

Evidence: What It Is, Why You Need It, and How to Get It Admitted

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Evidence:

What It Is, Why You Need it and
How to Get it Admitted

- Honorable Stephen L. Johnson
- Honorable Gregg W. Zive
- Jennifer L. Braun, Esq.
- Zachariah Larson, Esq.

**The Important Role of
Pre-Trial Practice**

Research and Know the Elements of Your Claims and Defenses

- Your discovery plan and pre-trial motions should be designed to elicit admissible evidence to support your claims and defenses

Stipulations for Admissibility of Evidence

- Stipulate to undisputed facts in advance of trial
- Stipulate to the admissibility of exhibits
- Pre-Trial Orders

Common Evidentiary Issues in Bankruptcy Cases

E-mail as Evidence

Debtor/plaintiff wants to admit e-mail from her real estate broker into evidence. The e-mail includes the broker's estimate of value for the property.

E-mail as Evidence -- Authenticity

- Authentic? -- FRE 901. Is the evidence what it purports to be
- Authenticate the e-mail by:
 - Personal knowledge
 - Circumstantial evidence – Contents, Substance, Usual Patterns
 - Tracing using internet addresses
- Consider: e-mails produced in discovery by a party may be deemed authentic

E-Mail as Evidence -- Hearsay

- Business records – 803(6): requires evidence of a regularly conducted activity
 - Narrow interpretation – require a business purpose and business practice
 - Broad interpretation – a regular practice of sending e-mails is good enough
- Exceptions:
 - Party admissions
 - Excited utterances
 - State of mind
- Hearsay within hearsay – 805

Web Page as Evidence

Debtor wants to admit Zillow print out from a web page as evidence of home value.

Web Pages from the Internet

- Hearsay – 801
- Exceptions to hearsay:
 - Government records, reports – FRE 803(6) or (8)
 - Business records – FRE 803(6)
 - Market reports – FRE 803(17)
 - Admissions of party opponent – FRE 801(d)

Summaries as Evidence

The debtor wants to introduce documents proving rental income and expenses from multiple properties for the past three years.

He can authenticate the documents – but there are 800 pages of records.

Summaries as Evidence – FRE 1006

- FRE 1006 : Summaries can be used to prove content to save time and to avoid inconvenience.
- How to admit:
 - Underlying materials
 - Must be admissible
 - Must be made available for other parties' review
 - Court may order their production in court
- Sponsor:
 - The person who prepared the summary should testify as to what the summary does, state what he or she did to prepare it, and identify the underlying information.
- Distinguish:
 - Summaries by counsel in closing – not evidence!
 - Summaries by witnesses of other testimony – not evidence!

Business Records as Evidence

The debtor has obtained copies of a property file from a title company, and wants to move into evidence copies of the title documents, loan origination and sale documents, balance statements, notes, correspondence with debtor and the lender, and other documents.

Title Company Records – Hearsay Exception? – FRE 803(6)

- FRE Rule 803 (6) – records of regularly conducted activity that are:
 - made at the time by — or from information transmitted by — someone with knowledge;
 - kept in the course of a regularly conducted activity of a business, organization, occupation;
 - making the record was a regular practice of that activity;
 - custodian testifies to these conditions AND
 - Neither the source nor the preparation indicate a lack of trustworthiness

Title Company Records -- Authentication

- Self-Authenticating Records -- FRE 902(11), Certified Domestic Records of a Regularly Conducted Activity are self-authenticating:
 - Requires domestic records with a certification of the custodian or another qualified person that meet the requirements of FRE 803(6)(A)-(C).
 - Custodian's certification is critical – must address elements.
- Requires reasonable written notice of the intent to use Rule 902(11) declaration -- and must make the record and certification available for inspection — so that the opposing party has a fair opportunity to object.

Former Testimony

At trial, an opposing witness tells a different story than she did at her 2004 examination.

Impeachment – FRE 801(d)(1)

A statement is NOT HEARSAY if:

- Declarant testifies and the prior statement:
 - is inconsistent with prior testimony
 - is consistent, but offered to rebut a charge of recent fabrication; or
 - identifies a person as someone the declarant perceived earlier.
- Inconsistent sworn statements may be used to impeach a witness testifying at trial -- to reflect on the witness's credibility.
- Inconsistency includes evasion and inability to recall.
- Includes: testimony from § 341(a) Meetings, Rule 2004 Examinations, Depositions
- Must be shown to opposing counsel – see FRE 613(a).

Party Admissions – FRE 801(d)(2)

An opposing party's statement may be admitted where it:

- (A) was made by the party in an individual or representative capacity;
 - (B) is one the party manifested that it adopted or believed to be true;
 - (C) was made by a person whom the party authorized to speak on the subject;
 - (D) was made by the party's agent or employee on a matter within the scope of that relationship; or
 - (E) was made by the party's coconspirator during and in furtherance of a conspiracy.
- Admissions of a party opponent need not be incriminating or inherently damaging -- just a prior statement of the party that meets the criteria.
 - Depositions other prior testimony of opponents are admissions.
 - The statement does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or a conspiracy under (E).
 - Still must be authenticated.

Former Testimony Exceptions to Hearsay - FRE 804(b)

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

(1) Former Testimony. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
(B) is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

- Are the issues substantially the same?
 - Examinations in the same case, or in state court litigation
- Different strategies in former proceedings are irrelevant. Admissibility is based on similarity of substance, and opportunity to examine.

Procedural Requirements for Admission of Deposition Testimony FRCP 32

- Both the FRE and the FRCP are incorporated by reference in the FRBP. See FRBP 9017, 9032.
- FRCP 32 governs use of depositions for impeachment, and from adverse parties, corporate agents, and unavailable witnesses.
- Witnesses are “unavailable” if they are:
 - dead; over 100 miles away; outside the U.S.; too ill or infirm to attend; imprisoned; subpoena will not work; or, on noticed motion, in exceptional circumstances
- If a party offers part of a deposition, the adverse party may supplement.
- Rule 32 specifies certain limitations and process for objections.

The Role of Lay Opinion

- FRE 701
- Can an Individual Debtor testify regarding home value or value of assets?
- Can a Business Owner testify regarding business valuation?
- When is Use of Lay Witness Opinion Permitted?
- What weight will be given to this testimony?

FRE 701

- **Opinion Testimony by Lay Witnesses**

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception;
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 7017

Expert Opinion Testimony

- FRE 702
- Be mindful of Fed. R. Civ. P. disclosure requirements for any witnesses that may be offering Expert Testimony.
- Given the nature of contested matters in bankruptcy, timelines for these disclosure requirements are sometimes truncated but are still required by Courts.

FRE 702

Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

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

Factors for Reliability of Expert Opinion

- Whether the expert's technique or theory can be or has been tested, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability
- Whether the technique has been subject to peer review/publication; existence and maintenance of standards and controls
- Whether the technique or theory has been generally accepted in the scientific community.
- 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 purposes of testifying.”
- *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)
Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167 (1999)

Factors for Reliability of Expert Opinion

- The known or potential rate of error of the technique or theory when applied
- Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.
- Whether the expert has adequately accounted for obvious alternative explanations.
- Whether the expert “is being as careful as he would be in his regular professional work outside his paid litigation consulting” or “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”
- Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.
- *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)
Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167 (1999)

Linking FRE 701 to FRE 702

- The rule does not distinguish between expert and lay **witnesses**, but rather between expert and lay **testimony**. Thus, it is possible for the same witness to provide both lay and expert testimony in a single case.
- The rule makes clear that any part of a witness' testimony that is based upon scientific, technical, or other specialized knowledge within the scope of Rule 702 is governed by the standards of Rule 702 and the corresponding disclosure requirements of the Civil Rules.

Strategy in Use of Lay -vs- Expert Opinion

- What type of hearing is the Opinion being presented in?
- How contested will the Opinion be?
- What factual issues will the Opinion support?
- What other opinion testimony will be presented to the Court?
- What weight will be given to the Opinion testimony?
- Cost – Benefit Analysis of Hiring Expert

Judicial Notice

Debtor wants the court to take judicial notice of the value he placed on property in the schedules.

Judicial Notice – A Narrow Field

- FRE 201 – court may take judicial notice of facts
- Includes:
 - Facts generally known within territory (“Winter is Cold in this state” or “there’s a stop sign on 4th and Main”); or
 - Facts that can be accurately and readily determined from solid sources (“Weather Channel says the mean temperature is 56 degrees”)
- Judicial notice of schedules:
 - That they were filed
 - That property was listed
 - Cannot take judicial notice of valuation – not a fact at all, only an assertion of value

Conclusion

Know Your Witnesses and the Parties

- Meet with your witnesses in advance
- Have they given prior testimony via declaration, deposition or hearing?
 - In this case or another related matter?
- If so, obtain and review copy of declaration or transcript

Know Your Judge

- Will your judge permit you to use affidavits/ declarations for direct testimony submitted in advance of trial?
- If yes, how do you make evidentiary objections in advance of the trial?