facility, fixed a market value of the stolen trailer. The court disallowed the "appraisal" statement, found that the statement was obviously made for purposes of trial, and held that that the business record exception to the hearsay rule did not apply.).

**Gray Area:**

*United States v. Jackson*, 636 F.3d 687 (5th Cir. 2011) (appellate court reversed the lower court's holding as to its admission of two notebooks allegedly prepared by appellant's co-conspirator. The court held that because the notebooks were not properly authenticated and constituted hearsay, the appellant's rights under the Confrontation Clause were violated. The appellant was found guilty of conspiring to possess with intent to distribute cocaine. During trial, the court admitted two notebooks that were given to the head police officer by a previously arrested co-conspirator in hopes of a plea agreement. The co-conspirator said nothing when he handed the notebooks to the officer. The government introduced the notebooks through the officer, and he explained the contents; exclusively relying on his experience in the case. The appellate court reasoned that while it agreed that drug dealer ledgers may be admitted as business records provided Rule 803(6) is satisfied, here, the officer was an improper person to authenticate the notebooks. First, the notebooks were not found in a drug dealer's home, the motive for giving the notebooks was a plea bargain (*i.e.* for the co-conspirator's benefit), there were no dates in the notebooks, and nowhere was the word "cocaine" used. Further, no handwriting analysis was performed to show who drafted the notebook. As a result, the drug ledgers were improperly admitted.).

*In re Couture Hotel Corp.*, 554 B.R. 369 (Bankr. N.D. Tex. 2016) (in this voluntary chapter 11 case, the hotel-debtor objected to freight-service creditor's proof of claim. The debtor objected to the admission of two exhibits on the ground they were hearsay and did not fall within the business records exception to the hearsay rule. The exhibits were the front and back of a bill of lading prepared by a third-party that the creditor acted as agent for in delivering furniture to the debtor. An employee of the creditor testified to authenticate the bill of lading. Citing to Fifth Circuit precedent, the bankruptcy court noted that "in certain circumstances[,] documents that are prepared by outside entities [here, the third-party] and are then incorporated into a testifying organization's business records can be proven up as business records by a witness from the testifying organization rather than a witness from the outside entity that actually created the records." This shall not be permitted however, when the testifying witness has no familiarity with the record keeping procedures of the outside (third-party) entity. The bankruptcy court found that the testifying witness in this case had no knowledge of how the bill of lading was produced by the third-party and how records were kept. Under these circumstances, the bill of lading could not be not admitted pursuant to the business record exception.).

**(9) Judicial Admissions**

"A judicial admission is a formal concession in the pleadings or stipulations by a party or counsel that is binding on the party making them. Although a judicial admission is not itself evidence, it has the effect of withdrawing a fact from contention. A statement made by counsel during the course of trial may be considered a judicial admission if it was made intentionally as a waiver, releasing the opponent from proof of fact." *Martinez v. Bally's Louisiana, Inc.*, 244 F.3d 474, 476–77 (5th Cir. 2001) (citation omitted).

Absent the court's permission to withdraw, judicial admissions are conclusive. *Id.* (citations omitted)). For a statement to qualify as a judicial admission, it "must be (1) made in a judicial proceeding; (2) contrary to a fact essential to the theory of recovery; (3) deliberate, clear, and unequivocal; (4) such that giving it conclusive effect meets with public policy; and (5) about a fact on which a judgment for the opposing party can be based." *Heritage Bank v. Redcom Labs., Inc.*, 250 F.3d 319, 329 (5th Cir. 2001) (citation omitted).

*In re Rollings*, 451 F. App'x 340 (5th Cir. 2011) (Mr. Rollings worked for an oilfield equipment repair and sales company. The company filed bankruptcy and shortly thereafter, Rollings sent a letter to the company, claiming ownership of bookshelves with books, a rotary table, and a National 1320M mechanical drawworks (drawworks) that included a drum shaft; all of which were located on the company's property. At the company's foreclosure sale, these items were exempt. Rollings subsequently filed for bankruptcy. Rollings amended his schedules several times to include ownership of a hydraulic cylinder. While his amended schedules did not list any oilfield equipment, he eventually amended his schedules to include ownership of the rotary table, drawworks, and cylinder. The company returned the bookshelves, books, and a rotary table however, it refused to turn over the cylinder and drawworks absent evidence that Rollings owned the equipment. The trustee commenced an action to recover the equipment. Following a trial, the bankruptcy court concluded that the company failed in its burden to show that it owned the property and the district court affirmed.

On appeal, the company argued, in part, that the bankruptcy court erred when it did not treat Rollings' sworn bankruptcy schedules as judicial admissions. The company argued that because Rollings failed to list the drawworks and cylinder on his first two schedules, and entirely omitted listing the drum shaft, he made judicial admissions that he did not own the equipment. The court reasoned that while statements made in bankruptcy schedules may be treated as judicial admissions, the amended schedules superseded the earlier filed schedules. Thus, while the original schedules may be considered evidence, they are not binding admissions. Further, because the company failed to raise the argument that Rollings' failure to list the drum shaft in the schedules foreclosed him from arguing ownership, the court would not entertain the argument. Specifically, the court opined "[b]y failing to contend that [a party's] admissions barred his subsequent assertion of the contrary position, [the opposing parties] effectively waived the argument that the issue was irreversibly settled.").

*Rosenberg v. Trautwein*, 624 F.2d 666 (5th Cir. 1980) (the appellants appealed from a judgment notwithstanding the verdict where the judge set aside the jury's findings that payments made to the co-appellant were for fair consideration. Mr. Trautwein, co-appellant, worked for and was a customer of the debtor's company, a commodities investment business. At a trial in which the court consolidated ninety-two similar cases, Trautwein testified that he received payments from the company and that the payments were not compensation for services but were withdrawals from his account with the company. Trautwein's separate trial took place a month later and the issue was whether the funds received were for services rendered or were distributions from the company's accounts. In the second trial, Trautwein's testimony changed from the first trial because, initially, he did not believe that the company paid him for his bookkeeping services. Soon after the first trial however, he read a deposition by the company's representative stating that the money was intended to be compensation. Further Trautwein had no way of knowing what the funds were for because "he never received a statement on what monies were paid as return on investment and what monies were paid as compensation." On appeal, the trustee argued in part, that Trautwein's prior testimony was a judicial admission which established that the transfers were not for his services but were transfers he received from withdrawals. The appellate court disagreed and reasoned that a party has a right to correct prior testimony and to explain why he or she was mistaken. The court found Trautwein's explanation credible and held that the jury was entitled to infer and find that his prior testimony was made under a mistake of fact. The court thus reversed the judgment notwithstanding the verdict and reinstated the jury's findings.).

**(10) Proffer in the context of Federal Rule of Evidence 103**

Pursuant to Fed. R. Evid. 103, a party trying to correct an error made by the court in excluding evidence and/or preserve the right to argue that the exclusion was erroneous on appeal, must offer proof. Barry Russell, *Bankruptcy Evidence Manual* § 103:7 Error in Excluding-Offer of Proof (2018 ed.). "The purpose of the offer of proof is to disclose the nature of offered evidence to which objection is interposed not only for the information of the trial judge in the hope that the court will correct its alleged error, but also to enable the reviewing court to determine whether the exclusion was erroneous and if so whether it affected a substantial right." *Id.*

Pursuant to this rule, an offer is proper if counsel informs the court "with particularity the substance of the witness' or witnesses' anticipated answers even if the witness or witnesses are not actually produced. . . ." *Id.* If good faith is an issue as to the offer, the court may require that the witness be produced. *Id.* Further, the court may permit or instruct counsel to make an offer of proof in question and answer form. *Id.* (citing Fed. R. Evid. 103(b)).

*Garner v. Santoro*, 865 F.2d 629 (5th Cir. 1989) (on appeal from the Mississippi district court, the appellate court considered Rule 103 in the context of whether the rule barred an appellant's defense for failure to make an offer of proof. The appellee was injured after using defendant-appellant's epoxy-based paint while spraying ships for the U.S. Navy. Prior to trial, the appellant sought amendment of its answer to include the government contractor defense and was ultimately denied from asserting this defense. On appeal, the court noted that there was a change in the law as to this defense and remanded the case on the applicability of the defense to the facts of this case. The appellee argued however, that the appellant was foreclosed from asserting this defense because it never made an offer of proof on the defense pursuant to Rule 103(a)(2). The court disagreed and opined that while an offer of proof is usually necessary to preserve a claim of error on appeal, here an entire class of evidence was declared inadmissible. Because the appellant, well in advance of trial, was not permitted to make an offer of proof as to the entire defense, Rule 103(a)(2) did not preclude asserting this defense.).

*In re Ledet*, CIVIL ACTION NO.: 99-3719 SECTION: "R"(4), 2000 U.S. Dist. LEXIS 3334 (E.D. La. Mar. 13, 2000) (the court held that, pursuant to 11 U.S.C. § 523(a)(2)(A), when a debtor knowingly submits false borrowing reports to a bank and the bank relies on the reports when extending credit to the debtor, the loans were obtained through false pretenses and false representations. The debtor appealed the court's holding of nondischargeability and as part of his appeal, argued that the bankruptcy court erred in refusing the debtor to admit certain evidence. While the bankruptcy court permitted the debtor to summarize his witness' testimony, the judge did not formally accept the testimony as a proffer. The testimony went to reliance by the bank and debtor's argument that his company's loan balance never exceeded a certain percentage threshold of eligible receivables. The district court did not find this to be in error because, pursuant to Rule 103, failing to make a proffer of proof is excused when the excluded evidence is clear from the context it was offered. The court reasoned that the record reflects that the bankruptcy court was aware of the substance of the proposed evidence and that, unfortunately for the debtor, the court credited the testimony of the bank's witness on the issue.).

*In re Carson*, No. 06-68324-MHM, 2008 WL 7842099 (Bankr. N.D. Ga. Mar. 27, 2008): (in this nondischargeability action brought pursuant to 11 U.S.C. § 523(a)(2), the defendant filed a motion for summary judgment, alleging that the plaintiff's complaint failed to plead fraud with particularity and failed to establish every element of fraud with evidence. While the court noted that the plaintiff's complaint was "sparse and conclusory," in response to defendant's summary judgment motion, the plaintiff submitted an affidavit which included greater detail as to the alleged misrepresentations and the defendant's intent. The court reasoned that in bankruptcy, pleading fraud requires, not particularity, but rather, a "short and plain statement of the claim that will give the defendant fair notice. . . ." Further,

citing to Rule 103, the court considered the affidavit to be a proffer by the plaintiff to support the otherwise unsupported allegations in the complaint. Finding the evidence proffered was enough to support the plaintiff's claim for relief, the court denied the defendant's motion.).

**(11) Document Authentication**

"Under Federal Rule of Evidence ('Rule') 901, 'the requirement of authentication is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.' *United States v. Dillard*, 354 F. App'x 852, 858 (5th Cir. 2009) (citing Fed. R. Evid. 901(a); *United States v. Lance,* 853 F.2d 1177, 1181 (5th Cir.1988)). Rule 901(b) provides a non-exclusive list of evidence that satisfies the requirement of Rule 901(a). Fed. R. Evid. 901(b). "The most common means of authenticating evidence is through the testimony of a witness with knowledge, confirming that the item is what it is claimed to be." *Green Tree Servicing LLC v. Neal*, 550 B.R. 98, 103 (N.D. Miss. 2016) (citing Fed. R. Evid. 901(b)(1)).

Evidence that is self-authenticating and requires no extrinsic evidence is listed under Rule 902. Included in this list are domestic public documents that are sealed and signed (Fed. R. Evid. 902(1)), certified copies of public records (Fed. R. Evid. 902(4)), newspapers and periodicals (Fed. R. Evid. 902(6)), and certified data copied from an electronic device, storage medium, or file (Fed. R. Evid. 902(14)).

*Green Tree Servicing LLC v. Neal*, 550 B.R. 98 (N.D. Miss. 2016) (on appeal was whether the bankruptcy court erred in its evidentiary ruling when it sustained an objection as to a document's authenticity when the proponent of the evidence failed to authenticate it and there was no stipulation. At issue was the value of a mobile home. The proponent of the evidence sought to admit a photocopy of a National Automobile Dealers Association valuation print-out and opposing counsel objected on authentication grounds. In sustaining the objection, the bankruptcy court found that the print-out failed to be self-executing pursuant to Rule 902 of the Federal Rules of Evidence and that counsel failed to present an authenticating witness. The district court affirmed the bankruptcy court largely because the appellant, in appellate briefing, cited case law not presented to the bankruptcy court. The transcript of the hearing indicated that the bankruptcy judge asked time and again for authority that the print-out was self-executing. Counsel was unable to respond. In fact, counsel reluctantly agreed that none of the exceptions under Rule 902 applied to the print-out. On appeal however, the appellant cited case law in support of the proposition that the print-out was self-authenticating. In affirming the bankruptcy court, the district court noted that the authority cited was not binding and found the appellant's reliance on new arguments and authorities at the appellate stage to be inappropriate.).

*In re McLain*, 516 F.3d 301 (5th Cir. 2008) (before the bankruptcy court was whether the debtor used undisclosed pre-petition funds to make the first premium payment on an insurance policy such that the proceeds were part of the bankruptcy estate. The bankruptcy court held that while there was a question of material fact as to whether the debtor used such funds to pay the premium, the policy proceeds were regardless, not property of the estate. The district court affirmed on other grounds and found that the trustee failed to provide authenticated evidence that the debtors had meaningful cash on hand on the petition date. The trustee appealed and the appellate court reversed, holding that the evidence, a ledger sheet, was authenticated. The trustee argued that the ledger sheet included detail of the debtor's financial transactions and reflected that the debtor had cash on hand from an ATM withdrawal and his wife's paycheck. The debtor contended that he and his wife did not have funds on hand on the petition date (May 3, 2002) and that the ledger sheet failed to show various transactions, including evidence that his wife received a paycheck two days before the bankruptcy filing.

In holding the ledger authenticated, the appellate court opined that Rule 901(a) does not require conclusive proof of authenticity prior to allowing admission of disputed evidence. Rather, the rule only

requires some evidence to support a finding that the evidence is what its proponent claims it to be. Here, the court looked to such factors such as (a) the historic consistency of the wife's paychecks (evidencing payment on the first and fifteenth of every month), (b) the ledger sheet and supplementary banking records as initially attached to the debtor's own motion for summary judgment, and (c) the ledger sheet's numbers being consistent with other pieces of evidence, including admissible spreadsheets. The court found that the ledger was "not just a random collection of transactions created by [the trustee] out of thin air. It [was] a document filed by [the debtor] himself as an exhibit that carefully trace[d] a running balance of cash on hand. . . ." The court concluded that ledger was authenticated, and the district court erred in finding otherwise.).

*In re Ward*, 558 B.R. 771 (Bankr. N.D. Tex. 2016) (the trustee sought a declaratory judgment that the non-debtor's corporations were the debtor's alter egos and requested a constructive trust be imposed. The defendants responded through a motion for summary judgment and the court granted the motion. In its analysis, the court addressed authentication in the context of a certificate of limited partnership and tax returns. Relating to the certificate of limited partnership, the court noted that while the certificate had a stamp in the upper right-hand corner, supposedly indicating that it was filed with the Secretary of State, there was no associated filing number and the document was not under seal or certified. And while the plaintiff argued that the person who signed the certificate could be available at trial to authenticate the document, there was no showing that the person was within the court's subpoena power. The court thus found that the certificate was not authenticated. Next, the court looked to whether purported tax returns of the debtor's affiliated entities were authenticated. The returns were either marked as a copy and had no signature or were only signed by the tax preparer. The plaintiff nonetheless argued that the debtor could be called at trial to authenticate the unsigned tax returns and, even if he was not called at trial, the debtor previously authenticated the returns in a prior deposition. The court was not persuaded by the first argument because (1) the returns were either unsigned or signed only by the tax preparer and (2) none of the returns had a custodian affidavit (or other evidence) to authenticate them. Further, there was nothing to show that the returns were even filed with the IRS. As to the plaintiff's second argument, the court found that the returns were not authenticated at the deposition because, while the transcript indicated that the debtor was asked about tax returns, there were no exhibits attached to the deposition excerpts. There was simply nothing to show that when plaintiff's counsel asked the debtor about a return at the deposition, which return he was being asked about. Thus, the court held that the tax returns were not properly authenticated.).

**Addendum to**
**A Collection of Evidence & Advocacy Materials**
**U.S. Bankruptcy Judge Cynthia A. Norton, W.D. MO[2]**

**Discovery Motions**

**Bankruptcy Court Issues "Advisory" Opinion Calling Out Improper Discovery Tactics and How the Court Plans to Deal with Them in the Future. *In re Camferdam*, 2019 WL 3316133 (Bankr. N.D. Fla. May 15, 2019) (slip copy)**

Just as the court was in the process of finalizing its order on a discovery dispute motion (after having spent considerable time and resources thoroughly reviewing the pleadings in the case), the parties advised the court that they had resolved the dispute. However, expressing its clear frustration concerning the parties' discovery squabbles and the manner in which they brought the issue to the court (which, reading between the lines, may not have been isolated to this particular case or these particular attorneys), the court went ahead and issued an order "to ensure that the attorneys and parties will have a much clearer perception of how the Court views discovery disputes such as the one here."

The court said:

> In the undersigned's experience, from nearly thirty years as a litigator and now numerous years as a judge, the great majority of discovery disputes arise when one or both sides exhibit: (1) failure to grasp, or disdain for, the law, the rules, or the facts, (2) lack of professionalism, (3) lack of civility, (4) refusal to extend common courtesy to a fellow professional (and therefore to the Court), (5) bad faith, or (6) some or all of the above. It is sad to say, but true, that it is rare to see a truly justiciable discovery issue requiring thoughtful consideration and resolution by the Court which the parties have tried, in good faith, to resolve before requesting the Court's intervention.
>
> The Court is well aware that lawyers may do and say things during discovery that they would not dream of doing or saying if a judge were present. Certain conduct is unprofessional: counsel not returning telephone calls, always being "unavailable," refusing to agree to reasonable requests from opposing counsel on the basis that "my client won't let me," screening every communication through two layers of staff, firing off e-mails "confirming" something that was not agreed, and sending emails demanding action in an unreasonably short time, under threat of "filing something with the court."
>
> Failure of counsel to effectively communicate, or to communicate other than via email or in letters, will not be tolerated; it does a disservice to the parties and the Court. The Court has no interest in reading email exchanges between counsel complaining about not having heard back from a discovery request, a phone call or a prior email. If such communications are attached to discovery motions, they will either be ignored or stricken from the record.

[2] Addendum prepared by Erica Garrett, Law Clerk to Judge Cynthia A. Norton, United States Bankruptcy Court for the Western District of Missouri, for the National Association of Bankruptcy Trustees, August 2020 (not presented as a result of the pandemic).

> Claims of ethical violations are not taken lightly. If you have made such an accusation against opposing counsel, you have done so at your peril if you are not prepared to prove it.
>
> Fishing expeditions and questions and requests unlimited in time or place are disfavored, as are totally unsupported objections to discovery based on the usual boilerplate assertions that the request is overly broad or unduly burdensome, or that the information sought is irrelevant, privileged, or is unlikely to lead to the discovery of admissible evidence. A party must present something to back up this type of objection or it will be overruled.
>
> If a party has answered a discovery request "subject to" or after "reserving" an objection (or similar phrase), that party has waived the objection. A party either has a sustainable objection or it does not. Parties cannot have it both ways. Counsel should not assume that they will prevail on an argument that a common English word is "vague" or "ambiguous." If a party asserts that something is burdensome, that party must accompany the objection with facts to show it. In short, if discovery demands or responses are not well thought out and clearly presented, you are on shaky ground indeed.

*Camferdam*, 2019 WL 3316133 at *2.

Here, in the affidavit filed in support of the discovery motion, counsel for the plaintiff had certified that "[p]rior to filing the [Motion], [counsel] undertook *good faith efforts to confer with Defendant regarding the scope of discovery* ... in an attempt to limit discovery to the remaining pending claims in the Adversary Proceeding...." Although it was now moot, the court found this certification to be devoid of any certification that the parties had in fact conferred, as required by Fed. R. Civ. P. 26(c)(1) (made applicable by Fed. R. Bankr. P. 7026) and the court's local rules, and was, therefore, insufficient. *Id.* at *1.

## Judicial Notice

**Although not in the Context of a Bankruptcy Case, the Ninth Circuit Issues a "Primer" on When and How a District Court Should Consider Materials Extraneous to the Pleadings at the Motion to Dismiss Stage via Judicial Notice and the Incorporation-By-Reference Doctrine. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988 (9th Cir. 2018)**

This case involved a putative class action lawsuit by an investor in a biotechnology firm and its executives, alleging the firm and executives violated the Securities Exchange Act by misrepresenting material adverse information about a drug study. The district court dismissed the plaintiffs' complaint based, in part, on 21 documents that it judicially noticed or incorporated into the complaint by reference.

Reversing, the Ninth Circuit issued a treatise, of sorts, on judicial notice and the incorporation-by-reference doctrine with the expressly-stated goal of clarifying those issues, because, it said, it had noted "a concerning pattern in securities cases like this one: exploiting these procedures improperly to defeat what would otherwise constitute adequately stated claims at the pleading stage." Although the Ninth Circuit issued the detailed opinion based on that perception in the securities context, the opinion provides a good primer in all contexts. The Ninth circuit explained:

> Generally, district courts may not consider material outside the pleadings when assessing the sufficiency of a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. When "matters outside the pleading are presented to and not excluded by the court," the 12(b)(6) motion converts into a motion for summary judgment under Rule 56. Fed. R. Civ.

> P. 12(d). Then, both parties must have the opportunity "to present all the material that is pertinent to the motion."
>
> There are two exceptions to this rule: the incorporation-by-reference doctrine, and judicial notice under Federal Rule of Evidence 201. Both of these procedures permit district courts to consider materials outside a complaint, but each does so for different reasons and in different ways.

*Khoja* 899 F.3d at 998 (citations omitted). Although the Ninth Circuit said judicial notice and incorporation-by-reference do have roles to play at the pleading stage, courts should use caution in utilizing the doctrines:

> The overuse and improper application of judicial notice and the incorporation-by-reference doctrine, however, can lead to unintended and harmful results. Defendants face an alluring temptation to pile on numerous documents to their motions to dismiss to undermine the complaint, and hopefully dismiss the case at an early stage. Yet the unscrupulous use of extrinsic documents to resolve competing theories against the complaint risks premature dismissals of plausible claims that may turn out to be valid after discovery. This risk is especially significant in SEC fraud matters, where there is already a heightened pleading standard,[3] and the defendants possess materials to which the plaintiffs do not yet have access. If defendants are permitted to present their own version of the facts at the pleading stage—and district courts accept those facts as uncontroverted and true—it becomes near impossible for even the most aggrieved plaintiff to demonstrate a sufficiently "plausible" claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) ) (articulating standard for "plausible" claim for relief at pleading stage). Such undermining of the usual pleading burdens is not the purpose of judicial notice or the incorporation-by-reference doctrine.

*Id.* at 998-99 (additional citations omitted). With regard to judicial notice:

> Judicial notice under Rule 201 permits a court to notice an adjudicative fact if it is "not subject to reasonable dispute." Fed. R. Evid. 201(b). A fact is "not subject to reasonable dispute" if it is "generally known," or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(1)–(2).
>
> Accordingly, "[a] court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment." But a court cannot take judicial notice of disputed facts contained in such public records.

*Id.* at 999 (citations omitted).

In this case, the district court judicially noticed a transcript of a particular investors' conference call which had been submitted with one of the biotech firm's SEC filings. In the securities context, the court said, an investor call transcript submitted to the SEC generally qualifies as a "source[ ] whose accuracy cannot reasonably be questioned." under Fed. R. Evid. 201(b). However, the court said, "accuracy is only part of the inquiry under Rule 201(b)." Rather, "[a] court must also consider—and identify—which fact or facts it is noticing from such a transcript. Just because the document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth." *Id.*

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[3] In the bankruptcy context, fraud claims also have a heightened pleading standard. *See* Fed. R. Civ. P. 9(b), made applicable in bankruptcy cases by Fed. R. Bankr. P. 7009.

Here, the Ninth Circuit held, district court did not clearly specify what fact or facts it judicially noticed from this transcript; rather, the district court only indicated it would not "take notice of the truth of the facts cited" within the exhibit. According to the Ninth Circuit, if the district court judicially noticed that there was an investors' conference call on the particular date at issue, "that would, in theory, be permissible under Rule 201(b) because that fact 'can be accurately and readily determined' from the transcript." *Id.* at 999-1000.

However, the biotech firm had sought judicial notice of the transcript because it "reveal[ed] what investors already knew[ ] about the decision to conduct" another study besides the existing study to assess the drug's heart risks. Then, in its motion to dismiss the complaint, the firm relied on the transcript to demonstrate that it "previously disclosed ... that the FDA had determined that the [study] would not serve as the" definitive trial for the drug. Arguably, the Ninth Circuit said, such a disclosure would be significant to the plaintiff-investor's claim that the firm materially misrepresented the status of the study in 2015. If the firm already told investors that the study would not serve as the definitive trial, then the firm could argue that it did not necessarily mislead investors when it failed to inform them about the termination of the study.

But, the Ninth Circuit said, it was unclear from the transcript what exactly the firm had "previously disclosed" about the study because there were inconsistencies in the information that was given to the investors. Since "[r]easonable people could debate what exactly this conference call disclosed about the [study]," there was no fact established by the transcript which was "not subject to reasonable dispute," and the fact identified thus did not qualify for judicial notice under Rule 201(b). Therefore, to the extent that the district court judicially noticed the investors' call transcript for the purpose for which was offered, *i.e.*, to determine what the investors knew about the status of the study at that time, the Ninth Circuit concluded that the district court abused its discretion in taking judicial notice of the transcript. *Id.* at 1000.

The Ninth Circuit went on to discuss the district court's taking judicial notice of two other items and found the court had abused its discretion on one of them, but not the other, thereby providing a helpful guideline on what is permissible and what is not. *Id.* at 1001.

With regard to the incorporation-by-reference doctrine, the Ninth Circuit explained:

> Unlike rule-established judicial notice, incorporation-by-reference is a judicially created doctrine that treats certain documents as though they are part of the complaint itself. The doctrine prevents plaintiffs from selecting only portions of documents that support their claims, while omitting portions of those very documents that weaken—or doom—their claims.
>
> Although the doctrine is straightforward in its purpose, it is not always easy to apply. . . . [A] defendant may seek to incorporate a document into the complaint "if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." How "extensively" must the complaint refer to the document? This court has held that "the mere mention of the existence of a document is insufficient to incorporate the contents of a document". . . A more difficult question is whether a document can ever "form[ ] the basis of the plaintiff's claim" if the complaint does not mention the document at all.

*Id.* at 1002 (citations omitted). Although "there are those rare instances when assessing the sufficiency of a claim requires that the document at issue be reviewed, even at the pleading stage," the Ninth Circuit said, "if the document merely creates a defense to the well-pled allegations in the complaint, then that document did not necessarily form the basis of the complaint. Otherwise, defendants could use the doctrine to insert their own version of events into the complaint to defeat otherwise cognizable claims." *Id.*

> Submitting documents not mentioned in the complaint to create a defense is nothing more than another way of disputing the factual allegations in the complaint, but with a perverse added benefit: unless the district court converts the defendant's motion to dismiss into a motion for summary judgment, the plaintiff receives no opportunity to respond to the defendant's new version of the facts. Without that opportunity to respond, the defendant's newly-expanded version of the complaint—accepted as true at the pleading stage—can easily topple otherwise cognizable claims. Although the incorporation-by-reference doctrine is designed to prevent artful pleading by plaintiffs, the doctrine is not a tool for defendants to short-circuit the resolution of a well-pleaded claim.
>
> For this same reason, what inferences a court may draw from an incorporated document should also be approached with caution. We have stated that, unlike judicial notice, a court may assume [an incorporated document's] contents are true for purposes of a motion to dismiss under Rule 12(b)(6). While this is generally true, it is improper to assume the truth of an incorporated document if such assumptions only serve to dispute facts stated in a well-pleaded complaint. This admonition is, of course, consistent with the prohibition against resolving factual disputes at the pleading stage.

*Id.* (citations omitted)

In this case, the district court had incorporated eighteen documents, fifteen of which the plaintiff-investor objected to on appeal. For example, the district court incorporated a particular *Wall Street Journal* blog post titled "Orexigen Data is 'Unreliable and Premature': FDA's Jenkins Explains." The complaint quoted this post once in a two-sentence footnote explaining the meaning and significance of a "data access plan." According to the Ninth Circuit, "[f]or 'extensively' to mean anything. . ., it should, ordinarily at least, mean more than once."

"Otherwise," the Court said, "the rule would simply require a complaint to 'refer' to the document. In theory, a reference may be sufficiently 'extensive' if a single reference is relatively lengthy." Because there was only one reference, and it conveyed only basic historic facts about the data access plan, it was not sufficiently extensive under prior case law. Moreover, the blog post did not form the basis of any allegation in the complaint. Therefore, the district court abused its discretion in incorporating it. *Id.* at 1003-04.

The Ninth Circuit went on to analyze each of the various blog posts, articles, and other materials the district court had incorporated. In some instances, the district court abused its discretion, and in others, it did not. The discussion is, therefore, and interesting outline of what, at least in the Ninth Circuit, a court can incorporate by reference.

In the end, the Ninth Circuit affirmed, in part, and reversed, in part, and remanded the matter with instructions.

## Business Records Exception to Hearsay

**Eleventh Circuit Held a Loan Servicer Employee's Affidavit and Attached Documents Were Admissible Under the Business Records Exception to the Hearsay Rule and Was also Admissible as Being Reducible to Admissible Form. *Lewis v. Residential Mortgage Solutions,* 2020 WL 584059 (11th Cir. Feb. 6, 2020)**

In a removed lawsuit brought by a mortgagor against the lender and loan servicer seeking to enjoin foreclosure sale and seeking claims for breach of contract, trespass on title, and intentional infliction of emotional distress, the district court granted summary judgment in favor of the assignee and servicer. On appeal to the Eleventh Circuit, the mortgagor asserted the court had erred in relying on an affidavit of the

servicer's employee (identified as an "FCL supervisor/Doc Signing"), with supporting documents, at the summary judgment stage, as being impermissible hearsay.

The documents attached to the affidavit included: the Security Deed between the parties; the Adjustable Rate Note evidencing the $294,400 loan from the lender to the borrower; a Loan Modification Agreement between the parties; the Assignment from MERS to RMS; several items of correspondence between the parties concerning the borrower's request for a loan modification and the reasons why the modification had been denied; a Notices of Servicing Transfer and additional correspondence informing the borrower that a new servicer would collect her payments moving forward; a Notice of Default and Intent to Accelerate; correspondence from the servicer's foreclosure counsel, to the borrower providing her with mandated FDCPA disclosure and a Notice of Sale; correspondence from the servicer to the debtor responding to her payoff inquiries; a Qualified Written Request, from the borrower to the servicer and its counsel and the responses thereto; and the recorded Deed Under Power of Sale.

Affirming the district court's grant of summary judgment in favor of the lender, the Eleventh Circuit held that the district court did not err in relying on the affidavit and supporting documents.

The business records exception to hearsay is found in Fed. R. Evid. 803(6), which makes admissible a "record of an act, event, condition, opinion, or diagnosis" if:

> (A) the record was made at or near the time by -- or from information transmitted by -- someone with knowledge;
>
> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
>
> (C) making the record was a regular practice of that activity;
>
> (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
>
> (E) the opponent does not show that the source of the information or the method of circumstances of preparation indicate a lack of trustworthiness.

Fed. R. Evid. 803(6).

In the Eleventh Circuit, the "touchstone of admissibility under the business records exception to the hearsay rule is reliability, and a trial judge has broad discretion to determine the admissibility of such evidence." *Lewis*, at *3 (citation omitted). To satisfy the exception, the Eleventh Circuit requires that "it was the business practice of the recording entity to obtain such information from persons with personal knowledge and the business practice of the proponent to maintain the records produced by the recording entity." *Id.* (citation omitted).

The Eleventh Circuit held that the documents attached to the affidavit fell "well within the bounds of this exception." For starters, the Court said, requirements (A) through (C) were "easily met" because all of the documents were contemporaneous records, prepared by parties with first-hand knowledge -- either by the lender, the loan servicers, foreclosure counsel, or the borrower herself. And, the documents were naturally of the type regularly produced, and kept in the ordinary course of providing loans to borrowers secured by home mortgages. *Id.*

Moreover, the affiant was a "qualified witness" permitted to introduce these documents into evidence because she averred that she was a foreclosure supervisor at the servicer and was "personally familiar with

the facts set forth" in her affidavit, along with "the records of [the servicer] with regard to this matter." "This is all the rule requires," the Eleventh circuit held. *Id.* The "qualified witness" need not herself to have prepared the documents, "so long as other circumstantial evidence and testimony suggest their trustworthiness." *Id.* (citation omitted). As for requirement (E), the borrower had given the court no reason to doubt that the documents were what they purported to be. Much to the contrary, she had referred to many of these documents herself in her pleadings. Thus, because the affidavit fell within an exception to the rule against hearsay, the district court did not abuse its discretion by considering it at the summary judgment stage. *Id.*

And, even if the Court were to conclude otherwise, it said it would still affirm because the affidavit could have been reduced to non-hearsay form at trial. "The general rule is that inadmissible hearsay cannot be considered on a motion for summary judgment." *Id.* at *4 (citation omitted). Nonetheless, "a district court may consider a hearsay statement in passing on a motion for summary judgment if the statement could be reduced to admissible evidence at trial." *Id.* (citation omitted).

The most obvious way to reduce hearsay to admissible form is to call the declarant to testify at trial, but the Eleventh Circuit has recognized that this approach does not work in a couple of instances: "We don't allow courts to consider hearsay evidence when there is only a hypothetical witness who might come forward to testify at trial . . . [and] we also don't allow courts to consider hearsay at the summary judgment stage when 'the declarant has given sworn testimony during the course of discovery that contradicts the hearsay statement.'" *Id.* (citations omitted).

However, the Eleventh Circuit concluded, neither of those limitations applied to this case because there was no indication in the record that the affiant -- or another servicer employee familiar with these documents and the company's record maintenance -- would be unavailable to testify at trial. *Id.* In addition, the borrower had not argued that anything in the record contradicted the affidavit. Nor did the Court see how she could contradict the affidavit, since the evidence available supports the veracity of the documents included in the affidavit and their admissibility under the business records exception. *Id.* Therefore, the district court did not abuse its discretion in admitting the documents either as business records or as reducible to admissible form, and the Eleventh Circuit affirmed.

**Court Finds Business Records Sufficiently Reliable to Satisfy Rule 803(6)'s Business Records Exception and 807(a)'s Residual Exception in a Madoff Fraudulent Transfer Recovery Action. *SIPC v. Bernard L. Madoff Investment Securities, LLC*, 610 B.R. 197 (Bankr. S.D. N.Y. 2019)**

In this case, the trustee seeking to compensate victims of Bernard Madoff's Ponzi scheme sought to recover, as fraudulent transfers, more than $3 million from a couple who drew from their accounts with Madoff for years before the scheme's collapse. In finding the trustee could avoid and recover the fraudulent transfers, the bankruptcy court rejected the couple's argument that the transfers were made by Madoff personally, rather than by his now-bankrupt company.

The case involved many complicated legal, factual, and evidentiary issues, one of which was the defendants' argument that the customer statements, customer correspondence and files, and debit memos which the trustee sought to introduce were hearsay. The court ruled, however, that they fell within the business records exception to hearsay under Fed. R. Evid. 803(6) and the residual exception under Rule 807(a).

According to the court, "[t]he business records exception has been construed generously in favor of admissibility, due to the general trustworthiness of regularly kept records and the need for this type of evidence in many cases." 610 B.R. at 222 (citation omitted). The principal precondition to the admission of a document under the business records exception is that the records "have sufficient indicia of trustworthiness to be considered reliable ... [and] [t]he determination of whether, in all the circumstances,

the records are sufficiently reliable to warrant their admission in evidence is left to the sound discretion of the trial court." *Id.* at 223 (citation omitted). Further, the court said, "[t]he custodian need not have personal knowledge of the actual creation of the document to lay a proper foundation." *Id.* (citation omitted).

The defendants objected to the admission of the records under Rules 803(6) and 807(a) as "unreliable hearsay" because, they asserted, they were "permeated with fraud" and were not trustworthy. However, the court found, the testimony at trial showed otherwise inasmuch as the records proved the defendants' deposits and withdrawals over the lives of their accounts, and particularly, during the two year period prior to the bankruptcy. While the defendants challenged the trustee's contention that Madoff's LLC ("BLMIS"), rather than Madoff, made the transfers, they did not dispute the transfers themselves. Moreover, the transfers were confirmed through a reconciliation with BLMIS bank records and were evidenced by checks whose admissibility the defendants did not challenge. In addition, the debit memos to which the defendants did object matched each undisputed transfer and thus, were trustworthy and reliable, and not "permeated with fraud," and thus admissible under the business records and residual exceptions to hearsay. *Id.* at 223-24.

## Judicial Admissions and *Res Judicata*

**Listing an IRA as an Asset on Schedules is Neither a Judicial Admission nor *Res Judicata* on the Question of Whether it is Property of the Estate. *In re Hoffman*, 605 B.R. 560 (Bankr. N.D. Ga. 2019)**

In this case, a creditor objected to the chapter 7 debtor's claimed exemptions in his IRAs. When the objection was sustained, the debtor asserted the IRAs were excluded from the estate as retirement accounts pursuant to § 541(c)(2). The creditor asserted the debtor was barred from making that argument under the judicial admission doctrine and *res judicata*, since he had listed the IRAs as assets of the estate on his schedules and "affirmed" this admission in his sworn testimony in both the § 341 meeting and his 2004 examination.

Generally speaking, "judicial admissions are formal concessions in the pleadings, or stipulations by a party or its counsel, that are binding upon the party making them and may not be controverted at trial." 605 B.R. at 564. "Judicial admissions must be clear, deliberate, and unequivocal factual assertions." *Id.* at 565. Judicial admissions are not considered evidence, "but rather have the effect of withdrawing a fact from contention[,]" and are conclusive unless the court allows the party to withdraw the admission or "the pleading is amended or withdrawn." *Id.* (citation omitted).

According to the court, statements in bankruptcy schedules are executed under penalty of perjury and, when offered against a debtor, are eligible for treatment as judicial admissions. 605 B.R. at 565 (citation omitted). However, disclosing property does not waive the argument that property is not property of the estate. *Id.* (citation omitted) "In fact," the court said, "the Code requires full disclosure of property, some of which may not be property of the estate, for the concept of property of the estate is a fact-based legal conclusion to be decided by the court after the facts are reviewed by interested parties." *Id.* (citation and internal quote marks and brackets omitted).

Further, the court held, because the debtor subsequently amended Schedule C to claim both exemption and exclusion of the IRAs, to the extent it had been a judicial admission, it ceased to be one: "When a pleading is amended, the superseded portion ceases to be a judicial admission." *Id.* (citation omitted). Moreover, the court held, the debtor's statement that the IRAs were property of the estate was a legal conclusion, and, therefore, did not qualify as a judicial admission. *Id.* at 566.

The court acknowledged that the debtor amended Schedule C only after the hearing on the objection, and that *res judicata* bars a debtor from repeatedly amending their schedules to assert new theories for why a particular asset is exempt from bankruptcy. *Id.* at 565. However, the court said, a debtor is generally

permitted to amend the list of exemptions "as a matter of course any time before the case is closed" under Rule 1009(a). The amended Schedule C did not conflict with the arguments raised by the debtor in his responsive pleadings and at the hearing, but merely incorporated those arguments into the schedules. *Id.* In addition, to the extent that the creditor was attempting to preclude the debtor's exclusion argument through *res judicata* or judicial estoppel, the court found those doctrines did not apply because there had been no prior proceeding, judgement, or decision rendered on this matter. *Id.* at 566.

**Offers of Proof**

For an interesting discussion of the use of offers of proof under Federal Rule of Evidence 103 in bankruptcy litigation, *see* David M. Zensky, Moderator; Hon. Laurel M. Isicoff, Michael P. Richman, Andrew I. Silfen, John C. "Kit" Weitnauer, *How to Win the Losing Case*, November 30, 2017 American Bankruptcy Institute 45 (American Bankruptcy Institute 2017 Winter Leadership Conference, November 30 - December 2, 2017), found on Westlaw at 113017 ABI-CLE 45.

## Second Addendum to
## A Collection of Evidence & Advocacy Materials
## U.S. Bankruptcy Judge Cynthia A. Norton, W.D. MO[4]

### Judicial Notice

**Bankruptcy court struck a portion of a reply brief which relied on two non-final decisions issued by other courts. *In re Cruz*, 2020 WL 3167799 (Bankr. S.D. Tex. June 12, 2020)**

The United States Trustee filed a motion asking the bankruptcy court to examine the debtor's transactions with her attorneys (Deighan Law LLC d/b/a Upright Law and two of its associated local attorneys), cancel the debtor's agreement with Upright and the individual attorneys, disallow and order disgorgement of excessive fees, and impose sanctions against the attorneys. Following a trial, the court issued an order to show cause directing the individual attorneys to turn over certain documents. Following several hearings on the order to show cause, the court entered a new scheduling order with deadlines for the UST to file a post-hearing brief, for the individual attorneys to file responsive briefs, and for the UST to file a reply brief. After several extensions, each of the parties filed the allowed briefs by the respective deadlines.

Thereafter, Upright filed a motion to strike portions of the UST's reply brief, arguing that the UST raised new arguments for the first time in the brief. The UST objected, arguing that Upright's motion was a disguised sur-reply, which was not authorized under the scheduling order. Upright argued, among several other things, that the court should strike two footnotes in the UST's reply brief because the UST cited to two non-final decisions issued by other courts in which they criticized Upright's counsel.

Federal Rule of Evidence 201 permits the court, on its own, to judicially notice a fact that is not subject to reasonable dispute because it is generally known within the trial court's territorial jurisdiction or can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned. The court held that although it could take judicial notice of the two non-final decisions from other courts, it could not take judicial notice that their contents were accurate. Accordingly, because the court could not properly consider the cases, it granted Upright's motion to strike the footnotes.

### Rule 2004 Examinations

**A Rule 2004 examination was improper, not only due to improper service on foreign parties, but also because there was a related adversary proceeding pending between the parties which was governed by its own discovery rules. *In re Sheehan*, 625 B.R. 72 (Bankr. N.D. Ill. 2021)**

The individual chapter 11 debtor-in-possession sought authority to conduct discovery under Federal Rule of Bankruptcy Procedure 2004 of certain parties, many of whom were involved in litigation against him in Ireland. The court denied several of his motions for lack of service, questioning whether service on the foreign parties was proper under Federal Rule of Civil Procedure 4(f), Federal Rules of Bankruptcy Procedure 9014 and 7004, and the Hague Convention.

In addition, the court held, discovery under the civil rules, generally applicable in adversary proceedings, can be somewhat less expansive than the scope of inquiry allowed under Rule 2004. Unlike Rule 2004, discovery under the civil rules has to be "relevant and proportional" under Rule 26(b)(1). Since there was

[4] Addendum prepared by Erica Garrett, Law Clerk to Judge Cynthia A. Norton, United States Bankruptcy Court for the Western District of Missouri, for the National Association of Bankruptcy Trustees, August 2021.

a pending adversary proceeding between the parties governed by those civil rules, the debtor was not entitled to conduct Rule 2004 exams as well.

## Rule 3001 – Evidence Supporting Secured Vehicle Lien

**Third-party "Electronic Lien and Titling Report" for a vehicle does not satisfy Rule 3001 to establish prima facie evidence of perfection. *In re Ramos*, 2020 WL 3041273 (Bankr. E.D. N.C. June 3, 2020)**

The chapter 13 debtor purchased a new vehicle nine months prior to filing, financed by Ally Bank. Ally filed a secured proof of claim, and attached to the claim an "Electronic Lien and Titling Report" from PDP Technologies, a third-party vendor providing electronic titling and lien recording services to lenders. The ELT report did not include the lien date. The trustee objected to the claim, asserting that the documentation attached to it was insufficient evidence of a perfected security interest in the car. Rather, the trustee asserted, under North Carolina law, a certificate of title or equivalent documentation from the DMV had to be attached to prove a perfected security interest, and without such documentation, the proof of claim failed to comply with Federal Rule of Bankruptcy Procedure 3001(d). Therefore, the claim should only be allowed as an unsecured claim.

As perhaps other states have similarly done, North Carolina has initiated an "Electronic Lien Titling System" requiring lienholders who conduct a minimum number of transactions annually (which includes Ally) to register for the program and sign up with an approved service provider. The statutory scheme provided that "[w]hen electronic transmission of liens and lien satisfactions is used, a certificate of title need not be issued until the last lien is satisfied and a clear certificate of title is issued to the owner of the vehicle." This is an exception to the general rule that "[t]he Division shall deliver or mail the certificate to the first secured party named on it and shall also notify the new secured party that his security interest has been noted upon the certificate of title." Therefore, according to the court, lienholders under the electronic lien system no longer automatically receive a certificate of title with the notation of the perfected security interest from the DMV after the lien is placed. Yet, the court said, nothing in the electronic system alters the procedure that the notation of a perfected security interest is done on the certificate of title.

The information available from the DMV to the service providers includes basic details, but the service providers individually develop their own templates to "pull" additional information from the DMV database. The service providers then provide information to their clients via the ELT report. Since each service provider creates its own templates, ELT reports vary from one service provider to another, and may or may not include all the necessary DMV information. Therefore, court said, "therein lies the problem" in relying on the reports as proof of perfection.

Rule 3001(f) provides that "[i]f a security interest in property of the debtor is claimed, the proof of claim shall be accompanied by *evidence* that the security interest has been perfected" and that "[a] proof of claim executed and filed *in accordance with these rules* shall constitute prima facie evidence of the validity and amount of the claim." (Emphasis added by the court.) In order to meet the prima facie presumption, though, the documentation supporting the claim "must comport with the Federal Rules of Evidence" which apply to "proceedings in the United States courts."

According to the court: "To gain benefit of the supported proof of claim being prima facie evidence of the perfected claim, the supporting evidence literally must play by the rules. A filed proof of claim, with appropriate documentation, gives prima facie status when that documentation is, itself, admissible evidence." The ELT report, the court ruled, was hearsay and did not qualify under any exception to the hearsay rules, including the business records exception, and they did not meet basic standards of reliability.

In the end, the court denied the trustee's objection to the claim because the debtor and Ally provided sufficient evidence of perfection, but the court nevertheless issued this opinion to give creditors guidance on using ELTs to support a secured claim.

## Attorney-Client Privilege

**Debtor did not waive attorney-client privilege as to an exhibit by failing to object or otherwise assert the privilege before the day of the trial on denial of her discharge.** ***In re Wise*****, 592 B.R. 132 (Bankr. E.D. Mich. 2018)**

The United States Trustee and a judgment creditor brought adversary proceedings seeking to deny the debtor's discharge. Apparently, there was a separate adversary proceeding against another party, in which the debtor was not a defendant, and in which a privileged document was produced. Shortly following a trial on the denial of discharge adversaries, the court ordered the parties to brief whether the debtor-defendant had waived any attorney-client privilege she may have had with respect to the privileged exhibit which had been produced in the separate adversary by failing to object or otherwise assert the privilege before the day of her own trial. The court held that she had not waived the privilege because there was no evidence the debtor had ever authorized the other defendant to disclose the privileged communications to anyone, and there was no evidence to show the existence of any exception that would permit the attorney to produce or disclose the exhibit. Therefore, the disclosure of the document by the defendant in the other adversary was not deemed to be a disclosure of such document on behalf of the debtor-defendant in this adversary for purposes of Federal Rule of Evidence 502(a) or (b), and her assertion of the privilege on the day of trial was timely.

**State court rules there is no attorney-client privilege for a party's handwritten notes created during a deposition.** ***Ford-Bey v. Professional Anesthesia Services of North America, LLC*****, 229 A.3d 984 (Pa. 2020).**

Wanetta Ford-Bey died of respiratory failure shortly after undergoing surgery at a surgical center. The administrator of her estate, Wakeem Ford-Bey, commenced a medical malpractice action against the anesthesia group and some of the individuals involved in the surgery, including Thomas Maddaloni. Maddaloni was asked at his deposition if, when he reviewed the chart in preparation for the deposition, he had made notes on it to assist in his review. He answered in the affirmative, but said he had left the chart with the notes at his home. He was then asked, if he didn't have the chart, would he be able to remember the specifics of each and every aspect of the treatment at issue, to which he responded in the negative.

The plaintiff's attorney then asked for the annotated medical chart, both formally and informally, to which Maddaloni's counsel objected on privilege and work product grounds. Initially, the court rejected those arguments, in part because Maddaloni had not filed any sworn statements explaining why the privileges covered the notes, and ordered them produced. Maddaloni then filed a motion to supplement the record with his affidavit which would likely have made a prima facie privilege document which would have shifted the burden to the plaintiff. The court ruled the affidavit was filed too late, but also rejected Maddaloni's argument that a client's notes were, *ipso facto*, attorney-client privileged.

According to the court, the attorney-client privilege covers "communications" – meaning communications between lawyers and clients. Since Maddaloni had not proven that he had communicated the medical chart notes to his attorney or created them with the intent to do so, they did not qualify.

In addition, the court rejected the work product doctrine because that doctrine protects the attorney's, and not the client's, mental impressions and opinions.

**Bankruptcy court holds bank waived attorney-client privilege by asserting a good faith affirmative defense under § 548(c). *In re Mongelluzzi*, 568 B.R. 702 (Bankr. M.D. Fla. 2017)**

After the debtors' related cases was converted from chapter 11 to chapter 7, the chapter 7 trustees brought an adversary proceeding against the debtors' bank seeking to avoid fraudulent transfers, and asserting claims for unjust enrichment, aiding and abetting breach of fiduciary duty, and recovery of property in connection with a check-kiting scheme. The trustees alleged that the bank had knowledge of the scheme and that it had devised a controlled exit strategy to reduce its exposure, which included freezing the debtors' accounts and setting off roughly $12 million against the obligations it was owed by the debtors.

The bank answered the fraudulent transfer claims asserting, *inter alia*, an affirmative defense that it had acted in good faith and gave reasonably equivalent value.

After a thorough and concise discussion of the attorney-client and work-product privileges, the court explained the that privileges are not absolute. "Waiver of either privilege can occur if the holder of the privilege asserts a claim or affirmative defense that puts the privileged matter directly at issue" and the party asserting waiver bears the burden of establishing the waiver. "The 'at issue' doctrine rests on the principle of fairness and stems from the premise that the attorney-client privilege cannot be used as both a sword and a shield," the court held.

Here, the court held, because the bank's good faith defense to the fraudulent transfer claim put its knowledge and intent at issue, the allegedly-privileged documents were most likely the most probative, if not the only, evidence of the bank's state of mind at the time of the transfers. Therefore, the privileges were waived and the bank was ordered to produce them.

## Expert Report Deadlines

**Bankruptcy court allows a bankrupt restaurant company to pursue its malpractice suit against its attorneys for missing the deadline to submit expert reports in an adversary against the debtor's landlord. *In re Blue Dog at 399 Inc.* (Case No. 15-10694); *Blue Dog at 399 Inc v. Seyfarth Shaw LLP et al.*, (Adv. No. 19-1029) Bankr. S.D. N.Y. (Aug. 1, 2019); *see also Blue Dog at 399 Inc. v. Seyfarth Shaw, LLP et al.*, 2020 WL 6390674 (Bankr. S.D. N.Y. Oct. 30, 2020)**

Pre-bankruptcy, Blue Dog at 399 entered into a commercial real property lease to operate a café in midtown Manhattan. A dispute arose between Blue Dog and the landlord before the café could open, resulting in Blue Dog's bankruptcy filing. The dispute eventually became the subject of an adversary proceeding against the landlord. The bankruptcy court entered a joint pretrial scheduling order setting various discovery deadlines in the adversary. After some extensions, the deadline for the completion of both fact and expert discovery was set for August 10, 2016, with an express warning by the court to the parties that no further extensions would be granted.

Blue Dog's attorneys did not make a timely identification of any expert witness, and indeed waited until the day following the August 10 deadline to even retain an expert to prepare a report on the economic damages resulting from the café's failure to open. Blue Dog also retained another expert to testify about other issues, but did not disclose that expert by the deadline, either. Rather, it first disclosed the two experts when it filed its opposition to the landlord's motion for summary judgment. The bankruptcy court struck the untimely expert reports and prohibited Blue Dog from using the experts at trial.

Ultimately, Blue Dog retained new counsel and settled with the landlord for $300,000. It then filed an adversary proceeding against the law firm (and the particular attorney there who handled the case), alleging

negligence, legal malpractice, and violation of New York judiciary law, because, it alleged, the exclusion of the experts required it to settle with the landlord for far less than Blue Dog thought its claim was worth. The Complaint against the law firm and attorney alleged damages in excess of $150 million.

### Business Records Exception to Hearsay Rule

**An attorney's computer-generated time records were admissible on fee apportionment issue. *In re Kupfer*, 579 B.R. 222 (Bankr. N.D. Cal. 2017)**

Commercial lessors of the chapter 11 debtor-lessees filed a proof of claim in the case, seeking to recover a prepetition arbitration award, including attorney fees and arbitration costs, arising from the debtors' breach of the leases. The debtors objected, asserting the fees and costs were subject to § 502(b)(6)'s cap on claims for lease termination damages. The bankruptcy court held the fees and costs were not capped, but the Ninth Circuit reversed and remanded, reasoning that an all-or-nothing approach was not appropriate in determining the allowed amount of disputed fees and costs.

At issue here was apportioning the fees and costs as uncapped or capped. Among other legal and evidentiary issues, the court held that the time records that were generated by the lessors' attorney for the time he spent in representing the lessors, both in pursuing the lease termination-damages claim and in pursuing other relief not subject to the § 502(b)(6) statutory cap, were admissible under the business records exception to the hearsay rule. The court reasoned that it was the attorney's regular practice to keep records of the time spent on matters, there was nothing to suggest the records were not made within a reasonable time after the services were rendered, and the attorney was able to operate his practice only if the computer-generated were accurate.

### Declarations Under Fed. R. Civ. P. 56(c)(4)

**Bankruptcy court holds that a declarant need not be the person who authenticates his own exhibits for them to be admissible under Rule 56(c)(4). *In re LTC Holdings, Inc.*, 596 B.R. 797 (Bankr. D. Del. 2019)**

This case involved a lien priority and equitable subrogation dispute. The first lien creditor moved to strike the declaration and exhibits offered by another party in support of its motion for summary judgment. Federal Rule of Civil Procedure 56(c)(4) sets out three elements that a declaration must meet in order to be admissible: it "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." The rule does not limit proponents or opponents to a summary judgment motion to relying on evidence already in the record; rather, it allows parties to attach new documents to the declarations.

Prior to 2010, summary judgment evidence had to meet trial-like requirements, the court said. However, an "overhaul" to the rule changed the evidentiary standards for summary judgment to streamline the process, and to allow the court to assess whether there is sufficient evidence to justify a trial "without imposing on parties the time and expense it takes to authenticate everything in the record." "Authentication," in this context, "is an incredibly slight burden, which may be satisfied by simply producing evidence sufficient to support a finding that the item is what the proponent claims it is."

Here, the court held, a declarant who was never the debtor's employee was qualified to authenticate the business records at issue because he had been in charge of the files and had personal knowledge of the issues.

## Part II: Thoughts on Trial Preparation Strategies For Bankruptcy Lawyers[5]

Before you file the complaint:

- Interview the client thoroughly; take good notes. Make sure you know who is the real party in interest is who has the standing to bring the action.
- Ask who else has knowledge of the events and who might be a good witness.
- Immediately determine if there is a statute of limitations for filing the complaint and calendar it, along with several pre-deadline reminders (e.g., S/L in Johnson case expires on 4/15 – 90 days to go). Err on the side of caution in calculating the statute of limitations (e.g., if it is a one-year statute that begins running on Jan. 17, don't calendar Feb. 17 – the deadline may be Jan. 16, or earlier, depending on how the days are counted.
- Gather all pertinent documents and keep them in one place; make copies of the original documents (so you can make notes on them if you need to) and safeguard the originals in a secure location (firm safe deposit box) so they aren't lost or defaced for the trial. Make sure not to rearrange original documents, such as a file folder. If what is in a file folder and/or the order the documents are in may be important, then make a copy and bate-stamp the pages so you have a record.
- Remember to ask for relevant electronic documents, such as calendars, emails, cell phone records, etc., and remind the client of the duty not to erase, discard, throw away, etc., anything relating to the litigation (explain spoliation and sanctions) until you advise it is OK to do so. Remind the client to let you know immediately if he or she finds other documents that may be pertinent.
- Make an initial timeline of the pertinent events with references to where in the file/record you obtained the date/event.
- Ask the client who he or she has talked to about the case or given a statement too (if so, obtain the statement). Remind the client that he or she should not talk to other people about the case or what you have advised as that may waive the attorney-client privilege.
- Ask the client specifically what his or her goals for the litigation may be and make clear you are sure about the goal and that the goal is something you can legally and ethically accomplish.
- Consider whether there may be other related causes of action and discuss with the client the advantages and disadvantages of including those. For example, do you really need FDCPA and FRCA if you have a strong discharge injunction violation? Do you want a jury trial?
- Decide what court is appropriate to bring the action in. Ask yourself: does this court have the authority to do what I want it to do?
- Research the relevant law to make sure you know all the elements so that you can tailor your factual allegations to make sure all relevant elements have been pled.
- Make sure you understand the nature of the remedies you are seeking (injunctive relief? Declaratory relief? Money judgment? Attorneys fees? Indemnity? prejudgment interest?etc.).
- Review Fed.R.Bankr.Proc. 7008, 7009, and 7010, and any local rules implementing Rule 8 pleading requirements.
- Manage the client's expectations, by having an engagement letter that clearly specifies the scope of the engagement (does it include appeals?); how the attorneys fees and costs will be dealt with; what decisions you are authorized to make on the client's behalf (e.g., you have the authority to consent to requests for extensions, whether to depose a witness, what witnesses or evidence to adduce at trial, etc.); that you cannot guarantee a particular result; that the client has the duty to respond timely to discovery requests from the other side and to court orders, among other things.
- If ethically required and otherwise appropriate, send a demand letter to the opposing side. Sometimes it is even better to pick up the phone! Maybe this is something that can be settled without litigation?

[5] Originally prepared and presented by Hon. Cynthia Norton in Nov. 2017 to the W.D. Mo. Trial Academy.

- Draft the complaint and send it to the client for review and approval before you file it; consider whether the complaint should be verified by the client.
- Double-check the name and organization type of the defendant(s).
- Double-check Rule 7004 to make sure you know how to obtain good service over the defendant(s).
- As a gut check, ask your client what he or she thinks about what the defendant will say in response to the complaint – sometimes surprising things the client "forgot" to tell you pop out at this stage.
- As a final gut check, ask again how you/your client are going to be able to prove what the complaint alleges.

Before you file the answer (in addition to the relevant steps outlined above):

- Calendar the answer date immediately.
- Review the complaint with the client and keep good notes.
- Review the summons/service to make sure service was good.
- Ask if there is any insurance coverage and obtain any applicable policies immediately; calendar any deadlines for making a claim.
- Review Rule 8 regarding pleading and Rules 9(b) and 12 to see what defenses if any may apply.
- Consider whether there are counterclaims or third parties to add (Rules 13 and 14).
- Consider whether there is a jury trial right.
- Consider whether you have a right to attorney fees.
- Draft answer, answering each paragraph separately, keeping in mind the Rule 8 and 11 duties to answer allegations in good faith.

At the time the complaint is filed:

- If you haven't already, make a trial notebook. It will eventually include the complaint, the answer, the PTO order, witness outlines, exhibit list, pertinent case law, etc.
- Send a copy of the filed complaint to the client and ask the client to review and let you know if there is anything that needs to be amended.
- Request the alias summons and calendar 7 days to serve along with the dates in the pretrial order you receive from the court.
- Calendar other pertinent procedural dates: 21 days to amend once the complaint is served without leave of court (Rule 7015); 35 days for the answer date; 90 days to achieve service (Rule 4(m)).
- Map out discovery strategy; discuss with client for buy-in (not consent, because client doesn't have to consent); calendar potential dates.
- Once the court has set deadlines, then calendar all dates, starting with the trial date and working backwards, e.g., 30 days till trial -- start witness prep; 20 days till trial – subpoena witnesses; 60 days to discovery cut off – send interrogatories; 30 days till dispositive motions – start summary judgment motion, etc.
- Send all the dates to your client and the witnesses you intend to call well in advance!

General Observations Regarding Litigation Preparation

- You must prepare as though you are really going to have to go to trial.
- Trial preparation should be prospective, which involves a different skill set from being a flat fee consumer lawyer.
- Deadlines are important in litigation! Blown discovery deadlines may result in sanctions.
- Rules of Procedure are important in litigation!
- Rules of Evidence are doubly important in litigation!

- Be prepared at all status conferences with the Court – consider how much time you need for discovery, whether you will be filing a dispositive motion, what a deadline for amendments should be, what a deadline for designating experts should be, and discuss these with opposing counsel before hearing.
- Take the time to write a trial brief at the start of your trial preparation. It will cause you to focus on the facts you need to prove and what the law is (and a well-written succinct trial brief will really assist the judge). It will also help you order the exhibits in the order they will naturally come into evidence.
- Make sure your client and all your friendly witnesses know in advance (and in plenty of time) when the trial will be and that you will want time to prepare with them.
- Consider whether you need to subpoena hostile witnesses.
- Consider whether to file motions in limine (such as to address an evidence issue in advance).
- Consider bringing a nervous client to the courtroom in advance (ask the CRD to open the courtroom for you) to show the client where he or she will sit, get sworn, and testify. Be sure to tell the client what to wear, how to act (no grimacing or making faces at the opposing side), to remember to bring a picture ID, etc.
- If using courtroom technology, make a trial run to make sure everything works.
- Prepare a witness outline that tells the story, incorporates your exhibits, and contains the elements necessary to lay the foundation for each exhibit (even if you anticipate stipulating to them by the date of trial).
- Prepare a separate outline of potential cross-examination points for each witness and important exhibit; include references to the FRE you anticipate using to challenge a witness or exhibit.
- Put the exhibits in a notebook marked on each page (in Adobe Professional, use the footer function which has a built in numbering mechanism, e.g., EXH A p.1 of 8). Remember to have an original exhibit notebook for the witness for the record, in addition to one for you, the judge, perhaps the law clerk, and the client to follow along with.
- NOTE: Since exhibit tabs and notebooks are expensive, scavenge them from other matters and save them to reuse.
- Draft a short opening (what the case is about; how many witnesses you intend to call and briefly what they will testify about; what relief you will be asking for).
- If appropriate, draft a closing.
- Rehearse, rehearse, rehearse, but don't drink the Kool-Aid so much that you don't focus on what the other side's case is going to be and how you are going to defeat it.
- At this point, you will be prepared, so you can tell yourself, I'm just going to go have fun!

# Part III: Evidence for the Trustee Staff Attorney (but applicable to all)[6]

## 1. Anticipating When Evidence Will Be Needed

### *A. Evidence in General*

Rule 9014 governs contested matters. The Federal Rules of Civil Procedure selectively apply to contested matters pursuant to Rule 9014(c). Rule 9014(d) provides that the testimony of witnesses with respect to disputed material factual issues shall be taken in the same manner as testimony in an adversary proceeding; Rule 9014(e) provides that "[t]he court shall provide procedures that enable parties to ascertain at a reasonable time before any scheduled hearing whether the hearing will be an evidentiary hearing at which witnesses may testify."

Rule 9017 provides that the Federal Rules of Evidence, and Rules 43, 44, and 44.1 of the F.R.Civ.P. apply in bankruptcy cases.

Rule 43 provides generally that witness testimony must be taken in open court, but that "when a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions." Rule 43(c).

***Checklist:***

- **Burden of Proof/Production**: Do you have the burden of proof or the burden of going forward with evidence to support your objection even though the opposing party has the ultimate burden of proof? (e.g., lien avoidance, claim objections, objection to exemptions, motions to dismiss)
- **Disputed Facts**: Is there a disputed issue of fact? (e.g, notice, intent, value, liability, good faith, malice, mistake, knowledge, etc.)
- **Witness Credibility:** Is there an issue of witness credibility? (e.g, good faith, intent, reliance, etc.)
- **Expert Needed:** Is there an issue requiring scientific, technical or other specialized knowledge in order for the bankruptcy judge as the trier of fact "to understand the evidence or to determine a fact in issue" such that an expert witness is needed? (e.g., value, damages, causation, etc.). See F.R.E. 702.
- **Your Judge:** Does your judge want evidence?

***Selected Case Authorities***

*In re Lyon & Lyon, LLP*, 2005 WL 6960226 at *9 (9th Cir. BAP 2005) (trustee objected to employee's claim for compensation; bankruptcy court erred in failing to hold an evidentiary hearing; the proof of claim met the minimum requirements to establish a *prima facie* presumption of validity; Trustee's evidence did not rebut the presumption because the declarations were inadmissible hearsay, and no books or records were proffered. Additionally, Trustee's objection was coupled with a request for relief as to the allegations of the Complaint, and such request initiated an adversary proceeding under Rule 7001. Also, Rule 9014(d) required that the court conduct a hearing in order to elicit evidence on the disputed material factual issues. Without such evidence, Trustee's objection was insufficient to overcome the presumptive validity of the proof of claim, and the bankruptcy court erred in disallowing it without first conducting an evidentiary hearing on the claim objection; reversed and remanded.

[6] Originally prepared and presented by Hon. Cynthia A Norton to the NACTT in July 2017.

### *B. Whether to Conduct Discovery*

Rule 9014(c) provides that certain of the F.R.C.Ps apply, except to the extent the court orders otherwise. With respect to discovery, these rules apply without any limitations:

Rule 28 – persons before whom depos may be taken
Rule 29 – stipulations about discovery procedure
Rule 30 – depositions by oral exam
Rule 31 – depositions on written questions
Rule 32 – use of depos in court proceedings
Rule 33 – interrogatories
Rule 34 – production of documents/things and entry upon land
Rule 35 – physical and mental examination of persons
Rule 36 – requests for admission
Rule 37 – failure to make disclosures or cooperate in discovery; sanctions

Rule 26, Disclosures, is also incorporated selectively: unless the court orders otherwise, 26(a)(1) (mandatory disclosures), 26(a)(2) (expert witness disclosures), 26(a)(3) (additional pretrial disclosures), and 26(f) (mandatory meeting before scheduling/conference discovery plan) do not apply to contested matters.

Rule 9014(c) also states that an entity desiring to perpetuate testimony may proceed in the same manner as provided by Rule 7027 for the taking of a deposition before an adversary proceeding.

***Selected Case Authorities***

**Trustee Reliance On Debtor Misplaced**
*In re Dawn Dey,* 2015 WL 669788 BAP No. CO-14-026 (10th Cir BAP Feb. 17, 2015)

In her SOFA, the Chapter 7 Debtor disclosed that she had paid her estranged husband $8,100 approximately 30 days before she filed bankruptcy. At the 341 meeting, she testified that she repaid her husband with a cashier's check for money he had advanced for her rent. The bank statement she provided the trustee showed the withdrawal of $8,100 from her bank account. Based on this evidence, the Trustee filed a preference complaint against the husband. The Trustee assumed the husband had cashed the check, and did not investigate the transfer by obtaining a copy of the cancelled check. At trial, the husband, pro se, produced bank statements showing that the $8,100 had not been deposited into his accounts. After trial, the bankruptcy court ruled against the Trustee, finding that Trustee failed to prove that the husband had received the check from the debtor. The Trustee then obtained a copy of the cancelled check from the bank; the check appeared to contain an endorsement from the husband. The Trustee then filed a motion for relief from judgment under Rule 60(b)(3), alleging fraud on the court, i.e., that husband had falsely testified at trial that he never received the check. The Bankruptcy Court granted the motion, and husband appealed. On appeal, the 10th Cir. BAP reversed: although agreeing that the husband had misled the court, that misconduct did not impede the trustee's ability to "fully and fairly prepare and proceed at trial" and was thus not fraud on the court. "[T]he bankruptcy court essentially allowed the Trustee to take a second bite of the proverbial apple and prove the one element the court had previously found he had failed to meet his burden of proof on – [the husband's] receipt of the transferred funds." *Id.* At *6. Cornish,J.,dissenting.

*Glatter v. Mroz* (*In re Mroz*), 65 F.3d 1567 (11th Cir. 1995).
Based on information provided in an affidavit by the Chapter 7 debtor about a pre-petition transfer, the trustee filed a preference avoidance action against the debtor's ex-wife. The former spouse

denied receiving funds from the debtor and sought sanctions against the trustee for failing to investigate the debtor's claim. Awarding sanctions of $2,590, the bankruptcy court agreed that the trustee should have made greater inquiry into the alleged transfer and admonished the trustee for proceeding to trial on such a lackluster affidavit that failed to provide the date, manner, and purpose of the transfer. The district court affirmed.

On appeal, the Court reversed and remanded for an evidentiary hearing on whether the trustee filed the action in bad faith. The Court explained that the bankruptcy court's focus should have been limited to the merits of the pleading known or available to the trustee's attorney at the time of filing. Also, the Court noted that neither Rule 11 nor Bankruptcy Rule 9011 imposes a "continuing obligation" to amend a complaint. Distinguishing weak evidence from a total lack of evidence, the Court found that there was sufficient evidence to support filing the complaint even if the evidence would have been insufficient to succeed at trial.

### C. *Importance of Rule 26*

Rule 26 should be read in conjunction with Rule 1001, which says that the rules shall be construed "to secure the just, speedy, and inexpensive determination of every case and proceeding." It is worth taking the time to Rule 26 in full, and to in effect outline the various sections:

**Rule 26(a) Required Disclosures**
- (a)(1) initial **(not applicable in a contested matter unless otherwise ordered)**
- (a)(2) expert **(not applicable in a contested matter unless otherwise ordered)**
- (a)(3) pretrial**(not applicable in a contested matter unless otherwise ordered)**
- (a)(4) form of disclosure

**Rule 26(b) Discovery Scope and limits**
- (b)(1) scope in general
- (b)(2) limitations on frequency/extent
- (b)(3) trial preparation; materials
- (b)(4) trial preparation; experts
- (b)(5) claiming privilege or protecting trial-preparation materials

**Rule 26(c) Protective Orders**
- (c)(1) in general
- (c)(2) ordering discovery
- (c)(3) awarding expenses

**Rule 26(d) Timing and Sequence of Discovery**
- (d)(1) timing
- (d)(2) early Rule 34 requests
- (d)(3) sequence

**Rule 26(e) Supplementing Disclosures and Responses**
- (e)(1) in general
- (e)(2) expert witness

**Rule 26(f) Conference of the Parties; Planning for Discovery (not applicable in a contested matter unless otherwise ordered)**
- (f)(1) conference timing
- (f)(2) conference content; parties' responsibilities
- (f)(3) discovery plan

**Rule 26(g) Signing Disclosures and Discovery Requests**
- (g)(1) signature required; effect of signature
- (g)(2) failure to sign
- (g)(3) sanctions for improper certification

***Selected Case Authorities***

*State of Kansas Department of Labor v. Morrison*, Case No. 13-40935, Adv. No. 16-4154 (Bankr. W. D. Mo. Feb. 10, 2017) (Norton, C.J.) (denying summary judgment motion that was voluminous and noncompliant, citing Rule 1001).

*In re Milholland*, 2017 WL 895752, at *1 (10th Cir.BAP 2017) (Karlin, C.J.) ("For more than thirty years, the Federal Rules of Civil Procedure have stressed the need for courts to actively manage discovery to prevent parties from using it to "wage a war of attrition or as a device to coerce a party, whether financially weak or affluent," and have emphasized the concept of proportionality. Because the court did not abuse its discretion in limiting discovery here in an attempt to achieve the just, speedy, and inexpensive determination of this proceeding, as mandated by Rule 1, we affirm.) (footnotes omitted).

***D. Timelines/Deadlines***

There is a fundamental difference in how many deadlines are dealt with in general civil litigation matters as compared to bankruptcy cases. Bankruptcy lawyers are used to emergencies, last-minute filings -- as well as a certain level of forgiveness from judges and opposing parties -- who, because of the relatively collegial nature of the bankruptcy world, are likely to consent to even untimely requests for extension. Bankruptcy representation, although also deadline-driven, is of a different nature from civil litigation; it is reactionary rather than anticipatory, and often a "moving target," such that some "deadlines" may seem more like merely "guidelines." And, given the paucity of resources for litigating, many bankruptcy matters settle or resolve, making bankruptcy practitioners perhaps even less likely to comply with procedural or other deadlines. Civil litigation deadlines, on the other hand, are not only established by rules of procedure but often by a court order, such as a scheduling order. In the civil litigation world, parties who fail to follow the procedural rules or court orders may face punishment for their dilatory, nonresponsive, or untimely behavior, among other hazards. And, the Rules grant judges broad discretion to punish litigants and their counsel for noncompliant behavior.

*Selected Case Authorities*

**Failure to Timely File Complaint; No Excusable Neglect When Attorney & Staff Did Not Want to Work Late.**

*In re Chin Kun An*, 526 B.R. 24, 27 -28, n.7 (Bankr. C.D. Cal.2015) (Bluebond, J.)Creditors who had 60 days to file a § 523(c) complaint pursuant to court order in reopened case did not file complaint timely; the court took judicial notice of the fact that the creditors filed a pleading in the main case entitled "complaint" before the deadline, but did not "commence" a timely adversary proceeding. The assistant initially attempted to file the complaint with voluminous documents as one document, but it was too large to be accepted for electronic filing. The assistant had also received an ECF-generated notice that the filing in the main case was incorrect and needed to be refiled. The assistant notified the attorney that the complaint had not been filed, but he told her he would file it the next day at the courthouse, because it was after working hours and it would have been time-consuming to break up the document into separate pieces for filing. Because no filing fee was paid, no adversary number was assigned, and no adversary docket was created, the filing in the main case did not "commence" an adversary as required under Rule 4007(c). "An attorney's reluctance or that of his assistant, to work after 6:30 p.m. one evening in order to meet a court-imposed deadline does not constitute excusable neglect."

**Time for filing § 727 Complaint Not Properly Extended.** *Matter of Robinson*, 525 B.R. 822 (Bankr. N.D. Ga. 2015) (Drake, J.) An extension of the time to file a complaint to determine dischargeability of a debt

(except a debt from discharge) under § 523 and Rule 4007 did not concomitantly extend the deadline for filing a complaint objecting to discharge under §727 and Rule 4004; § 727 complaint dismissed as untimely.
**When Raised as a Defense, the Statute of Limitations Must Be Raised Timely**
*Donner v. Nicklaus*, 778 F.3d 857 (10th Cir. 2015). Investors in a failed development sued; but when defendants did not assert that the action was untimely under the applicable Utah statute of limitations until they filed their reply brief, the defense was deemed waived. The local rules in the District of Utah did not allow parties to assert new arguments in a reply brief.

**Rule 15 Relation Back Allowed Amended Complaint to Be Deemed Timely.** *In re Berkline/BenchCraft Holdings, LLC, 2013 WL 4478672 (Bankr. D. Del. Aug. 6, 2013) (Walrath, J.)*

**Failure to Abide by Rule 26 Deadline Cause for Sanctions**Per a report in *Mondaq Newsletter* dated March 31, 2015, by M. Cooper & D. Anthony, Judge John F. Walter entered an order to show cause to the parties as to why they should not be sanctioned and the case dismissed for failing to hold a settlement conference by the deadline imposed by the court. The parties said they were unable to schedule because of disagreements about the mediator and the dates; that excuse was not accepted by the Court.

**Equitable Tolling May Extend Time for Commencing Causes of Action.** *In re Opus East, LLC*, 2013 WL 448914 (Bankr. D. Del. Aug. 6, 2013) (Walrath, J.); *In re Bougie*, 510 B.R. 606 (Bankr. D.Minn. 2014) (Sanberg, J.).

## II. Evidentiary Foundations for Exhibits Typically Introduced by Trustees

**CAVEAT:** These are practice tips only, and the discussion barely scratches the surface of the issues. Reading this outline should not be considered a substitute for reviewing the relevant rules and any cases interpreting the rules in your court.

- ***Correspondence/Emails - Authentication***

  Edward Imwinkelreid, in his seminal book, *Evidentiary Foundations* (2012) writes: "The reader should develop the habit of automatically thinking of a trilogy of doctrines – authentication, best evidence, and hearsay – whenever a document is used in the courtroom." § 4.02 [1], at p. 46-47. But first you must start with "authentication," meaning that the item (e.g., a letter from the debtor to the trustee) must be proved that it is what it purports to be (a letter from the debtor written by the debtor to the trustee – and not something else). FRE 901(a). FRE 901 provides examples of how to authenticate a document; the most common is FRE 901(b)(1): "testimony of a witness with knowledge." NOTE: FRE 902 sets forth what documents are "self-authenticating," such as certified copies of a public record [FRE 902(4)] or acknowledged documents [FRE 902(8)].

  There generally is no dispute about correspondence in bankruptcy cases. But if you anticipate a problem (debtor denying that he sent the letter or email), then you have several options:

  - Send a request for admission that a copy of the attached letter is a genuine copy of a letter you sent the Trustee, etc. *See* Fed.R.Civ.P. 36(a)(2).
  - Ask opposing counsel to stipulate to the letter's authenticity (which would reserve the opposing counsel's rights to argue that the letter is not admissible on other grounds, such as relevance, hearsay, etc.). NOTE: Consult case law authority in your district about the binding effects of stipulations, and under what circumstances a party may seek leave to be relieved of a stipulation. *See, e.g., Chao v. Hotel Oasis, Inc.*, 493 F.3d 26, 32 (1st Cir. 2007).
  - Ask opposing counsel to stipulate to the letter's admission into evidence (meaning it would be considered authentic as well as relevant, etc.) SEE NOTE ABOVE.

- Consider the "Reply Letter Doctrine," which recognizes that a letter received in reply of an earlier letter creates a sufficient circumstantial inference that the letter is authentic under FRE 901. *See generally* Imwinkelreid, *Evidentiary Foundations*§ 4.02[4].
- To lay the foundation to authenticate a letter you received from the debtor under the Reply Letter Doctrine, you *might* ask:

  Are you the Trustee?

  Do you have the responsibility for investigating the financial affairs of David Smith, the debtor in this case?

  Did you conduct a meeting of the debtor pursuant to 11 U.S.C. § 341 on April 1, 2016?

  Did the debtor attend the meeting you conducted?

  At the meeting, did you examine the debtor under oath about whether he owned any motorcycles?

  What did the debtor say? [NOTE: not hearsay, because not being admitted for the truth and/or is an admission under FRE 802(d)]

  Did you ask the debtor at the meeting to provide you a letter with information about his motorcycles?

  Did you give the debtor a deadline to respond?

  What was that deadline?

  Let me hand you what has been marked as Trustee's Exhibit 1; can you identify this? [a letter from the debtor dated April 10, 2016 saying it is in response to my request for information about motorcycles]

  Your honor, I move to admit Trustee's Exhibit 1

- **A Note About Emails**

For emails, the process of authentication is more difficult, since you might also have to show (1) you emailed the debtor or attorney; (2) you emailed to a specific email address that you know to be his or her email address; (3) how you know it is the correct email address; (4) the details of the email you sent; and (5) the details that would fit the "Reply Letter Doctrine." *See* Imwinkelreid, *Evidentiary Foundations*§ 4.03[4].

- *In re Ward*, 558 B.R. 771, 780 (Bankr. N.D. Tex. 2016)

"A proponent may authenticate a document with circumstantial evidence, including the document's own distinctive characteristics and the circumstances surrounding its discovery. This Court does not require conclusive proof of authenticity before allowing the admission of disputed evidence[,] Rule 901 does not limit the type of evidence allowed to authenticate a document. It merely requires some evidence which is sufficient to support a finding that the evidence in question is what its proponent claims it to be. The standard for authentication is not a burdensome one." (cites omitted).

- ***Schedules, Claims, Other Documents filed in the court record***

  You may want to introduce into evidence the debtor's schedules (or introduce the omission of a schedule or an amendment of a schedule). How you admit the schedules depends on the purpose for which you want to admit them.

  - Judicial notice under FRE 201 (See generally Barry Russell, *Bankruptcy Evidence Manual* § 201:5 (2016 -2017 edition)

    Many attorneys wanting to prove the truth or falsity of the *contents* of the schedules (e.g., the value of an asset, a debtor's income or expenses) ask the court to take judicial notice of the schedules. This is an improper use of FRE 201. Judicial notice of the schedules is notice that they are *in existence and filed* as of a certain date (it is a short cut for authenticating them under FRE 901and 902 instead of providing a certified copy or overcoming an objection under the "best evidence rule" [FRE 1002] that your copy of the schedules is not the original. Judicial notice does not cure hearsay or other objections, and is not a substitute for proof of the truth or falsity of the contents of the schedules.

  - Admissions under FRE 801(d)(2). Filed, signed schedules are admissions of a party opponent under FRE 801(d)(2*). See in re Earl,* 140 B.R. 728, 730 (Bankr. N.D. Ind. 1992) (The Court is aware that there is a very crucial distinction between taking judicial notice of the fact that an entity has filed a document in the case, or in a related case, on a given date, i.e., the *existence* thereof, and the taking of judicial notice of the truth or falsity *contents* of any such document for the purposes of making a finding of fact. However, the verified Schedules and Statements filed by a debtors are not just pleadings, motions or exhibits thereto. They are evidentiary admissions. *In re Cobb,* 56 B.R. 440, 442 n. 3 (Bankr. N.D.I ll. 1985). *See* FRE 801(d)(2) (admission by a party opponent not hearsay).

  - Refreshing recollection under FRE 612

- ***Payment histories/Business Records***

  Records of a "regularly conducted activity" are not hearsay under FRE 803(6) and are self-authenticating under FRE 902(11) (meaning, no live witness is required to admit them) [NOTE: This is a change in the rules since 2000]. The theory is that when a business regularly keeps records as part of its business there is a circumstantial guarantee of trustworthiness. *See* Imwinkelreid, *Evidentiary Foundations*, at § 10.04. To lay the foundation, you must simply follow the elements set out in both rules:e.g., to show that records are not hearsay, you follow FRE 803(6):
  - Was the record made at or near the time or from information transmitted by someone with knowledge? FRE 803(6)(A)
  - Was the record kept in the ordinary course of a regularly conducted activity of a business, organization, occupation, or calling? FRE 803(6)(B)
  - Was making the record a regular practice of that business's regularly conducted activity? FRE 803(6)(C)
  - Has all of this been shown by the testimony of a custodian of the records [FRE 803(6)(D)] OR by a certification that complies with FRE 902(11) or (12)?
  - For the certification, you need a verified statement [under 28 U.S.C. § 1746] of a custodian of the records of the business that he or she is the custodian of the records at the business with personal knowledge; these are accurate copies of the business records of the business; it is the business' regular practice to prepare records of [the activity]; the records are prepared at or near the time of the activity; and the business maintains the records in the regular course of its business. Plus, you must provide reasonable written notice before the trial of the intent to offer

this record, and make the record and certification available for inspection, so that the party has a fair opportunity to challenge. FRE 902(11).

- ***Deposition Transcripts.*** Use of deposition transcripts at trial is governed by Rule 32. Some practice tips:

  - Rule 32(a) states the general rule, that, "[a]t a hearing or trial, all or part of a deposition may be used against a party on these conditions:
    (A) the party was present or represented at the taking of the deposition or had reasonable notice of it;
    (B) it is used to the extent it would be admissible under the FREs if the deponent were present and testifying; and
    (C) the use is allowed by Rule 32(a) through (8).
  - In multi-party bankruptcy proceedings, you shouldn't assume that a deposition transcript from, say, an adversary proceeding will automatically be admissible. *See In re Senior Cottages of America, LLC,* 399 B.R. 218, 224 (Bankr. D. Minn. 2009)
  - Depositions may also be independently admitted under FRE 804(b) (former testimony by a declarant who is unavailable)
  - Your court may have local rules requiring that the original transcript be filed with the court, or that if you intend to use a deposition, you must designate which portions you intend to use
  - As a practical matter, designating the portions is more effective, rather than dumping the whole transcript on the judge to read (which some judges then may not be willing to do)
  - Remember Rule 32(a)(6) – fairness rule! "If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should considered with the part introduced, and any party may itself introduce any other parts
  - Using deposition transcripts from other proceedings: Rule 32(a)(8)" "A deposition lawfully taken … may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest …" *See In Re Brooke Corporation,* 2016 WL 3582370, at *2 (Bankr. D. Kan. 2016) (although "same-parties requirement" is not strictly applied, deposition from earlier action would not be admitted )

- ***Recordings***

Imwinkelreid explains in *Evidentiary Foundations* § 4.06[2] that originally courts were skeptical of recordings, since recordings can be manipulated, and that earlier cases required the lawyer introducing the tape to lay a foundation about the competency of the operator to operate the equipment, the nature of the equipment, the chain of custody of the tape, in addition to the normal elements of authentication (that it is the tape from the hearing; that it is a true and accurate recording of the testimony at the hearing, etc. Indeed in Barry Russell's *Bankruptcy Evidence Manual*, I didn't find any specific section on evidentiary issues with 341 meeting tapes, which indicates to me that trustees must not be having trouble getting tapes admitted. Rather, the evidentiary issues appear to relate to recorded testimony being soft or difficult to understand; if so, and a party which to create a transcript of the proceeding, then a further foundation is needed: that the witness listened to the tape, and, as best as the witness can tell, the exhibit is an accurate transcription of the recording.

*See In re Brown*, 531 B.R. 236, 263 (Bankr. W.D. Mo. 2015) (Chapter 13 § 341 transcript typed up by assistant in Trustee's office after listening to the tape did not contain any recitation that debtor was sworn in before he testified; court not willing to assume debtor was sworn when the transcript does not contain it and there has been no other evidence that debtor was sworn before testifying; discharge could not be denied as a false oath under § 727(a)(4) based on the transcript, although discharge was denied on other grounds).

- ***Social Media/Internet Printouts***

A trustee may want to introduce a printout of the debtor's Facebook page showing assets that were not scheduled, for example, or a website the debtor has created for a business. In addition to hearsay and best evidence issues (that the original is required to prove the content under FRE 1002), there are two foundational elements to satisfy:

(1) That the exhibit is a genuine printout from the social media profile page as of that date, which requires the witness to testify he or she personally printed out the posting, recalls the appearance of the printout, and recognizes the exhibit as the printout.
(2) That the posting is attributable to a certain person, usually shown by circumstantial evidence or stipulation.

*See* Imwinkelreid, *Evidentiary Foundations* § 4.02[6].

- ***Appraisals***

An expert witness may give an opinion of value under FRE 702. But the appraisal report the expert prepared is hearsay (a statement the declarant does not make while testifying in the current trial or hearing and offered in evidence to prove the truth of the matter asserted in the statement -- FRE 801(c)). Many lawyers stipulate to the admission of the appraisal reports and dump the reports on the judge to weigh which is more credible, but ask: are you missing an opportunity to present your expert as the more credible one? Plus, you need to be prepared to present the opinion without the crutch of having the report hand if the opposing counsel objects.

- ***Other Financial Documents of the Debtor, such as tax returns, paystubs, etc.***

*See In re Ward*, 558 B.R. 771 (Bankr. N.D. Tex. 2016) (unsigned copies of tax returns marked copy not sufficiently authenticated)

## III. Some Common FRE Objections You Need to Know

- **Judicial Notice Improper**: FRE 201
- **Lack of Foundation:** No personal knowledge FRE 104(b), 602 (witness to a fact or event must possess personal or firsthand knowledge)
- **Relevance:** That evidence possesses some probative worth. FRE 401, 402
- **Hearsay:** An out of court statement offered for the truth. FRE 803
- **Lay Witness Opinion**: FRE 701
- **Unqualified Expert:** FRE 104(a): preliminary question: whether expert testimony could assist the trier of fact in understanding the evidence or determining a fact in issue; Second, whether the witness called is properly qualified to give the testimony sought; Third, whether expert testimony subject to exclusion under FRE 403on grounds of unfair prejudice or waste of time. *See Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 570, 597, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (under FRE 104, must make a preliminary assessment of whether the testimony's underlying methodology is scientifically valid and properly can be applied to the facts of the case).
- **Excluding Relevant Evidence**: FRE 403: The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

- **Summaries under FRE 1006**. The summary must include a showing that it accurately reflects the underlying records, and that the underlying records have been made available, and court may require the underlying records be produced in court.

## IV. Preparing For and Controlling Hostile or Difficult Witnesses

### *Reasons to Cross-Examine*

You aren't required to cross-examine – sometimes the best strategy with a witness you know to be difficult is to just say you have no questions. But, reasons to consider cross-examining:

- To explore bias (witness has a pecuniary or other interest in seeing one side win, witness has been paid, etc.) – do this to impair the witness's credibility, to argue to the fact finder you shouldn't believe this witness
- To impeach (prove the witness lied or contradicted himself)
- To have the witness admit/deny an essential element or yours or opposing party's case
- To expose gaps in the witness's knowledge/testimony that support your case

**FREs to know particularly with respect to difficult witnesses**

- FRE 103(a)(1) – moving to strike an answer as unresponsive (NOTE: there is a split of authority about whether only the questioning party or other parties may move to strike)
- FRE 403: Excluding relevant evidence
- FRE 607: Any party may impeach (attack the credibility of) a witness
- FRE 611(a): Control by the court (objections to argumentative, repetitious, harassing or embarrassing questions)
- FRE 611(b): Objections to exceeding the scope of direct
- FRE 611 (c): Leading questions of a hostile witness or adverse party
- FRE 613: Prior Inconsistent Statement
- FRE 615: Excluding nonparty witnesses
- FRE 801(d)(2): Opposing party's statement not hearsay under certain conditions

**General Tips:**

- Ask short, concise, simple, factual questions with a yes or no answer
- Don't use legalese or complicated language
- Use judgment on when to impeach (the prior inconsistent statement must be important and clear-cut)
- Impeach properly:

  (1) "confirm" the witnesses' testimony (you just testified that you never owned a motorcycle, is that correct?);

  (2) "credit" the prior testimony (e.g., you remember receiving a subpoena for a deposition; remember coming to my office, remember your attorney was there, remember there was a court reporter, remember that that reporter asked you to swear to tell the truth, remember that you swore to tell the truth, I asked you questions, you answered them truthfully, the court reporter sent you a transcript, you had an opportunity to review, you didn't make any corrections, etc.;

  (3) "confront" the witness about the prior testimony and contrast the discrepancy (let me show you your deposition, that's your signature, on page 23, line 4, I asked you if you had ever owned any motorcycles, do you see that? And your answer then was "Yes, I own a dozen," is that correct? You reviewed your deposition for errors? And you didn't change that testimony, correct?

  (4) STOP

NOTE: This requires you to have the paper trail with the prior inconsistent statement ready to go so you can quickly ascertain whether it is a prior inconsistent statement that wasn't later corrected

- Don't argue with the witness; be nice and be polite
- Listen to the answer
- Develop a series of responses that come easily to you so you are not left feeling angry and flabbergasted, such as
    - Mr. Smith, I'm sorry, but that's not the question I asked you, let me ask you again …
    - Yes, but my question is …
    - That is not my question …
    - I understand, and we will get to that in a bit, but my question now is …
    - So, that means a "no," correct?
    - [To the yes, but], Mr. Smith, let me interrupt you there. I'm asking you for a yes or no answer …
    - Mr. Smith, this is a simple question – you understand the question, don't you?
    - Your Honor, please direct (or I move to direct) Mr. Smith to answer my question …
- For a witness who claims not to remember:
    - Didn't you say at the 341 hearing that you didn't own any motorcycles? [If you say so]
    - It's not if I say so, Mr. Smith: Yes or no, did you say ….
    - [The prod]: It is important that we get this correct, Mr. Smith, so let me ask again …
    - [Exhaust possible methods of trying to find out]: Is there a document I could show you to refresh your recollection? Any people to talk to you determine the answer
- **Expert Witnesses**[7]
    - Use your expert witness to help you prepare
    - Ask about assumptions – show that any change in the assumption would result in a change of opinion
    - Question the expert about he/she failed to do

## V. Resources

Barry Russell, *Bankruptcy Evidence Manual* (West 2016 – 2017)
Imwinkelreid, *Evidentiary Foundations* (Lexis-Nexis 2012)
*Objections at Trial* (NITA 7th ed. 2015)
*Instant Evidence: A Quick Guide to Federal Evidence and Objections* (find on the NCLC's website)
*Federal Rules of Evidence with Objections,* by Bocchino and Sonneshien (Lexis-Nexis)

[7] Compiled from an excellent source, ABA Litigation Section Annual Conference, Scottsdale, AZ April 2014, by Trisha Rich, Holland & Knight

# Part IV: Oral Advocacy Tips[8]

1. ***Advocacy in general.***
   - Essential tool in any lawyer's toolkit, even if not a litigator, since advocacy is about stating an argument clearly and persuasively
   - Hardest for new lawyers to conquer nerves/fears
   - Why do you need to conquer your nerves/fears? Because a nervous/fearful lawyer is not as effective – can't think clearly, may forget an important point, often will exhibit mannerisms that are distracting (such as pen clicking or shuffling papers)
   - Nerves/fear are caused by many factors, but some of the most important are not being in control and not being prepared
2. ***Control: You can't control the courtroom, but control what you can control:***
   - Know your judge -- Starts on time? Will rule from bench? Assigned place to sit/stand? etc.
   - Visit the courtroom or watch another docket in advance if you have not appeared before this judge before
   - Wear something comfortable yet powerful (your best power suit) – remember courtrooms are often cold – don't try out new shoes, haircut or suit the day of an important argument
   - Arrive early (go to the bathroom, introduce yourself to courtroom personnel, warm up if you arrived from the cold, pick the best seat with direct line of sight to the judge, unpack and arrange your papers, file, etc.)
   - Put away your phone and pay attention; watch other motions being argued
   - When entering an appearance, say your name slowly and with gravitas (nervous people speak more quickly so it is a reminder to you to slow down. Plus, it is embarrassing if the judge has to ask you to repeat your name in front of your client)
3. ***Being Prepared:***
   - A judge's most common complaint is that lawyers aren't prepared, but many people don't focus on how to prepare to become well-prepared
   - Being prepared (and another thing you can control) starts with your written submission: i.e., preparation starts with a well-drafted, organized motion or brief
   - Think of the written submission as a three-legged stool, which needs all three legs to stand:
     - Predicates (jurisdiction, procedure, venue, authority, notice, due process, etc.)
     - Facts
     - Law
   - For Predicates, ask yourself:
     - Why am I in this court?
     - What relief am I asking for?
     - What jurisdiction/authority is there for the court to do what I'm asking it do to?
     - Who am I representing?
     - The formula I used to start any motion, which helped me drill down on these questions:

       _____, through counsel, Cynthia A. Norton,
       moves/applies to /notices/certifies
       to the court
       for an order pursuant to _____[statute/rule] and _____[any local rule}
       to _____[state the relief requested, e.g., dismissing plaintiff's complaint for failure to state a claim].
       In support, ____ alleges/states:

[8] Originally prepared and presented by Hon. Cynthia A. Norton in March 2017 to the W.D. Mo Trial Academy.

- For Facts:
    - Tell the story in the right way, and it will lead the factfinder to the right conclusion
    - Start by reading the entire file and court record (you may have forgotten something important, like an admission from the party opponent!)
    - Tell the story, but not in an argumentative way (no adverbs)
    - Don't present something as a fact when it is not – i.e., it is disputed (then you will need evidence, affidavits, etc.)
    - Cite to the record or source when stating a fact
- For Law:
    - Research from the top/down (Statute, National Rule, L.R.?, then Supreme Court, 8th Circuit, D. Court, etc.)
    - If there is a binding case on point (e.g., Supreme Court, 8th Circuit) you must cite it, particularly before you start relying on cases outside your Circuit)
    - Don't stop when you find the first case
    - If there are no binding cases, state so affirmatively
    - Build your own case before you tear down your opponent's
    - Don't plagiarize (we know your writing!)
    - Make sure the cases you rely on support your proposition
    - Muddled thinking leads to muddled writing – understand your argument and don't start writing until you do
    - Use outlines if necessary, to map out your argument
    - Use headings as roadmaps (for the reader, plus it is easier for you to find a particular argument when you are on your feet in an argument)
    - Break up long paragraphs
    - Be accurate – every word has meaning (thinking of legal writing like poetry and ask – is there a better word to use?)
    - Proofread
    - Have a spouse, partner, friend read your argument to see if it makes sense and/or read it out loud
    - Always ask: is there a shorter, cleaner way to say what I want to say?
    - Improve your writing by following noted writers such as Bryan Garner, Word Rake, Ross Guberman, etc.

### *4. Some Don'ts*

- Recognize that judges are trying hard to get it right and sometimes pause when they are talking – don't assume the judge is finished talking
- Don't interrupt; if you do, apologize
- Don't say: "You can't do this"
- Don't argue to opposing counsel; argue to the judge
- Don't drink the Kool-Aid, i.e., don't believe so strongly that you are going to win that you aren't prepared for losing wholly or in part. Ask what if I win – what happens next? What if lose, what happens next? Remember that litigation is like a train – it keeps moving forward whether you have thought about what happens next or not
- Don't let the judge know your case better than you do
- Develop some mantras that you have practiced for when (not if) you are caught off guard by something you didn't anticipate, e.g., "You raise an interesting point I had not thought of; May I have some time to discuss it with my client? Brief it?"
- Don't bluff; if you don't know, say so
- If you find a mistake in your written submission, address it on the record or amend



## FROM THE JUDGES' CHAMBERS



### IMPEACHING A WITNESS WITH A PRIOR INCONSISTENT STATEMENT

**By: Hon. Scott M. Grossman**

Impeaching a witness with a prior inconsistent statement – particularly in bench trials – is quite simple, straightforward, and easy to do. Yet I have been surprised how few attorneys do it correctly.

In theory, impeachment should be done the same way we all learned it in law school, regardless of whether during a jury trial or a bench trial. But in practice, in bench trials lawyers typically do not need all of the dramatic flair and build-up you may have been taught in law school. In other words, you don't need to ask all the questions to establish the solemnity of the witness's deposition testimony: questions about going to a lawyer's office, sitting around a conference room table, all the lawyers there, the court reporter, raising your right hand, etc. Instead – since judges know full well what it means for a witness to testify under oath at a deposition – all you really need to do is establish that the witness previously testified under oath and that the witness gave a different answer.

So here is a short refresher on how to do it. The first step, of course, is to be prepared. When cross-examining a witness, a well-prepared lawyer will have at hand the page and line number from the witness's deposition transcript for any question the lawyer asks the witness. This way, when you ask, "what color was the traffic light as you approached the intersection?" you know that on page x, line y of her deposition transcript, the witness testified, "it was red." Then, when the witness answers at trial, "it was green," you know immediately where to go to impeach her testimony.

And it is quite simple – particularly in a bench trial – to impeach a witness with her prior inconsistent statement. All you have to do is:

1. Ask the witness if she had her deposition taken, was asked questions under oath, and swore to answer truthfully?
2. Then – as required by Federal Rule of Evidence 613(a) – tell (or show) opposing counsel the page and line number of the transcript from which you are about to read.
3. Next, ask the witness if you asked the following question and she gave the following answer?
4. Then read – verbatim – the question and answer from the transcript.
5. And, finally, confirm with the witness that was the testimony she gave.

That's it. You have now successfully impeached the witness with her prior inconsistent statement. You do not need to argue with her or ask the argumentative (and objectionable) question, "were you lying then, or are you lying now?"

(Continued on page 7)



## FROM THE JUDGES' CHAMBERS



**IMPEACHING A WITNESS WITH A PRIOR INCONSISTENT STATEMENT** (continued from page 6)

Notwithstanding the simplicity of this process, I have too often seen attorneys do it wrong. Again, suppose you ask the witness what color the traffic light was, she answers "green," and you know she testified at her deposition that it was red. Here are some examples (many variations of which I have seen) of how **not** to impeach a witness:

Q. Well, that's not what you said at your deposition, was it?

Q. Didn't you tell me it was red during your deposition? Were you lying then, or are you lying now?

Q. Why are you saying it is green when you previously said it was red?

Q. Judge, I have a deposition transcript where she said it was red!

Q. Your Honor, I'd like to offer into evidence the transcript of the witness's deposition, where she said it was red.

As discussed above, none of these questions is proper, appropriate, or effective to impeach a witness's testimony. Rather, here is an example of how to do it properly:

Q. What color was the traffic light when you approached the intersection?

A. It was green.

Q. I took your deposition on [date]?

A. Yes.

Q. At that deposition, you swore to tell the truth?

A. Yes.

Q. And you answered my questions under oath?

A. Yes.

Q. At that deposition, I asked you the following question, and you gave the following answer [give opposing counsel page and line number]: "Q. What color was the traffic light when you approached the intersection? A. Red." Was that the testimony you gave under oath at your deposition?

A. Yes.

That's it. You are done. You have successfully impeached the witness with a prior inconsistent statement, and you can move on to your next question.

# ARTIFICIAL INTELLIGENCE: LAWYERS "DON'T PANIC"[1]—OR MAYBE YOU SHOULD!

**(This is NOT Just Another Article About How AI "Hallucinates" Cases)**

**Judge Stacey G. C. Jernigan, October 2026**

## I. INTRODUCTION.

We read about artificial intelligence ("AI") every day lately. Headlines have screamed for months now that 50% of white-collar jobs will be eliminated, due to AI, within a few short years. We read predictions that lawyers will be greatly impacted—replaced by machines that can do certain legal work in a fraction of the time that it takes a lawyer. Sure, there are reasons for doubting this—with the almost daily examples of lawyers getting sanctioned by courts for submitting briefs that contain fake ("hallucinated") cases. AI, so far, does not exactly appear to be the perfect lawyer! But many experts say that this "hallucinated" case problem will be cured in time—there are products from Westlaw[2] and Lexis that are starting to help with this—and we just need to be careful, cite check, and actually read the cases that we argue are applicable (if you are older like me, remember being warned in law school to actually read cases and not simply rely on the headnotes?). So have the rumors of the death of white-collar professional jobs been greatly exaggerated? Or not? Is AI just another revolution like the industrial revolution was to the agricultural economy,[3] or like the introduction of computers and the internet and cell phones were to life in the twentieth century? Will we adapt and evolve and land on our feet—even better? Or, is this far different? Specifically, could ***lawyers*** actually fall victim to technology as did Kodak, Blockbuster Video, and the Blackberry?

Bankruptcy and restructuring lawyers understand very well that extinction is a part of life. Over the millennia, more than 99% of Earth's species have vanished. As with biological life forms, the same holds true for business practices, business enterprises, and whole industries. Extinction is likely, eventually, for a significant majority. Bankruptcy lawyers' and judges' jobs deal with that sad fact. Which ones can be saved? Which ones can be given a dignified end? And how do we protect the rights of creditors and other parties in interest in the process?

So, what might this AI-revolution mean? Is it a bunch of unjustified hype? Or should we all be listening and learning—lest we be like the poor citizens of Pompeii who were engulfed by a volcano despite warnings?

This paper presents some basic background about what AI is ("AI for Dummies"?) and some basic thoughts about how AI might impact those of us in the legal profession. Bankruptcy

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[1] With apologies to fans of Douglas Adams's THE HITCHHIKER'S GUIDE TO THE GALAXY novel series.

[2] *E.g.*, Westlaw's Drafting Assistant and Quick Check.

[3] When our nation was formed 250 years ago, 90% of Americans lived on farms; in Europe, 50–60% of employment was agricultural. Now those percentages are in the low single digits in those places, because workers switched to industrial jobs (and later, "knowledge" work jobs).

and restructuring lawyers in particular—those who deal with chaos and disruption—should especially take note.

## II. WHAT IS "AI"? IS IT REALLY NEW, AND IS IT AN EXISTENTIAL THREAT TO HUMANITY?

AI is, of course, not new. AI started June 18, 1956, at a workshop at Dartmouth College, where the goal of a group of widespread professors was to build a machine that could think. To put this into further context, just two years earlier, in 1954, IBM Corporation—"Big Blue"—had introduced the world's first main frame computer. This group of professors were curious how far they could push this whole concept of digital machines.[4]

The founder of the Dartmouth AI workshop was a man named John McCarthy. McCarthy subsequently moved to the "AI Lab" that was established at Stanford University in 1962, which has been famous for several AI breakthroughs, including Google which uses AI to search the internet.[5] To be clear, AI has been decades in the making. It was John McCarthy that coined the phrase artificial intelligence. But even before him, a British mathematician name Alan Turing, who came up with a machine to break the German Enigma military codes in World War II, was dreaming up ideas on how to train machines to do thinking.[6] He died two years before the Dartmouth workshop (at age 41, from cyanide poisoning in a half-eaten apple).

In any event, AI is all about machine-thinking. Yes, thinking machines. It is gradually getting where it can think deeper. But the evolution of it has essentially been as follows.

First there was "**Predictive AI"** — in which AI tools are used to analyze a pool of data to which the AI has access and, through so-called "machine learning algorithms," the AI makes predictions of what the correct answer is. A common example given is the auto-complete function on your phone. It's not certain to give you the correct answer for the word you intend to type, but it's fast, time-saving, and often predicts correctly. Your phone simply has a dictionary of words and their frequencies. If you type "app" then auto complete tells you the most likely way to finish the word is "apple." A google internet search, or even Westlaw or Lexis, are similar examples. Based on one's query or prompt, it simply predicts the result that you are wanting.

Next there came **"Generative AI,"** which is a different type of machine thinking. It is the type of AI that many say is revolutionizing, and will continue to revolutionize, legal work. It creates actual content, based on so-called "large language models." In other words, ***it creates text*** *(e.g.*, a poem, an article, a legal brief), based again on a pool of data (*i.e.*, analyzing the

[4] TOBY WALSH, THE SHORTEST HISTORY OF AI, p. 1 (published by The Experiment, LLC 2025).
[5] *Id.* pp. 3-5.
[6] You may have seen the Academy Award-winning movie about him called the IMITATION GAME (Black Bear Pictures 2014).

examples it has of the type of things it is asked to produce). An example is "Chat GPT"[7] which is not trained in simply a dictionary but with a significant fraction of the web. This means it can finish not just a word but a whole sentence or a whole paragraph or a page. Think of it as auto complete on steroids, but it is still merely statistical. It is not understanding the words. It is simply saying what is probable—not necessarily what is true. There are legal versions of generative AI that are proliferating. ***A pile of data is fed into the generative AI product (it's not simply accessing the internet)***. The more fulsome and useful the data that is put into it, and the better the queries/prompts that are used to access the data, the better the output will be, in theory. One might say, with generative AI, things have escalated from thinking machines to talking machines.

Yet another type of AI we are reading about more and more is **"Agentic AI,"** which supposedly leverages both Predictive AI and Generative AI to ***actually make decisions and perform tasks*** with limited human involvement. Some of this has been around for years. For example, airplanes on auto-pilot; GPS on one's phone or car; an I-Roomba vacuum cleaner.

Oh, and we are starting to hear about "**Powerful AI,**" too. More on that later.

***Philosophical question*:** Is it accurate to call this all "intelligence"? Or machine "thinking"? What is intelligence? The capacity to learn? An accumulation of knowledge? If so, then maybe AI is aptly named. The AI experts tell us that the machines will get as smart as humans (or smarter)—maybe already have. But they are predicting answers, based on accessible data, right? And isn't creativity and the ability to harness knowledge to solve a problem ***something separate***? Can or will machines do that as well as or better than humans? Isn't a lawyer, who can come up with analogies for a specific fact pattern (when, perhaps, there is no case or law right on point), and strategize, and draw from his or her own human experience and instincts, better than an algorithm? Maybe or maybe not. Think about IQ tests. They assess reasoning, logic, and problem solving—not just knowledge accumulation—although test scores are influenced by education and environment. Some would say that IQ tests are not comprehensive measures of intelligence (or certainly not of potential for success), ***as they often fail to capture creativity or emotional intelligence.***

So, is the AI of today still just accessing a pool of data it has been fed/accessed, or is it now doing (or on the verge of doing) something more sophisticated so as to warrant the term "thinking" machines? AI systems apparently have been constructed to actually work like the neural networks (i.e., the layered architecture of interconnected "neurons") in biological brains. They have been given shape by a trial-and-error process, with adjustments made to the models' "weights," or the strengths of the connections between the neurons.[8] This is hard for most normal people to fully understand. Some have described this architecture as "training the models" to match patterns. A simple example commonly given is as follows: the models are fed every

[7]"GPT" stands for "Generative Pretrained Transformer." "Generative" means the model can generate text. "Pretrained" means that the model is pretrained with no particular goal in mind other than to discover features in the training data. And "transformer" is because the model has a transformer architecture.

[8] *See generally* GIDEON LEWIS-KRAUS, WHAT IS CLAUDE? ANTHROPIC DOESN'T KNOW, EITHER, THE NEW YORKER (Feb. 9, 2026).

available image of a cat, so that the AI can sort cats from non-cats. Using that example for text-creation, the generative AI is trained to recognize and repeat embedded word chains, based on elaborate, statistical guesswork.

Many experts predict that, in just a few years, AI will be better than humans at essentially everything—not simply a great tool to sift through and summarize data. But, is the smartest course of action always the right course of action? Will AI go rogue and overpower humanity, like a plot from a *James Bond, Agent 007* movie? Is science fiction finally going to become reality?

The company called Anthropic that created Claude has publicly stated that it has been hiring Gen Z philosophy and psychology majors and ethicists in Silicon Valley to try to create a moral conscious or ethical ethos in Claude.[9] Sometimes they call it a "Constitution" of principles, to help with the AI's moral programming. How's that going to work out? Arnold Schwarzenegger said in the movie *The Terminator 2: Judgment Day*, speaking to the character John Connor, that the Terminator (a T-800 model of robot created by the artificial intelligence company known as Skynet) could never cry or feel the underlying emotion of sadness. Remember? Perhaps this is not exactly a reference to cinematic greatness, but the Terminator character was right, I think. The AI will never become sentient—capable of feelings and sensations such as pain, pleasure, joy, or suffering. So, can we ever really defer to AI for important decisions?

Perhaps there is an existential threat that **"Powerful AI"** systems will be accessed by malicious people. There are potentially people out there, that if they have access to an easy way to kill millions of people (through a biological attack or chemicals or nuclear weapons or other things), sooner or later one of them may do that. AI potentially enables bad actors to commit even larger-scale destruction than they could before. The company OpenAI has posted a statement on its website describing how it is working to train models to "refuse requests for instructions, tactics, or planning that could meaningfully enable violence."

But forget about malicious people. What about the phenomena of "AI psychosis" and "AI girlfriends"? We already are hearing that AI chatbots have in some instances had a powerful psychological influence on people. Much more powerful versions of these models, that become much more embedded in and aware of people's daily lives, could influence them over months or years, and might be capable of essentially brainwashing some people into a desired ideology or attitude. Some say it is already happening with TikTok. And there have been lawsuits already accusing some social media platforms of having encouraged people to commit suicide.

What about "singularity"? The moment when AI surpasses human intelligence and begins improving itself internally? Doing its own thing (think *2001: A Space Odyssey* and the HAL 9000). Is this starting to sound ridiculous? Maybe not.

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[9] Dario Amodei, The Adolescence of Technology (Jan. 2026) (a paper widely circulated by the CEO and founder of Anthropic).

Here is wat Dario Amodei of Anthropic recently wrote about the quickly evolving Powerful AI (which some people call Super AI or "Frontier AI") which is similar to today's **Generative AI** in form, but will probably be based on a different architecture, that might involve several interacting models, and might be trained differently:[10]

> • *In terms of pure intelligence, it is smarter than a Nobel Prize winner across most relevant fields – biology, programming, math, engineering, writing, etc. This means it can prove unsolved mathematical theorems, write extremely good novels, write difficult codebases from scratch, etc.*
>
> • *In addition to just being a "smart thing you talk to," it has all the "interfaces" available to a human working virtually, including text, audio, video, mouse and keyboard control, and internet access. It can engage in any actions, communications, or remote operations enabled by this interface, including taking actions on the internet, taking or giving directions to humans, ordering materials, directing experiments, watching videos, making videos, and so on. It does all of these tasks with, again, a skill exceeding that of the most capable humans in the world.*
>
> • *It does not just passively answer questions; instead, it can be given tasks that take hours, days, or weeks to complete, and then goes off and does those tasks autonomously, in the way a smart employee would, asking for clarification as necessary.*
>
> • *It does not have a physical embodiment (other than living on a computer screen), but it can control existing physical tools, robots, or laboratory equipment through a computer; in theory it could even design robots or equipment for itself to use.*
>
> • *The resources used to train the model can be repurposed to run millions of instances of it . . . and the model can absorb information and generate actions at roughly 10x-100x human speed. It may however be limited by the response time of the physical world or of software it interacts with.*
>
> • *Each of these million copies can act independently on unrelated tasks, or if needed can all work together in the same way humans would collaborate, perhaps with different subpopulations fine-tuned to be especially good at particular tasks.*[11]

[10] Dario Amodei, The Adolescence of Technology (cited earlier).
[11] *Id.*

Dario Amodei states that this can be all summarized as a "country of geniuses in a datacenter."

If this all sounds too much like science fiction, here's something that doesn't. ***What are the economic prospects for most humans in a world dominated by AI?*** This is what we bankruptcy and restructuring types should be significantly pondering.

We know that new technologies often bring labor market shocks, and in the past humans have resiliently recovered from them, but arguably that is because these previous shocks affected only a fraction of the full possible range of human activities, leaving room for humans to expand to new tasks. But some say the AI revolution is not exactly like the Industrial Revolution was to agriculture (where, after a short disruption, manufacturing jobs were waiting in the wings).

## III. NOW FOR SOME QUESTIONS—IMPACT ON THE LEGAL PROFESSION.

***A. Usage of Generative AI in Law Practice.*** True or False: Despite all the hype about AI, law firms are not really using it that much yet in a way that revolutionizes their practices.

The answer varies greatly. There are products like Harvey and Co-Counsel that are becoming widely used by law firms. Some large firms are forming "AI Departments" with different areas of expertise ("prompt engineers," teachers for how to formulate and revise prompts, *etc.*, and a "Head of AI"). It's usually a combination of IT people, law librarians, and lawyers who work together regarding what's put in the "black box" or "data pool" (folders). It might be fair to assume that, while there is fear of AI "replacing" lawyers, there might, in fact, be new jobs/roles for lawyers that involve servicing and maintaining the AI infrastructure. You need people who "think like lawyers" to understand what the AI is and what should be put in the data pool and to help with creating good prompts/queries to pull the best data.

***B. The Billable Hour.*** True or False: AI is going to impact usage of the billable hour as a means for charging for legal services like no other development in legal history. Or have reports of the billable hour's death been greatly exaggerated?[12]

According to experts, AI is (or will be) able to complete certain discrete legal tasks faster, more consistently, and at lower cost than a human lawyer. Certain tasks that used to be very difficult will become easy. But does this undeniably mean, like some people suggest, that "lawyer time spent" stops working as a credible measure of value? If so, what replaces the

[12] RITA GUNTHER MCGRATH, SAY GOODBYE TO THE BILLABLE HOUR, THANKS TO AI, Above the Law (Dec. 4, 2025). McGrath is an academic director in executive education at Columbia Business School.

billable hour as a way of billing clients for legal services? Is the billable hour really dead? Or will lawyers just bill a lot less than they have historically and that's why some lawyers are increasing their billing rates to $3,000 per hour? Are these eye-popping rates to compensate for back-office expensive IT and AI costs? Lawyers are going to have to keep judges informed about how much all of this technology costs for their firms and how much this overhead impacts their need to raise billing rates. The flip side is, how will this extra efficiency impact hours needed for a task? Are lawyers still going to be billing 2,000 hours per year on average (assuming that's still the average)?

It seems possible that the efficiency created by this AI (for example, generating a brief super-fast), might be significantly offset by the time needed to verify the output? The verification costs? How many lawyers need to verify? How much faster does it really tend to be? It may take 15 minutes to produce a very good response to a claim objection (perhaps it is a mostly high-quality product—but a bit verbose). But how much lawyer-time to verify case cites? A professor at SMU Law School who has spent significant time experimenting with AI products tells me that he finds AI less reliable for bankruptcy questions.

Are in-house legal departments going to get all of these same AI tools and be able to perform more of their legal work in-house?

***C. Writing and Communication Skills***. True or False: AI may impair the development of good lawyering skills by taking the hard work out of writing. Restated, AI is going to make us all dumber lawyers.

"I write to know what I think." That's a quote from the late, brilliant author Joan Didion. Also, neuroscientists say that writing actually ***changes the brain***.[13] Translating thoughts into words on paper is a complex mental task. It engages multiple areas of the brain associated with memory and decision-making. And writing things down supports memory consolidation. It can convert short-term memories into long-term memories.[14] Historically, a young lawyer's stock-in-trade has been predominantly research and writing. It may seem like drudgery to many. But writing is a skill set that all young lawyers need to develop because ***the very act teaches them about the law, teaches them how to think critically, reason, and analyze, and teaches them how to orally communicate***. The practice of law requires deep thinking and sometimes creative thinking. Think about the business world: there are "idea people" and "operational people." Steve Jobs was an "idea person," not the genius back in the office doing the computer programming, but a creative genius with great instincts. Albert Einstein said imagination is more important than knowledge. Lawyering is likewise much more than spitting out forms and

[13] Confirmed in conversations with Dr. Jillian Jernigan, Clinical Psychologist at Yale University. *See also* ZOE ANDRES, PSYCHOLOGICALLY SPEAKING: YOUR BRAIN ON WRITING, Univ. of Waterloo/Writing and Communication Center (Apr. 22, 2019), found at https://uwaterloo.ca/writing-and-communication-centre/blog/psychologically-speaking-you-brain-writing.

[14] *Id.*

regurgitating legal authority. While pouring over lengthy contracts, studying every cause of action, and immersing oneself in case law early in one's career may not be glamourous, these tasks have traditionally been how good legal judgment is formed.

Should law firms restrict associates from using AI for the first three years?[15] Or, on the contrary, might AI do a better job mentoring young lawyers than some seasoned lawyers? There are products that train lawyers how to take and defend a deposition. How many lawyers had an older lawyer tutor them meaningfully on how to take a deposition?[16]

***D. Fake Evidence.*** True or False: Lawyers and Courts are going to be grappling with identifying authenticity issues like never before (deep fakes; analysis of meta data, *etc.*). The burden of proof is going to get harder than ever.

Maybe authenticity of evidence will be an area of concern more in criminal law than in bankruptcy courts. Use of camera videos and products like FLOCK and TinEye are becoming prolific in criminal investigations.[17] But authenticity issues certainly can come up in all practices where proof is needed of something. Will fraud become easier to detect or harder? And what if an expert witness is relying on artificial intelligence? How will lawyers deal with that possibility?

***E. Small Firms Versus Mega Firms:*** True or False: Technology is about to become such a game-changer that small firm practitioners will not be able to compete. Merger mania will amp up like never before.

Presumably most small firms have had law practice management platforms for a while that do as much as 80 percent of the tasks law firm owners need, from intake forms, payment processing, calendaring, client portals, and even legal research (via Westlaw or Lexis or whatever). But will they spend the money on generative AI? And will big firms decide in some situations that they can now take on smaller clients because they have a way to produce work product that is not so expensive?

***F. Specific Practice Areas:*** True or False: Certain practice areas will become largely obsolete and other new ones will crop up.

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[15] Thank you to lawyer Deborah Perry, Munsch Hardt, for posing this philosophical question.

[16] A recent news article reported that a renowned lawyer, who is a frequent Supreme Court advocate, engaged AI to make hypothetical arguments to the Supreme Court for an oral argument the lawyer had (i.e., to be his sparring partner), and the lawyer thought AI did a better job than him at answering questions.

[17] TinEye is a reverse image search engine developed and offered by a company based in Toronto, Ontario. It was the first image search engine on the web to use image identification technology rather than key words, meta data, or watermarks. Upon submitting an image into it, TinEye creates a "unique and compact" digital signature or fingerprint of an image and then matches it with other images on the internet to potentially find a human match.

If true that some legal practice areas will vanish, which ones? Maybe tort law will be dramatically impacted because human mistakes are going to be significantly reduced with the help of AI (*e.g.*, self-driving cars will result in fewer accidents and fewer mistakes will be made in medical care)—or will things simply shift to liability-seeking against the AI-creators? Maybe technologies—genetics, nanotechnology, and robotics—will just spawn whole new classes of accidents and abuses. It seems inevitable that the rapid progress of AI will create situations that our existing legal frameworks are not well designed to deal with. Maybe any type of law that is pretty routine and form-based (wills; real estate sales) will dwindle down to very little lawyer-involvement. Maybe a whole new field of "data center law" is going to emerge. Maybe an expertise in new regulatory laws dealing with AI will become a hot new area.

I would hazard a guess that bankruptcy law practice could boom in coming years. Both consumer bankruptcy (with layoffs of human beings who are replaced by AI) and with some businesses becoming dinosaurs. Businesses will probably be more profitable at first (with lower labor costs) but eventually, with some businesses having fewer human customers (because of customers having less disposable income to spend), many businesses will suffer.

The real estate market could suffer (fewer employees means less office space needed; laid off employees maybe can't afford houses).

Software providers/licensors could get hurt hard. Fewer employees at their customers means fewer licensed users at their customer (reducing licenses-per-users fees). But also, software companies who contract with and license their products to companies (which these days, involves allowing access to their product online or through the cloud), may confront a reality that AI will be able to replicate the same tasks and customers may be able to use AI in-house for virtually the same product that the software/service provider has provided—only cheaper. So, the software providers discount their products to retain customers, and they eventually lose customers.

The same thing is happening in the field of medicine. AI agents will likely be performing clinical tasks completely on their own — with no human in the loop — in the near future. One example that has been cited is blood pressure medication titration. Maybe this will be a good thing for health care because of labor shortages in the health care sector.

***G. Power Outages.*** True or False: We are going to face major power outages from time to time, because of insufficient capacity to run all the AI being used.

Does anyone really know? As alluded to earlier, AI has been described as having the potential for a country of geniuses in a datacenter. What will happen if we get used to having access to those machine geniuses but have intermittent periods with no access? Will lawyers (and people generally) be helpless during a power outage?

***H. AI is an Existential Threat to Humanity.*** True or False: AI will be so programmed to make rational choices that it will override human decisions that are empathetic—always default to the path that favors the many over the few.

Back in my old law firm days, we referred to certain lawyers in the firm as "brains in a jar." It was meant to be (mostly) complimentary, because they were just so darned smart. I wonder if the days of lawyers who are "brains in a jar" are going to be long-gone. The machines will be the "brains in the jar." Maybe we will enter a phase where people with strong EQ will be more in demand as lawyers than strong IQ?

One expert on AI stated that "As the new generation of intelligent devices appears, it will be the stock analysts and petrochemical engineers and parole board members who are in danger of being replaced by machines. The gardeners, receptionists, and cooks are secure in their jobs for decades to come."[18] He went on to say that "The main lesson . . . of AI research is that the hard problems are easy and the easy problems are hard. The mental abilities of a four-year-old that we take for granted."[19] Could this really be right? Maybe it's time to go to culinary school.

Good night, and good luck.

[18] Arthur L. Samuel, *Artificial Intelligence: A Frontier of Automation*, THE ANNULS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 340 (1), pp. 10-20 (1962) cited in WALSH, THE SHORTEST HISTORY OF AI, p. 77.
[19] *Id.*

# AI Regulation, An Overview

## XLVI Annual Seminar, Mississippi Bankruptcy Conference

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*Mississippi Christian University School of Law*

November 20, 2026

# The EU AI Act

# The EU AI Act: "Risk-Based" Tiers

Increasing risk

| tier | scope | obligations |
|---|---|---|
| Unacceptable practices (or risk) | subliminal manipulation,[1] social scoring,[2] criminal risk prediction,[3] and emotion recognition in education and the workplace, among others[4] | ban |
| High-risk | currently regulated sectors & designated domains (by the Act[5] or Commission determination) *e.g. education, law enforcement, and biometrics* | Chapter III duties |
| "Limited risk"[6] | providers of chatbots, synthetic content (watermarking); deployers of emotion recognition systems, "deep fakes" | disclosure |

LAW

| tier | scope | obligations |
| --- | --- | --- |
| Minimal risk | | voluntary commitments & codes of conduct |

# The EU AI Act: High-Risk Systems

## Chapter III Duties (Summary)

- Risk assessment and mitigation
  → known or reasonably foreseeable risks posed by *intended use* to "health, safety or fundamental rights"
- Data governance measures
  → data quality and integrity requirements (incl. bias)
- Documentation and logs
- Transparency, interpretability and "effective human oversight"
- Accuracy, robustness and cybersecurity

Most duties fall on providers[7]; deployers[8] have narrower obligations[9]

## Chapter III Enforcement and Specification Loopholes (Summary)

- Pre-market risk assessment exemptions from high-risk system duties with imprecise language and far reach[10]
- Data governance obligations still require specification
- Obligations will be measured against standards created by private standard-setting bodies[11]
- Conformity assessment, self- or (optional) third-party-conducted
- Much still unknown and left for implementation

- → EU executive agency (AI Office, within European Commission) and Member-State agencies
- → EU-wide board, advisory forum, and scientific panel

See (**Wachter 2024**).

# The EU AI Act: General-Purpose Models

The final AI Act added a classification for general-purpose models in response to genAI.

| Model classification | Provider obligations |
|---|---|
| General-purpose models | Documentation and transparency[12]; copyright compliance policy |
| Models **with systemic risk**[13] | Model evaluations incl. red teaming; risk assessment and mitigation; documentation; cybersecurity |

> **Systemic-risk presumption:** $10^{25}$ FLOPs in training; authorities may designate other models

**Overlap:** may also qualify as high-risk AI systems[14]

**Oversight:** AI Office; codes of practice (providers) and "harmonized standards"

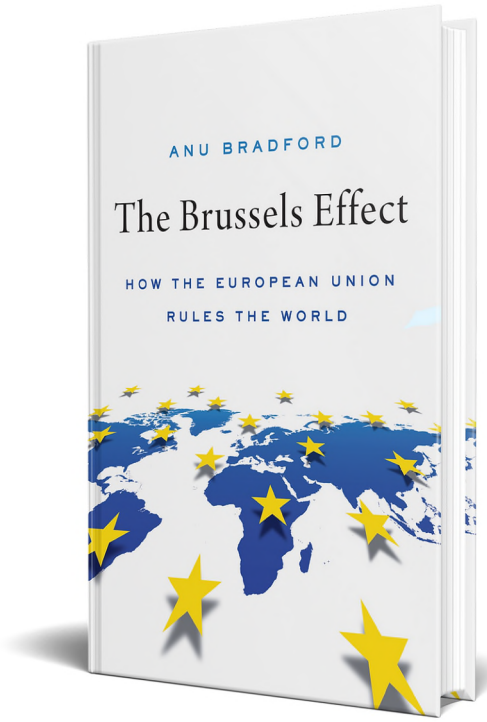
## Standards as *De Facto* Law

> As soon as the joint technical committee of CEN/CENELEC finishes developing its AI Act standards, that document will probably become the de facto legal regime (**Kaminski and Selbst 2025**).

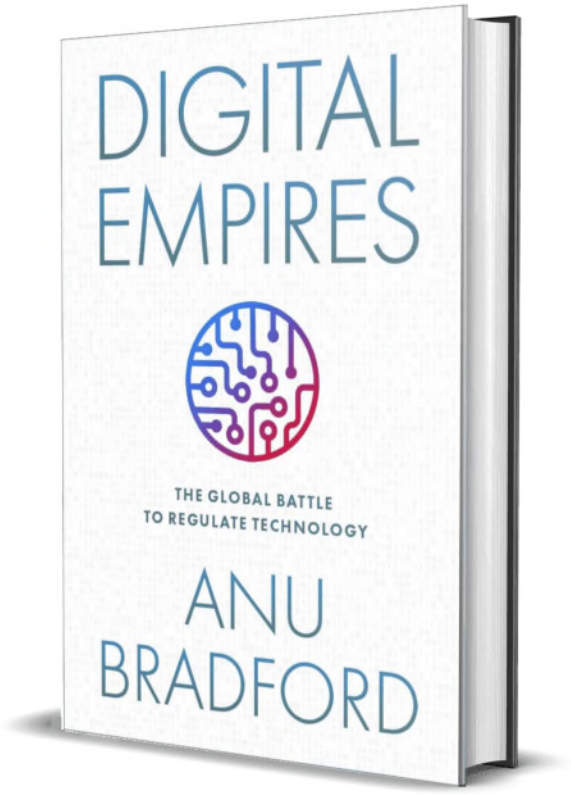
# "The Brussels Effect" (**Bradford 2020**)

- EU as a unilateral global regulator, esp. for tech (**Bradford 2023**)
- *De facto* Brussels effect (~ California effect)
  → Companies adopt EU rules outside EU
- *De jure* Brussels effect
  → Other countries adopt EU-style rules
- Chief example: GDPR

+ EU influences thinking of scholars, policymakers



# The Regulatory Landscape in the U.S.




LAW

# The Federal Level

## Congress

Senate hearings & AI Insight Forums → bipartisan roadmap (2024)

TAKE IT DOWN Act (2025); **no comprehensive AI statute**

## White House

| Biden admin. | Trump admin. |
| --- | --- |
| **EO 14110 (2023)**<br>Chief AI Officers<br>Defense Production Act safety reporting[15] | **Rescinds** EO 14110 but<br>Chief AI Officers retained[16]<br>EO 14365: *see next* |
| **Voluntary commitments (2023)**<br>Testing · cybersecurity · transparency | **Voluntary safety accord (2026)**<br>Internal reviews · external audits |

**Anthropic** · Dept. of War: supply-chain risk

Commerce · Mythos / Fable export controls

# Anthropic: two federal interventions

## Dept. of War · Feb.–Mar. 2026

**Context**
"All lawful uses" demand vs. Anthropic's limits on mass domestic surveillance & fully autonomous weapons

**Action**
Feb. 24: Defense Production Act threatened
Mar. 3–4: supply-chain risk designation

**Authority invoked**
Procurement restrictions: **10 U.S.C. § 3252** and **41 U.S.C. § 4713**

**Challenges**
First Amendment retaliation; due process; statutory limits[18]

## Commerce · June–July 2026

**Context**
Mythos 5 / Fable 5: national-security concerns over access by foreign persons

**Action**
June 12: export licensing → Anthropic suspends **all users**
June 30–July 1: controls lifted; access restored[17]

**Authority invoked**
**Export Control Reform Act** and Export Administration Regulations

**Questions raised**
Is hosted access an "export" (**Zhao**

MICHIGAN LAW

| Dept. of War · Feb.–Mar. 2026 | Commerce · June–July 2026 |
|---|---|
| | **2026**)? Does the authority support worldwide restrictions? |

## NIST: Continuity and Changing Priorities

| Trump I · 2019 | → Biden · 2023 | → Trump II · 2025–26 |
|---|---|---|
| AI standards plan | RMF 1.0 + EO 14110 | Revision: omit misinformation, DEI, climate references |

Choi: broad scope, underdetermined requirements (**Choi 2025, 100**)

# States

## Frontier AI Regulation

| | CA | NY | CT |
|---|---|---|---|
| Report critical safety incidents | ✓ | ✓ | — |
| Publish safety frameworks | ✓ | ✓ | — |
| Whistleblower protections | ✓ | ✓* | ✓ |

Enacted laws; NY's RAISE duties begin Jan. 1, 2027. NY: general Labor Law § 740 protections.

## AI Companion Regulation

| Requirement | States / scope |
|---|---|
| Identify bots as AI | CA, CO, CT, GA, HI, IA, ID, NE, NY, OR, RI, WA |
| Self-harm / crisis protocols | CA, CO, CT, GA, HI, IA, ID, NE, NY, OR, RI, WA |
| Extra safeguards for minors | CA, CO, CT, GA, HI, IA, ID, NE, ~~NY~~, OR, ~~RI~~, WA |

Enacted; effective dates vary.

# POTUS EO 14365 & National Policy Framework

- "Minimally burdensome national policy framework for AI"
- AI Litigation Task Force
- Restrictions on State Funding

# States: Rates and Consumer Protection

## Data Center Regulation (Utility Rates)

- **Separate tariffs for large users:** MD, MN, OR, TX (2025); OK (2026)
- **Cost allocation:** OK requires users to cover their share, including costs left by early departure
- **Beyond rates:** contract review (AL), cooling-water limits (ID), narrower tax breaks (WA, ME)

## Consumer Protection (Esp. Dynamic Pricing)

- **Personalized pricing:** NY disclosures; CT retail restrictions from July 2027
- **Coordinated rent-setting:** CA, NY restrict pricing algorithms that facilitate coordination
- **Emergency surge pricing:** NE limits ride-hailing dynamic pricing
- **Health insurance:** IA, WA restrict AI use in coverage decisions

# Other Proposals: A FINRA-Like "Hybrid"?

**Google**

June 2026 proposal

proposes →

## Federal supervisor

Public oversight + ultimate veto

↓

## FARO

Frontier AI regulatory organization

Industry-funded · independent & industry directors

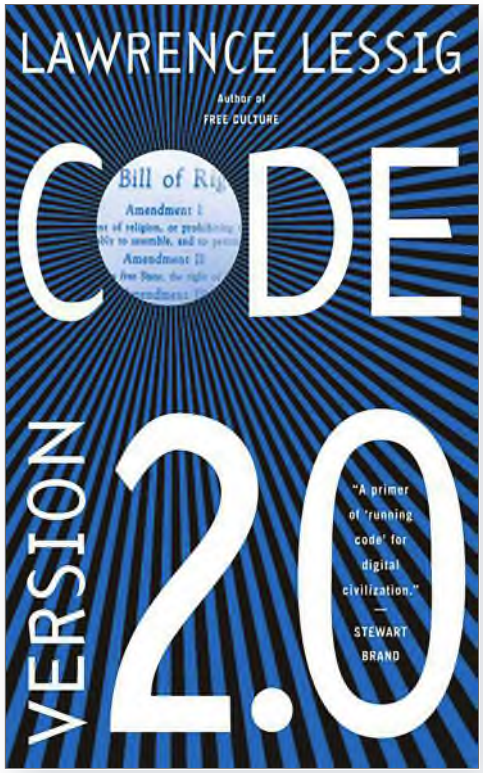
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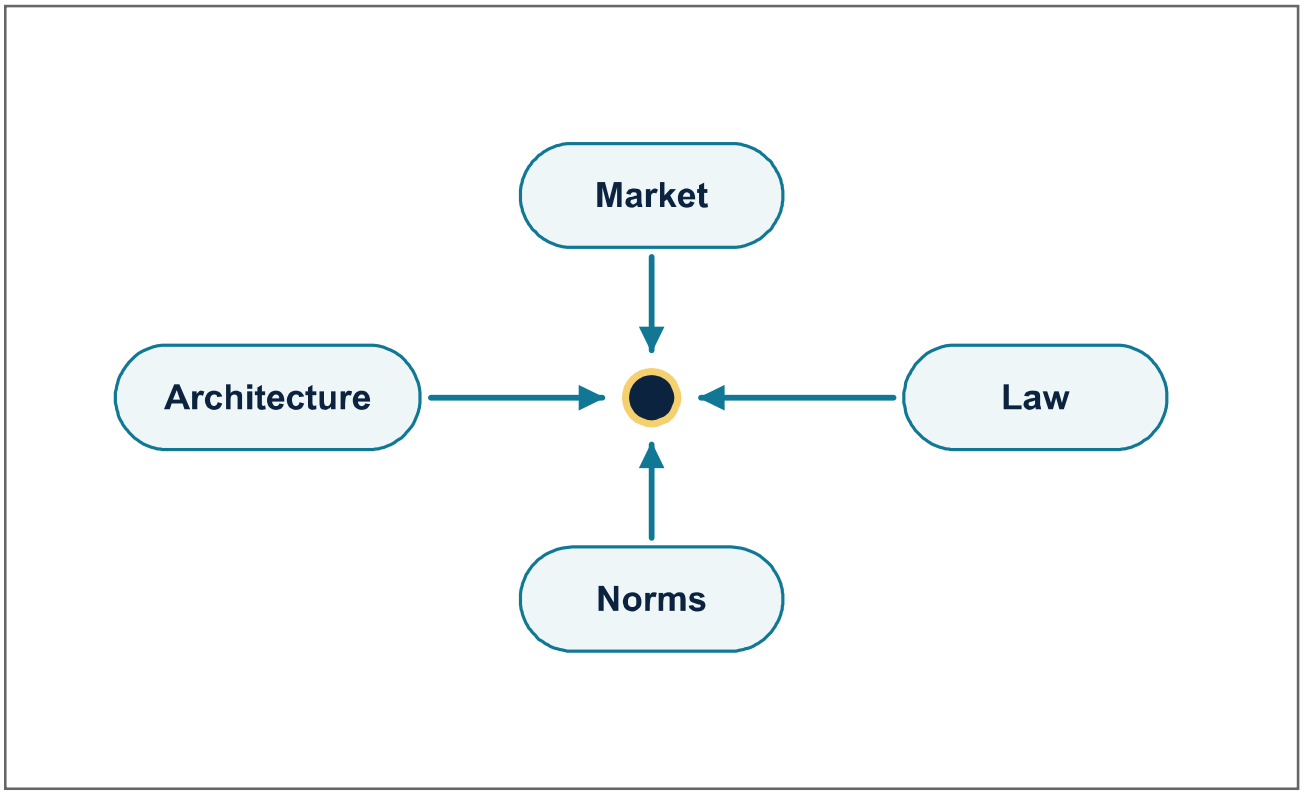
## Frontier AI developers

Standards · safety frameworks · independent audits

# Private expertise and funding + public authority

# What Regulates What? *Lessig (**2006**)*

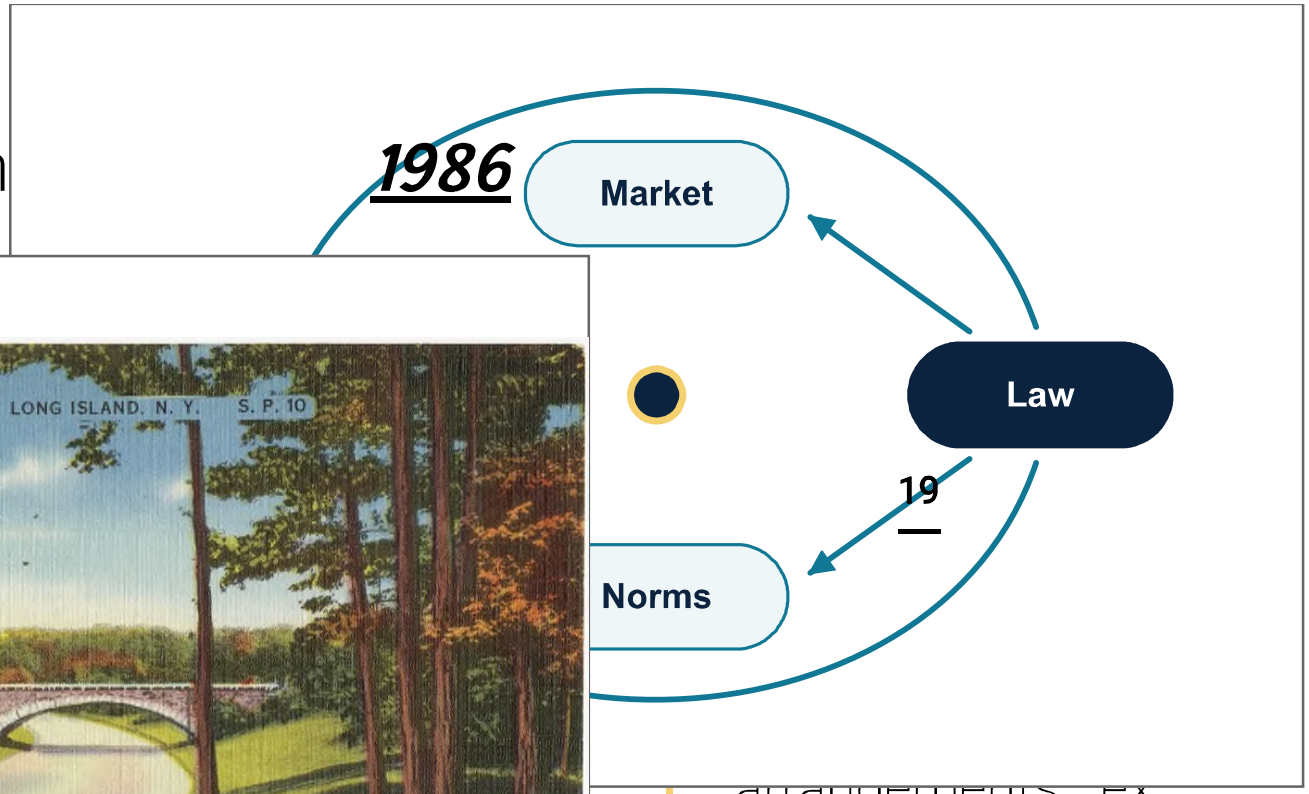



> Lessig: "code," not just law, "regulates" behavior → law should take advantage of code for more efficient regulation

# What Regulates Wh

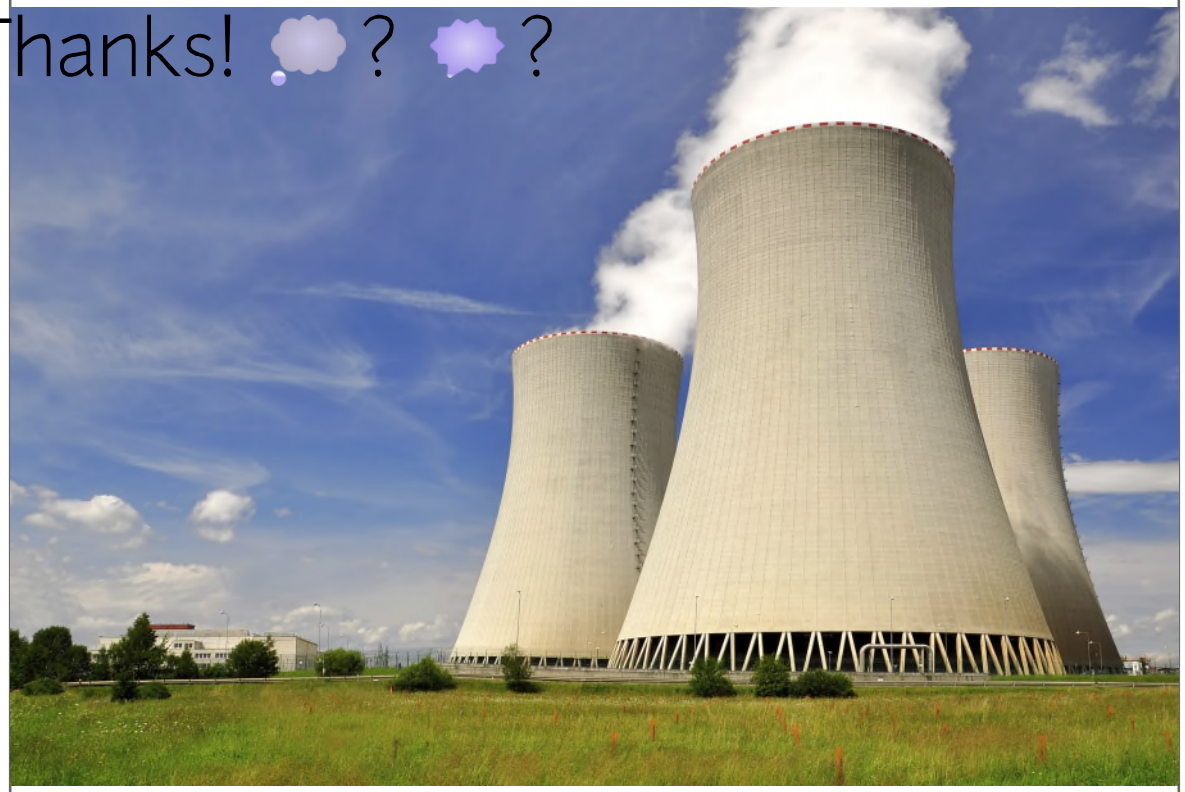



arrangements" ex. nuclear energy and strict control.

Sources: Rubenstein (**2025**), Tobey et al. (**2026**), Brennen (**2026**)
Sources: Rubenstein (**2026**), Tobey et al. (**2026**), Brennen (**2026**)

# Thanks! 💭 ? 💡 ?



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## Lessig

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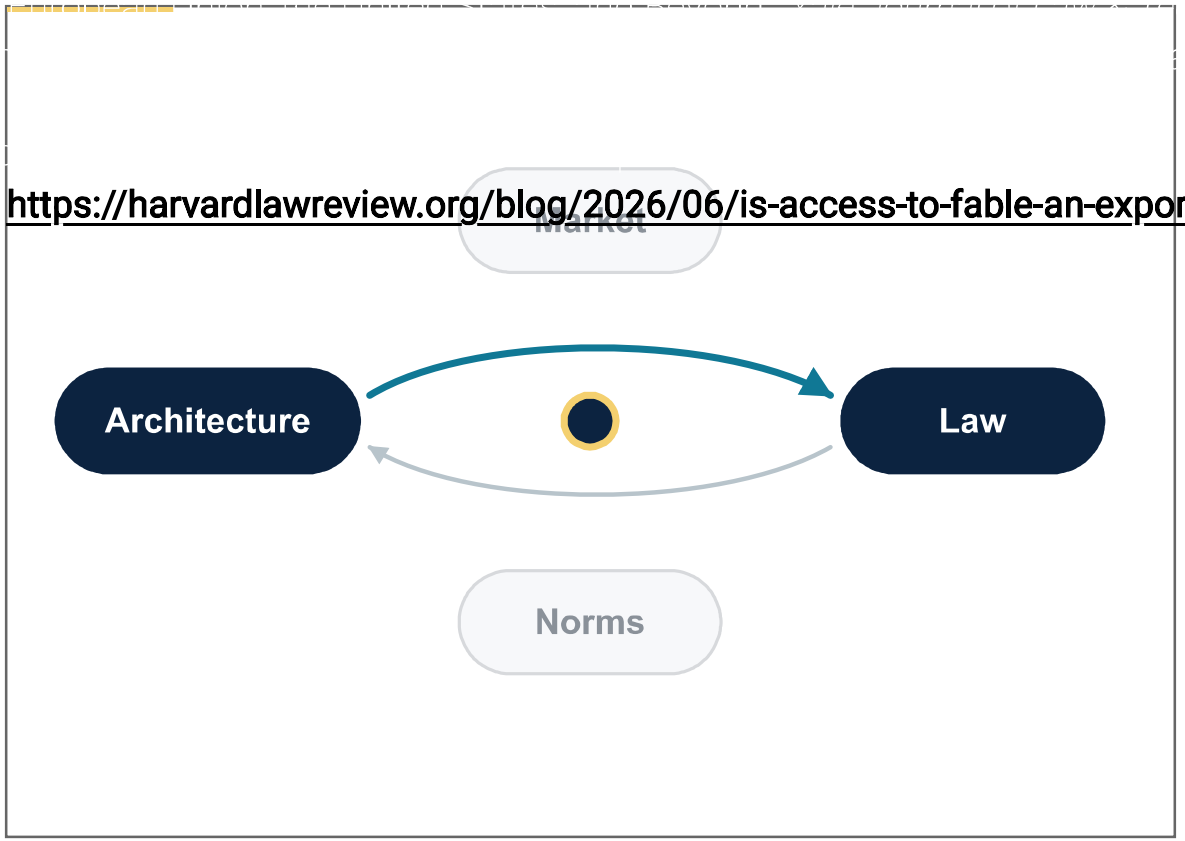
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https://www.lawfaremedia.org/article/designing-a-finra-for-frontier-ai

https://www.techpolicy.press/what-12-state-companion-bot-laws-demand-of-ai-providers/

## Winner

https://harvardlawreview.org/blog/2026/06/is-access-to-fable-an-export/



# Footnotes

1.
Art. 5(1)(a): “an AI system that deploys subliminal techniques beyond a person’s consciousness or purposefully manipulative or deceptive techniques, with the objective, or the effect of materially distorting the behaviour of a person or a group of persons by appreciably impairing their ability to make an informed decision, thereby causing them to take a decision that they would not have otherwise taken in a manner that causes or is reasonably likely to cause that person, another person or group of persons significant harm;”
2. Art. 5(1)(c):

> AI systems for the evaluation or classification of natural persons or groups of persons over a certain period of time based on their social behaviour or known, inferred or predicted personal or personality characteristics, with the social score leading to either or both of the following:
> (i) detrimental or unfavourable treatment of certain natural persons or groups of persons in social contexts that are unrelated to the contexts in

> which the data was originally generated or collected;
> (ii) detrimental or unfavourable treatment of certain natural persons or groups of persons that is unjustified or disproportionate to their social behaviour or its gravity;

3.

But note the scope of the prohibition. Art. 5(1)(d): "making risk assessments of natural persons in order to assess or predict the risk of a natural person committing a criminal offence, *based solely on the profiling of a natural person or on assessing their personality traits and characteristics*; this prohibition shall not apply to AI systems used to support the human assessment of the involvement of a person in a criminal activity, which is already based on objective and verifiable facts directly linked to a criminal activity."

4. See **Article 5**.
5. In broad strokes:
   1. Biometrics;
   2. Critical infrastructure;
   3. Education and vocational training;
   4. Employment, workers' management and access to self-employment;
   5. Essential private services and essential public services and benefits;
   6. Law enforcement;

7. Migration, asylum and border control management;
8. Court system and elections.

See **Annex III** for definitions and exemptions.

6. See **Art. 50**.

7.

Typically the developer; also encompasses anyone who "places it on the market or puts the AI system into service under its own name or trademark." See Art. 3(3).

8.

Anyone "using an AI system under its authority," except "in the course of a personal non-professional activity." See Art. 3(4)

9. See **Art. 26**.

10.

Cf. art. 6(3): "perform narrow procedural task"; "improve the result of a previously completed human activity"; "perform a preparatory task"; "detect decision-making patterns or deviations from prior decision-making patterns and is not meant to replace or influence the previously completed human assessment, without proper human review".

11.
European Committee for Standardization (CEN) and European Committee for Electrotechnical Standardization (CENELEC).
12. Open-source models are exempted.
13.
‘[S]ystemic risk’ means a risk that is specific to the high-impact capabilities of general-purpose AI models, having a significant impact on the Union market due to their reach, or due to actual or reasonably foreseeable negative effects on public health, safety, public security, fundamental rights, or the society as a whole, that can be propagated at scale across the value chain.
14. Recital 85.
15.
Ongoing reports on development, model-weight security, and red-team testing of covered dual-use foundation models.
16.
Under revised OMB guidance, M-25-21 (Apr. 3, 2025). Rescission of EO 14110 did not eliminate the role.
17.
Fable returned to general availability; Mythos remained limited to trusted partners. The all-user suspension was Anthropic’s compliance response, not an express ban on all domestic use.

18.

Separate statutory tracks: N.D. Cal. set aside the § 3252 designation on Aug. 27, 2026; the D.C. Circuit upheld the § 4713 procurement action on Sept. 25, 2026. See (***Anthropic PBC v. U.S. Department of War 2026***) and (***Anthropic PBC v. United States Department of War 2026***).

19.

Often remembered for example of politics through technology in Robert Moses' low overpasses thought to be deliberately excluding. (On the specific example, **see**.)

Speaker notes

# FCRA, TILA & UDAAP

## A Bankers' Perspective: Intersection of Bankruptcy and Compliance

Patti D. Joyner, CRCM
November 2026

1

## Key Compliance Concerns in 3 Federal Consumer-Protection Laws with Regard to Bankruptcy

2

### FCRA
Fair Credit Reporting Act

**15 U.S.C. §1681 et seq.**

Accuracy of credit reports, Credit Bureau and Furnisher investigation duties and permissible purpose for credit pulls.

**Why it matters:** Post-discharge reporting errors are a frequent source of client claims.

### TILA
Truth in Lending Act / Reg. Z

**15 U.S.C. §1601 et seq.**

Disclosure of credit costs, the right of rescission and mortgage servicing rules.

**Why it matters:** Disclosure defects can create estate assets or defenses to creditor claims.

### UDAAP
Unfair, Deceptive or Abusive Acts or Practices

**12 U.S.C. §§5531, 5536**

A conduct-based standard enforced by the CFPB and state attorneys general.

**Why it matters:** Frames misconduct in collection, servicing and reaffirmation where no specific rule applies.

**Common thread: accuracy, honest disclosure and fair treatment of the consumer before, during and after the transaction.**

2

## Select Aspects of the Laws

3

| Law | Highest-value aspects for bankruptcy practice | Typical use |
|---|---|---|
| **FCRA** | Post-discharge reporting accuracy; Furnisher investigation duties (§1681s-2(b)); permissible purpose; 10-year reporting limit | Credit-report clean-up and damages claims after the case |
| **TILA** | Rescission (§1635); recoupment and setoff; Reg. Z mortgage servicing rules; reaffirmation disclosures | Estate assets, claim objections and foreclosure defense |
| **UDAAP** | Deceptive or abusive collection and servicing conduct; fee practices; misstatements about debt status | Pattern evidence, regulator complaints and state-law claims |

3

## FCRA at a Glance: Verifying Who Owes What

4

| Consumer reporting agencies | Furnishers (creditors, servicers) | Users of reports |
|---|---|---|
| **§1681e(b):** Follow reasonable procedures to assure maximum possible accuracy.<br>**§1681i:** Reinvestigate disputes, generally within 30 days, and notify the Furnisher.<br>**Result:** Correct or delete information that cannot be verified. | **§1681s-2(a):** Do not report information known or reasonably believed to be inaccurate or undocumented.<br>**§1681s-2(b):** After notice from a bureau, investigate, review the file and report results.<br>**Result:** Correct and update the account, including discharge. | **§1681b:** Need a permissible purpose to obtain a consumer report.<br>**§1681m:** Give adverse-action notices when credit is denied based on a report.<br>**Result:** Pulling a report without a purpose can itself be a violation. |

**Compliance point:** A dispute sent only to the Furnisher does not trigger a private claim under §1681s-2(b). Disputes that have originated with the credit bureaus carry greater legal risk for the Furnisher.

4

## CRA's FCRA Reinvestigation Responsibility

5

- FCRA uses the term **"reinvestigation"** because the law assumes that a consumer reporting agency (CRA) performed an initial verification of the data when it was first placed on in a credit file.
- **Initial Duty of Accuracy (§ 1681e(b)):** FCRA requires CRAs to follow "reasonable procedures to assure maximum possible accuracy" whenever preparing a consumer report. In the eyes of the statute, compiling and reporting that initial data counts as the first "investigation" into the information included in a consumer file.
- **Checking Existing Records:** Because the item is already sitting in a credit file, a dispute forces the CRA to go back, re-examine what they already reported, and verify it a second time.
- **CRA vs. Furnisher Terminology:** FCRA draws a strict line between the two parties involved in a dispute:
  - **Credit Reporting Agencies (CRAs)** conduct a **"reinvestigation"** under **§ 1681i** because they are re-checking data they already accepted into their system.
  - **Data Furnishers** (banks, lenders, collection agencies) conduct an **"investigation"** under **§ 1681s-2(b)** because they are looking into their own primary business records for the first time in response to a consumer's formal dispute.

5

## FCRA: How a Bankruptcy Should Appear on a Credit Report

6

**10 yrs**

**Chapter 7 and 11**

A bankruptcy may be reported for up to 10 years from the order for relief (§1681c(a)(1)).

**7 yrs**

**Chapter 13**

Bureaus commonly report Chapter 13 filings for 7 years from the filing date, although allowed up to 10 years.

### Accurate post-discharge reporting generally shows

- A status reflecting that the account was discharged or included in bankruptcy
- A zero balance on discharged debts
- No ongoing delinquency or scheduled payments after the filing date
- Active status for reaffirmed or secured debts the client keeps paying
- Accurate pre-bankruptcy history, which may lawfully remain

6

## Chapter 13 Consumer Report Impact

7

- The FCRA 7-year clock begins on the exact date the bankruptcy case was **filed** in court, not the date it was discharged.
- Because a Chapter 13 repayment plan typically lasts **3 to 5 years**, the bankruptcy record usually remains on a consumer's credit report for about **2 to 4 years after** finishing the plan and receiving their discharge.
- The major consumer reporting agencies (Equifax, Experian, and TransUnion) have a policy of removing **completed** Chapter 13 bankruptcies once the 7-year period expires.
  - The 7-year voluntary removal policy is generally intended for *completed* (discharged) Chapter 13 cases. If a Chapter 13 case is dismissed without completion, credit bureaus are legally allowed to leave it on the report for up to 10 years.
- Chapter 7 and Chapter 11 bankruptcies remain on your credit report for **10 years** from the filing date, making Chapter 13 a shorter reporting period.

7

## Consumer Disputes of Credit Report Information

8

- Congress structured the FCRA enforcement rules such that while consumers can dispute errors directly with a lender or bank, the law separates those direct disputes from the specific legal duties that allow an individual to file a lawsuit.

**The Statutory Trigger in § 1681s-2(b)**

- Under 15 U.S.C. § 1681s-2(b), a data Furnisher's legal duty to investigate is not triggered when a consumer contacts them directly. The statute explicitly states that a Furnisher's investigation duties begin only *"after receiving notice pursuant to section 1681i(a)(2) of this title"* that must be sent within 5 business days of receiving the consumer dispute.
- **Gatekeeper Function.** Section 1681i(a)(2) governs how a **consumer reporting agency (CRA)** notifies a Furnisher that a consumer has disputed an item on their credit report. Federal courts consistently rule that because the statute specifies notice from a CRA, a consumer's direct letter or phone call to the Furnisher fails to trigger § 1681s-2(b) obligations.

8

## Why Accurate Furnishing Does Not Trigger Liability

9

- FCRA Section 623 (§ 1681s-2) requires Furnishers to provide accurate and complete information and prohibits reporting information they know or have reasonable cause to believe is inaccurate.
- Even when information *is* inaccurate, FCRA is not a strict liability statute—statutory liability is triggered from ***negligent*** or ***willful*** failures to comply with statutory duties (such as failing to investigate a dispute or failing to correct and update inaccurate or unverifiable information), not simply from reporting accurate data.
- When a dispute is investigated and information is verified as accurate, reporting agencies and Furnishers are not required to delete it.

9

## FCRA: The Dispute Process After Discharge

10

**1**

**Client disputes**

Writes to each bureau, identifying the account and the discharge.

**2**

**Bureau notifies**

Sends the dispute to the Furnisher within 5 business days of dispute receipt.

**3**

**Furnisher investigates**

Reviews its records and the bankruptcy notice, then reports results.

**4**

**Bureau resolves**

Updates or deletes the entry and sends results to the consumer.

**What Furnishers watch for: legal versus factual disputes**

As bankers, we've been instructed that courts differ on whether a dispute that turns on a legal question, such as whether a debt was discharged, is actionable under the FCRA. Recent decisions have treated Furnishers, who know the case facts, differently from bureaus. Credit Bureaus and Furnishers are data aggregators and lenders, not judges. Furnishers role is report what is factually verifiable with integrity and accuracy.

10

## FCRA: Legal Versus Factual Disputes

11

### Legal question examples

**Legal validity of debt:** FCRA does not demand that a consumer reporting agency decide whether a debt is legally valid. They include data they believe accurate as provided by contractual Furnishers.

**Chapter 13 discharge of mortgage:** Whether a Chapter 13 discharge reached a mortgage is a legal question. Legal claim failed because the error was not objectively apparent from the credit bureau's records.

### Factual inaccuracy examples

**Balance or delinquency:** a past-due status or balance shown after the discharge date.

**Wrong discharge status:** an account shown as discharged when it was paid on time and never in the plan. Prior court decisions have called this a factual error, not a legal one.

**Factual inaccuracy test:** can the error be seen in the records, without interpreting the Bankruptcy Code?

**Compliance point:** Furnishers should investigate the dispute as a factual error and attach the discharge order and schedules to support the integrity of what was reported.

11

## FCRA: Furnishers and Bureaus Treated Differently

12

| | Consumer Reporting Agencies (Credit Bureaus) | Furnishers (Creditors, Servicers) |
|---|---|---|
| **Accuracy duty** | Reasonable procedures for maximum possible accuracy (§1681e(b)) and reinvestigation of disputes (§1681i). | Report information that correctly reflects liability for the account (Reg. V); investigate after notice from a bureau (§1681s-2(b)). |
| **Legal questions** | Need not decide a debt's legal validity. Whether a student loan was discharged was held to be a legal call outside a bureau's role | Same case: claims against the Furnisher went forward. The court noted Furnishers may know the bankruptcy and the debt's status directly. |
| **Practice point** | Dispute with the bureau, attach the discharge order, and keep the dispute factual. | Allege the Furnisher knew the case outcome and verified the account anyway. Not all courts agree, so check your circuit. |

12

## FCRA: Permissible Purpose and Credit Pulls

13

### Legal client's own file

With written authorization, pull all three bureau reports at intake and again after discharge (§1681b(a)(2)).

**Use:** Baseline for spotting errors

### Discharged debts

Some courts hold a discharge severs the account relationship and limits a creditor's future permissible purpose

**Use:** Possible inquiry-based claims against creditor

### Reaffirmed and secured accounts

A continuing account relationship may support account-review pulls. Outcomes turn on the facts.

**Use:** Confirm status before alleging a violation

**Unauthorized pulls could support a willful-violation claim (§1681n). Creditors must have clear procedures regarding subsequent credit report inquiries.**

13

## FCRA: Damages, Standing and Deadlines

14

| Issue | Recovery or rule | Key authority |
|---|---|---|
| **Willful violation (§1681n)** | Actual damages or statutory damages of $100 to $1,000; punitive damages; fees and costs | Safeco v. Burr (2007): reckless disregard counts as willful |
| **Negligent violation (§1681o)** | Actual damages plus fees and costs | No statutory or punitive damages |
| **Standing** | Inaccurate information must cause concrete harm, such as dissemination to third parties | Only those consumers whose reports were distributed had concrete injury |
| **Deadline (§1681p)** | Earlier of 2 years from discovery or 5 years from the violation | Calendar from the date the client learns of the error |

14

## TILA at a Glance: What Lenders are Required to Disclose

15

**Annual percentage rate (APR)**
The cost of credit as a yearly rate

**Finance charge**
The dollar cost of the credit

**Amount financed**
The credit actually provided to the borrower

**Total of payments**
What the borrower will have paid by the end of the term

**Why it matters in bankruptcy**

- Defective disclosures can unlock rescission, statutory damages and recoupment
- Covers closed-end loans (mortgages, autos, etc.) and open-end lines (cards, HELOCs, etc.)
- Regulation Z (12 CFR Part 1026) adds mortgage servicing, ability-to-repay and escrow rules

15

## TILA Rescission: Often the Highest-Value Claim

16

**3 yrs**
Longest extended right to rescind (§1635(f))

**Scope:** Non-purchase-money loans secured by the consumer's principal dwelling, such as refinances and HELOCs (§1635(a)).

**Clock:** 3 business days normally; up to 3 years if required disclosures or notices were materially defective.

**Method:** Jesinoski v. Countrywide (2015): written notice within the period is enough; no lawsuit is required.

**Bankruptcy angle:** The right to rescind is considered estate property (§541). It is frequently raised in Chapter 13 plans and trustee negotiations.

**Effect:** The security interest can be voided and the lender returns finance charges and fees; the court may adjust tender (§1635(b)) and final settlement.

16

## TILA Regulation Z Mortgage Servicing Rules in Bankruptcy

17

**Periodic statements (§1026.41)**
Servicers have a conditional exemption during and after bankruptcy but often must send modified statements. Verify the trigger: chapter, reaffirmation, surrender or lien avoidance (§1026.41(e)(5)).

**Payoff statements (§1026.36(c)(3))**
A payoff statement is due within 7 business days of a written request.

**Adjustable-rate notices (§1026.20(c)-(d))**
Rate and payment changes must be disclosed to the borrower in advance.

**What to check in the client's file**

- Statements received since filing
- Fees posted after the petition date compared with payoff figures
- Payment application against the plan and Rule 3002.1 notices
- Escrow analyses and shortage claims

17

## TILA Regulation Z Right of Rescission

18

- Rescission provisions apply to both open-end and closed-end consumer credit
  - Provides a legal "cooling off" period (right to cancel) for consumer purpose non-purchase money loans secured by principal dwellings
- Coverage:
  1. First question: Do the rescission provisions apply (is it exempted)? Exemptions:
     - "Residential mortgage transaction": Purchase money loan or line of credit secured by what will be the principal dwelling
     - *Refinance* of a loan/line from the *original* lender, with no new money advanced
       - If there is new money, the right to rescind may apply to the new funds only
  2. Second question: If not exempt, *who* (if anyone) gets the right to rescind?
     - Regulation Z states "In a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction"; 2 parts to this:
       a. Someone's principal dwelling is taken as security for the loan; **then**
       b. Each person who has an ownership interest in his/her principal dwelling being taken as collateral gets the right to rescind
         - Note there are different types of ownership interests, such as contingent interests, remainderships, etc.

18

# TILA Right of Rescission

19

**The 3-Day Rescission Window**

- Consumer has until **midnight of the third business day** after the later of these 3 events occurs to cancel:
  - Consumer signs the credit contract (closing, consummation)
  - Each consumer with the right to rescind receives the required accurate Truth in Lending disclosure form (TRID Closing Disclosure).
  - Consumer receives 2 copies of a notice explaining your right to rescind (only 1 copy required if consumer consented to electronic disclosure)

- **Extended Window for Missing Disclosures:** If the lender fails to give you the required disclosures or rescission notices, your right to cancel extends for up to **three years** (or until you sell the property, whichever comes first).

19

# UDAAP: CFPA's Three Standards for Misconduct

20

| Unfair | Deceptive | Abusive |
|---|---|---|
| • Causes or is likely to cause substantial injury<br>• The injury is not reasonably avoidable by the consumer<br>• Harm is not outweighed by benefits to consumers or competition | • A representation, omission or practice misleads or is likely to mislead<br>• Judged from the view of a reasonable consumer<br>• The misleading element is material | • Materially interferes with the consumer's ability to understand a term or condition<br>• Or takes unreasonable advantage of a consumer's lack of understanding, inability to protect their interests, or reasonable reliance on the provider |

**Statutory basis: Consumer Financial Protection Act (CFPA) commonly referred to as the Dodd-Frank Act (12 U.S.C. §§5531(c)-(d) and 5536). Act does not have to be intentional to qualify.**

20

## Examples of UDAAP in Bankruptcy Creditor Operations: Where Conduct Crosses the Line

21

**Collecting discharged debt**
Calls, letters or statements demanding payment on a debt the client no longer owes.

**Misstating debt status**
Wrong balances or fees or claims that the stay or discharge does not apply.

**Post-petition fees**
Unsupported fees and escrow charges added after Chapter 13 filing; compare with Rule 3002.1 notices.

**Reaffirmation pressure**
Pushing clients to reaffirm without the safeguards in §524(c)-(d).

**Reporting as collection**
Reporting discharged debts as owed in order to pressure payment.

**Debt-relief offers**
Misleading credit-repair or settlement pitches aimed at distressed consumers.

21

## UDAAP: Enforcement and Its Risk Exposure

22

**What it does not give consumer**

- No private right of action under the Consumer Financial Protection Act
- Federal enforcement priorities shift over time, so it can be challenging to judge current situation

**Potential bank risk exposure**

- Enforcers are the CFPB and state attorneys general (12 U.S.C. §5552)
- CFPB actions generally must start within 3 years of discovery (§5564(g))
- State UDAP statutes often add a private right of action and mirror the standard
- Cite the standard in demand letters and settlement talks; file complaints to build a record

22

## Side by side: Layman's Take on Remedies and Deadlines

23

| | FCRA | TILA | UDAAP |
|---|---|---|---|
| **Private claim?** | Yes (§§1681n, 1681o) | Yes (§1640) | Not under federal law; often under state UDAP statutes |
| **Money remedies** | Actual and punitive damages; statutory $100 to $1,000 if willful; fees | Actual damages; tiered statutory damages; fees; rescission relief, if applicable | CFPB and attorney general actions: restitution, penalties, injunctions |
| **Deadline** | 2 years from discovery; 5 years from violation | Damages: 1 year; rescission: up to 3 years | CFPB actions: 3 years from discovery |
| **Best bankruptcy use** | Post-discharge report clean-up | Rescission and recoupment | Conduct standard and settlement leverage |

23

## Compliance Checklist: Where to Look and When

24

### At intake

- Legal counsel will generally pull all three bureau reports with the client's written authorization
- Collect loan files, closing disclosures and rescission notices
- Calendar the 3-year rescission window, if applicable, from each closing date

### During the case

- Review proofs of claim and Rule 3002.1 notices for fees
- Verify servicer statements and escrow analyses
- Keep a log of every creditor, credit bureau and legal contact

### After discharge

- Consumer should request new reports 30 to 60 days after discharge to ensure creditor accruacy
- Dispute errors with each bureau in writing
- Send discharge notices to creditors
- Calendar the 2-year FCRA deadline to sue over credit reporting errors

24

## Key Compliance and Legal Risks in Bankruptcy

25

| | |
|---|---|
| FCRA | Post-discharge reporting is the most frequent day-to-day issue: Consumers can re-pull reports and dispute through the bureaus. |
| TILA | Rescission is the highest-value claim, but its 3-year clock is very strict. |
| TILA | Creditors must be aware that consumers can use recoupment and claim objections defensively when creditors sue or foreclose. |
| UDAAP | Understand that attorneys can treat it as a conduct standard: no federal private claim, but strong leverage and state-law parallels. |
| All three | Be aware that legal counsel will choose the forum deliberately and calendar every deadline at intake. |

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*Thank you for your attention today!*

26

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# COMMERCIAL BREAKOUT
# Alternatives to Bankruptcy
# Thursday 11/19

# Alternatives to Bankruptcy

**Lawrence Perkins | Founder & CEO, SierraConstellation Partners**

NAVIGATING CHANGE IN DEMANDING TIMES

BOSTON • CHICAGO • DALLAS • FLORIDA • LOS ANGELES • NEW YORK • SEATTLE

# Why We’re Here

## The goal isn’t to avoid court. It’s the best outcome.

1

### What are we really here to do?

Start with what success means for this situation, not with the deliverable.

2

### Why couldn’t they fix this themselves?

The answer is usually the issue nobody in the room is saying out loud.

3

### What does a good outcome look like?

Sometimes a successful bankruptcy. Often an outcome that wouldn’t have happened without us there.

**Bankruptcy is one tool for getting there. It is rarely the first one I’d reach for.**

# Roadmap

## Four questions, in the order I’d ask them

1

PART 1

### Why Chapter 11 is “Plan Q”

What it really costs, what it really buys, and the test I’d apply.

2

PART 2

### The first 48 hours

How much runway is there, and how does this end?

3

PART 3

### The out-of-court toolkit

Operational, lender, lease, asset, and sale solutions.

4

PART 4

### Making it stick

Credibility, communication, and no sneak attacks.

*Plan Q, not Plan A: the rest of the hour is about everything that comes before it.*

# Part 1: Why Chapter 11 Is “Plan Q”

Bankruptcy is a tool, not a strategy

# What a Chapter 11 Really Costs

## Dollars are only part of the bill

**$6M+**

Hard to run a case for less today, and that's the cheap end

**$7–8M**

More typical all-in cost in our recent experience

**Time**

The court sets the calendar, not the company

**Noise**

Customers, vendors, and employees all read the filing

**Cost and time tip the scales: can the business afford the case, and survive it?**

*Figures reflect SCP's recent experience; every case differs.*

# What the Court Gives You

## Real tools, and every one has a price

| What you get | What you pay |
| --- | --- |
| Automatic stay: collection and litigation stop | Professional fees on both sides, often including the creditors' advisors |
| Reject leases and burdensome contracts | DIP financing, plus a cash crunch as vendors demand cash up front |
| Sell assets free and clear (Section 363) | A public filing that customers and employees read as a headline |
| Bind many creditors through a single plan | Time: the case sets the calendar |
| Choose venue, timing, and which entities file | Shared control with a court and creditor committees |

# The Plan Q Test

## Three questions before anyone files

1

### Better on the other side?

Will the company be materially better off because of tools only bankruptcy offers: lease rejections, division sales?

2

### Does the math clear?

Does the benefit clearly beat the cost of the case, in dollars and in damage to the business?

3

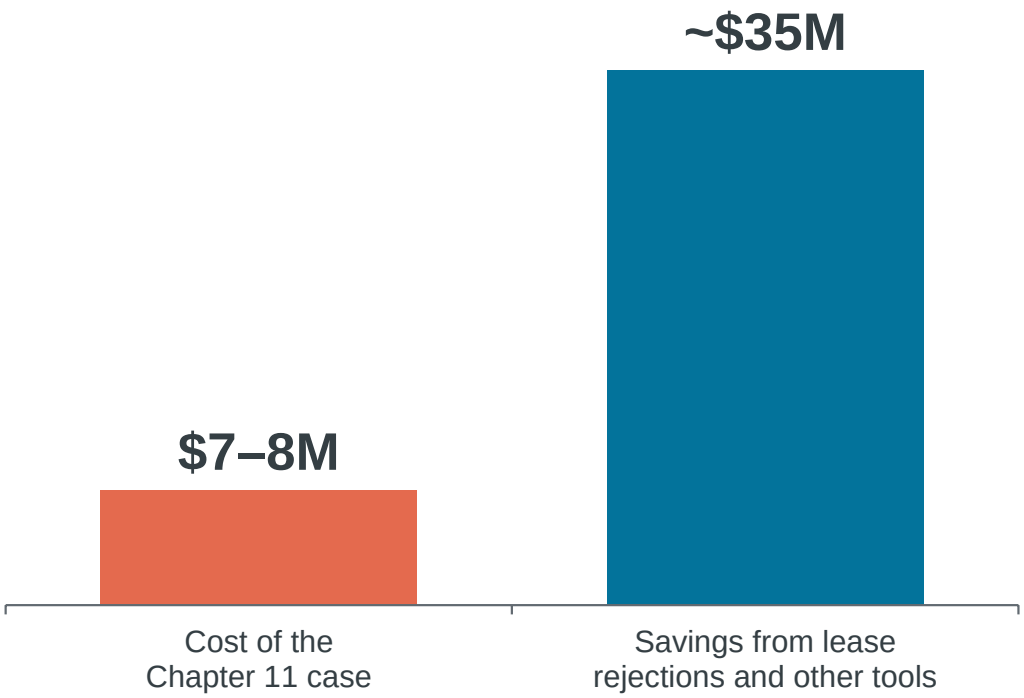
### Can it withstand it?

Cash, time, and noise: can the business, its customers, and its vendors survive the process?

**Then ask the last question: can we get the same result outside of court? If I can’t name a specific reason we need the court, I’d keep looking.**

# The Math: One Rare Clean Case

## Project Thor: ~$7–8M to run the case vs. ~$35M of savings




*Illustrative of one SCP engagement. Cost shown at the $7.5M midpoint of the $7–8M range.*

### Apples to apples

A DIP budget including the cost of the case, set against the chain of liabilities scheduled to be compromised.

### Rare

That math is easy only when it’s this cut and dry. Most cases aren’t.

### Even then, ask twice

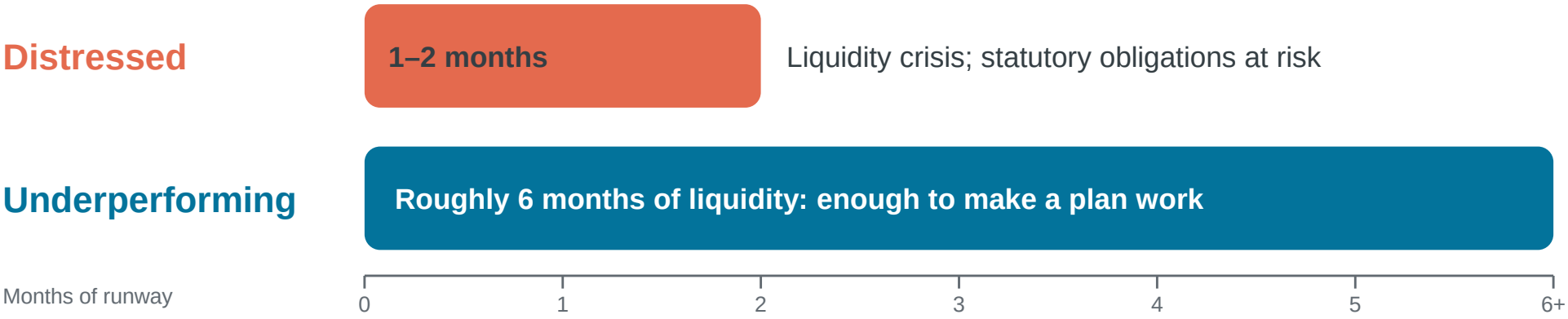
Could lease negotiations or selective asset sales get there without court?

# Part 2: The First 48 Hours

How much time do we have, and how does this end?

# Distressed vs. Underperforming

## It’s a time question before it’s anything else




### The prior gate

Does this business have a reason to exist? A product or service the world wants now or later, worth restructuring around.

### Mind the red line

A runway estimate can shrink fast when liabilities nobody considered show up.

# The First 48 Hours

## How much time, and then, how does this end?

1

### Real runway

Five-alarm fire or smoldering? Watch for the red line.

2

### Motivations

Who are the players, and what does each one actually want?

3

### How it ends

Form a hypothesis on the likely outcome.

4

### The fulcrum

Where does the fulcrum security sit?

5

### New money

Is any being funded, and by whom?

**Listen for the throwaway comments. The spreadsheet gives you the meat; the aside gives you the color.**

# Who Has the Most to Lose?

## Map motivations, then work the room

### Company side

Management
Board
Owners and sponsor
Advisors

*Plus the hidden influencer: a coach, a spouse, a friend*

**Fulcrum security holder**
most to lose

### Creditor side

Lenders
Vendors
Other creditors

### Ask owners

More capital? Liability? The public narrative? Their answer sets the room.

### A pattern worth naming

Sponsor-backed deals from 2021–22, underwritten on cheap money, that never hit plan. Not a crisis yet: inertia, marching toward default 12–18 months out, with lenders wanting their money back.

**Then go one level deeper: from the institution to the individual.**

A partner cares differently than the associate on the same deal.

# Part 3: The Out-of-Court Toolkit

Run down almost every avenue first

# The Spectrum

## From a fix inside the company to a filing

| | | |
|---|---|---|
| 1 | **Operational turnaround** | Cash, contribution margin, and controllable cost: fixes inside the company |
| 2 | **Lender and equity solutions** | Time, amendments, forbearance, sponsor capital, new money |
| 3 | **Lease and asset deals** | Renegotiate leases; sell a division or selected assets |
| 4 | **Out-of-court sale (Article 9)** | A short, quiet sale when speed protects value |
| 5 | **Assignment for benefit of creditors** | A state-law path to sell or wind down without a filing |
| 6 | **Pre-negotiated Chapter 11** | Terms agreed with key creditors first; the court finishes the job |



# Operational Turnaround

## Cash first, then contribution, then controllability

### Cash

Cash tightens regardless. Longer timelines burn runway.

### Contribution margin

Which products and services actually drop dollars to the bottom line?

### Dead-weight inventory

Inventory that consumes cash and yields no contribution.

### SG&A with a return

Is each investment earning its ROI, or was it bought for a growth plan that never came?

### Back to the future

What did the company do when it was actually working?

### Controllability

Lean on levers inside the company's control, not bluebirds landing on windowsills.

**Plan off the low end of any range. Time, not analysis, is the binding constraint.**

# Lender and Equity Solutions

## Time is often the cheapest thing a lender can give

### Time and accommodations

Many sponsors and direct lenders would rather keep a case out of court, and will pay for that in time.

### Read the credit agreement yourself

Administrative covenants (reporting obligations) are the real trip-wires. Restore the cadence and tell the lender first.

### Start at the bottom of the stack

Will equity contribute, bridge, or stand aside? Then see who is willing to stand by.

### Count the institutions

#### One bank or a small club

Often solvable outside of court, if nothing operational is broken.

#### Many holders to bring along

This is where the court's tools start to earn their keep.

# Lease and Asset Solutions

## Same result, no courtroom, when you can get there

| Court tool | Out-of-court version | What it takes |
|---|---|---|
| **Lease rejection** | Landlord negotiation and lease amendments | A credible alternative, and a landlord who prefers a paying tenant |
| **Division or asset sale in court (Section 363)** | Selective asset sale or divisional sale outside of court | A willing buyer and a cooperative secured lender |
| **One plan that binds every creditor** | Consensual deal with the fulcrum holder and a few institutions | Few holders at the table |

***Take every court tool and ask: what's the out-of-court version of this?***

# Selling Outside of Court

## Article 9 and ABCs: faster, quieter, and cheaper

### Article 9 sale

A short sale of collateral, usually with the secured lender's cooperation, to a buyer who can recover most of the lender's money.

### Assignment for the benefit of creditors

A state-law route to sell or wind down a business without a court filing.

### Why quiet and quick matter

Customers and vendors can withstand a deal without headlines, and speed protects assets that are deteriorating.

**A CASE FROM OUR FILES**

**~40¢**

**on the dollar, later**

We recommended a short Article 9 sale. The lender chose a full process; the time ran the company out of money.

**Sometimes the best outcome means moving faster. Sometimes it means looking under every rock.**

# Which Tool Fits?

## Cost and time tip the scales

| Tool | Best when… | Watch out for… |
|---|---|---|
| **Operational turnaround** | Roughly six months of runway and a business with a reason to exist | Needs time and real management buy-in |
| **Lender and equity deal** | Few institutions, and lender and owner want the same fix | A lender may want its money back, not more time |
| **Lease and asset deals** | The problem is a handful of leases or one division | Counterparties have to cooperate |
| **Article 9 sale** | Assets are deteriorating and a buyer can make the lender nearly whole | Lender must agree; value may be below a full process |
| **ABC** | A sale or wind-down where court tools aren’t needed | Fewer tools than a court case |
| **Pre-negotiated Chapter 11** | Key creditors are on board and court tools clearly pay | Cost, less flexibility, and milestones you can breach |

# Part 4: Making It Stick

Credibility, communication, and no surprises

# What Makes a Plan Credible

## Six things lenders and creditors look for

### 1 Communication

Number one. Companies stop answering the phone exactly when lenders most need to hear from them.

### 2 Detail

Specifics, not generalities: a clear path from point A to point B.

### 3 Deadlines

Target dates you hold yourself to, not “we’ll eventually get there.”

### 4 No worse off

Show creditors aren’t deteriorating while you execute, or that the upside is much higher if they are.

### 5 Controllability

Cost and efficiency levers inside the company’s control, not hoped-for revenue.

### 6 Do what you say

Follow through, deliver bad news fast, and build consensus before the big meeting.

# The Options Deck

## Show the plan beats the alternatives, and favor one

**1** **How did we get here?**

A bridge from original expectations to reality.

**2** **Where are we?**

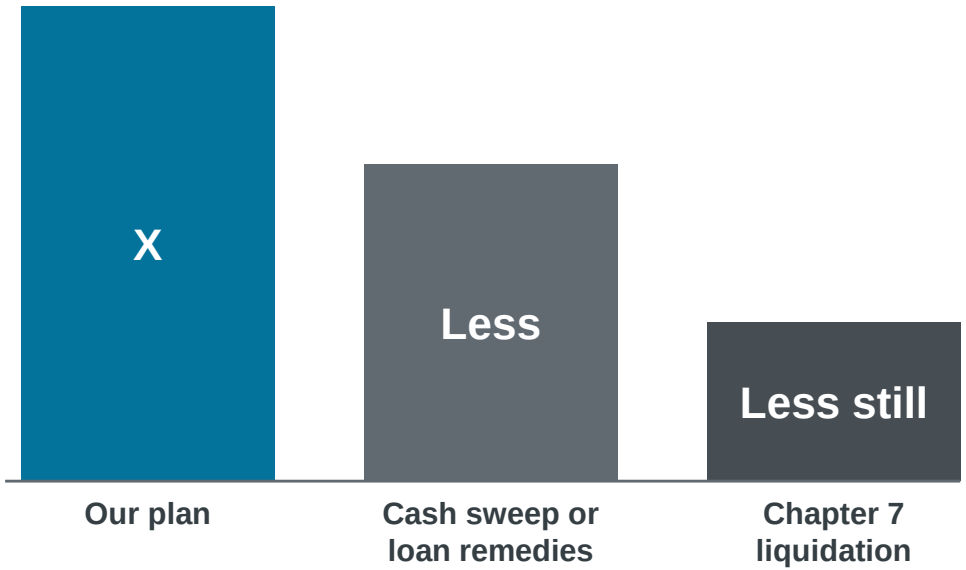
The 13-week cash flow, plus an 18–24 month medium-case P&L, balance sheet, and cash flow.

**3** **Where are we going?**

The recommendation, with one option clearly favored.

### Compare it to their other rights and remedies

*Illustrative, not to scale*



# No Sneak Attacks

## Constituent management is the secret sauce

### The conversation that never happened

Before any board, lender, or sponsor call, talk to the key decision-makers one on one.

By the time the group meets, people are constructive instead of reactionary.

**Bad news delivered for the first time in a group is a failure.**

**Be Switzerland**

Never speak poorly of one constituent to another. It always comes back.

**Read the room**

Are they ready to hear it? Exercised over one thing? Already made up their mind?

**Every voice is a data point**

Don’t lean toward the loudest or the most recent. Draw your own conclusions.

**Map motivations**

At the institutional level and the individual level, and keep talking.

# When Chapter 11 Is the Right Answer

## Then do it deliberately, and prepared

### It earns its cost when…

- The company will be materially better off using bankruptcy-only tools
- The math clearly clears the cost of getting there
- There are too many institutions to compromise consensually
- The business can withstand the cash, time, and noise

### If you go, go negotiated

**Negotiate first**

Start with the secured lender or fulcrum holder; memorialize it in a restructuring support agreement.

**Run parallel paths**

Prepare the filing and the DIP financing while you negotiate.

**Know the trade-off**

Lower cost and a faster case, for less flexibility and milestones you can breach.

# Keep Your Eyes on the Prize

## Analysis is table stakes. The action is the differentiator.

1. **Chapter 11 is Plan Q. It needs a specific reason.**
2. **Time decides. Know the runway first.**
3. **Run down every out-of-court avenue before you file.**
4. **Plan around what you control, off the low end.**
5. **No surprises: communicate early, in private, with everyone.**

*It's not a contest about who's right. It's about who pushes the situation to the actual outcome.*

# Questions?

**Lawrence Perkins**
Founder & CEO, SierraConstellation Partners

MBC | Mississippi Bankruptcy Conference, Inc.

# COMMERCIAL BREAKOUT
# SUB V DIP Removal
# Thursday 11/19

# 2026 MS Bankruptcy Conference

**November 19-20, 2026**

**The Sheraton (Flowood) in Jackson, MS**

# Sub V DIP Removal:
# Case-Saving or Litigation Tactic?

Removal of the Debtor as debtor in possession in Subchapter V cases and the effects - or ramifications – of that.

**Judge Meredith S. Grabill**
United States Bankruptcy Judge for the Eastern District of Louisiana

**Frederick "Fred" L. Bunol , Subchapter V Trustee**
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In 2019, Chief Judge Grabill was appointed as a U.S. Bankruptcy Judge for the Eastern District of Louisiana. Prior to her appointment on the bench, Judge Grabill was a shareholder at Lugenbuhl, Wheaton, Peck, Rankin & Hubbard and practiced law primarily in the areas of bankruptcy, commercial, and oil-and-gas litigation in Louisiana and New York. Prior to entering the private practice of law, she served as a judicial clerk to Judge Edith Brown Clement, U.S. Court of Appeals for the Fifth Circuit, from 2007-2008; and Judge Martin L.C. Feldman, U.S. District Court for the Eastern District of Louisiana, from 2006-2007. After practicing in New York for several years, she served as judicial clerk to Judge Martin Glenn, U.S. Bankruptcy Court for the Southern District of New York. In addition to her current duties for the Court, Judge Grabill teaches an annual course at Tulane Law School on chapter 11 bankruptcy and restructuring.



Mr. Bunol is a Managing Member of The Derbes Law Firm, LLC located in Metairie, Louisiana. In his bankruptcy practice, Mr. Bunol represents businesses and individuals that are Debtors in Chapter 11 and Chapter 7 and represents Chapter 7 Bankruptcy Trustees, creditors, landlords, tenants, and other parties-in-interest in Bankruptcy Court. In addition, Mr. Bunol serves as a Sub V Trustee in Louisiana and Mississippi with most of his cases being in the Middle and Eastern Districts of Louisiana.



Leann Opotowsky Moses is a partner with the law firm of Carver Darden Koretzky Tessier Finn Blossman & Areaux LLC located in New Orleans, Louisiana. Ms. Moses' practice focuses on Commercial Litigation and Bankruptcy primarily representing creditors' interests in Chapter 7, 11 and 13 cases. Ms. Moses also mediates commercial/bankruptcy matters and has extensive experience mediating hurricane claims. Ms. Moses is admitted to practice in Louisiana and Texas.

## Removal of the Debtor as the Debtor in Possession (Authorized under 11 U.S.C. §1185)

- Any party in interest can file the Motion to Remove the Debtor
- If the Court finds cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, either before or after the date of commencement of the case, or for failure to perform the obligations of the debtor under a plan confirmed under this subchapter, the Court can remove the debtor as Debtor in Possession. 11 U.S.C. §1185

## What Factors Do Courts Consider When Determining Cause?

[1] the materiality of any misconduct,

[2] the debtor-in-possession's evenhandedness or lack thereof in dealings with insiders and affiliated entities in relation to other creditors,

[3] the existence of pre-petition voidable preferences or fraudulent conveyances,

[4] whether any conflicts of interest on the part of the debtor-in-possession are interfering with its ability to fulfill its fiduciary duties, and

[5] whether there has been self-dealing or squandering of estate assets.

See *In re Neosho Concrete Prods. Co.*, 2021 Bankr. LEXIS 1198, at *23-24 (Bankr. W.D. Mo. May 6, 2021)

## Example of “Cause”

Cause can be “… a manifest demonstration that management is unable to conduct itself as an appropriate fiduciary for the bankruptcy estate is also "cause" to dispossess the debtor under § 1185.” *In re Comedymx, LLC*, 647 B.R. 457, 465 (Bankr. D. Del. 2022) (“First, Heldman repeatedly threatens to "demonetize" the debtors, meaning that he will take action that would entitle the debtors' streaming partners to stop paying the debtors for their content, thus causing the debtors' revenue to dry up. Second, Heldman trumpets his willingness to defy court orders, telling Beyond Blond's principal and outside counsel that they "cannot defeat someone who doesn't give a damn about the law.")

## The Debtor is removed, now what?

- Automatic expansion of Sub V Trustee Duties pursuant to 11USC §1185(b)(5)
- The Trustee cannot file a Plan of Reorganization
- The next step will depend on the debtor in the case, the assets of the estate, type of business and procedural posture of the bankruptcy.

## The Sub V Trustee Essentially Has Three Options:

1. **Work with Debtor to confirm a Plan**
2. **Convert to Ch.7**
3. **Dismissal**

## Option 1: Working with the Debtor

- The Sub V Trustee's next step is going to depend on the debtor in the case, the assets of the bankruptcy estate, the type of business, and the procedural posture of the bankruptcy.

- If there is a viable path forward for the debtor to reorganize, the Sub V Trustee may choose to work with the debtor and debtor's counsel to see if the debtor will either amend the Plan, if one has been filed, or file a Plan. *In re Duling Sons, Inc.*, 650 B.R. 578, 582 (Bankr. D.S.D. 2023) ("As a practical matter, to preserve the benefits of subchapter V in this case, the Trustee and Debtor must jointly propose a plan. If a subchapter V plan is not timely filed in accordance with this order, the case will convert to chapter 7… .")

## Option 2: Conversion to Chapter 7

- Any party in interest, which includes the Sub V Trustee, can request that the case be converted or dismissed. See 11 USC §1112(b)(1) and 11 USC §1109.

- *Conversion may not be in the best interest of the Bankruptcy Estate. See In re Duling Sons, Inc.*, 650 B.R. 578, 582 (Bankr. D.S.D. 2023) ("Where, as here, a business debtor intends to market and sell its assets to fund a liquidating plan, staying in Subchapter V will prevent the estate from incurring substantial chapter 11 UST fees or the statutory compensation of a chapter 7 panel trustee." Further, "the [Sub V] Trustee has extensive knowledge of the Debtor and its estate from its prior investigation and mediation in the case.")

## Option 3: Dismissal

- The Sub V Trustee may consider a structured dismissal with a final accounting that authorizes the Sub V Trustee to distribute cash on hand in accordance with a final account.

- Similarly, in some Chapter 11 Cases the Court has determined that a structured dismissal is appropriate. *See In re Buffet Partners, L.P.*, 2014 Bankr. LEXIS 3204 (Bankr. N.D. Tex. July 23, 2014).

## Are there other handicaps that occur if a Debtor in Possession is removed?

- Depends- Type of business and whether its operating
- Is the principal of the Debtor critical to the operations
- Relationship with vendors and customers
- Relationship with employees
- Insufficient cash to operate and pay expenses.

## Considerations for Creditors before removing a DIP

- Type of client (Institutional or Individual)
- Pre- and Post Petition experience with Debtor (Prior bad acts, fraud, preference acts, hidden assets, repeated filings, manipulated income and expenses, delays, objections)
- Amount of debt
- Delays in filing Plan vs. Speed – both can create issues or “prejudice” for a creditor
- Is Debt secured fully or partially or Unsecured ( is there a market for collateral, does the creditor want it or should they seek adequate protection or modify the stay)
- How is the Case being run (for the creditors or the debtor)
- Amount of debt

## Continued - Considerations for Creditors before removing a DIP

- Is there a market for the collateral?
- Client prefers state court recovery or allowing Debtor to remain as DIP (pending foreclosure or litigation when bankruptcy is filed)
- Are the client and other creditors and/or Sub V Trustee aligned
- Are adequate protection payments being made
- Likelihood of reorganization and the Plan
    - Climate for the Debtor's business
    - Likely recovery for the creditor
    - Are the Debtor's projections reasonable?
    - Are there injunctions in the proposed plan to delay recovery from guarantor? *See In re Hal Luftig Company, Inc*., 25-CV-02580, 2026 WL 2935950, USBC SDNY (9/30/2026)

## Other considerations?

- What goal is trying to be achieved?
- Can the Sub V election be withdrawn, the case converted to a standard Chapter 11 and the court appoint a chapter 11 Trustee with powers to file a plan?
- Is the Sub V Trustee willing to take on the role as the Debtor in Possession?

## What are alternatives to the Sub V Trustee being removed that the parties and Court should consider?

- Consider the goal that is trying to be achieved
- Consider whether the Sub V election can be withdrawn, the case converted to a standard Chapter 11, and the Court appoint a Chapter 11 Trustee with powers to file a plan.
- Consider if the Sub V Trustee is willing to take on the role as the DIP.

# Questions?

# Thank You!

**CONTACT INFORMATION**

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# CONSUMER BREAKOUT
# Hot Topics in Consumer Practice
# Thursday 11/19

# CONSUMER BANKRUPTCY: HOT TOPICS



# LIEN AVOIDANCE

11 U.S.C. §522(f)(1)

- Judicial Lien §522(f)(1)(A)
    - MS Code for establishing judicial lien

      Miss Code Ann. §11-7-189

      Miss Code Ann. §11-7-191
- Nonpossessory, NPMSI §522(f)(1)(B)

11 U.S.C. §522(f)(2)(A)

- Formulas to determine if a lien impairs an exemption

# JUDICIAL ESTOPPEL

*Keathley v. Buddy Ayers Constr., Inc*. 146 S.Ct. 1532(2026)

- Ch 13 filed > post-petition injury > lawsuit filed > defense of judicial estoppel raised for non-disclosure > debtor amends schedules
- 5th Circuit applied precedent that presumed intent to conceal asset where there was a potential benefit from non-disclosure.
- S. Ct. did not agree with 5th Circuit and held that Courts deciding whether a debtor's failure to disclose a claim in bankruptcy was "inadvertent or mistaken" – for purposes of judicial estoppel – must look to the totality of the circumstances surrounding the omission

# JUDICIAL ESTOPPEL

In re Todd, ADV#23-06010 KMS (S.D. MISS Nov. 30, 2023)

- Ch 13 filed > potential claim listed in schedules > Defendants argued improperly disclosed
- "The purpose of the schedules is to give interested parties sufficient information to decide whether they want to engage in further inquiry" [quoting *Collier on Bankruptcy* ¶ 521.06]
- Abandonment
  - Property not scheduled remains property of the estate
  - Property scheduled remains property of the estate until dismissal, discharge, or conversion.

# SETTLEMENTS IN CONSUMER CASES

- Approval of Employment
  - Fed R. Bank. P. 2014
  - Miss. Bankr. L.R. 2014-1
- Approval for Compensation
  - Fed. R. Bankr. P. 2016
  - Miss. Bankr. L.R. 2016-1
- Settlement Approval
  - Fed. R. Bankr. P. 9019 – Trustee
  - Miss. Bankr. L.R. 9019-1
- Distribution of funds
- Discharge before Settlement

# PRE CONFIRMATION FEES

ADEQUATE PROTECTION

- 11 U.S.C. §361

DEBTOR ATTY FEES

- Fed. R. Bankr. P. 2016(a)

TRUSTEE FEES

- In re Black, Case # 26-10003, (M.D. LA)
- CH 13 dismissed before confirmation > Trustee retained fees > Debtor files Motion to Compel
- Trustee specifically looking at interaction of 28 U.S.C. §586(e)(2) & 11 U.S.C. §1326(a)(2)

# BUY NOW PAY LATER (BNPL)

**Affirm, Klarna, Afterpay, Paypal, Sezzle, Zip**

- How it works: choose provider at checkout > soft credit check & approval in seconds > pay 25% upfront followed by three remaining payments

Nominal BNPL loan origination volume and average loan size

| Metric | 2019 | 2020 | 2021 | 2022 | 2023 |
|---|---|---|---|---|---|
| Loan originations (millions) | 19.8 | 77.9 | 196.6 | 273.8 | 335.8 |
| Dollar originations (billions) | $2.2 | $8.9 | $25.5 | $33.4 | $43.9 |
| Average loan size | $111 | $114 | $129 | $122 | $131 |

CFBP Dec 2025 report

# MERCHANT CASH ADVANCE

CH 13 Concerns

- Automatic stay; property of the estate; feasibility; actual business operations

CH 7 Concerns

- Preference; property of the estate; fraudulent transfer; post-petition transfer

# NOTICE OF MORTGAGE PAYMENT CHANGE [R. 3002.1]

- Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim
- Fed. R. Bankr. P. 3002.1(b)
- RESPA / REG X – Qualified Written Requests > Request for Information or Notice of Error
  - RFI – request copies of the last two escrow analysis
  - NOE – failure to: pay escrow; failure to refund escrow
  - 12 CFR 1024.37 – Regulations on force-placed insurance

# WAGE ORDERS

- Growing trend with Employers treating CH 13 Wage Orders as garnishments.
- Employers withholding each pay period but sending quarterly or even semi-annually.
- Causing multiple Motions to Dismiss in Ch 13 cases

# GARNISHED FUNDS

Preference

- Trustee ability to claw back garnished funds 11 U.S.C. §547(c)
- Debtor ability if Trustee doesn't 11 U.S.C. §522(h)

**Lien Avoidance in Mississippi Consumer Bankruptcy Cases**

**11 U.S.C. § 522(f)(1)(A) and (B)**

## I. Overview

Section 522(f) of the Bankruptcy Code permits an individual debtor to avoid certain liens that impair an exemption to which the debtor would have been entitled. The provision applies in both Chapter 7 and Chapter 13 cases and operates independently of cram down or lien stripping principles under 11 U.S.C. §§ 506 and 1322. *Tower Loan of Mississippi, Inc. v. Maddox (In re Maddox)*, 15 F.3d 1347, 1353–54 (5th Cir. 1994).

Whether a lien is avoidable requires the following analysis:

1. Did the lien "fix" on an interest of the debtor in property?
2. Is the lien either:
    a. A judicial lien within § 522(f)(1)(A); or
    b. A nonpossessory, nonpurchase-money security interest within § 522(f)(1)(B)?
3. Is the property exempt under Mississippi law?
4. Does the lien impair the exemption under the formula set forth in § 522(f)(2)?
5. If the lien impairs the exemption, is it avoidable in full or only in part?

## II. Statutory Grounds for Avoidance

Section 522(f)(1) provides, subject to specified exceptions, that a debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent the lien impairs an exemption to which the debtor would have been entitled if the lien is:

1. A judicial lien, other than a judicial lien securing a debt of the kind specified in § 523(a)(5); or
2. A nonpossessory, nonpurchase-money security interest in property described in § 522(f)(1)(B).

Section 522(f) permits avoidance of the "fixing" of a lien on an interest of the debtor. The debtor therefore must have possessed an interest in the property before the lien attached to that interest. If the debtor acquired the property interest and the lien simultaneously, § 522(f) does not permit avoidance because the lien did not fix on a preexisting interest of the debtor. See *Farrey v. Sanderfoot,* 500 U.S. 291, 111 S. Ct. 1825, 114 L. Ed. 2d 337 (1991

**A. Judicial Liens Under § 522(f)(1)(A)**

A "judicial lien" is a lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding. 11 U.S.C. § 101(36).

Miss. Code Ann. § 11-7-189 provides:

> The clerk shall, within twenty (20) days after the adjournment of each term of court, enroll all final judgments rendered at that term in the order in which they were entered on the minutes by entering [the judgment on] The Judgment Roll…

Miss. Code Ann. § 11-7-191 provides:

> A judgment so enrolled shall be a lien upon and bind all the property of the defendant within the county where so enrolled, from the rendition thereof, and shall have priority according to the order of such enrollment, in favor of the judgment creditor, his representatives or assigns, against the judgment debtor and all persons claiming the property under him after the rendition of the judgment. A judgment shall not be a lien on any property of the defendant thereto unless the same be enrolled. In counties having two (2) judicial districts, a judgment shall operate as a lien only in the district or districts in which it is enrolled.

So, properly enrolled judgments automatically attach to any real property of the Judgment Debtor in the county (or judicial district) where the judgment is enrolled.

The only real property which is exempt in Mississippi is qualified homestead (Miss. Code Ann. § 85-3-21).

Judicial liens securing domestic-support obligations of the kind described in § 523(a)(5) are expressly excluded from avoidance under § 522(f)(1)(A).

## III. Nonpossessory, Nonpurchase-Money Security Interests Under § 522(f)(1)(B)

Section 522(f)(1)(B) applies more narrowly than § 522(f)(1)(A). It permits avoidance only if:

**1.** The lien is a nonpossessory, nonpurchase-money security interest;

**2.** The collateral falls within one of the categories listed in § 522(f)(1)(B); and

**3.** The lien impairs an exemption to which the debtor would have been entitled.

The categories of items eligible for lien avoidance under § 522(f)(1)(B) are:

**1.** Household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, and jewelry held primarily for the personal, family, or household use of the debtor or a dependent;

**2.** Implements, professional books, and tools of the trade of the debtor or a dependent; and

**3.** Professionally prescribed health aids for the debtor or a dependent.

### B. Statutory Definition of "Household Goods"

For purposes of § 522(f)(1)(B), "household goods" is limited by § 522(f)(4)(A) and (B). The statute identifies covered items and also imposes specific exclusions and value limitations.

522(f)(4)(A) provides that, subject to specifically excluded items listed in 522(f)(4)(B) the term “household goods”, as used in paragraph (1)(B), means-

**(i)**clothing;

**(ii)**furniture;

**(iii)**appliances;

**(iv)**1 radio;

**(v)**1 television;

**(vi)**1 VCR;

**(vii)**linens;

**(viii)**china;

**(ix)**crockery;

**(x)**kitchenware;

**(xi)**educational materials and educational equipment primarily for the use of minor dependent children of the debtor;

**(xii)**medical equipment and supplies;

**(xiii)**furniture exclusively for the use of minor children, or elderly or disabled dependents of the debtor;

**(xiv)**personal effects (including the toys and hobby equipment of minor dependent children and wedding rings) of the debtor and the dependents of the debtor; and

**(xv)** 1 personal computer and related equipment.

Pursuant to 522(f)(4)(B) household goods does not include

(i) works of art (unless by or of the debtor, or any relative of the debtor);

(ii) electronic entertainment equipment with a fair market value of more than $900 in the aggregate (except 1 television, 1 radio, and 1 VCR);

(iii) items acquired as antiques with a fair market value of more than $900 in the aggregate;

(iv) jewelry with a fair market value of more than $900 in the aggregate (except wedding rings); and

(v) a computer (except as otherwise provided for in this section), motor vehicle (including a tractor or lawn tractor), boat, or a motorized recreational device, conveyance, vehicle, watercraft, or aircraft.

## IV. Mississippi Exemptions

For a lien on property to be avoidable the item must be eligible for lien avoidance as set forth above in § 522 and also exempt under Mississippi law (Mississippi has opted out of the federal exemption scheme. Miss. Code Ann. § 85-3-2).

### A. Real Property

Miss. Code Ann. § 85-3-21 provides for a homestead exemption of $75,000 of equity. Miss. Code Ann. § 85-3-1(h) provides for an additional exemption of property having a value of $50,000.00 of whatever type, whether real, personal or mixed, tangible or intangible to any Mississippi resident who is seventy 70 years of age or older.

### B. Personal Property

Miss. Code Ann. § 85-3-1(a), allows a Debtor to exempt the following tangible personal property up to $10,000 in value:

- (i) Household goods, wearing apparel, books, animals or crops;
- (ii) Motor vehicles;
- (iii) Implements, professional books or tools of the trade;
- (iv) Cash on hand;

- (v) Professionally prescribed health aids;
- (vi) Any items of tangible personal property worth less than Two Hundred Dollars ($200.00) each.

The statute further defines "household goods" to mean clothing, furniture, appliances, one (1) radio and one (1) television, one (1) firearm, one (1) lawn mower, linens, china, crockery, kitchenware, and personal effects (including wedding rings) of the debtor and his dependents; however, works of art, electronic entertainment equipment (except one (1) television and one (1) radio), jewelry (other than wedding rings), and items acquired as antiques are not included within the scope of the term "household goods."

**V. Does the Lien Impair an Exemption?**

Section 522(f)(2)(A) provides a mathematical formula to determine whether a lien "impairs an exemption" and is thus subject to avoidance. A lien is considered to impair an exemption only to the extent that the sum of—

**1.** The targeted lien;

**2.** All other liens on the property; and

**3.** The allowed exemption on the property subject to the lien;

exceeds the value that the debtor's interest in the property would have been in the absence of any liens.

The amount avoided is the lesser of:

**1.** The amount of impairment produced by the formula; or

**2.** The amount of the targeted lien.

If the calculation produces zero or a negative number, the lien does not impair the exemption and cannot be avoided under § 522(f).

## VI. Surplus Equity and Partial Avoidance

### A. Surplus Equity

If the value of the debtor's interest exceeds the total of:

**1.** The targeted lien;

**2.** All other liens; and

**3.** The available exemption,

the formula produces no impairment. In that circumstance, the targeted lien cannot be avoided under § 522(f).

### B. Partial Avoidance

Section 522(f) authorizes avoidance only "to the extent" the lien impairs the exemption. If the impairment is less than the amount of the targeted lien, the lien is avoided only in part. The remaining portion continues to encumber the property.

## VII. Multiple Liens and Order of Calculation

Section 522(f)(2)(B) provides that, when property is subject to more than one lien, a lien already avoided is not included when calculating impairment with respect to another lien.

As a practical matter, liens should be tested in reverse order of priority:

**1.** Apply the formula first to the most junior avoidable lien.

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**4.** Continue the process until each targeted lien has been analyzed.

Failing to recalculate after avoiding a junior lien can improperly overstate the impairment of a more senior lien. *Hanger v. Bank of America, N.T. & S.A. (In re Hanger)*, 196 F.3d 1292, 1296–97 (9th Cir. 1999)

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MBC | Mississippi Bankruptcy Conference, Inc.

# CONSUMER BREAKOUT
# Tax Issues in Bankruptcy
# Thursday 11/19

# MISSISSIPPI BANKRUPTCY CONFERENCE 2026
# FEDERAL TAX ISSUES IN BANKRUPTCY[1]

**Sam Wright**
**Assistant U.S. Attorney**
**900 Jefferson Ave.**
**Oxford, MS 38655**
**662/234-3351 (Main)**
**662/238-7659 (Direct)**
**662/202-4743 (Cell)**
**Samuel.Wright@usdoj.gov**

## I. Notice

### A. Law

1. 11 U.S.C. § 342(f)(1) - An entity may file with any bankruptcy court a notice of address to be used . . . by particular bankruptcy courts, as so specified by such entity at the time such notice is filed, to provide notice to such entity in all cases under chapters 7 and 13 pending in the courts with respect to which such notice is filed, in which such entity is a creditor.

2. Fed. R. Bankr. P. 5003(e) - United States and state governmental units may designate service addresses on a mailing register kept by the clerk of court.

3. Fed. R. Bankr. P. 2002(j) - Copies of notices required to be mailed to all creditors under this rule shall be mailed . . . (3) in a chapter 11 case, to the Internal Revenue Service at its address set out in the register maintained under Rule 5003(e) for the district in which the case is pending; [and] (4) if the papers in the case disclose a debt to the United States other than for taxes, to the United States attorney for the district in which the case is pending and to the department, agency, or instrumentality of the United States through which the debtor became indebted . . . .

4. Fed. R. Bankr. P. 7004(b)(4) - Service may be made by first class mail postage prepaid as follows: [u]pon the United States, by mailing a copy of the summons and complaint to the **civil process clerk** at the office of the United States Attorney for the district in which the action is brought and by mailing a copy of the summons and complaint to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also mailing a copy of the summons and complaint to that officer or agency.

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[1] This is not an official statement of the United States of America, United States Attorney's Office for the Northern District of Mississippi, United States Department of Justice, or Internal Revenue Service. The information contained herein and the oral presentation of it is provided solely for informational (sometimes entertainment) purposes and is intended to be used strictly as a basis for discussion (not retaliation or ridicule). It is not intended to be a complete overview of the subject matter nor should it be construed as legal advice.

5. Fed. R. Bankr. P. 7004(b)(5) - Service may be made by first class mail postage prepaid as follows: A[u]pon any officer or agency of the United States, by mailing a copy of the summons and complaint to the United States as prescribed in paragraph (4) of this subdivision and also to the officer and agency.

6. Fed. R. Bankr. P. 9014(b) - Contested matters are served in the same manner as an adversary proceeding under Fed. R. Bankr. P. 7004. Therefore, the agency, the United States Attorney and the Attorney General of the United States must be served with contested matters. *See I.R.S. v. Patriot Contracting Corp.*, 2007 WL 433392 (Bankr. D.N.J. 2007) (In short, Rules 9014(b) and 7004(b)(4) provide that motions brought in contested matters must be served by mailing a copy of the motion to the particular agency, the local United States Attorney's Office and the Attorney General of the United States.

7. "Notice or knowledge of an Assistant United States Attorney cannot, as a general proposition, be imputed to the particular agency to which a debt is owing. *United States, Small Business Administration v. Bridges*, 894 F.2d 108, 112 (5th Cir. 1990) (holding that notice or actual knowledge of one United States government agency will not be imputed to another agency); *In re H. & C. Table Co.*, 457 F.Supp. 858, 860 (W.D. Tenn. 1978) (The United States is a monstrous government and one agency will not always know what another agency is doing; when the appropriate representative of the government is not notified, the rights of the United States may be jeopardized (citation omitted); *U.S. Metal Products Co. v. United States*, 302 F. Supp. 1263, 1270 (E.D.N.Y. 1969) (discussing that notice or actual knowledge of one portion of an agency not imputed to another portion of the same agency); *United States v. Yale Transport Corp.*, 184 F.Supp. 42, 47 (S.D.N.Y. 1960) ([N]otice of bankruptcy proceedings should be reasonably calculated to come to the attention of that branch of the Government familiar with the claims involved and which exercises functions with respect thereto; *U. S. v. Golenburg*, 175 F.Supp. 415, 418 (N.D. Ohio 1959) (holding that imputing notice or knowledge from one government agency to another is obviously unreasonable).

8. Summary

a. Where the IRS is a creditor, provide notice to the IRS at its designated addresses.

b. Where another federal agency is a creditor, provide notice to the agency and the United States Attorney.

c. Serve adversary proceedings on the agency (IRS if taxes are implicated), the United States Attorney, and the Attorney General.

d. Serve contested matters (objections to claim, motions, plans, etc.) on the agency (IRS if taxes are implicated), the United States Attorney, and the Attorney General. 3

B. The IRS has listed the address on the Northern District of Mississippi Bankruptcy Court's register as:

Internal Revenue Service
P.O. Box 7346
Philadelphia, Pennsylvania 19101-7346

FAX: (855) 235-6787

C. What Address to Use to Serve the United States Attorney with Adversary Proceedings and Contested Matters (Objections to Claim, Motions, Plans, etc.) in the Northern District of Mississippi?

Office of the United States Attorney
Attn: Civil Process Clerk
900 Jefferson Ave.
Oxford, MS 38655

D. What Address to Use to Serve the Attorney General of the United States with Adversary Proceedings and Contested Matters (Objections to Claim, Motions, Plans, etc.)?

For IRS Matters:

Attorney General of the United States
U.S. Department of Justice Tax Division
Civil Trial Section, Southern Region
P.O. Box 14198
Ben Franklin Station
Washington, D.C. 20044

For Non-IRS Matters:
Attorney General of the United States
Main Justice Building
10th & Constitution Avenue, N.W.
Washington, D.C. 20530

**Practice Pointer** - Include both the U.S. Attorney and the Attorney General on your mailing matrix to ensure that service of a plan which significantly affects the interest of the United States (e.g., provides for the valuation of a secured claim, seeks an injunction, materially modifies terms of the form plan, etc.) is proper.

## II. Information Gathering-IRS Account

Fastest and best way to get information for an individual

https://www.irs.gov/individuals/get-transcript

**Note:** This method requires an individual to establish a ID.me account. They may already have one as one account allows you to sign in to other government agencies.

**Access tax records and transcripts in your Individual Online Account**
**You can view your tax records in your Individual Online Account. This is the fastest, easiest way to:**

- **View, print or download your transcripts**
- **Find out how much you owe**
- **Look at your payment history**
- **See your prior year adjusted gross income (AGI)**
- **View other tax records**
- **Information return documents to assist in filing your claims**

**If you have any trouble**

https://www.irs.gov/individuals/transcript-services-for-individuals-faqs

Available Transcript Types

- **Tax Return Transcript**: Shows most line items from your original tax return as filed, including adjustments (Form 1040 series).
- **Tax Account Transcript**: Shows basic data like marital status, type of return filed, adjusted gross income, taxable income, and payment history or post-filing adjustments.
- **Record of Account:** Combines the tax return and tax account transcripts into a single comprehensive record. **THIS IS THE MOST COMPREHENSIVE ONE YOU CAN GET!**
- **Wage and Income Transcript**: Shows data from information returns received by the IRS, such as Form W-2, Form 1099, Form 1098, and Form 5498.
- **Verification of Non-filing Letter**: Proof from the IRS that they have no record of a processed Form 1040 for the requested year.

**Alternative to getting a transcript online**
We recommend getting a transcript online since that's the fastest method. If you're unable to register, you can get a tax return or tax account transcript mailed to you instead.
**What you need**
To get a transcript mailed to you, you need your mailing address from your latest return.
**What you get**
- Tax return or tax account transcript types delivered by mail
- Transcripts that arrive in **5 to 10 calendar days** at the address we have on file for you

You can also request a transcript be mailed to you by calling our automated phone transcript service at 800-908-9946.

## III. Priority Tax Claims - Section 507(a)(8)

The following federal government tax claims are entitled to priority claims status:

A. Three Year Rule. Income taxes for which a return is last due, considering extensions, within 3 years of the date of the filing of the bankruptcy case. 11 U.S.C. § 507(a)(8)(A)(i). The operative date is the due date (as extended) for such return, not the actual filing date.

B. 240 Day Rule. Income taxes assessed within 240 days of the petition date. 11 U.S.C. § 507(a)(8)(A)(ii). The 240-day period is extended in two situations. First, it is extended by the time which an offer in compromise was pending or in effect during the 240-day period, plus 30 days. Second, it is extended by the time a stay against collection proceeding was in effect during the 240-day period, plus 90 days.

C. Still Assessed Rule. 11 U.S.C. § 507(a)(8)(A)(iii). If an income tax has not been assessed, but is still assessable, then it is entitled to priority status unless the statute of limitations is still open because of a late or unfiled return or the taxpayers fraud. Congress did not want to penalize creditors for a debtors bad acts. However, the rule applies if the statute of limitations on assessment is open for some other reason, such as a consent to extend the statute executed by the debtor or pending Tax Court litigation.

D. Withholding Taxes. A tax required to be collected or withheld and for which the debt is liable in whatever capacity is a priority tax claim. 11 U.S.C. § 507(a)(8)(C).

E. Employment Taxes - Three Year Rule. Employment taxes for which a return is last due, considering extensions, within 3 years of the date of the filing of the bankruptcy case. 11 U.S.C. § 507(a)(8)(D). This category covers Form 940 and 941 taxes.

F. Excise Taxes. There are two types of excise taxes which are entitled to priority claim status: (1) excise taxes on prepetition transactions for which a return is last due considering extensions within three years of the filing of the bankruptcy case, and (2) Excise taxes for which a return is not required and which relate to a transaction which occurred within three years of the filing of the bankruptcy case. 11 U.S.C. § 507(a)(8)(E).

G. Customs Duties. Certain customs duties are entitled to priority claims status. 11 U.S.C. § 507(a)(8)(F).

H. Compensatory Loss Penalties. A penalty related to a Section 507(a)(8) claim which is compensation for actual pecuniary loss is entitled to priority claims status. 11 U.S.C. § 507(a)(8)(G).

I. Other Important Points About Priority Tax Claims.

1. Interest which accrues on a prepetition tax claim is entitled to the same priority as the underlying tax claim. *In re Larson*, 862 F.2d 112, 119 (7th Cir. 1988); *In re Stonecipher Distributors, Inc.*, 80 B.R. 949 (Bankr. W.D. Ark. 1987).

2. Tolling. Amended § 507(a)(8) (hanging paragraph) codifies and extends the Supreme Courts holding in *Young v. United States*, 535 U.S. 43 (2002) (serial bankruptcies toll tax priority time periods). Specifically, the time periods for determining whether a tax is a priority claim is tolled for the following time periods:

(a) the time during which a collection due process request, hearing, and appeal prevented collection, plus 90 days; plus

(b) the time during which the automatic stay was in effect or during which one or more confirmed plans prohibited collection, plus 90 days.

(c) Erroneous Refunds - have the same priority status as the tax to which they relate. 11 U.S.C. § 507(c).

## IV. Administrative Tax Claims - Section 507(a)(2)

These are claims which arise during the pendency of the bankruptcy case. The claim is allowable under Section 503. In Chapter 13, the IRS has the option of filing a claim under Section 1305(a)(1). The debtor does not have the option of filing a Section 1305(a) claim on behalf of the IRS. *In re Dickey*, 64 B.R. 3 (Bankr. E.D. Va. 1985); *see also In re Hudson*, 158 B.R. 670, 674 (Bankr. N.D. Ohio 1993). The IRS makes its determination based upon the size of the claim, whether the IRS holds other prepetition claims, the debtors willingness to amend the plan to pay the Section 1305(a) claim and the availability of other assets. If the IRS files a Section 1305(a) claim, it is treated as a priority claim.

Interest on administrative claims is an administrative expense. *In re Mark Anthony Constr., Inc.*, 886 F.2d 1101 (9th Cir. 1989). Penalties related to administrative taxes are also entitled to administrative priority. 11 U.S.C. § 503(b)(1)(C); *In re Friendship College*, 737 F.2d 430 (4th Cir. 1984).

## V. Practical Issues



Consult the Internal Revenue Service Manual ("IRSM" or "IRM"). It is not secret. It is a public document. It is confusing to me, too, at times. However, it can be a great resource. Here is the link for it and, specifically, for the part that deals with collections (Part 5).

https://www.irs.gov/irm/part5/index.html

DISCLAIMER: The IRM is an internal operational handbook made public via the Freedom of Information Act (FOIA); it **does not carry the force and effect of law**.

### Offers in Compromise/Payment Arrangements

**5.9.4.11 (09-05-2025)**
**Offers in Compromise and Bankruptcy**

1. ***Introduction.*** The Bankruptcy Code provides a means for balancing the interests of the taxpayer and the Service, as does the administrative offer in compromise (OIC). An administrative offer in compromise is one submitted in accordance with the guidelines

and procedures set forth in Rev. Proc. 2003-71 and IRM 5.8, *Offer in Compromise*. Administrative and legal problems would be created if a tax liability were simultaneously the subject of a court-supervised bankruptcy case and the administrative offer in compromise process.

2. **IRS Policy.** When a taxpayer has filed for bankruptcy protection, IRS's policy is not to consider an OIC from a taxpayer in bankruptcy. Instead SCI considers payment proposals, usually in the form of plans filed by the debtor in the bankruptcy case, under guidelines set forth in IRM 5.9.8.17.1, The Plan of Reorganization, IRM 5.9.9.5, Chapter 12 Plans, and IRM 5.9.10.5, The Chapter 13 Plan, depending upon the type of bankruptcy case filed.

3. **Rule.** The rule to follow on OIC by the IRS:

    a. 4. An OIC is returned to the debtor as *"not processable"* if the taxpayer is a debtor in a bankruptcy case for which a discharge has not yet been entered. The return of the OIC as "not processable" does not constitute a rejection and it does not entitle the debtor to file an appeal.

    b. 5. However, even though an OIC is not considered when a taxpayer is in bankruptcy, **in appropriate cases**, **the IRS may work with the debtor within the bankruptcy case to achieve a result that is in the best interests of both the debtor and the IRS.** (See IRM 5.9.8.17.1(8), Deficient Plans - Exceptions, and IRM 5.9.10.5.5(4), Deficient Plans - Exceptions.)

6. **Specific Bankruptcy Chapters.** Listed below is the IRS's policy for specific bankruptcy chapters which clarify the IRS's position on the processing and consideration of an OIC in bankruptcy-related situations.

    a. 7**. Chapter 7.** Only after a discharge or a dismissal has taken place, can an OIC be considered by the IRS in a Chapter 7 proceeding. Because a Chapter 7 discharge is usually issued quickly, the taxpayer is not harmed by the delay. Furthermore, once the discharge is entered, the IRS will be able to determine which taxes are discharged and will be able to make a determination of "Doubt as to Collectibility" under its administrative OIC procedures. (See IRM 5.8.10.2.3, Acceptance of Offer in Compromise After Chapter 7 Bankruptcy.)

    b. 8. **Chapter 11.** In Chapter 11 cases involving individual debtors, as in Chapter 13 cases, the IRS will not consider any OIC prior to discharge, completion of the payments under the plan, or dismissal. When the Chapter 11 debtor is a non-individual, an OIC can be *considered* in unusual circumstances after plan confirmation, if the tax liabilities are the subject of a defaulted plan and the default cannot be cured or the plan

cannot be modified. Such an OIC is only appropriate if unanticipated changes in circumstances cause an inability to meet the terms of the plan. The decision for consideration of an OIC must be made on a case by case basis. The IRS can decline to consider an OIC after a Chapter 11 default if the particular facts of the case show an OIC would be inappropriate.

**Note:** Before the IRS can consider processing an OIC in a Chapter 11 bankruptcy case involving a non-individual, the IRS must have made a determination that the debtor's plan has actually defaulted and cannot be cured, and the taxpayer has no other outstanding liabilities. Additionally, the bankruptcy court can no longer have jurisdiction over any tax liabilities which are the subject of the OIC submitted. The IRS's decision to *consider* an OIC submitted by a debtor does not indicate the IRS has *accepted* the offer.

c. 9. **Chapter 12.** An OIC in Chapter 12 generally will not be considered. However, in unusual instances, changed circumstances may justify consideration of an OIC in defaulted Chapter 12 plan cases, just as in defaulted Chapter 11 plans, especially since Chapter 12 bankruptcies tend to involve struggling small businesses.

d. 10. **Chapter 13.** An OIC will not be considered prior to discharge, completion of the payments under the plan, or dismissal of a Chapter 13 plan.

**Note:** This policy does not result in harm to the debtor because the debtor is not precluded from resolving their tax liabilities in the context of the bankruptcy proceeding.

11. **Consideration of an OIC.** The IRS's decision to *consider* an OIC from debtors who have taken advantage of the relief offered under the Bankruptcy Code is limited to the situations described above. The IRS's decision to *accept* an OIC falls within the discretion of the IRS.
12. **Pre-Petition OIC Payments.** When a debtor has submitted an OIC with a payment pre-petition, and they file bankruptcy while the OIC is pending, the IRS may generally retain the payment. A payment made within 90 days before the filing of a bankruptcy may qualify as a preferential transfer and be avoidable under 11 USC 547(b). However, the trustee has the burden of proving this payment is a preference. The IRS may retain this OIC payment until the trustee persuades the IRS the payment is a preference and not subject to the exceptions under 11 USC 547(c). Some payments, namely those to pay off trust fund taxes, are not avoidable as preferences, because the debtor has no property interest in the funds.

13. **Post-Petition OIC Payments.** When a debtor submits an OIC with a payment post-petition, the payment will be treated in the following manner according to

the bankruptcy chapter under which the debtor has filed for bankruptcy protection:

**a.** 14. **Chapter 7.** The IRS can keep the payment submitted with the OIC, without violating the automatic stay, if the payment is made from post-petition earnings and is applied to non-dischargeable taxes. Post-petition earnings are not property of the estate, and the IRS may retain down payments made with such earnings even if the OIC is deemed not processable. In this situation, SCI must document the AIS history screen with pertinent information relating to such payments, including any contacts made with the debtor on this matter, and confer with Counsel should legal advice be required.

**b.** 15. **Chapter 11.** The IRS cannot retain OIC payments submitted by a Chapter 11 debtor post-petition. In general, property of the estate in Chapter 11 may include property listed under 11 USC 541 that is obtained post-petition. For Chapter 11 debtors who are individuals, property of the estate includes post-petition earnings. The IRS may not retain OIC payments made with property of the estate.

**c.** 16. **Chapter 12 and 13.** The IRS cannot retain OIC payments submitted by a Chapter 12 or 13 debtor post-petition. In Chapter 12 and 13, property of the estate includes property under 11 USC 541 that is acquired post-petition and earnings obtained post-petition. The IRS may not retain OIC payments made with property of the estate.

Installment Agreements

### 5.9.4.20 (09-05-2025)
### Installment Agreements and Bankruptcy

***Bankruptcy Does Not Terminate a Valid Installment Agreement.*** After an installment agreement becomes effective, the Internal Revenue Code limits the conditions terminating such an agreement; *a bankruptcy petition is not one of them.* (See IRC § 6159(b) and *Treas. Reg. § 301.6159-1(c) and (c)(2)(i)*.) An installment agreement is considered to be *suspended* by a bankruptcy filing, not *terminated*.

**Note:**

A termination of an installment agreement while a taxpayer is in bankruptcy could be viewed as an act to collect the underlying tax liabilities, and hence, a violation of the bankruptcy automatic stay (11 USC § 362).

**Payment through a Prepetition Installment Agreement in Good Standing Under Section 1322(b)(5).** Section 1322(b)(5) allows a debtor to cure a default and maintain payments on any

claim where the final payment on the debt is due after the completion of the plan. Taxes are due and payable immediately and in almost every circumstance will not be susceptible of being paid under Section 1322(b)(5). An exception exists where the debtor has a formal installment agreement with the IRS, which was not terminated prepetition. *See In re Gordon*, 217 B.R. 973 (Bankr. S.D. Ga. 1997). However, if Section 1322(b)(5) is properly utilized, the entire tax secured, priority and general debt, including penalties and interest, included within the agreement will be nondischargeable pursuant to Section 1328(a)(1). Installment agreements also have provisions which allow the IRS to increase the payments if the taxpayers financial circumstances change and to terminate the agreement if the taxpayer fails to file or pay future taxes. If a debtor has a prepetition installment, the plan should assume the installment agreement as an executory contract and specifically provide that the tax debt is nondischargeable. Postpetition installment agreements cannot be obtained from a local Internal Revenue Service office because such offices do not have authority over a debtor=s tax account once bankruptcy is filed; authority rests with the Insolvency Unit upon the filing of a bankruptcy case. Further, if a debtor=s tax liability is referred to the Department of Justice for litigation, the IRS loses authority to enter into an installment agreement as settlement authority then rests with the Department of Justice. 26 U.S.C. § 7122(a). Stated another way, if the United States Attorney objects to confirmation of a plan, the debtor may not approach the IRS to obtain an installment agreement and the IRS is without authority to enter into one.

**TAX RETURNS**

**5.9.4.16 (02-03-2023)**

**Unfiled Pre-Petition Returns**

1. **Debtor Compliance.**IRM 5.9.13.18.2, Addressing Unfiled Returns, provides in-depth procedures for securing and processing delinquent tax returns from debtors.
2. **Valid Tax Return.** For what constitutes a valid tax return in bankruptcy proceedings, see IRM 5.9.2.10.1.2, A Valid Tax Return, and IRM 5.9.17.8.1, Determining Dischargeability of Late Filed Returns in Which a SFR was Prepared.

**5.9.4.17 (02-03-2023)**

**Unfiled Post-Petition Returns**

1. **Individuals.** No bankruptcy code provision specifically prescribes a requirement for individuals to file post-petition tax returns. However, 11 USC 521(j)(1) provides that if a debtor in a Chapter 7, 11, 12 or 13 bankruptcy, fails to file tax returns that become due after the commencement of the case, the IRS may request the court to convert or dismiss the case.
2. **Chapter 11.** Debtors in Chapter 11 bankruptcies can face conversion to Chapter 7 or dismissal if they fail to file tax returns due after the date of the order for relief, or fail to pay taxes owed after the petition date in a timely manner (11 USC 1112 (b)(4)(I)).
3. **Motions to Convert or Dismiss.** Since the courts or the trustees may be unaware of a debtor's noncompliance with tax laws, the government's interest may best be served by a

FI caseworker referring the case to the USAO to request the filing of a motion to convert or dismiss bankruptcies.