FORTY-FIFTH ANNUAL SEMINAR
OF THE MISSISSIPPI BANKRUPTCY CONFERENCE

DRIVING YOUR CASE HOME:

AN EVIDENCE ROADMAP FOR BANKRUPTCY PRACTICIONERS[1]

Chief Judge Shon Hastings, District of North Dakota

1. ***Choose Your Destination*** – What does your client really want?
   - Protect an asset from creditors
   - Avoid a lien
   - Reduce obligations
   - Discharge a particular debt
   - Return of property
   - Continue a state court action
   - Judgment
   - Money or repayment
   - Equitable remedy
   - Or something else entirely

2. ***Manage Expectations***
   - Unexpected results
   - Prepare for the relief requested – particularly in a Motion for Relief from Stay
   - Judgment ≠ Money
   - Is it worth the time and expense?

3. ***Plan Your Trip and Select Your Route*** – How do you meet your client's goals?
   - Chapter, Motion, Adversary Proceeding (notice or specific pleading)
   - Jurisdiction and standing
   - Necessary parties
   - Federal or state law – which provides the best relief to meet client expectations?
   - Beware of § 105
   - Required elements (and any ancillary issues)

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- Burden of proof
  - ✓ Preponderance or clear and convincing
  - ✓ Shared burden

    E.g., stay relief under § 362(d):

    > After notice and hearing the court shall grant relief:
    >
    > (1) for cause, including lack of adequate protection of an interest in the property;
    > (2) with respect to a stay of an act against property under subsection (a) of this section, if—
    > (A) debtor does not have any equity in the property; *and*
    > (B) property is not necessary for reorganization.

    Under § 362(g), the movant bears the burden to show debtor's equity in property, and the opposing party bears burden on all other issues.

  - ✓ Shifting burden

    E.g., objection to exemptions under FRBP 4003(c): "[T]he objecting party has the burden of proving that the exemptions are not properly claimed." If the objecting party presents sufficient evidence to rebut the prima facie validity of the exemption, the burden shifts to the debtor to demonstrate that the exemption is properly claimed.

    See Danduran v. Kaler (In re Danduran), 657 F.3d 749, 754 (8th Cir. 2011) (citing *Walters v. Bank of the West (In re Walters)*, 450 B.R. 109, 112–13 (B.A.P. 8th Cir. 2011), *aff'd*, 675 F.3d 1142 (8th Cir. 2012)).

- Affirmative defenses and counterclaims

- Discovery and pre-trial motions
  - ✓ How much is enough?
  - ✓ Can the case be resolved through a 12(b) motion or motion for summary judgment?
  - ✓ FRCP 16 and 26: Do they apply? If so, are you complying?

4. Preparing to Hit the Road

- Making a Record – The Basics
- In person, telephonic, video conference, hybrid
- Live testimony (voluntary or involuntary), deposition or affidavit
- Witness preparation
- Sequestration

- Exhibits
  - ✓ Stipulation – what does that mean?
  - ✓ Evidence by affidavit
  - ✓ Pleadings and attached documents are not evidence. *In re Kana*, 2011 WL 1753208, at *2 (Bankr. D.N.D. May 6, 2011); *see also Steak N Shake Inc. v. White*, 2020 WL 85172, at *9 n.9 (E.D. Mo. Jan. 7, 2020) (pleadings are not evidence); *Nichols v. Hendrix,* 2020 WL 6588681, at *2 n.2 (E.D. Ark. Oct. 19, 2020) (same).

5. Avoid Delays

- Satisfy service requirements
- FRBP 2002 is the starting point. *See also* FRBP 9006, 9007 and 9008
- General rule of thumb—Serve any party that will be directly affected by the requested relief
- Handling amendments after notice and service to creditors
  - ✓ Some options:
    - Start by securing the Trustee's or Debtor's representative's agreement that the new provisions do not affect other parties;
    - Obtain this agreement days in advance of the hearing—basically offering limited notice to interested parties;
    - Include specific language in a motion asking the court to consider a new procedure for the amendment.

North Dakota adopted this text motion to help with this process:

> Motion to Limit Notice and Waive Solicitation of Acceptances or Rejections of the Amended Chapter __ Plan of Reorganization (Doc. __). Debtor represents that none of the changes included in the Amended Chapter __ Plan of Reorganization (Doc. __) adversely affect or change the treatment of any creditor or claimant who has not accepted the revisions. Therefore, Debtor moves to waive solicitation of acceptances or rejections of the Amended Chapter __ Plan of Reorganization and deem this Amended Plan accepted by all creditors and equity security holders who previously accepted the plan as permitted under FRBP 3019. With this motion, Debtor will serve a seven-day notice of this motion and the Amended Plan on the Trustee, any committee appointed under the Code and any other entity designated by the Court as required by FRBP 3019.

- Demonstrative exhibits
  - ✓ **FRE 1006. Summaries to Prove Content:**

> The proponent may use a summary, chart, or calculation to prove the content of **voluminous** writings, recordings, or photographs that **cannot be conveniently examined in court**. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place.

  - ✓ *See United States v. Hawkins*, 796 F.3d 843, 865 (8th Cir. 2015) (internal citations omitted):

> [S]ummaries are properly admissible when "(1) the charts fairly summarize voluminous trial evidence; (2) they assist the jury in understanding the testimony already introduced; and (3) the witness who prepared the charts is subject to cross-examination with all documents used to prepare the summary."
>
> Our precedent also permits parties to use a "pedagogic device," such as a summary of witness testimony and/or trial exhibits, to organize testimony and other evidence for the jury. Although "we do not encourage the use of" pedagogic devices to summarize evidence already in the record, we have recognized that such devices may assist the jury in understanding the evidence, particularly in cases involving "complex testimony or transactions." The use of pedagogic devices is within the sound discretion of the trial court, and our review is limited to "whether the pedagogic device in question was so unfair and misleading as to require a reversal." Our precedent also suggests, but certainly does not establish, that pedagogic devices may be admitted into evidence.

  - ✓ Must satisfy the other Rules of Evidence and be fair, non-inflammatory, non-argumentative, neutral in phrasing, and not unnecessarily conclusory
  - ✓ To help ensure reception of the summary, the underlying documents should be offered, in a usable form, to the other side a reasonable time in advance of trial
  - ✓ Admissibility of the summary is conditioned upon the requirement that the underlying evidence must be admissible

- Deposition Designations
  - ✓ Discovery depositions (FRCP 32)
  - ✓ Part of a deposition you would like the court to receive as evidence
  - ✓ Do not need a complete copy of the deposition (FRCP 5, 32)
  - ✓ Opposing party may offer counter designation that in fairness should be considered with the part introduced.

6. Anticipate Detours—Evidentiary Objections

- Relevance
  - ✓ FRE 401: "Evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."
  - ✓ FRE 402: "Irrelevant evidence is not admissible."
  - ✓ FRE 402: Relevant evidence is admissible unless the Constitution, a federal statute, the rules or other rules provide otherwise.
  - ✓ FRE 403: A court may exclude relevant evidence if its probative value is substantially outweighed by unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needless presentation of cumulative evidence.

- Authentication and Identification
  - ✓ Is the evidence what it purports to be?
  - ✓ FRE 901 Examples:
    - Testimony of a Witness with Knowledge
    - Nonexpert Opinion about Handwriting
    - Comparison by an Expert Witness or the Trier of Fact
    - Distinctive Characteristics and the Like
    - Opinion About a Voice
    - Evidence About a Telephone Conversation
    - Evidence about Public Records
    - Evidence About Ancient Documents or Data Compilations
    - Evidence about a Process or System
    - Methods Provided by a Statute or Rule

  - ✓ FRE 902 Self-Authenticating Evidence:
    - Domestic Public Documents that are Sealed and Signed
    - Domestic Public Documents that are Not Sealed but are Signed and Certified
    - Foreign Public Documents
    - Certified Copies of Public Records
    - Official Publications
    - Newspapers and Periodicals
    - Trade Inscriptions and the Like
    - Acknowledged Documents
    - Commercial Paper and Related Documents

- Presumptions Under a Federal Statute
- Certified Domestic Records of a Regularly Conducted Activity
- Certified Foreign Records of a Regularly Conducted Activity
- Certified Records Generated by a Electronic Process or System
- Certified Data Copied from an Electronic Device

- Foundation Objections
  - ✓ No evidentiary rule requires foundation
  - ✓ "Lack of foundation" = a missing link in a chain of logic necessary for establishing the relevance of the evidence.

    Laying a foundation is all about providing enough background and context to give the evidence some meaning—to show that it is relevant. Proponents who offer evidence need to establish the "who, what, when, where" information about that evidence to demonstrate its relevance.

    Essentially, an objection to foundation provides a shorthand method of protesting that the requirements of some other rule of evidence have not been met, such as a failure to:

    - Qualify a witness as an expert (FRE 702)
    - Show that the witness has personal knowledge of the event to which she is about to testify (FRE 602)
    - Authenticate the proffered exhibit (FRE 901)
    - Show that the facts underlying an expert's opinion constitute a permissible basis (FRE 703)
    - Establish the requirements for a particular hearsay exception have been met (FRE 803)

  - ✓ Overcoming Foundation Objections
    - Proper foundation varies depending on the type of evidence offered
    - Ask the objecting party to clarify what foundation is lacking
    - Identify the "missing link" of the chain of logic
    - Ask leading questions to elicit the information necessary to lay the foundation, or re-call a witness to lay additional foundation
    - A single exhibit may require the proponent to lay multiple "foundations"; e.g., authentication, best evidence, hearsay

- Privileges

  FRE 501. Common law privileges apply unless the Constitution, federal statutes or rules provide otherwise.

- Hearsay

  ✓ What it is: FRE 801(c): A statement that "(1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement."

  ✓ FRE 801(d) specifies in relevant part what it isn't:

  (d) STATEMENTS THAT ARE NOT HEARSAY. A statement that meets the following conditions is not hearsay:

  (1) *A Declarant-Witness's Prior Statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

  (A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

  (B) is consistent with the declarant's testimony and is offered:

  (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

  (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

  (C) identifies a person as someone the declarant perceived earlier.

  (2) *An Opposing Party's Statement.* The statement is offered against an opposing party and:

  (A) was made by the party in an individual or representative capacity;

  (B) is one the party manifested that it adopted or believed to be true;

  (C) was made by a person whom the party authorized to make a statement on the subject;

  (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed.

  * * *

  The statement must be considered but does not by itself establish the declarant's authority under (C); [or] the existence or scope of the relationship under (D)[.]

  ✓ FRE 802: Hearsay is not admissible unless a federal statute, these rules or other rules prescribed by the Supreme Court provide otherwise.

✓ Most Commonly Used Exceptions

FRE 803(6). *Records of a Regularly Conducted Activity.* 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 information or the method or circumstances of preparation indicate a lack of trustworthiness.

FRE 803(b)(7). *Absence of a Record of a Regularly Conducted Activity.* Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

FRE 803(b)(17). *Market Reports and Similar Commercial Publications.* Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

FRE 804. Exceptions to the Rule Against Hearsay – When the declarant is not available.

FRE 805. Hearsay within Hearsay – Each part must conform to hearsay exceptions.

FRE 807. Residual Exception.

(a) IN GENERAL. Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804:

(1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and

(2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

(b) NOTICE. The statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement–including its substance and the declarant's name–so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing–or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

7. Destination

- Notice of Hearing or Notice of Trial

  ✓ Follow directions in the order

  ✓ Handling exhibits

  ✓ Identification of witnesses

  ✓ Sample witness lists

- Presentation of Case

  ✓ Order of witnesses and issues
  FRE 611. Mode and Order of Examining Witnesses and Presenting Evidence

  ✓ In-person v. Zoom hearings – considerations

  ✓ Fact Witnesses

  ✓ Opinion Testimony

  FRE 701. Opinion Testimony by Lay Witnesses.
  If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
  (a) rationally based on the witness's perception;
  (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
  (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

  FRE 702. Testimony by Expert Witness.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

Some considerations

- Do you need an expert? Why and what do they add to the case?
- Should you object to a witness testifying as an expert?
- Relevance, weight and credibility
- Applicable case law:

  Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993)

  In re Petters Co., 506 B.R. 784, 804-05 (Bankr. D. Minn. 2013) (discussion of qualification of experts and proffer of evidence)

  Housley v. Orteck Int'l., Inc., 488 F. Supp.2d 819 (S.D. Iowa 2007) (insurance adjustor not qualified as an expert for opinion in product liability case)

  Schnittjer v. Alliant Energy Co. and Instate Power and Light Co. (*In re Shalom Hosp. Inc.*), 293 B.R. 211 (Bankr. N.D. Iowa 2003) (expert testimony allowed in preference case)

✓ Judicial Notice

FRE 201(b). Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or
(2) can be accurately and readily determined form sources whose accuracy cannot reasonably be questioned.

Examples:

- Prime interest rate is 2.5%
- Temperature in Fargo, North Dakota, on August 26, 2023, at 3pm was 93 degrees
- Interest rates increased from 3-5% in the second quarter of this year
- August is North Dakota's warmest month

Lawyers often ask judges to take judicial notice of the schedules and statements in the debtor's court file.

Judges may take judicial notice of the fact that on May 17, 2019, someone filed Schedules A-J bearing the debtor's name, and that those schedules contain certain representations. But when the court takes judicial notice of the fact that Schedule I indicates that the debtor earns $2,000 per month, this does not mean that the party asking the court to take judicial notice has proven that debtor earns $2,000 a month. It means that there is a document in a court file that includes this information, and the parties do not have to waste time litigating whether there is a document on file that includes this information.

FRE 201(c) and (e):

(c) TAKING NOTICE. The court:
(1) may take judicial notice on its own; or
(2) Must take judicial notice if a party requests it and the court is supplied with the necessary information.

* * *

(e) OPPORTUNITY TO BE HEARD. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request is still entitled to be heard.

✓ Proffers and Offers of Proof

FRE 103(a)(2): "[I]f the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context."

Purpose: 1) to preserve error in the exclusion of evidence and enable an appellate court to determine whether the exclusion was erroneous and harmful, and 2) to permit the trial court to reconsider the evidentiary ruling in light of the actual evidence.

Must include:
- A presentation or description of the evidence the party seeks to introduce, and
- A statement of the fact or facts she wishes to prove with the evidence

Should explain with particularity:
- The purpose of the evidence, which includes some account of the issues on which it bears or a reference to other testimony that the proffered testimony is to address, explain or refute.
- The relevance of the evidence, if not obvious

✓ Impeachment
- Not necessary to show the exhibit
- On request, you must show it to opposing counsel

FRE 613. Witness's Prior Statement.

(a) SHOWING OR DISCLOSING THE STATEMENT DURING EXAMINATION. When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

(b) EXTRINSIC EVIDENCE OF A PRIOR INCONSISTENT STATEMENT. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

✓ Refresh Recollection
- You may show the document to the witness, allow him/her to review it and then ask questions about the document
- Do not ask the witness to read it out loud
- The document does not have to be admissible to serve as a refresher
- *See* FRE 612, 803(5).

✓ Court Calling or Examining a Witness
- **FRE 614.** Court may call a witness on its own or examine a witness regardless of who called the witness.