Bankruptcy Court Trial Practice Symposium

Moderator:

Hon. Joan N. Feeney
U.S. Bankruptcy Court (D. Mass.); Boston

Panelists:

Hon. Frank J. Bailey
U.S. Bankruptcy Court (D. Mass.); Boston

Edward S. Cheng
Sherin and Lodgen LLP; Boston

Patrick P. Dinardo
Sullivan & Worcester LLP; Boston

Julia Frost-Davies
Bingham McCutchen, LLP; Boston

Frederic D. Grant, Jr.
Law Office of Frederic D. Grant, Jr.; Boston

Peter B. McGlynn
Bernkopf Goodman LLP; Boston

Patrick J. O'Toole
Weil, Gotshal & Manges LLP; Boston

Participating Judges:

Hon. Colleen A. Brown
U.S. Bankruptcy Court (D. Vt.); Burlington

Hon. Mildred Cabán
U.S. Bankruptcy Court (D. P.R.); San Juan

Hon. J. Michael Deasy
U.S. Bankruptcy Court (D. N.H.); Manchester

Hon. Robert Gerber
U.S. Bankruptcy Court (S.D.N.Y.); New York

Hon. William C. Hillman
U.S. Bankruptcy Court (D. Mass.); Boston

Hon. Enrique S. Lamoutte
U.S. Bankruptcy Court (D. P.R.); San Juan

Hon. Joel B. Rosenthal (Ret.)
U.S. Bankruptcy Court (D. Mass.); Worcester

Hon. Elizabeth S. Stong
U.S. Bankruptcy Court (E.D.N.Y.); Brooklyn

Hon. Brian K. Tester
U.S. Bankruptcy Court (D. P.R.); San Juan

Hon. Mark W. Vaughn (Ret.)
U.S. Bankruptcy Court (D. N.H.); Manchester

ABI NORTHEAST CONFERENCE

JULY 21-24, 2011

MATERIALS FOR

BANKRUPTCY COURT

TRIAL PRACTICE SYMPOSIUM

PREPARED AND PRESENTED BY:

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HYPOTHETICAL

Called for trial is the adversary complaint of D. Basil Dueright, the Chapter 7 Trustee (the "Trustee") of Discrete Ventures, Inc. (the "Debtor"), against the Debtor's officers and directors for breaches of fiduciary duty. The Trustee has commenced an adversary proceeding against Blake Carrington, III ("Carrington"), the Debtor's Treasurer and a member of Debtor's Board of Directors, Thurston B. Howell, IV and Lovey Howell, the other two members of the Debtor's Board of Directors, Mauvais Garçon ("Garçon"), the Debtor's President, and Viktor Badenov ("Badenov"), the Debtor's Vice President and Marketing Director. The complaint contains separate counts for fraud, misrepresentation, breaches of fiduciary duty and negligent mismanagement.

During the three years it operated (2007-2010), the Debtor held itself out as an international wine trader. It described its niche as the acquisition in Russia of lots of carefully stored fine wine (variously said to have been purchased for the Soviet leaders or seized in Germany at the end of World War II) for sale into the hot Chinese market for fine European wine.

Mauvais Garçon, President of the Debtor, had wowed Newport and Boston society with his impeccable French accent and European savoir faire. With Viktor Badenov, his Vice President and marketing director, Garçon spoke of their confidential ties and rich prospective returns. Original lenders enjoyed the promised 23% return on six month loans, and were assured that the Debtor had done even better. Later lenders, largely recruited from old line Newport society and a rather discrete Boston area country club, had advanced another $18 million as of October 2010, when Garçon went missing. He used company funds to buy a one way Air France First Class ticket to Shanghai and has not been heard from since.

Pursued by angry WASPs, the Debtor filed its voluntary Chapter 7 petition with the U.S. Bankruptcy Court for the Southern District of Rhode Island, Eastern Division, at Newport on December 3, 2010. According to Victor Badenov, who signed the petition, the Debtor's operations were all real, the problem was that the return of the proceeds of 2010 season Chinese sales had been interrupted, presumably by Garçon. Blake Carrington, III, Treasurer of the Debtor, testified at the Section 341 meeting and in a later deposition that he had few records and little knowledge of the Debtor's actual operations. These had been described to him by Garçon and Badenov as "eyes only" and "highly confidential." The Debtor's three person board of directors, each of whom have resigned, consists of: Thurston B. Howell, IV, of an old Newport family; Lovey Howell, his sister; and Blake Carrington, III. The Debtor's officers and directors were all handsomely compensated, receiving salary and a twice annual "bonus" based on the gross amount of loans then payable.

VIGNETTE NO. 1 – EXPERT WITNESS

The Chapter 7 trustee (the "Trustee") of Discrete Ventures, Inc. (the "Debtor") has commenced an adversary proceeding against Blake Carrington, III ("Carrington"), the Debtor's Treasurer and a member of Debtor's Board of Directors, Thurston B. Howell, IV and Lovey Howell, the other two members of the Debtor's Board of Directors, Mauvais Garçon ("Garçon"), the Debtor's President, and Viktor Badenov ("Badenov"), the Debtor's Vice President and Marketing Director. The complaint contains separate counts for fraud, misrepresentation, breach of fiduciary duty and negligent mismanagement.

Counsel for the Trustee retained J. Hardy Rodenstock ("Rodenstock") as an expert witness. Rodenstock is a managing partner in a large forensic consulting firm who holds degrees in accounting, business and law. She is licensed as a CPA and a lawyer and has also been awarded the Master of Wine designation by the Institute of Masters of Wine in London, England. There are less than 264 individuals in the world who have earned this designation.

In connection with her retention, Rodenstock has reviewed all of the Debtor's corporate records including its by-laws and articles of incorporation. She also reviewed the corporate laws of the state in which Debtor was incorporated, as well as the offering memoranda provided to prospective lenders, the loan documents executed by the Debtor with each lender and the limited financial records which the Trustee was able to locate. Finally, Rodenstock reviewed the deposition transcript and Section 341 meeting tape for Carrington.

On May 1, 2007, Rodenstock issued her "Expert Report of J. Hardy Rodenstock." The report contains the opinions that Rodenstock was asked to render and were, according to the report, rendered within a reasonable degree of professional certainty. Rodenstock rendered the following opinions:

- Based upon her interpretation of the Debtor's offering memoranda and her knowledge of the wine industry, Rodenstock opined that Garçon and Badenov made false and misleading representations to the Debtor concerning the expected rates of returns to be received by the Debtor. Rodenstock's analysis of comparative sales of pre-1945 wine shows that a 23% or more rate of return was virtually impossible to achieve.

- Based upon her interpretation of the offering memoranda and the loan agreements, Rodenstock opined that the lenders were actually investors in Debtor who would only be entitled to distributions (if there were any) from the Debtor's estate at the equity level.

- Garçon and Badenov breached their fiduciary duties to the Debtor and to its creditors as a result of their self dealings, fraud and their expropriation of corporate assets.

- Carrington, and the Debtor's board members also breached their fiduciary duties to the corporation due to their "benignly neglectful" conduct concerning the

management and operation of the corporation. The directors' excessive and unreasonable compensation constituted another basis to support Rodenstock's opinion.

- Based upon her education, knowledge and experience in business generally and the wine industry specifically, Rodenstock personally developed a damage theory whereby she projected the estimated profits the Debtor would have received over 10 years from its sale of rare wines to the Chinese. Rodenstock's profit projections were based upon an algorithm which he personally created which correlated rare wine consumption in China with her estimate of population growth in China during that ten year period. Rodenstock then apportioned those damages among the defendants based upon her assessment of their comparative culpability. Rodenstock's damages methodology, although years in the making, was first utilized by her in this case.

DOCUMENTS CONSIDERED AND/OR RELIED UPON BY HARDY RODENSTOCK

1. By-laws and Articles of Organization of Discrete Ventures, Inc.
2. Corporate laws of the state of incorporation of Discrete Ventures, Inc.
3. Offering memoranda provided to prospective lenders to Discrete Ventures, Inc.
4. Loan documents executed by Discrete Ventures, Inc. and various lenders.
5. Financial records of Discrete Ventures, Inc.
6. Summaries of financial records of Discrete Ventures, Inc.
7. Deposition transcript and Section 341 meeting tape for Blake Carrington, III.
8. Chinese Wine Consumption 2006 through 2009 compiled by The Wine Institute.
9. Population data compiled by China's National Bureau of Statistics.

APPLICABLE FEDERAL RULES OF EVIDENCE

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be

admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Rule 704. Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Rule 706. Court Appointed Experts

(a) Appointment.

The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation.

Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just

compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment.

In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection.

Nothing in this rule limits the parties in calling expert witnesses of their own selection.

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VIGNETTE NO. 2 - DOCUMENTS

Viktor Badenov will be called to testify in defense of the Debtor's officers and directors. He plans to testify about the details he collected on sales of pre-1950 fine wines, and his analysis of those sales, as the Debtor was preparing and refining its business plan.

Viktor Badenov will seek to rely on a summary of his voluminous notes and records, and the summary will present in a comprehensible form records he personally gathered on 2,865 sales occurring over the ten year period (1997-2006). Viktor painstakingly gathered information at various wine auctions he attended, as well as information from trade and other publications publishing the details of other auctions, and from email correspondence he received from his friends and colleagues in the industry (detailing sales they personally observed).

Viktor's counsel produced for copying and inspection all the notes and other documents on which Viktor's summary is based, at least three weeks prior to trial. The records comprise over 12,000 pages of material, and are contained in 16 banker boxes. He specifically recalls letting the Trustee's counsel know that he might have Viktor prepare a summary for trial.

The summary will prove beyond peradventure that Viktor's analysis reflects a historical, annualized rate of return of 24.98%. Badenov's counsel asks this Court to allow that Viktor Badenov's summary (marked as Exhibit 1 for Identification) be admitted into evidence under FRE Rule 1006.

Evidence Offered

- Summary, prepared by Badenov, of wine sales data collected and compiled over ten years including:

    1. Badenov's observations at various auctions;

    2. Published data regarding wine auctions to establish market purchase prices; and

    3. Emails from friends in the industry regarding data on wine sales they observed and recorded in the ordinary course of business (on which Badenov does not have his own personal knowledge).

- To prove: 24% annual return was achievable and based on evidence he collected; he had no intent to deceive or defraud.

1. Summaries admissible under FRE 1006

- "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court."

Foundation Requirements:

1. Underlying materials summarized are sufficiently voluminous to make in-court examination inconvenient, time-consuming or unduly difficult;

2. Underlying materials (not summary) were made reasonably available to opposing parties in a timely fashion;

   - Materials in party's possession; opposing party given reasonable opportunity to examine?

3. Underlying materials are admissible into evidence;

4. Summary accurately reflects underlying materials;

5. Summary is properly authenticated:

   - Can be by a witness familiar with the underlying materials and the manner which the summary was compiled.

2. Information published in media sources and industry press

(a) Judicial Notice FRE 201

- Two part test:

  1. Indisputability: Judge must find that reasonable persons would not doubt the fact.

  2. Fact is either generally known or verifiable.

- Judicial Notice of Verifiable Facts FRE 201(b)(2): two conditions:

  1. That the adjudicative fact in question is "capable of accurate and ready determination," and

  2. That the source used to determine it is accurate beyond reasonable question.

  Examples: Prevailing interest rates; publications introduced to show what was in the public realm at a time but not whether the information was true.

(b) FRE 902 Self-Authentication

- Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: Newspapers and periodicals.

3. Email Correspondence

FRE 611(a)

- "The Court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence…"

FRE 803

- "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(6) A memorandum, report, record or data compilation in any form…made at or near the time by…a person with knowledge, if kept in the course of a regularly conducted business activity…"

FRE 201. JUDICIAL NOTICE OF ADJUDICATIVE FACTS

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

FRE 611. MODE & ORDER OF INTERROGATION & PRESENTATION

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

FRE 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legiti-

macy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to character. Reputation of a person's character among associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

FRE 902. SELF-AUTHENTICATION

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions under Acts of Congress. Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.

(11) Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record—

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) Certified foreign records of regularly conducted activity. In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record—

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

FRE 1006. SUMMARIES

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Exhibit 1 (Marked for Identification)

SUMMARY (under FRE 1006) OF VIKTOR BADENOV'S RECORDS (Bates No. VB8165 through VB20253) RELATING TO THE HISTORICAL RETURN ON INVESTMENT IN FINE "HERITAGE" WINES (Sold 1997-2006)

Year Sold	# of Sales/Average Sale Price Per Case	Average Purchase Price Per Case	Average Length of Time Held (Years)	Average Annual ROI Based on Sales Price Per Case
1997	157/$16,655	$10,215	3.40	14.6%
1998	263/$16,743	$10,324	3.20	17.0%
1999	294/$17,153	$10,027	3.50	19.8%
2000	383/$24,682	$19,268	.60	45.0%
2001	324/$18,136	$7,329	4.50	22.4%
2002	368/$19,261	$11,262	1.50	26.0%
2003	375/$20,612	$9,498	3.20	24.5%
2004	220/$19,741	$11,315	2.70	21.5%
2005	277/$20,584	$11,788	2.45	27.0%
2006	204/$22,863	$10,263	3.10	32.0%
Totals for Period	**2,865/$19,643**	**$11,228.90/case**	**2.715 years**	**24.98%**

VIGNETTE NO. 4 - HEARSAY

Blake Carrington, III was the Treasurer, and a director for Discrete Ventures. He had a series of discussions with Viktor Badenov that Carrington's counsel wants to get into evidence. Carrington would say that Badenov told him to "stop bothering Garcon and me about the company's books," and that Carrington "was doing a fine job as the Treasurer and should let the accountants handle the daily books."

The Trusteee, however, believes that if pressed, Carrington would also admit that in other discussions, Badenov apparently criticized Carrington for "not having taken enough time to monitor the company's finances between tennis and mojitos."

Continuing on this tennis and mojitos theme, the Trustee has also learned about a conversation between Mr. Carrington and Mr. Garson in September 2010 (before Garcon disappeared), in which Mr. Garcon purportedly said that the, "jig was up, we are all in trouble, you [Carrington] are going down with the ship too, because all you did was play tennis and drink mojitos while cashing your checks."

Relevant Federal Rules of Evidence

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement.

A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant.

A "declarant" is a person who makes a statement.

(c) Hearsay.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay.

A statement is not hearsay if--

(1) *Prior statement by witness*. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of

recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2)*Admission by party-opponent.* The statement is offered against a party and is

(A) the party's own statement, in either an individual or a representative capacity or

(B) a statement of which the party has manifested an adoption or belief in its truth, or

(C) a statement by a person authorized by the party to make a statement concerning the subject, or

(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or

(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Present sense impression**. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) **Excited utterance**. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) **Then existing mental, emotional, or physical condition**. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) **Statements for purposes of medical diagnosis or treatment**. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) **Recorded recollection**. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) **Absence of entry in records kept in accordance with the provisions of paragraph (6)**. Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public records and reports**. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) **Records of vital statistics**. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) **Absence of public record or entry**. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) **Records of religious organizations**. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Marriage, baptismal, and similar certificates**. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) **Family records**. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) **Records of documents affecting an interest in property**. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) **Statements in documents affecting an interest in property**. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in ancient documents**. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) **Market reports, commercial publications**. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) **Learned treatises**. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) **Reputation concerning personal or family history**. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) **Reputation concerning boundaries or general history**. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) **Reputation as to character**. Reputation of a person's character among associates or in the community.

(22) **Judgment of previous conviction**. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) **Judgment as to personal, family or general history, or boundaries**. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) [**Other exceptions.**][Transferred to Rule 807]

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of unavailability.

"Unavailability as a witness" includes situations in which the declarant--

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions.

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former testimony*. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) *Statement under belief of impending death*. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) *Statement against interest*. A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) *Statement of personal or family history*. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) [**Other exceptions.**][Transferred to Rule 807]

(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

VIGNETTE NO. 4 - CHARACTER EVIDENCE

Viktor Badenov earlier attempted to provide summary evidence regarding his voluminous notes and records for sales occurring over a 10-year period. According to Badenov's analysis, an annualized rate of return of 23.6% was achieved historically. During his testimony, Badenov maintained that the representations he made to various lenders regarding the Debtor's operations were all authentic results.

In connection with Discreet Ventures, Badenov provided his "resume" to various lenders. According to the resume, Badenov made the Dean's List for all seven years of his college career. Additionally, Badenov's resume claims that in 1981 he received a doctorate in Oenology from The Culinary Institute of America. The Culinary Institute of America does not offer a doctorate program. The only course on Oenology that the Culinary Institute of America offers is a one-hour web based class on wine tasting entitled "Tiny Bubbles: A Whirlwind Discovery of the Great Sparkling Wine Regions of the World."

In addition, Badenov's past is not necessarily unblemished. In 2001, he, his wife Natasha and big brother, Boris, were found liable for a significant judgment in a civil action. In that action, disappointed investors alleged that the Badenov brothers and Natasha engaged in elaborate Ponzi scheme in which the Badenov's fleeced investors. The investors had ponied-up millions of dollars to fund Badenov's scheme to start a courier service using flying squirrels. No service was ever started and evidence surfaced that the Badenov's had filed false tax returns, and made false statements in various offering documents to prospective investors in the courier venture. The 2001 action caused the SEC to investigate the Badenov family. After a lengthy investigation the SEC issued an administrative order sanctioning Badenov, Among the penalties imposed by the SEC, was an order barring Badenov from selling securities for 18 months.

The 18 months expired in July 2004. Badenov is also currently a defendant in several pending cases alleging he breached a variety of contracts. Badenov remains hopeful that his long-lost cousin Harold will be available to testify about various aspects of his reputation.

Is any of this information helpful or permissible to use?

Rules of Evidence at Issue

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exception; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim. In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in Rule 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Rule 405. Methods of Proving Character

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Rule 406. Habit; Routine Practice

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Rule 608. Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of a crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule. For the purpose of attacking the character for truthfulness of a witness.

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that

admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

EVIDENCE IN BANKRUPTCY CASES

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EVIDENCE IN BANKRUPTCY CASES

October 15, 2008

I. Creating the Foundation

A. Generally

1. The basic rules for laying the foundation for a witness to testify or for a document to be introduced apply to both direct and cross examination. For the most part, the examiner should be concise and to the point in establishing background information.

2. The information given should relate to what type of evidence is being offered (e.g., a report, an affidavit, a recording of a 341 meeting, a real estate appraisal, etc.), who the witness is, who is authenticating the document, or testifying before the court, and the personal knowledge the witness has relating to the document.

3. Preliminary questions concerning the admissibility of a witness' testimony or of an exhibit are governed by FED. R. EVID. 104(a) and will be determined by the court.

4. Examiners should be given greater leeway in establishing foundation and background than in more substantive areas of questioning.

B. Authentication of Documents and the Best Evidence Rule

1. When introducing a document, a proponent must authenticate the document and show that the document meets the Best Evidence Rule. Additionally, there may be hearsay concerns, but those will be addressed later in the outline.

2. Authentication is governed by FED. R. EVID. 901(a) and requires that the proponent supply enough evidence to support a finding that evidence is what it is claimed to be. Authentication is only relevant to admissibility and questions surrounding the sufficiency of authentication will be determined by the court under FED. R. EVID. 104(a).

3. Unless a document is self-authenticating, as provided in FED. R. EVID. 902, a document must be authenticated before it will be admitted as evidence. FED. R. EVID. 902 provides that the following are self-authenticating:
   (1) Domestic public documents under seal

(2) Domestic public documents not under seal
(3) Foreign public documents
(4) Certified copies of public records
(5) Official publications
(6) Newspapers and periodicals
(7) Trade inscriptions and the like
(8) Acknowledged documents
(9) Commercial paper and related documents
(10) Presumptions under Acts of Congress
(11) Certified domestic records of regularly conducted activity
(12) Certified foreign records of regularly conducted activity

4. In certain instances, some documents may be authenticated before a trial even begins. One important authentication mechanism is FED. R. CIV. P. 36, by which a party can make a written request for admissions of fact along with genuineness of the documents. Admissions of genuineness can also be elicited from an adversary by a request for interrogatories (pursuant to FED. R. CIV. P. 33) or depositions (pursuant to FED. R. CIV. P. 30 and 31). *See* **CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE** 997 (3rd ed. 2003).

5. In the event that a document or piece of evidence needs to be authenticated at trial, FED. R. EVID. 901(b) provides a list of examples of how evidence may be authenticated. The list serves as an illustration and not a limitation. *U.S. v. Jimenez Lopez*, 873 F.2d 769 (5th Cir. 1989).

6. Traditionally, there are eight steps in the process of authenticating and introducing an exhibit:
   (1) the exhibit must be marked for identification
   (2) the exhibit must be authenticated by a witness if it is not self-authenticating
   (3) offering the exhibit into evidence
   (4) permitting opposing counsel to examine the exhibit
   (5) allowing opposing counsel the opportunity to object
   (6) submitting the exhibit to the court for examination if it desires
   (7) obtaining a ruling by the court
   (8) asking permission to have the exhibit presented, or read, to the jury

   See **CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE** 997 (3rd ed. 2003).

7. Writings can be authenticated in several ways. First, writings can be authenticated by the person who actually wrote the item being offered. *See U.S. v. Helmel*, 769 F.2d 1224 (8th Cir. 1985). Writings can also be authenticated by others who are shown to have personal knowledge of the

writing. *See NLRB v. Gen. Wood Preservative Co.*, 905 F.2d 803 (4th Cir. 1990) (authentication requirement met by witness who saw person sign the item). Further, someone who has seen the writing before, or someone who is familiar with the contents of the writing can authenticate it. *See U.S. v. Durham*, 868 F.2d 1010 (8th Cir. 1989); *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 883 F.2d 1429 (9th Cir. 1989).

8. In order to authenticate a voice on a recording a witness must have personal knowledge as to the sound of that person's voice at some point in time prior to testifying. *See U.S. v. Marin-Cifuentes*, 866 F.2d 988 (8th Cir. 1989).

9. Sound Recordings (such as recordings of 341 meetings) can be authenticated pursuant to FED. R. EVID. 901(b)(9) as a process or system. The parties speaking must be identified and the device that was used to make the recording must be shown to have been in good working condition and operated properly by someone who was qualified to do so. *See* **CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE** 1017-18 (3rd ed. 2003). Also, participants in the conversation that was recorded may authenticate the recording by testifying that it accurately reflects the conversation that took place. *See U.S. v. Lance*, 853 F.2d 1177 (5th Cir. 1988).

10. In addition to being authenticated, all writings, recordings, and photographs, offered for their contents, must comply with the Best Evidence Rule, as set forth in FED. R. EVID. 1002: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress."

11. However, in many instances production of the original will not be necessary as FED. R. EVID. 1003 allows for the introduction of duplicates made in accordance with the definition announced in FED. R. EVID. 1001. *See Equitable Life Assurance Socy. of the United States v. Starr*, 241 Neb. 609 (Neb. 1992).

12. The Federal Rules also provide for a number of other exceptions to the Best Evidence Rule. FED. R. EVID. 1004 excuses production of the original when the original is lost or destroyed (unless done in bad faith) or is beyond the reach of judicial process. FED. R. EVID. 1005 allows the use of certified copies to prove a public record. FED. R. EVID. 1006 allows the use of charts, summaries, or calculations to prove the content of voluminous writings, recordings, or photographs. This may be very helpful when introducing evidence of extensive account statements or financial transactions. *See Colorado Coal Furnace Distrib., Inc. v. Prill Mfg. Co.*, 605 F.2d 499 (10th Cir. 1979). Finally, FED. R. EVID. 1007

provides that production of the original is not necessary when your opponent had already admitted the content of the original by testimony or writing. *See* **CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE** 1080 (3rd ed. 2003).

C. Witness' Testimony

1. In order to get a witness on the stand to testify, the proponent will have to show that the witness is capable of testifying about the subject matter. If the witness is a lay witness, FED. R. EVID. 602 governs and requires a showing of evidence to establish that the witness has a personal knowledge of the matter about which he/she is being questioned. If the witness's capability is not self-evident, an offer of proof may be necessary under FED. R. EVID. 103. If the witness is an expert witness FED. R. EVID. 702-706 apply. Expert witnesses will be discussed further, later.

2. In the course of cross examining a witness, the examiner may want to introduce a new exhibit. The Rules allow this as long as the exhibit pertains to the testimony given on direct examination. *See* FED. R. EVID. 611(b). The required pertinence is usually liberally construed to include all inferences, implications, and explanations arising from the direct questioning. *See U.S. v. Arnott*, 704 F.2d 322 (6th Cir. 1983); *Roberts v. Hollocher*, 664 F.2d 200 (8th Cir. 1981).

3. There may be instances during questioning when a witness cannot remember certain details that the examiner wishes to reveal. In these instances, the Federal Rules provide guidelines on what can and cannot be done. FED. R. EVID. 612 governs and provides:

> [I]f a witness uses a writing to refresh memory for the purpose of testifying, either – (a) while testifying, or (b) before testifying, if the court in its discretion determines it is necessary in the interest of justice, or (c) any adverse parties entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce into evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. . . .

4. Anything can be used to refresh a witness' recollection. *See U.S. v. Rappy*, 157 F.2d 964 (2d Cir. 1946) (stating that anything can be used "a song, a scent, a photograph, an allusion, even a past statement known to be false.")

5. Under FED. R. EVID. 612(2), documents used in pretrial preparation can only be used to refresh a witness's recollection if the court determines it is in the interest of justice.

6. If the witness' memory is refreshed by the item, so that the witness adopts the matter suggested by the examiner, then the fact that the matter may not have been introducible by itself becomes irrelevant. However, if the witness's memory is not refreshed, or the witness does not adopt the matter suggested, there may be a risk of prejudice, especially if the matter is inadmissible as hearsay. *See* **CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE** 589 (3rd ed. 2003).

7. There are also some limits on when and how a witness' recollection can be refreshed. First, the witness' memory must be exhausted after both direct and cross examination before an attempt to refresh can be made. *See Hall v. American Bakeries Co.*, 873 F.2d 1133 (8th Cir. 1989). Second, the judge can control the manner in which the "refreshing" takes place. *See* **CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE** 590 (3rd ed. 2003). Third, the witness has to actually have a present recollection of the past event and cannot merely reiterate what the examiner says. *See Hall v. American Bakeries Co.*, 873 F.2d 1133 (8th Cir. 1989); *20th Century Wear, Inc. v. Sanmark-Stardust, Inc.*, 747 F.2d 81 (2d Cir. 1984). Finally, the examiner's adversary is entitled to inspect the item used to refresh the witness' memory and introduce it in evidence. *See Spivey v. Zant*, 683 F.2d 881 (5th Cir. 1982). Also, if the matter used to refresh the witness' recollection is a writing by the witness, it may be introduced into evidence under FED. R. EVID. 803(5) as a past recollection recorded, an exception to the hearsay rule.

D. Dealing with Objections to Foundation

1. Objections to foundational evidence usually result from failure to properly authenticate, failure to show that the witness has personal knowledge of the matter, or a violation of the hearsay rule. Objections on these matters should be countered with specific testimony from the witness addressing the nature of the objection.

2. A tool which may be useful in this context is FED. R. EVID. 104(b), which is known as the "linking up" rule:

> When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

This rule will allow the examiner to elicit further testimony from the witness, or introduce other evidence, which can satisfy the adversary's objection. *See generally Huddleston v. U.S.*, 485 U.S. 681 (1988).

II. Using Expert Testimony

A. Qualifying the Expert

1. The first step in introducing expert testimony is qualifying the expert. If the expert works in a profession that has unique knowledge, it is likely that he will need to be qualified. According to FED. R. EVID. 702 an expert witness must possess "knowledge, skill, experience, training, or education" in a field of particular relevance to the subject.

2. Usually, an expert witness can be qualified by showing that the witness possesses some type of formal, graduate education. *See Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167 (5th Cir. 1990) (PhD in mechanical engineering and Master's in production engineering qualified expert).

3. Personal knowledge or skill acquired through experience may also qualify an expert if the knowledge or skill is relevant to the subject at issue. *See Tuf Racing Products, Inc. v. American Suzuki Motor Corp.*, 223 F.3d 585 (7th Cir. 2000) (accountant could testify to damages suffered by plaintiff by examining plaintiff's financial information). Real estate appraisers would likely be qualified in this manner, however, bankers and landowners can also testify as to the value of land. *See U.S. v. 68.94 Acres of Land, Kent County*, 918 F.2d 389 (3d Cir. 1990).

B. Federal Rule of Evidence 702 and Admissibility of Expert Testimony

1. Once an expert is qualified, the testimony to be given must be admissible in accordance with FED. R. EVID. 702, which provides in full:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principals and methods; and (3) the witness has applied the principals and methods reliably to the facts of the case.

2. Expert testimony is only admissible when it will help the trier of fact determine a fact at issue. *See* **CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE** 618 (3rd ed. 2003). Further, the court will most

likely have to make case-by-case, ad hoc decisions on admissibility under the helpfulness standard as the expert's testimony will have to conform to the particular issues at hand. *See Bridger v. Union R. Co.*, 355 F.2d 382 (6th Cir. 1966). In the bankruptcy context, experts can help in a number of areas, from real estate appraisals to complicated business or financial practices. *See e.g. Philips Oil Co. v. OKC Corp.*, 812 F.2d 265 (5th Cir. 1987) (accountant allowed to testify about complicated technical terms).

3. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court stated that judges should serve as gatekeepers to exclude unreliable scientific testimony. The Court further extended this principle to all expert testimony in *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 (1999). *Daubert* set forth a non-exclusive list of factors to be used by the trial courts in determining the reliability of expert testimony:

> (1) whether the expert's technique or theory can be or has been tested—was the theory challenged in an objective sense;
> (2) whether the technique or theory has been subject to peer review and publication;
> (3) the known or potential rate of error of the technique or theory when applied;
> (4) the existence and maintenance of standards and controls; and
> (5) whether the technique or theory has been generally accepted in the scientific community.

FED. R. EVID. 702 advisory committee's note to 2000 Amendment

In addition to these factors courts have also found numerous other factors relevant in determining whether expert testimony is sufficiently reliable:

> (1) Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for the purposes of testifying." *Daubert* at 1317.
> (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. *See General Elec. Co. v. Joiner*, 522 U.S. 136 (1997).
> (3) Whether the expert has adequately accounted for obvious alternative explanations. *See Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994).
> (4) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting." *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940 (7th Cir. 1997).
> (5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. *See Kumho Tire* at 1175.

FED. R. EVID. 702 advisory committee's note to 2000 Amendment

4. Opinions and observations made by an expert that might not be admissible under FED. R. EVID. 702, may nevertheless be admissible as lay testimony pursuant to FED. R. EVID. 701.

III. Lay Witness Testimony

1. FED. R. EVID. 701 governs the admissibility of lay opinions and states:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

2. There are three requirements to Rule 701, first the testimony has to be rationally based on the witness' perception. This means that witnesses must have personal knowledge of the matter, which is also required by FED. R. EVID. 602. *See U.S. v. Rea*, 958 F.2d 1206 (11th Cir. 1992). Inferences or opinions based upon little or no firsthand knowledge should be excluded. *See Walton v. Nalco Chemical Co.*, 272 F.3d 13 (1st Cir. 2001). Second, the testimony must be helpful to understanding another witness' statements or a fact in issue. This allows courts to exclude testimony that merely takes sides. *See* FED. R. EVID. 701 advisory committee's note; *U.S. v. Phillips*, 600 F.2d 535 (5th Cir. 1979). Third, the lay opinion cannot be based on knowledge that would qualify a witness as an expert, for obvious reasons.

3. As a practical matter, lay witnesses are usually fact witnesses who can recount the who, what, when, and where of a given incident. In a bankruptcy setting, a lay witness may be helpful in testifying that certain documents were signed by an individual, or that certain conversations occurred, especially regarding an individual's intentions. Additionally, lay witnesses could be helpful in a variety of other scenarios, as long as the witness is not professing to have some kind of specialized knowledge that would necessitate qualification as an expert.

4. A final practical point about lay testimony is that what is considered general knowledge may vary from community to community. For instance, a coastal community in Maine would most likely have much more general knowledge about the lobster business that an urban community situated in Kansas.

IV. Hearsay

A. Generally

1. FED. R. EVID. 801 defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 802 provides that "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

2. The rules provided further definition of the terms used in the definition of hearsay. "Statement" is defined as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." "Declarant" is defined as "a person who makes a statement." Thus, in order to qualify as hearsay something as to be an assertion. As such, inquiries and questions would not qualify as hearsay. *See Quartararo v. Hanslmaier*, 186 F.3d 91 (2d Cir. 1999); *U.S. v. Jackson*, 88 F.3d 845 (10th Cir. 1996).

3. Another definitional element that must be satisfied in order for something to qualify as hearsay is that it must be offered to prove the truth of the matter asserted. Put another way, hearsay may exist when the declarant says something that matches what the proponent seeks to prove. It is for the court to decide, under FED. R. EVID. 104(a), what the proponent is trying to prove and what the declarant trying to say.

B. Statements That Are Not Hearsay Under Rule 801

1. FED. R. EVID. 801 provides two categories of statements which are not hearsay, prior statements by a witness and admissions by a party opponent.

2. Prior Statement by Witness. FED. R. EVID. 801(d)(1) provides that a statement is not hearsay if:

> The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person.

There are three basic types of statements within FED. R. EVID. 801(d)(1) that fall outside the hearsay rule. First, in order to be exempt from the hearsay rule, prior inconsistent statements must be shown to be

inconsistent with the witness' later testimony, that the testimony took place at a proceeding where the witness was under oath subject to the penalties of perjury, and the witness must be subject to cross-examination about his earlier testimony. *See* **CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE** 755 (3rd ed. 2003). Second, prior consistent statements must be consistent with the witness' present testimony, must be admissible to rehabilitate the witness from a charge of recent fabrication and the witness must be subject to cross-examination on the testimony. *See id.* at 759. Finally, the third exemption, which deals mostly with criminal cases, is fairly straightforward. If a witness testified previously, subject to cross-examination, about the identity of a person after observing the person, then the statement should be excluded from the hearsay rule.

3. Admission by Party-opponent. FED. R. EVID. 801(d)(2) provides that a statement is not hearsay if

> The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and infurtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

The purpose of this exemption is to align responsibility with making or breaking their case with the parties themselves. This exemption is given great breadth and can include anything from a written statement, to a nonverbal cue, to an undelivered email, as long as the statement can be attributed to, in accordance with the rule, the opposing party. *See U.S. v. Sprick*, 233 F.3d 845 (5th Cir. 2000) (undelivered email fits within this exception); *U.S. v. Abou-Saada*, 785 F.2d 1 (1st Cir. 1986) (nonverbal cue fits within this exception).

C. Hearsay Exceptions Pertinent to Bankruptcy Cases

1. FED. R. EVID. 803 provides a number of exceptions to the hearsay rule. While any number of these exceptions may be useful in any given instance, and it is always a good idea to examine be familiar with the

exceptions before any trial, a few of the exceptions may be of special interest to bankruptcy lawyers.

2. FED. R. EVID. 803(6) provides an exception for records of regularly conducted activity. This exception applies to memoranda, reports, records, or data compliations "kept in the course of regular practice of that business activity." The exception may cover the business activities of all commercial endeavors, nonprofit organizations, and institutions of all sorts. The records must be kept as a matter of regular practice, or pursuant to company policy. *See City of Long Beach v. Standard Oil of California*, 46 F.3d 929 (9th Cir. 1995); *Wilander v. McDermott Intern., Inc.*, 887 F.2d 88 (5th Cir. 1989). In order to utilize this exception, a foundation will have to be laid. This will likely include the person who keeps the records testifying as to the recordkeeping process. *See EEOC v. Alton Packaging Co.*, 901 F.2d 920 (11th Cir. 1990); *FDIC v. Staudinger*, 797 F.2d 908 (10th Cir. 1986). As such, any records will also need to be authenticated and comport with the Best Evidence Rule as described above. The exception also reaches computerized records (*see U.S. v. Catabran*, 836 F.2d 453 (9th Cir. 1988)) but not email, as email is more like casual notes than regular business activity. *See Monotype Corp. PLC v. International Typeface Corp.*, 43 F.3d 443 (9th Cir. 1994).

3. FED. R. EVID. 803(8) provides an exception for public records and reports. This exception has wide breadth and reaches records in almost any form as long as they belong to a public office or agency (local, state, federal, or foreign). The exception sets up three categories of records that can be admitted as evidence. First, records that set forth the activities of the office or agency are exempt. One example is the transcript of a judicial proceeding. *See* 28 **U.S.C.** § 753(b). Second, records that set forth matters observed pursuant to duty imposed by law are exempt. This can include any number of events observed by the public officials in the course of their duties, ranging from weather reports to police reports. *See Evanston v. Gunn*, 99 U.S. 600 (1879) (weather observations); *Baker v. Elcona Homes Corp.*, 588 F.2d 551 (6th Cir. 1978) (police accident report). Third, records that set forth the investigative findings of a public office are also exempt. This includes both internal and external investigations. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988) (Air Force accident report relating to training flight); *Staley v. Bridgestone/Firestone, Inc.*, 106 F.3d 1504 (10th Cir. 1997) (redacted OSHA investigative report).

4. FED. R. EVID. 803(10) provides an exception for the absence of a public record or entry. This exception allows the use of a certificate by a recordkeeper indicating that a diligent search did not turn up any record. *See U.S. v. Ventura-Melendez*, 275 F.3d 9 (1st Cir. 2001). This exception could be particularly useful when examining land records.

5. FED. R. EVID. 803(14) provides an exception for records of documents affecting an interest in property. This exception provides for the use of recorded documents, like mortgages or deeds, to prove the essential elements of a chain of title. *See U.S. v. Ruffin*, 575 F.2d 346 (2d Cir. 1978). FED. R. EVID. 803(14) can also be used in conjunction with FED. R. EVID. 803(15), which provides an exception for statements in documents affecting an interest in property. This exception was meant to cover the original documents, i.e. the deed or mortgage, rather than the recorded copy. When used in conjunction, these two exceptions will allow the introduction of most documents relating to ownership of real estate in order to prove content. As always, these documents must be properly authenticated with the requisite foundational evidence.

6. Another exception that has been the subject of some controversy is FED. R. EVID. 803(17), which exempts market reports and commercial publications. FED. R. EVID. 803(17) exempts: "Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations." Some have tried to argue that credit reports could be exempted from the hearsay rule under this exception. *See* Note, *Mercantile Credit Reports as Evidence*, 44 **MINN L. REV.** 719 (1960). However, credit reports also contain rumors and other kinds of hearsay and have not been exempted under 803(17). *See Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829 (8th Cir. 1976); *Philip Van Heusen, Inc. v. Korn*, 460 P.2d 549 (Kan. 1969).

7. FED. R. EVID. 804 provides an exception to the hearsay rule if the declarant is unavailable. FED. R. EVID. 804(a) defines unavailability as the following:

> Unavailability as a witness includes situations in which the declarant—
>
> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
>
> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
>
> (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (5) is absent from the hearing and the proponent of statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or

(4), the declarant's attendance or testimony) by process or other reasonable means.
A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

This definition fits a variety of scenarios and focuses on the legitimacy of the reason why the declarant is unavailable. In any number of situations a witness may not be available, or willing to testify and it will be important to know what may or may not be barred by the hearsay rule.

FED. R. EVID. 804(b) goes on to exempt the following testimony when the declarant is unavailable: (1) Former testimony (if the opposing party had an opportunity to examine the witness by cross or redirect examination), (2) Statements made under belief of impending death (declarant's belief has to be that death is imminent), (3) Statements against interest (statement has to be so far against declarant's interest to make that it would be unreasonable to make unless the declarant believed it to be true), (4) Statements of personal or family history, and (6) Forfeiture by wrongdoing (statements against parties who engage in wrongful conduct intended to make the declarant unavailable).

While most of the exceptions will come into play mostly in criminal trials, there are a few notable circumstances in which they could affect a bankruptcy proceeding. For instance, FRE 804(b)(3) could be raised in circumstances where a declarant makes a statement against their proprietary or pecuniary interest. *See Mills v. Damson Oil Corp.*, 691 F.2d 715 (5th Cir. 1982) (grantee admitted that he had knowledge of prior deed which conveyed property to another buyer); *In re Ollag Construction Equip. Corp.*, 665 F.2d 43 (2d Cir. 1981) (bank admitted that certain principals had prepared financial statements which overstated assets in an effort to increase favorability of bank's position when trying to enforce a security interests); *In re Thompson*, 205 F. 556 (D.N.J. 1913) (bankrupt made statement that he did not own dredge because he did not pay for it); *Egbert v. Egbert*, 132 N.E.2d 910 (Ind. 1956) (mortgagee admitted that note had been paid); *German Ins. Co. v. Bartlett*, 58 N.E. 1075 (Ill. 1900) (husband stated that he was indebted to wife and that property was bought with her money but he was holding title as trustee).

8. Finally, FED. R. EVID. 807 provides a residual exception, or a catch all provision, for hearsay that may not meet a specific exception, but nevertheless should still be exempt. FED. R. EVID. 807 provides:

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A)

> the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purpose of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and particulars of it, including the name and address of the declarant.

Usually this exception is used in scenarios that bear close resemblance to an already existing exception but does not hit the nail on the head. *See U.S. v. Valdez-Soto*, 31 F.3d 1467 (9th Cir. 1994) (if statement almost fits an exception, it is favorable to admit it). If you decide to use 807, there are four requirements that the rule sets out that must be fulfilled, (1) the statement must be evidence of a material fact, (2) the statement must be more probative than any other evidence reasonably obtainable, (3) use of the statement has to be in the interest of justice, and (4) notice has to be given to the opposing party.

TOP 10 LAWYER BOOKS

1) Harper Lee, To Kill a Mockingbird

2) Anthony Lewis, Gideon's Trumpet

3) John Clifford Mortimer, Rumpole of the Bailey

4) Truman Capote, In Cold Blood

5) Jonathan Harr, A Civil Action

6 Alan Morton Dershowitz, Reversal of Fortune: Inside the von Bülow Case

7) John Ray Grisham, Jr., The Firm

8) Scott F. Turow, Presumed Innocent

9) Thomas Kennerly Wolfe, A Man in Full

10) John Ray Grisham, The Pelican Brief

Exhibit 1 (Marked for Identification)

SUMMARY (under FRE 1006) OF VIKTOR BADENOV'S RECORDS (Bates No. VB8165 through VB20253) RELATING TO THE HISTORICAL RETURN ON INVESTMENT IN FINE "HERITAGE" WINES (Sold 1997-2006)

Year Sold	# of Sales/Average Sale Price Per Case	Average Purchase Price Per Case	Average Length of Time Held (Years)	Average Six Month ROI Based on Sales Price Per Case
1997	157/$16,655	$10,215	1.70	14.6%
1998	263/$16,743	$10,324	1.60	17.0%
1999	294/$17,153	$10,027	1.75	19.8%
2000	383/$24,682	$19,268	.30	45.0%
2001	324/$18,136	$7,329	2.25	22.4%
2002	368/$19,261	$11,262	.75	26.0%
2003	375/$20,612	$9,498	1.60	24.5%
2004	220/$19,741	$11,315	1.35	21.5%
2005	277/$20,584	$11,788	1.25	27.0%
2006	204/$22,863	$10,263	1.65	32.0%
Totals for Period	**2,865/$19,643**	**$11,228.90/case**	**1,345 years**	**24.98%**

10/1/01

ATTENDED AUCTION IN SHANGHAI:

20 CASES OF 1942 CHATEAU MARGEAUX (BORDEAUX) SOLD FOR ¥14,000 PER CASE TO CHINESE DISTRIBUTOR. SPOKE TO SELLER, AND COST TO PURCHASE (PER CASE) WAS ¥6,000.

PROFITS: ¥8,000 PER CASE IN 12 MONTHS!
A 36% RETURN!

1/8/02

ATTENDED AUCTION IN PARIS:

156 CASES OF 1964 CHATEAUX D'YQUEM SOLD FOR ₣18,000 A CASE TO RUSSIAN DISTRIBUTOR. SPOKE TO HEAD OF AUCTION AND COST OF THESE AVERAGED ₣9,000 WHEN PURCHASED TWO YEARS EARLIER. THAT IS THE FINEST SAUTERNE IN THE WORLD...

Email

From: Victor Badenov
Sent: June 17, 2004
To: A. Picup Andropoff
Subject: Wine, Wine, Wine . . .

Viktor, darling, it's been so long. I was thinking of you and wanted to tell you that we spent $1,500 to purchase 3 cases of 1948 Dom Perignon Champagne that we found in France in 1998, and sold them 3 years later in Shanghai for $3,600. The market in China is just outstanding for high quality European wines.

Amy

REDACTED