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