Litigation Skills: Handling the Evidentiary Hearing

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Educational Materials

LITIGATION SKILLS:
HANDLING THE EVIDENTIARY HEARING

I. Introduction

Practice in the bankruptcy courts is largely a motion practice, with evidentiary hearings being the exception rather than the rule. Counsel often stipulate to the facts or do not contest the movant's version of the facts, allowing the court to rule on the issue at hand without the need for a formal presentation of the evidence in support of or against the motion. The relative infrequency of evidentiary hearings coupled with the fact that those evidentiary hearings which do take place are bench trials and often not very lengthy, leads to sloppy practice. Many lawyers forget that their questions are not evidence,[1] their arguments or statements about the facts are not evidence,[2] and presentation does matter, even in a bench trial. This outline sets forth some simple tips that will hopefully assist in making your next evidentiary hearing proceed more smoothly.

II. Litigation Skills

A. Be Prepared

It sounds obvious but the key to a successful evidentiary hearing is to be prepared. A lawyer who has an in-depth knowledge of the facts, has thought through any evidentiary issues and considered what information will be necessary for the trier of fact to reach a decision, is more likely to be successful than one who thinks about what questions to ask the witness while conducting the examination. Well-prepared lawyers often do the following things:

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[1] *Tolbert v. Queens College*, 242 F.3d 58, 75 (2d Cir. 2001) ("counsel's questions are not evidence").

[2] *Morrison v. Duckworth*, 898 F.2d 1298, 1299 (7th Cir. 1990).

1. **Trial/Proof Outlines**

Put together an outline listing the elements of your case and setting forth the evidence that supports each element. For example, if you have filed a complaint objecting to the dischargeability of your client's debt under Section 523(a)(2), your proof outline might look like this:

I. Existence of a debt

Witnesses: ABC Bank Client Account Representative
Documents: Promissory Note, Account Balance Ledger

II. Statement in Writing About Debtor's Financial Condition

Witnesses: ABC Bank Client Account Representative/Debtor
Documents: 8/1/08 Financial Statement given to ABC Bank

III. Statement is Materially False

Witnesses: Debtor/account officer or records custodian for XYZ bank
Documents: XYZ Bank $35000 credit card bill not disclosed on financial statement to ABC Bank

IV. Reasonable Reliance

Witnesses: Account Officer/Bank Risk Manager
Documents: Credit Assessment Manual/Debtor Credit Analysis

V. Intent to Deceive

Witnesses: Debtor/account officer or XYZ Bank record custodian
Documents: 8/1/08 Financial Statement provided to XYZ Bank

The use of a proof outline is not confined to the moving party's or plaintiff's case in chief. The defendant/opposing party also can and should prepare an outline of the elements of any affirmative defense or issue where it bears the burden of proof.

Before trial, the outline is useful to ensure that you have evidence for each element of your claim and if you do not have all of the evidence you need, to help you focus your discovery so that you obtain the information you need before it is too late to do so. For this reason, to be effective, this is a document that you should create when you first draft your motion or complaint and one that you continually update through out discovery and up to the time of the hearing. During trial, it is helpful to use the outline as a checklist of the evidence so that you can make sure you have submitted all of the evidence required to prevail.

2. Document or Event Chronologies

Depending on the issue, it is often helpful to prepare a document or event chronology that lists all key events and/or documents in chronological order. Putting the facts/documents in chronological order can assist in helping you understand the evidence better. It will certainly help you organize the presentation of the evidence as generally it is easier to follow what happened if the material is presented in chronological order.

3. Prepare your witnesses for the hearing

Preparing the witnesses you will call to testify during the hearing is one of the most important aspects of your trial preparation. The primary reasons why you need to meet with your witnesses before trial are:

- **To make sure you and your witness on the same page.** You need to know what facts your witness/client can testify to so that you can properly frame questions for direct examination and prepare the witness for the questions likely to be asked on cross-examination. If you have not gone over the witness's areas of knowledge before he or she testifies, it will become apparent during your examination to both the court and opposing counsel and it will make your presentation less effective. Moreover, because

you cannot generally lead your client during a direct examination, you need to know what your client knows, so that if the client omits a key fact you need in the record, you are able to ask a follow-up question to elicit the necessary information. Remember, it is your job to get the necessary facts into the record, not the witness's job to remember what needs to be part of his or her testimony. You cannot do that job effectively if you do not meet with the witness in advance.

- **To make sure the witness is comfortable with what will happen in court.** Bankruptcy court is not a television court room drama. But your client may think that it may be just like a Law and Order episode. They will be nervous, which may make it more difficult for the witness to provide the necessary testimony. You need to walk the witness through the process, explaining even routine things like where he will sit when he testifies, how he will be sworn in, etc. so the witness is comfortable and better able to testify competently.
- **To refresh the witness's recollection to the extent necessary.** If the case involves documents, it is appropriate to make sure your client/witness is familiar with the documents that he or she may be shown during the examination, and to the extent necessary, to refresh the witness's recollection about prior events. If the witness was deposed, the witness should read the deposition in advance so that he can recall what he previously testified about. If the witness believes an answer given during the deposition is now incorrect, you need to know that so you can best decide how to present that information.
- **To explain to the witness how he or she should behave when testifying.** You need to tell the witness, particularly one who has not testified before, what is expected of him

once they are on the stand. Obviously the witness's job is to tell the truth and you should tell them that, but there are some general rules of behavior a lawyer may take for granted that will not be as obvious to your client. These include:

> (1) All answers must be audible and the witness should speak up so that the court reporter can easily transcribe his testimony.
>
> (2) The witness should not talk over the examiner, but instead should wait for the question to be finished. The hearing is not a race to see who can answer most quickly.
>
> (3) If counsel objects, the witness should wait to answer until the court instructs whether an answer should be given.
>
> (4) The witness should listen carefully to every question and answer the question that is asked. If the witness does not understand the question or did not hear the question, he should say so.
>
> (5) If the witness does not know the answer or cannot recall, the witness should not try to guess or speculate. If the witness does so, it will become apparent and the court will be less likely to accept the testimony of a witness that is stretching to testify.
>
> (6) The witness should not try to second guess what the other side is trying to do or how to advance his case. He should just answer the questions that are posed during the examination and leave the legal work to counsel. One way to make sure your client might try to do this is to confuse the client with all of your legal theories and those of the opposing counsel before the hearing so they are wondering why a question is being asked and how it fits into the puzzle. Tell your client his job is to tell the truth and it is your job to argue the facts to persuade the court to rule in the client's favor.
>
> (7) Explain to the witness that the other side gets to ask questions -- called cross-examination -- and they should not view this process as the battle of wits it is typically portrayed to be on television. The client should not get angry or try to spar with the other side, but instead should answer the questions truthfully. He should be serious and polite at all times. If the question does not allow for explanation, but there is one, the client should not worry about getting the explanation out. Explain that this is your job and that you know the facts well enough to ask them questions on redirect that will allow the court to hear the client's explanation.

(8) Your client should dress appropriately for court and appear as though they are taking the matter seriously.

4. Know your Court and the Court's Procedures

Knowing your audience is part of being prepared. If you look like you know what you are doing, appear well-organized and proceed the way the court expects you to proceed, it is more likely that your audience will be receptive to your position. For example, Judge Black in the Northern District of Illinois has detailed instructions on his website about how he expects hearings to proceed before him. If you have a hearing before him, you should be familiar with these instructions. These instructions also are a good guide for how to conduct yourself in any courtroom.

B. Opening Statements

"The purpose of an opening statement is to state what evidence will be presented, to make it easier for the [trier of fact] to understand what is to follow, and to relate parts of the evidence and testimony to the whole. It is not an occasion for argument." *Testa v. Village of Mundelein*, 89 F.3d 443, 446 (7th Cir. 1996). Because many bankruptcy courts frequently dispense with opening statements, the temptation is to not prepare an opening statement and to offer to waive the opening statement at the start of the hearing. Don't do that. Even if you never give the opening statement, it is helpful to write out a narrative of what the evidence will be so that you have the entire picture organized. Doing so will help you understand what the holes are in your case and help you prepare the questions of your witnesses to fill in those holes. For that reason, even if you never give the opening statement, it will help you determine what questions you need to ask and what documents you need to offer into evidence.

If you have a prepared opening, you will also resist the temptation to waive the right to do so. Obviously if the court does not want an opening statement, you should not insist on

giving one, but if given the option, it is always helpful to give a short opening statement to explain your case to the court.

Most trial practice materials gear their discussions about opening statements to civil jury trials or criminal cases. For that reason, these examples may not seem directly applicable to the types of issues presented in many bankruptcy cases. The same general rules, however, apply. The opening statement should be concise, direct and simple. Do not oversell your case or promise evidence that you will not be able to deliver.

Your opening statement should contain an introduction that introduces the parties and the nature of the case, *i.e.*:

> My client is the ABC Bank. ABC Bank is a small community bank. On September 10, 2008 it lent John Smith the Debtor $10,000 based upon a financial statement that Mr. Smith gave to ABC Bank. ABC Bank seeks the entry of an order finding this debt to be nondischargeablee because this financial statement was false.

Second, your opening statement should tell the story of your case, simply and directly, *i.e.*:

> On August 1, 2008, John Smith completed an application to borrow money from ABC Bank. As part of the application process, Mr. Smith was required to provide a financial statement. This was standard procedure at ABC Bank. Bob Jones, the head of credit at the bank, will testify that he used the asset and liability information provided by each applicant along with the applicant's income to determine whether the applicant would be able to repay the loan. Mr. Smith completed the financial statement and submitted it to the bank with his application. In accordance with the Bank's standard procedures, Mr. Smith was asked to list all of his debts. He listed a $6000 car loan. Mr. Smith signed the application. Directly above his signature line was a statement in bold type that the Bank relies upon the financial statement to decide whether to provide the applicant with credit.
>
> Mr. Jones, the head of credit for ABC Bank, reviewed the application. His notes show that he computed the ability of

> Mr. Smith to repay the debt based upon his reported income and available assets and other liabilities and approved the loan.
>
> Mr. Smith's application was false. In addition to the $6,000 car loan, Mr. Smith also owed $35,000 in credit card debt. Mr. Jones will testify that had this debt been listed on the financial statement, Mr. Smith would not have met the bank's guidelines for a loan and the loan would not have been extended.

You may want to anticipate defenses in your opening statement, but it is not necessary to do so, *i.e.*:

> Mr. Jones will testify that on two prior occasions he approved similar loans to borrowers making the same income as Mr. Smith with liabilities of $35,000. He will explain that the difference in this instance was that the loans for these other borrowers were secured and these borrowers had a longer work and credit history. Further, in 15 other circumstances, applicants similar to Mr. Smith with debts of $35,000 or more were denied loans.

Finally, you should have a conclusion, asking for a ruling in your favor, *i.e.*:

> Based upon this evidence, ABC Bank asks that the court find that Mr. Smith's debt to ABC Bank is nondischargeable.

C. Direct Examinations

A direct examination is the opportunity for your witness to tell what he knows. Generally speaking it is improper to lead your witness on direct and you really would not want to do so if you could. F.R.E. 611; F.R.B.P. 9017. Allowing the witness to testify without suggesting the answer is more persuasive. But the keys to being able to do so effectively are: (1) knowing what your witness can and cannot testify to so that you are prepared to ask follow-up questions in a non-leading manner without risking an unexpected answer; and (2) listening to your witness's answers and following up appropriately so the key information is included in their testimony. Because it is unlikely that your witness will answer the questions you pose in the same way on the stand as they might before court, you need to be flexible and able to vary from

the questions included in your outline to get out the key points. You will only be able to do this if you know the record thoroughly.

In planning your direct examination, you should think of the process as drawing a picture for the court. You want your witness to do the talking but you want to control how the information is presented. A rush of information in a long narrative form is not going to be as persuasive to the court as a more measured examination where you take the time to have your witness explain his testimony. In this regard, laying a foundation for why your witness knows what it is he or she is about to testify about is key. You may be able to present the testimony without the foundation, but generally laying the foundation will make the testimony more credible. For example, having Mr. Jones testify to the bank's credit review policies will be more credible if his employment history including his tenure and duties at the bank are part of his testimony. Without that information, the court cannot be certain that Mr. Jones knows the bank's policies.

D. Cross Examinations

The chief reasons why lawyers cross-examine witnesses are: (1) to highlight facts that were ignored during the witness's direct examination or not fully explained and that when fully explained or highlighted, either cast doubt on the other side's case or assist the cross-examiner in proving his case or defense; or (2) to discredit the witness's testimony by showing bias or untruthfulness. The chief differences between cross-examinations and direct examinations are that leading questions are allowed on cross and unless the court allows otherwise, the scope of a cross-examination is limited to the subject matter of the direct examination. F.R.E. 611; F.R.B.P. 9017. Many articles and books exist on how to effectively cross-examine witnesses. All of these materials make essentially the same points:

- **Do not try to do too much**. For each witness whom you expect to cross-examine, you should determine what are the points that you believe you can make with that witness that will advance the issues you need to prove or will cast doubt on your opponent's case. Once you determine what the points might be that you could raise, you should determine which of those points are actually points that are worth making. You should avoid overly long or complicated lines of questioning and instead should decide how you can cleanly make the points so that the court will come away from the examination with a clear understanding of why you are doing what you are doing. A short examination can be as effective and even more so than a long examination.
- **Not every witness is liar.** You are not going to be able to show that every witness is a liar or incompetent and you generally do not need to do so to make the points you need to make. As a general rule, if your tack is to try to paint every witness on the opposing side as a liar, you will not succeed in doing so and the court will not buy it anyway. If it is necessary to your case to paint someone as the bad guy, pick that person carefully and do not paint with too broad of a brush.
- **Be prepared**. The key to a successful cross-examination is preparation. Once you develop the themes that you want to present to the court through cross-examination, you need to think through the leading questions you will ask to develop those themes. For every leading question that you intend to ask, you need to be certain of what the answer will be and you need to be prepared to push the witness into that answer if he does not give it willingly. The way to do that is by knowing the record and having an examination outline that allows you to easily access the record. For every question, you should have an annotated reference back to the witness's deposition where he gave the answer you

want to elicit on cross examination or a reference to a document that contains the answer. If the witness fails to answer correctly, you are then prepared to impeach the witness without rummaging through your files and giving up on the line of questioning when the judge grows impatient with the delay.

- **How you ask your leading questions is important.** The point of cross examination is not for the witness to tell his or her story. The point of cross examination is for you to make your client's points. To do that effectively, you will want to exercise some patience in how you ask your questions, making sure you take baby steps, so the point can be made effectively and you can highlight the point for the court. For example, assume you are cross-examining a credit manager and your point is that he did not truly rely upon the debtor's financial statement in making a credit decision. You could ask one or two question to make the point that the credit manager had access to credit reports that provided more detail about the debtor's financial condition:

> Isn't it true that your bank subscribes to all three of the major credit reporting agencies?
>
> Isn't it true that you had access to John Smith's credit report?

But those two questions do not communicate the point as clearly as the following line of questions might:

> You are familiar with the three major credit reporting agencies?
>
> These agencies are Equifax, Experian and Transunion?
>
> Each of these three agencies issues credit reports for virtually anyone that has borrowed money in the United States?
>
> ABC Bank subscribes to each of these services?
>
> As a subscriber, that means you can access the reports for any individual that is asking to borrow money from ABC Bank?

In fact, it is your regular practice to run credit reports for every loan applicant?

You are familiar with the content of these reports?

One of the things that is included in these reports is a listing of the monthly payments made by the person that is the subject of the report?

Based upon these reports you can determine whether the person has any credit cards?

You can determine the average balance due to the credit card companies?

One of the reasons you order these reports is to determine whether the information the applicant has given to you is accurate?

You also use the reports to determine whether the applicant is someone you want to lend money to?

If there is a discrepancy between the credit report and the application, you investigate further if the discrepancy is one you view as material to your decision to lend money?

If there is a discrepancy and you make the loan anyway, it is because the discrepancy was not material to your decision?

Or you were satisfied with the results of your further investigation?

Turn now to Mr. Smith's credit report from July, 2008, marked as Debtor Exhibit 1, it shows a $36,000 balance on a XYZ credit card for the prior month?

This report was available to ABC Bank as a subscriber of the credit reporting service?

- **Avoid Giving The Witness Wiggle Room**. You want to avoid leading questions that give the witness wiggle room. If you use adverbs or adjectives in your questions, the witness can disagree and avoid answering the question.
- **Sometimes You May Not Want to Lead.** Rules are made to be broken and there are circumstances where you may not want or need to ask leading questions. If you are

certain that any answer that is given will make your point, you may in that circumstance want to ask a non-leading question.

E. Closing Arguments

Like the opening statement, many bankruptcy judges dispense with closing arguments. But like the opening statement, it also makes sense to prepare a closing argument before the trial begins even if you do not anticipate being allowed to actually give the closing argument. A closing argument differs from an opening statement in that you are allowed to present your legal arguments and explain how the facts relate to the elements of your claim or defense. Although it is a rare circumstance where the evidence goes into the record exactly as you anticipated, you should still prepare the closing argument in advance of the trial as a check on how your facts fit into the elements of your case. After the evidence is concluded, you can add or subtract or modify your arguments based upon how the evidence was received at the hearing.

Most trial manuals gear their discussion of closing arguments to civil jury trials or criminal matters. But the basic elements of a closing argument are the same. You want to explain your legal theory of the case and explain how the evidence the court has just received fits into those elements. You also want to use the closing argument as an opportunity to explain why your opponent's evidence should not impact the outcome or why that evidence is not persuasive in light of other evidence also received at the hearing. A closing argument also is a good time to focus the court on key language in the exhibits. While most courts are unwilling to allow a witness to read an exhibit into the record, they are willing to hear counsel's arguments about why the particular language in an exhibit is relevant to a claim or defense. Properly executed, the closing argument takes the facts presented in the opening statement that were proved at trial, plus

any additional material proved at trial, and explains to the court why a ruling in your client's behalf is justified under the law.

III. Selected Points

The following examples are illustrations of actual testimony that highlight some of the points in this outline.

CHARLES CROUCH, WITNESS, SWORN

DIRECT EXAMINATION

BY MR. LIEN:

Q Mr. Crouch, could you tell us your name and where you live.

A Yes. My name is Charles Crouch. I live at 3301 Hunter Oaks Court, Mansfield, Texas.

Q And who do you work for, Mr. Crouch?

A ORIX Capital Markets, LLC.

Q And where is that located?

A Dallas, Texas.

Q And what is your position with ORIX?

A I'm a senior asset manager in the special servicing department.

Q And what is the business of the ORIX entity you work for?

A We are the named special servicer on a number of REMIC trusts, and in that role we work on a lot of problem commercial real estate loans. We also have a few loans on our balance sheet that are not part of a REMIC trust. That's a small percentage of the business.

Q How long have you been with ORIX?

A Since August 1996, so nine years and approximately ten months.

Q And what positions have you held with ORIX in those nine years?

A I was an account representative and an asset manager, and now a senior asset manager.

Q Before you were with ORIX, what did you do?

A I was an asset manager with AMRESCO Management, which is another special servicer that's located in Dallas.

Q How long were you with that company?

A Approximately one year.

Q And before that what did you do?

A I was with the FDIC and the RTC. I was -- for approximately five years I was located in the Denver, Colorado office for most of that time, and then was transferred to Dallas.

Q And what was your position with the FDIC/RTC?

A I was an asset manager for most of that time with the FDIC working on nonperforming loans. At a later time I was transferred to the RTC and -- I'm trying to recall my title. I'm sorry. I can't recall my title exactly at RTC, but it was an operations specialist-type position where RTC was forming REMIC trusts and other forms of securitization to liquidate their assets, and I was

involved in the operations side.

Q Before working for the FDIC/RTC, what did you do?

A I was an operations officer with a bank in Lubbock, Texas.

Q And could you tell us a little bit about your educational background, Mr. Crouch.

A Yes. I have a bachelor's degree in business administration from Lubbock Christian University. At the time I graduated, it was Lubbock Christian College. It's now Lubbock Christian University. And I have a Master's degree, an MBA, with an emphasis in finance from Texas Tech University.

Q And what was the year of your bachelor's degree?

A 1981.

Q And --

A I apologize. 1985.

Q And what year did you obtain your Master's degree?

A 1989.

Q And how old are you, Mr. Crouch?

A I'm 42.

Q Okay. Let's talk a little bit about the

business of special servicing at ORIX. Could you tell us a little bit more about what you do as a senior asset manager.

A Yes. I'm responsible for a portfolio of loans that are in special servicing. The special servicing designation indicates that something has happened with respect to the loan that requires special attention or additional attention. And I currently have approximately 22 loans in my portfolio, and I'm responsible for the overall resolution process of those loans.

Q How do -- I take it when you talk about servicing or administering loans, you're talking about real estate mortgage loans?

A That's correct. All of the loans in a REMIC trust are commercial mortgage loans.

Q Can you tell us a little bit about the special servicing office of ORIX in Dallas.

A Yes. We have approximately 18 employees. There are two senior asset managers, myself and one other. We have two asset managers and an associate asset manager. We also have a small analytical staff, as well as some administrative support. We have a manager whose title is associate director. And also in our department is our president of ORIX

TAKE YOUR TIME!

to its [illegible] eneral counsel that Mr. M had sold the car back to Autohaus on Edens and that Autohaus on Edens had given him a $55,000 credit on a new Mercedes

Q And, sir, when did that transfer of the Mercedes back to Autohaus on Edens occur?

A I believe in the late summer of the year 2004 or post-petition.

Q That would be eight months post-petition approximately?

A Plus or minus two weeks, yeah.

Q Did Mr. M seek your approval in your capacity as trustee to sell that car back to Autohaus on Edens?

A No.

Q So is it your testimony, sir, that you had no idea that Mr. M transferred away this estate property?

A Absolutely none.

THE COURT: Mr. B --

MR. B : Yes.

THE COURT: -- if you could just slow the pace down a little bit.

MR. B : Oh, sure.

THE COURT: It's not a race. I will give you all the time you want. But it's very hard for me to digest all of this information when it's coming in this quickly.

MR. B : Very well. My apologies, Your Honor.

MR. C : Thank you, Your Honor. My finger's about to fall off.

THE COURT: Mine too.

MR. B : All right.

THE COURT: The last thing that I noted had to do with Mr. M selling a car back and getting a new one from Autohaus, so perhaps you could pick it up after that.

MR. B : Okay. I will just -- I guess with your Honor's permission, I will just re-ask those questions.

THE COURT: You can repeat, yes.

BY MR. B :

Q Sir, I believe your testimony was that your investigation revealed that Mr. M took the Mercedes S500 and sold it back to a car dealership known as Autohaus on Edens post-petition; is that correct?

A That's correct.

DON'T LEAD THE WITNESS

killed : safety.

Q you were going to surrender that property?

A Yes, I believe I did.

Q And I believe it was in your amended schedule that we submitted maybe a couple of weeks after that, after you had filed; is that true?

A I believe so, yes.

Q And at the time that we filed this bankruptcy, did you disclose all the rent that you were currently receiving at that time?

A Yes, I believe I did.

Q And I do believe that at the second meeting -- I'm going to ask you if this is true. At the second meeting when the trustee brought up the rents, and that they weren't on this financial -- the financial statement, isn't it true that your attorney stated that we could amend that?

MR. L : Objection. Leading. The whole line of testimony is leading.

THE COURT: Sustained.

BY MS. W :

Q Okay. When the trustee mentioned the fact that the rents were not disclosed on the statement of financial affairs, what was the response to that, if

LAY A FOUNDATION IF YOU WANT YOUR EXHIBIT ADMITTED

That's r rm. I'm not an attorney.

BY MR. G

Q And, Mr. G , you testified that you signed on behalf of Scattered when Scattered purchased the note from Loop, correct?

A I believe so.

Q And as the party who signed on behalf of Scattered, do you have any documentation that shows that Scattered actually paid $100,000 to Loop for that note?

A Yes.

Q Okay. Do you have it with you today, sir?

A No.

MR. G : Judge, I just want to wind up with the tax returns, so I move they be admitted into evidence.

THE COURT: Based on what? How about identifying them?

MR. G : Yes, Judge.

THE COURT: Laying a little foundation.

Unless Mr. C wants to stipulate --

MR. C : No.

THE COURT: And since he's objected, I don't think he will.

MR. C : Right. Thank you for saving me the verbal objection.

MR. G : Exhibit H, Judge, the foundation is the close connection between South Beach and Scattered.

THE COURT: No. That's an explanation of its relevance. Okay? Right now I have a bunch of paper in front of me.

MR. G : All right. Sorry, Judge.

THE COURT: With a bunch of numbers on it.

MR. G : Sorry, Judge.

THE COURT: That purports to be the tax return but --

MR. G : Yes, Judge.

THE COURT: But goody for it. So you need a little more, Mr. G .

MR. G : All right. I will give you more, Judge.

THE COURT: Thank you.

BY MR. G :

Q Mr. Gr , do you recall receiving a subpoena from our office for documents?

A Yes.
Q All right. Do you recall that that subpoena asked for all federal tax returns filed by the debtor from 2000 to present?
A I don't recall the exact details of the subpoena.
MR. G : May I approach, Judge?
THE COURT: Yes. Go ahead.
BY MR. GULDEN:
Q Mr. G , this is a rider to the subpoena. I am looking at number seven.
A Yes.
Q And in response to that request, did you produce what's been marked as Exhibit H in the folder in front of you?
A Yes.
MR. G : How we doing now, Judge?
THE COURT: Not very well, quite frankly.
MR. G : All right. Well, we asked for the tax returns, and this is what he gave us.
THE COURT: Why don't you ask the witness whether he recognizes the documents.
MR. G : Yes, Judge.

DON'T QUESTION A WITNESS ON THE LAW

answer t :?

A

Q Okay. Thank you. That's all.

MR. P : May I approach again?

THE COURT: Yes.

BY MR. P :

Q In terms of a duty of loyalty, sir, you've had a duty not to engage in self-dealing for your own benefit?

A I don't know if that's a legal term or not.

Q You're --

A Could -- I'm sorry. Could you clarify that?

Q I never know when you finish.

A Yeah. Could you clarify the question? I'm trying not to cut you off --

Q As you understand fiduciary duties --

A Yes.

Q -- do you believe you had a duty not to engage in self-dealing?

A What does "self-dealing" mean?

Q That's where instead of promoting the interests of creditors and shareholders, you promote at the detriment of those parties your own selfish interest.

A Yes, I should not do that.

THE COURT: Mr. P whether he's a fiduciary or not is a legal question. The components of a fiduciary duty are legal questions. I know what self-dealing is. I know that ~~is~~ it breaches a fiduciary duty for somebody to engage in self-dealing. So what point is there in asking Mr. M whether he understood that? If he occupied a position that was a fiduciary position, then he had those obligations. And regardless of what he thought, he had them. So I'm not sure quite where you're going.

MR. P : Your Honor, I'm going to move on.

THE COURT: All right.

BY MR. P :

Q Who is Mr. S ?

A An accountant.

Q When you say he was an accountant, was he a Certified Public Accountant or just a tax preparer, a bookkeeper?

A I don't know.

Q And when did he work for Delta Phones?

A On and off over the course of time that Delta Phones was open. I don't -- I couldn't tell

DON'T QUESTION THE WITNESS ON THE LAW, AND DON'T INTERRUPT THE JUDGE

A

Q And do you know when the REMIC provisions of the Internal Revenue Code were enacted?

A I think 1986, but I'm really not sure.

Q Yeah, I think that's correct. Why don't I do this. I'm just going to hand you a copy of the Internal Revenue Code, and you can just check when it was enacted to refresh your memory.

A I'm sorry?

Q Why don't you just hang on to it.

And that shows that it was enacted in 1986; isn't that correct?

A I don't even have any idea how to even read this document.

Q All right. Let me help you with that.

A I'll be glad to look it over.

Q If you look down, do you see Section 860(a)?

A Yes, I do.

Q And in the small print down there, it says, "public law 99-514"?

A Yes.

Q Title VI, Section 671(a), and then it shows the date of enactment, October 22nd, 1986.

A Okay.

Q So you were correct about that.

Now, mortgages were pooled and sold to investors long before 1986; isn't that correct?

A I really don't know if they were or not.

Q Do you know why these REMIC provisions were created in the tax code?

A I'd be guessing, but I would say to accommodate the structure of REMIC trusts.

Q Okay. I think that's correct.

Now, isn't it true that prior to the enactment of these code sections in 1986 there were concerns that a REMIC trust could be taxed as a separate taxable entity thereby imposing a double taxation on both the trust and the certificate holders?

THE COURT: Mr. B , this strikes me as a very strange examination of this witness. If you want to make a legal argument about the Internal Revenue Code and what the legislative history is, you can do that. But --

MR. B : Your Honor, here is my point --

THE COURT: -- to ask this gentleman about congressional intent when -- and as far as I can tell from his background, he's never been elected to

Congress. And I don't even know how old he was in 1986, but I wager that it was before he was in this industry. I just don't think this is an appropriate examination.

MR. B : Okay. Well, Your Honor, the point is here that -- the point I want to make here is that REMIC provisions are tax code provisions and they deal with the taxation of REMIC trust. They do not deal with the servicing of REMIC trust. And I can get into that.

THE COURT: Servicing a trust or servicing of loans?

MR. B : I'm sorry. Servicing of loans in a REMIC trust.

THE COURT: It seems to me that's a legal argument that you can make --

MR. B : Okay.

THE COURT: -- based on the Internal Revenue Code. And to try to extract those kinds of concessions from this witness who is not a lawyer I think is not appropriate. If you want -- if you want --

MR. B : No, that's --

THE COURT: -- post-hearing --

MR. B : -- fine, Your Honor.

THE COURT: -- briefing on this, I'm happy to give you the time.

MR. B : We can deal with this in a different way.

THE COURT: All right. Fine.

BY MR. B :

Q Now, these loans, as we said, were originated by First Union in November of 1997; isn't that correct?

A Yes, sir.

Q And they were transferred to the REMIC trust in May of 1998, correct? Maybe if you look at Exhibit 7.

A That's exactly --

Q Wells Fargo --

A -- where I looked at it.

Q -- Exhibit 7.

A This REMIC became effective on May 1st, 1998. That's for all intents and purposes the day on which the REMIC became the owner rather than the originator.

Q Okay. And when it was transferred to the REMIC, certificate holders purchased interest in these loans; is that correct?

A I'm sorry?

DON'T INTERRUPT THE WITNESS — OR THE JUDGE

receive ng had been forward

Q Okay. And where was it forwarded on from? Did he tell you that?

A I'm not really sure. It might have come from Wachovia, but I --

Q All right. So --

A -- can't say --

Q -- it's possible --

A -- for sure.

Q -- that this notice was--

THE COURT: Please, Mr. B , you have to let the witness finish his answer.

Were you --

MR. B : I apologize --

THE COURT: -- finished --

MR. B : -- Your Honor.

THE COURT: -- Mr. ?

THE WITNESS: Um...

THE COURT: He said it might have come from Wachovia, or you said. I'm sorry. I don't want to mischaracterize.

THE WITNESS: I don't know. I mean, when we started on this case, we had not -- I was told by the client that they had only very recently received

1. OBJECTIONS SHOULD BE ORGANIZED AND COHERENT

2. A SUSTAINED OBJECTION ISN'T ALWAYS A REASON TO QUIT

intention

Q What was your impression of the debtor's reaction at the conclusion of that second 341 meeting?

A I think she was surprised.

Q Surprised because?

A She was surprised that I --

MS. W : Objection.

THE COURT: Basis.

MS. W : Conclusion. He has no basis for saying she was surprised. I mean, on what is it based? It's irrelevant. It's a conclusion. It's subjective.

THE COURT: Well, okay. I've heard three different bases now (1) that it's not relevant, which I'll overrule; the other, that it's subjective, which I'll also overrule. I think people's observations are necessarily subjective because they're their own.

The last I would take really as a lack of foundation, meaning only that Mr. L hasn't described how he can draw any conclusions about her reaction. And that objection I'll sustain.

BY MS. Z :

Q Upon concluding the 341 meeting, what was

your next course of action?

A With respect to this case, I didn't have any further actions to be taken immediately. I am pretty confident that I filed an initial -- report of initial finding of assets in the case. And I would have gone about the rest of my business at that 341 call. But I had come to the conclusion that I was going to treat the case as an asset case at the conclusion of the second 341 meeting.

Q Do you recall when Ms. P filed her motion to convert?

A It was subsequent to that 341 meeting. At the 341 meeting, debtor's counsel advised me that it was her intention to convert, and I advised counsel that it was my intention to resist that motion to convert.

Q And what was the factual basis for your objection to the motion to convert?

A Debtor's schedules did not reflect the substantial fire insurance claim that existed, and debtor did not account to me for the rents that had been received since the commencement of the case. And so it was my belief and conclusion that the debtor had converted the case only because I had expressed an intention to administer it.

WAIT FOR THE COURT TO RULE AFTER AN OBJECTION IS MADE

mean you that's how you woul

A The company.

Q You said when you couldn't get something, do you mean -- was that like a general --

A The company, the company in general.

Q So you did that?

A I did not, no. I did not solicit vendors.

Q Okay. I guess my point is, do you see any reason for The Big Phone invoicing EZ Talk for any services, to your knowledge?

MR. T : I'm going to object to form, Judge. I think he's asking if there would have been any reason for Big Phone to invoice EZ Talk. I'm not sure we've got any testimony that there were any invoices.

THE WITNESS: Yeah. And, see, actually, now I'm looking down here, the payables don't include any -- I'm sorry.

BY MR. M :

Q But it says, "Due from Big Phone." EZ Talk was due money from Big Phone.

MR. T : Was Your Honor going to rule on the objection?

THE COURT: I don't know. I think we may

have moved passed it already.

MR. T : Fair enough.

THE COURT: Usually I get a little time.

THE WITNESS: I'm very sorry.

THE COURT: But the people asking and answering the questions aren't giving me time, so I guess I'll treat it as moot at this point.

MR. T : Fair enough.

MR. C : It's good conversation, though, Judge.

BY MR. M:

Q You mentioned talking to me as a shareholder on the phone.

A Um-hmm.

Q Did I hold any other position with these companies other than shareholder?

A Yes.

Q What was my position?

A You and Richard T ran the companies. You made the executive decisions of the companies.

Q And when I was discussing the bankruptcy filing with you, was your signature going to go on that filing?

A No.

Q Was my signature going to go on that

WHAT A JUDGE WANTS IN A CLOSING ARGUMENT

further qu

M

THE COURT: All right. Thank you, Mr. T . You may step down.

(Witness excused.)

Mr. C ., do you have any other witnesses?

MR. C : The defense rests.

THE COURT: All right.

MR. B : And I guess I must say then the trustee has no rebuttal case, Your Honor.

THE COURT: That was my next question.

All right. Then we are done. We will resume at 2:00 o'clock.

And as I said before, the trustee will have 45 minutes to close, Mr. C . will have 45 minutes to close, Mr. M will have a half hour following Mr. C ., and following that Mr. will have 15 minutes for rebuttal. And I will adhere strictly in a Court of Appeals fashion to those times.

My real interest here is not in fancy rhetoric. I am interested in knowing how -- from the trustee how the evidence supports the elements of his case. I am particularly interested in intent

and mental state questions. And if there are distinctions between Mr. T and Mr. M , and evidence that supports, say, a case against one but not the other, it is helpful to me if those distinctions are drawn.

By the same token, again, Mr. C , you said the other day you had a tendency to ramble. You may use your time as you see fit. But what is most useful to the court is that you explain to me how the elements of their case have not been met. All right. So something methodical and orderly, long on reason and short on emotional impact would be most useful.

And I'll see you at 2:00.

MR. B : Your Honor, thank you those clarifications. I will pass them along to Mr. P .

THE COURT: That's very much.

MR. C : I've only made a juror cry once in my career.

THE COURT: There will be no tears today.

MR. C : Thank you, Your Honor.

(Lunch recess.)

MR. P : Good afternoon, Judge.

THE COURT: Good afternoon Mr. P

Have a point that is worth making

Q. Okay. Well, lets back up a little bit and talk a little about you, if we may. Your formal education ended at high school; correct?

A. That's correct.

Q. And since you graduated from high school, you have not taken any formal educational courses relating to the topic of accounting or bookkeeping; correct?

A. No. I have not.

Q. And after you got out of high school... Indeed, you had worked there while you were in high school in about 1972 or 1973; you worked for a company called Tasty Donuts; correct?

A. Correct.

Q. And then in about 1977 or '78 you moved to Romney, Indiana?

A. Correct.

Q. And you were unemployed for about six months after the move; correct?

A. Correct.

Q. And then you found employment at the Kinney Shoe Store in Tippecanoe Mall; correct?

A. Yes.

Q. Now, based upon your accounting experience working at the Tasty Donuts store,

Make sure you know what the witness will testify to before you call him as a witness

Q. Did you formulate an opinion as a result of the work that you did as to whether Consolidated was solvent or insolvent?

Mr. _____: Objection. No disclosure under Rules -- under Rule 26. This is a 702 opinion. There is no expert opinion from this expert. He's not identified -- this person. He is not identified as an expert in the pre-trial order. A foundation has not been laid that he is an expert as to matters other than competency. And those are the ones that immediately come to mine.

THE COURT: I think that, based upon the work that this witness actually did, the personal experience, the personal involvement he had with regard to the formulation of the information going into the audit and the balance sheet, the conclusions that were reached in the audit process, that if this witness has an opinion, I will listen. I don't know that he does.

Mr. _____:So much for Rule 26.

Ms._____ Q. Did you formulate an opinion as to whether --

THE COURT: You're the one that brought him in here to talk about this, by the way, Mr. _____; so, quit saying so much for Rule 22. Okay?

MR. _____: It's 26, Your Honor.

THE COURT: 26. Keep your stage whispers to Mr. _____ and Mr. _____.

MS. _____: Q. Mr. K____, did you formulate an opinion as a result of having done the work that you did in connection with reviewing X's balance sheet as to whether X was solvent or insolvent?

A. We weren't thinking in that direction as we went through the audit. When we started to understand the order of magnitude of liabilities that we were hearing from the attorneys and as we discussed those issues, we were, you know, concerned that none of these numbers would be correct if the liabilities were this wrong. In retrospect, we, you know, we thought the company was... It was insolvent at that point.

Only include exhibits you want admitted on your own exhibit list

THE COURT: I want to go down the list and have you identify for me which documents that [are on your exhibit list] that you contend are A, not relevant; B, not what they purport to be; in other words, not authentic.

Mr. _____: Number 4 is a hearsay objection, Your Honor. The objection is hearsay and foundation.

THE COURT: Now, when you say foundation, what do you mean? Admittedly, there is no testimony here thus far.

MR. _____: That's exactly what I mean.

THE COURT: But, do you contend that it is not what it purports to be?

MR. _____: Your Honor, I have no contention. I have no evidentiary burden with respect to the Plaintiff's case. If the Plaintiff proffers an exhibit, he's got to get it in evidence. And until he lays the foundation, I don't have to say a word but objection. That's the way the rules work.

THE COURT: Anything further?

MR. _____: Well, do you want me to keep going, Your Honor?

THE COURT: No. I am going to receive into evidence the documents listed on the Defendants' list of exhibits to which the Plaintiff has made no objection. To do otherwise, I think, is to just force the other side to go through hoops for the sake of going through hoops.

MR._____: What about hearsay? Why isn't Exhibit 4 hearsay, Your Honor?

THE COURT: It may well be hearsay, but _-

MR. _____: Then why are you admitting it?

THE COURT: Because they don't object and it's your exhibit. There is no objection from the Plaintiffs to your identified exhibits. I think it is permissible. I think it is quite common. I think it is totally consistent with the concept of the

Federal Rules, which is, generally -- and the court's ability to control the presentation of evidence at trial -- I think it's totally appropriate to do so in such a way as it minimizes the unnecessary calling of witnesses. That unnecessary dance that consumes so much time of I offer into evidence exhibit such and such. Counsel do you have any objection? No, I have no objection. Received and... We can take inordinate amounts of time. I think it is clearly permissible. I'm going to receive, unless the Plaintiff has any second thoughts, I'm going to receive into evidence, understanding I'm doing so over the Defendants' objection, I'm going to receive into evidence the documents identified on the Defendants' submission, which are identified as no objection by Plaintiff.

MR. _____: Thank you Your Honor. No second thoughts.

THE COURT: Never heard of a party objecting to the admission of their own exhibits.

When do you use non-leading Questions

Q. What is a secured claim?

A. You, know. It's secured. It means its solid.

Q. What is an exemption?

A. It's like that thing you claim on your tax returns for your kids.

Q. What is a reaffirmation agreement?

A. You know, it when you agree to reaffirm.

Impeachment of a Witness by an inconsistent prior statement

Q. Honoring a margin call in the amount of 5 million Deutsche Mark, $2.9 million, that is going to be a very unusual event, correct?

A. I don't think that margin call amount was an unusual amount. I think it might have been larger.

Q. Sir, do you recall that I also examined you in connection with this case at a deposition?

A. I do.

Q. And you also were sworn in to tell the truth at that examination as well?

A. Correct.

Q. And you did so?

A. Correct.

Q. You recall at pages 67 of your deposition, line six, you were asked the following question, and you gave the following answer:

Question: Well, honoring that type of margin call -- referring to the 5 million Deutsche Mark margin call -- would be unusual, right?

Answer: Yes.

That was the testimony that you gave on that date, correct?

A. Correct.

THE UNPREPARED WITNESS

Q. Well, sir, do you know where your opinion is with respect to reasonably equivalent value?

A. (Examining documents.)

(Whereupon, long pause in proceedings -- approximately three minutes -- with no response.)

The Court: There is a question before the witness.

A. Yes. Witness is trying to reconstruct it in his mind.

The Court: And I appreciate you've got a big report that you've got to go through. I just wanted to make certain that we're not in that situation, you know, the joke about two chess players that sit there for an hour and ---

A. No. I understand. I understand.

The Court: Okay.

A. (Examining documents.)

(Whereupon, long pause in proceeding, approximately six minutes.)

* * *

Q. So again, sir, it's my understanding that your opinion is that these numbers have no bearing on the Debtor's solvency. Is that correct or incorrect?

A. (Examining documents.)

(Whereupon, long pause in proceeding, approximately six minutes.)

A. Can I flip this page over (indicating)?

Q. Oh, certainly, if it will help you.

A. (Examining documents.)

(Whereupon, long pause in proceeding -- approximately five -- with no response.)

Q. Sir, would it help if we re-read the question to you?

A. No. Just let me think about it.

Q. (Examining documents.)

(Whereupon, long pause in proceeding -- approximately fifteen minutes -- with no response.)

Q. Mr. G_____, is there anything that would help you answer the question?

A. (No response.)

The Court: Are you able to answer the question?

A. Yeah, I'm able to answer the question. I just wish that I could see the analysis that we did before mad this, this analysis. It was a chart that we had put up there.

The Court: That's the one that....

A. If you could just put it right down there (indicating), that would be helpful. (Examining documents.)

(Whereupon, long pause in proceeding -- approximately five minutes -- with no response.)

The witness never answered the question.